WARSAW STUDIES IN PHILOSOPHY AND SOCIAL SCIENCES 1

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The Status of Legal Ethics

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Introduction

The increasing interest which has been observed in recent years in legal ethics* is often a starting point for modern reflection on this subject. This attitude seems fully justified for at least two reasons. First of all, research directions, especially in practical sciences, to a significant extent are, and should be, determined by the needs of practice. Secondly, practice continually provides data which may form arguments for or against a specific thesis, conception or scientific theory. For the theory presented in the following work and the applied methodology it primarily means increased sensitivity to the needs of practice. Simultaneously, an assumption is being made that, in the case of practical philosophy, practice that should be taken into account covers not only the way in which people act, but also whether and how they justify their actions. In the most developed branches of practical philosophy, singular justifications as well as whole sets of them may be found in ideologies and doctrines and they also should become subjected to explanation and criticism.

As far as legal ethics is concerned, even superficial knowledge of literature allows us to draw the conclusion that a basic problem of practice, in its broad sense, is the conceptual confusion, manifesting itself not only in ambiguity of terms – which seems unavoidable in a branch on the border of law and morality – but primarily in ignoring the fact of this ambiguity. This ambiguity is also disregarded in theoretical considerations, which leads to the situation where scientific theses and concepts are not different views of the same subject, but rather they are studies on completely different subjects[1]. The basic aim of this study is to describe this ambiguity in such a way that it may be next used as a starting point for further research. Therefore, the study is not limited to the analysis of concepts but undertakes the attempt of creating such a theory of legal ethics that would not only accept the ambiguity, but also employ it to explain the

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* In the present work, the term "lawyer" essentially refers to a broad variety of law-trained persons, and not only to defence lawyers or attorneys as it is in the American context. Accordingly, the term "legal ethics" refers to professional ethics of lawyers in this broad sense.

1 See P. Skuczyński, "Wieloznaczność w teorii etyki prawniczej", ["Ambiguity in Legal Ethics' Theory"], in: *Etyka prawnicza. Stanowiska i perspektywy*, ed. H. Izdebski, P. Skuczyński, Warsaw 2008, p. 103.

phenomenon of legal ethics and to formulate research program for more specific problems.

Attaining this goal will be possible through explaining the status of legal ethics on the basis of two principles expressing the adopted methodology. The first principle may be characterised by the requirements of adequacy, which marks the division of the work on the analytical-empirical part and the part on moral philosophy and philosophy of law. This results from the fact that the fundamental, though not sole, ambiguity in legal ethics is a consequence of the ambiguity of the term "ethics" itself. Basic classification of its meanings relies first of all on distinguishing descriptive ethics, whose subject is values and duties regarded as moral, but also on the issue whether they are justified, and if so, how. Descriptive ethics does not concern the entirety of moral practice, which is conduct and its possible justification, but only those justifications of the conduct that refer to values and moral duties. Secondly, normative ethics is distinguished with its subject being values and duties of moral nature – from the perspective of rationality understood one way or another – and their justification. Finally, critical ethics (meta-ethics) is singled out. Its subject is language and justifications which are used and should be used in descriptive and normative ethics. Thus, critical ethics does not directly concern specific values and moral duties, but provides methods and criteria to discern what is value and moral duty and what is not on the grounds of morality theories formulated within its framework[2].

Legal ethics shares with ethics as such this fundamental ambiguity, and therefore its tasks are of descriptive and normative as well as critical character. While the thesis that legal ethics may be practised in the two indicated ways is relatively uncontroversial – but still, it requires justification – the place of legal ethics within meta-ethics proves significantly more complicated. On one hand, it has to be determined to what extent legal ethics has its own language and methodology – in other words, what is its status – whereas such problems are usually being solved on the grounds of specific morality theories. On the other hand, reduction of conceptual confusion related to legal ethics may be attained only with a comprehensive theory of legal ethics which will be autonomic in relation to specific morality theories.

The problem thus concerns relations between a general ethical theory and a theory of legal ethics. However, it would be an oversimplification to accept that

2 A. Kojder, "Etyka – przedmiot i stanowiska", ["Ethics – Subject and Views"], in: *Etyka zawodów prawniczych. Etyka prawnicza*, ed. H. Izdebski, P. Skuczyński, Warsaw 2006, pp. 16-18. Cf. R.B. Brandt, *Etyka. Zagadnienia etyki normatywnej i metaetyki*, [*Ethics. The Issues of Normative Ethics and Meta-Ethics*], Warsaw 1996, pp. 15-24.

this is only a problem of a relation between moral philosophy and philosophy of law since both premises and conclusions of arguments with which one may solve the problem of necessity have a wider scope. This is related exactly to the criteria of adequacy, which means in this case carrying out reflections so that their scope agrees with the scope of a problem with the same subject and methodology, and so if the problem concerns all professional ethics, then it should be approached as such. For this reason, the argument will fundamentally be developed from the perspective of moral philosophy and not philosophy of law, though the latter is necessary to understand what legal ethics is.

The second principle on which the study is based may be called the principle of historicality. Founded on the adequacy claim, the search for a model relation between a general ethical theory and a theory of legal ethics sets the perspective for the principal goal of this paper. The analysis would not be complete if it was not supplemented with some general assumption on the rationale of all ethical theories that I accept. The assumption, which I believe should be made *explicite*, is the proposition that all knowledge is historical in character — of course, it does not mean that necessarily historically conditioned — and therefore such terms as "tradition", "paradigm" or "research program" may be used in our reflection.

It is worth remarking that the view saying a paradigm is a basic structure of scientific thought comes from Thomas S. Kuhn, who maintained that this term must, "suggest that some accepted examples of actual scientific practice — examples which include law, theory, application, and instrumentation together — provide models from which spring particular coherent traditions of scientific research."[3] It may thus be said that a paradigm encompasses everything that in a certain society and certain time makes scientific thought, and that helps solve specific research problems, which Kuhn calls "puzzle-solving." When a certain paradigm becomes ineffective, it undergoes a crisis, which may lead to a scientific revolution and establishing a new paradigm[4].

In moral philosophy, the ideas of Alasdair MacIntyre, which may be seen as equivalent to Kuhn's standpoint, make "the beginning of some peculiar 'Copernican Revolution' in meta-ethics."[5] Ethical theories, like scientific

3 T.S. Kuhn, *The Structure of Scientific Revolutions*, in: *International Encyclopedia of Unified Science*, vol. II, no. 2, London 1970, p. 10.

4 P. Skuczyński, "Czy sprawiedliwość jest cnotą prawników?", ["Is Justice a Virtue of Lawyers?"], in: B. Wojciechowski, M.J. Golecki, *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej*, Toruń 2008, p. 292.

5 A. Chmielewski, "Filozofia moralności Alasdaira MacIntyre'a", ["The Philosophy of Morality of Alasdair MacIntyre"], in: A. MacIntyre, *Dziedzictwo cnoty. Studium z teorii moralności*, Warsaw 1996, p. XXV.

paradigms, should help solve ordinary and daily – though, of course, often very complicated – problems of normative ethics. If they fail in this task, it may bring on a calamity more dangerous than a crisis – according to Kuhn's terminology – of normal science operating within the framework of a certain paradigm because a different type of relations occurs between moral philosophy and morality than between philosophy of science and science.

The idea of moral tradition – a key term of this view – is based on the assumption that history of moral philosophy and history of morality are disciplines that are very strongly interconnected[6]. This, naturally, results in many problems arising from the relation of tradition and modernity and its related concept of practical rationality. The problems will have to be solved and, eventually, will lead to a perspective that overcomes some limitations which stem from solely adopting the point of view of particular traditions. This will be made possible as legal ethics becomes a part of an extensive modernising project – as it was understood by some great thinkers of the Frankfurt School.

In the first part of my presentation I begin with the analysis of the state of legal ethics, which includes elements of lawyers' conduct and its justifications (moral practice) – especially justifications referring to what in a given age and society is regarded as values and moral duties of lawyers. It has to be emphasised that a longstanding tradition connected with the domination of the category of virtue in moral thought on one side, and on the other, of ideas and principles of Roman law in legal thought, requires a separate discussion of the legal ethics beginnings. Subsequently, three most important traditions of legal ethics will be presented: the French, basing on the categories of virtue and independence, the American, related to the ideas of loyalty and professional duties, and the German, referring to professional roles and obedience. Equal treatment of all three, and only these three traditions, is justified by their fundamental meaning not only for the discussion in legal ethics, but also by the fact that all of them are objects of the globalisation, professionalisation and juridisation processes, which occur nowadays in legal ethics. These traditions are also present, relatively equally, in modern Poland.

The aim of this presentation will be to study whether and to what ideas there has been an *explicite* or *implicite* reference made in practice, and also what is the nature of the ambiguity present in legal ethics – namely, the ambiguity related to the term "legal ethics" itself. I will make an attempt to show that traditions of legal ethics and their modern transformations allow us to distinguish three basic meanings in which the term "legal ethics" is used. Then, this will serve as a foundation to build a theory of legal ethics that would not only take this

6 P. Skuczyński, "Czy sprawiedliwość…", p. 290.

ambiguity into consideration, but also make use of it. It appears appropriate to assume that in the case of ideas so complicated one should avoid reduction, which would limit or obscure the analysed subject, and thus lead to consequences opposite to scientific explanation. With the whole attachment to the value of simplicity in scientific theories, a more appropriate direction is to undertake the effort to find relations between particular meanings of the analysed idea and to make them a basis for subsequently formulated theories. In other words, the idea is to achieve a transition from an ambiguous term to a multidimensional theory, which will order this ambiguity[7].

In the second part, various concepts of legal ethics present in theoretical literature will be critically discussed. The conceptions will be arranged by the two criteria, namely cognitive value and practical value which legal ethics possesses on the ground of these views. However, the adopted criteria do not allow a logical division but only a typology organising conceptions so that any new perspective is a theoretical reaction to deficiencies in the preceding one. Within the framework of empirical and analytical conceptions, these are conceptions of legal ethics as the lawyer's ethos, as myth, as ideology and as professional deontology. Whereas normative and critical perspectives include legal ethics as applied ethics, the lawyer's situational ethics and critical professional ethics, the latter being further developed in the present study.

In part three, carrying out my reflections on the grounds of moral philosophy I will try to construct a multidimensional theory of legal ethics. The starting point will be a discussion of issues of validation crisis in ethics and the relation between moral traditions and practical rationality. The essential problem in ethics relating to particular groups or practices is the status of broadly understood standards or moral obligations formulated by this ethics, which status is characterised by constant lack of sufficient validation. If such ethics, on one hand, repeals some obligations of general ethics in relation to certain groups or practices, and, on the other, establishes some special obligations going even further, then it may be said that it modifies general ethics[8]. The acceptable scope and profundity of these modifications require validation. The thesis whose truth I will try to defend is the following: three fundamental meanings of "legal ethics" correspond with three planes of its theory in which every successive plane contains premises for decisions taken on the lower plane, thus providing for its validation. Accepting the point that a theory of legal ethics should have

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7 P. Skuczyński, "Wieloznaczność…", p. 104.

8 M. Michalik, "Społeczne przesłanki, swoistość i funkcje etyki zawodowej", ["Social Premises, Specificity and Functions of Professional Ethics"], in: *Etyka Zawodowa*, ed. A. Sarapata, Warsaw 1971, pp. 17-23.

critical and reflective character will lead to assuming the perspective going beyond traditions of legal ethics and to determining planes of a theory of legal ethics not only on the basis of elementary, traditional meanings of this idea, but also of ones relating to – connected with the Frankfurt School – modern views on Kantian categories i.e. pragmaticality, ethicality and morality. From this perspective the subject of legal ethics consists of three planes – deontological, social and a moral one. Guided by the requirements of the critical theory, the multidimensional theory of legal ethics describes relations between its planes as reflective validation and critical limitation. On the highest plane the theory is validated by reference to reflection as a procedure included in transcendental pragmatics for validation of all normative ethics. For this reason, on the moral plane of legal ethics, the principle of lawyers' responsibility for the law as social practice has been formed.

Part four examines, on the philosophy of law grounds, whether chosen legal-philosophical conceptions – selected on the basis of practical importance – contain, *explicite* or *implicite*, any legal ethics conceptions, and what is their relation to the multidimensional theory of legal ethics. In relation to this, basing on each of the analysed views, conclusions on the content of the lawyers' responsibility for the law principle – meaning that lawyers should maintain and develop law – have been drawn. Among the discussed conceptions there are some in whose case one may speak of corresponding law paradigms, and therefore they may be treated as theoretical models closely related to legal practice. From these models the following will be analysed: the positivist model in its classical but also modern version, characterised by the social thesis and the separation thesis, the juriscentric model[9], related to interpretivism and for this reason including integral theory of law as well as the institutional view, and, lastly, the discursive model, containing topical-rhetorical approach, in which legal discourse is treated as an exemplary one, and procedural approach, in which it is assumed that legal discourse is a special case of general practical discourse.

Finally, the fifth part analyses the status of legal ethics as a scientific discipline which not only has its theory, but also can be practised systematically. For it is not evident and one can imagine a situation in which moral practice and a theory of legal ethics exhaust the forms in which legal ethics is represented. I will also discuss the relations of legal ethics to other legal sciences – dogmatic and general ones – and to what extent its original research program permits its

9 This term was introduced by A. Kozak, see: *idem*, *Granice prawniczej władzy dyskrecjonalnej*, [*The Limits of Discretionary Legal Power*], Wrocław 2002, p. 156 ff., and chapter 4.4.2 of the present work.

distinction as a separate discipline. An attempt will be made to answer the question to what extent legal ethics is interdisciplinary.

Both the adopted methodology and the structure of the study require making an important terminological remark at the outset. On one hand, if the starting point of the present study is the legal ethics concept's ambiguity, which will be used to construct a theory in this scope, then it seems very difficult to accept one meaning of the term only for the use of the argument. However, on the other hand, the term must necessarily be used as a fundamental category referring to the subject of the study. Therefore, it will be used in different meanings depending on the context, whereby some additional qualifications like "traditions of legal ethics", "legal ethics conceptions" or "multidimensional theory of legal ethics" will serve as guidelines.

The present work has been completed on the basis of my doctoral thesis, only editorially changed, entitled "Philosophical and Methodological Status of Legal Ethics", prepared and defended at the Faculty of Law and Administration of Warsaw University. To the thesis supervisor, professor Tomasz Stawecki, to the thesis advisers – professor Hubert Izdebski and professor Marek Zirk-Sadowski I owe a deep and sincere debt of gratitude for their invaluable support and always a factual critique. I also want to thank my parents especially for the faith in successful accomplishment of my research and for creating the ideal conditions for it.

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It has been several years since the creation of this book in the original, Polish version. During this time, some drawbacks of the text have been discovered. They concern both its content – the theses presented and the argumentation, which, from a time perspective, seem to me insufficient, and the form – the way of presenting the theses is often too complicated and requires too much effort from a reader. Also the cited literature should be updated since every year there are new positions being published. Despite all this, I have decided to publish the book in English in an unchanged version. I have assumed that if I tried to eliminate the flaws by changing the text, this would only complicate it and make it completely unreadable. I hope that, in spite of this, the publication in English will make the book a noteworthy position for all those interested in legal ethics and professional ethics in general. At the same time, I want to thank Katarzyna Popowicz for her patience and the effort she has put into translating the book as well as the Polish Ministry of Science and Higher Education for financial support.