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ON THE PURPOSE AND FUNCTIONS OF LEGAL- -DOGMATIC RESEARCH (CONTINENTAL TRADITION)

Abstract

The present text discusses the role of a special kind of research into criminal law in the continental legal tradition, for which the term “legal-dogmatic research” has been adopted and used by many scholars from outside the common law system and which is described in more detail below, its place among other scholarly disciplines, and its significance for legal practice. The concept of this “legal-dogmatic research” can be understood in two ways. Based on the first approach, it is perceived as an abstract study of law independent on the legal rules in force at a given time and place. In this sense, it appears as synonymous to terms used in the German language: *Doktrin* or *Lehre* (study). In the second sense, this research is seen as a study of existing law (*lex lata*) – and nothing else. It differs from other areas of jurisprudence in that it does not strive to be universally valid, but is confined to a time and place. The article presents a point of view in the light of which this research aims to render the normative system coherent and comprehensible, i.e. to establish the correct meaning of the law by clarifying and systematizing it. In this context, the author shows that the purpose of legal scholarship is to reveal and subsequently to conceptualize reality. At the same time, the importance of investigation of the law as it is (legal-dogmatic research) is by no means limited to the hermeneutical analysis of the legal text, but that it faces equally ambitious tasks, such as the development of criminal law and the need to find material legitimacy for the use of coercion by the state against citizens.

KEYWORDS

analysis, synthesis and interpretation of legal norms, criminal law, jurisprudence, theory and philosophy of law

SŁOWA KLUCZOWE

dogmatyka prawa, prawo karne, prawoznawstwo, teoria i filozofia prawa

1. INTRODUCTION

As opposed to natural sciences, the output of jurisprudence in principle eludes empirical verification with the use of falsification mechanisms. It would seem that legal studies have never managed to develop a methodological procedure as advanced as that of for instance descriptive studies. Although the question whether jurisprudence deserves the name of a science does not sound that compelling any more, the matter of the methodological autonomy of legal studies has in fact never been solved¹.

It is neither necessary nor even possible to give even a general overview of what happened in the discourse on the methodology of legal studies triggered by Savigny's *Juristische Methodenlehre*². Suffice it to recall that, over the last two centuries, many prominent representatives of legal theory have failed to provide a satisfactory answer to the question of whether the study of law is, in methodological terms, an autonomous discipline or if it is merely dependent and based on the achievements of other scholarly disciplines³.

In the European legal tradition, it is customary to distinguish between several fundamental branches of legal studies, i.e. legal philosophy, theory, sociology, history, and "legal-dogmatic research" – a term adopted and used by many scholars from outside the common law system to denote investigation of the law in

¹ In 1847, while giving a lecture for a German lawyers' society titled "Die Wertlosigkeit der Jurisprudenz als Wissenschaft" (English: "The worthlessness of jurisprudence as a science"), J. Hermann von Kirchmann perversely asked whether jurisprudence could be treated as a science (the content of the lecture was published a year later in the form of a booklet under the same title by the Verlag Julius Springer publishing house, Berlin 1848).

² In fact, the origins and development of this discussion are presented in detail in both Polish and German-language literature (as for more recent Polish studies, see J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2006, as well as the literature cited therein; as for German-language works, see J.C. Schuhr, *Rechtsdogmatik als Wissenschaft*, Berlin 2006).

³ F. Bydlinski, *Grundzüge der juristischen Methodenlehre*, Wien 2012, p. 12.

force⁴. In this article this term shall be used to denote this particular continental tradition. It should be noted at this point that the individual areas of legal studies are not independent of each other and thus closed in a kind of vacuum. Therefore, legal-dogmatic research is free from neither legal history nor philosophy. Although it serves a different purpose, it draws on the achievements of these disciplines. Similarly, history and sociology likewise benefit from the achievements of legal-dogmatic studies.

Nevertheless, contemporary legal-dogmatic research is most closely linked to philosophy and often employs instruments characteristic of that discipline. For, like legal-dogmatic research, philosophy does not treat law as a fact to be merely described and explained⁵. Philosophers, just as legal-dogmatic researchers, often ask what kind of law is right and just⁶. Unlike legal-dogmatic researchers, however, they do so at a very abstract level, often in isolation from the other elements of the overall legal system or branch in question. Meanwhile, the forte of legal-dogmatic research lies precisely in a systemic approach that takes care of structural homogeneity.

The meaning of terms such as “dogmatic research” or “analysis, synthesis and interpretation of legal norms for the purpose of legal practice” (*dogma* in the continental legal tradition, not to be confused with the theological concept of dogma) intuitively seems to be obvious to humanists and representatives of social sciences, if only because of their theological connotations. Unfortunately, this obviousness is often only apparent. Many legal scholars use these concepts incorrectly. This may be caused (especially in international literature) partly by the fact that, although legal-dogmatic research is an important part of the European legal tradition, it remains foreign to the standards of English-speaking countries. Nevertheless, also European legal scholars, trusting too much in an intuitive understanding of the term “dogmatic research”, use it in a way that is inadequate to its semantic load. This, in turn, may be due to the fact that the notion of legal-dogmatic research has partly detached itself from its original meaning, characteristic of Enlightenment philosophical thought, where dogmatic thinking took as its starting point for the analysis of a given problem certain a priori assumptions uncritically adopted by dogmatists (so-called *dogmas*)⁷. Nonetheless, substitutes of such thinking about dogmatic research can be seen also in some contemporary philosophers of law, who consider it to be a less critical discipline than the philos-

⁴ K. Larenz, *Methodenlehre der Rechtswissenschaft, Enzyklopädie der Rechts- und Staatswissenschaften Abteilung Rechtswissenschaft*, Berlin 1991, p. 189.

⁵ R. Planas, *Das Wesen der Strafrechtsdogmatik*, ‘Zeitschrift für Internationale Strafrechtsdogmatik’ 2010, No. 5, p. 362.

⁶ W. Frisch, *Wesenszüge rechtswissenschaftlichen Arbeitens – am Beispiel und aus der Sicht des Strafrechts (Kommentar zu Günter Jakobs und Joachim Schulz)*, (in:) C. Engel, W. Schön (eds.), *Das Proprium der Rechtswissenschaft*, Tübingen 2007, p. 175.

⁷ E.J. Thul, *Die Denkform der Rechtsdogmatik*, ‘Archiv für Rechts- und Sozialphilosophie’ 1960, No. 2(6), pp. 241 ff.

ophy of law. In contrast to the latter, legal-dogmatic research would, in this view, be based on assumptions not subject to critical analysis⁸.

2. LEGAL-DOGMATIC RESEARCH AS A FIELD OF STUDY

Legal-dogmatic research is a discipline that aims to systematize and interpret legal rules as well as to elaborate scholarly principles in the area of law and to offer their criticism. From a more abstract perspective, the purpose of legal scholarship is to reveal and subsequently to conceptualize reality⁹.

Individual legal-dogmatic researchers namely often develop contradictory *dogmas* whose accuracy cannot be unambiguously verified. Then, contradictory claims cannot be brought together as one homogeneous dogmatic category common to a given discipline. In this sense, whether a scholar works in the field of legal-dogmatic research is determined not by the consistency of their assertions, but by the application of the dogmatic method to make specific assertions concerning a particular branch of law¹⁰. In other words, however much legal-dogmatic research strives for systemic coherence, it contains many irreconcilable assertions as an academic discipline.

The concept of “legal-dogmatic research” (also defined as scholarly legal commentary) can be understood in two ways. Based on the first approach, it is perceived as an abstract study of law independent on the legal rules in force at a given time and place. In this sense, it appears as synonymous to terms such as the German *Doktrin* or even *Lehre* (study)¹¹. Although one of the principal goals of legal-dogmatic research is to secure the current legal reality, it is by no means locked into this reality. It is precisely the principles and assertions made on the basis of past normative experience that empower legal-dogmatic research to develop universal principles for future normative solutions.

In the second sense, legal-dogmatic research is seen as a study of existing law (*lex lata*) – and nothing else. Legal-dogmatic research differs from other areas of jurisprudence in that it does not strive to be universally valid, but is confined to

⁸ A. Kaufmann, *Rechtsphilosophie, Rechtstheorie, Rechtsdogmatik*, (in:) A. Kaufmann, W. Hassemer, U. Neumann (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, Heidelberg 2004, p. 11.

⁹ A. Kaufmann, *Lebendiges und Totes in Bindings Normentheorie*, Göttingen 1954, p. IX.

¹⁰ For more about the issue of internal consistency of legal-dogmatic research, see: W. Frisch, 2007, *op. cit.*, pp. 156 ff.

¹¹ R.R. Planas, 2010, *op. cit.*, p. 357.

a time and place¹². It reflects the existing normative reality¹³. It lives in symbiosis with the law in force. The demise of such law shifts legal-dogmatic research into legal history or other areas of jurisprudence. Assertions concerning existing law cease to be established legal scholarship as soon as the latter ceases to be law. From this perspective, the purpose of legal-dogmatic research is to specify what form of law at a given time and place responds to the social needs and best reflects the cultural and ethical views in a given society. Thus, legal-dogmatic research in this sense is always determined by the current social needs.

It is difficult to answer definitely which of the above two approaches constitutes a more comprehensive reflection of legal-dogmatic research. It seems that both and at the same time neither of them do. While the main goal of legal-dogmatic research is the proper interpretation of law, it is never detached from its tradition. Legal-dogmatic research does not exist in a temporal and local vacuum of a specific normative reality.

3. LEGAL-DOGMATIC RESEARCH AND THE LAW

Generally speaking, legal-dogmatic research is a set of opinions and statements for the correct application and, indirectly, creation of law. While the purpose of legal-dogmatic research is the correct interpretation of the existing legal regulations, it serves this purpose while being firmly embedded in the existing jurisprudential tradition and decision-giving practice. It is the result of an evolution of legal discourse and as such, it reflects the development of the legal studies over time.

Dogmas cannot be changed with the use of normative instruments. For it is the legal-dogmatic research that shapes the law, and not the other way round¹⁴. It does not seek answers to questions posed within law, but poses questions that the law should answer. Certainly, this does not mean that legal-dogmatic research never changes. It certainly does – its findings may be verified precisely based on new experiences. This is how legal-dogmatic research differs from teleology – it does not make absolute and authoritative assertions, but its assertions are subject to continuous development¹⁵. In this sense, legal-dogmatic research is a living field of study, which is precisely what distinguishes it from other legal disciplines

¹² C. Creifelds, *Rechtswörterbuch*, München 2014.

¹³ See more in: M. Maiwald, *Dogmatik und Gesetzgebung im Strafrecht der Gegenwart*, (in:) O. Behrends, W. Henckel (eds), *Gesetzgebung und Dogmatik*, Göttingen 1989, p. 120.

¹⁴ R. R. Planas, 2010, *op. cit.*, p. 360.

¹⁵ D. de Lazzer, *Rechtsdogmatik als Kompromissformular*, (in:) *Dogmatik und Methode*, Josef Esser zum 65. Geburtstag, Kronberg 1975, p. 85

that treat law as an external, established element¹⁶. As legal-dogmatic research is a study on how to understand the law in force from the perspective of the intellectual achievements of legal scholarships, it always precedes the law that is the subject of dogmatic analysis, often indirectly determining its shape. *Dogma* – contrary to what the term itself suggests – is not an immutable statement, but the expression of a living study of law. Although a *dogma* always concerns a particular normative system, as the surrounding social, legal, economic etc. reality changes, the necessity to reinterpret *dogmas* arises. This process in turn favours the continuity of dogmatic thought.

4. LEGAL-DOGMATIC RESEARCH OF CRIMINAL LAW

The legal-dogmatic research of criminal law (German: *Strafrechtsdogmatik*) is a system of principles resulting from scholarly discussions which constitutes an essential element of criminal legal studies (German: *Strafrechtslehre*). The goal of this area of studies is to marshal and systematize the substantive foundations of criminal liability based on general rules and abstract assertions¹⁷. From the time of Liszt and Binding until today, the central area of criminal legal-dogmatic research has been the study of crime (German: *die Lehre von der Straftat; die allgemeine Verbrechenslehre*), which brings together the intellectual output of criminal law experts on the general foundations of criminal liability.

5. THE ROLE AND FUNCTIONS OF CRIMINAL LEGAL-DOGMATIC RESEARCH AS A SCHOLARLY DISCIPLINE

5.1. LEGAL-DOGMATIC RESEARCH AS A FACTOR IN THE IMPROVEMENT OF CRIMINAL LAW

However much legal-dogmatic research initially floated on the wings of legal positivism, over time it became a major factor in mitigating a positivist approach to law. Already at the time when the discourse on legal methodology was beginning to germinate, the fundamental purpose of legal-dogmatic research was seen to be the proper reconstruction of what had been distorted in the layer of legal

¹⁶ N. Luhmann, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?*, Heidelberg 1993, p. 5.

¹⁷ J. Rüdiger, *Einführung in eine analytische Rechtslehre*, Berlin – Heidelberg 2011, p. 89.

rules¹⁸. Even today, criminal legal-dogmatic research invariably strives to find the correct interpretation of legal concepts and to systematize and axiomatize knowledge of the law¹⁹.

The purpose of legal-dogmatic research is to waterproof legal regulations from the perspective of theory by mitigating their imperfections. Legal-dogmatic research aims to render the normative system coherent and comprehensible, i.e. to establish the correct meaning of the law by clarifying and systematizing it²⁰. It is by no means a matter of finding the literal meaning of legal terms, but one of setting their semantic boundaries in such a way that, on the one hand, they are in harmony with the rest of the criminal law system and, on the other hand, they do justice to the generally accepted standards in the field of criminal law.

By assisting the process of interpreting legal concepts, dogmatic thought delimits the boundaries of criminal law. It namely restricts lawyers in their freedom to deal with the law. If a judge wishes to rule against a commonly accepted *dogma*, they can only do so if they are able to refute that *dogma*²¹. By minimizing the possibility of inappropriate court decisions that contradict or deviate from hitherto established *dogma*, legal-dogmatic research appears as the area of criminal law studies that provide the best guarantees²². It is the area where legal theory comes into the closest synergy with practice. It is an area where the theoretical output of the studies appears as a supporting and at the same time often corrective factor vis-à-vis the legislature and judicature.

In the context of the above, it can be said that legal-dogmatic research stabilizes legal norms, aiming to achieve a state of certainty of meaning of the concepts and institutions present in criminal law²³. In this regard, one can speak of the stabilizing function in the criminal law system.

As it serves to, in a way, “clarify” the legal system, legal-dogmatic research by no means reduces the complexity of criminal law in the theoretical aspect; on the contrary, under the influence of dogmatic thought, the system becomes much more complex than it would be in isolation from legal-dogmatic research. Indeed, the role of legal-dogmatic research is not limited to being a tool for determining the correct meaning of a legal text. Aiming to find the correct interpretation of legal concepts, to systematize and axiomatize the knowledge of law, legal-dogmatic research obviously determines the development of criminal law.

¹⁸ F.C. von Savigni, *Juristische Methodenlehre*, Stuttgart 1951, p. 20.

¹⁹ R. Zaczyk, *Was ist Strafrechtsdogmatik*, (in:) M. Hettinger, T. Hillenkamp (eds), *Festschrift für Wilfried Küper*, Heidelberg 2007, p. 723.

²⁰ A. Aarnio, *Denkweisen der Rechtswissenschaft. Einführung in die Theorie der rechtswissenschaftlichen Forschung, Forschungen aus Recht und Staat Bd. 48*, Wien – New York 1979, p. 34.

²¹ B. Rüthers, *Rechtsdogmatik und Rechtspolitik unter dem Einfluß des Richterrechts*, ‘Rechtspolitisches Forum’ 2003, No. 15, p. 29.

²² R. Zaczyk, 2007, *op. cit.*, p. 728.

²³ J. Rödiger, 2011, *op. cit.*, p. 92.

It has already been pointed out several times that legal-dogmatic research is based on the endeavour to systematize the knowledge of criminal law. It should be added that in doing so, it is not merely a logical-structural systematization of normative material, but rather the shaping of criminal law by means of making arbitrary statements that are carriers of fundamental assessments. Legal-dogmatic research, unlike descriptive methods, is not based solely on positivist descriptivism. It is namely not free of axiological valuation. In this sense, it combines social, economic, political, and ethical contexts with the legal context, and on that basis makes fundamental statements in the form of criminal law principles and rules²⁴. At the opposite pole are the common law and Scandinavian systems, which avoid abstract legal principles and rules. This element constitutes the fundamental difference between the European criminal legal tradition based on analytical-critical assumptions and the tradition based on formal-descriptive premises typical of the English-speaking countries²⁵. Meanwhile, it is the embedding of criminal legal-dogmatic research on fundamental philosophical principles that seems to determine its enormous intellectual potential.

5.2. LEGAL-DOGMATIC RESEARCH AS A SOURCE OF SUBSTANTIVE LEGITIMACY FOR CRIMINAL LAW

Criminal law, as the branch of law most deeply interfering in the rights and freedoms of the individual, needs significantly stronger legitimacy to justify the existence of the repressive mechanisms envisaged by this branch than legal regulations originating from other branches of law. Certainly, the normative character of the act establishing a specific legal text does legitimize the application of criminal law mechanisms, but only formally. Meanwhile, criminal legal-dogmatic research seeks substantive legitimacy for the existence of a legal system that significantly restricts individual freedom²⁶. Criminal legal-dogmatic research as an area seeking legitimacy for criminal law is even sometimes assigned the role of guarantor of the rule of law and protector of the constitutional order²⁷. Before the basic criminal law guarantee mechanisms, including the central standard of *nullum crimen*, became legal rules, they were eradicated with the theoretical and legal substrate precisely in the area of criminal legal-dogmatic research.

It was legal-dogmatic research that first reacted to normative attempts to base criminal law on the abstract criterion of the danger of a violation of a legal good

²⁴ R. Zaczyk, 2007, *op. cit.*, p. 728.

²⁵ B. Schünemann, *Strafrechtsdogmatik als Wissenschaft*, (in:) B. Schünemann, H. Achenbach, W. Bottke, B. Haffke, H.-J. Rudolphi (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, Berlin 2001, p. 4.

²⁶ M. Pawlik, *Strafrechtswissenschaftstheorie*, (in:) M. Pawlik, R. Zaczyk (eds), *Festschrift für Günther Jakobs zum 70. Geburtstag am 26. Juli 2007*, Köln – Berlin – München, p. 476.

²⁷ R.R. Planas, 2010, *op. cit.*, p. 362.

by moving further and further away from the classical criterion of a violation of a legal good as a basis for criminal liability²⁸.

Contemporary attempts to find legitimacy for the repressive punishment of the individual increasingly break away from national normative and interpretative contexts and thus create a kind of supranational or even international body of criminal law scholarship and commentary²⁹. Legal-dogmatic research understood in this way seeks to develop universal statements, principles, and rules of criminal law, with the aim of achieving an even stronger and more universal legitimacy for this branch by giving the general prerequisites of criminal liability an expedient dimension, determining the ultimate rightness of punishment after the appropriate application of criminal law mechanisms³⁰.

6. CONCLUSION

Criminal legal-dogmatic research appears to be an academic discipline concerned with the interpretation, systematization, and further development of the legal system and scholarly commentary in the field of criminal law.

First of all, it is supposed to ensure the possibility to properly apply the law. With this aim in mind, it seeks answers to questions that the law omits to answer, but which must be answered for its proper application. The normative form of almost every institution of general criminal law, which is after all not covered by the standard of *nullum crimen* regarding the *certa* aspect, requires detailed specification by legal-dogmatic research. The law does not unambiguously determine where the boundaries between the individual forms of guilt lie; where perpetration ends and criminal complicity begins; whether omission is an act, etc. These and many other questions are answered by criminal legal scholarship, rendering it possible to apply the law in accordance with its characteristic guarantee standards, by means of theoretical models that by far exceed the limits of hermeneutic rules of inference.

To perceive legal-dogmatic research as a tool limited to the analysis of what is “given” to us in the form of law, i.e. to the hermeneutic differentiation of existing legal regulations and concepts, or to the grasping of the principles underlying the legal system and thus to the provision of a structured set of solutions for the appli-

²⁸ W. Hassemer, *Perspektiven einer neuen Kriminalpolitik*, ‘Strafverteidiger’ 1995, No. 15, p. 486.

²⁹ C. Roxin, L. Creco, *Strafrecht. Allgemeiner Teil*, München 2020, p. V.

³⁰ W. Frisch, 2007, *op. cit.*, pp. 156 ff.

cation of law, would do great injustice to this discipline³¹. The critical function of legal-dogmatic research vis-à-vis criminal law, which is so strongly emphasized in relevant literature, could by no means be fulfilled if the area of legal-dogmatic research were limited merely to hermeneutic thinking. The elaboration of key concepts for the study of criminal law that do not stem from positive law would only be possible if one had a vision of an ideal system of criminal law based on a vision and standards going beyond the area of positive law, and thus consequently also beyond the area of hermeneutic thinking³². For the development of criminal law as a branch would only be possible on the basis of reflections on what is right, which stem from beyond the boundaries of legal thought³³.

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³¹ W. Frisch, *Zur Bedeutung der Rechtsdogmatik für die Entwicklung des Strafrechts*, (in:) R. Stürner (ed.), *Die Bedeutung der Rechtsdogmatik für die Rechtsentwicklung*, Tübingen 2021, p. 171.

³² R. Zaczyk, 2007, *op. cit.*, p. 728.

³³ W. Frisch, 2021, *op. cit.*, p. 172.

- Maiwald M., *Dogmatik und Gesetzgebung im Strafrecht der Gegenwart*, (in:) O. Behrends, W. Henckel (eds), *Gesetzgebung und Dogmatik*, Göttingen 1989
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