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LEGAL DISCOURSE ETHICS

1. *Ius est ars boni et aequi* – comments on the axiology of law

The issue of the axiology of law is one of the most difficult problems of the widely understood jurisprudence. A study of the relationship between the law and morality has fascinated many researchers, constituting at the same time one of the central issues of philosophy, law, politics and other social sciences. A problem of determining a content of the “good law” has always accompanied people. A social life is penetrated by moral judgment. The law is also subjected to such judgment. No legal system can, therefore, be fully neutral axiologically.

Axiology is the knowledge about the values of all kinds, being connected to general and multifaceted reflections on them. Axiology of law creates a set of values, restricted to the valuation standards revealed by a given legal system, or referred to by a given system.

Thus the concept of “value” becomes fundamental when considering axiology. Leaving aside the controversies arising while determining a semantic meaning of the term, value can be defined as an attribute (property) of a thing resulting from its positive assessment.¹ This is a characteristic feature attributed to the thing freely by a given subject (subjective approach) or in accordance with the accepted norms in a particular culture (objective approach). Reasonable is the statement that the essence of our humanity is judged by values.² The values that a given legal system declares or incorporates are inevitably relativized to social valuation standards.

¹ W. Lang, *Aksjologia polskiego systemu prawa w okresie transformacji ustrojowej*, (in:) L. Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie. Aksjologia. Konstytucje. Integracja europejska*, Lublin 1999, pp. 47–55.

² T. Kozłowski, *Wolność jako założenie pro-wartościujące*, (in:) T. Kozłowski, K. Kuźmich (ed.), *Człowiek wobec systemów wartości*, Białystok 2006, p. 100.

There appears a key problem of determining the normative values that are essential for a public order.³ Is it possible at all to specify a catalogue of universal and permanent values that are common to pluralistic orders?

Since the beginning of human history there has been a debate over the relationship of morality to law. Since ancient times it has been possible to notice the existence of a core of some immutable law, despite its inevitable evolution. Many fundamental principles of law, which are still existing today, were elaborated in ancient times as some immutable standards of law rooted in the relation between law and morality. The eternal conflict of morality and law can be summed up as the opposition of the rules: *dura lex sed lex* and *summum ius summa iniuria*. The first rule states that law is law and it should be respected, regardless of its content. The second rule claims that the highest law may become a “statutory lack of law” and its extremely strict usage leads to injustice.⁴

A basic principle of the law definition taken by contemporary civilizations from the Romans is: *ius est ars boni et aequi*. This rule was created by a jurist Celsus who described law as the ability to do what is good and right. The old Roman *paremia* states that law is powerless if it is not supported by morality (*leges sine moribus vanae*). However, even in those times people realized the fact that law was not always consistent with morality. Paulus, a jurist, noted that not everything that is permitted under the law is always fair. It was expressed in the formula: *non omne quo licet, honestum est*.⁵

In medieval times, Christian ethics strongly influenced the perception of the “good law” conditions. It was assumed that a positive law was a reflection of a natural law, whose essence was the will of a personal God, regarded as the creator and ruler of the world. A natural law should designate the shape of the law created by humans. A legal doctrine was dominated by static approaches of the natural law.

The Enlightenment thought and liberal views provided the foundations for the contemporary, modern interpretation of the “good law” concept. The theory of I. Kant was of a particular importance. By raising the moral autonomy to the rank of the main principles of social life, he created the foundation for the concept of moral neutrality of the state. Kant linked morality with duty dictated by practical reason to act only according to

³ M. Zdyb, *Państwo prawa w perspektywie zaszłości historycznych oraz dokonujących się zmian*, (in:) S. Fundowicz, *Studia z prawa publicznego*, Vol. I, Lublin 1999, p. 18.

⁴ See M. Matczak, *Summa iniura. O błędzie formalizmu w stosowaniu prawa*, Warszawa 2007, p. 39 and the following.

⁵ W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 135.

such a rule which we want to become common. He clearly emphasized that law does not serve moral improvement. The law should simply guarantee a coexistence of individual freedoms.⁶

A view on the natural law was fundamentally challenged by Kant. There emerged numerous concepts of the natural law which were in the opposition to the traditional approach, the so-called “theories of natural law with variable content” (eg. R. Sammler, G. Radbruch). On their basis, God was no longer the source of the natural law. The source was seen in human nature, in human reason, in cultural products, etc. The minimalist theory of natural law was created by L. L. Fuller who assumed the axiological law involvement (the so-called “internal” and “external morality of law”). With time, dynamic theories of the natural law emerged proving that God is the source of law, but its principles change with the society evolution (for example, J. Maritain). Simultaneously, the positivist approach flourished, totally eliminating axiology from the philosophy of law, declaring that the study of law is mainly based on the analysis of texts and legal concepts (KI Bergom, R. Ihering, G. Jellinek, H. Kelsen, and others).

In modern times, a dispute between supporters of the natural law approach and the positivist approach has a significant impact. The characteristics of the positivist and natural law doctrines refer to their attitude towards duty. One of the most important problems of metaethics constitutes the basis for their opposition: the problem of transition from being to duty, from facts to values, from descriptive sentences to evaluating sentences.

The legal positivism approach proclaims the necessity of obeying any law and accepting the will of any legislator. Breaking the law, as a kind of attack on authority, results in negative consequences. According to the positivists, law should not be evaluated. It is morally neutral. Private views of the law recipients on its validity are irrelevant to the law enforcement. Legal norms do not reveal a character of the sentences in a logical sense. Therefore, it is not possible to state that duties are true (the so-called “non-cognitivism”).

The natural law mainstream is based on the thesis that values are material foundations of the positive law. They should embody the law. A legal order should be the order of values. This is the condition for it to become a genuine law, and not an arbitrary order of force. In addition to the positive law, there is a higher law – natural law. Law has a bidding power only when it remains in harmony with a moral order. Disobeying a “bad law” may become a moral duty. On the basis of this approach, it is assumed that

⁶ M. Szyszkowska, *Etyka*, Białystok 2010, pp. 59–61.

legal norms are sentences in a logical sense, certain obligations are real and absolutely binding (the so-called “cognitivism”).

At the turn of the XX century an attempt to reconcile postulates of the natural law and legal positivism was undertaken. Increasingly, even in the theories classified as positivist, there appears axiological entanglement of law, which, as it has been recognized, should refer to morality (eg, H. L. A. Hart, R. Dworkin). It is emphasized that the morality and justice component should be the foundation of every legal system. There is a necessary relationship between law and morality reflected even in the fact that some moral principles are by definition the *ex definitione* components of the law. It is argued that law should be consistent with obvious truths about the human nature.

In the twenty-first century there appeared concepts on the basis of which a search for the so-called “third way”, that is a middle way between legal positivism and the natural law ideas, was undertaken. That search constitutes a specific alternative to the eternal dispute between cognitivism and noncognitivism as well as extends the reflection on the law, considering its functioning in specific social systems. Attention is drawn to the role of the law interpretation and the need for rational justification of values and norms (legal realism, hermeneutics, theories of legal argumentation and rhetoric, etc.).⁷

The analysis of the views on law and morality increasingly leads to the conclusion that contemporary differences between legal positivism and natural law trends have almost disappeared. Some researchers even point out that both approaches have come closer to each other, and the boundary between them has ceased to be interesting or important.

Leaving aside the controversy regarding the non-positivist and positivist visions of law, it should be noted that one of the necessary conditions to ensure an effective rule of law is the compliance of the axiology adopted by the legislature with the socially recognized values: “(...) *regardless of whether the legislature seems to realize it, every positive law has at its base an idea of man and a concept of value associated with it. (...) law is an important part of the social system, being a continuation of the cultural heritage and a constant result of the efforts of many generations to realize their assumed values – goals*”.⁸

⁷ For more information see J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999.

⁸ P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa*, Kraków 1996, p. 5.

A “good law” is based on the values being the foundations of the civilization and culture of the society. Its axiological approval by the norm recipients makes it the actual regulator of social, political and economic functions.

The process of creating law is largely conditioned axiologically and currently this fact is not subjected to any discussion. Law must be a carrier of values. From the material point of view, a “good law” is the law that protects important values. However, controversial is the choice of values which are to be incorporated into modern legal systems. Undoubtedly, over time there have been significant changes in axiology important for the choice of law-making activities and means to achieve these goals.

Because of the fact that in multicultural societies different views about what is right and what is wrong overlap, the public order construction is possible by basing it on the net of values that are recognized and respected by the majority of the European legal culture.⁹ It has worked out some universal standards of the “good law”. Common roots of this culture are sought in four civilizations: Greek, Roman, Jewish and Christian. They are the basis for the values which are treated today as axiological foundations of the democratic state.¹⁰ They constitute a solid skeleton because they have helped to make a conscious and cultural choice.¹¹

A “good law” can be referred to in purely technical terms. The requirement of a “good law” involves not only the content but also the course of its creation, the design of the legal norms system and institutional mechanism for its secure compliance. Therefore, a “good law” should meet a number of thetic requirements. Among them the most important are: equality, impartiality of law, consistency of the legal system, non-retroactivity, designation of the legal standards possible to meet by citizens, adequate publication, and rule of law.

A “good law” is coherent, logical. Moreover, it does not contain contradictions and gaps. It is important to accurately determine legal consequences referring to the legal norms addressees as well as establish consequences of individuals’ failure to obey or break the rules. Along with the establishment of responsibilities and rights, a mode of their implementation should

⁹ T. Zieliński, *Czas prawa i bezprawia. Myśli niepokorne kustosza praw*, Warszawa 1999, p. 60.

¹⁰ A. Chodubski, *Wartości globalne kultury europejskiej*, (in:) R. Rybiński (ed.), *Kultura polska w zintegrowanej Europie. Szanse czy zagrożenia?*, Toruń 2003, pp. 11–36.

¹¹ P. Winczorek, *Wstęp*, (in:) W. Sadurski, *Myślenie konstytucyjne*, Warszawa 1994, p. 9.

be defined. Normative acts should be understood by their recipients. No law beyond a reasonable need should be created.¹²

Even the legal positivism supporters have recently come to the conclusion that a “good law” is based on the natural law. However, it is being treated somehow differently than in the typical conventional natural law approaches. A. Zoll has given its accurate definition adequate to the needs of pluralistic societies stating that this is the law “*that a person, primarily characterized by dignity, treats as the norm of his conduct. The natural law should be close to the civil one; it should even be the civil law basis*”.¹³

Values, recognized by the law, affect its understanding, which is reflected in the course of the law interpretation. E. Smoktunowicz has repeatedly emphasized the role of interpretation stating that “*Legal regulations are acts of the will. Their interpretation should make them acts of the reason*”.¹⁴ The author concludes that the legal reality is created not only by the legal standards, but mainly by the practice of their application.¹⁵ A legal culture greatly affects the interpretation of law. It is also reflected to a large extent by the awareness of the person using the law and decides on how the rule of law will be understood. It is fair to say that “*our civilization lies at the root of our law content (...)*”.¹⁶ *Ius* has the authority to set a framework for interpretation of *lex* from which it takes its legitimacy.

2. A legal dispute over “good reasons” in the context of the reflection on social communication and legal discourse

Recently, the so-called “communication vision of law” has been playing a significant role.¹⁷ Primarily, the significance of social communication was stressed mainly with a reference to different philosophical views: hermeneutical concepts of language games (A. Aarno), universal pragmatics (J. Habermas), new rhetoric (Ch. Perelman), postmodern deconstruction (J. Derrida), the positivist concept of the text openness (M. Hart), integral

¹² P. Winczorek, *Prawo i polityka w czasach przemian*, Warszawa 1995, pp. 24–25.

¹³ A. Zoll, *O prawie*, (in:) *Rozmowy na koniec wieku 2*, Kraków 2000, p. 178.

¹⁴ E. Smoktunowicz, *Orzecznictwo Sądu Najwyższego i Naczelnego Sądu Administracyjnego. Kodeks postępowania administracyjnego*, Warszawa 1994, p. 17.

¹⁵ E. Smoktunowicz, *Orzecznictwo...*, *op. cit.*, p. 51.

¹⁶ A. Zoll, *Kultura i prawo*, (in:) E. Kamińska (ed.), *Uniwersyteckie wykłady na koniec starego i początek nowego tysiąclecia*, Warszawa 2004, p. 45.

¹⁷ L. Morawski, *Prawo w toku przemian*, Warszawa 2003, p. 150.

philosophy of law (R. Dworkin), etc.¹⁸ Such a perspective has also entered a broader jurisprudence.

Generally, it can be assumed that communication is a process in which parties (a sender and a recipient) by entering into certain social interaction tend to communicate through a language or other significant symbols.¹⁹ Therefore, transfers of meaning through verbal and non-verbal signs take place. To make it possible, one should know a particular “code”. Each communication action is directed to obeying of the intersubjectively accepted social norms which become the basis for understanding.²⁰ Legal communication has its own characteristics. Its participants are the subjects of law, and the rules of such communication are reflected by borders of the law.²¹

The communication foundation is the so-called “discourse”. This concept should be understood as a unique, individual communication event, in which particular communication partners are involved in a given situation. Axiology, which according to S. Gajda is defined as a “powerhouse” of human life, becomes the basis of any discourse, a legal discourse in particular. The author notes that the multiplicity of values and their rivalry “(...) releases energy, which gives the world the power of development”.²² Certainly, the analysis done from a global perspective, through the prism of the development of human history, confirms this thesis. However, observation of specific countries (at a given time and place) leads to the conclusion that values (eg religious) often block the development, posing a barrier to legal regulations. Nevertheless, it does not change the fact that the discourse should be arranged so that it provides communication in an understandable way, consistent with reality, social expectations and universally recognized legal and non-legal norms.

A general framework for the legal discourse is associated with the fact that the basis for decision-making processes cannot be a unilateral imperious decision. Such a decision should be an expression of a social consensus, based on the dialogue compatible with the principles of honest communication. As a result of this dialogue, one goes beyond the boundaries of a given local community and adopts a universal point of view of rational people.

¹⁸ J. Jabłońska-Bonca, *Prawnik a sztuka negocjacji i retoryki*, Warszawa 2002, p. 11.

¹⁹ L. Morawski, *Prawo...*, *op. cit.*, p. 142.

²⁰ *Ibidem*, p. 142.

²¹ M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 28.

²² S. Gajda, *Prestiż w dyskursie prawniczym*, (in:) A. Choduń, S. Czepita (ed.), *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, Szczecin 2010, pp. 821–882.

Many years ago E. Smoktunowicz noted that such a discourse may serve to improve the law, both in its creation and use. He emphasized the importance of legal discourse based on J. Habermas's theory of communicative competence. According to Smoktunowicz, the main participants in the discussion should be: the legal doctrine of judicial decisions, legislative bodies, and the subjects who are particularly interested in the quality of law and its application.²³

J. Stelmach and B. Brozek observe that nowadays jurisprudence (and other humanities) is offered different methods of philosophical interpretation, referring not only to logic, but also, for example, hermeneutics. It provides a kind of the "third way" in the methodology of legal science. Thus, it also becomes possible to justify the normative interpretation theses, by referring not only to the criterion of truth, but also to the criterion of justice, fairness, validity, credibility and effectiveness. Many authors highlight that the basic principles determining the criteria of the practical discourse acceptance ultimately have an intuitive explanation. They claim that argumentation plays a huge role by providing an "ethical minimum" for jurisprudence, that is the minimum of certainty and objectivity.²⁴

A legal discourse has been accompanied by a dispute regarding "good reasons" since ancient times when the basis of logic, dialectics, rhetoric and eristics began to develop. The knowledge of the basic replies and the differences between them has had a significant role. For a long time it was considered that descriptive sentences, whose truth is expressed in conformity of the reality with the expressed judgments, was the main type of those replies. With time, it was noted that language can be used not only to describe the external world, but also to change the reality and create new non-linguistic facts.²⁵

Dialectics became fundamental to determine what was most probably "right". For Socrates, it meant a method of the philosophical dispute conduct. As a result, through the right argumentation it was necessary to direct the opponent's thesis towards absurd if it was really false. Socrates acknowledged that a person having a discussion should have a special ability to recognize any falsehood. He used the so-called "maieutic methods" based

²³ E. Smoktunowicz, *Związanie administracji publicznej prawem, wartościami i interesem publicznym. Zarys problematyki*, (in:) *Prawo do dobrej administracji. Materiały ze Zjazdu Katedr Prawa i Postępowania Administracyjnego*, Warszawa 2003, p. 154.

²⁴ J. Stelmach, B. Brożek, *Metody prawnicze*, Warszawa 2006, p. 161.

²⁵ M. Pietrzykowski, *Wyzwania moralne. Etyczne problemy prawa*, Katowice 2010, p. 17.

on extracting the truth. Plato also emphasized the importance of the continuous use of reason and practicing it in intellectual activities.

Dialectical methods, allowing for a non-empirical way of accounting of the world, were reflected in the form of eristic dialectics (A. Schopenhauer) and hermeneutics (H. G. Gadamer, E. Kaufmann, Ch. Perelman).²⁶

It was already in the ancient times that the so-called “rhetoric” became the basis for the dispute about “good reasons”. Its classical definition is attributed to Quintilianus who described it as *ars bene dicendi*, that is the art of good persuasion. Socrates suggested getting out of man what is good or discrediting his false theses through a discussion. For Aristotle, rhetoric was the art of searching for the persuasion means in any situation. Thus, since ancient times it has been understood as an art of fair, earnest, beautiful, persuasive and effective speaking. It was given a legal and judicial pedigree.

Today, rhetoric is a classic area of legal skills based on the speaker’s fairness and honesty.²⁷ It is based on the skills of conducting disputes in a “good” way and persuading listeners. Over time, however, this concept began to refer not only to the art of oratory, but also to a certain type of argumentative philosophy.

According to contemporary encyclopedias, rhetoric is a science of the functional and efficient use of language in speech and writing.²⁸ This involves an analysis of discursive techniques that aim to stimulate or strengthen the support for the statements used for approval.

Although rhetoric has undoubtedly a judicial pedigree, nowadays it is frequently used in non-judicial dialogues. It is used for flexible and effective formulation of the content of the legal relations by means of voluntary agreements between the parties.²⁹

In ancient times, apart rhetoric the so-called eristics began to develop, originally understood as an art of litigation (from Greek *eristyke*, *eris* – quarrel, dispute). It should be emphasized that the boundary between eristics and rhetoric is very indistinct. Today eristics is frequently understood as the ability to achieve a victory in a dispute. Its goal is to win the debate, regardless of the ways in which it is achieved. Defeating an opponent is an art in itself, no matter who is right and what the truth is. Using eristics helps to win at any price, by means of permitted and prohibited measures

²⁶ *Ibidem*, p. 166.

²⁷ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 11.

²⁸ M. Korolko, *Sztuka retoryki. Przewodnik encyklopedyczny*, Warszawa 1998, pp. 48–49.

²⁹ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 12.

(*per fas et nefas*).³⁰ In ancient times its merits were indicated, if it helped to achieve one's goal, while maintaining the resemblance of being right. Nevertheless, such methods of discussions were criticized already in those times. For example, Aristotle judged them as unfair ways of fight.³¹

Today, eristics is usually treated as "rhetoric of lies." It is emphasized that in case of eristic claims only their form seems correct, but the claims themselves are not true.³² In case of sophistic reasoning (frequently associated with the eristic argumentation), the very form of reasoning is erroneous although it creates a resemblance of truth.³³

Classically, eristics is recognized today by using A. Schopenhauer's definition as a kind of "mental fencing" used to prove one's points in a discussion. Its primary role is to win, and not follow the rules. Eristics understood in this way relies on a frequent use of specific "tricks" to prove one's points right, despite the fact that the truth in the dispute lies in the opposite side.

Some time ago in the Polish jurisprudence there appeared a trend to understand eristics as an art of persuasion consisting in the ability to collect facts and "*process them into the wisdom of persuasive statements*".³⁴ Still, such an approach characterizes the opinion of some contemporary jurists, especially practicing lawyers.

There are sound reasons to agree with the view that if eristics has lost a primary goal of rhetoric, that is searching for truth, it should be treated as "depraved dialectic" making it extremely dangerous.³⁵ J. Jabłońska-Bonca highlights that although the eristic discourse has only one goal – winning, and one criterion – efficiency, lawyers may benefit from the knowledge of its rules just to resist dishonest attacks and unmask lies.³⁶

3. From ethocratio to etoplebs, or reflections on the role of the lawyer as the legal discourse subject

Lawyers play a special public role. Their work is directly related to the law protection, resolving conflicts in the name of justice, establishment

³⁰ *Ibidem*, pp. 15–16.

³¹ Arystoteles, *Topiki. O dowodach sofistycznych*, Warszawa 1978, p. 264 and the following.

³² J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 171.

³³ *Ibidem*, p. 171.

³⁴ R. Łuczywek, *Z zagadnień erystyki sądowej*, "Nowe Prawo" 1956, nr 9, pp. 59–72.

³⁵ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 157.

³⁶ *Ibidem*, p. 222.

public order, and providing legal assistance for those individuals and organizations whose rights and freedoms are threatened. They make decisions about the highest values: life, health, freedom, dignity, security, prosperity, etc. Lawyers' special status and professional ethos along with their special qualifications oblige them to be outstanding participants of the interpersonal communication. They owe their authority to the legal profession's high prestige, the law authority and deeply established patterns of the legal culture. Hence, the highest level of morality should be a fundamental requirement for this professional group.

Today, lawyers are expected to meet appropriate standards of morality. It has become widely recognized that people who join "the sanctuary of justice" for professional reasons should demonstrate the highest qualities of personality. They become the so-called "theocracy," or "power of moral people." Lawyers should form a new social aristocracy, the so-called "aristocracy of spirit" (not just aristocracy of power and income). As Max Weber imagined, they create a professional product in the form of legal services. They control supplies and demands on the market. They raise their social status among all through supporting their services by highly specialized professional knowledge, indispensable for the society and valued by consumers who do not possess such expertise. Lawyers control and restrict the access to the profession, and their prestige rises with the introduction of new regulations in different areas of life.³⁷ However, idealistic expectations connected with the "mission" of the legal profession do not always coincide with practice. Today a crisis of the social confidence in the legal profession representatives is obvious. It deepens with the revelation of new cases of corruption, fraud, embezzlement, fraudulent brokerage, nepotism, etc. Moreover, this tendency has been noticeable since ancient times, when examples of the corrupted lawyers were pointed out and heavily criticized. R. Tokarczyk notes that "*contrary to those dreams of lawyers being a moral elite – ethocracio, in many cases, their spirits reach the ethic bottom – a level that can be described as ethoplebs*".³⁸ J. Jabłońska-Bonca sees reasons for the legal profession crisis in giving primacy to the practical value instead of giving it to the content value. This state of affairs should be regarded as a symptom of the victory of the interest market over the intellect world.³⁹

³⁷ R. Tokarczyk, *Etyka prawnicza*, Warszawa 2001, pp. 22–23.

³⁸ R. Tokarczyk, *Etyka...*, *op. cit.*, p. 13.

³⁹ J. Jabłońska-Bonca, *Autorytety prawnicze. Pomiędzy pragnieniem prawdy i dobra wspólnego a potrzebami rynku wiedzy i władzą*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 943.

Legal professions have always been accompanied by a clear contradiction. From a purely hypothetical perspective lawyers are expected to fulfill the “mission” whose execution relies on nobility, special moral sensitivity, etc. Through the prism of their constant practice it is possible to observe their calculation, nepotism, bribery, low moral standards, etc. In view of the professional dilemmas occurring in practice of the legal profession one is forced to agree with the opinion that no social role is associated with so many moral expectations as the legal profession is, and no profession disappoints as much as the profession of lawyer does.

This is not a great exaggeration to make a general statement that the reputation of lawyers is now the lowest in the history of mankind. Lawyers use their position through the linguistic nomenclature. They have created a new language that is not understood by average people. Thus, they place themselves in a position of wise men who possess knowledge not available to the public. Often they use “mental fencing” to achieve their goal – winning – by taking advantage of their superiority, which, among other things, results from their knowledge of the “legal communication code”. Bearing in mind the importance of the widespread slogan which states that any profession is a “conspiracy against the average people”, lawyers should be regarded as the biggest conspirators.

Barristers comprise the most critically evaluated legal profession. They are often identified with “fallen angels”, “fathers of lies,” “cunning devils,” or simply devil’s advocates, the “defenders of vicious cases”. Their immoral attitude has been the motive of numerous aphorisms. Here are several examples taken from the work of R. Tokarczyk entitled *Commandments of legal ethics. A book of ideas, standards and drawings (original title: Przykazania etyki prawniczej. Księga myśli, norm i rycin)*: “A lawyer after the case and a young lady after a party are worthy of the devil” (Z. Pauli); “An advocate is not believed, though he is already in a coffin” (W. Kunysz); “A lawyer lives on what the legislature cannot express” (unknown author); “A bad lawyer can lose a good case; he wants to justify it by the paragraph, which is not suitable for the case when the right one does not come to his mind” (A. Schopenhauer).⁴⁰

A profession of the judge, which is described as the “crown of legal professions”, is also a subject of heavy criticism. A few aphorisms taken from the above mentioned book by R. Tokarczykiem perfectly illustrate this

⁴⁰ R. Tokarczyk, *Przykazania etyki prawniczej. Księga myśli, norm i rycin*, Warszawa 2009, pp. 285–287.

fact: “When you hear the names of the righteous judges, bend your knees dear fellows; such a miracle is rarer than a virtuous wife. Good things are rare.” (J. Dowbor-Muśnicki); “A fool has heard that the courts in Hades are fair. So when he had a case in the court, he hanged himself.” (Hierokles); “Even a corrupted judge can be fair when he takes bribes from both sides” (K. Bunsch); “The court is a group of people adjudicating which side has a better lawyer” (J. Tuwim).⁴¹

Along with a deep crisis of the legal profession ethical standards in society there is a strong belief that it has become very difficult to find a “good” lawyer. Much too often, professional lawyers who know the craft well often remain on the borderline neglecting the profession ethical principles and general rules of morality and decency.⁴²

Professions of legal confidence, legal professions being among them, should enjoy a special prestige. The word “prestige” has a Greek origin (from Latin *preastigium*). It means respectability, authority and seriousness. The prestige is one of the fundamental autotelic values. Its aspect places it in the row of important values, especially from the standpoint of the law functioning.⁴³

In the face of the growing crisis and collapse of the legal profession, it seems reasonable to pose R. Sarkowicz’s questions: “(...) *to which extent is that bad reputation deserved? Do lawyers actually do anything to change that image?*”⁴⁴ Perhaps one way to overcome the present situation is to give an adequate education, which, beyond the knowledge of the legal ethics principles, would propagate the knowledge of the legal discourse fair rules so that they are identified with rhetoric, and not with eristics.

4. Expectations towards the contemporary legal discourse axiology

It seems that a current critical assessment of the legal profession is associated with the fact that for centuries lawyers have used the rules of eristic argumentation in their discourse, which they never considered as something wrong. Effective actions were valued above all. The issue of being right

⁴¹ *Ibidem*, pp. 266–274.

⁴² R. Sarkowicz, *O etosie prawniczym*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 928.

⁴³ S. Gajda, *Prestiż w dyskursie prawnym*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 813.

⁴⁴ R. Sarkowicz, *O etosie...*, *op. cit.*, p. 923.

almost disappeared for it was not about being right but about winning a dispute.⁴⁵ Although in contemporary democratic conditions it seems impossible to justify eristic methods, it is possible and necessary to use the achievements of rhetoric in an ethic way.⁴⁶

Representatives of legal professions should have appropriate communication skills. The art of compromising and considering legal and non-legal interests becomes the area of lawyers' necessary skills. Rhetorical competence is the foundation. It is advisable to be proficient in establishing and maintaining social contacts. It allows for a better use of professional practice and skills thanks to the mutual understanding and trust. Effective lawyers should, therefore, appreciate the importance of social competence and cultural dialogue. Only then they have a chance to establish charisma, credibility and authority. They should use the tactics of persuasion so that not to break the law and ethics of their profession. A delicate boundary between justified tricks and unethical manipulation cannot be crossed.⁴⁷

Not only should a "good lawyer" know the law, but he should also be able to persuade clients to accept the proposed solutions and negotiate compromises in the world of diverse interests in the legal framework.⁴⁸ A "good lawyer" cannot only be "silent lips of the acts," performing his functions only by using formal and dogmatic methods. A need for integration of legal science with other sciences (including rhetoric and communication theory) becomes clear. A "good lawyer" should be able to "extract" a hidden content of the legal matter, through the appropriate use of non-linguistic interpretation.⁴⁹

It seems that currently a criterion of the practical discourse evaluation should be justness. This term is ambiguous. It is always associated with a certain type of moral values that define only the "ethical minimum" for all types of possible practical discourse.

The role of values in the process of the text legal interpretation is huge. In such situations, to solve a particular case, it is important to grasp the law as a cultural phenomenon. The 'internal' legal culture created by lawyers consists of *"a number of conduct pattern used by lawyers for the purposes of their work, which are not included directly in the legal texts, but without*

⁴⁵ J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 14.

⁴⁶ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 14.

⁴⁷ M. Zirk-Sadowski, *Wprowadzenie...*, *op. cit.*, p. 58.

⁴⁸ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.* p. 12.

⁴⁹ *Ibidem*, p. 23.

which rules allowing for the legal issues settlement could not be extracted from these texts”.⁵⁰

A “good lawyer” is the one who employs the art of applying principles of rightness and justice and is well trained in “the legal craft”. At the same time, such a person becomes a philosopher, seeking solutions while taking into account the complexity of social phenomena and the legal culture “framework” established in the course of history.

A growing complexity and unpredictability of social phenomena and axiological pluralism implies the flexibility of the law and ‘opening’ of many notions of the legal language.⁵¹

Any attempt to answer the question what is meant by the “legitimate discourse” oscillates around rationality as the foundation of any discussion. Hence, the commonly used “eristic tricks”, which have nothing to do with truth, seem to be unacceptable. The majority of eristic methods should be referred to critically for they remain in opposition to the rational discourse principles. Therefore, they may be classified as “immoral practices”.

The assumption that even right premises should not be employed if the predicted consequences would be unfavorable for one party of the dispute is morally unacceptable. One should not “juggle” the terms and concepts using a proven thesis as a premise. Asking questions which would aim to get the opponent’s answer to prove one’s assertion is immoral. Obviously, using deceptive comparisons is unfair. Techniques aiming at forcing the opponent to admit his mistakes, provoking him by returning to the particularly sensitive issues, using paradoxes to confuse him and demonstrate the absurdity of his argument cannot be justified. Pointing to contradictions in argumentation, searching for ambiguity, and employing intentional changes of the subject are morally doubtful. Methods of unreasonable treatment of something that is not the cause as being the cause, fabricating consequences, using deliberate exploitation of ignorance of the people solving the dispute by using unfair arguments, presenting the lack of matter-of-factness, using a stream of senseless words for the purpose to astonish the opponent, and referring to the apparent authority are highly unacceptable.

To conclude, unethical are arguments that are not merits-related, that is using *ad hominem argumentum* instead of *ad rem argumentum*. Additionally, *ad balacum arguments* by which a threat of negative consequences is

⁵⁰ M. Zirk-Sadowski, *Wprowadzenie...*, *op. cit.*, p. 16.

⁵¹ J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, pp. 13–15.

expressed by exerting pressure, and *ad personam* arguments in the form of personal attacks employed in order to disqualify one's opponent are not to be accepted from a moral point of view. The same applies to *ad ignorantiam* arguments, relying on the appeal to the opponent's ignorance in order to throw him off balance, thereby weakening his credibility and authority, and the *ad populum* arguments which employ the use of colloquial opinion to convince one's opponent.

In the legal discourse arguments which refer to the so-called "topos" should be considered. This concept is also known as "legal topics". They point out to the "common places" (*loci communes*), that is universal values and "specific places" (*loci specifici*) which refer to the highly specialized legal issues. Such arguments are very important because they allow for the reference to the well-known reasons which are accepted and legitimized by important traditions (eg. Roman law). At the same time they become difficult to refute. The knowledge of the topos determines the rules of the game in contemporary legal debates. They promote rationality and impartiality, particularly in situations of various doctrinal disputes regarding the so-called hard cases.

It is already at the stage of the law-making process that it is possible to differentiate the category of the so-called "hard" cases.⁵² Nonetheless, such situations very frequently arise in the sphere of the application of law. They rely on the ambiguity of the law interpretation or occurrence of gaps in the law.⁵³ There may be risky regarding the courts' acceptance of the claims which are not supported by scientific justification, and are based only on religion, or being adopted on the basis of dogma.

According to J. Zajadło, such situations highlight the helplessness of *ius* and *lex*.⁵⁴ J. Stelmach notes that "*Capturing the sense (essence) of the law is possible by capturing the sense (essence) of hard cases making up this law. (...) A hard case is the ultimate goal of the legal knowledge (the law interpretation). Only its proper diagnosis allows for defining the limits of the acceptable law interpretation*".⁵⁵ According to J. Leszczynski, in such

⁵² T. Biernat, "Trudne sprawy" w procesie tworzenia prawa. Pole dyskursu legislacyjnego, (in:) A. Choduń, S. Czapita (ed.), *W poszukiwaniu...*, op. cit., pp. 472–489.

⁵³ Z. Pulka, *Podstawy prawa. Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2008, p. 136.

⁵⁴ J. Zajadło, *Co to są hard cases*, (in:) J. Zajadło (ed.), *Fascynujące ścieżki filozofii prawa*, Warszawa 2008, pp. 17–18.

⁵⁵ J. Stelmach, *Przypadek trudny w prawie*, (in:) A. Choduń, S. Czapita (ed.), *W poszukiwaniu...*, op. cit., pp. 140–150.

cases practice is able to redefine the content of the rules.⁵⁶ A “hard case” is interpretatively complex and “open”. It cannot be easily predicted. In a given situation there may be more than one decision, so it is difficult to interpret the situation using the standard methods of interpretation.

A current ethical debate has showed that material theories of morality, giving one answer to each question, are deprived of rational justification. It is much easier to justify logical rules of procedure, indicating rules of practical argumentation in a precise way.

Undoubtedly, pluralism should be the basis of legal discourse. Indeed, it constitutes the rule in all areas: religious, philosophical, and moral, which derive their rationality only from their argumentation apparatus – strong points which can be presented in favor of or against the reviewed thesis. The domain of argumentation, dialectic and rhetoric are always the values which are the subject of social consensus. Universal values play a fundamental role in fundamental argumentation. They make it possible to introduce specific values on which the consensus of particular groups is made, being a specific aspect of the universal values.

In conclusion, it is necessary to state that in the first place the ethical legal discourse should be objective, critical and fair from the standpoint of the intellectual perspective. It should be conducted in direct connection with the law, and the restriction regarding the application of the general rules is possible only if it is justified by the law regulations.

Such a discourse should consider factual findings and aim at the target. It is important to have the conviction that one’s judgments are right and that they respect the principle of truthfulness. It is also necessary to take into account the basic principles of linguistic communication (transparency, simple verbal means, etc.). The subjects of the discussion should be characterized by their readiness to verify their views. Disputes should also be deprived of stereotypes, myths and prejudices.⁵⁷ The legitimacy of the discussion should be restricted to difficult cases. A dispute should take into consideration the generally accepted standards, practices and customs.

The role of the discourse style is especially visible while the process of the court decision legitimating. The opinion that such a style is more desirable than a deductive style seems reasonable.⁵⁸ The assumption of a logo-

⁵⁶ J. Leszczyński, *Problem tożsamości prawnika i jego alter ego w teorii prawa*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii. Ponowoczesność prawa*, Wrocław 2007, p. 167.

⁵⁷ T. Pietrzykowski, *Wyzwania...*, *op. cit.*, p. 8.

⁵⁸ E. Łętowska, *Kilka uwag o praktyce wykładni*, “Kwartalnik Prawa Prywatnego” 2002, z. 1, p. 33.

centric image of the legal text deprived of gaps and contradictions, which L. Morawski defines as an “obsession” with rationality, cannot be justified.⁵⁹ A discursive style has higher requirements than a deductive one highlighting the problematicity of the legal issues.⁶⁰ A judge should be an interpreter ready for an *axiological case*. He should get out of the “axiological discomfort” situation and overcome the interpretive routine.⁶¹

Therefore, nowadays the law cannot be grasped as a closed and definite system of norms. It constitutes an “interpretation fact” which does not exist beyond the interpretation. An interpreter creates its sense.⁶² A full knowledge of the law is only possible through communication activities, whose criteria create ethical requirements. They result in reaching a consensus. Through the legal discourse a system of the legal law norms is somehow “closed”. However, for the law to function as a “good law” it is essential that it should be a tool in the hands of a “good lawyer” who is not only a professional lawyer, but also an “ethical lawyer” professing values commonly accepted in a given social group.

The above considerations can be perfectly summarized by the words of L. Morawski, who in one of his works highlights the following opinion: “*The theory of discourse, though it is formulated very generally and subtractively, seems to implement the basic assumptions of the universal ethics of communication. We can, therefore, conclude that the concept of universal ethics as the basis for the legal order is possible at least from a procedural point of view. (...) The evolution of law based on the unilateral and authoritarian decisions towards the law based on negotiations and agreements seems to set the path for the future law development.*”⁶³

S U M M A R Y

This paper is devoted to the problem of the legal discourse ethics closely connected with the issue of the axiology of law and attempts to find the so-called “good law”, that is law which is compatible with universally recognized moral values. There is no doubt that legal reality is

⁵⁹ L. Morawski, *Teoria prawodawcy racjonalnego a postmodernizm*, “Państwo i Prawo” 2000, nr 11, pp. 30–31.

⁶⁰ *Ibidem*, p. 31.

⁶¹ E. Łętowska, *Kilka uwag...*, *op. cit.*, p. 50.

⁶² For more information see L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2005, p. 197; M. Zirk-Sadowski, *Uczestniczenie prawników w kulturze*, “Państwo i Prawo” 2002, nr 9, p. 3.

⁶³ L. Morawski, *Główne problemy...*, *op. cit.*, pp. 161–163.

not created only by legal rules, but mainly by their interpretation practice and legal norms application. A legal dispute over “good reasons” is realized, among others, through social communication. A legal discourse determines an ideal form of the creation and application of the law, as well as a perfect state of the social relation organization. A unilateral decision-making cannot be the basis for the decision-making processes. A consensus should be based on the dialogue resting on the principles of honest communication. A “good law” should be based on the acceptance by the majority. Nowadays argumentation offers jurisprudence numerous possibilities of justifying theses of a normative character by referring not only to the criterion of truth, but also to the criterion of justice, fairness, validity, credibility and effectiveness. Therefore, it plays a huge role offering jurisprudence a kind of “ethical minimum”. A system of civil norms is somehow “closed” through a legal discourse. The role of rhetoric as an art of fair dispute and persuasion based on the argumentative philosophy methods of a particular type should be emphasized in the “morally legitimate” legal discourse. In the legal communication highly controversial seems to be the use of eristic methods which do not seek for the truth but explore argumentative methods in order to demonstrate one’s reason, despite the fact that the truth in the dispute lies in the opposite side. Lawyers’ special status and professional ethos imply a need to be distinctive participants of an interpersonal communication. Among others, a law may be considered “good” if it becomes a tool not only for a “professional lawyer,” but also for an “ethical lawyer”, that is a lawyer professing values commonly accepted in a given social group.

