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The Impact of Online Media on Legal Discourse

Wpływ mediów internetowych na dyskurs prawniczy

ABSTRACT

This article examines the methodological challenges and difficulties created by the emergence of new forms of legal discourse. These are provided by the new channels of communication, collectively found within the "mass media" and concerns online media: portals, blogs, social networking applications, etc. Since analytical theories of legal discourse were developed before the IT revolution, it is important to consider to what extent existing theories of legal discourse are adequate, given the contemporary picture of the phenomenon. The article is scientific but also contains some reflexions in the field of legal methodology due to its subject. There are formulated two research theses. The first concerns the assumption that due to the expansion of mass media, legal discourse is losing its previous hermetic character. The second assumes that the research programme of analytical jurisprudence, within which previous theories of legal discourse have been developed, requires appropriate modifications to capture the new forms in which it is conducted. The paper concludes by formulating possible directions for the development of a methodology for creating theories of legal discourse.

Keywords: legal discourse; mass media; analytical jurisprudence; legal argumentation

INTRODUCTION

After World War II, the strand referred to in general legal studies as philosophies of discourse and legal argumentation became one of the leading lines of research. Several circumstances favoured this. The first was the anti-naturalist turn in philosophy itself, which then permeated to analytical philosophy of law. This

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condensed not only the study of the language of the sources of law itself and that one in which lawyers express themselves about it, but above all, attention was paid to the pragmatic aspect of speech (see more in the research and results section of this article). The second factor was the weakening of the whole paradigm of legal formalism, with its basic assumption of the usefulness of formal logic for the analysis of normative reasonings. This process, moreover, continues to the present day. Symbolic in this respect are the works of C. Perelman, who demonstrated the usefulness of the dialectical syllogism rather than the classical one in relation to norms and statements about norms. The third factor lies outside the science of law and is related to processes variously referred to in the literature. However, it is most often referred to as the information or communication revolution and, on the sociological side, it is referred to as the "third wave" or the emergence of the information society. The progress of civilisation in the field of hardware and software enabling communication has, over the last 50 years, led to profound cultural transformations, which – as is already a truism – are not irrelevant to law and legal studies. This process has culminated in the emergence of digital spaces, including new media (social networks, blogs, news portals). New forms of communication are also being carried out in them, which is important – not in a monological formula, but in a dialogical one. As a result, new forms of discourse exist.

The lawyer's society has also found itself in this reality. Meanwhile, theories of legal discourse – or at least the most well-known and influential ones – were developed before or at the very beginning of the communication revolution. Certainly, however, the theories made by J. Habermas, H.-G. Gadamer or R. Alexy, in their basic assumptions do not consider at all the specificity of mass media, including digital space. This is not a negative feature of them. It is since the dynamic evolution of discourse itself and – as mentioned – new forms of civilization achievements in the field of communication (both in the elements of hardware and software).

In this paper, I review the adequacy of existing theories, pointing out their descriptive and explanatory limitations. I also reflect on the validity of existing definitions of legal discourse. The article is a part of the analytical legal studies strand. The research method is descriptive conceptual analysis. In the paper, I put forward a research thesis that the existing theories of legal discourse already show serious deficits in the adequacy of the description of legal communication (intra-juridical view) and the social description of law (extra-juridical view). Therefore, it is necessary to reformulate some assumptions within the framework of theoretical or sociological-legal research on the phenomenon of legal discourse, considering mass media.

RESEARCH AND RESULTS

First, it is necessary to establish basic conceptual issues regarding both the definition of legal discourse and mass media.

To date, the most widespread and generally accepted definition of legal discourse has been agreed as it is a special case of practical discourse, which is grounded in the assumptions of the so-called ideal speech situation.[1] The "practicality" in this definition refers to the development of a resolution, a consensus on the subject matter of legal discourse.[2] This resolve, in turn, is an accepted ontological-legal position, and therefore results from the accepted (or presupposed) philosophy of law (the participants in the discourse are always stuck in a particular philosophical-legal paradigm, even if they do not know that).[3] The object of legal discourse usually concerns the wording of an obligation (legal norm) or the acceptance of a particular statement about the norm (e.g. evaluation on the basis of a given criterion, i.a. from an axiological perspective).

Legal discourse theories are never concerned with concretized discourses. This is obvious. They are analytic-descriptive concepts with a broad scope. They are not only concerned with the discourse of dogmatics or legal theory, the inclusion of specific considerations flowing from the branch of law, the object of discourse such as a substantive or procedural norm, etc. However, legal practice discourses are sometimes distinguished from discourses of jurisprudence (legal doctrine), which is somewhat reminiscent of the division of legal interpretation into doctrinal and operative, among others. Judicial discourse has been the object of interest due to its role in the petrification, but also the evolution of concepts.[4] It is modelled that legal discourse has the special characteristic that, as already mentioned, it is conducted according to the assumptions of an ideal speech situation. This one contains certain axiological assumptions about the conduct of communication, the most important of which are sincerity and truthfulness.[5] The former presupposes a volitional attitude on the part of the interlocutors to communicate according to

[1] R. Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie derjuristischen Begründung*, Frankfurt am Main 1978, pp. 33–39, 263–272, 356–359, cited after A. Grabowski, *Dyskurs prawniczy jako przypadek szczególny ogólnego dyskursu praktycznego*, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/149556/grabowski_dyskurs_prawniczy_jako_przypadek_szczegolny_ogolnego_dyskursu_praktycznego_2003.pdf?sequence=1&isAllowed=y (access: 9.12.2023), p. 1.

[2] J. Habermas, *Faktyczność i obowiązywanie Teoria dyskursu wobec zagadnień prawa i demokratycznego państwa prawnego*, Warszawa 2005, p. 76.

[3] J. Wróblewski, *Postawa filozoficzna i afilozoficzna we współczesnej teorii prawa*, [in:] *Pisma wybrane*, ed. M. Zirk-Sadowski, Warszawa 2015, pp. 35–36.

[4] F. Schusser, *Judicial Activism in a Comparative Perspective*, Heidelberg 2018, p. 23, 26.

[5] D. Rasmussen, *Ideal Speech Situation*, [in:] *The Cambridge Habermas Lexicon*, eds. A. Allen, E. Mendieta, Cambridge 2019, pp. 182–184.

conviction, thus without deception, lying, etc. Truthfulness in theories of legal discourse has always been defined dialectically, as the acceptance of a given view by the widest possible audience.[6] This is due to the analytical nature of the language of law,[7] whether we are talking about science or legal practice, sources of law or statements about those sources.

These are, of course, general assumptions. They were taken as criterial features to distinguish legal discourse from other types of social discourse. They made it possible to easily separate discourses conducted by so-called professional (substantively competent) subjects from external discourses, conducted perhaps with the participation of lawyers (substantively competent subjects), but about the law from a social, general perspective, etc. This was a very important assumption resulting, e.g., from the development of new forms of mass communication since the beginning of the 20th century, such as radio or television. The idea was to remove from the object of the theory of legal discourse cases introducing conceptual chaos, such as political discourses about law, popularisation, social opinions (including populism), etc. For in them, neither consensus is reached, nor norms are reconstructed.

A presupposed feature of the legal discourse thus defined was its hermetic nature, which is easily demonstrated on semiotic grounds.[8] The features of the language of law (both of the legal and jurisprudential variety) are fairly well recognised in the literature. From the point of view of interest, it is appropriate to cite the following characteristic features of it, which unequivocally lead to the conclusion of the hermetic nature of legal discourse.

On the semantic aspect, special attention should be paid to the differential meaning function that accompanies the use of language in the context of law. In the case of other cultural products, the primary semantic function is descriptive. We describe what was, is or is about to happen. In the case of law, language is used in a function referred to as normative-prospective. The legislator does not describe an existing reality, but creates patterns of behaviour from which a prospective reality can be reconstructed. Also statements about norms do not fit into the classical descriptive function. This is one of the reasons why the difficulties arising from the division of statements into synthetic and analytical are formulated in the analytical philosophy of law.[9] We do not make statements about law in the sense of its existence, but of its validity. The discourse on norms is also full of evaluations.

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[6] C. Perelman, *Logika prawnicza. Nowa retoryka*, Warszawa 1984, p. 30, 32, 231.

[7] J.L. Austin, *How to Do Things with Words*, Oxford 1962, p. 33.

[8] It is a popular approach in the theory of law. See, e.g., B.E. Butler, *Dworkin's "Semantic Sting" and Behavioral Pragmatics*, [in:] *Further Advances in Pragmatics and Philosophy: Perspectives in Pragmatics*, eds. A. Capone, M. Carapezza, F. Lo Piparo, Cham 2018.

[9] T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*, Warszawa 2016, p. 24.

The hermetic nature of legal discourse in semantic terms is influenced by the characteristics of the lexis of legal and juridical language. In this respect, it is pointed out, first of all, the quasi-idiomaticity of expressions, their semantic peculiarity (modification of meaning in relation to general language), the contemporary susceptibility to specialisation, and the use of expressions with the so-called low frequency of use in general language. In view of the expansion of the volume of regulation, the deterioration of semantics with the language of the subject of regulation also seems crucial. The law of ever newer human activities is full of expressions from specific professions. This phenomenon is particularly evident in the area of substantive law (it is most strongly felt within administrative law).

In terms of syntax, the hermetic nature of the discourse is already influenced by the basic feature of the language of law which is the peculiar syntax of the legal norm and the phenomenon of the so-called two-level normative statements. The editorial and normative levels have different meanings and syntaxes. The proper meaning of normative statements naturally arises at the normative level, within which the participants in the discourse reconstruct the obligations in whole or in part (who and what must do and if not, what happens). Another issue inherent in the syntactic aspect is the peculiar collocations of legal language. Legal doctrine develops specific collocations in the course of grounding legal concepts (such as bring an action, pronounce a judgment, etc.). A basic knowledge of these syntactic properties conditions gives the ability to participate in legal discourse.

In the issue at hand, however, the pragmatic aspect of legal discourse appears to be crucial, which is, after all, what Anglo-Saxon descriptive analytical jurisprudence was based on (as discussed further below). It has been recognised that the way in which we use language (with sociolinguistic context) creates the semantic aspect of a normative utterance in a different way in the first place. In legal discourse it is the pragmatics that determines meaning, not meaning that influences pragmatics. A proper understanding of legal concepts, or the social archetype of law, requires adopting an inclusive, culturally engaged attitude towards law and legal science. Such a procedure is universal and goes beyond H.L.A. Hart's analytical theory built only in relation to Anglo-Saxon legal culture, although the research programme built so far in relation to legal discourse uses most of its assumptions. From our point of view, it seems most relevant to assume that the contemporary language of law and legal science is a so-called professiolect. This applies to all elements of the pragmatic analysis of language use, thus locution, illocution and perlocution. Participation in legal discourse therefore requires not only the adoption of an inclusive perceptual stance, but also the possession of a minimum of lexical and communicative competence by the interlocutor. Its most important manifestations concern the pragmatic aspect of language, whose role far exceeds that of general discourse. Let us recall that these properties overlap with the already mentioned properties of legal discourse in the form of its orientation towards the reconstruction

of duty and its formalisation, among other things, by conducting it according to the assumptions of the ideal speech situation.

As already indicated, the above assumptions were developed in the days before the communication revolution. This, moreover, is evolving very rapidly. From the point of view of the development of the mass media, especially the Internet, the period of interest is very short and covers – more or less – the last 16 years. Let's recall some facts. The first-generation iPhone was launched in 2007, but it was only after 2010 that smartphones began to gradually displace previous mobile phones that did not have the computing power to reproduce Internet content to a large extent. Facebook was launched in 2004, but the popularization of social media did not take place until several years later. This was only possible after the proliferation of mobile devices capable of processing web content. These include the smartphones already mentioned, but also tablets and the miniaturization of laptops, including their acquisition of more powerful batteries and energy-efficient but powerful processors.

Mass media are defined as "forms of communication in which specialised groups communicate messages to a heterogeneous and dispersed audience by means of an institution or technique".[10] With the issue of legal discourse in mind, two elements of this definition should be noted. The first is the multiplicity of communication channels, and the second is the inhomogeneity of the audience.

It is, I believe, an unarguable thesis that contemporary legal discourse has expanded into fields of communication inherent in mass media. However, it should be emphasised to avoid the mistake of mixing the discourse conducted in the "mass media" with popularization activities. Content appearing in social media may be part of legal discourse, but what makes it possible to include it is the criteria of practicality and the assumption of an ideal speech situation. However, lawyers are using new forms of communication. The most relevant new form of legal discourse seems to be online media; in particular, web portals, social networks, and blogs.

One may wonder, what has changed since the days of television and radio. After all, G. Radbruch first presented the concept of statutory lawlessness during a radio programme in 1944. Why have theories of legal discourse so strongly contrasted legal discourse with discourses about law, without the element of practicality, although conducted with the participation of lawyers? The answer to this question is simple. It was not so much that legal discourse was juxtaposed, but that new forms of communication, precisely the mass media, were not considered because of their – assumedly – marginal influence. Theories of legal discourse were essentially created on the 19th-century features of legal debate, thus based on the observation of the properties of the discourse conducted in legal doctrine and jurisprudence.[11]

[10] P.S.N. Lee, *Mass Media and Quality of Life*, [in:] *Encyclopedia of Quality of Life and Well-Being Research*, ed. A.C. Michalos, Dordrecht 2014.

[11] L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988, p. 97.

The biggest change that took place less than 20 years ago, with the popularization of online media, is a kind of "overlap" of legal discourse conducted in the new communication channels (or one collective mass-internet one, if we accept such a conceptual convention) with the existing legal discourses – both doctrinal and judicial. The difference with respect to the preceding period boils down to a significant broadening of the influence of discourse conducted in mass media (primarily online) on existing legal discourses. This influence is, of course, heterogeneous and depends on the prestige power of the interlocutors and the argumentative power of their statements. Nevertheless, content presented for practical discourse with the assumptions of the ideal speech situation appears in posts on social networks, blogs, commentaries, legal forums, etc. In turn, the participants in the discourses conducted through the existing communication channels, primarily written and verbal (in doctrine and jurisprudence), have ceased to regard the content produced in social media as being of inferior merit, unacceptable in public debate (due to its origin), etc. Whether or not the citation of the source of an argument from online media will be disclosed in a given, concretized legal discourse (e.g. a court, as part of the reasoning of a decision) is a secondary matter. We consider these matters abstractly, model-wise. Once again, it should be emphasised that discourses in mass media – online media – overlap and intermingle with the hitherto defined legal discourse. And if only for this reason, it is necessary to consider the adequacy of the theories of legal discourse, which were developed before the conditions indicated above.

However, before analysing this issue, let us still try, synthetically (due to the limitations of the academic article format), to characterise the legal discourse conducted in online media. The first thing that is easily grasped is the communicative parallelism of the sender and the receiver and the heterogeneity of the audience (the latter additionally reinforces the position on the adequacy of the new forms of legal discourse in relation to the already cited definition of mass media). Of course, the unity of place and time of discourse was not at all already required in the previously defined legal discourse. It was a feature of the discourses of legal practice (primarily judicial), but even so it was not a condition *sine qua non*. Indeed, the discourse of legal doctrine, but also of practice, takes place with a lack of preservation of unity of expression, is often staggered in time, etc. However, the feature of communicative parallelism is quite different in discourses conducted through mass media. The manner in which communication is conducted in them is more varied. Sometimes there is a lack of temporal stretching of the debate, while at other times the communication is stretched in time. The communication space is also heterogeneous. While previous legal discourses are fairly homogeneous in this respect (the written – literary – channel seems to have dominated), in the case of mass media we are dealing with blogs, online forums, social media posts, legal opinions distributed on specific websites, and even video-blogs. Hence, the observation about the parallelism but also the diversity of the communication space of the participants in this form of legal discourse.

In attempting to characterise the legal discourse conducted in the mass media, above all taking into account the specifics of their online variety, three elements come to mind as particularly relevant for elucidation.

The first is the multiplication of content – previous forms of legal discourse have been limited. Participation in the debate of legal doctrine, not to mention jurisprudence, was in principle only possible for professional, specialised entities, with a high degree of substantive and formal control over the reported messages.[12] The dissemination of the media also means the dissemination of accessibility to discourse, importantly, not only in passive form, but also in active form. Hypothetically, there is also the possibility of a strong influence on legal discourse by non-professional actors.[13] The only limitation is the dissemination of the source of transmission of the message, hence the important role of "likes" on social media, subscribing to a channel, blog, etc. This phenomenon leads to the loss of elitism in legal discourse, its high transparency (including facilitated criticism of the presented content by professional or non-professional interlocutors), but at the same time is connected to negative phenomena, described in the literature as an information bomb (a mass of information,[14] including "junk" content[15]) and disinformation, including – particularly dangerous – institutionalised disinformation.[16]

The second issue is the impairment or even complete exclusion of the "ideal speech situation". Rather, it is about the difficulty of maintaining the assumption that legal discourse (at least that conducted in online media) is characterised – *in abstracto* – by such a feature. This is a very important point, and research, above all sociolinguistic research, should be undertaken on this circumstance. This observation stems from an easily perceived lack of control over the conditions of discourse in the form of sincerity and truthfulness. This is due to several circumstances, among which one can only hint (due to the volume limitations of the study): the high accessibility and ease of participation in discourse, but the significant limitation in controlling the content and form of expression. This is perfectly evident in social media, where in the open profiles of prominent lawyers (e.g. former Supreme Court judges, recognised practitioners, etc.) in the discourse can be participated

[12] Cf. the division between professional and non-professional actors who participate in legal discourse in L. Leszczyński, *Wykładnia operatywna (podstawowe właściwości)*, "Państwo i Prawo" 2009, no. 6, pp. 11–12.

[13] In the literature it has been referred to the so-called legal non-institutional discourses in this context. Cf. A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego*, Kraków 2009, p. 503.

[14] S. Lem, *Bomba megabitowa*, Warszawa 1999; P. Virilio, *The Information Bomb*, London–New York 2006.

[15] C.L. Cosper, *The Expert Mind in the Age of Junk Data*, "Cogent Social Sciences" 2016, vol. 2(1).

[16] J. Stray, *Institutional Counter-disinformation Strategies in a Networked Democracy*, [in:] *Companion Proceedings of the 2019 World Wide Web Conference (WWW '19): Association for Computing Machinery*, New York 2019, 1020–1025.

in by basically anyone (the profiles are usually public). The control of the speech comes down to a binary acceptance or exclusion of the interlocutor. Another factor is ethical problems, such as circumventing the ban on advertising legal services by representatives of selected (commercial) legal professions.[17] Their "medianess" is conditioned not by the sincerity and truthfulness of their statements, but by self-promotion, which is assumed to translate into economic effects.

The third circumstance is related to the previous one and – in short – can be called the lack of institutionalisation of the discourse. Well, a feature not always mentioned of legal discourse was its very high formalisation. This was due, among other things, to the form of communication. Doctrinal discourse, not to mention judicial discourse, is highly formalised and easily controlled by a moderator. In the case of mass media discourse, its massiveness and ease of participation lead to the relativisation of judgments and results from the objective difficulties of pragmatically analysing content from the perspective of illocution and perlocution, which mainly involve standards of truthfulness. Another property of legal discourse in the mass media is the lack of a general orientation towards practicality, i.e. the establishment of a norm of conduct or an acceptable statement of the norm by the audience. This is due to the heterogeneity of the audience, the lack of moderation, and little control over the discourse.

Thus, either we acknowledge that mass-media discourse should not be taken into account as a form of legal discourse, or we admit – bearing in mind all the arguments presented above – that its definitions and the methodology behind its theories so far are insufficient or to what extent limited. However, the position on the exclusion of mass media discourse from the meaningful scope of the concept of legal discourse cannot be shared, as it would involve the exclusion from the field of analysis of all, contemporary phenomena of the development of legal debate. It would also reduce the definition of legal discourse to an anachronistic concept, which does not consider the evolution of communicative processes in modern civilisation.

CONCLUSIONS

The considerations so far may give the impression that the overall assessment of the expansion of legal discourse into the new area of mass media is negative. Nothing could be further from the truth. And it is not the point that it depends on the criteria of evaluation. Besides, by adopting a position that is as anti-valuational as possible, inherent in the positivist paradigm of conducting legal research, we

[17] P. Brożek, *Czy adwokaci powinni się reklamować?*, "Palestra" 2021, no. 7–8, pp. 238–252.

are only formulating observations as to the facts, without evaluating them from an axiological perspective (as far as this can be achieved).[18]

By extending legal discourse to the field of mass media, above all the Internet, the following civilisational achievements should be signalled.

The first is the compatibility of the process in question with the phenomenon described in the literature as the "third wave" society. A. Toffler points out that the spread of information technology is bringing households back to the role of participants in the global economy.[19] In this sense, legal discourse can be co-produced personally, from the level of household activity, regardless of place and time, by the individual interlocutor.[20] Previous barriers to participation in the discourse (e.g. in terms of joining an academic conference, participating in litigation, etc.) disappear. The dissemination of new legal views, individual innovative positions or arguments is much easier. All this combines to democratise the legal discourse, although at the same time it exposes it to the signalled populism.

The second is the proliferation of modern hardware and software within the conduct of legal discourse. This was, of course, a gradual process, but one that has accelerated to a qualitatively greater extent because of the COVID-19 pandemic. This is of relevance to the discourse of legal doctrine. This is, of course, conditioned by the mentality of the scientific community of the country in question, but it should be noted that for representatives of the older generation of academics, forms of online communication or content delivered there did not have the same impact as traditional sources in the form of publications, speeches at seminars, in-person conferences, etc. The last few years have seen a significant change in the approach to the discourse formula thanks to the new and widespread forms of communication via the Internet.

The openness to broad participation in legal discourse by new participants is leading to a demythicisation of law as a cultural archetype and is linked to a gradual transformation of the deontological function of lawyers in society. They cease to be the only "scholars of the law".[21] As a result of the availability of online sources on the law, but at the same time the ease of joining legal discourse by interlocutors of diverse backgrounds, lawyers are losing their exclusive control over the phenomenon of law, which has been an immanent feature of this professional

[18] J. Lemańska, *Problem of Applying the Law on Positivist Grounds, Judge's Dilemmas, Judicial Paradoxes*, "Prawo i Więź" 2020, no. 3, pp. 227–229.

[19] A. Toffler, *Trzecia fala*, Warszawa 1986, pp. 240–247.

[20] M. Fleischer, *Ogólna teoria komunikacji*, Wrocław 2007, pp. 62, 150, 220–223.

[21] This problem is as old as reflection on the law. "The teachers of the law and the Pharisees sit in Moses' seat. So you must be careful to do everything they tell you. But do not do what they do, for they do not practice what they preach. They tie up heavy, cumbersome loads and put them on other people's shoulders, but they themselves are not willing to lift a finger to move them" (Bible, Matthew 23:2–4).

group in principle for centuries. This is a broader theme that could be dealt with in a separate op-ed and is also linked to the yet poorly recognised phenomena of legal populism (not necessarily understood in a pejorative sense), the juridification of social relations, etc.

To summarise the above theme, the expansion of legal discourse into the new field of mass media, above all online, has led to the dissemination of legal information with all its consequences.

As already mentioned, the theories of legal discourse and argumentation to date have been developed as part of the research programme of descriptive analytical jurisprudence.[22] It is neither possible nor necessary to discuss its assumptions in detail. It should only be recalled that the main assumptions of Hart's theory, but also of the entire methodological paradigm of descriptive analytical jurisprudence, boil down, i.a., to the adoption of the position of methodological anti-naturalism (rejection of empiricism proper to applied sciences as the best model for conducting research), directing attention to language and assuming that cognition of social phenomena is possible through its analysis.[23] This, in turn, involves expanding the pragmatic analysis of normative statements to ensure that the psycho-social determinants of law are reconstructed. According to descriptivists, there is no need to resort to so-called linguistic reconstructionism and to establish the deep structure of language use. They reject formal logic as unreliable with regard to the reconstruction of the concept of law. Instead of answering the question of why we recognise some concepts as normatively binding and others not, they are interested in describing how they are used and, on this basis, presuppose that they are law. This was the thinking of Hart, who did not make things any easier because of his manoeuvring between analytic philosophy and the sociology of language, which became, among other things, the reason for R. Dworkin's charge of the "semantic bite" of conceptual analysis and the nominalism behind it.[24]

As already indicated, theories of legal discourse and argumentation were developed along the lines of legal analytic philosophy mentioned above. Three of its limitations seem particularly relevant in view of the adequacy of the description of legal discourse, which considers new forms of communication, above all in social media.

These limitations boil down to the lack of a precise distinction between the descriptive sociology of language and the methodological assumptions of discourse theory as an analytical theory of law. The problem of the linguistic analysis of social

[22] M. Pichlak, *The Law's Autonomy and a Practical Law-View: Preliminaries to Legal Discourse Analysis*, "Wroclaw Review of Law, Administration & Economics" 2014, vol. 4(1), pp. 61–69.

[23] A. Bator, *Postanalityczna teoria i filozofia prawa. Nowe szanse, nowe zagrożenia?*, "Przegląd Prawa i Administracji" 2015, vol. 102, p. 29.

[24] R. Dworkin, *Law's Empire*, Cambridge 1988, p. 45.

phenomena is to presuppose that something exists if it is the subject of a linguistic utterance, and all the attributes of speech act theory can be attributed to it. While these assumptions are effective for affirming the performative status of social facts, they are not suitable for discourse analysis and legal argumentation. This is because they lack the ability to quantify observation in this aspect alone (i.e. causation in a realistically observable reality). Perhaps this limitation is since the research programme of analytic, descriptivist philosophy of law is primarily suited to the analysis of static discourses, particularly in relation to professional subjects. Also, Hart's theory was not designed to address the use of legal concepts by all language users. This one made it clear that "certainly the rule of recognition is in my book based on a conventional form of judicial custom. That this is so evidently borne out at least in English and American law, for surely the rationale of an English judge for recognising the legislation of Parliament (or of an American judge for recognising the Constitution) as a source of law superior to other sources includes the fact that his fellow judges act in this respect as did their predecessors".[25]

In summary, we have established that:

- legal discourse is losing its hitherto hermetic nature, with the attendant broader possibility of participation by diverse, heterogeneously competent actors;
- legal discourse is functioning in new communication channels, in which online media are developing most dynamically. This leads to the dissemination of legal information, but is associated with a possible downgrading of the social role of lawyers, who are displaced by non-professional actors, as well as new phenomena such as AI, legal applications, etc. A good example of this phenomenon was once the prevalence of compilations of judgments prepared by lawyers. Today, the demand for such sources is nil in view of the proliferation of legal databases, online collections of case law, etc.;
- the assumptions of the descriptive philosophy of law were adequate in the face of theories of legal discourse developed before the communication revolution, and already there is a lack of a new theory of legal discourse that would take into account the achievements in the development of Internet media, which occurred several years ago. These are therefore new phenomena. Legal discourse has expanded into new fields of communication, while legal discourse theory has remained further a description of the debate of doctrine and jurisprudence.

It is not possible in this article to provide comprehensive solutions on how to reform existing theories of legal discourse, or whether the scale of these modifications should be so large that we will in fact be dealing with new theories.

[25] H.L.A. Hart, *The Concept of Law*, Oxford 1994, p. 267, cited after T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *op. cit.*, p. 345.

As a conclusion, however, it is possible to signal a few elements that should be considered in the development of a curriculum for the study of legal discourse in the mass media age.

The first suggestion is to change the research method. Theories of legal discourse have been developed based on the method of conceptual analysis. They were intended to be (and have become) a generalisation of the features of legal debate, conducted – as has been pointed out many times – by professional actors, or further formalised (normatively, institutionally, precedentially, etc.).[26] Mass media discourse is not homogeneous (and cannot be so since part of the definition of mass media is the diverse audience and potential heterogeneity of interlocutors). In view of this, it is suggested that attention be paid to the case study method. This loses the element of representativeness of the results, and it is difficult to build generalisations based on it, but by distinguishing the criteria of legal discourses in influential mass media from the irrelevant ones, it will be possible to abstract the common features of the former. This is also a reference to N. Luhmann's systems theory.[27] This is not particularly revealing, as it is already in social systems theory that an alternative to traditional approaches to discourse, including legal discourse, has been sought.[28] Luhmann sought to isolate qualitatively significant messages from those that merely constitute a systemic discourse of a particular kind. Thus, he introduced some internal qualification of which processes should be studied because they are responsible for changes in the system, from those that do not. In essence, the construction of a theory should be based on the former (note the parallel to Dworkin's theory, which also assumes that the analysis of difficult cases can lead to the construction of an adequate theory of law, despite the potential objection that one overlooks ordinary cases and focuses on the peculiarities of the system[29]). Luhmann defined such communications as those that "make a difference" in the system.[30] I believe that adopting such a paradigm can be very useful within the study of legal discourse.

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[26] C.E. Alchourrón, *The Intuitive Background of Normative Legal Discourse and Its Formalization*, "Journal of Philosophical Logic" 1972, vol. 1(3–4), pp. 447–463; E. Melissaris, *The Limits of Institutionalised Legal Discourse*, "Ratio Juris" 2005, vol. 18(4), pp. 464–483.

[27] G. Skąpska, *Prawo w ponowoczesnym społeczeństwie*, "Zarządzanie Publiczne" 2008, no. 4(6), pp. 56–59.

[28] J. Winczorek, *Zniknięcie dwunastego wielbłąda. O socjologicznej teorii prawa Niklasa Luhmanna*, Warszawa 2021, pp. 123–127, 180–190, 197–198.

[29] Because in common law also "statutory interpretation has become closer to common law method. By common law method, I mean the familiar process of extrapolation of underlying principles and values from disparate sources, with a view to identifying the rule to apply to the case in hand". See Rt Hon Lord Justice Sales, *Modern Statutory Interpretation*, "Statute Law Review" 2017, vol. 38(2), p. 125.

[30] "By information we mean an event that selects the states of the system". See N. Luhmann, *Społeczne systemy. Zarys teorii ogólnej*, Kraków 2007, p. 69, 76; M. Fleischer, *op. cit.*, p. 61.

The final proposal, which is an extension of the previous one, is to pay attention to the discourses that ground concepts. On the one hand, contemporary legal debate is characterised by a greater susceptibility to different understandings of concepts; on the other hand, in view of the rapid evolution of law and legal science, concepts are subject to more rapid extensional or intensional modification. This is also due to the dissemination of legal discourse, the greater participation in it by new actors, but it is also the essence of mass media, which are, after all, based on entropy rather than information limitation. Legal discourse has also always been treated as self-perpetuating, and therefore highly susceptible to reproducibility.[31] Mass media, however, leads to conceptual ambiguity for various reasons. One of them is also the phenomenon of multiculturalism, the multilingualism of contemporary law (e.g. in the EU area), etc. There are quite a few factors of this kind. The fact is, however, that some discourses lead to the entrenchment of new concepts, taking them over by secondary discourses, while others do not.

Legal discourse is a fascinating area of analysis that should be done from different perspectives. Philosophies of legal discourse do not yet have the status of positivism, philosophy of natural law, legal realism, etc. It is a philosophical and legal direction that is still evolving. Dynamically changing forms of communication, however, should result in a reformulation of the established theories of legal discourse. After all, the basic measure of any theory is its adherence to facts.

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[31] G. Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, "Law & Society Review" 1984, vol. 18(2), pp. 291–301.

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ABSTRAKT

W artykule przeanalizowano metodologiczne wyzwania oraz trudności, jakie stoją przed naukami ogólnymi prawoznawstwa w związku z rozwojem nowych form prowadzenia dyskursu prawniczego. Mają one miejsce w nowych formach komunikacji, zbiorczo określanych jako mass media, ale dotyczą głównie mediów internetowych: portali, blogów, portali społecznościowych itp. Ponieważ teoria dyskursu prawniczego to teorie analityczne powstałe co do zasady przed rewolucją informatyczno-komunikacyjną, wydaje się istotne przeanalizowanie tego, na ile dotychczasowe teorie dyskursu prawniczego adekwatnie opisują zjawisko dyskursu prawniczego. Artykuł jest naukowo-badawczy, ale zawiera również refleksje w przedmiocie metodologii prawoznawstwa w ramach omawianego zakresu przedmiotowego. Znajdują się tu dwie tezy badawcze. Pierwsza dotyczy założenia, że wskutek ekspansji mediów masowych dyskurs prawniczy zatraca swą dotychczasową hermetyczność. Druga natomiast zakłada, że program badawczy jurysprudencji analitycznej, w ramach którego tworzono dotychczasowe teorie dyskursu prawniczego, wymaga stosownych modyfikacji celem uchwycenia nowych form, w których jest on prowadzony. W podsumowaniu sformułowano możliwe kierunki rozwoju metodologii tworzenia teorii dyskursu prawniczego.

Słowa kluczowe: dyskurs prawniczy; mass media; jurysprudencja analityczna; dyskurs prawniczy