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The Methodological Assumptions Underlying 'Law in Literature' as a Legal-Philosophical Current

SUMMARY

Law in literature is a research perspective within a broader field of study, *law and literature*, which was formally initiated in the 1970s in the United States. Although, conventionally, the date of 1973 is taken as the beginning of this scholarly project, when James Boyd White's book entitled *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* was published, pioneering works by John Wigmore and Benjamin L. Cordozo had appeared at the beginning of the twentieth century. In the later twentieth century, attention was once again drawn to the fact that law and literature have a lot in common. The law and literature tendency is based on the hypothesis that there are many connections between these two disciplines, and that the basic common element is language, which is used by both lawyers and writers. In addition, it has been suggested that drawing on legal literature and literary methods and tools can be of use to jurists themselves. At the same time, legal literature can help ordinary people know and understand the law; it can bring them closer to legal problems and to the representatives of the justice system itself.

Law and literature, also known as the literary school of law, is today a branch of a broader field in the philosophy of law: the aesthetics of law. This project focuses on finding what can be described as broadly understood relationships between law and literature, and on analyzing and comparing these relationships. Research is carried out within two basic approaches, i.e. an internal one (*law as literature*) and an external one (*law in literature*). But it should be noted that the research field is much wider and other areas can be identified, including: *law on literature*, i.e. legal regulations concerning literature (copyright, censorship etc.); *literature in law*, i.e. the presence of literary elements in court decisions, defense and prosecution speeches, and even references to literature in normative acts; *literature as law*, i.e. the law-making function of literature (statements of doctrine in Roman and Greek law; the Koran, the Bible, or the Talmud understood as texts of a literary nature, which, at the same time, contain a set of laws of a given community); and *legal literature*, including narrative jurisprudence.

Although *law and literature* is one of the most thoroughly discussed elements of the aesthetics of law in both non-Polish and Polish literature, there is still no coherent methodology for its study. The aim of the dissertation is to propose a research methodology and to demonstrate it via the example of law in literature. The starting point for my research are two questions, both located in philosophical and legal reflection. One concerns the aesthetics of law as a part of the philosophy of law, while the other concerns the evolutionary trend in the philosophy of law.

The first, which draws on the article by Jerzy Zajadło entitled “Estetyka – zapomniany piąty człon filozofii prawa” (Aesthetics - the Forgotten Fifth Pillar of the Philosophy of Law), refers to the field of my research, and specifically whether our "micro" perspective for studying law can be concrete literary texts included within broad category of legal literature. I assume that since the macro perspective in Zajadło’s view is a certain ideal image of law, an image of law "as it should be" that is based on an entire system and derives from an interpretation of legal norms (*law as literature*), we can seek examples on a “micro” scale in a specific work or in several works (*law in literature*). Literature as a response to surrounding reality also shows the law that surrounds us; it contains examples of various situations, legal events, and the behavior of lawyers and criminals. My goal is, *inter alia*, to demonstrate how to use literature to learn about law, not so much in the sense of its specific provisions, but in the sense of its nature, principles, and ideas.

The second question is related to methodology: can we use the method adopted by Wojciech Załuski in his *Ewolucyjna filozofia prawa* (Evolutionary Philosophy of Law) as a research method? Załuski proposes to define any philosophical-legal tendency as offering a set of answers to four questions: 1) the ontological question: what is law, what is its nature?; 2) the teleological-axiological question: what are the main goals of law and how can they be achieved?; 3) the question about normativity: what is the basis for the validity of law (its normative aspect) and its observance (its motivational aspect)?; and 4) the methodological and epistemological question: by means of what methods do we study and learn about law?

The methodological idea presented in my dissertation is to study the relationships between literature and law in external terms in such a way as to look for answers to the above questions in literary works. More precisely, it is a matter of showing how writers have answered such questions.

I put forward the thesis that: first, law and literature is a field within the philosophy of law, which can be examined using the four-question test proposed by Załuski; and second, by examining the relationship between law and literature from the point of view of the philosophy of law, it is possible to ascertain a great deal about the law itself, about its essence, its nature, its goals, and also about the relationship of human beings, both individuals and society in general, to the entity that is the law in political, legal, and cultural terms. Research in the field of law and literature may come close to answering the question about the essence of law in terms of legal philosophy.

Philosophy of law, however, constitutes only a background for the discussions in this dissertation, because the discussions concern only one of the research fields within the philosophy of law: that is, law and literature, or, more precisely, law in literature.

Research carried out within the field of law and literature is interdisciplinary in nature, and two fields of knowledge, which are fundamental for each of these disciplines, will be applied here: 1) jurisprudence, including the theory and philosophy of law, history of law, and legal dogmatics; and 2) literary studies (individual approaches within literary studies), i.e. literary theory, literary history, and literary criticism.

The dissertation consists of two main parts, each of which is divided into chapters. Part One entitled “Law and Literature as a Legal-Philosophical Tendency” is of a theoretical nature and consists of four chapters. Drawing on the extensive literature on the subject, I discuss the most important aspects of the field of law and literature. The first chapter is historical; in it I present the development of the field of law and literature, taking into account the most important studies devoted to this subject and their impact on the development of this tendency. In the second chapter, I discuss the most important assumptions underlying the tendency, drawing attention to how these have translated into the development of specific research approaches. I present the positions of representatives of the doctrine, including polemical ones, and also offer my own assessment of them. The third chapter is devoted to various approaches to law and literature, the three most basic of which I discuss in detail in the following sub-chapters: 3.1. “Law in literature”; 3.2. “Law as literature”; and 3.3. “Literature in law.” Other approaches are briefly presented in sub-chapter 3.4. “Possible Supplements”. This part ends with a chapter four, in which law and literature are presented

against the background of the broader field of the aesthetics of law. I end the discussions in the theoretical part with a summary.

Part Two entitled is entitled "*Prawo w literaturze – studium przykładów*" (Law in Literature – A Case Studies) and is of a theoretical and research nature. In it I focus only on the external approach to law and literature. In the fifth chapter, I briefly discuss the above-mentioned four philosophical and legal questions as formulated by W. Załuski and explain the concepts they contain. In the sixth chapter, however, I analyze specific literary works in which some legal issues are raised or reflections on the law are made. These are works considered to be canonical for the field of law in literature, but the canon itself is so extensive that I have drawn on some works that, in my opinion, are important from the point of view of the philosophy of law. In these works, the law is, if not the main, then certainly one of the key topics considered by the author. At the same time, these works are referred to in jurisprudence, which indicates their strong influence on social legal awareness and confirms their substantial value in terms of argumentation. That is why in my corpus, each work has a different provenance and refers to the law of a different country. Considering the above, for the purposes of the analyses carried out in this part of the work, I have selected the following works: the Bible (especially the Pentateuch and the Gospels); *Antigone* (Ἀντιγόνη) (442 BC) by Sophocles; *The Merchant of Venice* (1594–1597) by William Shakespeare; *The Brothers Karamazov* (*Братья Карамазовы*) (1880) by Fyodor Dostoevsky; *The Doll* (*Lalka*) (1890) by Bolesław Prus; *Before the Law* (*Vor dem Gesetz*) (1914) by Franz Kafka; and *To Kill a Mockingbird* (1960) by Harper Lee. The second part ends with a summary that shows that philosophical and legal issues are addressed in each of the works discussed. In addition, in each case, the value of the analysis of a literary work for jurists is that it encourages them to make assessments, formulate opinions, and to reflect on the entity that is the law. Regardless of the fact that the background of this reflection is literary fiction, such consideration may be of a legal-philosophical character. Thus, assigning law and literature a permanent and important place in philosophical and legal reflection is certainly appropriate even within the continental legal tradition.