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Modern law education in the context of natural understanding of law

ANDRII M. KUCHUK^{1*}, LILIIA M. SERDIUK² and YULIIA S. ZAVHORODNIA²

The article is devoted to explaining the differences between legal educational systems in states with a positivist understanding of law and states where the system of law is based on the natural understanding of law. Law education has a value orientation. The educational process at higher law schools aims not only to transfer information about law but also to involve the student into the legal values. The purpose of law education under the positivist understanding of law is to provide the student with encyclopaedic knowledge of current legislation. The purpose of legal education under the natural understanding of law is the preparation of a critically minded lawyer, who is characterized by devotion to the idea of law and who meets advanced ethical requirements. An important direction for improving law education is the introduction of legal clinical education.

Keywords: case method, legal positivism, moral requirements, natural law school.

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INTRODUCTION

In a civilized society the main regulator of human behavior is law and, accordingly, the rule of law is recognized there. However, for the functioning of the rule of law within the society there must exist a set of legal knowledge formed by lawyers (both practitioners and scholars) and the lawyers themselves who maintain the rule of law. In its turn, the factor of this is a well-developed system of law education, without which there will be neither specialists nor a system of scientific knowledge of law. Therefore, any developed society pays much attention to the educational system of lawyers, and raises the increased demands towards them. The significance of this topic is quite clearly manifested in states where the legal doctrine changes from positivism to a natural understanding of law, including in Ukraine where to this day law education in many respects remains “soviet”, aimed at preparing a lawyer without critical thinking, who in the first place protects the interests of the state, and not of the person whose legal argument is limited by reference to the text of a legal act, and who can not critically analyze legal acts that are unfair, do not conform to the rule of law, and lack certainty.

Consequently for states which have chosen the direction for the development of a law-based state, the urgent issue is ensuring that law students receive highly-qualified law education.

In general, the issue of law education in the context of natural understanding of law is poorly investigated. Scientists focus on its particular aspects. Thus, V. Bigun (2006) studied the comparative and legal aspect of law education in modern conditions in Ukraine and the USA. Law education in modern China was the subject of the study of L. Minyan (2011). The issues of the introduction of legal clinical education are the subject of research of E.M. Prikhodko (Prikhodko 2014). N. Bordovskaia, E. Koshkina, M. Tikhomirova, N. Bochkina (Bordovskaia et al. 2018) solved the issue of application of the case-method in the educational process.

The state of law education in Ukraine has become the subject of an analysis by the Ministry of Education and Science of Ukraine and the OSCE Project Co-ordinator in Ukraine (Ministry of Education... 2018). The results of this analysis rather negatively characterize the quality of law education.

The basic provisions of the natural understanding of law, formulated by R. Alexi (2011), R. Dvorkin (2004) and G. Radbruch (2004) constitute the basis of the research.

The aim of the study is explaining of differences between legal educational systems in states with a positivist understanding of law and in states where the system of law is based on the natural understanding of law and determination of directions of improving law education in the states that have chosen building of the mature democracy as the vector of development.

METHODOLOGY

The description of the modern state of law education in Ukraine, analysis of the 39 judgments of the European Court of Human Rights in cases against Austria, Bulgaria, Greece, Denmark, Italy, Moldova, the Netherlands, Germany, Norway, Russia, the United Kingdom, Turkey, Croatia, the Czech Republic, Switzerland are carried out with the help of logical methods of analysis and synthesis, as well as using the comparative legal method. The analysis of the norms of international and domestic legal acts in the field of education was carried out with the use of the hermeneutic method providing cognition of the essential characteristics of these norms.

In contemporary civilized society law education should be based on the following provisions.

First, law education has a value orientation. The educational process at the higher law schools aims not only to transfer information about law but to involve the student into the following legal values, in particular, human dignity, justice, the rule of law, constitutional democracy. Accordingly, for the states with the predominance of positivist understanding of law, it is necessary to move from formally oriented jurisprudence to value-oriented jurisprudence. It is important to give students not only legal knowledge, but also to involve them in legal values. A sense of justice is an important quality of a lawyer. The abovementioned stipulates the need for society to introduce higher moral standards for lawyers. The purpose of law education under the positivist understanding

Modern law education in the context of natural understanding of law

of law is to provide a student with encyclopedic knowledge of current legislation. The purpose of law education under the natural understanding of law is the preparation of a critically minded lawyer, who is characterized by devotion to the idea of law and who meets advanced ethical requirements. Consequently, if the state has chosen the direction for the development of the law-based state, it needs to substantially reform the system of law education.

Secondly, an important constituent of law education is a practical component. Law is not confined to precriptive texts, but it (law) is a real rule existing in relations between the members of society. Practicality also cover the aspect that within the information society the use of information technology by a lawyer is an extremely important skill. A separate direction for further scientific research should be the digitalization of law. The practical component also determines the need to change the forms of classroom work with students, the use of interactive teaching methods, in particular, the case-method. An important direction for improving law education is the introduction of legal clinical education.

RESULTS AND DISCUSSION

The issue of law education covers the need to solve two fundamental questions: what to teach (the content of law education) and how to teach (the methodology of teaching law subjects). Given that the law subjects teaching methodology is the subject of study by pedagogy and andragogy and requires an individual study, we will focus on the first issue and as to the second issue, we will mention only the main provisions.

In view of the wide discretion of states in the organization of education, there is a plurality of educational systems in the world, including in the field of law education. Although the vast majority of states agree that “Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall advance further activities of the United Nations for the maintenance of peace” (UNESCO 1960).

In this context reference should be made to the judgment of the European Court of Human Rights in *Campbell and Cosans v. The United Kingdom* (European Commission... 1982), where the Court differentiated education and teaching or instruction: “The Court would point out that the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development” (European Commission... 1982). In general we agree with such an interpretation of the terms given, however, given the particularities of law education as well as the use by the European Court of Human Rights (2015) of the principle *mutatis mutandis* (the decision in this case was taken back in 1982 and at that time corporal punishment as a disciplinary measure was applied in the public schools in Scotland), training anticipates involving the student in legal values. After all within the limits of a natural law school law is considered not only as a text but also as a value.

The Constitutional Court of Ukraine in the case about the imposition of a more lenient punishment by the court noted that law is not limited only to the law, but also includes other social regulators, in particular, the norms of morality, customs, which “are legitimized by the society and are stipulated by the historically achieved cultural level of society. All these elements of law are united by a quality that corresponds to the ideology of justice, the idea of law” (Decision of the Constitutional... 2004). The lawyer must clearly understand his purpose in society, he/she must have immanent devotion to law which implies, in particular, the recognition of human dignity, human rights, and the rule of law. The lawyer must see the differences between law and the law. Bruno Leoni (1991) in his paper “Freedom and the Law” on the basis of the review of Roman law shows that, according to the ancient Romans, law was the process of discovery and not a set of officially adopted orders. That is historically and traditionally “law” was considered as something that was revealed to judges and lawyers and was not identified with that that the legislators create and what they are voting for (Leoni 1991). The law is only a prescriptive text, which may not reflect

public relations, be not implemented in social behavior and therefore not be a norm (the existence of a text about the legal norm does not yet indicate the existence of the norm itself). R. Dvorkin (2004), in his paper “About Rights Seriously” described the case of “Riggs v. Palmer”, which was considered in the United States in New York in 1889, the court had to decide whether the heir named in the will of his grandfather could obtain an inheritance under this will, even if the heir had killed his grandfather for the purpose of receipt of this inheritance (it should be noted that civil law at that time did not provide for a provision according to which “a person who has unlawfully deprived the decedent of his life cannot be the heir”). The court began to base its reasoning on the following assumption: “It is correct that the legislative acts regulating the drafting, approval and execution of wills, as well as the transfer of property, with their literal interpretation and taking into account the impossibility to control and change their power and effect under no circumstances, are ordered give this property a killer”. However, the court further noted that “the effect and power of all laws, as well as of all treaties, may be controlled by the fundamental principles of common law. No one is allowed to take advantage of a fraudulent way, to benefit from an offense committed by him/her, to justify a claim on his own wrongdoing or to acquire ownership through a crime”. The killer did not inherit his inheritance (Dvorkin 2004).

The results of the survey of 300 students of the Saratov Law Academy regarding the personal qualities of a professional lawyer conducted by E. Prikhodko (2014), demonstrate that “a significant proportion of students in all courses (I course – 71%, II course – 64%, III course – 61, 5%, IV course – 46%, V course – 42%) showed a low level of awareness. The level of awareness increases in IV and V courses, albeit slightly” (Prikhodko 2014).

Law is a complex and a many-sided phenomenon in which cultural, ethical, economic, political, civilized and universal values, scientific truth and goodness and justice and other aspects are intertwined. L. Fuller (1958) notes that “Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation” (Fuller 1958).

Law is not an artificial formation but it is a result of the life of society and it is an element of the culture of the latter. Gustav Radbruch (2004) stressed that the concept of law is a concept that belongs to the sphere of culture that is it is the concept of reality, mediated by the value of reality, the content of which is to serve values. Law is a reality the meaning of which is to serve the legal value, the idea of law (Radbruch 2004). Each society creates law according to its peculiarities, level of development, its philosophy, and ideology. Law of any society is the expression of a special concept of law and order of this society. Within the framework of the natural school of law is considered in close connection with morality.

Thus, understanding of law as a phenomenon of culture of an appropriate society, which is closely connected with morality, the recognition of justice as the essence of law determines the promotion of higher ethical requirements for lawyers by society. Indeed, a person who protects justice must be endowed with appropriate ethical qualities. In this context we can not but mention the American experience in accessing the legal profession. “The generally accepted progressive world practice is to establish standards of professional ethics that are mandatory in the conduct while performing professional activities”. Thus, in the United States, for the protection of justice and the public not only from incompetent but also from “unethical” future lawyers, serious ethical demands have been introduced both for lawyers and for candidates for lawyers” (Bigun 2006). To obtain a license for exercising legal activities the candidate undergoes a check on personal qualities by the results of which he/she may get a refuse in obtaining such a license.

Commitment of a disciplinary offense (including a writing off, which is considered a fraud) by a student while studying is the reason for his exclusion. Therefore it is important that students while studying respect the discipline and the principles of academic morality. In *Sulak v. Turkey*, Application No. 24515/94, the European Commission for Human Rights said: “The Commission further recalls that the right does not in principle exclude recourse to disciplinary measures, including those of suspension and expulsion from an educational establishment” (European

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Commission... 1996).

There is a completely different approach to understanding of qualities of a lawyer and thus the legal education system exists in the states whose system of law is based on positivism. “All theories of positivism derive from the thesis according to which concept of law must be given a definition that does not include moral elements. The divisional thesis presupposes the absence of a terminologically necessary link between law and morality, between that that law prescribes and that that justice demands, or, in other words, between law as it is and law that it should be” (Alexi 2011).

Under such conditions law is identified with the law as a result of public authority. Accordingly the training of lawyers is limited to the study of the text of such official texts. Law is separated from morality, and therefore the ethical requirements to the lawyer are subsidiary and are purely formal. Violation of the oath is not considered to be a serious disciplinary offense and depending on the political situation it whether remains unnoticed or used by public authorities in their own interests. Thus in the case of *Ushakov and Ushakova v. Ukraine*, Application No. 10705/12 (European Court... 2015). The European Court of Human Rights has stated: “Lastly, it does not escape the Court’s attention that, as pointed out by the applicants, one of the police officers actively involved in their ill-treatment, K.... Indeed, it was established by the domestic courts in that case that K. had severely ill-treated the applicant back in 1999, but the charges were dropped as time-barred. The Court classified that ill-treatment as torture given that it had resulted in the applicant’s disability for life. It also noted that K. had however built a successful career in the police as of March 2010. In the present case, the behaviour of K. and his colleagues, as described by the applicants, can only be interpreted as a demonstration of ultimate impunity and arbitrariness” (European Court... 2015). It should be noted that in Ukraine police officers who graduated from institutions in the system of the Ministry of Internal Affairs are lawyers.

In the conclusions on the results of a single professional entrance examination of those enrolling in a magistracy in the specialty “law” held in 2017, it is noted that the true value of a diploma in higher law education in Ukraine is devalued by the presence of a large number of certified specialists on the labor market having very low qualifications and who cannot be distinguished by diploma. The employer cannot focus on the availability of a state-recognized diploma as a proof of the existence of a minimum level of competence (Ministry of Education... 2018).

All the abovementioned stipulates the need to consider the second aspect of legal education – teaching methods. In this context we should mention the words of Gray (2016) who outlined the 10 skills that a worker should have in 2020 for a successful career. These are the following skills: complex problem solving, critical thinking, creativity, human management, coordination of actions with others, emotional intelligence, judgment and decision making, service orientation, interaction, negotiation, cognitive flexibility (Gray 2016).

On condition that positivist understanding of law prevails within the state, the legal education system can not contribute to the formation of these skills, since it is knowledgeable, aimed at obtaining encyclopaedic knowledge. Critical thinking, including a critical evaluation of the legal text, creativity, and teamwork are done through the use of interactive methods that are inherent in a different education system and require a different perception of law. Socratic method and case method are crucial in this context. The necessity of using a case-method is determined by its didactic potential in terms of skills development and the ability to use it both within individual subjects and in the training of specialists to solving complex, essentially professional tasks (within proposed situations) (Bordovskaia et. al. 2018).

The Case method allows students to develop a comprehensive approach to resolving legal conflicts in their future activities and is one of the aspect of the relationship between theory and practice (let us emphasize that the practical component plays a key role in law education). In this context one can note the positive experience of individual states regarding the introduction of legal clinical education. “Legal clinics should become an obligatory element of a professional educational program for both bachelors and masters. But they shouldt function only if all conditions

are created to ensure the provision of the most qualified legal aid” (Khudoykina & Lysenko 2017).

By contrast the knowledge system of education does not allow achieving such goals. Exploring the legal system in contemporary China, Lyan Minyan (2011) points to a gap in law education from practice. The teaching system is based on lectures and the mastering of theoretical material; less time is spent on seminars and mastering practical skills. Probation is envisaged before the end of the university but many students do not attend it. The organizations are not interested in probationers as they do not get reimburse the costs of conducting the practice. The result of such education is graduates who can not immediately start working as they do not have the necessary skills, do not know the features of the activity of the lawyer, can not competently and qualified prepare and file documents, and do not possess legal thinking (Minyan 2011).

In addition, an important area of improvement of law education is the preparation of students for legal practice related to the use of information technology. For the information society, in particular, the digitalization of law is characteristic. In modern conditions, the lawyer must have competence in the field of working with artificial intelligence. However, this issue requires a separate study.

CONCLUSIONS

Significant differences exist between the educational systems in the states where prevails positivist understanding of law and the states where the system of law is based on the natural understanding of law. The indicated differences are manifested both in the content of education and in the teaching method. The purpose of legal education with a positivist understanding of law is to provide the student with encyclopaedic knowledge of the current legislation. The purpose of legal education with the natural understanding of law is the preparation of a critically minded lawyer who is characterized by devotion to the idea of law and who meets higher ethical requirements. Consequently, if the state has chosen a direction for the development of the law-based state it needs to substantially reform the system of law education.

An important direction in improving law education is to strengthen its practical component, to introduce legal clinical education, and the use of case-method while giving classes.

RECOMMENDATIONS

States that have chosen building of the mature democracy as a vector of development in order to improve legal education it is necessary:

- 1) to change the legal doctrine, which should be based on the natural understanding of law;
- 2) to introduce increased moral requirements for lawyers and candidates for lawyers;
- 3) the educational process in law educational institutions should be aimed not only at the transfer of information about law but also at the involvement of the student into legal values, which, in particular, are human dignity, justice, the rule of law, constitutional democracy;
- 4) the educational process must have a practical orientation;
- 5) to introduce legal clinical education.

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