

COMMUNITY AS A LEGAL CONCEPT?

SOME USES OF A LAW-AND-COMMUNITY APPROACH IN LEGAL THEORY

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It is a great pleasure to come to the University of Helsinki.¹ I have been asked to speak about my work in legal theory and, for nearly a decade, that has focused especially on an attempt to make ‘community’ a useful concept in legal inquiry. So this lecture will attempt to explain why I have gone back to community – a very old idea in social science – and tried to develop it into a new idea for sociolegal theory (though one that owes a great deal to the inspiration of Max Weber’s sociology).

It is important to stress that what follows is not related to, or even necessarily sympathetic to, communitarian ideas in political and legal philosophy. They have become prominent for different reasons from those that drive my work. The law-and-community approach I want to talk about is not a philosophical approach, arguing, for example, like communitarianism, that communities are more fundamental in ontological terms than individuals. Nor is it a prescriptive approach suggesting that our societies would be better morally, and we would be better people ethically, if we thought about communities more, and individuals less. It is rather a methodological approach. As such, it tries to respond to what I see as defects in both legal philosophy (at least in the forms that are dominant in English-speaking countries) and sociology of law. These are defects in the capacity of both legal philosophy and legal sociology to understand the experienced reality of law.

A law-and-community approach tries to offer a framework for studying law that recognises the deep embeddedness of legal ideas, practices and problems in social experience. It recognises also that social experience is very varied and must be understood in all its variety. Legal philosophy in its dominant contemporary forms is not very interested in the empirical variety of law’s social settings: what we can call ‘the social’ – the world of social experience of which law is an aspect or field. But,

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equally, modern legal sociology has not devoted enough attention to studying law as legal doctrine – by which is meant here rules, principles, concepts and values and the modes of interpreting and reasoning with these that are central to juristic practice and other legal experience.

The sociologists have failed to study law as a world of *ideas* and as subjective understanding of those ideas in action. The philosophers have failed to study law as a diverse, varied *social and historical experience*; in other words, as legal ideas and practices that do not exist in abstraction but are encountered, interpreted, understood, invoked in different social settings, by lawyers and citizens with diverse personal aims, expectations, projects, emotional attachments, traditions, beliefs and values.

1. An engagement with law

These briefly stated ideas give some pointers to the general themes of this talk. I can best begin to be more concrete by saying something of my own experience. As an undergraduate student of law at London University in the 1960s I found it hard to link legal ideas with important social issues. Legal doctrine in some way reflected a social world ‘outside’ law but it seemed relatively unimportant to know exactly how law did this, since as doctrine it could be analysed without empirical knowledge of the social world. All that was needed was a general, conservative common sense. The gulf seemed striking between the technicalities of legal reasoning, on the one hand, and large moral and political issues about law, on the other. Legal reasoning and broad moral-political discourses seemed to inhabit different worlds, and the latter clearly posed a threat to the professional maintenance of the former, unless they could be largely excluded from consideration within it.

A compulsory final year undergraduate course (‘Jurisprudence and Legal Theory’) seemed at first to promise to bridge the divide between legal analysis and moral and political theory. But I quickly felt dissatisfied with the non-empirical approach of most legal philosophy² – the lack of concern to ask what people actually experience in relation to law, and how that experience varies for different parts of a population.

² Legal realism in its Scandinavian and American varieties seemed to offer a refreshing partial exception. Both kinds of legal realism seemed to take psychological dimensions of law seriously, even if this rarely extended as far as requiring empirical research.

To take familiar examples, John Austin, founder of modern English legal theory, sees the social only in terms of the 'bulk of the population' in a 'habit of obedience' to a sovereign; for Austin, the only salient social fact for legal theory is mass submission to authority. In legal theory, the population can be ignored as long as it stays quiet. Again, H. L. A. Hart's contrasting of 'internal' and 'external' aspects of legal rules, and of 'officials' and citizens, hardly seeks to address the complexity of the social or of legal experience. Officials are apparently what the legal system designates as such, yet their 'internal' recognition of certain rules is crucial for the legal system to exist. This circularity remains because of a failure to ask sociological questions about officials and, in particular, to study (as Max Weber did) the historical emergence of legal elites. Again, Ronald Dworkin's work, postulating a political community as notional author of its law, devotes no attention to the idea that there might be *many* communities, competing and conflicting in their interpretation of the same law. Dworkin does not recognise that, to understand the possibilities of relating these communities, we might need to explore (especially in today's multicultural societies) the social conditions and cultural environments that inform differences in outlooks on law. (See e.g. Roberts 2001.)

Problems such as these (which I sensed at the time, rather than understood) led me to begin to read myself into sociology of law from around 1970. In the mid-1970s I studied sociology formally as a postgraduate student in London, while teaching law. Fortunately, my sociology teachers emphasised the great classical sociological theorists (especially Max Weber, Émile Durkheim and Karl Marx), who devoted much attention to law. Perhaps this gave me a particularly rosy view of sociology as an open, imaginative enterprise, relatively unconcerned with disciplinary boundaries. Especially in Weber's and Durkheim's work the ambition to make sense of the social in all its variety and historical complexity seemed immense, almost breathtaking. I felt that beside such giants, most legal philosophers I had read were pygmies, because they seemed to ignore vast social worlds – and the possibilities for understanding these systematically – that the classical sociologists opened up.

Almost paradoxically, sociology's great attraction and value for the legal scholar – its intellectual openness, theoretical ambition and rich variety – seemed to be a consequence of its disciplinary weakness. It is still unclear whether Weber should be labelled as a legal historian, economic historian, economist or sociologist. Marx fits no disciplinary label. Durkheim saw himself as definitely a sociologist – but, for him, sociology is an umbrella discipline that embraces all social studies, including the study of law. I relished this intellectual unboundedness – the huge vistas that sociology opened up for legal inquiry.

Sociology has its problems, however. Its disciplinary weakness has, at least in Britain, often made it a relatively open club, but efforts to professionalise it (most successful in the United States) have worked against the possibilities for using its resources in legal theory. These efforts have encouraged a privileging of quantitative (rather than qualitative) research methods, an emphasis on the importance of hypothesis-testing (rather than more philosophically-oriented inquiries), and a positivistic, value-free stance (with a corresponding lack of overt concern with social criticism or evaluation). These developments are valuable in many respects and have been reflected in much good empirical research in modern sociology of law. But they tend to drive sociological inquiry away from the juristic world – and, more generally, the world of legal ideas – and towards the study of measurable, observable behaviour in legal contexts.

This is in sharp contrast to the strong focus on legal and moral ideas that one finds in Durkheim's writing, or on legal reasoning in Weber's. It is also very different from the focus of much early sociology of law, such as the work of Eugen Ehrlich, Leon Petrazycki and Georges Gurvitch on legal experience as a form of social or cultural experience. A focus on legal discourse is important in Niklas Luhmann's recent sociology, and a concern with legal values (especially the value of legality) centrally informs Philip Selznick's sociology of law. But these are exceptions. My strongest intellectual allegiance is to sociology of law, but I gradually felt dissatisfied with the lack of concern of much legal sociology with any need to engage with legal philosophy – to debate with the jurists the nature of law as institutionalised doctrine, as ideas embedded in social practices.

2. Legal theory and its discontents

In general, legal philosophy lacks serious interest in social variation. It has few resources for studying analytically differences within and between legal systems in terms that are meaningful to citizens of those systems. In its dominant (positivist) forms it has little serious interest in ethics or morals: an interest in the former atrophied with natural law theory; an interest in the latter as a social support of law seems weak at best. It also has little interest in history – including the comparative history of legal and moral ideas (for which we might recall here the tradition of Westermarck). It has, indeed, little interest in citizens as such: its focus is overwhelmingly on lawyers' thought and juristic (rather than popular) images of law. It is little concerned with law that is not jurisdictionally bounded by the nation state – i.e. with such phenomena as

legal pluralism, and the nature of transnational legal regimes and contemporary international law. It has yet to come to grips with multiculturalism as a phenomenon raising new issues about legal pluralism in various forms. (See e.g. Shah 2005; Demleitner 1999.)

What of sociology of law? It is seen (even by many of its practitioners) as concerned with behaviour in legal contexts rather than with legal ideas as such, and so as 'external' to juristic discourse. It tends to observe rather than interpret law (yet Weber provided a model of *verstehen* and a method of ideal or pure types to facilitate the sociological study of legal ideas and subjective social experience). Just as Weber emphasised the need for both observation and empathetic understanding of social phenomena, it should be possible to study legal communities from both the 'inside' (as experienced by their members) and the 'outside' (as they appear to a non-member observer). Again, legal sociology is insufficiently concerned with legal values (with notable exceptions, such as Selznick) or with morality as a component of or normative support for law. Yet Durkheim saw a sociology of morals as a vital partner of (and hardly separable from) a sociology of law.

Most fundamentally, modern sociology of law has been mainly *instrumental* in orientation. Historically its concern has often been to address policy-makers. (Sarat & Silbey 1988.) It has been funded especially to be useful to legal and political reformers. Its pragmatist temper has in some degree (especially in the United States) been inherited from legal realism. Sociology has often been understood as inspired historically by a need to confront the Hobbesian 'problem of order' (what makes society or social integration possible; see generally, Parsons 1968) and by problems of capitalism (the poor, the marginalised, the urban proletariat). Sociology of law, like sociology, has often been in the business of helping to *engineer* the social, to shape or steer it. It has been less concerned to *appreciate* the social (and the legal within it), exploring it in its diversity. The dominant focus has been on planned change and reform. It is, indeed, striking how little concern there has been with custom and tradition (and, more generally, with sources of cultural stability and organic social change) in sociology of law.

Because of this pervasive instrumentalism, sociology of law has long been caught up in 'gap' questions (Nelken 1981). How far does law constitute the social? (i.e. how far is the social shaped by law?) How far does law 'mirror' the social? (i.e. how far is law shaped by the social?) What is the relationship between law and social reality? How much of a 'gap' or failure of 'fit' is there between law and the social? All of these questions are, I think, misguided. Law is an aspect or field of the social. What is in issue is not law's relation to something *apart from itself* (the social); the issue is

how a certain side or part of the social *takes the form of law*. If we understand the social in terms of social relations we can see how law provides a form or structure of social relations. Any ‘gap’ or lack of ‘fit’ is not between law and the social, but between types of social relations (and their law) that may be in conflict with each other.

In some respects, orientations of modern legal sociology parallel dominant trends in Anglophone legal philosophy. Thus, a predominantly positivist orientation tends to marginalise moral issues about law, and to obscure intimate relations between law and morals. A dominant assumption is that law is the unified law of the nation state, supervised by centralised state institutions supported by a monopoly of coercive power. There is an absence of reflexiveness (a sociology and a socio-political history of legal sociology are needed, as they are also for legal philosophy). Most strangely of all, legal sociology’s most rigorous recent theory, Luhmann’s autopoiesis theory (Luhmann 2004), parallels legal philosophy’s tendency to see law as a relatively self-contained discourse. It does so, however, with no greater warrant from empirical studies than legal philosophy claims.

3. Law and community

A law-and-community approach seeks to respond to many of these criticisms of legal philosophy and sociology of law, and to transcend the divide between these research fields. What then is the essence of this approach? Here it is only possible to set out, schematically, ideas developed much more fully elsewhere (Cotterrell 2006).

Firstly, the unit of study is social relations; all law is a regulation of social relations. The aim is to understand the general conditions and problems of regulating social relations through law. And law is taken here to be doctrine – rules, principles, etc., and modes of interpreting them – institutionalised in the sense that distinct agencies or practices are associated with creating, interpreting or enforcing doctrine, but not necessarily with all three functions. This is a pluralistic view of law – law is not limited to the law created by centralised state agencies (it could be created, for example, by churches or localities), though state law will usually be especially significant. Where social relations have a degree of stability, duration and trust, they can be thought of as relations of *community*. Law’s role is to protect community and to express or support conditions for it.

All jurists know that legal analysis must use abstractions; it cannot deal individually with every distinct social relation in its uniqueness. The same is true for sociolegal inquiry. As Weber taught, social analysis can make no progress unless it

abstracts from the infinity of circumstances in social life by using a limited number of logically formulated types or categories (which he calls ideal types). On this basis, social relations of community can be analysed in terms of just four ideal types that underpin all the different kinds of social bonds that link people in relations of community.³ In combination they exhaust all the possible forms in which social relations of community can exist.

The types are instrumental community, traditional community, affective community and community of belief or values. Instrumental community arises where people share a common project (often, but not necessarily, economic) or have convergent projects in which they co-operate. Traditional community arises from mere co-existence in the same shared environment – the same locality, language group, traditions, historical experience, etc. Affective community is founded purely on affection. It can be a matter of emotional attachments (love, friendship) but it can be defined also by shared dislikes or hatreds (of ‘outsiders’ of the community). Finally, community of belief or values is founded on shared fundamental beliefs (for example, religious beliefs) or ultimate values (accepted for their own sake and not for instrumental reasons). These types of community rarely, if ever exist in pure form in actual social reality. They combine and interact in complex ways as networks of community. Separating them out, however, makes it possible to examine the different logical characteristics and consequences of each.

On other occasions I have discussed these four types of community in detail (Cotterrell 1997). Here the main concern is with what they can be used for in the light of the criticisms, made earlier, of legal theory in its philosophical sociological forms. A law-and-community approach unites aspects of legal philosophy and legal sociology in a common enterprise of identifying different kinds of general *regulatory problems* that arise when law is seen as the regulatory aspect of the social. A map or agenda of legal theory’s essential regulatory concerns can be sketched by speculating on general characteristics of the types of community.

For example, when people are linked solely by common involvement in a project, the scope and limits of this *instrumental* social relation are usually relatively clear. The relation focuses on *that* project (e.g. as contract, deal, association or enterprise) and lasts until it is completed. The relation links people on only one

³ They are, themselves, derived from Weber’s own four ideal types of social action – instrumentally rational (*zweckrational*), value-rational (*wertrational*), affectual and traditional – which, he claims, are combined in an infinity of ways in actual social life. For Weber, all social phenomena can be understood in terms of patterns or combinations of these four types. See Weber 1968, 24-25.

relatively narrow plane of common and perhaps transient interest. But because of this clarity of scope and aims, legally regulating instrumental community may be relatively easy and effective. Contract and commercial law, for example, are typically sophisticated, well developed kinds of law. As comparative lawyers know, they often 'travel well,' making strong juridical sense across and between jurisdictions (see e.g. Levy 1950). Instrumental community may often be limited or attenuated community, but with strong law.

Traditional community is similar in some respects. Merely happening to be in the same environment of co-existence does not necessarily make for any strong or deep social bonds. But this mere co-existence can be guaranteed by strong, well-understood law: for example basic tort (delict) or criminal law; law that aims at preventing friction in everyday interactions. But if the focus is on environments of co-existence, the crucial complicating factor for regulation is that the meaning of 'environment' varies and constantly changes. Which environments are most important, most deserving of protection? New forms of environmental risk arise (relating, for example, to public health, climate change, security and ecology). Protection of one environment may be at the expense of another. What is to be taken as the essential *arena* of co-existence for regulatory purposes? (the local neighbourhood, the city, the nation, the world?) The law of traditional community is basic in one sense (in governing everyday interpersonal contacts), but very complex in others (in assessing often poorly understood risks and trying to balance them).

What of community of *belief or values*? A community based on shared fundamental beliefs may be relatively strong. But it may be hard and even undesirable to provide regulation to express or protect the beliefs that unite the community. Values or beliefs are hard to translate directly into rules, or into any kind of unambiguous law. Ultimate values or beliefs need interpreting, but this easily produces controversy. And regulation is weak if it attracts serious controversy and interpretive impasses. Law expresses values, but legal reasoning usually avoids appealing to the broadest values and (as noted earlier) 'hides' in technicality. So the regulation of community of belief or values is always problematic, yet necessary. How are fundamental values to be expressed and guaranteed by law?

Affective community poses the hardest regulatory problems of all. Perhaps ties of love or friendship can provide some of the strongest, most inclusive bonds of community, but how is love or friendship to be regulated? The very idea seems misguided. Yet law has to provide regulatory frameworks for social relations that are founded on affection, and to regulate the consequences of ending these relations. It also has to regulate relations created by pure hatred and bigotry, resistant to reason (as in

racism). It frames altruism in the form of charity, welfare care and support, and fiduciary relations. In many ways law is concerned with the definition and analysis of relations based on emotion; relations that are powerful yet often quixotic, diffuse and hard to codify in terms of obligations and expectations; relations that – for Weber, at least – defied rational analysis.

4. Re-orienting legal theory

The tentative generalisations above are intended to suggest possible lines of inquiry for legal theory. They point to a need for sociological inquiries about social relations of community and their regulatory problems, and juristic inquiries about the forms that law can and should take in expressing these relations. They make no direct reference to the state, since networks of community exist both inside and across the boundaries of nation states. A law-and-community approach assumes that regulation of communities is not necessarily regulation by state law, though that will be of most interest to jurists. It sees regulatory problems as rooted in the very nature of community life – in all its variety. Hence legal studies not informed by sociological insight will be barren. Further, if the pure types of community interact in complex ways in actual social life, contradictory regulatory problems will often arise in these interactions. An emphasis on community does not imply an absence of conflict. Rather it highlights key foci of legal contradiction and controversy.

Two final claims to be made here address the main criticisms of legal philosophy and legal sociology presented earlier. Firstly, a law-and-community approach corrects the instrumentalist overemphasis of sociology of law, and directs attention to law's complex relations to culture, which legal philosophy often ignores or under-emphasises. Secondly, this approach restores the significance, in legal theory, of ethics and morality, seen in intimate but variable relation to law.

As has been seen, in a law-and-community approach, *instrumental* social relations are only one of four distinct social realms of regulation. The framework of analysis puts equal emphasis on tradition, beliefs and values, and emotion – matters underemphasised in most contemporary legal analysis but important to culture. Culture is often seen as embedded in beliefs and values, on the one hand, or traditions, on the other. It also has important affective aspects. People do not just consider instrumentally the culture they inhabit (as, for example, when they talk of levels of material or technological culture). Culture is also a matter of cultural inheritances and cultural values, often overlaid with (nationalistic or other) emotional attachments. Law is called

on to express and protect culture in these senses, no less than it is also required to frame economic life and serve instrumental or material aspects of culture. (Cotterrell 2004.) A law-and-community approach recognises (i) that these different regulatory demands relating to culture may often violently conflict and (ii) that a legal focus on the promotion or protection of instrumental social relations alone would be a distortion of law's responsibilities as an expression of community life.

It may be that, partly because of the general legal problems (mentioned earlier) of regulating both community of values and affective community, there is a tendency for regulatory aspects of these two types of community to be reinterpreted as regulatory aspects of instrumental or traditional community. Thus, recent tendencies to reinterpret fiduciary relations of trust (which have affective aspects as relations of care and concern) as contractual relations can be noted (Langbein 1995). Similarly, difficult questions of religious sensitivity (related to community of belief) may be turned into issues of public order (a kind of regulation of traditional community), in justifying laws on blasphemy (Unsworth 1995) or incitement to religious hatred. If a law-and-community approach has an explicit moral-political message it is that law's relations with all types of community are important and that the vitality of the social requires law to engage sensitively with them all, recognising their distinct integrity.

One other aspect of a law-and-community approach is important here: its emphasis on law's close relation to ethics and morals, and its claim that these vary, taking different forms in relation to different types of community. In a community, morality specifies the shared understandings that allow mutual interpersonal trust to exist. Ethics concerns the individual's responsibilities. Some appropriate orientations of morals and ethics for each type of community can be tentatively suggested here (appropriate in the sense that they spring directly from the nature of the social bond involved). Thus, courtesy, civility and neighbourliness seem important to the morals of traditional community, together with an ethics of non-interference. Empathy, sympathy and an ideal of unbounded concern for the other seem morally important to affective community; the relevant ethics is one of altruism and care. Again, honesty and fair dealing are morally important to instrumental community; and the relevant ethics is one of performance (meeting personal obligations undertaken). Finally, as regards community of values or belief, morality focuses on fellowship and respect for others' integrity; and ethics here demands personal integrity and discipleship.

Of course, it can be said that many of these moral and ethical principles have little to do with law, and it is not the responsibility of law to enforce them or reward their adoption. But law either mirrors aspects of them, or engages with them, turning them into practical rules or principles insofar as it can. Just as ultimate values resist

precise legal expression, so law (in the form of rules, at least) merely approximates the general moral and ethical directions of community solidarity. Yet legal doctrine might be better understood as something socially vital, and less a matter of 'mere technicality,' when its relation to the various moral dimensions of community is explored in depth.

As noted earlier, the regulatory problems of different types of community can conflict. So, complex networks of community may present a picture of moral confusion or contradiction, reflected in the law relating to these networks. Some overarching values, common interests or traditions, or shared emotional attachments are needed to hold networks of community together; to prevent unmanageable conflicts between them. It was claimed earlier that shared values or beliefs and mutual affection often provide the strongest communal bonds (as compared with instrumental or traditional bonds). But in considering large-scale networks of community, affect or emotion may be too unstable and volatile to consider as a primary basis of unity. So, if, by a process of elimination, the most promising source of bonding is common beliefs or values, where are these to be found?

In sociology of law, Philip Selznick has claimed that a universal humanism can guarantee an ultimate integrity of pluralistic community life (Selznick 1992, ch. 4); but its source remains obscure. Durkheim suggests a sociological basis for a moral individualism (emphasising respect for others as individuals, and human dignity) appropriate to complex modern societies (Cotterrell 1999, ch. 7). Others, such as Jürgen Habermas (see e.g. Habermas 2001), have speculated on historical conditions that have given rise, through painful experience, to unifying ultimate values in Western Europe. Here the problem of identifying such unifying values can only be indicated, not explored. But a law-and-community approach, tentative and undeveloped as it is at present, at least points clearly to the need to reconsider in depth law's relations to morals, ethics and ultimate values. It raises many more questions than it answers, but this is because, as suggested at the beginning of this lecture, it is a methodology – a tool to open up legal theory to a sharp and sustained sensitivity to the variation of the social and the cultural meanings of law.

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