

EDITORIAL

There is an interesting passage in H.L.A. Hart's *Essays on Bentham* where he discusses J.S. Mill's use of the legal in the definition of moral right (Hart 1982, 91-94). There it seems that a knowledge of practically feasible law is taken as the defining component of an abstract idea of morality. According to Mill, there is a moral right, if that right should be a legal right even if all the side-effects, costs and other troubles ('disutilities') ensuing from its enforcement and protection as law are taken into account. This, according to Hart, amounts to putting the cart before the horse, because Mill was trying, with his idea of moral right, to develop a standard with which positive law could be measured. If the moral right was to check law as an external measure, it would be against proper ways of construing that measure to make the law (the thing to be measured) a defining part of the measure itself.

Mill's formula brings to mind another and at least equally famous definition in moral philosophy. Namely, the moral law of Immanuel Kant according to which one should act so that the maxim of thy will could be a principle of general legislation, *allgemeine Gesetzgebung* (Kant [1902/10] 1995, 30). Markedly, the law is also here contained in the definition of morality. In Kant's case the placing of horse and cart is not a problem, as his moral law is not intended as an external measure for positive law. In both cases, however, one makes the observation that the thought procedure, in which a concept of critical morality is to be developed, relies definitively on a preconceived concept of positive law.

Émile Durkheim and Marcel Mauss maintained in their *Primitive Classification* that '[f]ar from it being the case, as Frazer seems to think, that the social relations of men are based on logical relations between things, in reality it is the former which have provided the prototype for the latter' (Durkheim & Mauss [1903] 1963, 82). Guided by this idea, that is, the idea of predominance of the social over other things in conception, let us make a pair of brief experiments with law as a 'social relation' that precedes and determines the conceptualization of other 'relations'.

The moral autonomy requires that external influences such as the variety of factors affecting the survival and well-being of one, and among them the social pressures leveled against him/her by the majority opinion, will not affect the personal deliberation concerning one's moral duty. Only in such an independent condition, is one free and therefore morally accountable in full. Autonomy, i.e., the self-motivated obligation to act morally, is assigned praise and valour because of its capability to overcome heteronomy, i.e., to trump all dependency upon external factors.

Courts of law are ideally autonomous, both in their independence from governmental and legislative powers, and in their impartiality with regard to the parties of the case ('without fear or favour'; Luhmann [1993] 2004, 60). A great variety of institutional arrangements in both regards have been applied to establish such autonomy, ranging from the procedural rules against personal bias of judges to the rules governing their appointment and removal. All this is done for the purposes of securing that the court may be autonomous and thereby obligated exclusively with the generally valid law.

There is a perceptible analogy between the autonomy of the (modern) moral agent and the autonomy of the (modern) court of law, and an impression arises that the former could have served as a model for the latter. But the thesis of Durkheim and Mauss make us consider the inversion of that modeling relation: could the 'social relations' embodied in the institution of legal court perhaps have served as the basis for the idea of moral autonomy? To me, this would be interesting.

It is pure speculation, of course, and from the perspective of sincere historians it perhaps shows no more than foolish impertinence on the part of the present writer. For that matter, my excuse is that its merits and demerits would not be judged by the historical facts which could provide evidence for or against it, but rather by its power to open new avenues for thought. The sense it makes is not relative to a proper establishment of historical causation as objective knowledge.

Establishing objective knowledge brings about the next experiment. Sensations create perceptions when they effect reflection in the conceptual mind, for example, when someone penetrates my body against my will and I consider it rape. What could establish this consideration as objective knowledge? The classical formulation of the question is: what is the difference between mere opinion and true knowledge? The classical answer, though unsatisfactory even at the time, is that knowledge is a belief with grounds (reasoning, justification, explanation) while opinion appeals by way of persuasion.

What, then, makes the given ground a ground and not merely persuasion? Qualification of belief as objective knowledge is crucially relative to the validity of 'ground.' The puzzle is shifted onto another level, but is it solved? Such ground in my rape case for example could be the fact that *I said no and no means no!*, whatever the perpetrator himself, or perhaps the jury too, may think of it (say, on the basis that I was married to the perpetrator). I myself may rely on this 'said no!' criterium, and thereby knowledge is established as objective in quality.

Again, it is given that in courtrooms the general human faculties for knowledge, perception and understanding, are at work. But along the lines set out by Durkheim and

Mauss, one should ask whether it could be the case that *the courtroom actually is the model* for the general human faculties for knowledge. According to this theory, the courtroom is, in some non-historical sense, the primordial social setting in which objective knowledge is constructed. Courtroom-knowledge is construed, first, by way of testing the reliability of accounts given by the parties and other witnesses, and second, by way of fitting these testimonies to such preconceived cultural categories as crimes and contracts, rapes and marriages.

Legal procedural rules of evidence – ranging from ancient rituals for invocation of spirits, through medieval regulation of inquisition by torture, to the modern rules of proper criminal investigation – all aim at proper establishment of objective knowledge. (Moreover, don't they all make different *concepts* of objective knowledge?) If the 'social relations' are the prototype and basis for other relations, then I believe that practices in courts are as good as any to occupy the place of prototype and serve as a basis for human faculties of knowledge. Should I say, to the irritation of all serious historians, that the faculty of knowing is socially produced in legal courts?

In courtrooms, objective knowledge is not desirable as such; it has no intrinsic value. Instead, knowledge is needed for the purpose of deciding the case. Consider King Salomon and his famous mock decision to split the child in two halves and give one of them to each of the rival mother candidates, and the consequent real decision to give the child to the one who was, after hearing Salomon's ruling, ready to abandon her claim to the child. Did Salomon, by way of his mock decision, wish to know whether it was this or that woman who had in fact given birth? Or was he more interested in finding out which of them would be the better mother for the child? Both questions, the factual and the evaluative-normative, fuse together in Salomon's investigation. Taking the practice of law in a courtroom as the prototype would perhaps, if nothing else, exhibit and point out more clearly something of the role that the evaluative-normative plays in objective knowledge as well.

20 November 2006,
Samuli Hurri

References

- Durkheim, Émile and Marcel Mauss: *Primitive Classification*. Translated from the French original of 1903 by Rodney Needham. The University of Chicago Press 1963.
- Hart, H.L.A.: *Natural Rights: Bentham and John Stuart Mill*. In H.L.A. Hart: *Essays on Bentham. Jurisprudence and Political Theory*. Clarendon Press 1982, 79-104.

Kant, Immanuel: Kritik der praktischen Vernunft. In Immanuel Kant: Werke in sechs Bänden. Band 3, Könnemann 1995 (based on the *Akademie-ausgabe* Berlin 1902/10).

Luhmann, Niklas: Law as a Social System. Translated from the original German of 1993 by Klaus A Ziegert. Oxford University Press 2004.