

SELF-DESCRIPTION AND EXTERNAL DESCRIPTION OF THE LAW

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The title of my paper borrows from Niklas Luhmann, who in his *Des Recht der Gesellschaft* (1993) makes a clear distinction between the *Eigenbeschreibung* and the *Fremdbeschreibung* of law and applies it to the characterization of legal scholarship's and sociology's views on law, respectively. Luhmann stresses the dissimilarity between the internal participant's perspective of the legal scholar and the external observer's perspective of the sociologist. Here his position clearly diverges from that of Professor Cotterrell. In this paper, I argue for my own standpoint through a critique of both Cotterrell and Luhmann. I agree with Luhmann and disagree with Cotterrell on the need to draw a line between legal scholarship's internal and sociology's external point of view. But I diverge from Luhmann's way of thinking in allowing a greater space for the influence of insights provided by sociology in legal science.

When speaking of legal science (or legal scholarship), I am referring both to what in Continental Europe is called legal dogmatics and to legal theory, or legal philosophy.¹ Legal dogmatics focuses on the interpretation and systematization of the legal material appearing on the law's surface, such as, primarily, legislation and court decisions. Legal theory, by contrast, attempts to reconstruct the law's sub-surface normative and conceptual structures. Legal discourse, in turn, is a broader concept than legal science or legal scholarship. It refers to all legal communication which takes place within the legal practices of the legal system; to all communicative acts which – to use Luhmann's terminology – rely on the binary code of lawful/unlawful (*Recht/Unrecht*); in addition to legal science, legal discourse includes, first and foremost, law-making and adjudication. The pole of *Fremdbeschreibung* is occupied by sociology or social theory; these terms will be used more or less synonymously.

A central premise in my argument consists of what I have called the dual citizenship of legal science (Tuori 2003, 283 ff). Legal science is one of the legal practices of a modern legal system. Legal practices are social practices which have

¹ I use the terms 'legal theory' and 'legal philosophy' synonymously here.

specialised in a specific function in modern society: the production and reproduction of the legal order, i.e. law as a normative-symbolic phenomenon. Legal practices constitute the loci for legal discourse, for legal acts as acts of legal communication. Legal practices, such as law-making, adjudication and legal science, each have their typical assignments in the legal system, but they all participate in the ongoing legal discourse. If we limit our view to what can be termed the law's surface, we can define valid law (law in force) as an always temporary result of a discourse where the main interventions are those by the legislator, the judges and the legal scholars. The relative weight of their interventions is determined by the prevailing doctrine of legal sources.

But legal science is not only a legal practice. It is also a scientific practice and, consequently, subject to the commitments and institutional constraints this status entails. As I shall try to demonstrate in the following, legal science's peculiar dual citizenship accounts for many of the difficulties that both legal scholars and sociologists have had in identifying its characteristics and in defining its relationship to sociology or social theory. In this paper, I concentrate on one aspect of this relationship, namely the controversial distinction between the internal and the external perspective on law.

In legal theory, at least since H. L. A. Hart's *The Concept of Law*, this distinction has become almost a commonplace. The legal scholar is supposed to adopt an internal, participant's point of view, whereas the sociologist is said to approach law from an external observer's perspective. In the view of many legal theorists, this divergence in perspective also explains the frequent breakdowns in the communication between legal and social scientists. It is not uncommon for the former to blame the sociologists for completely losing sight of the law, for talking in their supposedly legal analyses about something other than law. Consequently, legal science often grants very little space for sociological insights; sociologists are reserved merely the status of humble servants who are allowed to offer their services only on request and under conditions set out by legal science.

In contemporary sociology, the prevalent posture towards the distinction between the internal and the external point of view, so cherished by legal scholars, seems to be rather critical. In this respect, Professor Cotterrell's views may be deemed representative.

1. Juridical ideology and sociological science

Cotterrell is inclined to treat the distinction between the internal and the external point of view as a device with which normative legal theory tries to legitimize the ideological closure of legal discourse that prevents it from attaining the level of a science. Ideology differs from science by its self-perception. It ‘assumes its own completeness and its unassailable integrity, closes off inquiry because within its sphere answers are already known, specified in advance of any observations of the complexity and contradictions of experience’ (Cotterrell 1996, 11). Because of the ideological closure of its discourse, legal scholarship tends to ward off sociological information about extra-legal social reality. Legal ideology also postulates unity where, in reality, diversity, complexity and fragmentation hold sway.

For Cotterrell, Ronald Dworkin seems to be the epitome of ideological legal thinking based on a discursive closure. According to Cotterrell’s criticism, ‘Dworkinian legal discourse generates its own closed world, observing morality, politics, and society only in its own discursive terms.’ This discourse allows the legal sociologist two alternatives: ‘either to accept the Dworkinian characterisation of law’s discursive empire and share in legal knowledge as a participant in this discourse or else remain an outside observer unable to speak of “law” as such since law is accessible only as and through legal discourse.’ (Cotterrell 1996, 103-104.)

In Cotterrell’s view, legal sociologists should examine the practices that reinforce, result from and depend on the normative and discursive closure of law. But he also emphasizes that legal sociology ‘must ultimately deny or transgress internal-external or observer-participant distinctions.’ Thus, ‘in order to understand law, the legal sociologist has to understand it as a participant, or as a participant does, or rather as many different kinds of participants do – lawyers or citizens, for example, living in the world of law.’ There are different participants’ positions, but none of them are ‘pure’: ‘participation blends with observation; there are innumerable, continually shifting forms of involvement and distancing that make up the diversity of legal experience and understanding.’ Legal sociology ‘samples, inhabits, imagines, explores, compares, questions, and confronts different participant perspectives.’ In sum, ‘legal sociology is the enterprise of trying to broaden legal perspectives while understanding the narrower perspectives of particular professional or other encounterers of law.’ (Cotterrell 1996, 369-370.)

Thus – to summarize Professor Cotterrell’s views – legal sociology is able to tell the truth of law which the ideological closure prevents legal discourse, including legal science, from achieving. Sociology and legal science relate to each other as science

and ideology; and as science, sociology can be deemed to represent a superior form of knowledge in comparison with ideologically tainted legal scholarship.

On Cotterrell's account, sociology is also superior to legal scholarship in its reflexivity. Sociology is 'fundamentally reflexive, self-contextualizing'; it 'must also embrace the examination of the social foundations of all disciplines and discourses, including its own.' Law (legal discourse), by contrast, lacks this inherently reflexive character; at least in normal conditions, it 'necessarily presents itself as authoritative and normatively secure.' (Cotterrell 1996, 109-110.)

Cotterrell draws the yardsticks for his comparison between sociological and legal knowledge about law from scientific practices. His judgement is based on the assumption that legal scholarship – and legal discourse more generally – harbours scientific aspirations similar to those of sociology but, as a consequence of its ideological closure, is unable to live up to these. Sociology, by contrast, is able to open the law's normative and discursive closure and produce more adequate knowledge about social reality, including law and legal ideas. Such a view, assessing legal scholarship merely as a scientific practice, ignores the other side of the dual citizenship of this enterprise; its character as a legal practice.

2. The autopoietic systems of law and (sociological) science

Even if Cotterrell's view of legal scholarship and the relative lack in significance of the internal-external distinction can be deemed representative for contemporary (legal) sociology, it is not universally accepted. Luhmann's sociology, based on autopoietic systems theory, constitutes perhaps the main deviation from the prevailing orthodoxy. Luhmann subscribes to the view that legal scholarship and sociology adopt different perspectives on the law. According to his account, both lawyers (legal scholars) and sociologists observe the law, but the former does this from the inside, the latter from the outside.

Luhmann treats law and science as two different, autopoietically organized and operating social sub-systems, each with its own communicative network, closed to its environment. Sociology's domicile is in the sub-system of science, and its discourse is scientific discourse. Legal scholarship, by contrast, participates in legal and not in scientific discourse; the binary code it relies on is that of lawful / unlawful (*Recht / Unrecht*) and not that of true and untrue. Owing to its specific code, legal discourse is inevitably closed to communication taking place in other social sub-systems. But so too

is scientific discourse; communicative closure characterizes not only legal but also sociological discourse.

In the internal differentiation and division of labour of the legal system, legal scholarship fulfils specialized tasks in the autopoietic functioning of the legal system. Legal scholarship produces two types of theories, corresponding to the difference between legal dogmatics and legal theory. Dogmatic theories strive for conceptual consistency in law, and serve the internal norm of justice which requires like cases to be treated alike and unlike cases unlike. In the evolution of law, i.e. in the circular movement of variation, selection and stabilization (retention), the contribution of legal dogmatics lies in the phase of stabilization.

In Luhmann's conceptual scheme, dogmatic theories are based on the self-observation of the legal system but they do not yet amount to its self-description. In self-observation, individual legal operations are located within the structures and operations of the legal system; self-observation implies or explicates that what is at issue is legal communication. Self-descriptions, in turn, are reflexive; in them, the unity of the system is reflected in the system itself. Legal theory is the form in which the legal system reflects itself, its unity. (Luhmann 1993, 496 ff.)

Legal theory addresses the legal system, whereas social theory functions in the scientific sub-system, with the scientific community as its audience. Luhmann is very cautious about social theory's potential to serve the self-description of the legal system, i.e. legal theory. The principal reason for this caution is evident: legal and social theory are inserted into different communicative networks, into different operatively closed social sub-systems. Although legal and social theory have no opportunity for direct communication across the boundaries of the social sub-systems, Luhmann does leave one channel open for their mutual influence.

The interaction between autopoietically operating, closed social sub-systems constitutes a general problem in Luhmannian social theory. It also affects the theory of law: assuming the autopoietic functioning of social sub-systems, how can we account for the impact of other social sub-systems on law and *vice versa*? One of the solutions proposed by Luhmann is what he calls structural coupling. In structural coupling, individual operations, communicative acts, partake simultaneously in the functioning of two different social sub-systems: contracts are operations of both the legal and the economic sub-system, and a constitution establishes a structural coupling between the legal and the political sub-system. (Luhmann 1993, 440 ff.) Correspondingly, Luhmann hints at the possibility of theory acting as a medium for a structural coupling of the scientific sub-system with the reflexive self-descriptive theories of other sub-systems, such as legal theory in the system of law. The theory of which such coupling could be

expected is, of course, the Luhmannian theory of autopoietic social systems. (Luhmann 1993, 563-564.)

Luhmann, too, can be blamed for not paying due attention to what I have called legal scholarship's dual citizenship. If Cotterrell tends to reduce legal scholarship to a scientific practice, with scientific pretensions equivalent to those of sociology, Luhmann's reductionism lies in the opposite direction. He examines legal scholarship, both legal dogmatics and legal theory, merely as a legal practice and, thus, rejects any claims of its scientific nature.

3. The normativity of legal scholarship

So even within social theory, we have two almost diametrically opposed views of the distinction between internal and external perspectives on law and of its significance for the characterization of legal science, including legal theory, and legal sociology. For Cotterrell, at issue is a device of legal scholars, and lawyers in general, for justifying the ideological closure of their discourse; for Luhmann, in turn, the distinction is an inevitable consequence of legal science's and sociology's locus in different social sub-systems. What separates my position from both Cotterrell's and Luhmann's is my effort to attach to the dual citizenship of legal science the importance it deserves. Legal scholarship is not misfired or deficient sociology with validity or knowledge claims analogical to the latter; legal scholarship is not only a scientific, but also a legal practice. But nor does legal scholarship consist only of interventions in the on-going communication about valid law, with validity claims comparable to those of law-making or adjudication; legal scholarship is not only a legal but also a scientific practice.

I find both Cotterrell's and Luhmann's account unsatisfactory. But in a sense, my position is closer to Luhmann than to Cotterrell: I accept the internal-external distinction and employ it in the portrayal of legal science and legal sociology. And despite my disagreements with Luhmann, I find some of his insights of relevance in the criticism of Cotterrell's views.

Let us take a closer look at what, exactly, it means for legal science to be a legal practice and to partake in legal discourse. It means, first of all, that legal science is bound by the distinctions constitutive of this discourse and by the commitments participation in this discourse imposes. As a legal practice legal science cannot simply ignore the constitutive distinction – or, in Luhmann's vocabulary, *Leitunterscheidung* – between norm and fact. In legal sociology, this distinction seems to evaporate: what

for lawyers constitute norms, and, as such, something distinct from facts, appear for sociologists as facts among other facts. So be it. But a sociology of law which purports to include in its account of law the way lawyers understand the law should be aware of and pay due attention to the significance of this distinction for the functioning of the legal system. The role the distinction between norm and fact plays in legal science should already prevent us from assessing it according to the same criteria as legal sociology.

Employing the distinction between norm and fact, legal science focuses on its former pole. Legal science is normative in character, and not only in the sense of taking norms as its object but also with respect to its products. The outcomes of legal science, be they interpretations, dogmatic theories or legal theories aiming at a self-description of the whole system, have explicit or at least implicit normative pretensions. They raise normative validity claims which call for redemption in the subsequent communications of the legal system, in subsequent legal practices. Through their normative consequences, the interpretations and theories of legal science affect what counts as valid law and thus alter the state of the legal system. This also holds for legal theories as self-descriptions of the legal system: in Luhmann's words, 'through the production of a theory of the system in the system, the system itself is changed, the object of the description changes through the act of description' (Luhmann 1993, 543).

Legal sociology, by contrast, does not participate in the self-production and self-reproduction of the legal system, nor do its outcomes entail normative validity claims that would be assessed in subsequent legal communications by legal normative criteria.

Legal argumentation is normative argumentation, and this goes even for argumentation in legal science, i.e. in legal dogmatics and in legal theory. Legal science does not aim at providing us with 'true' descriptions of extra-legal social reality or with causal explanations of processes taking place therein. Legal science cannot be declared a loser in a competition with sociology on the most adequate social descriptions or explanations; legal science does not take part in any such competition. It does not occupy the pole of ideology opposite to that of sociology as science. The Althusserian opposition between ideology and science should be rejected in the analysis of legal discourse for the simple reason that it wholly loses sight of the normativity of legal argumentation.

4. The facts of law

Legal discourse is bound to obey the constitutive distinction between norms and facts. In sociological discourse this distinction, too, is treated as a fact: for sociological discourse it is – or at least should be – a fact that this distinction is acknowledged in the legal system as its *Leitunterscheidung*.

In spite of the emphasis on the normative side, legal discourse deals not only with norms but also with facts. But what is important for our topic is that in the purview of legal discourse and knowledge, facts do not appear independently of norms. In law, facts are dependent on norms and observed through norms. This is a fact of which especially the institutional theory of law has recently reminded us (MacCormick & Weinberger 1986). In legal discourse and knowledge, facts have the guise of legal institutional facts. The subjugation of facts to norms also affects those validity claims raised in legal discourse which concern the depiction of extra-legal social (or psychological) reality. The truth claims of legal speech acts are not identical to the truth claims raised and assessed in sociological discourse. Law's 'truth' is different from sociology's truth.

In court proceedings, the 'truth' of the facts is ultimately determined not by criteria employed in empirical sciences but by those provided by procedural and substantive legal norms. Facts are not facts if legally appropriate and sufficient evidence has not been presented to support them and if the court does not acknowledge them as facts for legal purposes. In addition, legal facts are selected facts, with substantive legal norms providing the criteria for pruning. Not all that witnesses, for example, in their statements recount of are considered legally relevant and included in the factual premise of the judicial syllogism of the court's decision. 'Legal truth' is only attributed to facts which are accorded legal significance by the norm to be applied in the case at hand. In legal proceedings, facts are legal institutional facts as defined by the institutional theory of law. The peculiarity of legal truth is manifested by the institution of *res judicata*. Unlike scientific truth, legal truth cannot, as a rule, be challenged afterwards by new evidence; legal facts retain their status in the face of counter-evidence presented after the proceedings have ended. There are exceptions to this rule, but these too are legally determined. In the relationship between facts and norms, the latter have the last word.

Law's normativity also influences the facts that legal science deals with. In its interpretative task, legal dogmatics construes hypothetical sets of facts, typified facts, which function as factual premises in the recommendations for statutory interpretation. Such typified facts could perhaps be compared with Weberian ideal types. But their

role is wholly different: they are not tools for empirical research but for normative argumentation.

In addition to the formulation of the factual premise of court decisions or the interpretative standpoints of legal dogmatics, facts may enter judicial or legal dogmatic reasoning through consequentialist argumentation. In such a case, facts are resorted to even in the formulation of the normative premise: alternative interpretations of legal material are appraised according to their probable factual consequences. But in this case too facts remain subjected to norms. Facts are relied on in finding and justifying the correct interpretation of norms – in establishing, not the truth about facts, but the ‘truth’ about norms. And if it turns out that the court was mistaken in its prediction of subsequent developments in extra-legal reality, this does not, as a rule, strip the decision of its legal validity.

Let us move in our examination of the role facts play in legal discourse to the level of legal theories, starting with dogmatic theories. Dogmatic theories consist of the general legal concepts and principles of different fields of law, such as contract law, penal law or constitutional law. We can focus our examination on the conceptual side of dogmatic theories.

What are called legal concepts do not constitute an internally homogenous group in their relation to facts. Roughly, three constellations can be distinguished:

- Legal concepts refer to a bundle of norms, and the factual side recedes into the background. This is how the German conceptual jurisprudence (*Begriffsjurisprudenz*), in its constructive method, understood the nature of legal concepts, such as, say, ‘property.’
- Legal concepts refer to a combination of norms and facts, to institutional facts. This is how von Savigny in the beginning of the 19th century conceived of his institutions and this is also how the institutional theory of law explicates the concept of, say, marriage.
- Legal concepts aim at articulating the factual situations to which legal norms are applied. Reference can be made to the analytical concept of property which dissolves *Begriffsjurisprudenz*’ unitary concept into owner positions in different relations. Here the normative side of the distinction between facts and norms is relegated to the background.

So in dogmatic theories and concepts, the mutual weight of the factual and the normative aspect may vary. However, the normative side is never wholly obliterated; dogmatic concepts are never exclusively about facts. Their use in adjudication has normative consequences, and the very enterprise of legal dogmatics has a normative purpose. Dogmatic theories with their general legal concepts do not primarily aim at

providing an accurate description of extra-legal social phenomena or at explicating the causal nexus connecting these. Dogmatic theories are tools to be employed in legal argumentation, in legal practices in courts and elsewhere. They maintain coherence in the legal order and serve the consistency of adjudication; their normative purpose is to secure the realization of the principle of formal justice or equality. The constitutional law theory of the separation of powers does not pretend to describe or explain the factual workings of the political system; its pretensions lie in the guidance of the interpretation and application of constitutional law. It does not intervene in political discourse, nor does it raise validity claims to be appraised by the criteria of that discourse. Its communicative network consists of constitutional law discourse.

On the other hand, dogmatic theories and general legal concepts always include a factual side, and are always based on a conception of the extra-legal reality submitted to legal regulation. Legal ideas have, as Professor Cotterrell, among others, has pointed out, social causes, and the emergence of dogmatic theories can be explained sociologically; thus, only in certain social conditions, at a certain historical point of time, do modern concepts of property or contract or the legal concept of state become possible.

With my emphasis on the specificity of legal theories, I do not deny the possibility or legitimacy of sociology's taking a critical stance towards legal theories. Sociology can try to expose the conception of society implied by dogmatic theories and assess it by social scientific standards. It may well be that the 'hidden social theory' of legal dogmatics does no longer provide a sociologically adequate description of the extra-legal social reality. Because of a particular inherent fossilizing tendency of dogmatic theories such findings should not come as a big surprise.

The procedure of excavating and explicating the implicit social theoretical assumptions of legal dogmatics and comparing them with the sociological truth bears a resemblance to the programme of the critique of ideology. Has my own argument ultimately led me to accept the distinction between ideology and science and to assign these positions to legal scholarship and sociology, respectively? Presumably not. Sociology's critique remains a critique from the outside; it employs standards that are not equivalent to the yardsticks of legal discourse. Again we have to be aware of the normative aspect of dogmatic theories and of their subservience to the fundamental principle of formal justice. The peculiar inertia of legal concepts and dogmatic theories should not be attributed to an ideological blindness; it may perform an important task in the functioning of the legal system. Thus, too much susceptibility to new sociological insights would deprive dogmatic theories of their potential to secure consistency of adjudication and to enhance the realization of formal justice. In this respect, the closure

of legal discourse is not a consequence of an ideological self-deception but of the specific normativity of this discourse.

In legal practices, dogmatic theories largely function in an unconscious way. This should not, either, be interpreted as a symptom of their ideological character. Instead of the binary opposition of ideology and science, it is more fruitful to approach dogmatic theories through Anthony Giddens' notions of practical and discursive knowledge, or Michel Foucault's *savoir* and *connaissance*. In legal practices, lawyers employ dogmatic theories and legal concepts but are not necessarily constantly aware of their significance. *Nulla poena sine lege* is applied in criminal law and *pacta sunt servanda* in contract law cases, even if they are not even mentioned in the court's argumentation. In adjudication, the need to transform knowledge of dogmatic theories from practical into discursive shape, to explicitly thematize dogmatic theories, only arises in hard cases; in routine cases they operate as practical or tacit knowledge.

Dogmatic theories constitute an integral element of the common legal culture which is shared and internalized by lawyers as the main agents of legal practices and which functions through their practical knowledge. This enables these theories to fulfil their stabilizing and justice-promoting task. However, this does not hinder legal discourse from taking a reflexive stance towards its doctrinal premises. The elaboration of dogmatic theories by legal science and the courts' argumentation in hard cases attest to legal discourse's reflexive potential under the conditions of modern law. The specific normativity of legal discourse entails a certain inertia but does not create any irremovable blockage for the development of dogmatic theories.

In Cotterrell's view, one of the symptoms of the inferiority of legal discourse and knowledge in relation to sociology is their lack of reflexivity. However, the deliberate elaboration of dogmatic theories already tells of a reflexivity in legal discourse. This reflexivity is even more conspicuous in those comprehensive accounts of law that Luhmann has called reflexion theories: legal theories which reflect on law's unity.

It is obvious that these theories also imply a conception of extra-legal social reality or, in other words, a hidden social theory. Luhmann has distinguished in contemporary legal theoretical discussion between two main alternative accounts of law's unity: rationalist and positivist ones. The former seek to found law's unity on rationally justifiable principles, whereas the latter employ a doctrine of legal sources which derives legal validity from explicit decisions by the legislator and the courts. Cotterrell's analysis is quite similar when he writes of *ratio* and *voluntas* as the two poles between which legal discourse rotates. *Voluntas* represents 'the element of sovereign will, coercive power, or unchallengeable political authority that shapes legal

doctrine and is expressed through it [...] the co-ordinating and hierarchical characteristics of law as a system of *political* control.’ *Ratio*, in turn, is ‘the element of reason or principle that structures and presents doctrine in patterns of ideas whose strength to bind and convince the citizen (and the lawyer or official) comes from their logical persuasiveness, normative consistency, or rational coherence.’ (Cotterrell 1996, 317.)

Theories emphasizing *ratio* or *voluntas*, respectively, clearly imply divergent conceptions of law’s social environment. Again we might refer to Cotterrell, now to his thesis of *community* and *imperium* ‘as images of society that are presupposed in legal doctrine and rhetoric.’ The former is ‘the image of a cohesive association of politically autonomous people’ and the latter ‘the image of individual subjects of a superior political authority.’ (Cotterrell 1996, 223.) The explication of the image of society implied by legal theories and its eventual criticism in the light of social theoretical insights constitute important meeting-points of legal and sociological discourse. But, again, sociological criticism should be aware of the tasks that ‘reflexion theories’ perform in the legal system and of the specific normativity these tasks entail.

We are ready for an interim conclusion. There are compelling reasons for not rejecting the distinction between the internal and the external perspective on law and for not treating it merely as a legitimizing move intended to justify the ideological closure of legal discourse. Legal science is not only a scientific practice; it is also a legal one, and as such it partakes in legal discourse; this imposes on it a normativity foreign to the enterprise of sociology. Legal discourse does also deal with extra-legal reality, but views it through normative lenses. The truth in and for law is not identical with the truth in sociology, and the validity claims of legal discourse are different from those of sociology. Legal discourse should not be seen as flawed sociology, presenting ideological conceptions of society which call for correction and rectification from the side of the science of sociology. Legal science adopts an internal view on law, relies on the constitutive distinction between norms and facts and raises normative validity claims addressed to subsequent legal discourse. Sociology’s position is diverse: it does not participate in legal discourse, it is not bound to adopt the distinction between norms and facts, and its outcomes do not display pretensions of normative validity. Sociology remains an outsider to law and its point of view an external one. As many sociologists – and Professor Cotterrell is one of them – have emphasized, sociology must include the lawyers’ understanding of law in their descriptions. But meeting this requirement does not transform sociologists into participants; their talk remains talk about law also when discussing talk in law.

5. Sociological knowledge in legal discourse

Luhmann is acutely aware of legal science's participation in legal discourse and of its ensuing normativity. But his autopoietic systems theory leads him to ignore the other side in legal scholarship's ambivalent position, its character as a scientific practice. Legal science shares with other scientific practices certain fundamental commitments, concerning, for instance, methodology, argumentation and publicity. Legal scholarship is a legal practice, but in important respects it differs from the other main practices of modern law: adjudication and lawmaking. Its outcomes receive their binding force only through other legal practices, through their acceptance by judges and/or law-makers; the practice of legal scholarship is not legally reserved for specific institutions; nor are its procedures legally fixed. The distinctive features of legal scholarship as a legal practice are largely due to the scientific aspect of its dual identity.

However, legal scholarship's scientific identity appears to be rather insecure. This too is a consequence of its dual citizenship, of its domicile not only among scientific but also among legal practices. If its peculiarities as a legal practice derive from its also being a scientific practice, the same holds conversely. Here we again encounter corollaries of the normativity which results from legal science's participation in legal discourse. This normativity gives rise to legal science's almost continuous bad conscience, its qualms about its own scientific nature. Its weak self-identity as a scientific practice accounts for the phenomenon commented on by, among others, James Balkin: legal scholarship's tendency to borrow methodologies from other disciplines. However, as Balkin has also noted, its professional focus compensates for the lack of a purely intellectual one; consequently, law cannot be entirely absorbed by any other discipline. 'Law is continuously invaded but never conquered,' is Cotterrell's (1996, 178) conclusion of Balkin's analysis. What shelters legal scholarship from conquest is its safe haven as one of the legal practices.

Legal scholarship is not and does not pretend to be sociology, nor should it be judged as a defective version of that discipline. But legal scholarship's inclusion among legal practices does not necessarily make it deaf to sociological insights, it only creates a filter which these insights must traverse before they can find their way into the legal discourse. Sociology's talk about law has first to be transformed into legal science's talk in law. Conceding this much, we can still criticize Luhmann's thesis that sociology and law as discursive realms are closed to each other. Thanks to legal scholarship's dual identity, it is able to hear from social sciences much more than just noise. There is much that legal scholarship can learn from sociology, even if sociology has no means of imposing its lessons, of 'conquering' legal scholarship.

These lessons may be at least threefold in nature: argumentative, critical and reflexive. Consequentialist legal argumentation, where alternative interpretations and decisions are judged according to their probable social effects, gains in cogency if it is supported by sociological evidence. Dogmatic theories possess an in-built inertia, deriving from their stabilizing task in the functioning of the legal system. This inevitable and even normatively desirable immobility should not, however, make them immune to a sociologically grounded critique of their implicit social theoretical premises. Even reflexive legal theories should be sensitive to a disclosure and critical assessment of their sociological assumptions. However, sociology should not pronounce its critique of the factual implications and presuppositions of legal theories as some Althusserian judge, sitting on the throne of science with legal discourse lying at its feet as the vanquished ideological opponent.

Legal discourse possesses its own reflexivity, as is shown by, for example the elaboration of legal theories. But what is difficult to perceive from the internal perspective is the position law and legal discourse, including legal science, occupies in society as a whole. Such a perception seems to require the adoption of an external point of view. Here social theory can add to the reflexive self-conception of legal scholars, by enhancing their awareness of the social presuppositions and consequences of their activities.

But legal science is not merely on the receiving end in the learning processes operating between legal and social science. In order to be able to talk about law, sociologists must understand talk in law; they must adopt what Neil MacCormick (1981, 37) has termed the hermeneutic point of view. The grammar employed in the talk in law they can learn from legal science. As Weber already noted, legal science provides legal sociology also with epistemological and causal support. Legal sociology must also acknowledge the fact that legal facts are institutional facts; legal sociology can only identify legal phenomena – say, the elements of legal proceedings – through legal concepts, i.e. concepts worked out and systematized by legal dogmatics. Legal science may even have a causal significance in legal sociological inquiries: it is justified to assume that in legal conflicts, parties and their lawyers are guided by the prevailing dogmatic interpretations and theories. (Tuori 2003, 298-299.)

6. Fragmentation and/or coherence

There is one additional issue I would like to touch on briefly in conclusion to my paper: the issue of fragmentation and pluralism.

A central point in Professor Cotterrell's critique of Dworkin is the claim that the latter 'tends to proclaim or assume broad consistencies of value and social understandings' when, in fact, law 'reveals complexity, fragmentation and diversity.' Contrary to what ideological currents in legal philosophy maintain, law in contemporary advanced Western societies does not consist of 'legal systems as unified, stable systems of reason or principle but as loosely interrelated, overlapping, and sometimes conflicting patterns and structures of piecemeal regulation.' (Cotterrell 1996, 19.) Contemporary legal philosophy, exemplified by Dworkin, also errs when it assumes one privileged participant's position; in reality, there exists a great diversity of participants' roles, each of them including varying degrees of social observation (Cotterrell 1996, 369-370).

It may well be that Dworkin exaggerates the degree of unity and the extension of shared values and principles in our advanced Western societies. However, once again, it is important to clearly separate normative argumentation from empirical claims. One of legal science's tasks in the division of labour among legal practices consists of bringing coherence into fragmented legal normative material. This is a task that Cotterrell also stresses: legal science embodies *ratio* in face of the *voluntas* of legislation and court decisions. Legal theory 'should examine possibilities for maximizing *ratio* given the diverse conditions in which *voluntas* is expressed through regulation' (Cotterrell 1996, 293). 'Maximizing *ratio*' is only possible through the elaboration of dogmatic and reflexive legal theories.

Even as an empirical claim legal philosophy's assumption of shared principles may be closer to the truth than is suggested by criticisms appealing to the increasing cultural fragmentation of modern societies. The discussion of the value pluralism in our contemporary societies often enough suffers from a conceptual confusion. A clear distinction should be made between ethical questions concerning the values of individuals and collective groups, their notions of the good life, and moral issues concerning the impartial solution of conflicts of action between individuals and groups. As Jürgen Habermas, among others, has repeatedly emphasized, ethical questions are always raised from the egotistic I- or we-perspective, whereas moral issues require that equal attention is paid to the standpoints of all concerned. The fundamental principles of modern law, enshrined in constitutions and international human rights treaties, relate to moral principles, rather than to ethical issues of value; through such basic rights as

freedom of religion and conscience, freedom of expression and cultural group rights, ethical issues are, as a rule, left to the cultural autonomy of individuals and groups. A comprehensive enough consensus on fundamental legal principles stands in no necessary contradiction with value-based cultural fragmentation. Such a consensus, be it termed *Verfassungspatriotismus*, in the wake of Habermas, or ‘overlapping consensus’ in the wake of John Rawls, can be deemed as indispensable for a functioning democracy; it clears the ground for all the interest-based divergencies and machinations in policy issues which crowd the everyday routines of democracy.

There is also another type of pluralism on which critics of legal closure and the internal-external distinction rely: the phenomena the theorists of legal pluralism have thematized. The legal order of the nation state, so it is claimed, has lost its privileged position; instead of the monopoly of the state-centred legal system, our present legal situation is characterized by polycentricity and a plurality of legal orders. Legal norm-production transpires more and more elsewhere than in legal practices which have their locus in the institutions of the nation-state; not only in international organizations or trans-national polities such as the EU, but also in self-regulative mechanisms within diverse social fields or social sub-systems.

These are important phenomena and deserve close attention from both legal and social science; in fact, I readily agree with Cotterrell that these are the key contemporary and future issues facing both normative legal theory and legal sociology. In this connection, I have to content myself with some comments which focus on their implications for the type of analysis I have presented above.

The growing polycentricity of legal norm-production and legal sources can be characterized as an entry of new participants into legal discourse; it does not necessarily topple the internal-external distinction. Furthermore, it is doubtful whether the legal practices associated with nation-state institutions have indeed lost their centrality. This concerns especially adjudication, i.e. the responsibility of courts. As a rule, self-regulative mechanisms seem to be dependent on an acknowledgement of their norm-production by courts; even when self-regulation includes conflict resolution and norm application, access to courts usually remains a last resort. It appears that self-regulative acts can be included in the same legal communicative network as the acts produced by the legal practices of law-making, adjudication and legal science.

International and transnational regulation too seems to a large extent to be dependent on access to national courts. There are, however, exceptions to this rule, such as the WTO’s conflict resolution mechanism, international criminal courts and international human-rights régimes. At what point international or trans-national regulation crosses the threshold of a separate legal system is an issue that need not be

addressed now. If this happens, it does not in any way invalidate the central thesis of this paper: the continuing relevance of the distinction between the internal participant's view adopted by legal science and the external point of view from which sociology approaches the law.

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