

A GLANCE AT THE WORK OF ROGER COTTERRELL

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The purpose of this paper is to introduce some themes that, at least for the present writer, seem essential to Roger Cotterrell's work. This short introduction is also meant to function as a prelude to his article on the uses of a legal concept of community published in this volume of NoFo.

For Finnish post graduate students, Roger Cotterrell's work is perhaps best known from his monograph *The Politics of Jurisprudence – A Critical Introduction to Legal Philosophy*, which for many years has been one of the set books in general jurisprudence. This book, which introduces the main trends of thought within modern legal philosophy, first appeared in 1989. The second edition, with a revised version of these themes appeared in 2003. In addition, this edition introduces some new trends within legal philosophy, such as deconstruction and reconstruction in legal theory and the jurisprudence of difference, both of which are themes familiar to critical legal studies of the end of the 20th century. Roger Cotterrell has also edited several books on the theme of law and society; among them *Law and society* (1994) as well as *Sociological Perspectives on Law vol. 1* (2001) and *vol. 2* (2002).¹

The Politics of Jurisprudence, a thorough book on legal philosophy and jurisprudence, forms only a tiny part of Roger Cotterrell's work. In fact, one can, speaking tentatively, find a central theme that appears throughout his work, an overall theme that takes different forms in different connections. This theme, which could roughly be described as the task of the sociology of law with an emphasis on a sociologically-understood concept of morality, works as a tool for analysis in Roger Cotterrell's earlier writings. This theme also constitutes the theoretical framework within which the legal concept of community is adapted.

¹ A short analysis of the content of these books can be found, for example, in Siltala 2006, 254-255.

1. Legal science and legal sociology

To start with, I will focus on Cotterrell's book *Law's Community*, which presents in a collected form his thesis about the nature of the sociology of law as a discipline while exploring his ideas on the theoretical interrelationship between law and sociology.² In this framework, his central thesis is that the sociology of law as a discipline should adhere more strongly to the law than to sociology, and that legal theory is in fact quite open to the influences that sociology of law can offer. *Law's Community* is by nature a summary of his thoughts up to that point, and serves as an illuminating background for his later articles published, for example, in the *Journal of Law and Society*. He further develops his idea of the task of legal sociology in his articles *Why Must Legal Ideas Be Interpreted Sociologically?* and *Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies*.

The way Roger Cotterrell pursues his thesis on the sociology of law has a long history in his writing. Cotterrell is particularly interested in methodological questions as well as in the general question of legal sociology as a scientific enterprise. Cotterrell bases his ideas mostly on the work of classical sociological theorists, rather than on first-hand empirical studies as perhaps one might expect. He emphasises that most of the early sociologists can be categorised as legal sociologists because they were looking for the rationality of modern society through the examination of law.³

In chapters 3 and 5 of *Law's Community* Cotterrell attempts to build a bridge over the disciplinary boundaries that separate the sociology of law and legal theory as knowledge fields. In fact, Cotterrell tells us that no strict boundaries exist between legal theory and sociology of law, at least when the question is posed on the level of

² See Cotterrell 1995, especially parts I and II. The analysis given now is only a glimpse of Cotterrell's thoughts presented in *Law's Community*. It is an attempt to explore the basic thoughts by which Cotterrell argues on behalf of the sociology of law's greater significance to legal theory. His analysis of different scientific disciplines in general and of legal science in particular, is based largely on a combination of Foucault's archaeology of knowledge and the discursive construction of the scientific field as well as of Foucault's conceptualisation of knowledge and power and Kuhn's theory of scientific paradigms and the possibility of a break down of the predominant paradigm. It should be pointed out, however, that what Cotterrell seeks in his analysis of the legal knowledge field and the possible changes in the conditions of contriving accurate knowledge within that field, is not a scientific revolution in a Kuhnian sense, but a much more modest change in the conditions of legally significant knowledge.

³ Cotterrell 1995, 69-70. See also Cotterrell's analysis of the work of Emile Durkheim, in which Cotterrell points out that, by examining the law, Durkheim tried to identify social solidarity in order to explain it; Cotterrell 1999, 40.

sociology and law as scientific enterprises, rather than of sociology as discipline and law as a doctrine serving legal practitioners. Cotterrell accentuates that, rather than true disciplinary boundaries between sciences, the endeavour to maintain the status-quo prevails especially within the legal realm (Cotterrell 1995, 54-55).

Despite the strong attempt to cross over the boundaries between legal sociology and the law, these socially constructed, separate fields of scientific knowledge are important in Cotterrell's theory as they are indispensable in making the confrontation of disciplines possible. Namely, he claims that it is exactly this confrontation of disciplines that produces conceivable changes and reproduction of knowledge within the relatively autonomous scientific fields. Only when a confrontation of different disciplines occurs is there a possibility of alteration in the conditions of scientific knowledge within the disciplinary field in question.⁴

As Cotterrell analyses the field of legal knowledge, he finds it useful to separate it into law-as-discipline and law-as-doctrine, which perform slightly different functions (Cotterrell 1995, 50-51). Law-as-doctrine, with its concepts, metaphors and methods of knowing, and especially with its focus on the judge and on court practice creates its own forum for discussion and assures the normative closure of law. It is within this normative closure of law-as-doctrine, that the view of an insider prevails, and that law presents itself as an autonomous and closed enterprise. As a consequence of law's close relationship with political power, the dominant form of law-as-discipline tends to appear as the mirror-image of law-as-doctrine (Cotterrell 1995, 50-53). Even then, such is not necessarily the case. Cotterrell uses the concept of law-as-discipline to demonstrate that within legal science, there consistently occur different kinds of illustrations of law (unorthodox forms of law-as-discipline) that do not subscribe to the predominant form of law-as-doctrine. Cotterrell notes that the separation into the interacting realms of law-as-discipline and law-as-doctrine paves the way for a sociologically oriented legal theory (Cotterrell 1995, 54-57).

The closure of legal discourse should be understood as a feature of legal doctrine, rather than of law-as-science which lies open to nearly all kinds of influences from other disciplines (that usually appear in the form of the so-called 'law-and' studies; see Cotterrell 1998, 181). In his later writings, Cotterrell seems to adapt more and more to the view that the distinction between law-as-doctrine and law-as-science does not, however, pre-empt sociological inquiries into law-as-doctrine even for the

⁴ Cotterrell 1995, 47-48. According to Cotterrell, this also requires a change in social conditions, meaning that confrontation is often not merely scientific, but political as well.

purpose of reformulating legally significant concepts and to assisting with judicial decision making, and hence interfering in the normatively closed discourse of law.⁵

2. The theme of law and morality

The analysis of law as a field of knowledge and the other major theme in Cotterrell's work, the question of morality and law, are both already highlighted in one of his earlier writings: *Liberalism's empire: reflections on Ronald Dworkin's legal philosophy*. Here Cotterrell analyses Dworkin's theoretical contribution and its effect on lawyers' conception of legal philosophy, that is their understanding of the law's region. In this article, Cotterrell claims that Dworkin's image of legal practice which, at least in the ideal form, produces a coherent and integrated legal realm appeals to lawyers because it offers and further confirms the idea of law as a closed circle, in which legal professionals have ultimate control through their exclusive right to interpret (Cotterrell 1987, 522).

Cotterrell points out that in Dworkin's theory morality actually becomes a question of law, which is answered in the moral domain run by lawyers (Cotterrell 1987, 514). Cotterrell rejects the dichotomy of principles and policies in Dworkin's theory. He claims that in Dworkin's presentation law becomes a moral-legal domain and consists of the history of interpretation that is found in the legal and political acts in the past, there thus is no dividing line between the (law-external) politics and the (law-internal) world of interpretation that legal practice of professionals is about. In this way, Cotterrell also here raises the idea of the open character of legal theory, the idea upon which Cotterrell later on elaborates and uses as an argument for the possibility of a sociological interpretation of legal ideas and legal concepts. Dworkin's idea of law as a chain-novel and especially its foundation in the political pasts of the communities is for Cotterrell a sign of the transparency of the legal realm, and thus a route for the external effects on law (Cotterrell 1987, 522).

⁵ For a critical evaluation, from a jurisprudential viewpoint, of Cotterrell's idea of bringing the sociology of law into legal discourse or legal theory, see Nelken 1998, and from a point of view oriented more toward the sociology of law, see Banakar 2000.

3. Cotterrell on Durkheim

Cotterrell further explores the relationship between law and morality by closely analysing the work of Émile Durkheim. Cotterrell notices that ‘Durkheim’s legal sociology is to praise or put the law in a perspective that reveals its potential moral worth and what has to be done in order to realise that worth to the full’ (Cotterrell 1999, 45). Hence, the study of Durkheim seems an important analysis regarding to Cotterrell’s work on the whole but especially with regard to the legal concept of community. In his analysis of Durkheim’s work, Cotterrell seems to seek a special kind of connection between morality and law that is essential to the kind of legal concept of community he is developing. Briefly placing this conception into a kind of loose framework of legal theory, seems to suggest that the interplay Cotterrell seeks is one that would at the same time deny, all at once, the central idea of the separation of law and morality in legal positivism, the inevitable moral axioms of natural law, and the tendency of legal realism to reduce law (and morality) to mere behaviour.

Cotterrell stresses that, for Durkheim, law as well as morality should always be understood as embedded in certain social and cultural conditions; they are social facts with a history (Cotterrell 1999, 16-17) and law is ‘a distinct but inseparable part of morality’ (Cotterrell 1999, 62). Moral rules are rules that pose external constraint on individuals, and because legal rules are part of moral rules, the experience of constraint is also an essential element of legal rules.⁶ In his *Division of Labour* Durkheim treats law as a mere indicator of the state of social solidarity in society. This Durkheimian way of using the law as an index seems overly simplistic and links with the idea of society as external to individuals. For Cotterrell, however, it is clear that Durkheim recognises that as law emerge those representations that, as interpretations made in legal practices, are experienced as constraining by individuals (Cotterrell 1999, 12-13). In the Durkheimian conception, law should be understood widely, as encompassing the ideals that inform and surround it as well.⁷

⁶ Cotterrell 1999, 59. Cotterrell makes clear that Durkheim’s conception of moral rules is simplistic as it bears only this one specific feature, the external constraint of individuals, and as such holds many difficulties. Nevertheless he claims that for Durkheim’s purposes the conception seems precise enough.

⁷ Cotterrell 1999, 37-38. These ideals are the social facts of a particular society in the sense that Durkheim describes in *Les règles de la méthode sociologique*. As the ideals (or ideologies) of law, and around the law, are social facts, a Durkheimian sociologist must therefore treat them as such; i.e. as part of the law as an object of study.

According to Cotterrell's interpretation of Durkheim, the inseparability of morality and law holds, even in modern society (Cotterrell 1999, 62). In order not to lose this, Durkheim points to the attachment of the individual to social relations and to the moral rules that these social relations offer. Basically, the dialectics between the social structure of society and human nature's tendency toward self-regulation maintain the inseparability of morality and law. Durkheim holds a wide concept of regulation that is attached to his conception of human nature. According to Cotterrell, human nature is for Durkheim a complex phenomenon of unlimited culturally produced and formed desire, control of which is necessary in order to avoid one's enslavement to that desire. Such control can also represent regulation as an internal constraint acting on the individual. Though morality and law impose the external constraints on the individual, they may also be internalised objects of attachment. The line between external and internal constraint for Durkheim remains unclear; what is important is that the constitution of society requires both. Particularly in his later writings, the human will for attachment to social groups and social relations, which provide the social sources of moral authority, is essential (Cotterrell 1999, 18-20).

Cotterrell further suggests that for Durkheim, legal rules differ from other moral rules only in degree, through the organisation of sanctions, although the system of law does not necessarily require governmental organisation. Therefore governmental organisation is not part of the Durkheimian concept of law, yet it seems that in Durkheim's theory, too, such organisation leads to a more developed form of law. In modern society, law is a governmental political instrument and a result of the negotiation of the diverse beliefs and values of a particular society, an expression of the morality of those in power.⁸ In Cotterrell's representation, however, Durkheim later on accentuates that morality – and law as a part of it – is more than external constraints imposed on individuals. He claims that all collective representations (common values, understandings, perceptions and interpretations) and established social institutions 'exist only in so far as they are generally recognised or collectively understood' (Cotterrell 1999, 54). Moreover, because in modern society law is the most noticeable and well-organised control mechanism it actually constitutes the society (Cotterrell 1999, 21).

⁸ Cotterrell 1999, 60-62. See also Cotterrell 1999, 184, where he notes that even from a Durkheimian standpoint some occasions demand recognition of law as a conflictual object of political struggle rather than as a negotiated expression of consensus within political power.

So, according to Cotterrell, for Durkheim even law is much more than just an external governmental constraint on individuals; it is also an expression of human attachment to a social group, to social relations. The specific component of modern morality is autonomy as the 'individual freedom to assess moral rules.' Particularly in Durkheim's later writings, the idea of 'the cult of individualism,' a necessary element of modern morality, must, because of the Durkheimian conception of the inseparability of law and morality, be reflected in law. Hence the critical reflection that autonomy enables in modern society means that it is possible to analyse that society through law and through that analysis highlight its future. For Cotterrell this means that Durkheim at the same time contrives to hold to the idea of inseparability of morality and law, and manages to maintain the law both as a source of social solidarity and as a tool for planning the future (Cotterrell 1999, 62-63).

For Cotterrell one of the most important ideas that Durkheim highlights is his concept of law as an expression of a community's morality which, in Durkheim's case, is committed to the idea of individual dignity (Cotterrell 1999, 112). Individualism is an impersonal unifying social value of the secularised modern world that provides the basis for the social relations of interdependence and mutual dignity. As a social value, it is a social product. The social relations of modern society grant the appreciation of individualism and human dignity to individual persons, hence individualism remains, for Durkheim, a social creation. More than the liberal idea stressing the inviolability of personal autonomy as against the society, this social creation becomes the unifying basis of modern society. (Cotterrell 1999, 112-114.) Individualism becomes 'objectively necessary as the unifying moral system of modern society' (Cotterrell 1999, 114). The 'cult of individualism' exists, for example, in human rights which themselves are an expression of the mutual dignity of human beings. This mutual dignity thus reflects one ideal type of (the legal concept of) community that Cotterrell sketches; the community of beliefs and values. (Cotterrell 2000b, 20-21).

4. Cotterrell's legal concept of community

Cotterrell's interpretation of Durkheim serves as part of the theoretical scheme he elaborates in his article on law and morality from the perspective of common law (Cotterrell 2000b). In analysing the traditional practice of common law, Cotterrell uses

the legal concept of community and further develops its four different ideal types.⁹ The ideal types of the legal concept of community follow Max Weber's four ideal types of social action and various social relations that constitute the Durkheimian idea of society. Community in Cotterrell's thinking seems to adhere to Weber's ideal types in two senses. Firstly, each of the ideal types of the communities parallels Weber's ideal types of social action. Secondly, these ideal types describe the social action that engenders community as a legal concept from an individualist point of view; the legal concept of community refers to the relationship between two individuals rather than to a wider community of people.

Cotterrell argues for the idea that the traditional common law approach to the subject of morality and law is compatible with Durkheim's sociological concept of morality which recognises that law must necessarily seek the universalising common expression of community's morals. But as an empirical and historical phenomenon, it is always embedded in its social context. (Cotterrell 2000b, 12.) According to Cotterrell, the traditional common law method uses a kind of 'conceptual community' in a way that offers more flexible access to moral arguments than does legal positivism because of the latter's strict theoretical separation of morality and the law (Cotterrell 2000b, 10-11). This way of thinking could perhaps also be described as situational sensitivity. However, it is inevitable that for both Durkheim and Cotterrell, law is a matter of cohesion rather than of conflict; this cohesion is reflected in the concept of community.

The idea of the legal concept of community, intended for the use of both legal theory and legal sociology stems from the thoughts that Cotterrell has presented both about the nature of the sociology of law as a discipline as well as about his studies of law and morality. One of the intentions of the legal concept of community is to offer a new approach to the problems of legal pluralism, both on an intranational and transnational level, which is something that the positive law, as the law of sovereign, finds difficult to deal with. The other purpose of the legal concept of community is, according to Cotterrell, to help lawyers better understand the environment in which legal practice is carried out.¹⁰ The legal concept of community connects Cotterrell's two academic interests; the sociology of law's task as a discipline as well as the theme of law and a (sociological) concept of morality in a community. The basic idea of Cotterrell's thought is not primarily in the formulation of the sociology of law as a

⁹ Which he also presents, for example, in his article *A Legal Concept of Community* (1997) as well as in his contribution in the present volume.

¹⁰ See for example Cotterrell's article in the present volume.

study of the interrelationship between law and society as a structural mechanism, but rather in his attempt to attach to the law a specific community's morality, a task that according to his way of thinking requires a specific legal concept of community.

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