

The decline of gospel

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In the tradition of continental European legal development, the main objective of shaping the rules has been to develop codified forms, structures, procedures, individual rights and principles as safeguards for equal and predictable justice ('rule based law'). This is the way the long-prevailing ideology has had it, but whether the tradition has consistently and constantly been followed in political practice is a matter of controversial debate. The tradition is reflected by the 'eternal' debate between legal positivism and natural justice concerning the core of the rule of law. The so called formal rationality of the legal system – the demand for coherence of the system and its principles and for adhering to the wording of rules – has always been subjected to the scrutiny of critical legal studies. Formal rationality has been criticised both by the conservative approaches to the 'substance of justice' and by modern societal technology that uses law as a highly adaptative means to an end. However, nobody can deny that the excessive use of indefinite provisions or blanket clauses and vague procedures for the balancing of public interests and individual rights should have served as a warning sign that essential changes were in progress in the legal system. These changes are related to the overrating of interests of power and underrating of civil liberties.

1.

For a long time, the mainstream of jurisprudence captivated by the (ideological) tradition did not fully comprehend the extent to which rapid social, political and economic developments since the 1980s had overtaken the apparently proven and consistent structures of 'old-European' law. One could refer to this development and the type of 'law' emerging from the different *chiffres* as the 'second modernity', 'neoliberalism', (in terms of critical theory) the 'dialectic of enlightenment' and the 'rise of instrumental reason', (in terms of sociology) 'risk society', (the inevitable) 'globalization' and talk about 'informal law', 'regulated self-regulation', 'situational law', 'governance', 'decodification and deconditionalization' et cetera.

From the perspective of the traditional critical theory the decline of gospel could be described as a consequence of the formal structure of modern reason,

which opens the sphere of law to every rational interest whatsoever. This degrades and sometimes even eliminates any substantive ideas of justice and law which are considered to be an obstruction to the interests of 'efficient problem solution'. Under the supremacy of instrumental reason, law is getting involved in a transformation process to an 'organ of calculation and planification, indifferent concerning the goals, to a pure element of coordination of interests' (Horkheimer & Adorno 1947, 107 *et seq.*).

A modern Critical Theory of law would react to this development with the proceduralization of the category of law (Wielthölder 1989, Habermas 1992): it would try to open a line of defense against the 'colonization of life-world' (and law as a part of it) by 'system-imperatives' (i.e. imperatives of the economic and political-administrative system = money and power) by opening up a sphere of discourse for the crucial questions of justice and law. However, the question arises whether this concept can actually succeed under the predominance of economic and instrumental reason under the conditions of globalization and the serious consequences for the distribution of power in societies. There has to be a place for these discourses in society, there has to be access to these places and the participating people have to have a 'voice' that can articulate the demand for freedom and distributive justice. For this reason, Nancy Fraser has demanded that there has to be 'participatory parity' (Fraser 1996). And for participatory parity you need certain fundamental social conditions and prerequisites that are 'recognition and redistribution'.

A non-reflected systemic theory of law would react to this social process with a concept of law as a framework guaranteeing the procedures of reflexive reconciliation between the social subsystems. This approach would reject substantial requirements in the process of conflict reconciliation and would be in favour of 'regulation patterns for self-regulation'. Whether (and with which value) law principles could occur (or even if they should occur in a substantial way) in regulation patterns and if this theory has any critical perception of the decline of principles seems to me a blind spot.

From the perspective of a critical theory, the decodification and deconditionnalization of justice and law describes the abandonment of the liberal substance and the emancipatory potential of the principles of justice founded in the 18th and 19th century bourgeois revolutions. In this sense, rights open the field for all parts of civil society to make demands, and the 'backlog' (*Überhang*) of law (Honneth 2003, 171 *et seq.*) can be understood as the substantial basis for the 'fight for recognition' (Honneth 1992).

From the perspective of proceduralistic theories of law this ‘fight for recognition’ could be the chance for new social discussion processes denouncing the colonization of life-world and establishing new forums of social normative communication and settlements. A ‘left-wing’ emancipatory critique would deny this chance and would demand that justice today requires both redistribution and recognition to establish participatory parity in the civil society.

The sociological theory of ‘risk society’ (Beck 1986) shows analytically that a principle-orientated concept of law is declining under the conditions of the development of industrial society to a globalized world market regime of exploitation of resources and labour and the predominant goal of maximizing profits. This development goes along with a process of ‘brazilianization’ of societies in all respects of economy, ecology, morals and law. Law under these conditions transforms to an instrument and strategy of social risk adjustment (risk adjustments of the labour market, of the market of resources exploitation, of the market of migration, of the social antagonism between the poor and the rich, of the global political conflicts, and of the politics of human rights).

The law of risk society is no longer interested in the implementation of concepts of social justice and on the principle-orientated solution of social conflicts, but in risk-minimizing and efficiency-optimizing distribution procedures (in a broad sense from money to power). This shows up for instance in the increasing flexibility of legal rules, the staging of the exercise of power as ‘governance’ and the political instrumentalization of the use of law in national and/or international conflicts.

2.

These *chiffres* can be illustrated by numerous and disparate phenomena in modern societies and modern law today.

Major social problems and disorders of social balance such as structural unemployment, cost explosion and demographic factors in the health system, the future of pensions, the reckless exploitation of nature and the climate crisis, migration, cultural conflicts and xenophobia and the growing gap between the rich and the poor tend to be resistant to governance by law. The political and public debate on these issues is highly sensitive; all kinds of real and imagined interests and pressure groups are engaged, and political parties are afraid of losing any section of their (potential) voters should they take a firm stand. Hence the debates end up

with compromises whose life spans are too short for achieving law's traditional function of balancing interests in the medium or long run. The kind of 'law' arising from such compromises is typically manifested in the form of large margins of administrative discretion based on dazzling elements of rules and chatoyant goals of regulation.

The actual 'new' legislators are the participants of 'exploratory talks' held between governments, political parties, NGOs, employers' associations and unions and other lobbies on national, European and sometimes even on international level (for example in the G8 Summits). 'Fireside rounds' lead to 'consensus', 'recommendations' and 'guidelines' for the regulations to be made, while parliaments tend to assume a position of irrelevance in the law-making process. Quite often, rules which relate to diffuse objectives (for example 'stability of the market') are drafted in a great hurry and rotten compromises are celebrated as a victory by all of the participating interest groups.

These kinds of regulations lead to the so called 'dynamic developments' of law in the process of its application: a euphemism for the dissolution of the classical concept of the separation of powers and legal priority. Just as with legislation itself, also courts and offices of administration assume new roles and significance as centres for 'exploratory talks' and bargaining of decisions.

Private law becomes 'private law' – multinational corporations and entire branches of trade like the petrol industry or the IT industry say goodbye to national legal systems and regulate their conflicts in procedures and by rules which are developed by globally operating law firms.

Regulatory-repressive law such as administrative sanctions and criminal law serve as 'standby systems' and 'catastrophe reserves' in cases which highlight the weakness of the ideology of regulated self-regulation and self-responsibility and therefore cause severe social friction. In such cases, a 'symbolic use' of tough law and tough law enforcement can be observed. Such a strategy of symbolic use of law accords with intense campaigns in the mass media. Yet in many cases, it does not lead to formalized prosecution, trial and punishment, but once again to informal outcomes.

3.

The regulation of financial crimes in markets can be used as an exemplification for my thesis. The processes of Europeanization and globalization of markets are inseparable from the corresponding structures of organized financial crime. These structures constitute an area of growing public interest and they are observed by the media as the 'dark side' of globalized capitalism. In terms of advancement and applicability, the traditional legal concepts like those of general criminal law and market regulation are way behind modern financial crimes such as money laundering, tax fraud, commercial fraud, bribery or securities law violations. As a result, the traditional concept of law is fiercely criticized for using obsolete 19th century methods in combating 21st century problems.

Although the neo-liberal mainstream of regulative strategies is prioritising the responsibility of market players, self-regulation, governance and compliance conducted by the 'invisible hand', there is still a strong public demand for repressive regulatory law which can tackle and combat cases of disturbing and disarranging financial crimes. In cases of severe market disarrangement and strong public demands of control, the liberal state shows its capacity and competence to fight the dark sides of capitalism by means of the 'symbolic use' of repressive law and law enforcement.

It is a matter of both common and expert knowledge that criminal law has never in its history solved any social problems. With particular reference to the field of organized financial crime, one will have to be prepared for a race between the hare and the tortoise. Nevertheless, the use of criminal law seems to be of utmost importance for a variety of actors in publicly distancing oneself from the 'shark-capitalists'. As recent cases of tax fraud and its prosecution in Germany have shown, this opens the stage for all political parties, all interest groups, industrial associations as well as unions, to demonstrate a broad consensus in society about basic values like honesty, trustworthiness and respect for the law. Even secret services and intelligence agencies are involved in the investigations to show what a force to be reckoned with the financial criminals are. There is a political scenery developing which highlights the war against financial crime with as much prominence as it highlights the war against drugs, the war against terrorism and all the other 'wars' going on.

'Modern' criminal law designed to tackle financial crimes has undergone a significant change not only in its normative structure, but also in its strategies of prosecution and law enforcement. Definitions of offences in criminal law have

relaxed the 'old-fashioned' structure of certainty and definitions related to protected legal interests. The structure used to be unambiguous, but now appears vague. Procedures of prosecution and adjudication are no longer strictly bound to formalities and guarantees of rights. Instead, procedures are approached as flexible strategies of social risk management and social control.

Characteristics of the definitions of offences in criminal law in the field of financial crimes therefore include the vagueness and ambiguity of definitions related to protected legal interests (for example 'the efficiency of the market', 'the stability of the financial market'). This opens the field for a strategic use of criminal law ruled by the principle of opportunity in the narrow legal sense and in a broader sense of applying criminal law to market phenomena in the light of higher-ranking political-economic interests. The inflationary use of blanket clauses can be interpreted in the same context. Additional regulative features are the extensive use of offences of endangerment and vague standards of due diligence. It is quite unpredictable which cases of deviant or disturbing behaviour on markets will be considered as civil law cases of tort, which ones as administrative law cases of business inspectorate, which ones as criminal law cases of financial crime and which ones would be considered just as bad business ethics.

Characteristics of investigation in the field of financial crime include a gradual shift from suspicious facts to typologies of risky/unusual behaviour and investigation by means of monitoring, data mining and data research. As the shape of the elements of crime gets fuzzy, the decision whether the facts of a case prove a violation of law becomes undetermined. Monitoring and other tools of market audit can 'compensate' this uncertainty by providing information on possible developments leading to violation of the law. The involvement of secret services and intelligence agencies in this kind of investigations points up that the paradigm has changed from a reactive approach on the basis of facts to a proactive approach on the basis of scenarios and data analysis. Risk monitoring, risk assessment and risk management are keywords of the paradigm. The intervention of law enforcement agencies follows up this rationality by the strategic use of the public (media) effects of investigation, for example the negative publicity of investigations for the suspects is not concerned as a possible violation of the presumption of innocence but is used as a 'desired spin-off' for risk management politics. The prosecution of senior management in the high-tech industry under the suspicion of being involved in a 'network of bribery funds' (the German case of Siemens) in this sense can be staged as the expulsion of the black sheep and as precondition for the 'recovery' of business ethics.

The characteristics of criminal prosecution and procedure change in a fundamental way under these surrounding conditions. Criminal law in action turns to an 'event' with a certain communicative function in social debates and strategies of managing social risks. This evolves from the impression ordinary people have that the responsible persons in the business have gotten out of hand. The function is to 'blame and shame' them and to touch their sore spot. This leads to an increase in the importance of the (publicly celebrated) preliminary proceedings with a corresponding decrease in the importance of the trial. The corresponding events include the searching of offices under the attendance of camera crews, raids at companies, the confiscation of assets, and spectacular press conferences held by prosecutors. Prosecutors and commenting politicians aim at popular outrage, and criminal cases herald moral crusades (just recently in Germany tax fraud cases involving the Liechtenstein-connection led to a campaign against 'the anti-social rich'). The prosecutors take over the role of the heroes in the criminal justice system with a decreasing importance of the role and the power of judges. Quite a lot of cases are even settled without a formal indictment and a trial on a 'contractual basis' of (financial) sanctions bargaining.

A characteristic motto for this kind of regulatory criminal law and legal practice can be found in the field of anti money laundering regulations and politics: 'from a rule based to a risk based approach of law'. This development corresponds with a 'flexible response' design of regulations and sanctions and the decline of safeguarding principles and coherence in the law enforcement process. Developments like the one outlined in this paper show that it is time for a critique of the rise of instrumental rationality in law and legal practice and for a rediscovery of the power limiting gospel of law and justice.

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