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Correcting Society by a Corrected Sociology of Law?
Or: What If Sociology (of Law) Resembled Lobbyism?

Introduction

Correcting society refers to how modern society deals with the societal consequences of functional differentiation (unjust distribution of wealth, ecological problems, etc.; Luhmann 2013[1997]: 124ff.; Kjaer 2014; Thornhill 2014). For decades, sociology of law focused on the role the law (Teubner) and the state (Willke) played in taming idiosyncratic social systems, i.e. making them reflect the consequences of their recklessness. Meanwhile attention has shifted to other players like NGOs, protest movements or investigative journalism (Mölders 2015, 2017). The mere length of such a list hints at a second meaning 'correcting society' might gain. Today, there is an unprecedented stock of knowledge on the barriers steering, planning or correcting face. But this does not prevent ever more social entities from designing ever more refined control techniques (Münte 2017; Bröckling 2016; Leendertz 2015). Correcting society is so ubiquitous that it serves as a characteristic feature ('*Zeitdiagnose*') of modern society.

A comparatively new perspective asks for the potential sociology (of law) itself might have for correcting society. This sociology aims at evoking responsivity within the law which is still seen as the most important force for ordering society. Law regulates what can be expected from and within a society. This is Marc Amstutz' (2013) anchor point for his critical systems theory of law. Basically, he holds that a social theory intending to reach the law has to use the medium of jurisprudence as an academic discipline ('*Rechtswissenschaft*'). After introducing this model, an example is discussed, namely Gunther Teubner's (2014) proposal that a sociological understanding of networks could serve as an added value for

jurisprudence, even for legal doctrine. Taken together, we might expect that if a sociologically enlightened concept of networks (Teubner) entered textbooks or legal commentaries used in legal decision-making (Amstutz), we would witness a legal sociology able to correct the law.

My thesis for why such developments remain absent is that these considerations show a blind spot in that they exclusively focus on the factual dimension ('*Sachdimension*'), e.g. by asking whether jurisprudence has an adequate understanding of networks. What remains unseen are social and temporal aspects which are presented subsequently. In short, in order to evoke responsivity within the law, any social theory would have to resemble lobbyism which could be neither possible nor desirable. An alternative would be to wait for unintended or unplanned spillover effects. Thus, this seems to contradict the second meaning of 'correcting society' sketched above: not thinking of how to come to impacts is not considered an option.

Critical Systems Theory of Law

According to systems theory, the legal system's societal function is conflict resolution by establishing and stabilizing normative expectations (Luhmann 2004[1993]). In contrast to cognitive expectations, normative ones are maintained in case of violation. If you expect a member of your staff to be a good singer, you might have to learn and adjust your expectation hearing his or her voice in your company's choir. If s/he is not fulfilling his or her contractually fixed tasks, you won't change the corresponding expectation but making him or her learn and adapt to it.

This very brief account already points to the central meaning expectations gain for this kind of thinking about the law. Normative expectations are characterized by being maintained even if they are disappointed. Of course, this cannot mean that what a society expects (the law to defend) would not change over time. Thus, the law needs a constant proliferation of updates on which expectations it should be ready to maintain. How this is done (best) is one of the oldest and most fundamental questions for any legal sociology (cf. Bora 2016).

For classical systems theory, the crucial point is that any novelty, any information is proceeded in terms of what has already been developed. It cannot, for instance, take over the information "people think being

married is an outdated prerequisite to live together" like inserting it into its source code. It will have to translate it in order to keep it compatible with its information processing and its memory which is applicable law ('*geltendes Recht*'). This classical stance emphasized the aspect of processing while leaving the input-part – how a changed expectation made itself known to the law – far more open.

It is this point, Marc Amstutz' critical systems theory of law starts with. Precisely, he asks whether a (more) critical version of systems theory itself could act as such an input. Can insights that intend to change the state of scientific, sociological knowledge *also* irritate the law, i.e. stimulating it to become aware of a legal problem untackled so far? Amstutz claims that this points to a blind spot in Luhmann's original sociology of law. There are no mere descriptions (whether critical or not). Any (social-)scientific description of the law always affects law and science *at the same time*. This could be elaborated in abstract theoretical terms. But this argument aims at something practical. Descriptions cannot control their uptake, they spill over (Fuchs 2013). While this is an in-principle-argument, Amstutz does not leave it at that.

Although any such description also affects the law, only some succeed in reaching it, in systems theoretical terms: only some turn out to be relevant irritations, i.e. meaningful from the legal perspective. Amstutz submits that there is a high responsivity for scientific communication in legal processing. Practically, judgements refer to scientific literature, e.g. commentaries, juridical journals, or textbooks. In particular, this applies when judges find themselves in a state of uncertainty. This coupling or script: if in doubt, look it up (and you know where!) is so strict that Amstutz speaks of "regular irritations". They only become regular because there is, following Amstutz, a medium able to transfer foreign (here: scientific) expectations to the law, still with the assumption that the original information must be translated. This medium is jurisprudence ('*Rechtswissenschaft*'). Judges visit jurisprudential studies on a regular basis. Thus, for a critical systems theory of law intending to correct the law – as a modest share in correcting society – the crucial question seems to be: How to enter this kind of literature?[1]

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[1] In remarkable convergence, Niklas Luhmann (2004[1993]) and Ludwik Fleck (1979[1935]) emphasized the meaning of textbooks for producing facts and evidence.

The Law and Sociology's Added Value

Sociology's products cannot help but spill over to other contexts where they have to and will be translated (Renn 2006). Still, this does not answer the question for conditions that facilitate for sociology to make a difference, more precise: for producing irritations that stimulate the law to check whether its problem-solving routines (laws, norms, procedures) work properly – in its own terms.

Gunther Teubner (2014) discusses the problematic relationship of law and social theory extensively. Among the many obstacles presented, we are already familiar with this crucial point: "Any authentic transfer of knowledge from social theory into the law is an impossibility. It cannot succeed because of the unyielding autonomy of the legal system" (Teubner 2014: 204). Translations are indispensable. While many systems theoretical accounts would stop there, Teubner suggests that it was possible for social theory to initiate translations within the law. This does not occur "as a mere transfer of identical meaning in another language, but in such a way that the law's own terminology allows itself to be challenged, in accordance with the conditions of its inner development logic, by social theory constructs, and thereupon to be inspired to create quite differently structured new formations. It is only the sequence (executed within the law) of challenge – reconstruction – norm change – observation of effect that generates the doctrinal added value" (ibid.: 209). Added value means that the law benefits from sociological insights in its very own terms. Teubner's understanding of responsiveness, as the law's capacity to be irritated by social theories, refers to the assumption that it had not gained this value without considering sociology.

Teubner gives a concrete example for this abstract model: the "publication bias". Working on effective drugs against serious but rare diseases, private and public institutions formed a Public-private-Partnership (PPP) network, based on bilateral agreements. A publication of experiments giving evidence of negative consequences was suppressed. But, the bilateral agreements between research institutions and pharmaceutical companies authorized this behavior legally (ibid.: 183ff.). To sociologists, Teubner explains, this does not come as a surprise. On the contrary, this case would serve as a classical example of "network failures" which, for instance, Manuel Castells (2000)

thoroughly described. This means, in short, if the law translated what sociology knows about networks, this publication bias could be treated and future problems prevented.

In a thought experiment, Teubner translates sociological knowledge on networks – via several stops – into legal doctrine. He identifies the doctrine of connected contracts, developed for financed purchase agreements, "to be the most suitable for networks […] Network versus connected contracts – this difference between analysis based on social theory and juristic classification holds the potential for generating the doctrinal added value we are seeking" (Teubner 2014: 211).

In his earlier writings, Teubner described the potential any single legal decision might gain in evolutionary terms as an "interweaving of episodes" (Teubner 1993[1989]: 60f.). Legal process is conceived of as "the interface between normative expectations as mechanisms of variation and legal decisions as mechanisms of selection" (ibid.). On the one hand, any legal decision refers back to established legal norms. On the other hand, legal process may serve as a point of departure for future developments in the law. This enables "insights gained in one trial to be applied to legal doctrine, and thus to become part of the 'memory' of the law" (ibid.). In short, one selected variation, one decision of a new kind might make it into legal doctrine and become a prerequisite for respective cases to be judged.

But what could make a judge attentive to, for instance, a sociological concept of networks? The meaning of an added value, on the one hand, is more concrete than you might expect from such an abstract theory. On the other hand, there may be other than factual factors – without referring to a "post-factual era".[2]

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[2] I am guilty of exclusively focusing on the factual dimension discussing added values, as well (see Mölders 2013).

Discussion: Critical Systems Theory of Law's Blind Spots

Amstutz posed the question: What is it that systems theory does not see – with eyes open? His answer was that there is no such thing as mere description but that any theory of the law affects the law at the same time. But then it gets somewhat puzzling that even theoretical insights that explicitly point to added values from a legal perspective do not spill over. My concluding thesis is that this observation makes visible a blind spot on the side of a critical systems theory of law: its focus on the factual dimension. So, we might vary the question: What is it that this stance does not see? On an abstract level, I will argue that the content of an information only refers to one of (at least) three meaning dimensions – the temporal as well as the social dimension are missing.

The social dimension would ask for whom to involve or to address to make sociological insights accessible to the law. Bearing in mind Teubners model of an interweaving of episodes, judges served as an outstanding address. Amstutz would suggest a similar target, yet his claim was to make sociological readings appear in sources judges use in decision making: commentaries, textbooks, handbooks, etc. More concrete recommendations are easy to come up with: Likely, there is only a handful of relevant publishers for this kind of publication. Is there a way to publish social theory in juridical textbooks? You could invite relevant program directors. You could organize trainings, seminars and open to judges, publishers, etc. You could connect to your university's legal faculty, asking whether you might recommend some publications or conduct a sociological seminar series for law students (which might have the added value of encouraging reflexive capacities at an early career stage).

As regards the temporal dimension, an obvious candidate is finding an opportune time, a so-called window of opportunity (Geels & Schot 2007). Maybe less obvious is the potential of persistence, repeating irritating information over time and across many different channels. This is exactly what Michael Hutter (1992) observed and called "talking the law into co-evolution". Yet, this case study referred to pharmaceutical companies irritating the law persistently over decades in countless conversations until pharmaceutical patent law was developed.

What I sketched as an irritation design that might help sociology on its way to a (more) responsive law, can empirically be found in how law firms specialized in insurance law approach judges respectively the legal system. Such lawyers write topical commentaries, textbooks, standard references, edit relevant journals – in short, they exactly reach the spots judges look at if they need orientation. Furthermore, they do not exclusively rely on explicit knowledge but conduct seminars and courses on insurance law, engage in universities by funding booster clubs ('friends of the university') as well as by taking part in lectures. Thereby a rather implicit familiarity is fostered.[3]

Likely, any critical theory would have to act similarly to attain a comparable impact. We might have good reasons to reject the notion that sociology is to resemble lobbyism. But by asking how to initiate legal translations one enters an already crowded field full of other well-equipped and skilled players.

Conclusion

On the one hand, there is a lot of potential for improvement a responsive sociology of law could give a try. Some social and temporal factors unconsidered so far were discussed. On the other hand, we may conclude that the entire debate around responsivity is a display of correcting society in the second meaning introduced above, namely as a society unable to stop refining attempts to influence others whilst knowing about fundamental barriers.

What all examples so far had in common was that sociology approached the law. Only looking for (respectively in) this direction may well be another bias. Consider the recent case of Judge Michael J. Davis, a Senior United States District Judge of the United States District Court for the District of Minnesota. Judge Davis had to decide on six young Somali Americans who had schemed to fight in Syria, eventually pleaded guilty to trying to join the Islamic State. The standard sentence for an American is fifteen years in prison. But the judge was troubled as some of the defendants appeared to be "malleable youths who'd been

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[3] Ironically, this information is extracted from reporting by investigative journalists that also seek to irritate the law – by other means (https://correctiv.org/recherchen/justiz/artikel/2017/02/15/anwaltskanzlei-bld-maechtiger-gegner-fuer-versicherte/).

ensnared by sly recruiting tactics" (Koerner 2017). To cut a long story short, Davis found himself irritated, in a state of uncertainty and the usual sites of orientation and information could not help. There were no legal means to deal with membership in terroristic organizations beyond criminal law. Davis discovered the concept and practice of deradicalization and its most prominent proponent, German researcher Daniel Köhler. In October of 2015, Davis sent parts of his staff to the Europe to meet with deradicalization experts. At the end, Davis came up with the delicate project of the creation of the Terrorism Disengagement and Deradicalization Program, the first government initiative of its kind in the US.

This story started with a doubt or an intuition of a single judge. His novel and deviant decision could in principle (not least dependent on whether the defendant will be qualified as 'deradicalized' in some near future) spread wide, other instances might select this variation. If deradicalization programs turn out to work as planned, this surely had an impact worth of naming 'correcting society'.

Returning to a responsive sociology of law: In principle, again, judges might approach sociologists (of law) if in doubt, just like Michael J. Davis asked Köhler who studied religious studies, political sciences and economics and holds a 'Master of Peace and Security Studies'.[4] Yet, Köhler gained scientific as well as extra-scientific reputation because his research was both, original and turned out to work in practice, at least on a small scale so far. So, the final conclusion of this paper would be, whether you want to talk the law into correction or you trust in co-evolution and spillover effects: solid, original and maybe counter-intuitive legal sociological findings would be a good start.

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[4] See http://girds.org/staff.

References

Amstutz, Marc (2013): Der zweite Text. Für eine Kritische Systemtheorie des Rechts. In: ibid. and Andreas Fischer-Lescano (ed.): Kritische Systemtheorie. Zur Evolution einer normativen Theorie. Bielefeld: transcript, 365–401.

Bora, Alfons (2016): Sociology of Law in Germany: Reflection and Practice. In: *Journal of Law and Society* 43 (4), 619-646.

Bröckling, Ulrich (2016): Zukunftsmanagement zwischen Planung, Selbstorganisation und Prävention. In: Ariane Leendertz and Wencke Meteling (ed.): Die neue Wirklichkeit. Semantische Neuvermessungen und Politik seit den 1970er-Jahren. Frankfurt a. M.: Campus, 269–280.

Castells, Manuel (2000): The Rise of the Network Society. Oxford: Wiley-Blackwell.

Fleck, Ludwik (1979[1935]): The Genesis and Development of a Scientific Fact. Chicago: University of Chicago Press.

Fuchs, Peter (2013): Die Unbeeindruckbarkeit der Gesellschaft: Ein Essay zur Kritikabilität sozialer Systeme. In: Marc Amstutz and Andreas Fischer-Lescano (ed.): Kritische Systemtheorie. Zur Evolution einer normativen Theorie. Bielefeld: transcript, 99–110.

Geels, Frank W.; Schot, Johan (2007): Typology of sociotechnical transition pathways. In: *Research Policy* 36 (3), 399–417.

Hutter, Michael (1992): How the Economy Talks the Law into Co-Evolution: An Exercise in Autopoietic Social Theory. In: Alberto Febbrajo and Gunther Teubner (ed.): State, Law and Economy as Autopoietic Systems. Regulation and Autonomy in a New Perspective. Milan: Giuffrè, 265–293.

Kjaer, Poul F. (2014): Constitutionalism in the global realm. A sociological approach. London, New York: Routledge.

Koerner, Brendan I. (2017): Can you turn a terrorist back into a citizen? In: *Wired*, 1.24.17. Retrieved from https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/.

Leendertz, Ariane (2015): Das Komplexitätssyndrom: Gesellschaftliche 'Komplexität' als intellektuelle und politische Herausforderung in den 1970er-Jahren. Max Planck Institute for the Study of Societies. Cologne (MPIfG Discussion Paper, 15/7). Retrieved from http://www.mpifg.de/pu/mpifg_dp/dp15-7.pdf.

Luhmann, Niklas (2004[1993]): Law as a Social System. Oxford: Oxford University Press.

Luhmann, Niklas (2013[1997]): Theory of Society. Volume 2. Stanford, CA: Stanford University Press.

Mölders, Marc (2013): Kluge Kombinationen. Zur Wiederaufnahme systemtheoretischer Steuerungskonzepte im Governance-Zeitalter. In: *Zeitschrift für Rechtssoziologie* 33 (1), 3–28.

Mölders, Marc (2015): Der Wachhund und die Schlummertaste. Zur Rolle des Investigativ-Journalismus in Konstitutionalisierungsprozessen. In: *Zeitschrift für Rechtssoziologie* 35 (1), 49–67.

Mölders, Marc (2017): Shaping pressure: on the regulatory effects of publicity. In: Regine Paul, ibid., Alfons Bora, Michael Huber and Peter Münte (ed.): Society, Regulation and Governance: New Modes of Shaping Social Change? Cheltenham: Edward Elgar, 121–137.

Münte, Peter (2017): Improving modern society: governing science and technology by engineered participation. In: Regine Paul, Marc Mölders, Alfons Bora, Michael Huber and ibid. (ed.): Society, Regulation and Governance: New Modes of Shaping Social Change? Cheltenham: Edward Elgar, 166–180.

Renn, Joachim (2006): Übersetzungsverhältnisse. Perspektiven einer pragmatistischen Gesellschaftstheorie. Weilerswist: Velbrück.

Teubner, Gunther (1993[1989]): Law as an Autopoietic System. London: Blackwell.

Teubner, Gunther (2014): Law and Social Theory: Three problems. In: *Ancilla Iuris* (135), 182–221.

Thornhill, Chris (2014): Rights and constituent power in the global constitution. In: *International Journal of Law in Context* 10 (3), 357–396.