

THE PARADIGM SHIFT OF A KEY CONCEPT NORM PRODUCTION IN CONTEMPORARY SOCIOLOGY OF LAW IN EUROPE

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Foreword

Since the Enlightenment, both the notion of production and the production paradigm have been at the core of western culture. From their inception new sciences such as sociology gained considerable influence by studying the everchanging facets and multi-dimensional impact of the issues related to these conceptual tools. Sociology of law also has been bound up with concern for their heuristic value. Indeed, the development of this disciplinary area is closely related to the theory and practice of how, when and why legal rules and legal systems are constituted, replaced, processed, and so forth. The aim of this paper is to look at the way in which contemporary European sociology of law approaches and discusses these variables.

Europe: a Socio-Legal Laboratory

The reasons for studying norm production in relation to the sociology of law in Europe at present are quite substantial.

The notion of production and the production paradigm are primarily European conceptual devices. Their geo-cultural origin accounts for the fact that they are embedded in specific socio-political projects, i.e. that institutional (not merely economicist) preconditions and prospective scenarios are inherent in their scientific meaning. This normative embeddedness is now gaining a new intensity, because at present a somewhat revisionist, constituent process is taking place in Europe in a continental dimension. This is not only giving socio-legal analysis of European legal

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constructivism a special prominence, but is putting socio-legal theorizing to a real test. Indeed, if it is true that the compatibility of a plurality of unstable legal arrangements is at the core of *Strukturbildung* in the European Union, scientific reflection about legal decision-making at transnational, national and regional levels cannot rely on routine forms of inquiry and ready-to-use formulae, but has to fit with the theory and practice of competing socio-legal rationalities, and with strategic games of social complexity (Arnaud 1993). For nation-state legal systems this is even more uncomfortable, for what is at stake is precisely the deconstruction of their traditional cultural and normative hegemony (Olgiati 1995).

Furthermore, a number of material and intellectual developments have recently undermined classic conceptualizations. A review of the current literature shows that both the notion and the paradigm of production have been increasingly challenged by a new theoretical device, that of communication. Increasingly communication, as either a notion or a paradigm, is conceived of as an application of universal pragmatics, as a refined type of logic, linked with social relationships and therefore strictly related to the rules and standards of all sorts of discourses and practices (Wroblewski 1993).

Undoubtedly an appraisal of the new scientific tools provides evidence that certain transpositionings have occurred, of meanings and projects, as well as of institutions and environmental conditions (Woodiwiss 1990). In the case of legal experience the idea of law as an object, technique or instrument, that is, as a pattern, standard or measure of social progress is increasingly giving way to the idea of law as a sign or symbol of mimetic or semantic interactions. Consequently one can expect, for example, that legal systems will increasingly incorporate circular models of power relations, moulding their traditional hierarchical structures to cope with recursive or retrospective causalities.

How does contemporary European sociology of law conceive the matter and thematize its epistemic conditions?

This essay is not concerned with the dilemma as to whether the rise of the notion and paradigm of communication in current socio-legal debate constitutes a mere mending device, a sort of secondary adjustment, or a real alternative to the classic notion and paradigm of production. Rather it attempts to clarify basic problems stemming from the dominant mode of norm production in present-day Europe, and to outline how and why European sociology of law is theoretically and operationally engaged with them at present.

For a cluster of reasons that will become apparent, the focus will be on an emblematic and highly selective process of legal creation and change. This is the

process which European continental legal doctrine still takes as a reference normative model, namely, the official imposition of a binding decision by a competent public authority, or, in a word, positive law.

Approaching the Fieldwork: the Programmatic Methodology of European Sociology of Law

In order to approach the fieldwork correctly, it is necessary to outline the theoretical-methodological guidelines of the study.

Notwithstanding a number of external constraints, a programmatic methodology defines the identity of sociological thought in Europe. It states that any scientific activity, either theoretical or empirical, must (1) refer to a general conceptual scheme, (2) accommodate problematic phenomena raising fundamental social questions, and possibly (3) build up new generative models by developing a more advanced theoretical understanding of the field (Boudon 1993). The guidance afforded by specific work hypotheses is absolutely necessary.

In the sociology of law two work hypotheses are pivotal according to Jean Carbonnier. The first is the so-called evolution hypothesis, that accounts for the historically determined development of a given legal experience, and so refers to the space-time mobility and relativity of law. The second is the structure hypothesis, that accounts for the position and shape of legal rules and systems in given contexts, and so refers to the space-time plurality of legal phenomena as well as the plurality of forms of legal pluralism. Both hypotheses substantiate two fundamental theorems embodying the constitutive postulates of the discipline, the underlying assumptions "without which sociology of law is simply impossible". The first theorem states: "law is bigger than formal sources of law". This implies that: (a) "law is wider than legal norms, rights, *règles du droit*, etc.", and (b) "law is wider than legal disputing, jurisprudence, etc." The second theorem states: "law is smaller than overall social interactions". This implies that: (a) "law is a mere lining, covering the external surface of social relationships", and (b) "there are social and individual standards that are not law, and law does not even consider or considers and refrains from dealing with them" (Carbonnier 1965).

Clearly these hypotheses have to be applied to particular sets of variables or in given contexts. The aim of this contextualization, however, is not mere data collection, or the arrangement of clusters of information, but creative reaction to what has been perceived as socially problematic. According to this school of thought, this may be achieved if two criteria are met. (a) Scientific understanding (and not mere description) has to go hand-in-hand with problem-solving (and not mere *ad hoc*)

explanations. (b) The explanatory dimension of such problem-oriented understanding has to mesh with an interpretative account of basic epochal trends in social dynamics. This is required to avoid the transformation of sociological analysis into “cameral science”, as Schumpeter would put it, and consequently to foster the proposition of new models of general value.

Indeed, to the extent that both explanatory and interpretative insights are congruently connected, the study is further enlarged up to the point that the social scientific implications of the analysis are also explicitly taken into account. The theoretical and practical intertwinement between sociological theorizing and the broader process of social construction is thus the core issue of what is meant by the notion of theory as a generative model (Boudon 1993).

As we shall see, the methodological benchmarks that have been just outlined are highly relevant to our discussion. Not only do they sustain the most advanced socio-legal studies devoted to the topic of this study. They also explain the main trends in its thematization. The question on the agenda is clear: Why can contemporary sociology of law in Europe neither limit its interest to the analysis of the factual genesis of law, nor be satisfied with a critical study of doctrinal and institutional devices, but rather is compelled to consider the current mode of norm production as a veritable social puzzle, absolutely requiring new theoretical and practical solutions, since its inner logic endangers the basic evolutionary conditions of contemporary society?

Needless to say, to put law and the sociology of law in a given context is a mere nominalistic exercise unless the normative *esprit* that characterizes it is operationalized and embodied in a broader reflexive strategy. One could therefore reformulate the same query as follows: Why does the need for a proper sociological theory of law, i.e., for a reflexive use of socio-legal conceptual devices, correspond in contemporary Europe to a widespread need to put under theoretical control both the conditions and the processes of production and change of law, up to the point of enhancing a paradigm shift of the same disciplinary area?

From the Past to the Future: the Present as a Problem

The historical sedimentation of legal experience in Europe requires that in dealing with the above question longitudinal, in-depth, relationships between the past and the present are put to the fore. One can directly perceive the spatial-temporal constraints as well as the pressure forces involved. However, while this is necessary, it is not sufficient. The premises sketched above show clearly that the issue at stake is also

the cleavage between the past and the future. This cleavage constitutes the present as the problem. That should not be surprising. Not only is it absolutely consistent with classic European sociological thought. It is also the only plausible way to focus on the notion and paradigm of norm production in a society where positive law is still a primary model of law-making. After all, is it not true that this dominant mode of norm production is typically future-oriented (Luhmann 1972)?

In order to make the issue clearer, let us briefly draw a sort of understanding net, or a cognitive frame. As is well known, questions about the genesis of the law and its spatial-temporal variability were in the past assessed by standards radically different from those of contemporary society. Ancient peoples were well aware that law artificially produced by occasional decisions and enforced through imposition was fundamentally threatening for the order of social dynamics. Such laws could be cognitively and normatively inscribed neither in the original order, or order of prime cause, of a natural or divine *jus eminens* (eminent law), nor in the everlasting legal order of the *mores majorum* (ancients' customs). Therefore, they considered legal change to be a social evil, a process or phenomenon contrary to the nature of things, and they emphasized the immutability, or at least the durability of law as a basic social and normative device.

Of course, legal variability was also for ancient societies an unavoidable fact. Thus, legal innovation was accepted in a casuistic way only, and only to the extent that it was sustained by special conditions of urgency and necessity. This confirmed, rather than contradicted the perennial validity and efficacy of the given socio-legal system as a whole. Consequently new rules were not conceived as a sort of product, since law-making was seen only as a reflexive act of discovery, imitation, or elaboration of pre-existing standards. Such an act was made possible by typically cognitive ritualistic processes related to certain cosmic regularities or seasonal cycles of the *Alma Tellus* (Mother Earth). Even the law produced and imposed *ex novo* by virtue of mere power relationships derived its legitimation from superior normative sources (Maine 1960).

When a fully disenchanted model of law emerged, the new rationale of the mode of norm production was a complete rejection and reversal of the above rationale. In western (Europeanized) society in particular, production and change of law by means of mere conditional and contingent decisions are now commonly valued as a means of promoting social transformation. Moreover, they are considered as a given, a taken for granted fact. Far from being perceived as an evil, norm reproduction is simply assumed to be a necessary process. This is so much the case that law itself appears to be ... a permanent variable! This routine variability is still so basic and widespread that dominant European positivistic legal doctrine

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thematizes it as a topical achievement of modern civilization. To the extent that it fosters conceptually constructivist political projects, the oxymoron is considered rational by definition!

For the sociology of law in Europe, on the contrary, this issue has always been a problem. Following the programmatic methodology described above, some socio-legal scholars consider that for any social variable, as well as for society at large, evolutionary processes entail not only achievements and results, but also failures and limitations. Equally, structural constraints might reduce social complexity, but might also give rise to a broader complexity. Thus a wider range of items has to be taken into account and a more refined approach has to be developed to deal theoretically and practically with law-and-society (Olgiati 1993).

Undoubtedly awareness of this contradiction explains the recurrent scientific interest of European socio-legal studies in pre-modern and non-western legal experiences as well in comparative analysis of modern and ancient laws (Unger 1976). The same can be said of recurrent claims for old and new forms of natural law theory. It also explains why evolutionary scenarios, whether positive or negative, about positive law have always been the main concern of those schools of thought, in particular liberalism (Comte) and socialism (Marx), which have predicted the withering away of its reference mechanism, the State. Thus, in a nutshell, if there is an image that epitomizes European sociology of law with regard to the issue, undoubtedly this is... Hamlet!

Were ancient people right when they rejected the idea of an artificially constructed law? And, if contemporary western society cannot turn back to the past, what will it be in the future? Significantly, the 'What to do?' question is now at the core of the discussion. In fact, from any theoretical perspective, what puzzles is nothing less than the extent of what we might call - even if we ignore authors as varied as Henri Bergson and Ulrich Beck - the organized irresponsibility of positive law vis-à-vis European society at large!

To examine this serious topic, we shall look in later sections in detail at three pivotal dimensions of norm reproduction in Europe: positivization, codification and litigation. The mutually disorganized interplay between legal decisions, legal institutions and legal actors will immediately become apparent. To stress the relevance of each of these variables three different approaches - the systemic, the phenomenological and the empirical - and three different cultural patterns, for brevity referred to as the German, the French and the Italian, will be assumed as the contextual frameworks.

The Risks of Positivization: Towards a Superpositive Sociology of Law

Among contemporary European scholars who been influential in orientating socio-legal analysis towards the theoretical problem of positive and negative trends in the current mode of legal production, a special place is certainly due to Niklas Luhmann. With regard to this topic, Luhmann's thesis is radical but absolutely clear. He claims that the process of positivization of law - i.e., its irrepressible and relentless (because structurally constitutive) reproduction and changeability - has now reached such a stage that it constitutes one of the most serious and worrisome phenomena of contemporary society.

At first sight it would appear that this condition basically concerns practical aspects of legal experience: the deficiencies, imbalances and perversions inherent in the programming of its operational devices. On a closer inspection, however, the crucial point of positive law appears rather to be its theoretical status. The preconditions of its validity cannot be theorized by traditional modelling any more. But more than that, the gap between traditional modelling and daily legal practice has reached such a conceptual impasse that even the evolutionary performance of differentiation of the broader social system is likely to be jeopardized. What is needed, therefore, is a radical change in legal theorizing that could be, at the same time, plausible, i.e., intersubjectively constructed through a rational discourse, and socially adequate, i.e., grounded on primary social issues (Luhmann 1980).

To account for these clear statements, the relevance of which can hardly be overestimated, let us briefly review Luhmann's argumentation as exposed in his book *Ausdifferenzierung des Rechts* (Luhmann 1981). Starting from the idea that any evolutionary process implies (1) mutation, (2) selection and (3) insulation, Luhmann notes that since the eighteenth century European (western) law has (a) developed conflictual normative expectations, (b) differentiated decision-making programmes and (c) established *ad hoc* legitimating criteria. Through positivization western law has created the conditions to manage its own validity and the functioning of its self-reproduction by extending its own functional and structural limits to society at large. In doing so it has also oriented the whole society towards more generalized levels of social reproduction and change.

To reach these selective results, positive law had to accommodate the fact of common experience that factors stimulating innovative patterns also create disturbances and opposition. Yet the leading principle of real life refers not to mechanisms of normative variability, but to those of stability. In the long run, it is this simple factual experience that has made co-evolutionary compatibility of positive law and social dynamic increasingly difficult of achievement. How could legal

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positivization stabilize normative expectations while at the same time continuously changing the legal setting to foster socio-legal innovation? Retrospectively one easily realizes how positive law tried to neutralize the problem. Following the requirements of its functional differentiation, paradoxically it reinforced its constitutive asset. In the course of relatively autonomous processes of restructuration, it oriented its decisional programmes more and more to the future.

For some time legal theory and jurisprudence managed to keep under control the resulting legal over-production. But as an unstable, unsystematic and asynchronic mass of norms was matched with excessive and incoherent, albeit potentially successful normative expectations, the process became almost uncontrollable. To meet this issue also, positive law turned into a veritable responsive law. But this attempt to use the unpredictable outcome of every legal decision as a parameter for future legal change made it even more apparent that the substantial frame of reference for assessing the validity of positive law lay simply in the social value that society ascribed to... undetermined temporal lags!

Of course, the fact that positive law does not really control its own mechanisms and that future events are *de facto* the primary source of its reproduction, is not a structurally or technically dysfunctional feature. Since the capture of the Bastille, European society has understood that the efficacy, legitimacy and validity of official law are grounded in the temporal success of its foundation, that is, in the prospective results of a victorious revolution. The fact is that today this awareness concerns not only the *Grundnorm*, but the functioning of every part of the legal system. Thus, to the extent that unstable preconditions lead to continuous discretionary legal changes, the lack of any closure device makes the whole *ratio juris* of positive law unreliable in normative terms.

This explains why the social dangerousness of positive law for contemporary society lies not just in its amorality or a lack of meaning, but in the improbability of its further enhancing the conditions of its own successful, but merely self-referential and one-dimensional, evolutionary reproduction vis-à-vis social experience. In fact, as Luhmann puts it,

it is improbable that society could accept as a law expectations that one cannot even know because they have become boundless. It is improbable that formal legality, lacking substantial ties of value, could be considered legitimate. It is improbable that one could accept certain decisions just because he/she took part in the legal proceeding that produced them. It is improbable that in the case of normative expectations resistance to delusion could be resolutely

affirmed, while at the same time learning from actual results is also needed. (Luhmann 1981)

To sum up, if at present positive law cannot even control its formal certitude, can no longer protect social actors from social complexity and contingency, does not any longer meet the general needs of society, up to the point of putting into question basic evolutionary patterns of social dynamics, one may wonder: is it still possible to preserve both social and legal variability? Is it still possible for complex societies to achieve a relatively congruent evolutionary interdependence between law and society?

Interestingly, Luhmann gives a clear, but highly selective answer to these questions. He says that there is a need for a paradigm shift from a mere normative to a proper sociological account of the validity of positive law. For Luhmann, in fact, the basic problem is not the contingency in legal reproduction (for this is a constitutive pattern of contemporary society), but rather the level and type of rationality that sustains legal positivization as a stabilizing social device. Consequently, what is needed is not a return to a pre-modern type of law, but an up-to-date theory of law which will overcome current normativistic dogmatism and positivism. For the normative validity of law to be built upon a mere normative discourse has become intolerable. Thus a true theory of law-in-society is required. This will have to be a sociological science of law, the adequacy of which will be assessed by its capacity to enhance new transformative, and not merely declaratory or descriptive guidelines. Unfortunately, however, such a sociological theory of law is, according to Luhmann, in mere embryonic form at present. This, he states, is likely to make the above-mentioned theoretical impasse more disquieting and risky than ever!

The Janus-Headed Character of European Sociology of Law

Needless to say, the scanty observations above do not do justice to the analytical and discursive refinements of Luhmann's analysis. Nevertheless, they permit us to outline a staging point in our discussion.

As has been noted, the positivization of law, as a typical mode of norm production of contemporary society, has been caught in a contradiction. Because of the temporal gap between legal decision (oriented to the future) and social experience (based on the past), this sort of legal constructivism cannot deal with social dynamics adequately. Thus, paradoxically, it is precisely positive law and its related normativistic theory that might be blamed for the so-called failed promises of modernity. One can hardly overestimate the significance of the historical link between that contradiction and the decline of the glorious *Jus Publicum Europaeum*,

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the dissolution of the legal and economic standards of classical political economy, and the decadence of the legal principles and political institutions of the Enlightenment (Olgiati 1994a).

Yet Luhmann's analysis suggests that the risks and problems of positive law could be dealt with at a new and more refined level of theoretical reflexivity. He does not hesitate to assert strong claims for the adoption of sociologically oriented legal theorizing. Only a sociological theory of law could, once properly developed, incorporate into a plausible and socially adequate account both the co-evolutionary adaptation and the double contingency of law in society.

What then about such a development? Although one has to credit Luhmann for correctly pointing out the issue, it seems that he is primarily concerned with the construction of a new sociological theory of legal evolution, rather than of a new constitutional process of legal production. Apparently, he is more oriented towards a new general organizational rather than a socio-political, constitutional perspective on legal validity. To recall the programmatic methodology of European sociology of law, it seems that he is more inclined to deal with the first great hypothesis of the discipline, concerning the evolutionary mobility and relativity of law, rather than with the second, concerning the plurality of forms of legal spheres.

Yet a *tour d'horizon* of contemporary sociology of law in Europe makes it immediately apparent that, in accordance with a deep-rooted European cultural tradition, the inclination towards an Hegelian-type thematization of the *becoming* of law-in-action, does not exclude, and indeed is compensated by a parallel inclination towards a Montesquieuan-type thematization of the *being* of law-in-context. This latter mainstream is extremely active and influential in current European socio-legal studies. Interestingly, the thematization of law as a phenomenological experience is particularly apparent among European scholars who reflect a Latin-type cultural milieu and share a specific interest in the problem of legal reproduction as a political device. What attracts these legal scholars is precisely Montesquieu's problem: how to contextualize descriptive-prescriptive legal reproduction as a specific political-constitutional ordering of a given society. To put it otherwise, what puzzle them above all are the social complexity of legal experience, the plurality of legal phenomena, and the intertwined but contradictory dynamics of individual facts and values, collective movements and institutions.

Given these premises, these scholars no longer conceive of law as a norm, but rather as a field of action. Law, or better: legal reproduction, being part of an everchanging interactive social strategy, is an ensemble of conflicting rationalities, the recursivity or retrospective effects of which give rise to multiple, unpredictable

outcomes. The notion of legal field subsumes and replaces that of law, for law as such is not perceived and cannot be represented as a given product or as a programmed mechanism. But also the notion of sociology of law as a bounded disciplinary field of study is considered inadequate, as, because of the variables sketched above, it tends to fade away into the broader discourse of general sociology (Chazel and Commaille 1991).

These substantial theoretical-methodological shifts are clearly apparent, for example, in the well-known works of Boaventura de Sousa Santos. To this socio-legal scholar we owe the conceptualization of legal pluralism in contemporary society as a fact of phenomenological “interlegality” (Sousa Santos 1989). The same is basically true for the equally well-known works of André-Jean Arnaud on the current European law-making process, the logic of the structural complexity of European law, and the modelling of a complex decision-making process for “a law of the future” (Arnaud 1991, 1993).

Beside the contributions of these renowned scholars, however, the most recent work of Jacques Commaille deserves a special mention. It is worth stressing that it is entitled *L'esprit sociologique des lois* (Commaille 1994a).

The Decline of Codification: Towards a Sociology of the Politics of Law

At first sight Commaille's work is merely an account of the social, cultural and institutional conditions that have characterized the reform of family law in France in recent decades (Commaille 1994a). In reality it also contains a scientific programme for socio-legal and political studies of the reproduction of positive law in complex western society.

The outstanding relevance of Commaille's work can be appreciated if one considers the highly symbolic value of the object of study. The family and family law have a strategic function in the assessment of both private and public socio-normative order. Family issues are, at the one time, both primary organic variables and primary institutional patterns. Thus any regulatory intervention in relation to them synthesizes and activates possibilities that are embedded in the basic reproduction processes of the society.

This is taken seriously by Commaille in his investigation of the context and content of legislation. Analysing in detail the socio-legal stages of the process (such as parliamentary debates, media expressions of opinion, pressure groups' claims, cultural traditions, emerging values, and structural constraints) he demonstrates that

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the reproduction of law is a veritable field of action, not a mere procedure, since the *ratio juris* that permeates arises from the inputs of different social actors and sub-systems. He also demonstrates that the issues stemming from this multidimensional social context (such as conflicting rationalities, recursive effects, and interactional games) establish the basic deficiency, the political emptiness, of codification as a typical “mode of norm production” of the present state-form.

With regard specifically to the family law reform of the last decade in France, the evidence shows that, in the absence of a meaningful realisation, representative and bureaucratic institutions, legal proceedings and decisions simply act as distorting models, or even fictitious devices. Besides, to the extent that social dynamics press for legal validation, the correspondence between state decision-making activity and its related normative values of certainty and generality progressively dissolves. Alternatively, the more that disruptive social questions exacerbate political issues, the more the alleged strategic planning capacity of the entire legal system degenerates into a particularistic and conjunctural tool. Thus, far from establishing firm standards or manifesting the exercise of unquestionable official competencies, the process of norm production produces mere tit-for-tat practices and occasional operations. The final result, in brief, is mere legal management of elastic and changeable objects, rather than a decisive regulation of societal dynamics.

None of this denies that such legal management carries normative effects. The process is essentially the imposition of labelling or framing schemes, transfiguring the real sphere of action (*effet de principe*). It also realizes a sort of “transpositioning” of meanings and roles, deactivating the functions originally attached to them (*effet d’affichage*). It is itself conditioned by what Commaille calls “a triple euphemisation”, that is, the ideological, social and political neutralization of conflicts involving real choices between conflicting values (*effet de conjoncture*). These effects reveal even more clearly the unreliability of public apparatuses in sustaining selective political options, and the inability of legislative proceedings to control the spread of antagonistic social claims. Thus they reveal the collapse of the strategic constitutional role of the state vis-à-vis society, as well as a substantial decline in the social function of positive law vis-à-vis other socio-normative systems. In a nutshell: not only does state-produced law no longer function as a pivotal generalized medium of social control; it no longer plays any substantial political role.

Commaille’s study confirms, from a particular perspective, what is already well-known: the withering away of the enlightened, allegedly universal, liberal ideals of western modernity. Once again European legal culture is confronted with its own past. As Commaille puts it: “*Rien ne confirmerait plus cette perte d’universalisation que, précisément, ...la fin du légicentrisme*”. Codification, the model *par excellence*

of European order, has turned “*en un exercice ordinaire, sinon dérisoire, de réforme législative*”. It no longer creates, as in the last century, “*règles générales créatrices d’ordre, de sens, et de projet*”. At the same time, by contrast, the future seems menacing. Is it all this really unavoidable? Is there a plausible, socially adequate starting-point for a general socio-legal reconversion? What sort of model could foster “*la transition de paradigme*” towards a democratic society of the future?

On these issues Commaille seems to agree with Luhmann that the problem of the current mode of norm production in contemporary western society is not merely technical. It is cultural, and lies in the use of an inappropriate theoretical framework based on abstract notions and preconstituted legal doctrines. Consequently Commaille, like Luhmann, maintains that a conceptual shift is required and that only an appropriate general sociology of law can provide a way out.

Yet Commaille’s position differs greatly from Luhmann’s with reference to one basic item: the scientific status of the sociology of law as a transformative discipline. He claims that, if the decline of codification entails both the lack of a substantial political project and a political change in the overall normative resources of society, the sociology of law is called upon to make these two variables explicit and understandable. This task, for Commaille, cannot be achieved merely by overcoming dogmatism and the positivism of traditional legal culture. It requires a *quid pluris*, something more substantial.

Thus Commaille notes that historically the production of a normative order might be either conventional or social; and political legitimation might be either etheronomous or socially immanent. He also notes that social self-regulation is now increasingly dominant over conventional state law, and that a substantial democratic legitimacy could lie in the direct involvement of social actors. There is evidence that at present social self-regulation from the bottom activates the political dynamics of society at large, while state law-making neutralizes and depresses them. Commaille explicitly concludes that a comprehensive social, institutional and cultural reassessment of norm production in contemporary society necessarily requires also a programmatic conceptual shift in the perspective through which law in society is observed. If at symbolic as well as a material level law is the art of politics in the reproduction of society, then the sociology of law must become the art of the law, i.e. the sociology of the politics of law (Commaille 1994a, 1994b).

European Sociology of Law at a Crossroads

Unfortunately, as in the case of Luhmann's theory, it is impossible to convey here the argumentative subtlety of Commaille's study. Yet what has been said is sufficient to further enlarge and deepen our discussion. It has been noted that Commaille approaches both law and norm reproduction as constitutive parts of what might be called the morphology of socio-legal praxis. This approach leads him to suggest two programmatic routes of escape from the current theoretical and practical impasse in the study of law in society.

The first proposal entails the sociological observation of a given legal field with regard to the patterns of the broader reproductive dynamics of the society. Within this frame of reference law is not a mere technique, nor a science. Rather it is a specific type of social action embodying a specific rationale. More precisely, it is a form, i.e. an aesthetic model relating to the reality of the symbolic force of a power relationship. This is the meaning of the notion of law as the art of politics. It is a true metaphysics, or, as a classicist would say, a veritable *corpus mysticum*, structurally and functionally coupled with social life.

Yet such a definition presupposes two substantial conditions: (1) that the theory and practice of such aesthetic modelling reaches a certain level of formal perfection, and (2) that such a perfection reflects the so-called legal universals such as reciprocity and experience, that constitute the basic foundations of social action. If these conditions are fulfilled, the law will clearly differ from any other sort of regulation. The task of the sociology of law is precisely that of driving emerging forms of social regulation towards these achievements.

The second proposal entails that the viewpoint for sociological observation of a given legal field must be the whole social system. Within this frame of reference the sociology of law does not have disciplinary boundaries, but only scientific priorities. These priorities are not arbitrary. Problematic issues of the political dynamics of society are always central to the process of norm reproduction, for this is both a process of reproduction of symbolic domination and a process of reproduction of social construction. Law is thus related to power, and for this reason the sociology of law is properly conceived as the art of law.

Commaille's proposals require a notable cultural transformation in European socio-legal studies. Not only does he try to restore the unity of sociological discourses (rather than disintegrating them), thus substantiating a general claim that "the next decades will witness another Golden Era of European sociology" (Nedelmann and Sztompka 1993). He also tries to reassess the identity of the discipline with specific reference to a general aim, rather than an internal division of topics, thus reinforcing

the basic theorems of its programmatic methodology, namely, those which state that law is bigger than the formal sources of law and is smaller than the totality of social interaction. This he does not by following a subjective, conjunctural or personal commitment, but by recalling the deep-rooted socio-legal *esprit* of European culture. For the notion of law as art is directly linked to a substantial respect for great European institutional traditions and the sacredness of social forms. Commaille's respect for the values embodied in the great socio-legal traditions and political projects of the past makes the prescriptive part of his work a veritable manifesto, a scientific programme for the future not only of law, but also of the sociology of law.

Yet the crucial question remains: is the sociology of law equipped for the task? If one looks at the current state of the discipline in Europe and elsewhere in the West, one is struck not only by the insufficiency of its theoretical progress, but also by the fragmentation of its research and theoretical work. To some this chaotic condition may seem to be a consequence of inter alia the extraordinary achievements of the discipline in achieving academic relevance and social appeal, as demonstrated by the amount of literature currently published. In reality, its scientific development has been asynchronous as regards spatial-temporal variables, narrow-minded and parochial as regards cultural contexts, and incoherent as regards analytical and conceptual tools. It is not by chance that claims for a more plausible and socially adequate sociology of western law have been increasingly made not only 'from within' (Podgorecki 1991), but also 'from outside' (Chiba 1993). It is equally not by chance that sociologists of law, although well organized, are intellectually ill integrated, and that the risk of a 'balkanization' and 'babelization' of the discipline is far from remote (Arnaud 1988). In this context one immediately understands why Commaille's efforts are directed to suggesting not so much a new theoretical model, but the need for a veritable New Enlightenment programme in socio-legal studies.

It is noteworthy that Commaille is not alone on this issue. Other scientific initiatives in Europe press along the same path. This is the case, for example, of renowned collective works such as the *Dictionnaire encyclopédique de théorie et de sociologie du droit* and the *Thesaurus of sociology of law*, both coordinated by André-Jean Arnaud. These notable contributions try to lessen the risk and sustain the claim mentioned above. As the recollection of the eighteenth-century Encyclopedists tells us, they constitute a scientific work that will increasingly be in great demand among jurists, political scientists and sociologists. They provide up-to-date and highly reflexive accounts of the conceptual tools that could be useful for dealing systematically with the norm production puzzles discussed so far (Arnaud 1988; Carr and Arnaud 1993).

Last but not least, another line of attack characterizes contemporary sociology of law

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in Europe. This is the promotion of transnational, empirical, comparative research projects. To indicate the theoretical insights that these may offer, let us briefly consider the preliminary, but already significant results of one of the most advanced instances: the research project on 'Cross-border legal relations' directed by Volkmar Gessner.

Cross-Border 'Litigotiation': Towards a Sociology of Law-and-Communication

As we have seen, theoretically European sociology of law is still characterized by a dominant interest in the problematic functioning of nation-state law. However, the rise of a new geo-political and normative climate, and particularly unification through the European Union, is increasingly putting to the fore new issues concerning transnational legal interactions.

To study these issues systematically, various empirical comparative studies have been developed. Among these is Gessner's project. (See Gessner 1996) This has an emblematic relevance as regards the mode of norm reproduction, in that it focuses particularly on the dislocation of 'primary actors' (parties directly involved in cross-border relations), 'secondary actors' (institutions or infrastructures operating as intermediary agencies of cross-border relations), and 'styles of legal cultures' (models, patterns and attitudes qualifying cross-border relations). Within the project a specific conceptual grid has been defined. The notion of 'anomie' involves a situation of low norm orientation, contradictory normative expectations, and operational helplessness vis-à-vis legal complexes. The notion of 'third culture' designates a set of values and attitudes developing between different levels or types of legal cultures. 'Conflicts of culture' and 'cognitive adaptation' are inherent in those learning processes that are related to unpredictable and largely unknown situations.

The research project is currently in progress, but the first part, on civil litigation in foreign state courts, is already complete (Gessner 1996). The results are puzzling indeed. Data from the analysis of European court files show, besides the inadequacy of certain formal procedural arrangements, a high level of domestication of patterns, values and norms occurring during the proceedings. This domestication is certainly due to certain legal policies. On closer inspection, however, it seems to be related also to the specific cultural need that legal actors feel to treat court disputes as real social constructions. With reference to both issues, the results of the court file analysis carried out in Milan, Italy, are no doubt specific to their context, but they are surely indicators of prospective trends that could occur in any country. Is it not true that, if Europe is a socio-legal laboratory, Italy is its botanic garden: the place

where, as in the past, every sort of experiment in European mainstream institutions is carried out?

The foregoing claim is based on the fact that empirical data (1) confirmed and even strengthened the perception of already well known phenomena such as the avoidance of court disputing and the rise of extrajudicial dispute resolution; but (2) these were quite inexplicable according to common explanatory models. It is generally recognised that state court disputing at present is based upon traditional legal doctrine which emphasizes formal-rational goal-oriented procedures, courses of action and decisions. A rational actor in a state court aims at a formal decision, for this is the rationale of a court proceeding. Otherwise a dysfunctional or irrational choice has been made. This theoretical model is still used to explain factors such as variations in disputes rates, parties' behaviour, and judges' roles.

In contrast to this, the data gathered by the Milan research unit suggests that cross-border disputes in the Milan Civil Court are initiated by actors whose attitudes, expectations and strategies imply a contingency approach. It is possible to argue that the court is seen as a 'common' place, where parties who are culturally distant and socially unrelated have the opportunity to meet. The dispute is a sort of expedient used to create certain conditions or to realise certain opportunities, and not necessarily to obtain an authoritative decision. Legal technicalities are used primarily as temporal structures of communication rather than as formal devices. Substantive law is employed to assess the most convenient award, rather than to provide an enforceable ought-to-be. Proceedings are turned into multilayered, purpose-oriented action systems instead of following predefined programmes. During the proceedings, and either within or outside them, inquisitorial, cooperative and adversarial roles are performed, often each of them simultaneously and for the same purpose. To a large extent, the outcome of any dispute, reached (mostly outside the court) through a continuum of partial decisions, is an opportunistic quasi-solution, not a definite win-or-lose choice. In brief, court disputing as a whole is seen as a technostructure whose main function is to bring the parties together and contextualize a double-loop learning, that is, a sort of analytical de-reconstruction of behavioural and organizational standards produced by assessing priorities, weighing norms, confronting patterns, and restructuring ideas and models. It has been defined as a *litigotiation* model, consisting of a mix of litigation and negotiation processes (Olgiati 1996).

All of this, it must be repeated, seems to concern culturally distant and socially unrelated parties otherwise lacking self-regulatory communicative standards and infrastructures. In fact, and by contrast, current experience in non-state court disputes systems indicates that cross-border cases are treated according to a strict elective affinity, up to the point that relational norms predominate over any other

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normative device and a symbolic intermediate technostructure is not needed.

Empirical data emerging from new socio-legal dynamics are thus extremely puzzling when compared to current theorizing. Judicial law-making seems to arise from the parties' social interactions, rather than the judges' legal reasoning. In general the judges simply act as notaries of the parties' will. Positive law and legal proceedings seem to be less pivotal constraints than instances of a number of interactional arrangements. In any case, one can hardly ignore the fact that the enforcement of 'binding' legal decisions is often a mere 'virtual reality' at cross-border level.

The conceptual shifts required by these findings are likely to provoke unseemly reactions among legal practitioners. However, it is not difficult to foresee the new theoretical paradigm that they will adopt. That is likely to be the 'communication' paradigm as a normative pattern of global social interaction. Social and cultural relational distance, as well as inequalities and differences, are generalized existential conditions of the so-called network society. This is so much so that problems stemming from these conditions will certainly mark the future of norm reproduction. The sociological theorem according to which law is a subtile lining, merely covering the external surface of social relationships, will thus be further confirmed.

What happens when social actors from different cultures, and with conflicting interests and values, meet to do things together within a given, often predefined context? What are the forms of the so-called 'interspaces' which they create, shape and mould during their joint but asymmetrical, performances? What sort of mutuality do co-participants develop as a result of acting according to different programmes? How far do opposing, stereotyped mentalities - *prisons de longue durée*, in Braudel's term - affect loosely coupled, but functionally interrelated socio-legal structures?

To the extent that movements across boundaries are likely to increase in the coming decades, two major theoretical and practical issues will certainly arise. One will be the management of the 'fusion of horizons', 'mutual learning' and 'dialogic understanding', which will be required for, and thus enhanced by encounters between motivated (rationally limited) social actors, coming from different societies and embodying different reference models, but all involved in a common performative process. On the other hand there will be an issue of the management of a degree of inertia - but also blockmodelling, monologism, transposition of ends, transaction costs, and reactive trade-off, that inevitably arises whenever social change puts into question the task environment of a given structured context. Only a true sociological theory of law can deal with such a problematic set of variables.

The Constitutional Nature of a Future European Sociology of Law

This study has aimed to provide an up-to-date account of how European sociology of law observes and reflects upon major problems and trends of norm reproduction in contemporary society. It has taken positivization, codification and litigation as referents, and looked at the interplay between legal decisions, legal institutions and legal actors from different theoretical perspectives and in the light of different cultural experiences. It has been possible to argue that the current mode of norm production in Europe has reached a theoretical and practical impasse that can be overcome only by a 'great leap forward', a paradigm shift, towards a sociological theory of law proper. The study suggests that this is required by a simple, but traumatic fact: that not only legal validity and efficacy, but also political legitimacy in all its aspects is at breaking point.

It has been noticed that in Europe the symbolic and technical relationship between, on the one hand, norm reproduction and the broader processes of social construction, and, on the other, political domination, is increasingly challenged by the lack of a meaningful socio-legal conceptual framework. This, in turn, emphasizes the gaps between legal arrangements, legal culture and social dynamics. Thus, even if a certain degree of legal regulation exists, day-to-day human and social forms of interaction increasingly demand the recognition of their basic sovereignty over official law.

Indeed, all the general hypotheses and theorems of the discipline are now at the top of the agenda. It is time for the sociology of law in Europe to overcome legal normativism (Olgiati 1994b) and take up the honour and the burden of realizing its own constitutional project.

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