

LAW AND SOCIETY STUDIES AND LEGAL EDUCATION

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1. *Legal education: aims, virtues and shortcomings*

As suggested by the title, my purpose here is to reflect briefly upon the role of a law and society approach within legal education and to plea for its wider recognition in academic institutions. The source of my reflections is twofold: on the one side, the international debate that has been vivid for more than forty years now within the communities of socio-legal scholars; on the other side, my long teaching experience in a country in which sociology of law has been happily recognised as a potential part of law curricula and therefore offered as an at least optional course in many law schools (Ferrari and Ronfani 1991).

I shall start by weighing some virtues and vices of traditional legal education. The virtues are historical. Future lawyers are exposed to *rules* – whatever their shape or “source”: statute, precedent or custom. They are expected to learn, interpret, understand and systematize rules with an eye to what will be their *job*, i.e. “reading” actual occurrences under the guidance of rules and deciding whether

the former should be “subsumed” under the latter¹ – what is traditionally termed as the “application of rules to facts”. By no means can this kind of work be avoided, since it holds a fundamentally “practical” nature, in a Kantian sense: i.e., it both concerns practical life and affects the ethical sphere of those – private counsellors, public attorneys or judges – who are expected to take actual decisions. Legal theories do not exist *per se*, but for the sake of concrete actions to be taken by somebody. In the field of legal science, knowledge is the basis for action: an “is” approach is there for the sake of a subsequent “ought”.

This practical task, which lawyers are expected to perform, is to a large extent *formal*. Rules are semiotic systems, linguistically expressed. They cannot be understood but by connecting between them their component signs, which converge into more or less complex symbols. This kind of exercise is logical in principle, by its very nature, although the semantic conclusions that may be drawn about the “correct” significance of any individual rule are not logically bound, but depend on a number of elements, varying from one interpreter to another. The ethical and social commitment to “respect” the rules and comply with them may well lead this inevitable formal task to be accomplished in a “formalistic” manner. This, however, is but an attitude, more psychological than theoretical, which is stronger among those who agree on the content of single rules and especially

¹ The description of the judicial activity as “subsumption of facts under rules” (rather than formal syllogism) is at the core of a classical contribution of an Italian philosopher to legal theory (Calogero 1951³).

on the basic principles of a legal system, and weaker among those who disagree with them and therefore seek alternatives, specific or general, up to fighting for a wholly different system of law.

This model of legal education is often taken as being typical of legal positivism, which is based on the idea of the “autonomy” of law. This is not entirely untrue, especially as far as the most extreme expressions of legal formalism are concerned. Yet, in more general terms, it should be observed that the antiformalistic streams of legal thought do not diverge from that model either. Legal realism, in both its most popular versions, American or Scandinavian, and also sociological jurisprudence, differ from traditional legal positivism in that, acknowledging the high variability of social materials and social perceptions, they allow the interpreter to move more freely along the chain of meanings theoretically attributable to each linguistic expression and shift the attention from general to individual rules – i.e. from legislatures to courts – under the assumption that law “lives” through concretely enforceable rulings rather than through abstract utterances. Yet, their starting point is always *rules*. Though taken in a wider sense or even approached under the pressure of facts, rules still occupy centre stage. Briefly, they are taken as a *constant element*, rather than a variable, of reasoning. The task of the antiformalist lawyer still consists of *subsuming* actual social occurrences under the frame of a normative prescription, be it a specific norm or a general principle, which is taken for granted *a priori*.

This model, I repeat, is unavoidable in that it is the core of legal education in any legal system or culture. Its shortcomings, however, are – so to say – symmetrically correspondent to its virtues. The most recurrent vice they display, which is especially visible in the more extremely formalistic versions of legal positivism, though not only there, is precisely the fact that looking at law as a constant element may easily induce a distorted and limited vision of the external world. Social reality is not a given quantity, an *objet trouvé*, but rather the fruit of perceptions, intercommunication and constructions, thus a process which is highly selective. Starting from rules may lead to select perceptions, and therefore events themselves, according to a pre-defined model which often happens to correspond to an individual's personal views about what rules mean. Factual interpretation, in short, may easily become normatively bound. As a result, lawyers often tend to have a pre-selected and simplified vision of the social landscape that surrounds them, all the more so because law, by its own inner logic, “dichotomizes reality” (Abel 1994, 81) on the basis of the “lawful-unlawful” (*Recht-Unrecht*) discrimination code (Luhmann 1993).

This is the main reason why – in my opinion – law students should be given a concrete chance to place themselves metaphorically outside the legal field, at least for a short while, during their university curriculum. More precisely, they should learn to look at law also as a *variable* and not only as a constant element of their way of reasoning. This can help them reduce the distance that usually

separates and isolates the lawyers' world from the "external" society which bears the burden of their decisions.

2. From Law to "Law and..."

What has been said so far is obviously not new. Remarks of this kind were produced to uphold the birth and the diffusion of sociology of law, not just as a different approach within the legal science, but rather as a field distinct from it, after WW2, starting with official courses offered in Norway and in Japan, field research carried on in such different countries as the United States or Poland and, as early as 1962, the creation of a Research Committee on Sociology of Law within the International Sociological Association. The atmosphere was then particularly favourable. The western world was at the height of its welfare, reformist and socially-sensitive political phase, while Stalinism had been abandoned by the communist elites in eastern Europe, in favour of a kind of timid openness to what had been previously described as the "bourgeois society", and to its symbols, among them sociology itself. Under such political circumstances, sociology of law – or law and society, in the American version – enjoyed considerable success between the 1960s and the 1970s: this decade would later be described as "glorious", as far as the development of this new topic was concerned (Blankenburg 1983). Thus it comes as no surprise that – with some notable exceptions, among

them Italy – the social changes that occurred in that same period hindered its growth seriously. The “social democratic consensus” – I borrow the expression from Ralf Dahrendorf – that had backed the reformist wave was replaced by increasingly harsh social struggles vis-à-vis the growing crisis of the western economies facing what was termed as the fiscal crisis of the state. The academic status of the discipline was therefore questioned and rigidly restricted in many countries, with financial motivations that often worked as fig-leaves used to hide evergreen scientific prejudices.

However, the push toward interdisciplinarity in the field of law could not be halted. The expansion of sociology of law in the field of research, if not in that of teaching, was not stopped, as international bibliographies reveal (Ferrari 1990)². Besides this, a “law and...” approach also continued along other tracks, with special emphasis put on economics, though not limited to it. Law and economics became the favourite battlefield of a generation of scholars, most of them jurists, who shared a kind of faith in the chance of measuring the effects of legal regulations by introducing a number of quantifiable variables into increasingly sophisticated schemes. Besides law and economics, a stimulating stream of law and literature has grown up gradually, as another sign of the relative impatience of the juristic world toward traditional legal methods.

² The most impressive example of how much law and society has grown in the past decades is the library of the International Institute for the Sociology of Law, Oñati (Basque Country, Spain), active since 1989, which contains, at the date of this

Such variants, which enjoyed partial recognition in law curricula, could hardly be described as real alternatives to sociology of law, however. Studies in law and economics – with remarkable exceptions, such as Guido Calabresi – often rely on a concept of efficiency that is taken as an *a priori*, irrespective of the impact of values upon economic choices – a perspective which is ideological *per se*, despite the proclaimed neutrality of its supporters. Moreover, its descriptions seem to be bound to short-term forecasts. Law and literature, for its part, suggests that law should be researched and understood through narratives. In this, it echoes the best examples of legal history but, like it, it is predominantly topical, rather than systematic.

Perhaps the time has now come for a more complex version of interdisciplinary approaches to law, in which different fields of social science may be bridged within a general theoretical and methodological frame. Some pillars of this frame may be offered, again, by an updated sociological insight.

3. *Law and Society: what does it entail?*

Taking law, not as a constant, but rather as a variable has a meaning that can be summarised in a few points, all highly relevant for legal education.

On the theoretical level, it means looking at law as a way or means of social action that displays a fundamentally communicative nature. Once they are expressed socially, rules are no more than messages that circulate in a social environment, passing through a number of media filters: they may be interpreted differently, are understood or misunderstood and may be used in view of a variety of individual and social projects. They affect social expectations and thus orient (and sometimes dis-orient) social behaviour. They qualify or disqualify actions, thus working as powerful tools of legitimisation. They can be used to settle but also to arouse conflicts, either individual or collective. This approach should not be discarded as a sort of cynical refusal of the “sanctity” of law. On the contrary, as a critical approach, it is the most solid starting point, helping to discriminate between good and bad laws or good and bad actions. Law is better respected if its actual usages, up to the most perverse ones, are unveiled.

Such theoretical eye-glasses – I should stress – are particularly helpful if one wishes to understand the status of today’s law, which displays a number of unprecedented characters, sometimes contradictory: an increasing degree of entropic disorder of local legal systems, alongside a resurgent push toward legal certainty internationally and transnationally; a growing degree of interdependence

and convergence among all the world's legal systems, alongside ever resilient local differences and resurgent pushes for more local differentiation; a multiplication of law sources with increasingly difficult problems of integration between them, on a national and especially on an international level; an indefinite expansion of the human rights sphere, alongside the multiplication of conflicts, potential or actual, at all events hardly negotiable, between competing rights. The "transnational lawyer" would highly profit of an approach that may help them analyse such phenomena in their context.

The methodological implications of a social science perspective are no less important. Social sciences, and sociology in particular, proceed through hypotheses that are put forward and challenged critically, i.e. submitted to potential refutation. Once it is refuted, a hypothesis should be corrected or discarded. In the social science field, criticism is basically self-addressed, i.e. it is self-criticism. This is to a large extent the opposite of common legal reasoning. The juristic method is predominantly logical and deductive. Rather than to test hypotheses, it seeks to demonstrate the validity of theses. No doubt, this style is more evident in continental Europe than in the Common Law countries: but even here rules – as already remembered – work as a permanent light for a lawyer's argument. However – and this a crucial point – the practical job that lawyers are asked to do has a highly hypothetical character. Reconstructing "facts" on the basis of evidence, weighing them, discovering their causes or understanding the actors' motives, even subsuming "facts" under a norma-

tive frame, all this is typically so. Even interpreting the meaning of a rule entails a degree of hypothetical empiricism if, for example, an interpreter is deemed to move beyond a merely literal analysis and to discover the “reason” that is behind the adoption or the recognition of that rule. If legal science is in search of certainty, law enforcement – like empirical research in sociology – is the realm of doubt, as is suggested, incidentally, by the telling formula “beyond all reasonable doubt”. Many practicing lawyers and, especially, many public prosecutors and judges do not understand it fully, sometimes with pernicious consequences when dramatic effects stem from a legal decision.

I do not need to specify that what precedes is not addressed to suggest that the traditional methods of education should be replaced by a social science approach, or that sociology of law should take the place of legal dogmatics, as Eugen Ehrlich seemed to uphold about one century ago. The “internal” and the “external” views of law, to adopt Herbert Hart’s terminology, must be kept distinct, as are distinct the ought-sphere and the is-sphere. None, however, should be completely sacrificed. And even if their combination may bring about a degree of distress among students during their law curriculum, it is far better that they come out of it somewhat equipped in view of the contradictions and the role conflicts they will face in their professional life.

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