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On Two Paradigms of Legal Theory and Their Relationship

Abstract: H. L. A. Hart thought that a theory of law can be purely descriptive and called his theory a "descriptive sociology". One of his great contributions to modern legal theory is his emphasis on the internal aspect of social rules. According to him, a theory of law can be built on the basis of the description of the participants' view without sharing with it. This descriptivism is totally rejected by Dworkin, who propagates a theory that denies a sharp separation between a legal theory and its implications for adjudication. For Dworkin, a legal theory is only possible as a theory with "the internal, participants' point of view". Dworkin's position implies a radicalization of legal theory that will transform the statement of an external point of view to that of an internal one. For Dworkin, the descriptivism bases on the sociological concept of law, which is an "imprecise criterial concept" and is "not sufficiently precise to yield philosophically interesting essential features."Hart's position is vulnerable because it takes an impure form of descriptivism that still draws a categorical distinction between fact and norm. This theoretical impurity results from the ambiguity of interpreting the internal aspect of rules. A strategy to rescue the Hart's project is to radicalize his descriptivism with Luhmann's systems theory. Adapting the systems theoretical distinction between internal and external observation of law with all its implications for the explanation of the legal system and legal communications, Hart's descriptivism finally attains its pure form, which is not only a distinctive paradigm of legal theory, but also possesses the potentialities to clarify its relationship to the legal theory based on the internal aspect of law.

Keywords: Hart, Dworkin, Luhmann, legal theory, paradigm, descriptivism, interpretivism, system theory

I. Preamble

New approaches in the fields of legal theories emerged frequently after 1960. These approaches were not limited to theories of legal doctrines (juristische Theorien), nor were they legal philosophy in a traditional sense. They focused on new questions and research fields and were named as legal theory (Rechtstheorie) as a result of a new demand.[1] The period from 1965 to 1985 was called the renaissance of legal theory (Die Renaissance der Rechtstheorie).[2] In this period, besides the traditional approaches of natural law and legal positivism, many new

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[1] Niklas Luhmann, Das Recht der Gesellschaft, 1993, 11-12.

[2] Eric Hilgendorf, Die Renaissance der Rechtstheorie zwischen 1965 und 1985, 2005.

approaches emerged such as legal rhetoric (Juristische Rethorik), legal hermeneutics, theory of legal argumentation, discursive philosophy of law, scientific theory of law, law and social science, systems theory, Marxist legal theory, political-legal theory, pure theory of law, legal logic and deontic logic, and legal informatics.[3] At the same time, a decades long debate (a debate between Hart and Dworkin) started as a prologue to the new jurisprudential focus in the English speaking world. Parallel to this debate, new schools of law also arose such as critical legal movements, law and economics, law and society, feminist jurisprudence, and post-structuralist jurisprudence.[4] What are distinguished from legal theory are theories of law (juristische Theorie) and theories of legal doctrines (rechtsdogmatische Theorie). Theories of legal doctrines are theories regarding the resolution of various legal problems in legal doctrines.[5] These theories come from either a need for legal education or for legal practice.[6]

Legal theory or legal philosophy? Legal theory and legal philosophy? Legal theory as legal philosophy? These questions can be seen as a reflective attitude of reflectivity on law. They signify discontent with the traditional legal philosophy and a need for a new type of theory. To capture the meanings of the newly emerged legal theories, there can be different strategies. They can be analyzed by means of conceptual analysis, the development of concepts, social-historical approach, or sociology of knowledge. However, this article does not adopt these approaches as its methodology. This article uses the concept of legal theory and legal philosophy interchangeably because both are concerned with the reflection of law. The problem stays the same. Facing the diversities of legal theory since 1960, and the failing communication and dialogues between theories, is it possible to develop a framework to account for these multiple phenomena? A comprehensive framework will probably be outdated in today's age of functional differentiated society. But how about the predominate form of the current legal philosophy?

II. The Debate between Descriptive and Normative Legal Theory

During the past decades, the legal academia in Taiwan has had an ongoing interest in the dispute between Hart and Dworkin. Instead of introducing, analyzing, and evaluating arguments offered by both sides, this article focuses on a debate about the paradigm of legal theory. In 2001 Julie

[3] See Hilgendorf (note 2), 35-66.
[4] See Hilgendorf (note 2), 67-69.
[5] Ralf Dreier, Zur Theoriebildung in der Jurisprudenz, in: ders., Recht – Moral – Ideologie. Studien zur Rechtstheorie, 1981, 73-77.
[6] See Luhmann (note 1), 11.

Dickson, a legal philosopher at Oxford University, demonstrated the clearest picture concerning this debate in *Evaluation and Legal Theory*, which triggered serious subsequent debates about the methodology of legal philosophy. Of course, the following debates still benefited from those between Hart and Dworkin. Therefore, this article will briefly introduce the debate between Hart and Dworkin.

In 1961, Hart asserted that the book, *The Concept of Law*, was a descriptive sociology.[7] He analyzed and explained the crucial elements in the concept of law by distinguishing law, coercion, and morality.[8] Based on a distinction between habits and rules, he argued that in addition to external points of view of law, law also encompassed an internal aspect.[9] Laws in the modern state are a union of primary and secondary rules.[10] Hart illustrated this basic characteristic in his theory again in the second edition of *The Concept of Law* after the idea was criticized by Dworkin by means of the distinction between rules and principles and his interpretative theory of law. He argued that in his descriptive jurisprudence, nothing was able to obstruct an external observer, a non-participant, from describing laws by way of the participant holding an internal point of view. Indeed a descriptive legal theorist has to understand what an internal point of view is and, then, be able to put himself in a position of a participant to some extent. However, it is unnecessary for him to accept the law he observes or to accept an internal point of view held by participants. Therefore he does not have to give up his descriptive position.[11] Hart insisted that even though an understanding and description of participants' internal point of view entails moral reasons for conforming laws, this does not obstruct a descriptive theorist from adopting a neutral standing position. A description of evaluation is still a description.[12]

A basic issue in Hart's arguments is his distinction of an internal and an external aspect of law and his distinction between the internal and extremely external point of view. Is a descriptive position, which enables an observer to understand a participant's internal aspect without sharing his internal point of view possible? This question seems to be a problem of methodology for descriptive jurisprudence. If contemporary analytical legal positivisms define themselves as a

[7] H. L. A. Hart, The Concept of Law. (2nd ed.) With a "Postscript" edited by Penelope A. Bulloch and Joseph Raz., 1994, V.
[8] See Hart (note 7), 17.
[9] See Hart (note 7), 55-57.
[10] See Hart (note 7), 94-95.
[11] See Hart (note 7), 242.
[12] See Hart (note 7), 244.

kind of descriptive jurisprudence, a defense of this descriptive methodology is unavoidable. In fact, besides Hart's self-defense, both Josef Raz and Neil MacCormick also argued for this descriptive methodology. Raz called this methodology the point of view of the legal man or the legal point of view.[13] MacCormick called it a non-extreme external point of view or hermeneutic point of view.[14]

Dworkin cannot accept this middle position between an internal and an external point of view. In his early criticism, based on a distinction between a discursive method of sociology and a discursive method of social members, he had challenged Hart's theory of social rule.[15] In *Law's Empire*, he further advocated a theory based on the internal and participant's point of view and treated this point of view as a key for understanding legal practice.[16] Recently, in *Justice in Robes*, he argued that, based on four categories of the concept of law: doctrinal, sociological, taxonomic, and aspirational concept of law, the descriptive jurisprudence held by Hart and his followers adopted "the sociological concept of law at most.[17] According to Dworkin, this concept used by sociologists as a criteria concept is inaccurate and approximate. Therefore this concept of law is unable to be adopted as a concept in the legal philosophy.[18] Furthermore, he argued that Hart and his followers' theories are not a descriptive theory at all but only a kind of conceptual analysis.[19]

Is this sociological concept of law unable to be used as a doctrinal concept as Dworkin pointed out? This question is also raised by Julie Dickson when she defends an indirectly evaluative legal theory. Furthermore, does Dworkin's criticism of the sociological concept of law contain a potentiality of "a radicalization of interpretivism?[20] In other words, does Dworkin's "interpretivism" eventually cancel the distinction between an internal and an external point of view even without explicitly insisting that a statement from an external point of view is still a statement from an internal point of view? Does this kind of "interpretivism" also lead to a conclusion that all statements of legal propositions are statements from internal point of view? Will this "interpretivism" also cancel the boundary between legal philosophy and sociology of law when canceling the possibility of descriptive jurisprudence? From another perspective, it is

[13] Josef Raz, The Authority of Law: Essays on Law and Morality, 1979, 140-143.
[14] Neil MacCormick, H. L. A. Hart, 1981, 38.
[15] Ronald Dworkin, Taking Rights Seriously, 1978, 50-56.
[16] Ronald Dworkin, Law's Empire, 1986, 14.
[17] Ronald Dworkin, Justice in Robes, 2006, 2-21.
[18] See Dworkin (note 17), 228-229.
[19] See Dworkin (note 17), 165.
[20] Chueh-An Yen, Dworkin's Interpretivism and its Radicalization, Academia Sinica Law Journal 3 (2008), 185.

fair to ask another question: Is it possible to radicalize Hart's descriptivism and "hermeneutic point of view" to achieve a true descriptive sociology by canceling the distinction between an extremely external point of view and external point of view? For sociology, it is impossible to study laws without understanding participant's point of view. Law is part of society and "understanding", as Max Weber indicated, is an unavoidable topic in sociology.

This article does not aim at describing the dispute between descriptive and normative jurisprudence, or at the dispute between indirectly evaluative and normative jurisprudence, but tries to investigate this dispute, which exists within the legal system, from the perspective of systems theory.

III. Two Paradigms of Legal Theory: A Reinterpretation based on Systems theory

1. Legal Theory as Self-Description and as External Description of Law

As Luhmann puts it, legal theory deals with abstract problems such as "why do people have a duty to obey the law?" and, therefore, it takes a distance from evaluating an individual legal order. But discourses in legal theory imply a self-recognition of law, because legal theory usually does not challenge the following questions: whether or not laws need to be enforced, whether laws must be particularized in a specific case, and whether an interpretation on a specific text is better than other interpretations.[21] One problem is explaining the legal theory when theory itself is subjected to a legal system. And when another theoretical possibility exists, how can it be distinguished from a legal theory which implies a self-recognition of law?

Constructing the subject of research is the function of theory. Therefore, different theories (disciplines) determine different study subjects for themselves and they are unable to communicate with each other even if law is targeted as their study subject. This disability of communications is obvious when focusing on the relation between the traditional legal philosophy and sociology.[22] Systems theory transforms the question of what law is, the crucial question for legal theory, to the question of what the boundary of law is. It argues that the boundary of law is determined by its object. In other words, law itself decides its boundary and decides whether something belongs to law or not. According to Luhmann, the main points of an explanation based on a systems theory of law can be briefly described in the following steps. First of all, it describes how something can produce its own boundary in relation to its

[21] See Yen (note 20), 13.
[22] See Yen (note 20), 14.

environment. Secondarily, it adopts a theory of observer: a second order theory. This theory treats its study subject as an observer and also as an object, which is produced from a distinction between system and environment. Thirdly, an epistemology of constructivism is based on the second order theory. Finally, an observation based on a distinction between jurisprudential and sociological observation of law. Sociology observes laws from the outside and jurisprudence from the inside. Both observations only follow their own logic of system to which they belong.[23]

Systems theory's arguments are based on a scientific system and belong to a scientific system of observing and describing law and to "sociology's observation on law."[24] At the same time, systems theory distinguishes jurisprudential theory of law (traditional legal philosophy) from sociological theory of law. Systems theory attributes sociological theory of law to an external description (Fremdbeschreibung) of a legal system. Only when this theory describes a legal system as a system of self-observation, is it appropriate. A description of a legal system from an external and scientific perspective is based on the appropriateness of its object and this description treats a legal system as a self-describing and theorizing system. Therefore, a sociological description of law needs to take the legal theoretical reflections on basic questions in law, such as the concept of justice, into consideration.[25]

Systems theory attributes jurisprudential theory of law (traditional legal philosophy) to the self-description of the legal system.[26] A primary distinction in systems theory is the distinction between system and environment. Only after a specific reference of system is given, can the respective environment be known. After considering a system's capacity of self-description, a distinction between self-description and external description of a legal system results. Originally, the use of the concept of legal theory may presuppose an integration of the two points of view (self-description and external description), but systems theory has to separate them again.[27] Legal theory needs to take a side. It is either an external description or a self-description of law, which enables it to claim a normative validity and belong to the legal system.[28]

[23] See Yen (note 20), 15-17.
[24] Niklas Luhmann, Soziologische Beobachtung des Rechts, 1986.
[25] See Luhmann (note 1), 497.
[26] See Luhmann (note 1), 14-15.
[27] See Luhmann (note 1), 24.
[28] See Luhmann (note 1), 497.

2. Legal Theory as a Reflective Theory within the Legal System

Sociological theory of law benefits from external descriptions, which refrain it from following the internal norms or presupposing something which is taken for granted in a legal system. Although it can take another perspective than that of the legal system, sociology of law needs to take its object seriously. It has to describe its object in a way to allow understanding by lawyers. It must observe that its object itself is an object of self-observation and self-description.[29]

Jurisprudential theory of law is developed in context of law's own self-description. It respects law as a legal system and accepts the corresponding "normative binding" from the law which it respects. This concept of legal theory applies to both legal theory of doctrines and the reflective theory on a legal system. Systems theory's investigation of jurisprudential theory of law focuses on the reflective theory. A reflective theory is devoted to describing the unity of a legal system, the meaning of law, and its function which enable it to establish expectation[30]. It illustrates the development of the eigenvalue (Eigenwert) of justice and the meaning of an autonomous legal system.[31] Because a reflective theory never gives up the distinction between norm and fact and insists that a norm is unable to be inferred from a fact, and described as fact, this theory ultimately subjects itself to the legal system and remains a kind of law's self-description.

Systems theory distinguishes observation (Beobachtung) from description (Beschreibung). Self-observation (Selbstbeobachtung) is defined as an attribution of individual operations into a legal system's structure and its operations. Communications of the legal system are described as either legal or illegal through law's self-observation. Self-description means illustrations of the unity of a system within the system. More accurately speaking, self-description reflects the unity of a system within a system. In addition, self-description will end up with a text, a self-referential text. The function of self-description is to thematize a system where self-description operates. This is the meaning of reflection. Because self-descriptions in a process of reflection will reflect that self-descriptions themselves also belong to a system in question, an acceptance of characteristics attributed to a system must be implied in an operation of self-description. In other words, self-descriptions, like the other operations within the same system, respect restrictions which are imposed on it by a described system. For example, self-descriptions of the legal system

[29] See Luhmann (note 1), 17.
[30] See Luhmann (note 1), 1.
[31] See Luhmann (note 1), 18.

will not argue against the idea that it is meaningful and legitimate to distinguish legal from illegal behaviors[32]

Based on these external descriptions of self-descriptions mentioned above, it could be found that self-descriptions entail an internal binding: self-description must incorporate itself into a system which it aims to describe and this incorporation is possible only when self-description accepts and thematizes the binding owned by the respective system. For example, self-description will not dispute that a legal system has authority to distinguish legal and illegal and it will not dispute that people must agree a "valid" norm. It will not dispute that obedience to a norm is correct and act as a legal system requires. The function of expectation recognized by sociology is interpreted as a behavioral indication in a legal system. The distinction between norm and fact is marked from a normative perspective in a legal system. This distinction symbolizes a tautology: norm indicates what ought to be done. And even a statement of sociology of law, insisting the factuality of norm, can be criticized due to its ignorance of essential characteristics of norm.[33] In a nutshell, the function of self-description is to interpret the unity, function, and autonomy of the legal system and it ignores anything irrelevant to the law and does not pay attention to a justification for a decision.[34]

The starting point in self-description is that controversial communications will always be settled within the legal system. This point results from the function and codification of a system. In other words, there is always an answer (a decision) to every question in the legal system and the decision is always based on good reasons. Although one right answer is not necessarily presupposed for all questions, one right answer needs to be assumed during communications.[35] Different from the other (legal) communications, self-description can avoid making a decision and taking a side. While the other communications have to make a decision or justify a decision, self-description's avoidance of taking a side throws a question back to itself: self-description needs to clarify what is implied when a system promises to have an answer for all questions relating to legality or illegality and when all operations in the legal system are forced to obey the rule of justifiability.[36] A self-description has to set up a boundary within the system where it makes descriptions so that this self-description can observe itself and others by going back and

[32] See Luhmann (note 1), 498.
[33] See Luhmann (note 1), 498-502.
[34] See Luhmann (note 1), 499.
[35] See Luhmann (note 1), 503.
[36] See Luhmann (note 1), 504.

forth across this boundary. During processing self-description, a system presupposes itself and accepts its presupposition. Forms of justification are changeable but a coercive decision never disappears. Therefore self-description has to describe a system to which it belongs in the following way: Searching for a right answer is meaningfully. The function of self-description is to endow a system with meaning and to promote continuous communications within a system. A transformation of self-description is also accompanied by a changing status of a system and an evolution of structure. Therefore it is necessary to search for a new self-description to satisfy this function.

IV. Radicalization of Hart's Descriptivism and its consequence

On the one hand, there is a question of whether Hart's descriptivism can withstand attacks from Dworkin's "interpretivism". However, on the other hand, there is also a relevant question of whether Hart's descriptivism is sufficiently radicalized or not. The insufficient radicalization can be found in Hart's characterization of law as a social rule and his interpretation of the rule of recognition.

For the idea of law as a social rule, there are two possibilities of interpreting the internal aspect of rules: cognitive dimension and willingness[37]. It is a question of whether both elements are necessary for Hart's "hermeneutic methodology", or one of them is sufficient. In other words, can an observer take a detached position when he explains an internal aspect of rules, or must he take a committed position? Of course, it is fair to ask whether this is really an either/or question, or is it just a choice on theoretical character?

For the idea of the rule of recognition, the rule of recognition indeed plays a crucial role in identifying other rules within the legal system and functions as a criterion of judging whether a rule belongs to a certain legal system. The rule of recognition deals with the validity of rules within the legal system. However, Hart said that the rule of recognition itself is neither valid nor invalid. What matters is whether the rule of recognition is accepted or not.[38] Hart looked at social practices of judges, public officials, and private individuals and emphasized the factual existence of the rule of recognition.[39] It is quite problematic that the rule of recognition escapes from being challenged of its validity. By distinguishing between internal statements and external statements,

[37] See MacCormick (note 14), 47.
[38] See Hart (note 7), 108-109.
[39] See Hart (note 7), 109-110.

Hart tries to resolve the question of the validity of the rule of recognition. He simply veils this question by using a distinction between validity and fact.

Based on the observation of systems theory, the distinction between norm and fact is essentially the distinction within a legal system. Any legal theory based on this distinction has subordinated itself to a legal system. However, this distinction does not benefit scientific discourses because a scientific system only deals with factual problems without differentiating norm from fact. Therefore for sociology and sociology of law, it is impossible to mark the subject of study by a distinction between fact and norm.[40] For systems theory, the concept of norm refers to no more than a specific form of an expectation of fact. An expectation either exists or does not exist. Even though an expectation ought to exist, this argument does not regress back to a level of normativity but merely back to a level of an expectation, an expectation of an normative expectation. A concept of validity is not a normative concept either. When a law is valid, it means that a law is marked as a valid law by using the concept of validity. If a law is not marked by using the concept of validity, this law is invalid. Therefore a law itself has no binding force (die bindende Gewalt). Law consists in communications and the structure of communications.[41]

With regard to the radicalization of descriptivism, it seems like that both Dworkin's "interpretivism" and Hart and his followers' version of legal theory do not abandon a basic position of internal aspect within a legal system, which insists the concept of norm as the basic concept in each theory. A norm means what ought to be done. It is to suppose that if Hart and his followers cannot give up a distinction between fact and norm, their descriptivism is not radicalized enough to escape from the critics of Dworkin. This kind of descriptivism is unable to go through a boundary, set by a legal system (Rechtssystem), into a discourse within the scientific system (Wissenschaftssystem). The radicalization of descriptivism here refers to the abandonment of the distinction between norm and fact, to the treatment of laws and legal systems as phenomena of society, and to the description and observation of laws and legal systems from a purely factual view of point. Using the terminology of systems theory, this radicalization means a system reference switches from a legal system to a scientific system. A purpose of legal philosophy and legal theory is devoted to their applicability by a legal system directly or indirectly. But, instead of a legal system as an addressee, the addressee of sociology of law is a scientific system and, therefore, sociology of law avoids any implication involved in normative

[40] See Hart (note 7), 29-33.
[41] See Luhmann (note 1), 32-33.

meaning. All statements made by sociology of law refer to a factual level and all concepts applied by sociology of law mark truths that are able to be observed.[42]

To radicalize or to complete Hart's descriptivism means crossing the boundary of the system. At the same time, it may result in giving up the function of legal theory as self-description of the legal system, in the terminology of systems theory. It is a crucial dilemma of the descriptivism that cannot be resolved. On the one hand, to defend itself against the criticism from Dworkin's "interpretivism", the descriptivism is forced to leave the legal system, to which it belongs. On the other hand, when the descriptivism crosses the boundary of the legal system, it will lose its original identity as jurisprudential legal theory and at the same time fail its original function as self-description that gives reasons to the operations of the legal system.

When the descriptivism achieves its pure form by way of giving up the distinction between fact and norm and through its adopting systems theoretical insights, this kind of jurisprudential legal theory transforms itself into a sociological legal theory. The relationship between two paradigms of legal theory becomes the relationship between legal philosophy as self-description of law and sociology as external description. As sociology, sociological legal theory could observe the legal system and its operations inclusive of self-description from the standpoint of scientific system, without obeying what the legal system demands. Whether jurisprudential legal theory adopts these external descriptions or not, the legal system and its self-descriptions must make a decision for itself. The mutual "irritations" will not be excluded.

V. Conclusion

H. L. A. Hart thought that a theory of law can be purely descriptive and called his theory a "descriptive sociology". One of his great contributions to modern legal theory is his emphasis on the internal aspect of social rules. According to him, a theory of law can be built on the basis of the description of the participants' view without sharing with it. This descriptivism is totally rejected by Dworkin, who propagates a theory that denies a sharp separation between a legal theory and its implications for adjudication. For Dworkin, a legal theory is only possible as a theory with "the internal, participants' point of view". Dworkin's position implies a radicalization of legal theory that will transform the statement of an external point of view to that of an internal one. For Dworkin, the descriptivism bases on the sociological concept of law, which is an "imprecise criterial concept" and is "not sufficiently precise to yield philosophically interesting

[42] See Luhmann (note 1), 31.

essential features."Hart's position is vulnerable because it takes an impure form of descriptivism that still draws a categorical distinction between fact and norm. This theoretical impurity results from the ambiguity of interpreting the internal aspect of rules. A strategy to rescue the Hart's project is to radicalize his descriptivism with Luhman's systems theory. Adapting the systems theoretical distinction between internal and external observation of law with all its implications for the explanation of the legal system and legal communications, Hart's descriptivism finally attains its pure form, which is not only a distinctive paradigm of legal theory, but also possesses the potentialities to clarify its relationship to the legal theory based on the internal aspect of law.

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