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Modern law and the crisis of common knowledge

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Abstract: The relation between law and practical knowledge plays no negligible role in the practice of law. But precise observations of this network of references have been neglected – probably owing to the printing press and the legal codes of nineteenth- and twentieth-century nation-states. In any case, the notion is now widespread that modern law must be described as an autonomous, "positive" law: this is, after all, how the post-1800 legal regime broke with earlier normative orders such as etiquette, morals, convention, and custom (French *coutume*, German *Brauchtum*), and thenceforward exercised its authority by means of a jurisprudence anchored in the institutions of the nation-state – written constitutions, law books, courts, and faculties of law. In contrast to such notions of a normatively closed order of law and a legitimacy secured through state authority, my remarks proceed from the theoretical realization that the codifying successes of modern law cannot be evaluated in isolation from the law's situatedness in a "cultural and discursive space" of a higher order.

Keywords: Modern law. Common knowledge.

1. Example: business law and business custom

Modern law makes constant reference to practical knowledge. As an example, let us take commercial law. Just as the medieval *lex mercatoria* was formed from the habits and customs of seafaring trade, everyday business in the cities, and so forth,[1] modern commercial law takes as given a set of instituted practices among businesspeople.[2] Thus the

Autor convidado.
Traduzido do alemão por Stephen Haswell Todd.

[1] See Berman (1983, p. 340).
[2] See Baumbach and Hopt (2014).

codified laws of commerce are, to this day, intimately connected with business conventions, most of which are unwritten: with business-specific etiquette, forms of interaction, or usages, such as the handshake as a means of concluding business; specific forms of measurement, as in the lumber trade; or the (increasingly obsolete) sign language of the trading floor. This dependence of the written law of commerce upon unwritten conventional ways of doing business often means that such conventions take on the character of binding law, so long as consistent use and practice is joined to a consensus view of their lawful character. In the German commercial code, the dependence of codified law upon instituted business practice comes most prominently to the fore in paragraph 346. There it reads: "Concerning the meaning and effect of actions or the lack thereof among business people, the prevailing habits and customs in commercial relations are to be taken into account".

The first thing we notice in this formulation – "the prevailing habits and customs in commercial relations are to be taken into account" – is that it makes explicit reference to a practical knowledge shared among people of business but not centrally accumulated or centrally available. Whereas the medieval *lex mercatoria* still battled for legitimacy *against* unwritten local laws and customs – for instance the practice, common in England, of arresting foreigners for the debts owed by natives of a fellow citizen, which was abolished by the thirteenth-century Statute of Westminster[3] – the codification of large swaths of commercial law in the nineteenth century gave rise to a commerce-specific conglomerate of written and unwritten norms: the direction of reference is *from* the legal code *to* a distributed local knowledge, which points further to an "open system" that constantly restructures itself independently of any higher-order intention. Granted, quotidian usages can themselves be codified into statutes, as in the domestic lumber trade in Germany, where, since 1950, a written set of norms – the so-called "Tegernsee Custom" – has been in force. As a rule, though, the customs to which commercial law refers are marked by their uncodified, unwritten, and at times not even verbally formulated character.

The structure of the conglomerate of written and unwritten commercial law can be further exemplified by the so-called "commercial letter of confirmation", which concerns the concluding of contracts. While the institution of contract law normally requires two compatible *declarations* of intent, which together manifest a binding intent (in some types of contract, this must be present in writing), in commercial law an imaginary validity is sufficient for the conclusion of a binding contract,

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[3] See Berman (1983, p. 342).

an implication in the sense of the *iura imaginaria* that Giambattista Vico already discerned as typical of Roman law.[4] The parties to the contract need not even be consciously aware of this implication or fiction: in the case that preceding negotiations – either in fact or in the view of the author of a letter of confirmation – have brought about a contractual relation, and these negotiations are preserved in the letter of confirmation, then the receiver of the letter, if she or he does not react, must yield to the validity of its contents. The declaration of intent is in this case "derived" from the party's tacit acceptance. This applies even to an individual who is taking part in the relevant sort of contractual relations for the first time and is unaware of the conventions attached.

2. The legal-historical context

The example of commercial law demonstrates that the relation between law and practical knowledge plays no negligible role in the practice of law. But precise observations of this network of references have been neglected – probably owing to the printing press and the legal codes of nineteenth- and twentieth-century nation-states. In any case, the notion is now widespread that modern law must be described as an autonomous, "positive" law: this is, after all, how the post-1800 legal regime broke with earlier normative orders such as etiquette, morals, convention, and custom (French *coutume*, German *Brauchtum*), and thenceforward exercised its authority by means of a jurisprudence anchored in the institutions of the nation-state – written constitutions, law books, courts, and faculties of law. Kant already distinguishes legality from morality, and links this distinction to a difference between inner and outer, associating the authority of law with an externally binding force. In the early twentieth century, with Hans Kelsen's pure theory of law, this inner-outer split gives rise to the notion of a normatively closed legal order supported by an internal hierarchy (the *Stufenbau* of the legal order), whose validity is theoretically taken for granted (as *Grundnorm* – "Basic Norm") and must be concretely secured through state power. Even in Luhmann's systems theory, this positivist legacy remains active. It is true that Luhmann insists that the normatively (that is, operatively) *closed* system of law, which is no longer to be analyzed primarily on the basis of its normative structure but rather on that of the juridical "production of decisions", must be "cognitively open". But with the notion of a cognitively open system of law, the activity of practical knowledge

[4] See Vico (1976, p. 389).

within the legal order is nonetheless reduced to the status of "factual knowledge." Moreover, according to Luhmann's basic assumption, this "factual knowledge" is absorbed into law in a manner that follows from and conforms to the internal rules of the legal system.[5]

In contrast to such notions of a normatively closed order of law and a legitimacy secured through state authority, my remarks proceed from the theoretical realization that the codifying successes of modern law cannot be evaluated in isolation from the law's situatedness in a "cultural and discursive space" of a higher order.[6] My point of departure, however, is not a critique of legal positivism from the side of natural law, as was undertaken by Gustav Radbruch, for instance, after the end of the Nazi regime in Germany. This and similar debates remain too fixated on the idea of an autonomous "positive" law. My aim is rather to ground a cultural-historical (media-theoretical) perspective on modern law, one that accentuates the way in which the normativity of law depends upon a common knowledge permeating the subject of law like a "second nature." Modern law always already maneuvers inside the framework of cultural orientations that transcend it, "cultural texts" in the sense of Aleida and Jan Assmann,[7] a framework of intensified "binding nature" or "binding authority" (*gesteigerte Verbindlichkeit*); e.g. rules of social behavior or narratives about a common concern, which belong to the self-image of a group and hence also to the "expressive potential" of individuals.[8] Another component of this framework of cultural orientations is a common practical knowledge, without which the legal coordination of actions cannot be thought. – Against this backdrop I will unfold the argument in three steps. Under the heading "social epistemology" I will introduce a few thoughts about the grounding of knowledge in social practices and forms of life. Then I will give a historical dimension to these considerations, under the heading "historical epistemology." Finally, I will sketch a three-phase model of the changing structure of reference between law and practical knowledge in the history of modern law.

3. Social epistemology

In contrast both to the modern theory of knowledge since Descartes and to the tradition of analytic philosophy, "social epistemology" sees all practices of knowledge as embedded in society.[9] Knowledge is not generated on the inside of an insular subject, through the sense-perception of objects in the outside world and on the basis of pure logical thinking. Rather, social epistemology departs from the premise – which it shares with the common-sense philosophy of the Scottish Enlightenment – that the generation of knowledge is tied to a social activity of reasoning and is always dependent on the knowledge of others.[10] If we bring together this "neighborly" model of

[5] See Luhmann (2004, p. 117). For a critique see Ladeur (2010a, p. 131) (In contrast to Luhmann, Ladeur conceptualizes experience as a hybrid concept. For him experience is a process which integrates cognitive, practical and normative elements).

[6] This term is used by Bender and Wellbery (1996, p. 79).

[7] See Assmann, J. (2005, p. 104).

[8] See Descombes (2013, p. 231), who – following Cornelius Castoriadis – speaks of institution-giving power in contrast to the constituent power and who subordinates the latter to the first.

[9] For an overview see Wilholt (2007, p. 46), Krämer (2015, p. 223) and the contributions in Loenhoff (2012).

[10] See Reid (1786); for the connection of moral judgements and social relations in Adam Smith's work (Reids' predecessor) see Raphael (2007).

knowledge production with the processes of the transfer of knowledge between persons and the problem of credibility, then we can say, with Sybille Krämer: any production of knowledge presupposes "a circulation of acts of witnessing at the societal level." Such "attested" knowledge then provides "the soil and the reservoir" for all practices of knowing; this certifies that *all* epistemology is "a thoroughly social epistemology".[11]

Social epistemology pictures knowledge as distributed within societal reference networks, not as centralized inside a meaning-endowing subject. Knowledge can thus also not simply be appropriated (by a single subject), let alone "constituted", as it is highly dependent on practical abilities and personal aptitude. All knowledge, from preparing food to building a house, rules of conduct in the family, the formulating of norms for the interpretation of legal texts, or the activities of scientific discovery in the lab, includes a component that cannot be fully articulated or that must be covered over from the start. This not immediately knowable or perhaps never knowable component of knowledge is nowadays most often designated by the concept of "implicit" or "tacit knowledge", a concept that can be traced to Michael Polanyi, who was active first in Germany as a physicist and chemist, and later in England as a theoretician of science.[12] Polanyi's idea of tacit knowledge goes together with a style of thinking that is fundamentally critical of subjectivity, one according to which the production of knowledge always already occurs within a "cultural machinery of language and writing" that "rids us of the absurdity of absolute self-determination" (POLANYI, 1983, p. 91).

For Polanyi, implicit knowledge is a kind of acquired intuition, as manifest prototypically in the master craftsman (SCHÜTZEICHEL, 2012, p. 115).[13] The skills of, say, a carpenter, the individual "handiness" he has, the level both of design and of workmanship at which his wares are produced – these are as dependent on implicit knowledge as is his ability to pass on his craft to colleagues and apprentices. Implicit knowledge, in this view, is always bound up with everyday practices; it cannot be made explicit – at least, not without some loss – and can only be taught and passed on from person to person.[14] Similar considerations had already underpinned the scientific philosophy of Ludwig Fleck in the interwar years. Especially pertinent in our context is the distinction Fleck draws between "experience" (*Erfahrung*) and "expertise" (*Erfahrenheit*). "Experience" makes reference to a cognitive dimension, the ability to correctly judge and evaluate an everyday situation, a work, or an object. By contrast, "expertise" enables one "to embody to an extent estimations and judgments in the process of gaining knowledge, in other words, to think with tools and hands" (RHEINBERGER, 2005, p. 62). Converting skill and practical ability to a kind of natural capacity, however, is a process that resists all forms of rationally formulable control. "Expertise *must* be learned – this is inherent to it – and yet at the same time it exceeds what *can* be learned in an explicit sense" (RHEINBERGER, 2005, p. 62).

Both Polanyi's "tacit knowledge" and Fleck's "expertise" privilege practical over scientific knowledge. Like later scientific theorists such as Ian Hacking and Bruno Latour, Polanyi and

[11] See Krämer (2015, p. 254-257) and Augsberg (2014, p. 80).

[12] See Polanyi (1969, p. 142-161), Schützeichel (2012, p. 108-112) and Rheinberger (2005, p. 62).

[13] See Kogge (2012, p. 31) and Rheinberger (2005, p. 61-62).

[14] See Ladeur (2014, p. 103-111). Quotes Collins (2010, p.161): "We do not know how it works, nor the mechanisms by which individuals draw on it".

Fleck attempt to prove that our knowledge rests upon concrete forms of life and activity, which do the work of opening up the world to our knowledge in a fundamental sense. Only with this opening-up, say these theorists, is that trust in the world established that is essential for social action, and only thus do encounters between the self and everyday things become possible (SCHÜTZEICHEL, 2012, p. 114).[15] More generally, their insight is "that a knowing-*how* always takes precedence over a knowing-*that*. Pragmatic action enjoys epistemological priority over the sphere of theoretical reflection" (LOENHOFF, 2012, p. 16; SCHÜTZEICHEL, 2012, p. 108-113). Hans-Jörg Rheinberger expresses the same thought as follows: "In Polanyi's view, tacit and explicit knowledge coexists not simply as two forms of knowledge on the same plane. He departs from the primacy of tacit knowledge and claims that all knowledge, from the everyday action of riding a bicycle all the way to acts of scientific discovery, either has a tacit component or is at least rooted in tacit knowledge. For Polanyi, fully articulated knowledge is one of great but doomed illusions of analytic philosophy" (RHEINBERGER, 2005, p. 63).[16]

The privilege that social epistemology gives to practical knowledge is further supported by the fact that explicit knowledge is coupled to a particular form of perception, namely "focal attention", which for its part rests upon another, namely "subsidiary attention". When one hammers a nail into the wall, one's focal attention is on the nail; subsidiary attention, on the other hand, attends to the hammer, without whose action there would be no focal experience and no trustworthy objects (RHEINBERGER, 2005, p. 63).[17] In other words: we understand things "by virtue of our familiarity with a whole interconnected network of 'assignments' (*Verweisungen*) and interrelated possibilities" (PIPPIN, 2014, p. 104). Hammer and nail are thus not mere things, lumps of matter onto which the acting subject as it were retroactively projects usefulness. The things are rather originarily characterized by our own "being able to use them" (PIPPIN, 2014, p. 104). By the same token, explicit knowledge only becomes understandable against the backdrop of implicit practical abilities and always-already meaning-endowed "situational totalities".

All explicit knowledge is woven into a network of implicit knowledge; it presumes, returning to the terminology of Sybille Krämer,

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[15] See Vattimo (1997, p. 108), who speaks about the Heideggerian idea of a "destiny of Being" "that is articulated as the concatentation of openings of the systems of metaphors that make possible and qualify our experiences of the world".

[16] See Ong (1977, p. 45) ("total explicitness is impossible").

[17] See Polanyi (1969, p. 138) and Schützeichel (2012, p. 116).

an “attested” or “witnessed” knowledge whose structure is for the most part oral or pre-linguistic and which can only be secured and passed on through listening, watching, imitating, experimenting, practicing, etc.

4. Historical epistemology

Social epistemology accentuates the societal constitutedness of knowledge. Cognition is conceived in the form of a societal process, which always already assumes a kind of knowledge that “runs alongside” and “can never be fully thematized and made explicit in communication” (LUHMANN, 1990, p. 122). This is true of knowledge on the whole: not just practical, everyday knowledge but also scientific knowledge contained in writing, printed books, and computer networks has to be understood as embedded in social and cultural structures. Even scientific knowledge incorporates elements of social context and cultural norms; it is never the result of a pure conceptual and methodical instrumentarium proceeding from a knowing subject’s conscious performances – as is still widely taken for granted in legal theory.[18] Moreover, (juridical) concepts and methods must be understood more as experiences than as “object-constitutive” forms of thinking – as experiences that others have had and that, with the aid of writing, can make up a standing tradition that need not constantly be learned anew from fresh experience.[19]

The decisive point for social epistemology is hence the claim that epistemology does not find its object in the “connaissance” of a subject, but rather in a process of “savoir” bound up with “the structure of a practice” (RHEINBERGER, 2010a, p. 72). The individual subject “does not appear as titular” of this practice, but merely a “temporary participant” in it (RHEINBERGER, 2010a, p. 72). In place of the subject’s cognitive relation to the world, we find an understanding of knowledge “as an always technically and culturally implemented process” (RHEINBERGER, 2010b, p. 19). Social epistemology, precisely considered, must then be thought of as both social and historical. Beside the consideration of the social and cultural constitution of all knowledge, there must be a reflection “on the historical conditions *under* which, and the means *with* which, things are made into objects of knowledge. It focuses thus on the process of generating scientific knowledge and the ways in which it is initiated and maintained” (RHEINBERGER, 2010a, p. 19). With a certain concision, we could say that knowledge is

[18] See Kelsen (2008, p. xi-xxxv).

[19] See Rheinberger (2010a).

dependent on "styles of thought" and "habits of perception" that rely not on timeless laws but on a process of historical shifts and "in-built internal outbreaks" (Gaston Bachelard). And because such shifts and breaks must also be expected to occur in future, they keep all knowledge "in a state of permanent lack of closure" (RHEINBERGER, 2010a, p. 32).

5. Law and its referential context of instituted practices

Modern law and the practical knowledge accompanying it are dependent on instituted practices that are not fully susceptible to conscious knowledge and influence. Every formal legal operation refers us back to a world of obligations and conventions that are neither given in nature, nor assimilable to an autonomously conceived "positive" law. Laws (*Gesetz*) and the legal system (*Recht*) are always woven into "a whole interconnected network of 'assignments' (*Verweisungen*) and interrelated possibilities," which in turn refers back to a "practical world of significance" and its "prepropositional familiarity" (PIPPIN, 2014, p. 104).[20] Just as the law of commerce always presumes commercial conventions to be actually in force, the judge must already speak a language and inhabit a semantic world before he can interpret a legal text or pronounce and justify a decision. And because instituted practices not only generate knowledge but also "commitments, attestations, and trust, without which knowledge is incapable of being connected to anything" (LADEUR, 2012, p. 220-250), the authority of law, the binding force of law – what legal positivism terms "legitimacy" – cannot be generate only by formal legal operations on the part of systems that intervene in society, by judicial actions, by administrative decisions or university dogma.

Modern law is bound up with linguistic semantics and naturalized linguistic usage – and just this usage refers us back in turn to prior practical experience of a shared nature. Wittgenstein's pragmatic philosophy of language rightly puts emphasis on the fact that no linguistic process of understanding is thinkable in the absence of a common knowledge underlying it. "There must be agreement not only in definitions but also (queer as this may sound) in judgments" for linguistic understanding (WITTGENSTEIN, 1953, p. 88e). This formulation carries much consequence. It implies no less than that participants in a linguistic community must proceed in a completely synchronized manner with regard to linguistic usage, must be "mutually *attuned* top to bottom" (CAVELL, 1999, p. 32). All capacity for judgment in language is dependent on a group of people being fundamentally, reciprocally attuned to each other; dependent on the customs, habits, and institutions that make up a form of life. This fundament of presuppositions can also be ascribed, as Hans Blumenberg does, to a "rationality" anchored in the "life-world", a rationality that according to Blumenberg is distinguished precisely by its "lack of a foundation" (*Begründungslosigkeit*).[21]

[20] See Pippin (2005, p. 145): "there are no original, natural oughts; there are always […] results, commitments […]This is the heart of the claim that there is no *prereflective* or natural human experience of the human; there is rather only the implicitly reflective, already 'negative', not yet fully explicitly reflective human experience, if it is to count as human".

[21] See Blumenberg (2010, p. 90). Wittgenstein's analysis of the authority of following rules also amounts to the image of a consolidated implicitness. Here, too, the focus is on practical ability, a rule-governed behaviour, of which the person following these rules is not aware. "When I obey a rule, I do not choose. I obey the rule blindly" (WITTGENSTEIN, 1953, p. 85e).

This means that all explicit knowledge of juridical rules – lawmaking, judging, and legal dogma – is attached to criteria that have to be presupposed as generally valid and that open themselves up to theorization only in retrospect. This is exemplified in juridical hermeneutics. Explicit juridical-hermeneutic knowledge can be written into a canon in the form of rules for interpretation and argumentation, with the purpose of establishing a communal professional orientation for the explication of legal texts. But the essence of legal hermeneutics is in no way bounded by a *juridical* methodology, the methodology transmitted via the professional education of jurists. Juridically disciplined interpretation, rather, must necessarily participate in the reproduction of an intertextual network of reference, and thereby takes part in the upholding of a pragmatic world of law, one which, for its part, cannot be separated from the contexts and cultural norms that surround it, including their various respective histories – of language, mores, customs, habits, conventions, etc. When paragraph 185 of the German penal code criminalizes insult and libel, the printed text refers to an unwritten code of honor, whose validity and actuality in quotidian social life must be presumed. In other words: the juridical invocation of libel and the search for criteria in the light of which the judge can say that this or that utterance is libelous in the eyes of the law presuppose a common knowledge, a "convergence of judgments" on insult and libel.

We can therefore join Karl-Heinz Ladeur in departing from the premise that practical knowledge "stands always in a historically variable situation of contextual correspondence and reference to legal concepts, which without this would be of no use" (LADEUR, 2014, p. 103-108). Modern "positive" law correspondingly refers back to practical knowledge, mores, customs, habits, conventions etc., and this entire structure of reference between law and instituted practice can only be conceived as dependent on time and context, in line with social and historical epistemology. We must therefore also posit that the entire structure of law and practical knowledge undergoes processes of historical transformation, shifts of meaning, and changes in the "style of thought". If we confine ourselves to modern law and its connection to instituted practice (leaving aside the question of the relation between law and common knowledge in the middle ages and antiquity),[22] we can distinguish three "styles of thinking" or "habits of perceiving": a bourgeois-liberal, a group-pluralistic, and a network-like culture. These distinctions are not intended in the sense of a historical progression,

[22] For this dependency in the case of the athenian democracy see Ober (2008) and Ezrahi (2012).

but serve to sketch out a multilayered image of differing, interwoven, and conflicting structures of knowledge and law, in which history is not merely that which has been, but retains its presentness within the legal culture of modernity.[23]

6. Generally accessible knowledge from experience

In the center of bourgeois-liberal culture stands the general rule of law, itself referring back to a generally shared, generally recognized (implicit) knowledge. The general rule of law in Germany owes its impetus not least to the overreaches of the monarchy. It was against the latter that the jurists rebelled, with a strategy of "excarnating" the king for the sake of the objectivity of ("un-incarnated") legal texts.[24] Savigny had already made the connection between "positive" law and the *Volksgeist* or "spirit of the people" as its instance of authority, in other words, an invisible or non-corporeal binding force; and he portrayed the bourgeois jurists themselves and their abstract law as the representatives and spokespersons of this spirit. The later nineteenth century saw the jurists concentrate increasingly on the printed law and ultimately on the law book or legal code as textual ideal (AUGSBERG, 2017). The rise of the law book (*Gesetzbuch*) is itself inseparable from the increase in lawmaking activity on the part of the ascendant nation-state. The law is now bound to respect only the common utility and is no longer legitimated by tradition and divine sanction. In this sense even the monarchical state was able to set the law in motion, to prize it loose from local and city jurisdictions and reorganize it, on a higher level of generality, as a medium for the coordination of actions among strangers. To paraphrase Monika Dommann: not only in the area of music did nineteenth-century law equate progressive qualities with the abandonment of tradition and lift written signs above knowledge handed down orally (DOMMANN, 2014, p. 41).

Once we attend to this historical context it quickly becomes clear why we must not make a voluntaristic misreading of the liberal legal culture of written constitutions and law books. It is true, the general law is imagined as the expression of the sovereign will of a respectable subject. The will of the sovereign, however, can articulate itself only in the medium of written law texts and thereby undergoes an objectification: the law becomes general, that is, non-instrumental, non-goal-directed, formulated;[25] and by means of its articulation in written language it remains in contact with the accumulated store of real experience and with ordinary semantics and everyday speech. Moreover, in this intertextual network not only the lawgiver is supposed to be a respectable subject, but the addressees of the law as well: in the civil code, for instance, the person is taken to be a basically reliable and predictable partner to contracts, one who can be trusted even outside of personal circles of acquaintance and family relations. The emerging law of copyright endows the author, for his creative powers of invention, with individual rights – and thereby presupposes the integrity of the author as a person under the law. The same is true for the legal agents

[23] In favour of such a modell regarding cultures of subjects see Reckwitz (2010). For legal theory see Ladeur (2010b, p. 143).

[24] See generally Koschorke (2006, p. 29) and Assmann, A. (2011, p. 116-117).

[25] Thus it is about "relationship in terms of rules" (Michael Oakeshott). Also Nardin (2001, p. 202-203).

of the state, for instance the judge. The judge is one who, in the process of applying the law, takes the will of the law *as if* it were a will "given by a power *higher than himself*" (LABAND, 1964, p. 178, emphasis added).

In bourgeois-liberal legal culture, the structure of reference obtaining between the law as explicit juridical norm and the networks of practical knowledge that rest upon an artificial ground of convention is determined by the generality of experience distributed among society. It is hence taken for granted (and could be presumed through history as well) that everyone has or at least can have access to practical knowledge and its prepropositional familiarity. This applies for instance to standards of care or to the legal concepts by which the threshold of harms and "damages" – a concept so central to bourgeois-liberal law – is determined. Thus the concept of culpability that triggers liability in business law refers back to a normal condition of things, to a conception of normal usage on the basis of which the value and usefulness of merchandise are determined. The carriage that arrives with spots of rust and cracks in its lacquer infringes upon certain things taken for granted in the carriage trade, and can therefore be sent back. The same does not apply, however, to secondhand carriages.

Hence the kinds of experience and knowledge accumulated by citizens in horizontal relation to each other, beyond the boundaries of traditional relations, gain significance as opposed to the kind of vertical knowledge that stems from the king and his advisers.[26] The same applies to public law, for instance the police, when it restricts police action to the guaranteeing of public safety and order and excludes social-welfare interventions that transgress those bounds. Policing law thereby refers ultimately to the practices and conventions found in society, which require no special royal decree or which are in fact immune to such. In particular areas of bourgeois law, such as commercial law, the subject of common knowledge is ultimately exchangeable: here it is the collectivity of businesspeople to whom specific business experience is ascribed. In any case, it is always a distributed, generally available knowledge, always experiences that can be had by anyone, that form the basis. One can say, vice-versa, that bourgeois-liberal legal culture rests on a close connection between explicit legal norms and implicit knowledge, and helps to secure, by means of this connection, a unified understanding of both complexes of meaning.

7. The knowledge of groups

Perhaps it is no accident that by the end of the nineteenth century, a social and historical epistemology that went beyond the classic philosophical tradition was already beginning to take shape. Hans-Jörg Rheinberger has done more than anyone to show, in various publications, how this epistemology relativizes the notion of an all-encompassing and unified science with physics at its center. The (single) ideal of a theory of knowledge oriented around the general mathematical laws of natural science becomes plural, and is replaced by the idea of a multitude of spatio-temporally distinct practices of knowledge production, "style of thought", and "habits of perception". Ludwig Fleck gives voice to this transition from the theory of knowledge to epistemology by, among other things, embedding epistemology from the start in a

[26] See generally (using the historical example of the early USA) Egan (1999).

social and cultural structure that transcends the elementary subject-object relation. "Wherever and whenever we begin, we are always already in the midst of things" (RHEINBERGER, 2010b, p. 28). And for Fleck, this being "in the midst of things" means first of all that the individual scientist can no longer be understood as a sovereign authorial subject, but only as always already entwined in various *thought collective*. All this goes to imply that we can never get rid of the individual's dependence on the experience, conventions, and practical working conditions of a particular community of scientists – for example that of the chemical laboratory.

Along with science, the bourgeois-liberal legal culture of the late nineteenth century was also expanded and transformed by a "style of thinking" oriented toward the collective. The various "interests" arising in society, and a view of "law as a means to an end" (*Der Zweck im Recht*, to take the title of Rudolf von Jhering's book), began to encroach upon the previous orientation toward law in general and communal practical knowledge. Legal culture gradually opens itself up to new institutional conditions and the practical experiences arising from them. In the 1930s, in the light of the demands that the new medium of radio made with regard to the "reachability" of its listeners, Benjamin (2002, p. 396-398) spoke of "grouping" (*Gruppierung*) as the decisive feature of the new epistemological situation.[27] Taking up this formulation, one could say that the new epistemology is defined by the experience of grouping: practical (implicit) knowledge is now filtered through a plethora of group standards, structured now more strongly than before "according to social strata, areas of interest, and environment" (BENJAMIN, 2002, p. 398). In contrast to the sovereign respectable subject of bourgeois-liberal culture, breaking free of the constraints of tradition and working out its newly won autonomy, the subject of grouping lives "more in his relations" (LETHEN, 2002, p. 189). The employee, with his or her extroverted social orientation, is a paradigmatic subject of grouping (RECKWITZ, 2010, p. 409).

The epistemology of grouping hangs together with a social world composed of collectives. Here the unity and generality of the law and of practical knowledge are rendered very much relative in their meaning, and confronted with the increasing significance of a plurality of group structures, which come to determine practical knowledge as well. Correspondingly the meaning of "positive" law now depends on the forces, groups, organizations, and milieus operating in a social field – as was always the case in the law of commerce. This shift in law in

[27] See Weber (2004, p. 110).

general and in the scientific climate is driven in the first place by the increasing significance of large-scale mass production enterprises and an expanding state bureaucracy. Both developments lead to an increasing orientation toward specialized knowledge, often requiring experts: one might think, for example, of the rise of self-imposed standards in the technical industries and the group probabilities in effect there.[28] Thought collectives among, say, electrical engineers, have more and more influence on rules and conventions, on the meaning of legal texts and thereby on legal culture's understanding of itself. Knowledge – of technical norms, in this instance – becomes refracted. Besides distributed knowledge that is in principle available to anyone, there emerges a knowledge dependent on particular groups – often on cartels – which can also be deployed strategically in the service of particular interests.[29]

What the rise of group epistemology means for legal culture can be gleaned from changes in juridical hermeneutics: in place of the "passive" subsumption of particulars under general laws, we now find a notion of the "legal labor" (*Rechtsarbeit*) performed by the interpreter,[30] which is tied to the circumstances of industrial society – the idea of the concretization of the law by way of the production of "practical concordance." Juridical interpretation now necessarily refers to prior self-interpretations, to a plurality of actual interests, self-understandings, and worldviews in various fields of significance – industry, the press, the artist, the partner to an agreement, the school, science, etc. These fields of significance structure the space of possible relevant interpretations in advance and thereby raise, among other things, the novel problem that the self-understandings in question may conflict with one another. This leads to a state of affairs in which the understanding of the law is detached from the implication of an inherent generality: the interpretation of the law now takes its cue from an "open society of interpreters", allowing for more flexibility in the process of interpretation and replacing the idea of a unity of the law – and the assumption of a stable and accessible practical knowledge – with the idea of a sought-after consensus or compromise among divergent formations of interests and values.

The novelty of the epistemology of grouping – once again to use a slightly different formulation – is that the law can no longer refer to generally shared values and a common practical knowledge, but instead becomes more and more dependent on group-based coordinations, detached from general public norms, general laws and expectations. The "positive" law of the state becomes dependent on prior, group-based structuration. Individual provisions for sickness, age, and the loss of work are supplemented by a complex social insurance system, the experience of individuals replaced by statistical knowledge; an author's copyright yields to the standards of utilization collectives; bourgeois literary and theater culture is replaced, including in terms of state financing and support, by broadcasting institutions conceived according to the needs of groups. Wherever and whenever the individual enters into action, she or he is always already in the midst of things, entangled in a world of collectives, connected to a network of "assignments" and interconnected possibilities that for its part refers to a practical world of significance shaped by specialized group knowledge and its prepropositional familiarity.

[28] See Ladeur (2010b, p. 143-147) and Ladeur (2010a, p. 131).

[29] See Vec (2006, p. 165).

[30] See Müller (1994, p. 246).

8. Network-dependent knowledge

The most recent development in the legal and scientific culture of modernity can be described as a transition from a plural group paradigm to a network paradigm. The new network epistemology's models and structures, however, are not easy to grasp and describe. What appears decisive is on the one hand a weakening of the "pre-structuring" effect of groups and organizations on the self-interpretation of the societal fields of significance and their normative orders: in place of relatively stably anchored group milieus (firms, associations, parties, etc.), we find a sort of permanent liquidation in which the processes of the production of knowledge become fluid and dynamic. On the other hand, the knowledge collected and articulated on the part of groups is overlaid with new specialized knowledge belonging to new epistemic communities. The differentiation of professional knowledge in high-tech industries, for instance (computer technology, nanotechnology, biotechnology and so forth), brings with it a relaxing of traditional organizational borders: the firm, or even individual units within the firm, open themselves up to shared projects, in order temporarily to network with other firms and units. Practical knowledge thus becomes project-dependent and manifests itself as a "swarm", e.g. in the experimental like development of new software or hardware in the Silicon Valley computer industry in which no foreseeable results can only be legally structured after the fact.[31]

This means that practical knowledge is now curated in micro-epistemic communities, such as entities in the financial markets industry. These entities cannot, however, be thought of as organized units with points of hierarchical control, but are rather themselves internally constituted from diverse milieus with distinct practical experience, sometimes not interpenetrable to each other (as in risk management, controlling, top management, etc.).[32] Highly specialized experience, often incomprehensible to other parts of the organizational structure – such as experience with mathematical (and computer-dependent) modeling of extremely risky financial instruments – eclipses the reciprocally observable knowledge of the whole organization, even the notion of generally shared experience. The picture becomes even less transparent when one considers that the extreme fragmentation of practical knowledge in dynamic networks of cooperation is confronted, in the public sphere, with a general experiential knowledge that is now

[31] See Ladeur and Vesting (2008, p. 123).

[32] See Ladeur (2011, p. 63-81).

strongly determined by the personalized scripts of electronic media (such as the "greed of bankers"). The last part of this picture is the "postmodern lifestyle subject" (RECKWITZ, 2010, p. 441), who personalizes his or her individualism,[33] which now speaks only for itself and wins at least a part of its identity by "sharing" the experience of media-events with others and exchanging its "extremely personal" experiences on "social media" (KAUFMANN, 2010, p. 173; RECKWITZ, 2010, p. 574). In the extreme case, then, the life of individuals moves between the local experiences of a radically particular section of world and the global, universal scripts of the world of media.

A widespread reaction to the shift to networked knowledge appears to consist in an interpretation of the complexity of project-based knowledge production as a return of the individual, and a declaration of the law as the expressive medium of the self: the subject demands recognition of its authenticity and possibility of self-determination, and political legislation, the interpretive practices of the courts, and the dogma of the universities are adjusted to fit this aspirational structure of the personalized individual. What had been a set of social rights coupled to definite aims and tailored to a plurality of groups becomes now an insurance system for each individual in need; generally propagated school curricula make way for an individualized "workshop of learning"; and an unlimited right to downloads takes the place of copyright. Though this sounds rhetorical or hyperbolic, a glance at the development of data-protection and personality laws in Germany, for example, points clearly in the direction indicated: here, the dominion of normative conceptions of autonomy extends throughout legislative and rights-granting processes, conceptions that no longer offer a point of reference to the idea of common knowledge. In place of the Other of culture, there comes a self that must now be a "chosen self", in any case at least the "co-decider" of its own personality (BRITZ, 2007, p. 10-16). The "I" becomes the foundation of its own identity, with a comprehensive right to authentic "self-presentation" (BRITZ, 2007, p. 37-41).

With the advent of temporary networks of cooperation and the rise of a personalized individualism, the connection between "positive" law and the instituted practice of societal forms of life, their habits and compulsions, seems to loosen, too. If the legal culture of the "plural groups" phase still aimed at the institutionalizing of systems in which common knowledge could be generated – one might think here of the establishment of public insurance systems, of state support

[33] See generally Ehrenberg (2011).

for the development of technical standards in machining or house building, or of the construction of public broadcasting organizations – the present state seems increasingly to lose sight of the necessity of a balance between, on the one side, the legal structures generated through legislation, the courts, and administration; and on the other the practical knowledge distributed throughout society. The crisis of common knowledge resulting from the fragmentation of factual and normative complexes of meaning in the new network epistemology cannot, however, be answered by a simple return to the individual and its right to self-presentation, but requires the elaboration of a law of networks that takes up the nature of experience in the new networks of project-based knowledge production and provides them with an appropriate legal framework.

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