

EPISTEMOLOGICAL PERSPECTIVES IN JURISPRUDENCE

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1. Emergence and development of legal theory

The progress of science and the emergence of new disciplines are not only the fruit of genius and the work of the learned. At certain points in history the time seems ripe for certain ideas, for new approaches in the field of a branch of science or for the development of new disciplines. It is no coincidence that the same discovery is sometimes made by two researchers at the same time, independently of each other.

Neither is it coincidental that a distinct paradigm, a scientific approach to law, is successful and is published by different researchers in several different countries at the same time. The emergence of a new approach or of a new discipline results from certain needs which are developing in society at a particular time. There is an awareness of deficiencies or weak points in the current approach and a 'demand' for new or further lines of research.

Sometimes it is a reaction to the previous approach: the rationalism of the nineteenth century, for instance, gave birth to romanticism. The present discussion on deregulation is probably the inevitable consequence of the policy of intervention by the Welfare State.

At other times the trend is to pursue the path mapped out by a former approach. Econometrics, for example, attempts to transform economic science into a more 'rigorous' and hence more 'scientific' discipline by mathematical means.

It is in this light that the emergence of new approaches or new branches in the science of law should be viewed.

The emergence in the nineteenth century of the general theory of law can be explained by the deep-seated crisis in the science of law in Continental Europe at that time. Before the major codifications, legal scholars were faced with a considerable scientific and creative task. The sources of law were many and varied, unsystematic and difficult to find, consisting as they did of customary law which differed considerably from region to region, of a limited body of legislation and learned Roman law that was taught in the universities. The creative work consisted in development and systematization, principally of customary law, with the aid of Roman law. This type of scientific work by several generations of jurists led to the major codifications in the

eighteenth and nineteenth centuries, for example the Code Napoléon of 1804. Yet paradoxically legal science, in preparing the codes, dug its own grave. Customary law and Roman law had ceased to be important sources of law since all law was, henceforward, to be found in a clearly written code accessible to everyone. The application of law by the judge now seemed to have become an easy matter. Suddenly legal academics became redundant. What could they add to the code, which was the product and the apotheosis of a bimillenary legal culture? The academic was confined to the limited task of teaching the law. It is true that books and articles in the field of legal doctrine continued to be published. But in these publications, the teacher of law often did nothing more than recapitulate the code, adding some comments on the historical origin of the rule and/or some practical applications. For a creative science there seemed to be no place. Legal doctrine has thus undergone a profound identity crisis.

Philosophy of law too experienced troubled times. The liberal society of the 1900s was fairly tolerant of new ideas. The confrontation with other conceptions of man and society (resulting, inter alia, from colonization and from amelioration and augmentation of modes of transport and communication) convulsed the hitherto homogeneous ideology that had provided a solid foundation for society. Within the realm of legal philosophy this signified a loss of belief in both a metaphysical natural law and a rational natural law, developed during the 17th and 18th centuries (and from which the codifications had, at least to some extent, been derived).

In contrast with the decline in legal science, positive science achieved an incomparable success. Progress in the sciences led to concrete results, plain to all, most notably to inventions and technical improvements, such as the train, steamboat, car, aeroplane, telegraph, telephone, photography, and electricity. The prestige of the positive sciences was clearly in the ascendant, whereas that of the science of law was undeniably declining.

It is readily understandable that in this climate several jurists should from the middle of the century start to question the scientific nature of their discipline¹. Obviously they had to compare their methods with the empirical methods of the positive sciences. From that point it was only one step to concluding that in order for an approach to law to be scientific it had to apply the

¹ 1848 could be seen as a symbolic starting year, when in Germany Von Kirchmann was publishing his book *Über die Unwissenschaftlichkeit der Rechtswissenschaft*. Other books, bearing the criticism of the unscientific approach of the law by legal science in the very title, were published later on by several European jurists: LUNDSTEDT, A., *Die Unwissenschaftlichkeit der Rechtswissenschaft*, Berlin, 1932-1936; MULDER, T., *Ik beschuldig de rechtsgeleerde faculteit van onwetenschappelijkheid*, Leiden, 1937.

same methods as those of the positive sciences. This realization introduced a scientific approach to law that could be called 'empirical natural law'. The ambition was to perform empirical research, historical and current, in a comparative legal perspective, hoping to find concepts and legal rules common to the various legal systems. They thought by applying an empirical method they would arrive at a scientific 'natural law'. An important representative of this conception was the German jurist Adolf Merkel (1836-1896), who described it as a 'positive science of law' or as a 'general theory of law' (*allgemeine Rechtslehre*). In his opinion, the general theory of law would become the scientific successor to a metaphysical philosophy of law, whose demise was pronounced. The general theory of law thus became, for some of its pioneers, not only a scientific alternative, but also an ideological alternative. Although this conception was limited to a small number of champions of the (general) theory of law², the theory of law has, both in the past and in our times, often been considered as a 'positivist philosophy of law', running counter any speculative approach of a metaphysical type³. Radbruch, for example, spoke of the 'euthanasia' of legal philosophy⁴. On the other hand, in the minds of the majority of representatives of the general theory of law, both past and present, it constitutes a division of work and not a conflict between two concurrent approaches⁵. The general theory of law of the 19th century has, however, been applied in the course of the 20th century by representatives of widely differing trends in philosophy. The historical grounds that gave birth to the general theory of law have gone out of fashion to a large extent, although not entirely. This naive belief in a scientific model of the positive sciences applicable to law hardly exists today. Nevertheless, at least in Continental Europe, the need remains, today perhaps even more than a century ago, for a 'positive', analytical and (partly) empirical legal discipline, to complement legal doctrine and the philosophy of law.

During the 20th century the general theory of law has evolved towards the present legal theory.

² See e.g.: HERAUD, G., 'Qu'est-ce que la théorie générale du droit?', *Archives de Philosophie du Droit*, 1962, p.120-121.

³ See e.g. the historical overview by Fasso of nineteenth and twentieth century jurisprudence, in which the '*théorie générale du droit*' is considered to be a positivist, anti-philosophical trend (FASSO, G., *Histoire de la philosophie du droit - XIX et XXe siècles*, Paris, L.G.D.J., 1970, p.144-145). See also the 1962 issue of the French *Archives de Philosophie du Droit*, in which various articles were published under the title 'Qu'est-ce que la philosophie du droit?', esp.: p.95-96 (J.Brethe de la Gressaye), p.100 (A.Brimo), p.106 (J.Dabin), p.116-117 (G.Del Vecchio), p.128 (G.Kalinowski), p.143 (J. Parain-Vial).

⁴ RADBRUCH, G., *Grundzüge der Rechtsphilosophie*, 1914, p.16.

⁵ E.g.: KELSEN, H., 'Was ist juristischer Positivismus?', *Juristenzeitung* 1965, p.468.

The programme of this new approach may be found in the preface to the first edition of the *Revue internationale de la théorie du droit/Internationale Zeitschrift für Theorie des Rechts* published in 1926 (by Duguit, Kelsen and Weyr).

Instead of looking for elements common to all systems of law, the main concern is now with common problems: "...the scholars carry out research based on the problems that come within a scientific domain which we designate 'theory of law'. This is because it raises questions which investigate e.g. the nature of law, the relationship of law with state and society, fundamental concepts and methods of legal knowledge." (Preface, p.2).

This method appears more analytical than empirical.

The evolution of legal theory was also influenced by the general evolution of the study of law within the context of the human sciences. During the last century new legal disciplines developed as independent branches of 'general' human sciences.

Logic of law, sociology of law, anthropology of law, ethnology of law, psychology of law, semiotics of law, economic analysis of law thus came into being. The dispersal of scientific approaches created the need for an integrative discipline that is able to coordinate and systematize the approaches and the results of these disciplines on an interdisciplinary base. This necessary integration is a new task for legal theory.

As a consequence of the critical movements of the society which developed during the 60s, critique of ideology, which already existed implicitly within the framework of legal theory, was also applied to law. Apart from those movements in thought, critical of law, which were themselves of an ideological nature (for example the critical legal studies in the United Kingdom), another purely scientific, analytical approach developed, which aimed at revealing the ideological nature of scientific reasoning, theories, arguments, legal constructions etc., without criticizing the ideological content as such. The ultimate aim is to eliminate such implicit ideological elements from legal science and legal practice, wherever possible by eradicating them completely, or else by making them explicit and thus clarifying the discussion.

The historical evolution as outlined above has to a large extent been confined to Continental Europe. In the United Kingdom the teaching of law and legal science has always been strongly tied in with legal practice, to such point that the first faculty of law in England was not instituted until 1826, in London, although Oxford, the first English University, dated from the 12th century. Moreover, the common law countries never had any major codifications or other discontinuities in the history of their law. Nevertheless, numerous paradigms that satisfied needs in the society of Continental Europe can be found in Anglo-Saxon legal literature. Jeremy Bentham and John Austin e.g. had already spread the gospel of analytical jurisprudence at the beginning of the

19th century, well before the birth of the general theory of law. Analytical jurisprudence, just like Continental 'general legal theory', set out to establish general concepts of law, based on the systems of positive law and from a non-ideological perspective. On the other hand, analytical jurisprudence is analytical rather than empirical⁶. The emergence of analytical jurisprudence can also be accounted for by the decline of philosophies of natural law and the success of scientific rationalism⁷.

2. Aims of legal theory

2.1. The Demarcation of legal theory

The literature relating to the demarcation of legal theory vis-à-vis legal doctrine is not conspicuous for its clarity. The consequence of a very wide definition of the object of legal doctrine and of the philosophy of law is that there is no longer any room for a third discipline, legal theory. In the final analysis this is of little importance, the real question being whether there is a genuine need for an approach to legal problems, which differs substantially from the doctrinal and traditional philosophical approaches. This means that the definition of the object of legal theory is relatively arbitrary and to a great extent conventional. From a survey of Continental European literature of the last century, a profile can be outlined and the following characteristics distinguished :

(a) Legal theory can be defined as an explanatory science that studies in an analytical or interdisciplinary manner the theoretical problems concerning the law which are not completely determined by the legal rules in force in a given legal system.

(b) Legal theory as an explanatory science of law concerns itself with an analytical and empirical study of legal phenomena, which embraces positive law and legal doctrine.

(c) As with all sciences and contrary to philosophy (of law), legal theory endeavours to develop an approach that is non-normative and value-free. Its aim is to produce scientific results that are

⁶ COTTERELL, R.B.M., 'English Conceptions of the Role of Theory in Legal Analysis', *Modern Law Review* 1983, p.686-688; SCHOFIELD, Philip, 'Jeremy Bentham and Nineteenth-Century English Jurisprudence', *The Journal of Legal History* 1991, p.58-88. See also the Introduction by John BELL in: VAN HOECKE, M., *What is Legal Theory?*, Leuven 1985, p.11-25 ('Legal Theory and the Anglo Saxon World').

⁷ COTTERELL, R.B.M., o.c., p.688.

relatively unconnected with philosophical theories or ideologies.

Completely value-free science, however, is impossible, as has now been accepted even in the realm of the positive sciences. Moreover, as Alexy and Dreier point out, this implies that any concern with the problem of justice is excluded from the field of legal theory. Such a conception presupposes that there is no conceptually necessary connection between the law as it is and the law as it should be, which as such is a philosophical theory (legal positivism) that is open to discussion⁸. Attention should be paid to the fact that analytical and ideological elements are sometimes interlinked to such an extent that they cannot even be dissociated for the sake of research. Nevertheless, all legal theorists in this analytical tradition, and most prominently Hans Kelsen, had very sound reasons for trying to keep a clear distinction between a value-free, scientific approach on the one hand, and a value-laden, ideological approach on the other hand. This means that in pursuing legal theoretical research one can at least try to keep it as value-free as possible. It is clear that the strong versions of legal positivism have played a historical role in their reaction against heavily value-laden approaches to law in both legal philosophy and in legal doctrine. But it is also obvious that some form of weak positivism (e.g., the Hartian or the Dworkinian approach) has in general become increasingly accepted in the course of recent decades.

Nineteenth-century belief in absolute scientific truth has, in the realm of the positive sciences, been destroyed by relativity theories such as Einstein's. In the same line of thinking, Kelsen's rather naive belief in keeping completely apart the law as it is and the law as it should be has nowadays been replaced by a more modest belief in the possibilities of segregating ideology from legal-theory research.

(d) The theory of law raises theoretical problems of its own, i.e. which are independent of any concern to solve, directly or indirectly, the practical legal problems. Nevertheless, a good theory (for example, concerning the interpretation of law) could be expected sooner or later to bear some relevance to legal practice.

The problems studied by the theory of law are not entirely bound up with legal rules in force in a specific legal system at a given moment. They are on a more abstract level that transcends national and other frontiers of the various legal systems. Questions such as those concerning the nature of the legal norm, the structure of legal systems, the separation of powers, the legal status (natural law or positive law ?) of human rights or the methodology of interpretation, cannot be studied independently of positive law. These problems are thus bound up with fundamental data, relating not to a system of law but to a legal culture. However, they remain independent of the specific

⁸ DREIER, R., and ALEXY, R., 'The Concept of Jurisprudence', *Ratio Juris*, 1990, p. 2-3.

content of systems of law at a given moment within this legal culture. Legal theory can, on this point, be clearly distinguished from legal doctrine.

2.2. Fields of research in legal theory

The development of legal theory over the last century shows that there have been four different lines of research. The first two fields - the oldest and most developed ones - are the analysis of law and legal methodology. Two fields have emerged more recently: epistemology and methodology of legal doctrine, and ideological criticism of law.

2.2.1. Analysis of law

The first task of legal theory is to elucidate the concepts, mechanisms and institutions of law. Thus the accent is laid on the analysis of fundamental concepts such as those of 'law', 'legal norm', 'legal system'; the nature and the hierarchy of sources of law is studied. Attention is paid to the various functions of law in society. This kind of research has been carried out by the analytical school of Kelsen and his disciples, but the contribution of sociology and psychology of law in this field has also been considerable (e.g. as regards the clarification of the functions of law in society, and the discussion of the effectiveness of legal norms).

2.2.2. Legal methodology

Traditionally the interests of researchers were oriented towards the methodology of the application of law, concentrating in particular on the question of judicial interpretation. A vast amount of literature developed in this sector and in other, related ones such as the solution of gaps and antinomies within legal systems, the theory of argumentation, and the qualification and the interpretation of facts.

More recently, however, researchers have also concentrated on the methodology of the creation of law or the theory of legislation. Economic analysis of law, introduced in the United States with the aim of, inter alia, evaluating the social cost of legislation, has made a notable contribution in this area.

The political theme of deregulation has also served to revive the debate on the art of legislation.

2.2.3. Epistemology and methodology of legal doctrine

The epistemological question has been an open one since the major identity crisis with which legal doctrine has had to contend over the last century. From that time there has been constant debate on the scientific value of this body of knowledge. What is its nature? Is it descriptive, experimental, empirical, hermeneutic or practical?

Could it, once this question is resolved, be classified among the sciences? Could its scientific character at least be enhanced? From this perspective, it is also interesting to analyse the nature of the diverse conceptions with respect to legal education at the universities.

2.2.4. Criticism of legal ideology

Although this approach of analysing hidden and explicit ideological data in law is not absolutely new (its beginnings are to be found in the writings of Bentham and of Kelsen, for example) it has developed considerably since the 70s. The object here consists in tracing the philosophical presuppositions, the ideological prejudices and the logical inconsistencies that adversely affect the texts and the legal institutions which are ostensibly neutral. Almost every area of legal practice and legal doctrine has already been the subject of such a critical analysis.

3. Epistemology of scientific legal theory

3.1. Legal science as a theoretical corpus and as social practice

As a cognitive activity aiming at a representation of legal phenomena conforming to the relevant scientific paradigm adopted, legal science is both a theoretical corpus and a social practice.

As a theory, legal science constitutes a collection of systematically linked-up propositions. It involves the application of a consistent methodology and the obtaining of knowledge which is communicative and capable, if not of verification, at least of rational agreement. Whatever the scientific criteria used, scientific discourse sets out to rationalize the phenomena studied by reducing them, if not to uniformity, at least to order. More demandingly, the theory can also endeavour to extend its power of clarification (explanation and prediction) to new aspects of reality, not infrequently deviating from its common-sense representation.

As a social practice, legal science presupposes an institutional system of research and training and reflects, either implicitly or explicitly, totally or partially, its interaction with values and ideologies

which were initially dominant in the scientific community and later in the society as a whole.

Legal science can, on the basis of the very general definition presented, be developed at different levels, having regard to the paradigms and the scientific criteria adopted. This point is, however, obscured by the fact that in judicial thought the general dominant epistemological monism leads to exclusions and mutual criticism and condemnation. If, on the other hand, a pluralist epistemological perspective is adopted, it will be recognized that the scientific character is a matter of degree and that the different versions of legal science can be applied in a spectrum of multiple graduations corresponding to the diverse uses of the term 'legal science'. Thus for some, legal science, in the form of legal doctrine or 'legal dogmatics', consists of describing and rationalizing legal rules. Its specific job is the interpretation and systemization of rules. This task is sometimes perceived as purely theoretical, the theoretician confining himself to knowing his object. In this case legal science (meta-language) is clearly distinct from its object (law as a subject of language). The object of legal science is normative but its methods are not. Sometimes, by contrast, legal doctrine is considered to have the function of combining knowledge and creation, the theoretician being called upon to argue in the light of the determination of the fairest solutions to problems raised by the application of the law. In this case, both the object and the function of legal science are normative.

Others, however, consider that legal science is unable to lay claim to this title unless it gains its autonomy in relation to its object of study by acquiring the faculty to explain legal phenomena or at least to account for them from a critical point of view and not merely provide a description and a systemization of the law. This scientific approach was in turn developed in accordance with a variety of epistemologies and methodologies : e.g., empirical, formal logical or hermeneutic. In the first case, the theory which identifies which propositions relate to the observable phenomena, and which are susceptible to empirical verification, is scientific. In the second case, the theory in which the language is formalistic and the propositions incorporated into an axiomatic system, is scientific. In the third case, the theory that accounts as satisfactorily as possible for (or explains) discourse actually delivered by various lawyers, is scientific.

For the most part, however, the literature presents theories which borrow, whether deliberately or not, elements of these various paradigms combining the various functions with which they are associated.

Finally, it may be noted that some jurists have concluded that a science of law is not feasible because, for example, of the impossibility of isolating purely empirical facts in the legal field, or the impossibility of attaining a formalization of its language and an axiomatization of its rules.

3.2. Which epistemology?

The debate aroused by these different approaches raises many questions. It appears that the most significant of them lies in the degree of proximity of legal science to legal practice and legal discourse. This question is probably basic to all scientific reasoning, but it is obviously more acute in the field of human sciences than in that of natural sciences, because the subject studied - human action - involves the use of the mind which, inevitably, involves the observer himself. If Wittgenstein's concept of language games is adopted, could it be said that the legal theorist should play the same game as the practitioner? If he does, doesn't he risk supporting the implicit postulates of the discourse and rationalizing the underlying ideology? If he doesn't, doesn't he risk failing to take account of the specific nature of his object and explaining something which is not real law? Legal science is deprived of its scientific character in the first case; legal science is deprived of its legal character in the second.

The relevant epistemological question that could encompass all others is: which object, theory, verification, and function should be adopted for legal science?

As it is not possible to discuss all these problems here, three may be examined: (a) the question of the paradigms, their multiplicity, their function, their historical nature, their dependence on dominant ideologies in society; (b) the debate that sets the advocates of explanation against those of understanding (sometimes represented in jurisprudence as the relationship between the external and the internal point of view); (c) lastly, the problems of interdisciplinarity, as distinct from both pluridisciplinarity and transdisciplinarity.

Here it will be argued that there is a case for a science of law, that it achieves the most fruitful results where it adopts an interdisciplinary form. This implies an epistemological change in relation to the common approaches to legal phenomena. Its point of view is external, but 'moderately external', to the extent that it takes account of the internal point of view of lawyers. In other words, its aim is to explain legal phenomena by relating them to other social facts and social discourses, without distorting its specific character, which assumes prior understanding of the latter. The first job of legal science consists in identifying paradigms of doctrinal discourse itself.

Adoption of this thesis does not mean contradicting the view that this legal doctrine can itself embody scientific elements, much as its practical utility is undeniable. It is possible that a science of law starting from other epistemological premises, such as empirical or formal logical ones, can also obtain scientific results. Contemporary 'post-positivist' epistemology appears in this respect to prefer criteria of truth applied by the scientific community. It is the knowledge of which language

game one plays, the assessment of its utility and its power of elucidation of them, that is important.

Just as in a card game, there is a wide variety with a certain family resemblance. The game of scientific language is capable of diverse applications, depending the criteria adopted for scientific assessment. The question is, however, whether one can find some common trait constituting the 'family lookalike'.

3.3. Paradigms and science of law

Kuhn proposed a broad sense and a narrow sense of the concept of paradigm. In the broad sense, the paradigm is the entire body of beliefs, recognized values and methods that are common to members of a given scientific community. In its narrow sense, the paradigm is a particular element of that group: the solution to a concrete problem that is used by researchers as a model or common example for the resolution of other problems that arise in the development of the discipline. Kuhn subsequently proposed the concept of 'disciplinary matrix' to account for the various elements envisaged by the paradigm in the broad sense. Among these he distinguishes between: (a) symbolic generalizations, kinds of formulae upon which the discipline is based (in physics, the action = the reaction), established laws and definitions; (b) certain shared beliefs that provide the scientific community with metaphors and accepted analogies; (c) the values shared by the members of the group of researchers concerned (e.g., coherence, simplicity, accuracy); (d) the paradigms in the narrow sense of common examples.

The importance of this epistemological concept lies in the emphasis laid on the fact that all science, whatever the scientific criterion it selects, necessarily relies on ontological and axiological premises: a specific view of the world (e.g., deterministic, finalist, probabilistic), and a set of values. This shows the social and historical character of scientific practice and its interactions with the interests and ideologies which clash in society, either reflecting these representations or itself doing duty as an ideology⁹.

This approach is even more necessary in legal science, where the object of study, the law, is of such concern, politically and axiologically, to society. In addition, contemporary meta-science of law aims at detecting the paradigms implemented in every theory of law that claims to be scientific. Thus, for example, it has been argued that Continental legal dogmatics contains two

⁹HABERMAS, J., *Technik und Wissenschaft als Ideologie*, Frankfurt, 1968.

central paradigms: belief in the sovereignty and the rationality of the legislator.¹⁰ These two postulates underlie the work involved in interpreting and systemizing texts by traditional legal science and make it possible to give positive responses to two essential questions which have to be addressed: those of the intelligibility and validity of the norms claimed to be part of the law. Although these postulates are only partly based on empirical observations, they impart a 'non-positivist certainty' to the deductions of legal science in that they express the values on which there is a broad consensus in the community of lawyers.

It is nevertheless easy, employing other paradigms, to question the scientific value of theories and methods based on the rationality and the sovereignty of the legislator. These principles, which should at the most find expression in the form of simple presumptions and regulate the process of reconstructing legal texts, often degenerate into irrefutable presumptions and dogmas incapable of verification. Thus they are not calculated to insure proper reorganization of legal science when the latter is faced with a crisis which involves problems as regards its internal coherence, as is the case today with the transition from the laissez-faire state to the welfare state. In the language of Bachelard one would say that such principles act as 'epistemological obstacles' shielding theory from all external criticism, showing how it departs from realities which should be taken into account and reflecting its twofold, normative character (object and function).

The reaction to legal dogmatics has often taken the form of positivism. In this case the essential paradigm for the scientist is adherence to the objective study of reality as such. Sometimes it takes the form of a 'normativist' positivism (the object of legal science brings the law actually in force), or it may be in the form of a 'realistic' positivism (the object of legal science being the law actually applied). Without entering into a discussion of these two models of legal science, one need only point to the considerable difficulty, even impossibility, of isolating in the field of law a purely empirical object that lends itself to wholly objective observation and study. The validity of the norm derives to only a limited extent from formal and explicit legal criteria. The meaning that is ascribed to a norm is largely reconstituted by the judge and others when applying it, using implicit principles and values.

'Open texture' thus characterizes not only every norm considered in isolation, but also the legal system envisaged as a whole. Analysis of the legal phenomena cannot confine itself to a

¹⁰ZULETA PUCEIRO, E., 'Legal dogmatics as a scientific paradigm', in PECZENIK, A., et al. (eds.), *Theory of legal science*, Dordrecht - Boston - Lancaster, 1984, p. 21, VAN HOECKE, M., 'Aard en methode van de rechtsdogmatiek', in *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, 1984, p. 188; OST, F., and VAN DE KERCHOVE, M., *Jalons pour une théorie critique du droit*, Brussels, 1987, p. 97.

description of facts the content and bounds of which are so uncertain. Otherwise it risks either reducing the object studied to a truncated or misleading representation, or implicitly espousing its suppositions and dogmas.

Other paradigms and other criteria of scientific authenticity have also been proposed, starting from a clear epistemological break. This however gives then rise to the debate, typical of the human and social sciences, on explanation and understanding.

3.4.Explanation and understanding - external and internal point of view

It is tempting to break free of the shackles of legal concepts and methods by adopting a radically behaviouristic or materialistic position. One could in that case, for example, choose an object of study produced entirely by the theory adopted and endeavour to analyse its functioning, to explain it with the aid of hypotheses borrowed from other fields of study, highlighting the mechanisms or the determinations of legal phenomenon. One such possibility is historical materialism, which maintains, in any event, in its economist version, that the law is a superstructure which in the final analysis reflects relations of production in a given society. One could also adduce certain versions of American realism, reducing the law to judges' decisions and accounting for them by a complex of psychological factors.

Without denying the demystification effect produced by these approaches, or the elements of truth they contain, it is easy to show that the objectivity sought and the explanation proposed mutilate legal phenomena by amputating the normative dimension which is precisely what is specific to them. The externality factor in this case therefore proves to be misleading and reductionist. This normative dimension is no doubt the subject of rationalization and interpretation by the lawyers themselves: a self-interpretation phenomenon characteristic of the object of all the human and social sciences. And no doubt too, it is precisely from this self-interpretation that science, as conceived from the point of view of external explanation, aspires to free itself. But in doing so is it not perforce constrained to reduce law to fact or at least to non-legal norms? This is the view of other theorists who reject the paradigm of explanation in favour of that of understanding¹¹. Externalization makes way for internalization, objectivity for subjectivity. The *raison d'être* of a social phenomenon lies in its internal sense (the sense that it has for the protagonists concerned), which is clarified by means of representations, conventions and rules common to the reference group. For the study of law, this would mean a type of knowledge that, without sharing

¹¹WINCH, P., *The idea of social science and its relation to philosophy*, London, 1970.

the normative ambitions of legal dogmatics, would embrace the paradigms (which sometimes take the form of myths and dogmas, as we have seen) employed in lawyers practical discourse. Here too it is easy to demonstrate the unsatisfactory nature of this position which deprives the scientific point of view of any real autonomy by conferring upon legal principles not only object-of-study status (which is legitimate), but also criteria for the validity of theories (which can scarcely be called scientific).

If one rejects both the position of an external spectator and that of an internal participant¹², must one then conclude that it is not possible to have a science of law? Not if one is willing to follow a third course, namely that of 'moderate external point of view' or 'point of view of the external observer who relies on the internal point of view of the lawyers'¹³. In our language this would mean dialectical interaction between the paradigm of explanation and that of interpretation. While it seems obvious that only the objective external point of view can lead to an explanatory theory of a scientific nature, it is not at all incompatible with this position to adopt as an object of study the 'internal sense' or 'self-interpretation' employed by lawyers. First of all, the legal phenomenon is described in discourse by the authorities and subjects of law, which involves an understanding of the explicit and implicit conventions in this discourse. Then in a second phase, which is strictly scientific, these discursive practices are explained (related in a causalist or teleological manner to a particular type of environmental phenomena). In a third phase this leads to a comprehensive reinterpretation of the object of study. The explanation therefore makes it possible to progress imperceptibly from naive and instinctive understanding to critical and constructive understanding. Various original concepts seek to portray the complexity and specificity of this approach to the human sciences: Max Weber speaks of 'comprehensive explanation', Von Wright of 'quasi-causal explanation' (to explain an action means to restore the premises of the practical syllogism by which it has been produced). Villa, on the other hand, considers that legal phenomena are 'quasi-acts' and only susceptible of 'quasi-observation'.

Has this process reached a point at which the various approaches are no longer relevant to the scientific issue? To make this assertion would be to overlook the recent developments in the epistemology of the natural sciences that have resulted in a far-reaching revision of the conventional notions of observations and of explanation. Without going further into this matter

¹²VILLA, V., 'Legal science between natural and human sciences', in *Legal studies*, 1984, p. 266.

¹³HART, H.L.A., *The Concept of law*, London, 1961. See also MACCORMICK, N., *Legal Reasoning and Legal Theory*, Oxford, 1978, p. 275-292.

we shall confine ourselves to reminding the reader that 'the facts' studied by the contemporary natural sciences are not drawn from and observed in 'nature' by our external senses but produced by the complex and artificial processes of experimentation, and thus totally mediated by the techniques and the theoretical language that governs the experimental process. Consequently, the traditional criterion of controllability (verification or falsification) is tending to give way to the criterion of fecundity of scientific pronouncements: theoretical interpretation is good when it provides the most satisfactory explanation of known phenomena and opens up the greatest number of perspectives regarding phenomena not yet elucidated. Thus there is no longer a radical difference between the natural sciences and the human sciences and even if specific differences persist, these are nevertheless not so important that there could not be said to be a 'family resemblance' between the two approaches.

What now remains is to specify the source of explanatory hypotheses adopted by legal science that we advocate. This involves examination of the interdisciplinary character of the science of law.

3.5. Interdisciplinarity, pluridisciplinarity and transdisciplinarity

Claiming that law explains itself by itself can only lead to pseudo-scientific speculations. Theoretical hypotheses adduced for the purpose of explaining legal phenomena have thus necessarily to be drawn from other fields of knowledge: history, economics, psychology or sociology, for example. But how can the respective discourses of these various disciplines be combined? Several ways can be envisaged:

Pluridisciplinarity (or multidisciplinary): A series of different disciplines developing their specific points of view and relating to a common object of study are juxtaposed. This juxtaposition of knowledge obviously gives rise to as many different problems as perspectives. Only if scientific activity is imagined to have miracle-working powers can a mere juxtaposition of disciplines be believed to create a common issue. In terms of language games, the situation in this case may be described as no more than co-existence of different languages, producing something like a scientific Babel.

Transdisciplinarity: In this case, the aim is, by discarding the specific standpoints of each discipline, to produce an autonomous body of knowledge from which new problems and new methods will arise. Here it is a matter of integrative disciplines. In terms of language games this results in the construction of a new, common language, a kind of scientific esperanto.

Interdisciplinarity: In this case, the research proceeds from the theoretical perspective of one of the disciplines involved, developing problems and hypotheses that partially overlap those evolved in the other discipline. This time the aim is to integrate bodies of knowledge and thus bring about partial reorganization of the theoretical fields concerned by successive approaches, as in a dialogue. In this case, one language game may be said to be 'translated' into another. There can, however, be no denying the difficulties and even the limits inherent in this type of exercise, in particular the need to respect the 'specific genius' of each scientific language.¹⁴

The conclusion to be drawn from this succinct typology is that only interdisciplinarity makes it possible to create the conditions for genuine scientific research. Pluridisciplinarity and transdisciplinarity are more in the nature of scientific utopias: the former because it fails to build up an original body of theory, the latter because it transcends all known scientific fields. On the other hand, the interdisciplinary position is seen to be relatively unstable: it is liable at any time to degenerate into a mere juxtaposition of approaches (pluridisciplinarity), as it may also lead, in certain points of the research, to raise questions concerning transdisciplinary character. Moreover, the nature of the phenomenon studied (in our case the legal phenomena and the categories evolved by legal doctrine) may easily exert an undue influence on the scientific approach by imposing its criteria of truth on the discipline which it studies, or vice versa. Here one is again confronted with the awkward question examined above, i.e. the integration of the internal and the external point of view, of understanding and explanation.

It may be concluded that in this complex model of an inter-disciplinary science of law, legal theory is called upon to play an important role which consists of the reconciliation or translation of two existing language games: legal doctrine (or 'legal dogmatics') on the one hand and the social sciences on the other.

4. Conclusion : Perspectives of Legal Theory

Current developments in legal theory show a changing paradigm. All traditional concepts, approaches, certainties of legal doctrine and jurisprudence are questioned and 'deconstructed' by new approaches, such as critical legal studies or semiotics of law. Legal theory is obviously searching for a new paradigm.

¹⁴ Regarding the possibilities, but also the difficulties of this interdisciplinary method applied to the study of law cf. chapter 7 of the collective work : *Theory of legal science* (A. PECZENIK et al., eds.), Reidel, Dordrecht, 1984.

Future research, in order to prove relevant, will need to clarify this paradigm problem. It will have to establish a new scientific frame of reference.

Therefore, in the field of legal theory some priority should be given to research carrying out one or more of the following approaches.

(a) **Interdisciplinary approach:** theoretical study of law and legal practice has been, and still is, in need of fresh blood, for new approaches of legal phenomenon, e.g. psychological and economic analyses of law. On the other hand, this proliferation of social science approaches to law reinforces the need for an integrating, interdisciplinary study of law, as a reaction to the one dimensional picture of legal reality offered by each of these disciplines and approaches separately.

(b) **Macroresearch:** Global approaches, the study of (sub)systems of law, should get priority over study of small details.

Deep level research will probably in the long term prove of much more importance than research of specific topics along the lines of traditional jurisprudence.

(c) **Comparative approach:** the obvious empirical basis of legal theory are legal systems and legal practices. Each theoretical research should depart from a correct analysis of this empirical material, not limiting itself to some intellectual construction and/or criticism based on a kind of self-created reality. In order to having a sufficient broad empirical basis there seems moreover to be a need for some new kind of 'General Theory of Law' (*Allgemeine Rechtslehre*): a kind of return to the nineteenth century approach (what is common to all legal systems ?), but at a more profound level, raising questions including: which are the common types of juristic discourse ? which are the needs and the psychological expectations to which specific theories are giving an adequate answer at a certain moment of time in a certain society ? These kind of questions transcend individual, national legal systems. The answers however can hardly be general in the sense the nineteenth century advocates of the *Allgemeine Rechtslehre* had in mind, namely some 'empirical natural law'. These questions have to be answered within the context of some legal culture in the current period of history. Some problems will have to be studied in the perspective of (basic) cultural differences. At this moment of time however it seems that an elaborated, overall approach in the field of legal theory will only be possible within the limits of some legal culture, as e.g. European legal culture, or at the most 'Western' legal culture, as opposed to African, Islamic or Asian legal cultures.

(d) **Intercultural synthesis:** the cultural limits mentioned above, although geographically and historically restricting the utility of the results of most legal theoretical research, will not, and should not make jurists renounce trying to reach more general valid results. On the contrary, it

will prove of the utmost importance studying these cultural differences and trying to make intercultural synthesis for at least some issues of common interest to the world community. E.g. theoretical analysis of international law will inevitably have to tackle that problem.

Maybe one might get the impression that the loss of one accepted paradigm creates too much uncertainty, leading to a paralysing relativism. This however should not entail real problems at all levels of theoretical research. Actually one could, within the field of legal theory, distinguish (at least) two levels: (a) a level of 'description' of some 'legal reality' for which legal theoretical analysis is to a certain extent bound by the paradigm of current legal doctrine (this e.g. is the case for the interpretation of law), and (b) a level of 'deconstruction' of (the approaches to) legal phenomenon. Level (a) fulfils a need for explanation and clarification of some legal practice. Here the paradigm problem is less crucial. Level (b) elaborates legal theoretical analysis, criticism and constructions departing from a scientific and philosophical point of view. At this level, the four elements proposed above for guiding future research should be fully taken into account.

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