

The Law and its Traditions

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1	The Historicity of the Law's Historicity	490
2	Two Concepts of Tradition	491
3	The Traditions of Traditional and Modern Law	494
4	The Different Temporalities of Different Legal Practices	497
5	The Increasing Pace of Late Modern Law	500
	References	503

1 The Historicity of the Law's Historicity

As Jarkko Tontti has recently pointed out in his *Right and Prejudice* (2004, p. 1-2), one of the main defects of neo-Kantian legal theory lies in its ahistorical approach: both law and legal scholarship have been treated as phenomena divorced from history. As a logical outcome of this way of thinking about law, we can point to Kelsen's legal positivism, his pure theory of law. Kelsenian positivism, in turn, gives rise to and justifies the familiar figure of the omnipotent legislator.

But law and legal scholarship are thoroughly historical entities. They are bound to the very past of the law, to its memory, to the conceptual and normative resources transmitted from the law's history. This holds for all legal practices, not only for adjudication and legal scholarship but also for lawmaking. The idea of the legislator's omnipotence runs into difficulties right here. I have tried to elucidate the manner in which all modern legal practices are dependent on the law's past through my multi-layered conception of law; this conception can perhaps also be called a theory of legal structuration. In addition to the surface detail of explicit normative material, such as statutes and precedents as well as legal scholars' articles and monographs, the law also includes "subsurface" levels where the past of the law is preserved, where its memory is kept alive. These subsurface levels, which I have called the legal culture and the law's deep structure, provide the conceptual, normative and methodological means without which the legislators could not issue their statutes, judges give their decisions or legal scholars write their articles. This I have termed the constitutive effect of the law's subsurface layers in relation to the legal practices continuously producing new material at the surface level. The subsurface levels constitute the very possibility of the legal practices which are responsible for the constant shifts and developments on the law's surface. (Tuori 2002)

It is greatly to the credit of hermeneutical legal philosophy, honourably represented by Tontti with his recent doctoral thesis, that it has so emphatically stressed the historicity of law and legal scholarship in defiance of the ahistoricism implicit in neo-Kantian legal positivism. Ironically, the blame for ahistoricism can just as well be directed towards at least certain works in the "tradition" of hermeneutical legal philosophy, influenced by, most notably, Heidegger, Gadamer and Ricoeur. The historicity of the law, its dependence on its past, is also historically variable in nature. This valorised history of the law's historicity may elude us if it is attached to something like Heideggerian ontology, and defined as qualities of Being (*Sein*) and Being-there (*Dasein*) which determine transcendental conditions for all human understanding and interpretation, all human acts of consciousness, irrespective of time and place. Such an approach can easily lead to a failure to acknowledge any differences in the law's dependence on its history as minor bagatelles of the "ontic" or "practical" level. The law's relation to its past, to its "traditions", must be examined historically.

The law's history can be divided into specific periods, i.e. into specific historical types of law. We can assume that every such historical type is marked by a characteristic relation to the law's past; that during different historical periods, the law's temporality varies. Thus, modern law does not relate to its

past in the same manner as pre-modern, traditional law. It may also be that in the contemporary era, the law's relationship with its history is also changing. We also have to approach the modern era historically, as those talking about reflexive or late modernity have advocated.

The general hermeneutical starting-point, with its emphasis on the law's basic, all-embracing, "primordial" historicity, is in need of specification in another respect, too. It is true that the law's inevitable reliance on its "traditions" holds for all legal practices, for lawmaking as well as adjudication or legal scholarship. But, again, the hermeneutical, Heideggerian-Gadamerian emphasis on the significance of "tradition" for all legal practice, for all legal cognition, understanding and interpretation, can make us insensitive to essential differences between various legal practices. We again face the danger that talk of the fundamental historicity of Being and Being-there reduces crucial divergences to insignificant contingencies on the "ontic" level.

In our present situation, historicity – and this is my third bid for specification – may also vary within different branches of law. Thus, the law's temporality may display different constellations in the fields which correspond to Habermas' (previously held) distinction between law as an institution and law as a medium (see Habermas 1989, p. 365).

So let us be precise and examine the law's historicity, its relation to its past, historically. Let us also allow for the possibility of variations in the relations that different legal practices – such as lawmaking, adjudication and legal science – maintain with the law's past. Finally, let us also bear in mind that in different fields of law, its temporality may assume different configurations.

In the following, my principal focus will be on the historical type of law we are accustomed to calling modern law. Thus, earlier, pre-modern historical types of law will mainly figure as a contrast to modern law. But before we are able to go into the specifics of modern law's relation to "tradition", we have to attempt to clarify the very notion of tradition.

2 Two Concepts of Tradition

I would like to propose a distinction between two concepts of tradition: a philosophical one and a sociological-historical one. There are, of course, connections between the two. Thus Habermas (1986 and 1989), for example, has transformed the philosophical *Lebenswelt* concept into a sociological one; the philosophical notion of the *Lebenswelt* – stemming from Husserlian phenomenology – is closely related to the concept of tradition.

The contents of the philosophical concept of tradition are to be sought from the hermeneutical, Heideggerian-Gadamerian "tradition", in which Tontti's thesis is also located. This strand underlines the notion that all human acts of consciousness, all acts of understanding, interpretation and cognition are bound to tradition; we humans never approach the object of our cognition or interpretation with a *tabula rasa* consciousness but always through the conceptual and interpretative means provided by a specific tradition. "Tradition" in this sense is equivalent to the preconceptions ("pre-understanding") and prejudices which – as Gadamer emphasizes – are necessary in order for the

process of understanding and interpretation to be launched. We draw this “pre-understanding” from the culture into which we have been “thrown”, in which we have grown up and internalised our fundamental conceptions of the world. The human artefacts which constitute the object of interpretation are, in a sense, products of the same tradition as the subject, the interpreter; the object, say a piece of literature or art, has become what it is through a culturally bound history of effect (*Wirkungsgeschichte*) to which where all the previous interpretations have made their cumulative contribution. This accounts for an inevitable intermingling of the subject and the object of interpretation. (Gadamer 1990, p. 270 ff.)

These basic hermeneutical insights can be applied to legal cognition and interpretation. We always approach the law, the “object” of legal cognition and interpretation, through a certain pre-understanding or tradition in the philosophical sense; employing the conceptual and methodological tools which our legal culture has provided us with. The law itself is a product of the same tradition, the same culture. Thus, we can argue for the inevitable interconnectedness of the subject and object of legal cognition and interpretation already on this philosophical-hermeneutical basis. But, again, we should be aware of the specifics of law and legal scholarship: the inter-relations between law and legal scholarship display peculiarities absent from, for example, other human and social sciences. These peculiarities are due to what might be called the dual citizenship of legal scholarship: legal science is a citizen of both the realm of science and the realm of law; legal science is at one and the same time a scientific and a legal practice.

The philosophical-hermeneutical concept of tradition does not tell us anything about our capability of becoming conscious of our pre-understandings and reflecting on them. It is true, though, that some hermeneutical philosophers, like Ricoeur and, in his wake, Tontti, have stressed our ability to gain a certain distance from the object of our interpretation - the capacity for “distanciation” – and the ensuing possibility of a certain criticism of our tradition. Ricoeur has argued that the hermeneutics of faith (*foi*) is not our only alternative, that we can also assume the attitude characteristic of the hermeneutics of suspicion (*soupçon*). Tontti, in turn, has tried to ground this possibility in the Heideggerian ontological level, in the “querulous” nature of Being. (Tontti 2004, p. 76 ff.) However, in the eyes of one critical reader, this seems to remain a mere postulate.

It is obvious that the openness of traditions (in the philosophical-hermeneutical sense) to criticism must be explored historically; there is no unchanging, ahistorical constant of possible reflexivity, but rather significant historical-sociological differences between the “traditions” of various societies. In addition, when analysing law and legal scholarship, we have to be careful to specify the pre-understanding which is peculiar to legal cognition and interpretation.

So let us turn to the historical-sociological concept of tradition. Here I use as my guide Anthony Giddens, the well-known English sociologist (Giddens 1994, p. 79 ff.). Traditions are something distinctive to pre-modern or “traditional” societies. Tradition means commitment, not only to time, to the past, but also to a place. Traditions are local traditions which divide people into friends and foes,

into insiders and outsiders; they define personal and collective identities. Discussion or communication through the barriers separating traditions is difficult, if not impossible. Traditions involve a certain interpretation of the world and the way people should live in this world; they confound the descriptive with the prescriptive.

The truth of traditions is – as Giddens terms it – a “schematic truth”, which is upheld by specific guardians who hold the monopoly over declaring and interpreting the tradition, such as priests and magicians. The guardians may discuss and even quarrel about the right interpretation of the tradition but a fundamental challenge to it is unthinkable. Finally, an essential feature of traditions consists of rituals which link traditions to social practices and through which adherence to and respect for traditions are renewed and reinforced.

In social modernization, pre-modern traditions are gradually dissolved or at least their character is transformed. Let us cite two clear-sighted social observers of the 19th century:

Constant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into the air, all that is holy is profaned, and man is at last compelled to face with sober senses his real condition of life and his relations with his kind.¹

But the relation modernization holds with traditions is not unilinear or univocal. Local traditions are dispersed and cultural foundations of local communities destroyed but, at the same time, new traditions are engendered. Eric Hobsbawm (1983) has explored what he calls “invented” traditions; these are connected to the rise of nationalism, the cultural cement of modern nation states. Nationalism generates, “invents”, new national traditions and new rituals for their reinforcement, such as Independence Day parades or opening and closing ceremonies of national parliaments. Nationalism has its own guardians, such as professors of “national sciences”: say, history, literature and linguistics.

The general tendency during the modern age, however, is towards the dissolution of traditions. Pre-modern traditions can be contrasted with modern expert systems which replace the guardians with specialists. The truth of the experts is not a schematic truth but a truth which is open to scientific testing and contesting. Expert knowledge can always be corrected, and this requires an attitude of systematic suspicion. The group of experts is not closed but open to anyone who is able to demonstrate possession of specific skills and knowledge which laymen lack.

Traditions are locally embedded; expertise, by contrast, is by nature disembedding. It is universal, non-local; it distances itself, not only from time, from the past, but also from place, from embeddedness in a certain location. Unlike traditions, expertise is the same everywhere, in China as well as in

¹ The quotation is from Marx and Engel’s Manifesto of the Communist Party. I have used the version available on the internet. See “<http://www.socialistparty.net/pub/manifestcomm>”.

Finland. Since the validity of expertise is not spatially bound, there are no hindrances to its removal from one place to another.

The guardians of a tradition may debate its interpretation, but their disputes are different from those concerning expert knowledge. The critique of a tradition can only be conducted within very narrow limits; the natural state of a tradition presupposes respect, not only from the community at large, but also the guardians. For experts, by contrast, criticism, systematic suspicion and mutual disagreements constitute the very motor of their activities.

As Giddens (1994, p. 91) notes, we also speak about “traditions” within institutions which are based on expertise; within academic science and research, for instance. However, the universalism and scepticism which govern the practice of modern science guarantee that both the supporters and critics of these “traditions” conceive them to be relatively arbitrary. Pre-modern traditions were sealed off from each other; discussion was impossible, and criticism meant total rejection. Expert traditions, by contrast, are receptive to reciprocal criticism, which remains within the boundaries of reasonableness. Such criticism is not only possible but even expected.

The general trend during the modern age is towards the replacement of traditions by expertise. But again, this movement is not without its ambiguities. Thus, science and scholarship can at times and within specific fields display features which are more characteristic of traditions than expert systems.

Now, armed with two concepts of tradition, the philosophical-hermeneutical one and the historical-sociological one, we can now examine the role of traditions in law and legal scholarship.

3 The Traditions of Traditional and Modern Law

Modern society is often termed a post-traditional society, and modern, largely positivized law post-traditional law. These denominations have their justification, but they should not obscure the fact that modern law also retains a relation to its past, to its history; the philosophical-hermeneutical concept of tradition, at least, retains its validity. This – let me repeat – I have tried to demonstrate through my theory of legal structuration: legal practices derive their necessary conceptual, normative and methodological resources, even their very possibility, from the law’s subsurface levels.

But the “traditions” of modern society and modern law are different from the traditions of pre-modern, traditional society and law. What under the conditions of modern law can be called tradition in the philosophical-hermeneutical sense diverges from pre-modern society’s legal tradition. We can contend that in the course of its modernization, the law has been gradually transformed from a tradition to an expert system, although through no obvious systematic development.

Arguably, pre-modern, customary law constituted a tradition in Giddens’ sense. Customary law had its “schematic truth”, which was guarded by the judges; they declared the law and had the monopoly over its authentic interpretation. Legal proceedings, where the law was upheld and renewed, displayed strongly ritualistic traits.

Common-law ideology, such as it appears in the description by J. G. A. Pocock (1989, p. 212 ff.), can be used to illuminate the specific features of pre-modern, traditional law. Pocock's focus is on common-law ideology such as it was formulated in the debates of the 17th century. In these debates, the most important representative of the opposite pole, supporting the legal-positivist conception, was Thomas Hobbes. Pocock's main spokesman for common-law ideology, in turn, was Sir Matthew Hale.

Pocock characterizes common-law ideology, such as it was established in about 1600 or even earlier, as simultaneously traditionalist and empiricist. It was traditionalist in identifying the law with immemorial custom, which was declared and interpreted in the countless decisions of common-law courts. It was empiricist in the sense that in new cases, the law as immemorial custom was constantly subjected to the test of experience. In fact, what was immemorial in common law was not its content but its unbroken continuity. The law consisted of a series of responses to the demands raised by ever-new situations. The law was a stream, but what was important was its uninterrupted flow, not the exact contents of the water.

In common law, a kind of artificial reason was distilled and manifested, a reason which was beyond the grasp of human natural reason. This also limited the scope of its criticism. The law was not based on general principles and consequences derived from them, nor on scientific laws. Laws had been generated in circumstances and for reasons which there could be no knowledge of and which, therefore, could not be assessed or criticized. But the mere survival of a law justified the assumption that not only had it originally been beneficial but it had also subsequently adequately responded to the needs of situations where it had been invoked, and would satisfactorily resolve the problem at hand, too.

Hobbes, the advocate of positive – or, we as might also put it, modern – law, rejected the doctrine of an artificial reason, which could only be deciphered by professional judges as their craft mystery and which was ultimately impervious to reflective reason, as dangerous to both the human mind and the stability of the state. The law should be a product of natural reason and comprehensible to anybody with the right use of her reason.

Common law, seen through the ideology formulated in 17th century England, clearly constituted a tradition in the historical-sociological sense of the term. It was grounded in a “schematic truth”, beyond the reach of criticism, it was guarded by common-law judges, and it was upheld and reinforced in the rituals of common-law proceedings. From a hermeneutical perspective, it also provided the judges with the pre-understanding through which they approached new cases.

Even under the conditions of modern law, legal actors confront legal problems equipped with a pre-understanding, with certain “prejudices”; traditions in the philosophical-hermeneutical sense are part and parcel of modern law, too. One of the main contributions the legal culture and the law's deep structure make to the functioning of a modern legal system consists in precisely this: furnishing the legal actors with their pre-understanding.

Thus, we can still talk about legal traditions in the philosophical-hermeneutical sense, whereas traditions in the historical-sociological sense, by

contrast, can only be discussed with strong qualifications, within quotation marks. On a cline leading from traditions to expert systems, the law moves towards the latter pole, although by no means has the law ever shed all features of a tradition. Legal proceedings, for instance, can still be claimed to display many ritualistic traits; and these can be of considerable significance for the law's (empirical) legitimacy. I am reminded for example of Niklas Luhmann's analyses in *Legitimation durch Verfahren* (1983). However, in the context of the law too, the general drift from tradition to expert system should be conspicuous enough.

This tendency has manifested itself in divergent ways and forms in common-law countries and the civil-law countries of Continental Europe. In the Roman-German "legal family" of Continental Europe, university-based legal scholarship and education have played a central role in the elaboration and transmission of the modern legal culture. Within legal scholarship, different "traditions" compete with each other, say, analytical legal theory with conceptual legal dogmatics (*Begriffsjurisprudenz*), critical legal studies with liberal doctrine or alternative legal dogmatics with mainstream scholarship. But these "traditions" cannot be equated with the mutually exclusive and locally embedded traditions of pre-modern law. What Giddens has written about the debates and criticism within modern expert systems also holds for discussions between various strands of legal scholarship.

The "traditions" of modern law are separated from the traditions of pre-modern, traditional law by, above all, the possibility of criticism. One of the main characteristics of modern law consists in its positivity; modern law is based on conscious human actions such as the explicit decisions of the legislator and the judges. Through new decisions, new law can be created and existing law repealed, and this could not be done without the possibility of challenging, criticising, inherited law. Criticism is unavoidably linked with modern law as a historic type of law, whereas in traditional law, the space for criticism was very limited, as Pocock's exposition made clear.

Traditions are said to perform their hermeneutical role mainly "behind the back" of social actors, in the form of tacit knowledge (Tontti 2004, p. 31). This also holds for the legal-cultural preconceptions through which modern legal actors confront legal problems. The legal culture - say, the general doctrines of various branches of law or the prevailing doctrine of the sources of law - plays its part primarily through the practical consciousness of legal actors, without these being immediately aware of its effect. It is because of the criminal-law principle of *nulla poena sine lege* that the judge checks in the book of statutes for the description of the crime and the latitude within which the sentence is to be meted out. But in the majority of cases this transpires in a quasi-automatic way, without the judge pausing to think about the demands of *nulla poena sine lege*. She explicitly thematizes the principle and spells out its implications in her decision only when, in the case at hand, its significance for some reason appears problematic. It may be the case, for instance, that the counsellor for the defence challenges the legal validity of a *blanco* regulation where the parliamentary statute merely states a provision of the punishment for a certain type of deed and leaves to delegated legislation the more precise definition of the deed.

What is crucial in a comparison with pre-modern, traditional law is that legal cultural preconceptions can, when needed, be transformed from practical, tacit knowledge into a discursive form; that ingredients of the legal culture can be openly thematized and submitted to criticism. This happens every time a court faces a hard case which cannot be solved by relying solely on explicit surface-level normative material but requires the opening of subsurface layers; or when legal scholars publish critical assessments concerning the general doctrines of a field of law or the prevailing doctrine of the sources of law. Under the conditions of modern law, the possibility of criticism is not confined to explicitly formulated norms but extends to their subsurface presuppositions. The law increasingly loses the sanctity it enjoyed as a tradition of pre-modern society. In their fundamental submissiveness to criticism and corrigibility, the “traditions” of modern law are closer to Giddens’ expert knowledge than to the traditions of pre-modern society. Many recent analysts have pointed to reflexivity as one of the distinctive features of modern society; this reflexivity is apparent also in modern law (see Beck – Giddens – Lasch 1994).

I have defended the view that pre-modern, traditional law relied on customs, whereas modern law is characterized by positivity, in the sense of being based on explicit human action. A frequent objection is that customary law has by no means lost its significance in the modern era; that, on the contrary, in certain fields we are witnessing its expansion. But it is important to note that what today is called customary law is very different from the customary of law of the 17th century common-law ideology or from the “custom of the land” referred to by the Swedish Law of 1734. Immemorial customs or communal practices are no longer paradigmatic of customary law. At issue are, for example, practices adopted within new social action fields which the revolution in information and communication technology has created; say, practices concerning data protection which are accorded immediate legal relevance. Often enough, such practices have been explicitly codified, through, for example, decisions by the organizations in respective fields. This amounts, paradoxically enough, to nothing short of a positivization of customary law!

4 The Different Temporalities of Different Legal Practices

In his doctoral thesis, Tontti (2004) has underlined the point that all legal practices are bound by tradition, by the law’s history, and that, consequently, all legal practices also play their part in the transmission of legal tradition. This also concerns the legislator: the past is the primary temporal dimension even for the legislator. To support his contention, Tontti (p. 211) evokes Hegel’s contribution to the famous debate on codification, initiated by Savigny and Thibault. Hegel’s argument against Savigny’s argument against the use of legislation was that legislation only concretized and actualized customary law, and by no means came to a break with tradition.

Again, basic philosophical-hermeneutical insights should not be allowed to block out important differences. The goal-rational approach of the modern legislator displays a wholly different temporality than, for example., that of a common-law judge bridging the legal past and future through the declaration and

interpretation of immemorial custom's response to the exigencies of the legal problem at hand. In his argumentation, Hegel was referring to the legislator of early modern codifications, the legislator of, say, the Prussian *Allgemeines Landrecht* (1794), the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811) or – we might add – the Swedish Law of 1734; at issue was not the instrumentally-oriented legislator we have become accustomed to during the era of the welfare state. Indeed, the early modern codifications could, to a large extent, be conceived of as authentications and reaffirmations of pre-existing (customary) law; consequently, they really played a prominent role in the transmission of the law's past into the future. The goal-rationality of the welfare-state legislator involves a wholly different attitude towards past and future. Now the emphasis shifts from the continuity of the past in the future to its detachment from the past. In those fields where the law appears – to use Habermas' vocabulary – as a medium, we can talk of the transmission of "tradition" at most in the general philosophical-hermeneutical sense; in my own "theory of legal structuration", I have argued that every act of lawmaking, adjudication or legal scholarship also participates, not only in the production, but also in the reproduction of the law's subsurface levels.

The basic temporal orientation of the goal-rational legislator is towards the future. A goal, concerning the desired state of society, is set in the future and legislation is conceived of as a means to achieve this goal. It is in the very figure of the legislator that the specific temporality of modern law finds its most conspicuous manifestation. The common-law judge and the goal-rational lawmaker embody two fundamentally different temporalities, i.e. different attitudes towards the law's past and future: respectively, that of traditional, pre-modern law and that of modern, positive law.

But, again, a word of caution is needed. The specific modern, future-oriented temporality is not equally evident within every field of law; the position of the goal-rational legislator varies. In modern society, the law is resorted to, not only as a medium of conscious social management, but also – to stick to Habermas' terms – as an institution whose main social function lies in the strengthening of the moral structures of society; let me refer to, for instance, constitutional provisions on human rights or the core areas of criminal law and family law. As a general assessment, law as an institution can be claimed to retain stronger ties to the past than law as a medium. Thus, in addition to different historical types of law and different legal practices, different fields of law also display different configurations of temporality.

In pre-modern, traditional law, judges were the main guardians of legal traditions. Under modern law, too, the main temporal dimension for the judges is the past. In adjudication, both the major and the minor, i.e. the legal and the factual, premise of the judicial syllogism is (re)constructed from materials procured by the past. A norm, construed from the acknowledged sources of law, is applied to a past event, reconstructed on the basis of acknowledged pieces of evidence. Often enough, of course, future-oriented considerations play their part, too: say, in the so-called teleological interpretation of the sources of law or, in criminal cases, the specification of the sentence with reference to the exigencies of general and individual prevention. But such goal-rational considerations are

of a secondary nature, having an impact only within the boundaries drawn by the primary orientation towards the past.

What about the legal scholar, then? In addition to the goal-rational legislator, the legal scholar belongs to the actors in the drama of law who have reached the centre stage only in the course of the law's modernisation. Legal scholarship began its rise in late medieval universities, where it focused on the transmission of the Roman legal "tradition" and its adaptation to contemporary needs. As Max Weber (1978, p. 784-789) has taught us, in Continental Europe university-based legal science played a crucial role in the process whereby the law gradually acquired features which distinguish legal modernity from pre-modernity. One of these is, in fact, legal scholarship itself.

In one particular respect, modern legal scholarship can be claimed to replace tradition. In pre-modern, traditional law, tradition-like customary law provided the legal actors, primarily the judges, with the pre-understanding through which they defined legal problems and sought for their solution. In modern law, again particularly in the Roman-German legal family of Continental Europe, legal actors draw their indispensable preconceptions from a legal culture, interpreted, elaborated and renewed primarily by university-based legal scholarship.

Modern legal culture plays the part of traditions in the philosophical-hermeneutical sense, but it does not consist of tradition(s) in the historical-sociological sense; rather it is an expert culture. As such, it is open to debates and criticisms in a quite different way than the traditions of pre-modern law. With regard to my own Finnish legal culture, let me only refer to the ongoing intensive debate on the so-called general doctrines and on the need to reconsider the division of legal norms into relatively independent fields of law, each with its general doctrines consisting of general legal concepts and principles. Legal scholarship can perhaps be termed the "guardian" of modern legal culture, but only with an important qualification – if it is a guardian, it fulfils its task in the manner of an expert.

Even as an expert culture, legal scholarship not only elaborates and (re)formulates the legal culture; it also reproduces it, and thus, for its part, maintains the law's relation to its past, to the accumulated legal experience sedimented into the law's subsurface layers. Legal culture constitutes the reservoir of modern law's memory, and it falls to university-based legal scholarship and education to ensure this reservoir's availability to other legal practices, such as adjudication and lawmaking. The possibility of criticism is typical of legal scholarship's relation to the prevailing legal culture, just as it is typical of the expert's relation to expert knowledge and culture in general. But as important as it is to stress the principal possibility of legal criticism, it also is to remind of its necessary restrictions. Legal criticism is always partial criticism; it always focuses merely on a limited segment of the prevailing culture. That which is not openly thematized and criticized is, as it were, taken for granted; micro criticism entails macro legitimation, as Thomas Wilhelmsson (1992, p. 49) has aptly put it.

There are several ways to conceptualize the constraints of criticism in modern law. The philosophical-hermeneutical perspective lays emphasis on the reliance on tradition of even critical interpreters. Not only is the criticism always partial in its focus; in addition, the critic cannot draw the criteria and the means of her

criticism from anywhere else than her own culture, i.e. her tradition in the philosophical-hermeneutical sense. In my proposal for “critical legal positivism”, I have drawn attention to the dual citizenship of legal science. In accordance with other legal practices, legal science participates in the continuous production and reproduction of law (as a symbolic normative phenomenon). This holds also for critical legal science; through her very criticism, critical legal scholar contributes to the reproduction of law, that is, the object of her criticism. This constitutes the dilemma of a critical legal scholar. (Tuori 2002, p. 308) A sociologist influenced by Pierre Bourdieu would approach the law as a social field where the possessors of different types of legal capital compete for the specific stake and price of the field: the power of jurisdiction, that is, the power to say what the law is (see Bourdieu 1987). The field is open only to those who accept the basic rules of the game; if the critic tries to challenge these very rules, she is excluded, and the criticism of she exercises is no longer legal criticism. Finally, we can draw a parallel with Habermas’ (1984, 1989) analysis of the modern *Lebenswelt*, that is, the socio-cultural horizon of our everyday life. Members of modern society can challenge the validity of their *Lebenswelt* culture, including its normative elements, but only in a piece-meal fashion, never as a whole. Correspondingly, legal actors can always challenge their legal culture, but never in its totality.

5 The Increasing Pace of Late Modern Law

Legal culture, the “tradition” of modern law, has been centred on the modern nation state. This, of course, is related to the fact that surface-level legal material has been differentiated in accordance with the boundaries of the nation states: it has been the nation-state legislator which has provided modern law with its statutes and the nation-state courts which have issued its precedents. It is true, though, that the legal-cultural focus on the nation state has been softened by cross-boundary influences, such as is implied by talk of a Roman-German legal family.

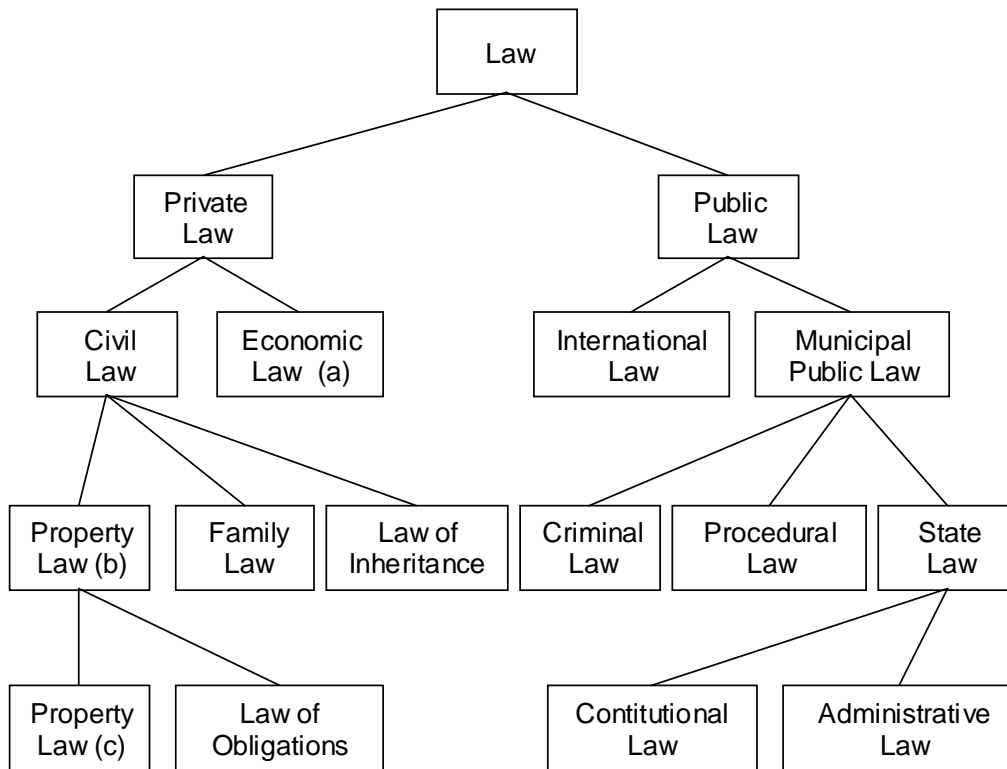
One of the crucial features of our present-day legal experience is the breakdown in the dominance of this nation-state perspective. What we are witnessing can be characterized as a pluralism or polycentricity of not only the sources of law but even of legal orders. Thus, EC law constitutes a separate legal order, which cannot be simply added to the inherited system of the nation-state centred division into relatively independent fields of law. EC law ignores, for instance, such fundamental distinctions as those between private and public law, and between domestic and international public law. But the “late modern” pluralism of legal orders is not manifested solely by the emergence of EC law. A globalisation is advancing within the law, too; a new *lex mercatoria* is evolving, and this process not only bypasses nation states but also such trans-national political units as the EU (see Teubner 1997). The development of a “law without a state”, of course, accompanies other forms of globalisation; it also continuously receives new impetus from the revolution in information and communication technology. As we have seen, the ground for the recent developments was already laid by the previous modernization of the law, by its

gradual transformation from a tradition into a “dis-embedded” expert system. Expertise does not have a mother country, and this is increasingly true of legal expertise, too.

It is obvious that the recent phenomena of legal pluralism and polycentricity not only affect the law’s surface of explicit normative material but will also have repercussions for its subsurface life. Legal culture is something which the law cannot dispense with; this is a basic truth to be learned from the hermeneutical analysis of the presuppositions of human cognition, understanding and interpretation. But it is probable that the legal culture will also abandon or at least loosen its attachment to the nation-state perspective; the legal cultural reservoir from which legal actors draw their necessary pre-understanding will also be internationalised, even globalised.

Alterations in the law’s spatiality will, we can safely assume, have an effect on its temporality, too. If we call the legal culture the law’s memory, this memory will become shorter than before. The law’s layers, i.e. the surface level of explicit normative material, the legal culture and the law’s deep structure, display different historicities, obey different paces of change. The surface is the turbulent level where various legal acts – such as new regulations and new decisions by the courts – cause change on a daily basis. The rhythm of transformations slows down at the level of the legal culture, and, finally, the deep structure represents the *longue durée* of law. But, we can surmise, changes especially in the legal culture will occur at a more rapid pace than we have so far been accustomed to.

As an illustration of the increasing rapidity of legal cultural changes, let me, again, refer to the recent debates within Finnish legal scholarship on the systematisation of legal norms and regulations, that is, on their division into distinct, relatively independent fields of law. As recently as twenty five years ago, the systematic nature of the Finnish legal order could still be represented along the lines adopted from the German doctrine during the latter half of the 19th century; the main distinction was that between private and public law. The following scheme is taken from a study published in 1979 (Björne 1979, p. 6):



- a) In German *Wirtschaftsrecht*.
- b) In sensu largo, in German *Vermögensrecht*
- c) In sensu stretto, in German *Sachenrecht*

Comprehensive systematisations of the law, such as the one presented above, manifested an aspiration for what can be termed the total coherence of normative legal material. Today's discussion, by contrast, is not inspired by such an ambitious goal. In recent interventions, arguments have been put forth to support such new fields as, for instance, medical law, information law, communication law and sports law, all of them endowed with their characteristic general doctrines, i.e. general legal concepts and principles. What the discussants do not seem to care about is the location of the proposed fields in the overall system of the law. Their goal is more modest than their predecessors': instead of a total coherence, the aim is at, at most, local coherence. In fact, the pluralism of legal orders seems to render impossible a comprehensive substantive-classificatory system which would guarantee the law's total coherence.

The familiar systematisation of legal norms, which, in the legal cultures of the Roman-German legal family, was established in the course of the 19th century, was committed to the monocentric perspective of the nation state. Many of the current candidates for new fields of law have abandoned this commitment and, rather, give expression to the pluralism of legal sources and legal orders. Often enough, they also seem to blur the strict separation of legal from other social norms which for Weber (1978, p. 657) was an indispensable precondition of

modern law's formal rationality. Environmental law, medical law, information law or sports law not only cross the internal boundaries of the inherited system – such as the fundamental one between private and public law – and combine norms and regulations which in that system would be dispersed over several fields of law; in addition, they assemble normative material from EC law and other non-domestic legal sources and legal orders. Soft-law material, such as recommendations or codes approved by national and international organisations or codified practices of various social fields of action, also plays an important role.

Proposals for new fields of law and their distinctive general doctrines aim at creating local coherence in a situation where a pluralism of legal sources and even legal orders pertains. They seek a new balance between stability and change, between predictability and creativity, and between legal certainty and flexibility. But this balance is under assault from the increasing tempo of legal change, as well as the mounting plurality and fragmentation of legal sources and legal orders. We can presume that the law's system, the division of legal norms into distinct fields of law, will be constantly changing, and that the life span of general doctrines will be shorter than we have been accustomed to.

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