Tacit Knowledge
– a Neglected Source of Private Law

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1 Introduction

> *"What is the difference between writing a judgment and playing poker?" Younger judges in court, who during court proceedings have proposed legal reasoning that has not been well received by their more experienced colleagues, have according to some stories been asked that question. The answer is that a skilful poker player is concealing, bluffing and screening, the skilful judge should be equally concealing and screening, but he should preferably not be bluffing.*

It might sound rather surprising to claim that a good judge actually is concealing and screening. I understand this statement in such a way that the judge to a large extent might be able to structure a case in front of him. When doing so some questions might come into focus and others can be excluded. Questions can be phrased as issues of facts, evidence or other legal issues. When doing that she or he might avoid facing difficult principle issues. To some extent the judge is therefore able to choose to screen certain issues, and again neglect or pass over other issues.

The art of passing over refers in this context to the many situations in a concrete process where the judge has to make choices.[1] Here the scope of the reasoning by the court is influenced by many factors, such as the relevant factual circumstances in the case, the legal base for the claims, evidence presented and the claims by the parties. In many cases they offer significantly different models for argumentation and solutions. Another type of lack of openness in legal conflict resolution might be found in the fact that the reasoning avoids discussing the value base for a certain piece of legislation, but prefers to hide behind something that in legal literature has been described as "legal facades", "legal smoke screens" or "veils of mist".[2] Behind such descriptions we might find the classical fact described in the sociology of law that legislation often might transform social conflicts into legal ones by regulating them and thereby might neutralize or formalize legal conflicts.[3]

Both of the phenomena described are in my opinion necessary integrated elements in a legal system. The latter one has also been very much discussed within the field of sociology of law. The first mentioned way to pass over problems is also a very well recognized way to solve legal problems. It is often formulated in a positive manner emphasizing that one should focus on the important relevant questions and that is also done in a manner internalized by legal practice concerning how cases should be resolved in court and other types of conflict resolution. One should avoid formulating conclusions in a form more general than necessary and avoid taking up any issues that are not necessary for solving a concrete problem.

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1 *See* Strömholm, Stig, *Rätt, rättskällor och rättstillämpning* (1996), 497, who describes the territory of legal interpretation as complicated and non-transparent.

2 *See* Påhlsson, Robert, *Om värderingarnas roll i rättsvetenskapen*, Svensk juristtidning 2006. 270.

3 *See* Bruun, Niklas, *Arbetslivets juridifiering – perspektiv på den finska utvecklingen.* JFT 1987. 136-142.

2 Tacit Knowledge in Legal Science

In legal textbooks and the education of lawyers the question of what we pass over, neglect or leave out is seldom discussed. On the contrary the advice given is usually that when resolving cases we should try to present all relevant arguments and evaluate their relevance from different perspectives before reaching a final conclusion. The prevailing normative theories of legal argumentation argue that we should, as openly as possible, try to present all possible arguments when resolving a case. That importance of factual knowledge, the determination of facts at hand in a concrete case, is as important as the legal interpretation for solving legal problems.[4]

Against the background in which the concept of tacit knowledge has gained importance in psychology and social sciences during recent decades, there is good reason to ask what role such knowledge plays within the legal system?

As a starting point we may ask what is meant by tacit knowledge in social sciences? Tacit knowledge might perhaps be described in Joseph Horvath´s words which again are based on texts written by the philosopher Polanyi[5]: "People know more than they can tell. Personal knowledge is so thoroughly grounded in experience that it cannot be expressed

in its fullness. In the last 30 years "tacit knowledge" has come to stand for this type of human knowledge – knowledge that is bound up in the activity and effort that produced it".[6]

Tacit knowledge in the sense described deals in other words with practical, non-articulated knowledge based on experience in contrast to theoretical, well-explained knowledge. Such practical working skills exist not at least among craftsmen, as well as among different jobs and professions, such as craftsmen, doctors and teachers. Within applied sciences, within psychology and management economy such an approach has been regarded as very important and there are many studies focussing on this problem. Several efforts have been made to empirically map the role and significance that tacit knowledge might have.

One of the research results achieved tells us that decision making in corporate and other organizations is seldom as rational and stringent as observers from the outside might postulate when they try to analyze the internal decision-making. Several less rational factors can influence the decision-making (the background of the decision maker, his or her networks, unwillingness to take responsibility for the consequences of the decision etc), which can only be understood from the point of view of the tacit knowledge that the decision maker

4 MacCormick, Neil, *Questioning Sovereignty: Law, State and Nation in the European commonwealth* (1999), 31 writes "Whoever is the master of the facts is in the last resort also master of the law".

5 Polynai, Michael in his classic *Personal Knowledge. Towards a Post-Critical Philosophy* first published in 1958 and later in a revised edition 1962. Routledge has published the book in 2002.

6 Horvath, Joseph A, *Tacit knowledge in the professions*. In Tacit Knowledge in Professional Practice. Researcher and Practitioner Perspectives (ed. Stenberg and Horvath, 1999), preface ix.

has. Tacit knowledge is therefore today an important concept within the research field of "knowledge management".

Tacit knowledge is not a completely unknown concept within Finnish legal theory. Markku Helin wrote in his dissertation (1988) concerning Scandinavian realism and its influence on Finnish legal science that the "tacit knowledge of the actor" often might be of better use in practice than theoretical reflected knowledge. His example of such a situation was the one of the Finnish tradition of legal dogmatics in the 1950s and 1960s that continued to stick to some of the starting points of the begriffsjurisprudenz or legal conceptualism and rejected some of the most radical postulates of the analytical legal theory. He claimed that from a retrospective point of view they made a reasonably good choice although these legal scholars were unable to justify their choices in theoretical terms.[7]

Also Raimo Siltala refers to the tacit knowledge, the terminology used by Polynai and to the relevance of legal practice for legal theory.[8]

Kaarlo Tuori refers in his book *Critical legal positivism (*Kriittinen oikeuspositivismi *in Finnish)* to the concept "tacit knowledge" as describing practical knowledge in contrast to articulated theoretical knowledge.[9] Tuori argues that such tacit knowledge actually can be found on the different levels of the legal system. On the surface level this knowledge has to do with practical skills for handling concrete problems. On the more abstract level of the legal culture this knowledge can help handle contradictions or conflicts within the legal system and use the doctrine on legal sources, different legal principles and standards. On this level legal education and the legal profession play an important role. Finally Tuori argues that on the deep structure level of the legal system the practical knowledge about law might be a kind of subconscious knowledge about the fundamental character of law for the legal actors, which might be more visible in the general debate on society than in practical legal activities.[10]

Among leading Finnish legal theorists there seems to be a general consensus about the fact that *tacit knowledge* is an important, relevant phenomenon for the legal profession. The typical everyday legal activity is very practical. Practical experience and traditional ways of behaviour have an important impact on how to proceed, as well as on how individual legal conflicts are resolved.

The question of how tacit knowledge might affect legal reasoning and solving problems has to be kept separate from the issue of how relevant tacit knowledge is for conducting legal research. In 2004 the two legal scholars Petter Asp and Kimmo Nuotio edited a Nordic anthology called *The Art of Legal Science. On Tacit Knowledge within Legal Research* (translation of the title,

7 Helin, Markku, *Lainoppi ja metafysiikka. Tutkimus skandinaavisen oikeusrealismin tieteenkuvasta ja sen vaikutuksesta Suomen siviilioikeuden tutkimuksessa vuosina 1920-1960.* (1988). 429.

8 Siltala, Raimo, *Oikeudellinen tulkintateoria* (2004), 340, 513.

9 Tuori, Kaarlo, *Kriittinen oikeuspositivismi* (2000), 165 ff. Here Tuori refers *ao* to Giddens and Foucalt.

10 Tuori, Kaarlo, op.cit.

here).[11] The book contains much practical advice, and many hints and views on how research can be conducted. In this context we are not interested in such tacit knowledge, which is about how one can successfully conduct research, but the focus here is on how legal science and research should handle the tacit knowledge that influences the legal practice (legal argumentation and decision making). It is all but self evident how legal research should relate to such knowledge, although there is a vast consensus on its existence and on its relevance for solving legal problems in practice.

What should legal scholars do with the tacit knowledge? This question is not discussed much in legal writing and is the focus of this presentation. The issue at stake is whether we have to remain silent about the tacit knowledge because by definition it is tacit. Or can we transform it into explicit, articulated knowledge by help of systematic surveys or other research in order to map it? Can we develop patterns of argumentation that improve the stock-taking of tacit knowledge in legal research? These are the questions we want to discuss in the following.

3 Different Types of Tacit Knowledge in Legal Argumentation

In the legal doctrine the tacit knowledge is, as already explained above, described as practical, not theoretically articulated knowledge that appears in the legal practice of judges, advocates and others.

Tacit knowledge is therefore an issue about experience, practical ways of dealing with conflicts, fingertip-sensibility and many other things. Within the normative doctrine of the use of legal sources we try to establish certain rules on how to solve legal problems. We might also have specific aspects that must be taken into account in certain fields of law, but there are issues that cannot easily be explained on a general level.

Tacit knowledge seems to be a category of knowledge that somehow links together empirical and normative aspects of law. Both legal theory and sociology of law observe its existence, but so far it has been thoroughly explored by neither discipline.

In private law it is rather easy to find examples of legal decision-making where tacit knowledge seems to play a significant role. A good example is trademark law. Trademark legislation prohibits registration of trademarks that are liable to be confused with ones registered earlier. When studying the examples of trademarks liable to be confused compared to those not liable one easily becomes slightly puzzled.

Why is the trademark *Sartor* not regarded as liable to be confused with *Sanfor,* while the trademark *Homandren* is liable to be confused with *Perandren* etc?[12] A further study of the subject shows that it is extremely difficult to describe the criteria for confusion in general and understandable terms.

11 Asp, Petter and Nuotio, Kimmo, *Konsten att rättsvetenskapa. Den tysta kunskapen i juridisk forskning.* (2004).

12 *See* Haarmann, Pirkko-Liisa, *Immateriaalioikeuden oppikirja* (1989), 152.

Nevertheless trade mark attorneys and others active in the field are able to tell you which marks might be liable to be confused with an astonishing degree of certainty, although there of course always are border line cases. I believe this forms an illustrative example of how tacit knowledge in a certain field might affect the interpretation of law.

There is also knowledge within the institutions responsible for legal conflict resolution that forms a type of tacit knowledge. Questions concerning the ethical rules for advocates or the rules for the internal activity of a court are to some extent codified in formal rules, but there is also tacit knowledge concerning what is acceptable and what is not. Here the tacit knowledge can be described as ethical or value-based knowledge concerning legal professions and their professional practice.[13]

In the judgments by courts there can also be elements of tacit knowledge in the sense that the result achieved in the formal decision-making is partly due to the facts mentioned in the explicit reasoning by the court, but is partly due to facts not at all mentioned in the judgment. This is not a rare phenomenon. Legal reasoning is to a large extent an activity where it is of crucial importance to manage to formulate the judgment in a way that convinces the surrounding group (auditorium) of legal professionals and society at large. Controversial viewpoints might therefore be passed over in silence. On the other hand there are many basic postulates in law that are so self-evident at least to legal professionals that they do not even have to be mentioned. Courts seldom explicitly mention the principle that contracts should be upheld and private ownership respected.

A special situation where the judge might choose to remain silent on certain considerations is when the judge for some reason feels that solution x has some less advantageous consequences and he therefore decides in favour of solution y, although he is believes that the traditional doctrine concerning the weight of different legal sources might have pointed in another direction.

> One typical example of such behaviour might occur when a person is denied legal protection in a situation where the person has taken legal action long after the "infringement" has started. If a person, for instance, has been satisfied with certain royalty compensations for inventions or language translations for several years, but then reacts and demands an adjustment of the contractual terms from the time when the compensations were first due, he or she seems to have less of a chance of getting the claims accepted by the court compared to a situation where compensation is claimed immediately after the grounds for such a claim occurred. One of the reasons behind such a practice presumably is that a late claim might be burdensome for the counterpart who has based his or her economic activities on the assumption that the amount paid is acceptable to the creator of an individual work or an invention. On the other hand, such a reason is usually unmentioned, and formally courts stick to the presumption that claims can be implemented as long as they are not prescribed.
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> Also recognition of ownership after a long period of possession might be a result that the court is placing so much emphasis on reaching that the

13 Wendel, Bradley W., *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*. Vanderbilt Law Review 54 (2001). 1955-2055.

> argumentation might become strange – to say the least. A remarkable example of this had to do with the old Finnish professor of folklore Professor Ala-Könni who used to ride around Finland on his motorbike in the 1950s and 1960s and buy up old traditional instruments. At that time he had no university funding for the project, so he used his own personal money. His activities resulted in a unique collection of Finnish folk instruments that was kept and registered by the University of Tampere. The Finnish Supreme Court then found that most of this collection had been donated to the University by Ala-Könni although he never formally donated it to his earlier employer.

Another form of tacit knowledge that decisions can be based upon are prejudices, conventional (not adequate) knowledge or wrong commonsense. Such judgments differ from the earlier ones in the sense that here the judges do not purposely remain silent on certain facts, but they lack certain knowledge or are unaware for instance of the values the legislator explicitly tries to promote by the legislation. The more complicated our legislation becomes at the same time as society develops in a more pluralist direction, the more difficult it gets for the judges to possess all the knowledge needed for successful and skilful conflict resolution. It becomes increasingly difficult to give guidance on how the well-known *bonus pater familias* should act in different circumstances or what knowledge the "average expert skilled in the art" should possess. It seems likely that these difficulties form one of the reasons behind the popularity of arbitration procedures to solve business to business (b2b) conflicts besides the advantages this has in order to speed up the process.

Viewpoints concerning what can be regarded as reasonable, fair or being in accordance with good practice can, of course, be based on some tacit agreements within the legal profession. Such agreements might imply that courts should be restrictive in granting damages (and restrictive in respect of the amounts) on the base of non-contractual behaviour. Such tacit, or sometimes even explicit, general policy attitudes might have an important impact and might to a large extent be based on tacit knowledge and perceptions.

4 Tacit Knowledge in Legal Science

Tacit knowledge seems to have a clearly different position in legal argumentation in practical argumentation in courts than in legal science.

Tacit knowledge in legal practice is by definition based on the practice and can only indirectly be traced in the legal decisions that are made. It is clear that such knowledge always remains partly invisible. Through an analysis of the judgments we can perhaps partly formalize and make such a practice visible. Then it no longer constitutes tacit knowledge. It is however impossible to give an adequate description of legal decision making without also taking this aspect into account.

An even bigger challenge for legal science is formed by the tacit knowledge that consists of non-articulated arguments and reasons. Such factors are difficult to trace in legal decisions. Prejudices and lack of factual knowledge can only be made visible with the help of critical analysis and reading of cases. Such a

discourse is part of everyday legal research where it is quite common for the commentator to speculate on the reasons for the end results of the court and the thinking behind them.

The factual relevance of the tacit knowledge as a source of law indicates that the old distinction made by Alf Ross between a normative and a descriptive doctrine of the sources of law is still relevant at least in some respects.[14]

From the normative point of view it seems reasonable to argue that the judge in his legal reasoning should in an open and transparent way document all the arguments that have lead to the judgment. Most lawyers probably agree on this. On the other hand it is clear that this is a type of ideal situation that we can never fully implement and that is undermined by many other factors. A description of the law in force must therefore take into account the relevance and existence of the tacit knowledge when legal practice is described. This does not indicate that the practice can be criticized when it does not live up to the normative ideals. On the contrary, we might then see cases where the judges are "laid open to public view" by lawyers, historians and sociologists as the Norwegian legal theorists Bernt and Doublet have described it.[15]

The conclusion is that the relevance of the tacit knowledge is accepted by legal scientists and should systematically take into account what Paul Ricceur called "the hermeneutic of suspicion". It indicates that the attitude towards all legal reasoning should be open, questioning and critical.

5 Tacit Knowledge in the Theory of Law

So far we have discussed legal sciences in the sense of legal dogmatics, systematization and interpretation of norms. The question is whether we can find any form of tacit knowledge concerning legal evolution. Are there any regular features that govern the evolution of law and could form some kind of tacit knowledge concerning the legal system?

The attempt by the Swedish scholar Anna Christensen to develop a normative theory on the development of law might be seen as an attempt to develop such a theory.[16] Anna Christensen claims there are some fundamental patterns in the development of law that duplicate themselves over time and that legal evolution is a kind of struggle for a balance between certain pools which Christensen describes as market functionality, protection of established position and fair distribution. In her concrete analysis within the law of housing (rental law) and social law Christensen shows that her theory is anchored in the reality of the development of law in these fields, that the legal evolution can be described as balancing acts between these pools that have tension between them.

14 *See* Strömholm op cit. 330 ff.

15 Bernt, Jan Fridthjof & Doublet, David R.,*Vetenskapsfilosofi for jurister – en innføring* (1998), 250. The authors use the expression "avkledd for åpen scene" in the original Norwegian language.

16 *See* Christensen, Anna, *Skydd för etablerad position – ett normativt grundmönster*. TFR 1993. 519-574.

Christensen shows us that we can find patterns in the legal evolution that can be rendered visible in a normative practice in the everyday life of society on how relationships between people should be defined and then are confirmed in legal forms. And although the practice has to be made visible to become a legal norm, it might still to some extent remain tacit everyday knowledge.

6 Summing up

It has been said that "Wovon mann nicht sprechen kann, darüber muss mann schweigen".[17] When we discuss tacit knowledge, there is however, much to be said and perhaps consciousness about the role of tacit knowledge can help give us a realistic view of certain aspects of legal argumentation and decision-making. It is also reasonable to emphasise both the positive and negative side of tacit knowledge: It is a positive phenomenon when it contributes to increased efficiency and professionalism. It is negative when it contributes to facade justifications and simple commonsense reasoning instead of deeper and more thorough analysis.

It is also good to emphasize that tacit knowledge to some extent can be made explicit or articulated knowledge. This can best happen in an open dialogue and exchange of views and arguments. On the other hand, we cannot deny that certain mechanisms might work in the opposite direction for a simple reason: Knowledge is power.

17 This famous citation from Wittgenstein reads in English: "One must remain silent on issues that cannot be discussed".