RECHTSTHEORIE

Beiheft 9

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Sociological Jurisprudence and Realist Theories of Law

Herausgegeben von / Edited by

Eugene Kamenka / Robert S. Summers
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Vorwort von / Preface by

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Introduction

The 11th World Congress on Philosophy of Law and Social Philosophy had a very broad scope, divided into the following topics:

Plenary sessions

1. Philosophy of Law in the Nordic Countries
2. Law and Morality
3. The Foundations of Legal Culture

Working groups

I. Law and Society
II. Law and Morality
III. Models of Legal Reasoning
IV. System and Systematization in Law
V. Knowledge and Values in Law
VI. Theory of Law and the Social Sciences

Special sessions

VII. Law and Anthropology
VIII. Philosophical Problems of the Social Sciences

The papers, presented at the Congress, are now being published in several volumes. Each volume is a thematic unit and may include papers read at different sessions. Papers included in this volume were originally discussed in groups/sessions 1, I, II and VI.

In accordance with IVR practice the papers are published as submitted with minimum editorial intervention. The contributions are arranged alphabetically by author-surname, except for some of the invited commentaries on the opening papers of Congress working sessions (in this volume, in Part I *Backman* on *Klenner* in the Congress session "Social Presuppositions of the Philosophy of Law", and in Part II *Mikkola* on *Mollnau* in the Congress session "Empirical Knowledge of Society and Legal Research"). It should be also mentioned that in Part II

of this volume, *Varga*'s paper was the opening paper in the session "Macrosociological Theories of Law", and *Rottleuthner*'s paper was an invited co-report on Varga. In Part III, *Bjarup*'s paper was the opening paper in the session "Legal Realism and Its Limitations", *Pattaro*'s paper being an invited commentary on Bjarup. *Jørgensen*'s paper was the main paper in the Congress Plenary Session "Philosophy of Law in the Nordic Countries", *Sundberg*'s paper being an invited plenary co-report on the same subject (the two other co-reports, by *Hannu Tapani Klami* and *Mikael M. Karlsson,* are published elsewhere; see the overall table of Proceedings contents at the end of this volume).

It is a pleasure to acknowledge, on behalf of the editors and contributors of this volume, that the editing of these Proceedings has been financially supported by the Finnish Cultural Foundation and the Finnish Foundation for Economic Education. Mr. *Jyrki Uusitalo* (Academy of Finland and Helsinki University) has efficiently served as editorial secretary for this volume.

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The decision jointly to publish papers on Sociological Jurisprudence and Legal Realism is justifiable among other things by some connection between these movements. Although different schools of realism originally evolved under the influence of ontology (Sweden), pragmatic considerations (United States), methodology (Russia, Poland), legal dogmatics (Germany, Austria), and so on, they often coincided with the growth of Sociological Jurisprudence and legal sociology. Let me then start this introduction with some remarks concerning Legal Realism and then pass to problems regarding Sociological Jurisprudence.

The World Congress papers on Legal Realism were mostly concerned with its Scandinavian version, quite naturally in the light of both the high reputation of Scandinavian Realism and the geographic location of the Congress. Since the plenary papers by *Stig Jørgensen* and *Jacob Sundberg* give the reader of this volume satisfactory information about the development of this school, I need not add any historical facts, except one. For rather irrelevant reasons, one of the absolutely central thinkers of Scandinavian Realism, *Karl Olivecrona,* was curiously played down in the Congress papers. Yet, Olivecrona was precisely the person who developed *Hägerström*'s philosophy in the most careful, consistent and juristically useful way. Others produced some exaggerations *(Lundstedt),* inconsistencies *(Ross),* or controversial recommendations *(Ekelöf),* but not Olivecrona. His theory is a masterpiece of theory building aiming at cool perfection. After him, Scandinavian Realism cannot be improved upon, it can be only accepted or abandoned.

Whereas Legal Realism still meets with friendly understanding in other countries (see, for instance, the papers of *Françoise Michaut* and *Enrico Pattaro*), the dominant attitude of legal theorists in the countries of its origin has recently become negative. The plenary co-report by *Jacob Sundberg* and the main paper by *Jes Bjarup* are quite representative in this respect, albeit both are unique in their ways of justifying the negative conclusions. Partly following *Robert Summers's*[1] "balance sheet" of the "virtues and vices" of American "pragmatic instrumentalism", let me summarize the situation as follows. The virtues of Realism lie in its empiricist approach, its emphasis on the pragmatic function of law, its concern with real life and its refutation of futile speculations. Its "vices", however, are grave. Some Realists have wrongly described the criteria of legal validity. Some have insisted on a wrong theory of the separation of law and morals, overstating the role of coercion in law. Some have played down the role of rational reasoning not only in law but also in other practical matters. The last point decided their fate. Most lawyers and jurists consider rational thinking as the most central professional skill. When a philosopher tells them that rationality in law is impossible, they either ignore legal philosophy in general, or believe in it and dramatically lower the level of reasoning. As Jacob Sundberg rightly emphasizes, this is exactly what happened in Sweden. I am not convinced that the Realists can be blamed for the excessively high taxes in Scandinavia, but they can certainly be blamed for something much worse, that is, for the belief of some Scandinavian lawyers that the legislature and the Supreme Court are always, by definition, right, and thus immune to juristic criticism.

Another weak point of Scandinavian Realism is its ontology. Its central thesis is that everything that exists must be placed in time and space. Physical objects and mental processes thus exist, whereas values, rights, valid law and so on do not. Consequently, the legal theorist is forced to assume an external point of view with regard to the law. He may scientifically examine only other persons' beliefs in valid law, never valid law itself. This fact constitutes a very serious limitation to his thought. But is not this limitation inevitable? Is not the ontology that underlies it right? By asking this question, we have already passed the demarcation line between Part III of the present volume, dealing with Legal Realism, and Part I, on Law and Society in the Light of Legal Philosophy. Let me say at once that it is no coincidence that this part is dominated by Marxist philosophers of law. Regardless of the controversial political, sociological and methodological implications of

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[1] *Robert S. Summers*, Pragmatic Instrumentalism and American Legal Theory, Ithaca 1982, pp. 278 ff.

Marxism, it is precisely the Marxists who have significant things to say about the ontology of law. Although their starting point is no less materialistic than the Realists', their final ontological views are much more moderate. The reader may, for instance, notice that the paper by *Kamil Fabian,* although rather extreme in other respects, ends with moderate views concerning the structure of political systems as a complex of subjects, norms, functional components and ideology. Obviously, not all Legal Realists would accept such ontological units as norms and ideology but I have developed in my own works rather similar views about the ontological nature of valid law.[2] In my opinion, valid law is a complex of

1. norms;
2. actions that give norms their social character, for example legislative acts, the practice of obeying norms, etc.;
3. "supernorms" that give the norms validity; and
4. rational interpretation.

One of the points of this scheme is that different components exist in different senses. Whereas actions exist physically, in a sense fully acceptable to the Realists, norms and interpretation exist merely conceptually. Not all Realists would accept the existence of abstract objects, and those who would, perhaps even *Hägerström,* would certainly not accept the conclusion that legal interpretation, although coloured by values, gives *knowledge* of law rationally interpreted. Valuations and knowledge do not go together in the world picture of the Realists, but do, in my opinion, in the world picture of the lawyers.

Another Marxist point, deserving attention, is the holistic philosophy of law. *Hermann Klenner* and *Karl Mollnau,* both from the GDR, emphasize in their papers the feedback between law, society, empirical knowledge and legal philosophy. One cannot stress this point too strongly. Legal concepts do not constitute a closed field. Although many of them cannot be fully defined without the use of other legal concepts, there exist some "bridging implications", as *Hector-Néri Castañeda* would say, between legal and non-legal concepts. Simply put, no one could understand such legal terms as, for instance, "purchase", who did not already possess an extensive social vocabulary, including such elementary words as "mine", "yours", "give" and so on. This vocabulary, in turn, would be unthinkable, if such social facts as individual disposition of things by people did not exist. Obviously, there also exist

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[2] *Aleksander Peczenik,* Legal Data, in: A. Peczenik/L. Lindahl/B. van Roermund (eds.), Theory of Legal Science, Dordrecht 1984, pp. 97 ff.

multiple causal connections between the law and other social phenomena, extensively discussed in many of the papers included in this volume.

Rightly emphasizing the connection between law and society, the Marxist theorists also hold that law has some autonomy. I will not repeat their sociological points, letting the papers speak for themselves, but merely add an analytical one. The autonomy of the law manifests itself in the existence of the legal system of reasoning, or, in other words, the legal paradigm. Many premises, taken for granted within this system, may be debatable when one exceeds its limits. For example, lawyers take for granted that Swedish law possesses the quality of being "valid", whereas many Realist philosophers of law meaningfully (albeit wrongly) contest this assumption. In my opinion, one can present legal reasoning as rational and even deductively complete, if one adds to it some new premises that appear to be certain within the legal paradigm. At the same time, the added premises are contestable outside the legal paradigm. This opinion constitutes the core of my idea of "jumps" (leaps) and transformations in the law.[3] While from the point of view of the semi-autonomous legal paradigm, legal reasoning appears to be complete, in the light of holistic, trans-paradigmatic considerations, it appears to be full of gaps and creative acts of transformation. The Marxist synthesis of holism and the relative autonomy of law is perhaps another side of the same coin.

One must, however, add a *caveat*. It is much easier to say such things *in abstracto* than to discuss empirical examples in detail. This is precisely the criticism made by *Eero Backman* of *Hermann Klenner*'s paper. We are thus ready to cross the second demarcation line, from Part I of the present volume, to Part II, on Theories of Law in Sociological Perspective. Whereas the main paper by *Karl Mollnau* discusses, as already mentioned, the interaction between legal research and empirical knowledge, *Matti Mikkola*'s commentary on this paper takes up a more concrete point, which, however, leads to another central problem. He thus focuses his attention on one type of legal research, that is, the critical use of the law. In this context, he emphasizes the following connection. Empirical studies may show unsatisfactory states of affairs, general research on ideological and structural factors in society shows why such states of affairs exist, whereas legal research performs the critical task of replacing existing concepts, principles, views and actions with new ones. It is not my task to criticise this scheme but three points require some brief comments.

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[3] Cf. *Peczenik*, The Basis of Legal Justification, Lund 1983, and *Peczenik*, Grundlagen der juristischen Argumentation, Wien/New York 1983, passim.

1. Theories about ideological and structural factors of society are often methodologically controversial. When a general statement of theory appears to contradict observed facts, the social scientist may immunize his theory by means of *ad hoc* hypotheses. One cannot easily see what conceivable facts would, for example, be considered proof that some central Marxist theses are false. In this context, one must bear in mind that some influential philosophers of science, notably *Karl Popper*, are of the opinion that scientific statements are by definition falsifiable by contrary observations. What is not falsifiable is not science but faith.

2. The second point concerns empirical social science. Several papers presented here, for example those of *Maria Borucka-Arctowa* and *Karlhans Liebl,* use results from research in the social sciences. All known proposals to integrate legal research and research in the social sciences meet a well-known problem. Whereas it is easy to propose integration, it is difficult to make the results of sociological research directly useful in legal practice, as it has produced surprisingly few significant results. There are several reasons for this weakness, one of them being the fact that the very idea of causality, essential to science in general, is contestable in social contexts, as, for example, *Georg Henrik von Wright*'s well-known analysis of this problem points out. Moreover, the nature of *legal* research is not easy to analyse. Legal research comprises a very special mixture of cognitive and evaluative elements and, without analysis of this, it is not clear what profit it can draw from the social sciences. The analysis of legal research, however, is discussed in other volumes of the Proceedings of this World Congress.

3. The third point to be considered is the question of how an empirical knowledge of society may facilitate criticism of unsatisfactory states of affairs. Regardless of the above-mentioned problems concerning the results of sociological research, there is also a problem concerning the qualification of a state of affairs as "unsatisfactory". One must have more or less objective criteria for the evaluation of states of affairs. Here, we approach the difficult problem of the rationality and justifiability of value-statements. Can one justify a value statement at all? Legal Realists, for instance, tend to answer this question in the negative. In my opinion, a justified value-statement must be supported by good reasons, some of which will consist of other value-statements. The core of the rational justification of value statements thus consists in their coherence, that is, in a complex supportive structure, including the value-statements to be justified. Some such value-statements are more central than others and these too, may be contested and justified, but because of their generality and their central place in various practical

reasonings, they have a peculiar importance. One such central value-statement is that a good law should be *progressive*. Within European culture, the idea of progress has been especially powerful. Yet, it is elusive. *Hubert Rottleuthner*'s paper includes an interesting survey of various criteria of progress. Unlike some 19th century philosophers, we can no longer identify social progress with advances in the natural sciences. Instead, I should say, we need a complex combination of cognitive, ethical and aesthetic progress. Only such a combination can constitute a justifiable ideal, useful for the purpose of evaluating law. Rottleuthner mentions some other attempts to formulate criteria of progress and rightly points out the methodological problems connected with them. Some other papers also deal with this problem, for example, that of *Lester Mazor,* which discusses certain problems connected with the fact that the evolution of society by no means constitutes a linear progression. Nevertheless he argues that we need a perspective from the future to the present. Needless to say, such a formulation opens a whole cluster of problems that cannot be discussed here.

I cannot do justice to all the papers included in this volume: most must remain unmentioned but not, let us hope, unread. One point, however, requires additional comment. *Thomas Wilhelmsson* advocates the use of relatively narrow concepts in law, which would accelerate changes and facilitate criticism of law. Perhaps this is so, but what then would constitute the Archimedean point of this criticism and what would be the proper critical procedure? We are back with several difficulties mentioned above. The proper procedure for criticising law is a *rational* one but the very idea of rationality presupposes some generality of concepts. To be rational implies the like treatment of like cases, the use of general theories and general concepts. Therefore "narrow" concepts should not be very narrow but only as narrow as the demand of generality allows. I do not say that Wilhelmsson is wrong, only that his insights are one-sided, just as the insights of all legal theorists are, including, of course, the author of this introduction. To read this volume demonstrates this very clearly. So many interesting things are said and so many things that perhaps should be said remain open. This is the present state of our discipline. It creates more questions than answers. For that reason we need much discussion. And we need World Congresses.

Aleksander Peczenik

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I. Recht und Gesellschaft in rechtsphilosophischer Perspektive

KONTINUITÄT UND DISKONTINUITÄT IN DER ENTWICKLUNG DES POLITISCHEN UND RECHTLICHEN SYSTEMS

Von Nora Ananieva, Sofia

I.

Ein besonderer Wesenszug der modernen Politologie und der politikwissenschaftlich akzentuierten Rechtstheorie im Osten wie im Westen ist eine rapide Entwicklung der Theorien. Das betrifft zum einen die Theorie der politischen Systeme und zum andern die Theorie über die Rolle des Rechts als mitspielender Faktor im Kontext des politischen Systems. Z. B. auf dem im August 1983 in Rio de Janeiro durchgeführten Weltkongreß der Internationalen Vereinigung für politische Wissenschaften waren die politologischen Diskussionen hauptsächlich mit der Theorie der politischen Systeme beschäftigt. Das war nicht zufällig. Die Vielfalt an Theorien, Modellen und Definitionen der politischen Systeme ist auf die wachsende Vielfalt an Systemen der Organisation der politischen Macht in den verschiedenen Teilen der heutigen Welt, auf die allgemeine Tendenz zurückzuführen, nach einer Organisation der Macht zu suchen, die die Erfüllung der politischen Ziele am besten gewährleisten und gleichzeitig damit der historischen, nationalen und ideologischen Spezifik der sozial-politischen Entwicklung der einzelnen Länder am meisten entsprechen würde.

In diesem Beitrag möchte ich die im Titel angedeutete Thematik überwiegend unter dem Aspekt der Kontinuität und Diskontinuität im Übergang von der vorsozialistischen zur sozialistischen Gesellschaftsform behandeln. Dabei wollen einige allgemeine theoretische Gesichtspunkte besonders beachtet werden. Anschließend werden einige konkretisierende Betrachtungen anhand des Beispiels der Entwicklung des politischen und rechtlichen Systems Bulgariens angestellt.

II.

Die marxistische Theorie behandelt das politische System und das Rechtssystem als Gesamtheiten von staatlichen und gesellschaftlichen Institutionen und Organisationen, die sich im Prozeß der Ausübung der politischen Macht auf der Grundlage solider Aufbau- und Funk-

tionsprinzipien gegenseitig unterstützen und die durch die materiellen Bedingungen des Gesellschaftslebens ökonomisch bedingt sind. Diese ganz allgemeine Definition erfordert die Ergänzung, daß die politischen Strukturen nicht als eine unmittelbare Folge der wirtschaftlichen Basis aufgefaßt werden sollten. Diese Erläuterung ist aus dem Grund erforderlich, weil dem Marxismus oft ein vulgarer wirtschaftlicher Determinismus zugeschrieben wird. Die Wechselbeziehungen zwischen Wirtschaft, Politik und Recht sind viel komplizierter, als es eine elementare These darstellen könnte. Sie stehen in einer komplizierten Verbindung zur sozialen und Klassenstruktur, zur Entwicklung der politischen Beziehungen, einschließlich auch dieser der internationalen Arena, zum Niveau des gesellschaftlichen Bewußtseins usw. Von großer Bedeutung für die Wechselbeziehung zwischen dem politisch-rechtlichen System und dem Wirtschaftssystem im Sozialismus ist der Umstand, daß bei den sozialistischen Revolutionen der politische Umschwung dem wirtschaftlichen vorausgeht. Diese Tatsache bestimmt die außerordentlich aktive Rolle des politischen Systems in bezug auf die materielle Basis.

Die sozialistischen Revolutionen sind immer radikal. Die politische Umwälzung ist unbedingt durch eine grundsätzliche Umwälzung in den Eigentumsbeziehungen begleitet, die der Klasse der Erzeuger und deren politischen Organisationen den Weg zur Arena der entscheidenden politischen Macht bahnt. Durch die Übereinstimmung des sozial-ökonomischen und des politischen Umsturzes entsteht ein politisches System, das sich von dem vorhergehenden nicht nur seinem Wesen nach, sondern auch nach dem fundamentalen Aufbau und den Funktionsprinzipien unterscheidet. Dies bietet oft einigen Autoren den Anlaß, jede Fortsetzung der Traditionen zwischen den sozialistischen und vor- bzw. nichtsozialistischen politischen und Rechtssystemen zu verneinen.

Solch eine These ist aus mehreren Gründen haltlos. Erstens: die Entwicklung der menschlichen Geschichte, einschließlich der politischen Geschichte ist ein kontinuierlicher Prozeß. Diese Kontinuität beeinflußt unumgänglich auch die Entwicklung der politischen Strukturen und des Rechts. *Marx* schrieb, daß „die Geschichte nichts anderes ist, als die Tätigkeit des seine Ziele verfolgenden Menschen"[1]. Die Entstehung der Klassengesellschaft und der politischen Macht bewirkte eine vom Standpunkt der Geschichte und der menschlichen Entwicklung aus paradoxe Metamorphose. Der Mensch bleibt dabei in wirtschaftlicher und sozialer Hinsicht ein Subjekt, kann jedoch im politischen Sinne zu einem passiven Objekt der politischen Herrschaft werden. In diesem Zusammenhang kann der langjährige Kampf für Demokratie, dessen historische Errungenschaften das allgemeine Wahlrecht, die repräsenta-

[1] *K. Marx/F. Engels,* Werke, Bd. 2, S. 100.

tiven, politischen und Betriebsorganisationen der Werktätigen, das Verfassungssystem der Menschenrechte usw. sind, als eine Kette unaufhörlicher Bemühungen um die Aneinanderpassung des politischen Menschenbildes an die philosophische Auffassung von Menschen als Subjekt der Geschichte betrachtet werden. Der Sozialismus ist daran interessiert, diese Errungenschaften der demokratischen Bewegung nicht nur aufrechtzuerhalten, sondern auch weiterzuentwickeln.

Zweitens: Die marxistische Ideologie entsteht nicht wie die Minerva aus dem Kopf des Jupiters, in einem ideologischen und politischen Leerraum. Sie baut sich auf der soliden Grundlage der wichtigsten Leistungen des menschlichen Gedankens in der Wirtschafts- und Gesellschaftstheorie auf. Der altgriechische Materialismus, *Hegels* Dialektik, die Wirtschaftslehre von *Smith* und *Ricardo*, die Auffassung *Guizot's* von den Klassen, die politische Theorie von *Jean-Jacques Rousseau* und anderes noch wurden rational verarbeitet, als ein theoretisches System ausgebaut und mit den politischen Zielen der Arbeiterklasse und ihrer Verbündeten in Einklang gebracht, d. h. in eine Philosophie der revolutionären Tat verwandelt. *Marx* und *Engels* verweisen unentwegt und gewissenhaft auf die theoretischen Quellen ihrer Lehre. Sie halten *Gracchus Babeuf* für den Urheber der kommunistischen Idee. Das ist ein Grund, von der Fortsetzung des politisch-theoretischen Erbes im Marxismus zu sprechen.

Drittens: die Allmählichkeit auch der radikalsten Transformation der sozial-ökonomischen und politischen Beziehungen, der komplizierte Prozeß der Anpassung der politischen und sozialen Ziele der Revolution an die materiellen Voraussetzungen, die ihre Erfüllung gewährleisten, sowie an das gesellschaftliche Bewußtsein, die Ermittlung der günstigsten Rechtsform und des Instrumentariums der Umgestaltung u. a. sind die Merkmale einer Übergangsperiode, während der die Fortsetzung der Traditionen auch in der konsequenten Anwendung des durch die Revolution überwundenen Verfassungs- und Rechtssystems zum Ausdruck kommen kann.

Viertens: Der Grad und Umfang der Kontinuität hängen auch von den spezifischen nationalen, historischen und psychologischen Besonderheiten der Bevölkerung eines bestimmten Landes, von den geerbten demokratischen Traditionen, von den Stereotypen des politischen Denkens aus der Zeit der überwundenen politischen Regime usw. ab.

III.

Diese Thesen können durch folgende Beispiele aus der Entwicklung Bulgariens konkretisiert werden: a) die Rolle der Regentschaft nach