How History Shapes the Legal Field: The Autonomy of Jurisprudence as a Historical Effect

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The story I am going to recount is a story of effects and counter-effects. In my paper I would like to briefly trace the steps that led to the development of legal positivism as a scientific, descriptive, non-evaluative approach to law. I will sketch an account based on two prototypical conceptions of law that in the different epochs have taken different shapes and have been supported by different theorists. In my reading, the polemics that I will concisely touch upon replicate the same basic opposition between two canonical and quite incompatible views of law: a law based on customs and drawn out by legal experts and a law made up of coercive rules issued by a legislator.

Why is it so important to trace the historical emergence of legal positivism? What light can this cast on the relationship between history and concepts? Among other things, two main factors kindle my interest in this particular subject. Firstly, I think that legal positivism, as a "canonical" approach to legal phenomena, is part of what, to build on a system theoretical vocabulary, could be defined as the *self-description* of a field, the legal field. To put it better, legal positivism may be seen a theoretical response to a series of events that radically changed the juridico-political scenario of European states. Secondly, the story of legal positivism recounts another story, which has to do with the never-ending conflict between two prototypes of law, generally referred to with the terms "ius" and "lex". And this story, I believe, has severely impacted upon our view of politics and law.

To put my argument in a nutshell, I will contend that *the autonomisation of legal science as a self-standing discipline is paradoxically and yet directly tied to the heteronomisation of the legal practice due to the conquest of the legal field by the political power holder*. In this framework, "heteronomisation" signifies the process whereby the legal practice, which had long been considered as a separate and autonomous dominion in the hands of legal experts (such as, for example, professors of law in the Middle Ages), was progressively incorporated into the machinery of the rising states, to such an extent that today, contrary to what happened in other eras, law and politics are straightforwardly represented as two sides of the same juridico-political coin.

To shed some light on this movement, I will concentrate on the rise of positivist jurisprudence as a scientific discipline and the new role it attributed to legal scientists (who not by coincidence started to be regarded as representatives of a science rather than as operative law-makers, like their medieval or early modern colleagues).

By briefly looking at three famed diatribes, I will show the way the image of law changes depending on its proximity to the political realm. In doing so, I will show how and (presumably) why the role of legal doctrine or legal science underwent impressive transformations.

A *methodological assumption* underlying my argument is that we cannot really make sense of the emergence of legal positivism unless we understand the complex chain of events that led to the formation of the modern and the late-modern state. Yet, before I go on, I would like to make a so-called *excusatio non petita*. Indeed it is necessary to distinguish two types of conditions of a theory: *conditions of existence* and *conditions of validity*. In other words, it is one thing to attend to *what brought a theory into existence* and another thing to assess *the conceptual validity* of such a theory, with no, or little, regard to its conditions of existence. In what follows, I will mainly focus my attention on conditions of existence. Nevertheless, we should bear in mind that between history and concepts there is a sort of "looping effect" (to use the expression coined by Ian Hacking) in that a concept is never a self-standing entity living in the Hyperuranium, but a utensil that human beings employ so as to provide intelligible and effective accounts of what surrounds them. Thus, in the language game of producing working accounts of reality, concepts capture practices and give them a form while practices draw the boundaries of concepts and make them what they are in the here and the now. In such a Wittgensteinian view of meaning, *understanding a concept* always entails *grasping the role it plays in the game it is meant to constitute*.
In other words, it is true that I will not be concerned with whether or not the positivist view, or the many positivist views provide a plausible picture of what law is. Indeed I would rather like to dig up some layers of the unconscious of positivism, where the relationship with history and facts was stocked as the experiences of early life were removed. But this sort of conceptual archaeology, in my view, offers a precious contribution to the understanding of any theory.

If there is a common trait among hugely different authors like, just to mention a few, Hobbes, Voltaire, Rousseau, Beccaria, Hegel, Bentham and Austin, is their staunch aversion to juristic law, the law produced by jurists (whether they were professors of law or judges). The casuistic, concrete, sapiential nature of the legal order of the Middle Ages and early modernity was regarded as a stumbling block to the establishment of a general, abstracts, public law enshrined in written constitutions and comprehensive codes.
The recipe to a strong state, holder of unquestionable legislative and judiciary powers, was the erasure of the monopoly of jurists over legal knowledge. That monopoly often extolled by Sir Edward Coke:

> 'For we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our daies upon the earth are but as

> a shadow, in respect of the old ancient dayes and times past, wherein the Laws have been, by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.'[1]

This is the manifesto of a conception of law as an age-old custom, emerging out of reiterated practices and elicited by wise and respectable interpreters. The core of this law was the *reason*, which was by no means a strategic calculator, but the accretion of experiences read through the lens of a common tradition. A conception of law that dates back thousands of years, if we think of the definition of the *ius* given by Celsus as 'ars boni et aequi'. Famously, this is the conception that Thomas Hobbes abhors and fights. In a (at times humorous) Dialogue he imagines a philosopher who replies to a jurist as follows:

> 'I grant you that the knowledge of the Law is an Art, but not that any Art of one Man, or of many how wise soever they be, or the work of one and more Artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law. Obscure also are the words Legal Reason; there is no Reason in Earthly Creatures, but Humane Reason; but I suppose that he means, that the Reason of a Judge, or of all the Judges together (without the King) is that Summa Ratio, and the very Law, which I deny, because none can make a Law but he that hath the Legislative Power.'[2]

What is at stake here is the *artificial nature* of law. Law as an artefact, the product of a craftsperson. While Coke recognises that law is a product, he sees craftspeople as enlightened readers of a text that is not written by themselves. Hobbes aims to unmask this view by denying that judges are candid and disinterested readers, as they are the holders of a power which, in his view, belongs to the sovereign. So, the question is: Where is this reason located? Is it a super-individual reason that lies at the heart of a community and needs to be brought out by the reflective activity of the most honourable of its members or is it the reason of a single person, endowed with the monopoly of force, who has taken upon herself to issue the rules of coexistence. And is the artificiality that both Coke and Hobbes acknowledge as a trait of law due to an activity of elicitation or of creation *ex nihilo*? Needless to say, these views are based upon antagonistic conceptions of sociality, normativity, rule-acceptance, obedience, obligation, and so on.

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[1] Sir Edward Cook, *Calvin's Case, or the Case of the Postnati*, in *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard, Indianapolis: Liberty Fund, 2003, Vol. 1., accessible on the web page http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=911&chapter=106337&layout=html&Itemid=27 (accessed on the 29th of April 2013).

[2] Thomas Hobbes, *A dialogue between a philosopher and a student, of the common laws of England* (1681), in *Writings on common law and hereditary rights*, Oxford: Oxford University Press, 2005, pp. 1-152: 10.

However, what matters here is not a general comparison between these views, but the different idea of legal science that they embody and promote. Before I unpack this, I would like to mention another famous diatribe between two unquestionable protagonists of the 19th century: Georg Wilhelm Friedrich Hegel and Friedrich Carl von Savigny. It is well know that Hegel was, even if with caution, a supporter of the process of codification that was forcefully spreading across Europe. Savigny had many reservations about codification and above all about the way the legislator should be involved.
According to Savigny, jurisprudence is all about understanding the "*spirit* of the *people*" where positive law truly lies. According to his doctrine of legal sources, all law is positive law that is rooted in the common consciousness of a people and, as such, assumes the basic form of customary law, on which statutory law has to be based. Even though Hegel felt great admiration for customary law (and this is all the more important), his sincere misgivings as to a conception of law à la Savigny is expressed in a well-known passage of *Elements of the Philosophy of Right*:

> 'The particular form of bad conscience which betrays itself in the vainglorious eloquence of this superficial philosophy may be remarked on here; for in the first place, it is precisely where it is at its most spiritless that it has most to say about spirit, where its talk is driest and most lifeless that it is freest with the words "life" and "enliven", and where it shows the utmost selfishness of empty arrogance that it most often refers to the "people". But the distinctive mark which it carries on its brow is its hatred of law. That right and ethics, and the actual world of right and the ethical, are grasped by means of thoughts and give themselves the form of rationality – namely universality and determinacy – by means of thoughts, is what constitutes the law; and it is this which is justifiably regarded as the main enemy by that feeling which reserves the right to do as it pleases, by that conscience which identifies right with subjective conviction.'[3]

In this quotation the sticking point becomes all the more visible: Hegel denies that a jurist, or even the entire class of jurists, may be the legitimate interpreter of a people's customs; he refutes that jurists are called upon to draw out the law which is hidden beneath the surface of everyday life. Doubtless, Hegel thinks that legal codes can hardly embrace once and for all the totality of the normative life of a people. And yet codes are much more trustworthy than the subjective conviction of the members of an elite who pretend to speak on behalf of a people and its spirit.
So, again, what is at stake here? In my view, the proper job of the jurist and the task of legal science. Famously Savigny was a stubborn opponent of the primacy of the legislator's will and deeply believed in the virtuosity of legal science. While law cannot be created by any will but only brought into light by a pondered activity of jurists, who have apposite knowledge and competences, legal science has the task of giving law a systematic form which it naturally lacks. As you can see, if law is regarded

[3] Georg W.F. Hegel, *Elements of the Philosophy of Right* (1820), Cambridge: Cambridge University Press, 2003, pp. 16-17.

as something frozen in a code and produced by a legislative body, the role of the jurist and the task of legal science are severely undermined. In this case, as Savigny tellingly remarked, legal scientists become "servants of law": they turn out to play no role in the delineation and determination of the content of the law. The activity of jurists is confined to *the mere explanation of an external object*. As I will say while talking about Kelsen, once the political power holder has taken over the task of producing law, the scientific activity of the jurist can still be regarded as essentially meant to make sense of systematicity of the contents of legislative enactments; but such a systematicity is no longer considered to be a property conferred on law by legal scientists. Rather, it is a scheme whereby law can be described. This is the crucial turning point: the new task of legal science is *to describe* law.

In other words, this is the major *historical effect* I want to cast light on: the revolution that has taken place in the understanding of the sources of law has brought about a decisive change in the understanding of legal science. Legal science is not – like in the Middle Ages and early modernity – conducive to a determination of the contents of the law. It becomes ancillary, as it is instrumental in making clear something that it does not contribute to producing. Savigny's main goal is to emphasise the intrinsic relation between *legal science* and *the production of law*, his main worry being the possibility that legal science may be reduced to a *mere activity of description*, which has got nothing to do with the definition of the contents of the law.

Savigny was one of the main exponents of a school of thought which was going down to defeat. A team of resolute legal scientists across Europe was paving the way for a conception of municipal law as innately tied to the creative activity of the legislator, for an understanding of the courts as intrinsic organisms of the state apparatus, and for a view of legal science as propaedeutic both to the cognition of valid law and to the formation of legal officials. The parliament was the only legislator, the judges were loyal appliers, professors of law were educators. This new division of labour among these elites is an undeniable cause of the rise of *legal positivism as a descriptive enterprise*.

This movement can be appreciated in the work of John Austin, but appears much more clearly in the work of Hans Kelsen. What Kelsen praised in the opus of Austin was precisely his open intent to draw the boundaries and systematise the science of law and to differentiate it from other sciences. Austin was convinced that this process of specialisation and systematisation presupposed a clear differentiation from other sciences, as he suggested when he wrote that the main purpose of his book was "to describe the boundary which severs the province of jurisprudence from the regions lying on its confines."[4] Such an intent to reorganise the field of legal theory is the main rationale of Kelsen's vindication of the "pureness" of legal science. He insists that legal theorists have to carry out a strictly *cognitive* task: 'The interpretation of law by the science of law (jurisprudence) must be sharply

[4] John Austin, *The province of jurisprudence determined* (1832), Cambridge: Cambridge University Press, 1995, p. 11.

distinguished as nonauthentic from the interpretation by legal organs. Jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms.'[5]

The main goal of this basic division of labour between legal scientists and legal officials (both law-makers and law-appliers) is to attribute legal scientists the task of determining whether or not something is a valid law (that is, whether something belongs to a given legal system) by applying well-determined theoretical schemes. This is the reason why, according to Kelsen, it is absolutely necessary 'to free the science of law of all foreign elements,'[6] namely from psychology, sociology, ethics, and political theory, so that this *purified* theory of law may provide a description of law as it really is, freed from any deceptive contamination.

So, the last polemic I would like to touch on is the one between Kelsen and Eugen Ehrlich. Kelsen's criticisms of Ehrlich's sociology – Ehrlich who not by coincidence was a Roman law scholar and an exponent of the Free Law Movement – are relevant insofar they bring out Kelsen's main concern: the identification of law with social order is conducive to the disappearance of legal science. By reading Kelsen's remarks, it looks like as if the existence of legal science as a science were parasitic on the existence of a stale legal order conceived of as a set of coercive rules issued by a legislative body. In this reading, legal science exists as long as a legal order exists and not the other way around. Kelsen is extremely afraid of what is now called "reductionism": legal science has its own status and can successfully preserve it only insofar as it sticks to the precepts of its own canon. The canon of a descriptive science, which is highly respectful of the boundaries between cognition and legislation.

Let me now try to conclude by saying that the diatribes I roughly outlined, in reality, set the scene of a millennial opposition between two competing and scarcely reconcilable images of law, that in my view were already present in the cradle of Western legal history, that is, ancient Rome: a conflict between the *ius* as the domain of the *iuri prudentes* and the *lex* as the product of the political power holder. It is a very long story that I cannot even allude to. But, as far as I can see, this conflict has taken different shapes in many different geo-historical contexts and has found many different solutions. Legal positivism, in my reading, signified and celebrated the triumph of the *lex*. Perhaps the time has come for the *ius* to get its revenge.

[5] Hans Kelsen, *Pure theory of law* (1967), Clark: The Lawbook Exchange, 1995, p. 355.
[6] Hans Kelsen, *Introduction to the problems of legal theory* (1934), Oxford: Clarendon Press, 2002, p. 7.