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DIALOGUE AND DEBATE

Two times two temperaments of legal scholarship and the question of commodification

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Abstract

The article offers a brief account of the continental European (viz., German) and the US American approach to legal education and scholarship. It then explores in which respect legal academics active in these cultures are vulnerable to the lure of commodification, that is, incentives to produce legal expertise for clients. After concluding that these incentives may well be stronger in countries where legal academics consider themselves badly paid and where scholarly traditions are weak, the article explores how commodification can adversely affect the culture of 'legal science' as a whole and even work to the detriment of clients.

Keywords: USA; legal science; legal scholarship; commodification

There are, indeed, at least two cultures of knowing, with a certain claim to authority, what the law is. Each comprises, within itself, a peculiar pair of opposites. One of these cultures is, possibly, continental European, while the other is, most definitely, US American. In both, legal scholarship comes in two forms that are basically incompatible with one another. Nonetheless, it is possible for them to coexist.

In what follows, I would like to sketch both cultures and then explain whether and how they are affected by the commodification of legal scholarship.

The concept of commodification, as it is used here, is meant to capture the fact that the value of legal expertise or of the capability to produce it is, albeit not exclusively, determined through market exchanges. Whichever merit it might be that we ascribe to legal knowledge, it has the potential to generate demand and can be held up to it *qua* standard concerning its quality. In a sense, one merely has to push the logic of mainstream law and economics a bit further and to extend it from law to legal thinking. Just as the value of entitlements is measured on the basis of an existing or hypothetical willingness to pay for them,[1] the value of legal expertise is equally subject to monetary assessments. Why not, one might ask – tongue in cheek – regard as correct that legal analysis on which clients are ready to expend most funds?

1. Knowing as a skill

The first approach to legal knowledge is most obviously manifest in how being a lawyer and thinking like one is imparted to students in the context of American legal education. Legal research and

[1]See, for example, AM Polinsky, *An Introduction to Law and Economics* (Little Brown 1983).

writing classes[2] teach students how to compose different legal texts and how to apply some more technical concepts, such as the 'holding' of a case,[3] to the specimens that they encounter in their reading materials. In addition to providing students, thus, with opportunities to learn the intellectual ropes, the training continues in a whole variety of moot court exercises, ranging from mock criminal trails to appellate advocacy. Such hands-on training is complemented, even if this is not required in the curriculum, with all kinds of externships and internships during which students can make themselves familiar with how institutions of the legal system work.

Undoubtedly, this skill-oriented way of learning is not only very valuable because it makes students familiar with the type of work that might allow them to earn an income in the future, it also implicitly sends out a message concerning what the business of knowing the law essentially is all about. While 'doing law as a skill' may, superficially, appear to be entirely atheoretical and devoid of efforts to engage in reflection or to 'think deep thoughts', it still inadvertently reflects a certain understanding of what legal knowledge amounts to. Thus understood, it implicates a certain conception of itself.

This conception says, roughly speaking, that it would be rather outlandish to approach the acquisition and practice of legal skills with the expectation to reveal what the law truly is or to serve the value of justice. Establishing a connection to what the law purportedly 'really' is, is not the point of legal training. The point of studying legal practice is to make those who grow into it master its routines successfully. Knowing what the law is, is a means of becoming and being a savvy and seasoned legal practitioner. And just as it would be bizarre to confront athletes with the question of what the truth or the ultimate value of their pursuit is, since what matters to them is to win a contest, it would be equally inappropriate to ask lawyers whether what they do promotes the cause of justice.[4] That is not the point of what they do. Knowing what the law is, is what makes a lawyer successful in practice. Teachers are coaches, students are trainees and doing law is a business.

Since the job of legal academics is, from that perspective, to teach students how to be successful in practice, it is a mark of distinction if they happen to be accomplished practitioners themselves, for example, criminal attorneys serving prominent clients in spectacular cases.[5] They do well to embody, in their person and with regard to their career, the success that they promise their students to earn in the future.

2. Interdisciplinarity

Opposed to this conception of legal thought, which is deeply engrained not only in the mindset of legal education, but in American culture in general, is the expectation widespread among higher-ranking American law schools that high-quality scholarship be 'interdisciplinary'.[6] I hasten to add that such scholarship scarcely ever meets the standard of being in between – or amounting to a combination of – different disciplines.[7] Rather, it exhausts itself in applying the viewpoint and the methodological commitments of another social science to legal matters. The background of such a

[2]See, for example, BA Garner, *Legal Writing in Plain English* (2nd edn, Chicago University Press 2013).

[3]For an introduction, see, notably, F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 54–7.

[4]See S Fish, 'Dennis Martinez and the Uses of Theory' in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Press 1989) 372–98.

[5]See, for example, A Dershowitz, *Taking the Stand: My Life in the Law* (Broadway Books 2013).

[6]See, for example, DW Vick, 'Interdisciplinarity and the Discipline of Law' 31 (2004) Journal of Law and Society 163–93. See also the by now classical contribution by RA Posner, 'The Death of Law as an Autonomous Discipline: 1962–1987' 100 (1987) Harvard Law Review 761–80.

[7]Elisabeth Paar has pointed out to me that research in the field of law and artificial intelligence is based on a genuine mutual engagement of disciplines. The exception is duly noted.

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pursuit is, of course, the conviction that ordinary legal doctrine – the type of reasoning that skilled lawyers willy-nilly have to exhibit when they are dealing with courts – is of low intellectual value; that it is merely a matter of mastering certain rhetorical tricks. Legal scholarship that seeks to pass as intellectually respectable, by contrast, had better observe the standards of another social science, such as neoclassical or behavioural economics, social psychology, empirical legal studies and such like.

Interestingly, in the context of American legal education, these two diametrically opposed forms of knowing what the law is can easily coexist, not least because the pragmatic skills-focused approach does not ascribe any intellectual value to itself. It exists for those wanting to earn a living by practicing in law firms or courts, while the pursuit of 'interdisciplinary' ambitions is the preserve of legal academics.

It may, therefore, be more accurate to recast the relation between the two as one of complementarity.

3. Legal science

The name 'legal science' stands for our continental European approach to the study of law. The name that is used, to this day, in German-speaking legal circles is *Rechtsdogmatik*.[8] It signals that legal analysis cannot proceed without taking certain premises for granted. In the legal context, more precisely, the term 'dogma' indicates that positions have proven to be useful for the purpose of solving legal problems. This shows that legal science is not by accident historical. It grows over time and is transmitted from one generation to the next.[9]

The most important point is, however, that legal science is taken by those who endorse it to be the right way of knowing the law. They contend that as a mode of expounding the law it is internal, and not external, to its subject matter.

External to the law is, for example, the psychological perspective on it, for it provides scholars with ancillary clues regarding human conduct or the perception of human behaviour. It does not, however, provide them with the meaning of legal norms, meanings that are supposed to be ultimately relevant for legal decision-making. One may object that normative law and economics, which is possibly the most dominant so-called interdisciplinary approach to legal thinking, after all provides us with a principle governing rule choices, namely the demand that an allocation of entitlements maximises overall welfare.[10] At the same time, law and economics is based on a universal principle that is, at any rate in its universal form, external to the law, for its relevance is only partially – and often only dimly – reflected in the legal materials and usually counterbalanced by other considerations.[11] If knowing what the law is were fully based on law and economics, then the analysis of law would be assimilated to, and possibly absorbed by, the perspective of another social science.

Legal science proper, by contrast, seeks to reconstruct a variety of principles that are inherent in the legal materials.[12] These principles are supposed to inform the interpretive construction and the determination of the relevant substantive scope of applicable rules. The most elaborate versions of legal science say something about sources, how the sources can be tapped by means of legal interpretation and how a variety of rules can be arranged into a system.

The construction of systematic coherence is not by accident essential to the legal science's task, for only if the meaning of rules is matched with specific types of situations, the law can keep its

[8]For a more recent account, see C Bumke, *Rechtsdogmatik: Eine Disziplin und ihre Arbeitsweise* (Mohr 2017).

[9]See M Herberger, *Dogmatik: Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz* (Klostermann 1981).

[10]See Polinsky (n 1).

[11]See R Dworkin, *A Matter of Principle* (Harvard University Press 1985) 267–91.

[12]For one of the rare approaches to legal scholarship that endorses this idea in the Anglo-American context, see E Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press 2012).

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promise of treating like situations alike.[13] Legal science is, thus, supposed to accomplish two things: First, it must develop a vocabulary ('legal concepts') that permits linking the relevant elements of the facts with normative standards. Second, it must elaborate the relevant differences of facts that explain the requisite scope of application of rules.

Legal science, in this understanding, is the medium to transpose the meaning of law into practice. The commitment to legal science reflects the belief that it is the mode of knowing the law which is congenial to the law itself.[14] If the law could speak, it would say to legal science 'Yes, I would like to be known by you, for you guarantee the appropriate application of legal norms'. For that reason, the science of law is indispensable for realising and sustaining the rule of law. It guarantees predictability, generality and equality of application.

Overstating the matter slightly, legal science is about letting the law speak for itself. Given that accomplishing this task requires a long time of immersion into the legal materials and the mastery of analytical and logical skills, it is not by accident that within this tradition the authority of legal knowledge is not vested in the practitioner tasked with disposing of one issue after another, but in the professor of law. It is the professors who, owing to their freedom from the exigencies of daily legal business, avail of the amusement necessary to engage in more comprehensive explorations of the oracles of the law.

4. Followership

The type of scholarship that has emerged in the context of the European Union (EU) has for a long period of time been marked by an attitude of veneration for the 'heroic' Court of Justice that has pushed the integration project forward in a long series of innovative decisions.[15] This explains why EU law is, at any rate from a certain angle, surrounded by a charismatic entrepreneurial ring. The new iPhone, the new court decision – both are glamorous, however, each in its own way.

That this type of scholarship is special is often concealed by the fact that it comes in the format familiar from the common law. The focus of attention rests on most recently decided cases that introduce a new idea. The cases are studied with the aim to expound this idea and to explain how it makes a difference vis-à-vis already existing precedents.

And yet, in the context of EU law the attitude of scholarship is different from the usual exposition of the holdings of precedents. In the case of EU law, court decisions are the equivalent of divinations of the law, *Rechtsweistümer*, as Max Weber would have put it, for they are amazingly thetic.[16] More than any usual court decision, they simply posit what EU law is. Scholarship then takes it upon itself to rationalise the basically irrational findings by giving them an additional spin. This spin is occasionally spelled out in visions concerning fundamental freedoms or certain fields of EU law. Scholarship thus supplements cases with larger conceptions of what the Union or a part of its law supposedly means.

The German political scientist Martin Höpner[17] once remarked correctly that the attitude towards law manifest in the case law of the European Court of Justice and its scholarly acolytes matches an attitude widespread among progressive international lawyers. Irrespective of whether the substance of the relevant part of international law concerns the full package of human rights or the neoliberal amendment to it ('xenos rights', such as the property rights of

[13]See A Somek, *Knowing What the Law Is: Legal Theory in a New Key* (Hart Publishing 2021) 36–7.

[14]See A Somek, *Wissen des Rechts* (Mohr 2018).

[15]See P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff 1974).

[16]See M Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, ed. J Winckelmann (5th edn, Mohr & Siebeck 1976) 446.

[17]See M Höpner, 'Von der Lückenfüllung zur Vertragsumdeutung: Ein Vorschlag zur Unterscheidung von Stufen der Rechtsfortbildung durch den Europäischen Gerichtshof' (2010) der moderne staat 165–85.

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investors),[18] the law is generally approached with an attitude of moral identification with the greater cause the law is believed to serve. The law is deemed to be the panacea for all social ills. At the same time, it is also understood that what the law ought to be is held hostage by backward-looking forces. As a result, the law as it ought to be has, on the level of official sources, not yet come to full fruition in the law as it is. Rather, it remains tied to the old ways and is impeded from expanding the frontier to a new and better world.[19]

Indeed, this type of scholarship is wedded to a variation of the myth of the frontier. As soon as scholars identify a legal institution, in particular a court, that appears to 'push the envelope' and to move an international project to their liking forward, they will jump on the bandwagon and contribute to the advancement of this cause.

In the case of public international law, it is not at all implausible to adopt this attitude, for scholars find themselves indeed in the position to 'write' international law, not only in the context of the supplementary source of 'reputed publicists' but also by calibrating emerging *opinio iuris*. In a system in which the most fundamental legal rules are rooted in customary law it is quite tempting and possibly even appropriate for scholars to put themselves into the role of a source of law. For who else, if not legal scholars, should provide a more elaborate account of new legal perspectives emerging from legal regimes that have given them so far only an imperfect articulation?

Something similar was going on in EU law during the heyday of the integration process at the turn of the millennium, and scholarship seemed to be keenly obsessed with innovations that originated either from the case law, such as the jurisprudence in citizenship, or from treaty reforms, such as multispeed Europe and variable geometry. There was a tendency to treat them as substitutes for the leading idea that the integration process notoriously seems to lack.

In any event, legal scholars occasionally align themselves with a process of innovation and support it. In a sense, then, what they do is somewhat reminiscent of how American legal realists and more modest sociological legal theorists such as Roscoe Pound conceived of legal scholarship, namely as a variety of social engineering.[20] The basic outlook is forward looking. Each new decision offers an opportunity to unearth a principle that is alleged to have lain dormant in the existing legal materials. This matches, as regards its effect, the type of reasoning in law that Dworkin would have called 'pragmatic'.[21] Existing legal constraints matter only insofar as they serve the value of predictability. This value is put on one side of the scale of balancing and pit against other desirable social objectives. The more often the desirable objectives win out over predictability, the greater becomes the legitimacy of ruling unpredictably, for the practice of the court no longer gives rise to an expectation to be calculable. And once the public has to be aware that it cannot attribute too much value to legal certainty, the social engineering process is free to throw off all remaining shackles.

5. Commodification

Both interdisciplinary scholarship and committed followership may remain rather academic affairs. Usually, the visionaries have no market. They are rather to be encountered in the agora of conference venues. Matters are different, of course, in the case of interdisciplinarity once another discipline has become relevant to legal analysis itself. Undoubtedly, law and economics

[18]See Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 140–9, 256, 259, 261.

[19]For a forthcoming attempt at reconstruction see my 'Pragmatism, Innovation, and Prophecy: Conjectures Concerning the Grounds of Belief in an Inventive Court' forthcoming in T Capeta, I Goldner-Lang and T Perisin (eds), *The Changing European Union: A Critical View of the Role of Law and the Courts* (Hart Publishing 2022).

[20]See R Pound, 'The Theory of Judicial Decision, Part III: A Theory of Judicial Decision for Today' 36 (1923) Harvard Law Review 940–59 at 953–4.

[21]See R Dworkin, *Law's Empire* (Harvard University Press 1986) 151–76; A Somek: 'The Emancipation of Legal Dissonance' in H Koch, et al. (eds) *Europe: The New Legal Realism* (DJØF Publishing 2011) 679–713.

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has made many forays into various fields of law. It is also the case, however, that scholarship dwelling closely to the border of philosophy does not produce the kind of knowledge that is believed to be in demand in legal practice. Therefore, the pressures inherent in raising funds for academic research aside, it is safe to say that interdisciplinary scholarship and committed followership are relative immune to the lure and vagaries of commodification.

Nevertheless, legal scholarship is invariably subject to its force. The people who make it their business to dispense legal expertise want to earn a living with it. What they do has to be in demand. What is in demand is subject to conventional expectations of how it is done. Indeed, at the most elementary level, law school grades are used as indicators for assessing the ability of candidates.

If demand is what matters, then the willingness to pay for expertise becomes the ultimate benchmark of legal knowledge. Viewed from that angle, legal scholarship does not reflect on its value in theoretical but in monetary terms. Money is the ultimate foundation of legal expertise.

Undoubtedly, commodification is inherent in lawyering as a skill. In fact, that is its whole point. Good is what works. And if something works, it will generate more demand and be amply remunerated.

Commodification is also, however, affecting legal science. According to my observation, this is not the case everywhere, but it is quite obvious that in countries where legal academics believe their salaries to be low and where strong traditions of academic excellence are lacking, this could serve as a pull factor on scholarship. Academics then experience a strong incentive to improve their income by selling their expertise to whoever is willing to pay for it. The relevant clientele ranges from law firms to public bureaucracies. Since, obviously, the cash value of expertise depends on the prestige of the professor, the academic career trajectory is turned into a means to secure future income. The professorial expertise is not necessarily only dispensed in writing. It can also be provided, for example, by serving on arbitration panels result of this structure of economic incentives are frequent absences, a rather casual attitude towards teaching and situations in which legal academics regard scholarly exchanges as an unwelcome opportunity cost for their business. A junior colleague of mine who had just been hired in my faculty confided in me that he distributed a manuscript of him to members of his department with the expectation to have it workshopped there. He was surprised to learn that not only the workshopping of papers was not part of the institutional culture, but that his colleagues reacted with an air of indignation to his request. Was not he aware that he was asking them to sacrifice 'billable hours' for an unremunerated academic pursuit?

And, yet, when it comes to professorial expertise a major contrast to the perspective that views lawyering as a skill should be noted. According to the latter, whether or not law professors are better at providing services than lawyers depends on their practical skills. Since legal academics that no longer regularly write legal briefs and have ceased to appear in court are less likely to be better at serving clients than law firms that deploy whole teams of lawyers (that are often easily exploitable and fresh human resources), there is no surplus value that accrues from enlisting the aid of a professor. Hence, the demand for expertise by professors is likely to be relatively low where doing law is regarded as a skill and where the excellence of an academic does not create a surplus value for legal expertise.

6. The impoverishing of legal science

In a cultural context where legal science is at least officially held in high regard, however, the prestige of the professor *qua* paradigmatic purveyor of legal knowledge is advantageous in order to muster more serious backing for legal claims. Hence, professorial expertise is in relatively high demand by bureaucratic bodies and corporations. Litigation can be replete, therefore, with the equivalent of amicus curiae briefs authored by professors and teams of academic assistants.

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In the systemic context of legal expertise, the demand that drives its production involves a certain expectation concerning its proper style. In other words, the dispensation of legal knowledge must meet the standard of what the clients expect it to be. The analyses have to observe the state of the art. As a consequence of a feedback loop that type of analysis which is taken to embody the state of the art becomes reaffirmed – endorsed as relevant 'to practice' – through the monetary nexus. Professors who are successful at selling their analyses to clients set the normative standard that the expertise of others is supposed to meet, for it is those who are skilled in consulting clients who have proven to know what the law is. The volume of business becomes a mark of academic distinction.

Not by accident, the self-reflection of the value of legal expertise in monetary terms has impact on its intellectual shape. Legal expertise is most trustworthy for clients if it appears to emerge from the solid centre of the discipline. The expert is not expected to take any intellectual chances or to innovate. It would actually be detrimental to clients if the expert offered anything out of the ordinary. This explains why the monetary self-reflection of the value of legal expertise serves to entrench long-observed intellectual routines and to establish various bars to critical self-examination. It merely reaffirms the 'solid' style of analysis that everyone competes to exemplify. Consequently, the work of academic lawyers is neither more elaborate nor more sophisticated than the work of ordinary lawyers. What they do does not do more to advance legal science than the work of regular attorneys. There is no pressure to push the intellectual envelope. This patent lack of the felt necessity to engage in reflection affects the discipline of legal science as a whole.

Legal science becomes stagnant and stays away from the bigger questions. Indeed, it becomes boring. Conferences are held, if at all, in order to commemorate certain events, such as the adoption of a constitution or the anniversary of a country's accession to the EU.

7. Conclusion

Commodification is, of course, inconsistent with the ethos of legal science. It is so for the following reason: If legal scholarship shifts the perspective of reflection from theory ('truth') to practice ('money'), it skips over what is supposed to guarantee its value, namely theoretical self-reflection. While arguments, in the context of expertise, are the methodological form to signal academic excellence, it is nonetheless the case that written expertise presented to clients is not the place to engage in theoretical controversy. This would not only be considered to be out of place, it would also quite openly reveal the uncertainty inherent in knowing what the law is. Hence, it is better to keep the lid on it and to proceed as if legal knowledge observes seemingly eternal intellectual ways. This is the ripple effect exercised by commodification on the legal scholarship in general. The engagement with theory or methodology appears to become redundant.

Interestingly, however, with the emergence of this attitude what legal experts produce no longer is any science. Rather, it morphs into the exercise of legal skills. And if legal expertise is just a skill, the question may be asked why the professor, who is based in the lofty academic precinct, should be better at doing law than a team of cooperating lawyers.

In the European context, we have lived with this inconsistency for a long period of time. Yes, the self-subversive effect that commodification has on legal science becomes all the more obvious if the standards of scholarship are determined by what can be sold on the market.

Clients, arguably, are caught in a prisoner's dilemma. Whoever is able to pay for it mobilises costly legal expertise, for it promises to provide one with a trump card. However, no legal expertise, if it is done well, is more credible than any other. As a result, all are worse off than without it. All would be better off if they cooperated and abstained from buying professorial expertise.

Lack of theoretical reflections confronts us with the contingency of styles and authority. In the context of political debates, it becomes quite obvious to the public that for any legal claim some

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legal expert will him- or herself forward in order to support or to refute it. This creates distrust in the value of legal expertise that also spills over into distrust of the judiciary.

There can be little doubt that, with regard to its overall effect, commodified legal scholarship is haunted by a strong propensity for self-subversion. Whether and how this will play out in practice remains to be seen in the long term. The question is, of course, how long it will last until we get to the end of this term.

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