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EDITORIAL

Social Theory and Legal Practices

Tobias Arnoldussen, Robert Knegt & Rob Schwitters

This special issue is inspired by the idea that it is rewarding for socio-legal studies to pay attention to social theory. In recent decades, socio-legal studies in the Netherlands and Belgium have been given an enormous boost through the increasing prevalence of empirical approaches such as law and economics, and law and psychology. Several research centers have been established that endeavor to facilitate and promote interdisciplinary research and/or empirical studies.[1] While this tendency has produced a wealth of studies about law in context, a distinctly sociological account is often difficult to discern. Without denying the usefulness of these studies of law in context, we aim to demonstrate that there is a good deal more to sociology of law than the empirical approaches that have been predominant recently. It is our ambition to articulate the distinctly sociological approach by paying attention to theorists whose insights provide important building blocks for that approach.

It cannot be argued that theory is completely lacking in recent socio-legal studies. In publications one comes across numerous references to the theories of Galanter, Sally-Moore, Macaulay, Griffiths and Tyler. What is striking is the predominance of the American social-legal tradition. Moreover, the depth and breadth of these theories are relatively limited compared the grand theories prevailing in mainstream sociology. The theories referred to articulate the relation between relational distance and the significance of law, how informal norms affect compliance, the significance of non-state law (legal pluralism), and the impact of the features of the legal procedures on the acceptance of court decisions. They offer a limited explanatory framework compared to the analyses that can be found in the grand theories of sociologists such as Parsons, Durkheim, Weber, Habermas, Foucault, Luhmann, Bourdieu and Beck. These are scholars who constructed overall theoretical systems covering nearly all aspects of social life, in which they focused on structural social transformations, and often on the role of law within these transformations.

Several factors may explain this relative neglect of grand theory. Most funding for research comes from institutions that are mainly interested in analyses of practical social issues (e.g. the Research and Documentation Centre and the Council for

1 Illustrations of recent initiatives concerning the empirical studies of law, e.g. the Erasmus University has established the research program *Behavioral Approaches to Contract and Tort*; the University of Amsterdam, theAmsterdam Centre for Law and Economics is engaged with empirical studies of law. Studying law in context approaches are also encouraged by the Utrecht Centre for Accountability and Liability Law.

the Judiciary). Tyler's observations and analysis of the impact of procedural features can be more directly translated in institutional transformations than, for instance, Habermas's appreciation of deliberation in the public domain. Moreover, the limited attention for grand theory may also be a consequence of the fact that there are not many sociologists of law who have a background in sociology. Further, the rapidly growing significance of alternative empirical approaches is received among most sociologists of law as a welcome expansion of a shared enterprise. Why focus on the differences?

Our ambition to pay attention to grand social theory is kindled by the conviction that it is challenging to invoke wider explanatory frameworks, especially in these times of rapid and structural social transformations. Globalization, the erosion of national states, decreasing trust in legal and democratic institutions, populism, changing labor relations, and pluralism, raise new questions and present us with new challenges. Many grand theories found their origin in the ambition of sociologists to explain rapid and structural transformations. The analysis of Marx, Weber and Durkheim can be seen as attempts to come to terms with the enormous impact of rapid processes of industrialization at the end of the nineteenth century.

We think that it is meaningful to reflect on concepts and analyses that are often taken for granted in sociology of law. Foucault's account of governmentality, for instance, indicates that it is difficult to analyze social transformations in terms of "top down" and "bottom up". Tendencies like self-regulation or decentralization are in fact often social technologies utilized by governing powers to more effectively realize social aims (see Arnoldussen in this volume). And it becomes less and less realistic to discern top-down interventions, when power and authority is dispersed among various international and national governing organizations. It may be questioned whether Latour's concept of "network" (see Knegt in this volume) does not give a better account of today's realities than concepts that articulate hierarchical relations.

It is not our ambition to merely present abstract social theories. We asked the authors to relate grand social theories to actual legal practices (issues of legal doctrine, legal principles or legal institutions). We invited six authors to compare two theoretical approaches and explain their relevance to a certain legal practice. They were allowed to interpret this notion broadly, and their choices ranged from social control at a shopping square (Chevalier) to the autonomy of law in Indonesia (Bedner), and from the use of the concept of "*opinio juris*" in international law (Tans) to that of free will in criminal law (Schwitters).

Two of the articles (by Adriaan Bedner and Olaf Tans) focus on communities of legal professionals and analyze the practical meaning of central concepts of law in their respective settings. Adriaan Bedner argues that the "autonomy of law" is something that has been imported in developing countries together with modern law itself and is being cherished by local lawyers. However, he observes that in Indonesia practices are not living up to this standard. What can we learn from

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"Western" theories to understand and explain this situation? He refers to the theory of Nonet and Selznick,[2] to Bourdieu's study of the "legal field" and to Luhmann's system-theoretical approach and finds that socio-legal studies on Indonesia's legal practice have been inspired by these theoretical approaches, which in his view are complementary rather than mutually exclusive. From Bourdieu's perspective the lack of communication between Indonesian judges can be explained by the absence of a body of law scholars that could guide the decision-making of the judges.

The community that Olaf Tans is investigating is that of the legal practitioners of international law. In the interpretation of rules, they call upon the notion of *opinio juris* to justify the normative relevance that certain ways of acting in international relations may acquire. To conclude that these ways of acting involve the "sense of obligation" that is required for *opinio iuris* to exist is a difficult step to make. Its indeterminate status is therefore considered a problem in legal theory, but Tans, referring to Bourdieu as well as to the social constructivism of Berger and Luckmann,[3] shows how useful such an "essentially contested" concept can be as a tool in the knowledge production practices of the epistemic community of international law. As its existence and function are discursively recognized and continually reconfirmed in the community's problem-solving practices, *opinio iuris* is turned into an institution.

The question of how central legal concepts are structuring legal practices, like *opinio iuris* does in international law, is also raised in two other contributions (Rob Schwitters and Robert Knegt). Rob Schwitters investigates the notion of free will, a key assumption of our criminal justice system that is nowadays apparently being countered by deterministic conclusions drawn from neurological research. He asks himself what social theory might contribute to this debate. Building upon the theoretical contributions of Anthony Giddens, Jürgen Habermas and Peter Strawson, he criticizes the flawed notion of free will held by determinists who tend to locate it within individuals, and argues that it is embedded in intersubjective relations instead. Attributing free will is not a neutral observation; rather it is about how to approach someone, part of a practice that implies moral judgment. In particular Giddens's reflexivity of social action suggests that knowledge of causal relations does not imply a rejection of the notion of free will, as insight in these relations may be a reason for us to change our practices. If free will deserves to be conceived in an inter-subjective way, the practical importance of this theoretical conclusion might be to give criminal procedures a more inter-subjective character too.

Social theory neglects the wisdom of the founding fathers of sociology, Robert Knegt argues, by going along with the trend to attribute action solely to individuals. He analyzes the contract model as it has been used both as a basis of theoretical models and to structure labor relations. In theory the individualizing approach

2 Nonet & Selznick 1978.
3 Berger & Luckmann 1966.

of orthodox economics and of "rational choice theory" is based on highly problematic presuppositions that tend to hide all kinds of relational aspects from sight. "Subjects" are not theoretical entities that can be held constant but elements that change with the arrangements of which they are part. It is shown that the individualizing contract model, principally designed for the transfer of property, has had a great impact in the field of structuring labor relations. By combining Bruno Latour's network model with insights from the theoretical tradition of Michel Foucault, it becomes possible to take off the blinders of individualism and shed light on the socially constructed character of legal subjectivity and on its role within a neoliberal governmentality.

The latter issue is also raised in the article of Tobias Arnoldussen on the "precautionary principle," the legal principle that calls for intervention to prevent risks of which it is still uncertain whether they will cause environmental harm. He also builds upon the theoretical contributions of Michel Foucault, as well as on Ulrich Beck's theory of the risk society to argue that the precautionary principle is the legal lynchpin of a new type of governmentality. It not only appeals to legislators but also acts as a mechanism to responsibilise and discipline private parties and it stimulates the creation of new markets. Neoliberalism calls for regulation of uncertainty to counter risks that the unfettered primacy of the market has brought about.

Although the analyses of Beck and Foucault overlap in important respects, their evaluation of the precautionary principle differs: in a Beckian analysis it is a result of a social learning process that might be able to solve the paradoxes of risk society, while in a Foucauldian analysis the idea of progress is absent and we find ourselves facing the product of a certain discursive practice becoming hegemonic due to favorable conditions.

Danielle Chevalier's contribution on the "production of law" also focuses on practices, but this time on its different addressees in the public space in an era of increasing diversification of society. Her results are based on observations of interactions at a shopping square that functions as a meeting place of diverse groups of citizens. Referencing Jürgen Habermas's theoretical turn from the bogey of juridification as an obstruction to conviviality to a conception of law as a moderator of cultural controversies, she investigates law's potential to act as a viable framework for offering a level playing field to all those who are negotiating an equitable shared social space. Building upon Henri Lefebvre's theory of the production of everyday public space, she introduces a threefold distinction of planned, lived and perceived law, the latter being pivotal as mediator between the other two. Like space, law has a constitutive relationship with the social. She concludes that rules contrived and implemented without follow up and without understanding how they are perceived can do immense damage, far outweighing their short-term symbolic benefits. The practical significance of this for legal research is to note that many people affected by the regulation do not have their voice institutionally heard, yet understanding how law works for them and how they perceive law is important.

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In a number of articles in this issue, the good old question of the relation between empirical and normative statements is treated in a new way. Tans shows how a concept that intends to bridge the gap from the side of legal theory, however questionable logically, functions in a legal, discursive practice in which it is being constantly reaffirmed. In Arnoldussen's analysis normative mechanisms are stretched to cover risks that are not actually part of our reality, but rather expression of our fears about the future of the planet. Schwitters defends the inter-subjective realm of normative attribution of responsibility against the reductionist determinism of brain sciences.

Contributions to this issue also resist the idea that law would primarily be an external normative frame, to be laid upon reality, and plead for a perspective on law as actively co-constituting practices. At Chevalier's shopping square, law is present in what people do, and you cannot understand it without grasping how it is perceived by them. Knegt notices how individualizing devices, both in labor relations and in the labor contract, are actually performing what they purport to describe. Similarly, an individualistic notion of free will is performing itself in criminal trials, a notion of free will that is rejected by brain and neuroscientists, even though, according to Schwitters, social theory shows it to be a much more inter-subjective phenomenon. The role that law has in attributing individual responsibility, whether conceived as part of a Foucauldian governmentality (Arnoldussen) or not, is an important aspect of the constitution of practices in several articles. The hopeful message of these results is that we might be able to alter practices if we were to succeed in changing the conditions under which these mechanisms are functioning.

The diverse contributions offer a kaleidoscopic perspective on different legal practices through the lens of grand sociological theory. However, from these contributions a number of current legally and sociologically relevant debates may be distilled. The issue of inter-subjectivity comes to the fore in the contributions of Knegt, Schwitters and Chevalier. Arrangements that seem to have an individual basis such as the assumption of free will and the labor contract are best understood in an inter-subjective context from which they derive their meaning. Social constructivism is still a viable way to look at the emergence of legal practices. As Tans and Arnoldussen show, legal practices may be better understood if the history of their construction is taken into account. Finally, the notions of space and distance are often neglected but actually vital to understand how law is interpreted and how it is received as Chevalier shows for the shopping square and Bedner for the Indonesian legal culture.

These themes are more or less perennial in sociological theory, but far less common in the current empirical orientation on legal practices. This collection of articles displays how fruitful it may be to apply them to law.