Critical Legal Positivism

Kaarlo Tuori

APPLIED LEGAL PHILOSOPHY

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Series Preface

The objective of the Dartmouth Series in Applied Legal Philosophy is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focuses on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

TOM D. CAMPBELL
Series Editor
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Preface

In this study, an attempt is made to elaborate a conception of law and a programme for legal science which I have called critical legal positivism. Critical legal positivism is positivistic in the sense that it acknowledges the fundamental positivity of modern law; the fact that modern law as a historical type of law is based on conscious human action. Critical legal positivism is critical in the sense that it shows the possibility of an inter-subjective and non-arbitrary critique of law, a critique which draws its yardsticks from the positive law itself.

Critical legal positivism is based on certain distinctions within the law. Firstly, the law has two faces: it can be approached as a symbolic normative phenomenon, as a *legal order*, on the one hand, and as a set of specific social practices, as *legal practices*, on the other. Secondly, as regards particularly its symbolic normative aspect, critical positivism understands the law as a *multi-layered phenomenon*.

The starting-points of critical positivism also presume a certain view on the basic problems of modern law and, by the same token, of legal science. Whatever else the law is, it is also a coercive order; it relies ultimately on physical coercion exercised by some human beings towards others. From this fact, the perennial problems of all law ensue: the problems of the *law's limits* and its *criteria of legitimacy*. The law's coercive character also forms the background to what I have called the *dilemma of the critical legal scholar*: if law is a coercive and, at least in this sense, repressive order, how can a legal scholar, conscious of this fact, justify her own activity, which necessarily contributes to the reproduction of this order?

The view of law as a multi-layered phenomenon was a clear influence on the structure and problem formulation of my doctoral thesis, which I defended in 1983. The dilemma of the critical legal scholar also played its role already then. In my doctoral thesis, I tried to respond to this dilemma by following what used to be called the programme of *critique of ideology*. I had adopted

this programme from the Frankfurt School, from its second-generation representatives, primarily from the 'young' Habermas of *Structural Transformation of the Public Sphere*.

In addition to the influences of the Frankfurt School, I built my application of the critique of ideology upon a conception of the law's levels, which I called *legal form*, *legal ideology* and *law form*. I began by analysing the bourgeois legal form. The method I employed was a critical reading of the works of the German Late Constitutionalist School from the late 19th and early 20th century, analogous to Marx's conceptualisation of the capitalist economy through the critique of the science of political economy. The major part of my thesis examined my specific topic – committees in state administration – at the level of the law form. But the thesis also included an analysis of the constitutional ideology infusing the Constitutional Acts of Finland. This ideology, which I anchored in the legal form of bourgeois social formation, provided me with the yardstick by which I could critically assess my research object, as it appeared in the regulations, interpretations and systematisations at the level of the law form. The reconstruction of the constitutional ideology made possible – so I thought – an *immanent critique* in the vein of the Frankfurt School: bourgeois society – in my thesis the law form of this society – could be criticised according to its own criteria, namely the constitutional ideology which the bourgeois legal form itself had given rise to.

In my thesis, I relied on a Marxist-inspired view of the levels of bourgeois society and its law. My Marxist-tinged conception of law can certainly be criticised in many respects. It is not only a question of the economic determinism which is typical of Marxism in general and which, in the context of law, leads to treating all legal phenomena as expressions or functions of the economy. Today, to acknowledge the problem of economism does not require very far-reaching or surprising self-criticism. Here, I would like to point to two other problematic aspects in the conception of law I espoused in my thesis.

One of these concerns the relations between the law's levels. The view of the multi-layered nature of law included the idea of relations of determination between the levels: legal form, in some sense, determined legal ideology and legal ideology, in turn, law form. But what was really at issue in these relations of determination remained open. It was obvious that legal ideology and law form also possessed a certain 'relative independence', to resort to an often used but quite uninformative expression: legal form

could not dictate legal ideology in all its details, nor could all the specifics of law form be explained by reference to legal ideology. In fact, the whole programme of critique of ideology relies on the assumption that bourgeois society may at its 'surface' level drift into a contradiction with its own presuppositions. In the context of law: individual regulations, court decisions etc. can stand in contradiction to the legal ideology produced by law form.

In many versions of Marxism, 'relative independence' has been a kind of magic word, which has often masked rather than solved problems. Thus, the elaboration of the idea of the law's multi-layered nature into a fruitful framework for legal scholarship presupposed a closer analysis of the nature of the relations prevailing between the levels. This, in turn, required specifying what exactly was meant by the law whose examination this framework was supposed to serve. Did the law consist of particular social practices or of a normative phenomenon, a normative 'thought form'? Or was the law to be understood as a combination of social practices and a normative thought form, as the interaction of these aspects? Answers to these questions also touched on the self-understanding and identity of legal scholars: if we can distinguish between different aspects of law, which of these forms the focus of legal science?

Nor could Marxist-inspired critique of ideology provide a satisfactory solution to the dilemma of the critical legal scholar. In the Marxist conception of society, legal form was inseparable from capitalism and the bourgeois social formation. The law represented a form of social regulation which the Marxist utopia did not include and which, thus, was to be abolished. However, it appeared that legal scholarship inevitably reproduced this form even when it adopted the programme of critique of ideology. A fundamental criticism of law seemed to be possible only from outside the law, that is, from a position inaccessible to a legal scholar.

My present approach shares with the previous programme of critique of ideology above all the view that the law is not exhausted by such concrete legal material as individual regulations and court decisions but includes 'sub-surface' layers. I now call these layers the *legal culture* and the *deep structure of the law*.

The road from critique of ideology to critical legal positivism has not been a straight one. My present conception of law has been influenced especially by three authors. François Ewald's and Jürgen Habermas'

philosophical premises are considerably removed from each other, but their conceptions of law do share some common features, too. They both approach the law as a multi-layered phenomenon, and they both appeal to this idea when attempting to demonstrate the possibility of and the yardsticks for critical legal thinking. Furthermore, they share an emphasis on the positivity of modern law and try to locate a critical position within this positivity. The very term 'critical positivism' is borrowed from Ewald.

Max Weber's writings on the law, in turn, have been instrumental in conceiving of the aspects of the law and the differences and connections between the approaches of legal and social scientific research on the law. These influences have resulted in the distinction between the 'two faces' of the law and in the characterisation of legal and social scientific research on the law through this distinction.

I have written my book from the (internal) position of a legal scholar. Is the conception of law I have tried to elaborate another legal scholar's folly, which can be constructed in a state of blissful indifference to (external) society?

Critical legal positivism is aware of modern law's ties to modern society and modern culture. However, its conception of law does not pretend to offer an exhaustive social scientific explanation for the law and its contents. Thus, I do not for example claim that the contents of individual regulations would be exclusively determined by the relations prevailing between the levels of the law: the surface, the legal culture and the deep structure. Legal practices transmit not only the mutual relations between the law's levels but also the law's external relations, law-making primarily contacts with politics, and adjudication and legal science with moral principles and ethical values. When we proceed from the deep structure to the surface level the law's normative contents are not only specified; they are also enriched in a way that cannot be explained according to factors internal to the law. On the other hand, however, an internal examination of the law can remind a researcher concentrating on external explanations of mechanisms which modify the impact of external factors, such as politics.

Another caveat concerning the scope of my study should also be made clear from the very beginning. My analysis of the aspects and levels of the law is based on a kind of idealised assumption. I focus on *'mature' modern law* where the process of sedimentation, originating from the surface level,

has already produced a legal culture and a deep structure sustaining surface-level regulations and decisions. I try to give an account of how such 'mature' modern law *can* solve the problem of its limits and criteria of legitimacy, rather than to examine some existing legal system. I take the 'process of maturation' of modern law largely as given; I shall only present some general remarks on how to study this process.

In my conception of law, I stress the role of the legal culture which future lawyers internalise in the course of their legal education and which is further reinforced by their professional experiences. It is obvious that my study bears signs of the influence of my own legal culture, which can be characterised as a variant of the Roman Germanic family. Thus, for Anglo-Saxon readers, the emphasis I lay on legal science as one of the specialised legal practices producing and reproducing the law as a legal order may seem exaggerated, to say the least. Even my more precise characterisations of legal scholarship may appear odd in Anglo-American context, where it is not for example usual to talk about legal dogmatics as the basic legal scientific activity or about general doctrines of different fields of law as one of the main products of legal dogmatics. I can only hope that this inevitable affiliation to a specific legal culture does not render my basic arguments unintelligible to readers with a different cultural background.

In commenting on the various versions of this study, some of my colleagues have complained of an over-emphasis on public law aspects of the legal order and a certain neglect of the central role which private law, after all, plays in modern law. Evidently, these complaints are justified. The excuse here too is a matter of personal legal socialisation: I have divided my professional activities between public law, on the one hand, and legal theory and philosophy, on the other.

The first version of this book was published in Finnish in 2000 (Helsinki: WSLT). I have deleted some of the references to Finnish debates, but not all of them. Finnish discussion has provided me with examples, which are desperately needed in a book dealing with rather general and abstract issues, and the viewpoints presented in this discussion are also often, I would venture to suggest, worth broader attention. In some contexts, for instance when examining institutional arrangements executing what I call the self-limitation of the law, I have drawn my examples from the Finnish constitution.

I have divided the book in three parts. In the introductory part, consisting of Chapter 1, I expose the background to the task of developing an alternative

to Hans Kelsen's and H. L. A. Hart's traditional legal positivism. In the second part, I present and assess Weber's, Ewald's and Habermas' interpretations of modern law and thus attempt to collect elements for my proposal for critical positivism. The third part is dedicated to the systematic presentation of this proposal.

The manuscript of the Finnish version of the study was commented on by several colleagues, to whom I again wish to express my gratitude: Aulis Aarnio, Lars D. Eriksson, Markku Helin, Ari Hirvonen, Martti Koskenniemi, Klaus Mäkelä, Kimmo Nuotio, Satu Paasilehto, Juha Pöyhönen, Raimo Siltala, Outi Suviranta and Hannu Tolonen. After the publication of the book, insightful reviews were written by Markku Helin and Hannu Tolonen; they have greatly helped me in preparing the English version. I am also grateful to Tom Campbell, Ernesto Garzòn Valdes and Alexander Peczenik for their valuable and encouraging comments on the English manuscript. John Calton has taught me a lot about how to write understandable, non-Finnish English.

A scholarship from the Finnish Academy gave me the opportunity to concentrate on research. The present work was completed in the beautiful historical town of Pavia. I shall always recall with warmth my *amici pavesi*: Tecla, Giuliana and Luciano, Nadia and Ettina, as well as the ever-helpful personnel of *Dipartimento degli Studi Giuridici* of the University of Pavia. *Grazie a voi tutti!* Zenon Bankowski, who lodged and fed me during my stay in Edinburgh in March 2001, proved to be not only a great friend and scholar but also a wonderful cook.

Kaarlo Tuori
Loppi

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I
INTRODUCTION

Chapter 1

Modern Law and its Problems

Modern law as a historical type of law

The 19th century witnessed the birth of a new science of society; sociology. The problem sociology focused on was modern society, what was distinctive about it and the factors which could explain its emergence. The classic figures of sociology, such as Karl Marx, Emile Durkheim and Max Weber, stressed the role of the law in both creating and guaranteeing the conditions for modern society. In Marx's theory of capitalism, the law played the role of necessary mediating form in the circulation process of the capital; for Durkheim, the law maintained the organic solidarity of modern society, based on the division of labour; and, in Weber's view, formal rational law procured the predictability and calculability without which neither the capitalist market economy nor bureaucratic administration could function. As regards contemporary social theory, Jürgen Habermas is perhaps the most conspicuous example of those theorists who have continued to follow the path indicated by the classics and who have analysed the specific impact the law has had in the birth and reproduction of modern society.

What unites the approaches of social theorists as divergent as Marx, Durkheim, Weber and Habermas is the presumption that just as modern society is a specific social formation, a specific type of human communal life, modern law constitutes a specific type of law, which in some crucial respects differs from previous phases of legal history. The distinctive features of modern law are also supposed to explain the contribution which modern law has made to the development of modern society. But are we really justified in speaking about modern law as a distinct historical type of law? And, if we are, what distinguishes it from its predecessors?

At the turn of the millennium, the assumption of a continuous and linear social development, of evolution, towards ever-higher forms of human social life no longer convinces. The crisis of Marxism, which succeeded – and in much even preceded – the collapse of the social experiment called Real Socialism, as well as the post-modern suspicion directed towards Grand

Theories and Grand Narratives, have subjected evolutionary theoretical social conceptions to recurring attacks. When speaking about modern law, do we not, at least implicitly, adopt the very evolutionary theoretical assumption whose credibility has crumbled?

This need not be the case. We can distinguish between various historical types of law without committing ourselves to an evolutionary theoretical view of the development of human culture and society. Michel Foucault's (1974) reconstruction of the *episteme* of different epochs constitutes an example of how historical eras which differ from each other in some crucial respects can be delineated without any theoretical commitments to evolutionary viewpoints. Habermas, by contrast, has attempted to examine the development of social structures employing evolutionary theoretical models provided by developmental psychology (Habermas 1979). In what follows, I shall, at certain points, rely on Habermas' interpretations of modern law and its location within the whole of modern society. However, this does not, I believe, compel me to adhere to his evolutionary theoretical premises.

It is possible to speak of modern law without evolutionary theoretical assumptions. What the adoption of the notion of modern law, however, implies is the view that modern law has a certain kernel which is common to the legal orders of, say, the USA, France, Germany and Finland and which leads us to regard these as expressions of the same historical type of law. To speak about modern law seems to imply even further initial assumptions. One of the distinctive features of modern law consists in its autonomy. But autonomy is not equivalent to absolute autarchy. There are reciprocal relations of influence between the law and the surrounding society: if the classics of sociology and their contemporary successors are right in claiming that modern society could not exist without modern law, nor would modern law be possible without modern society and modern culture.

My study does not have social theoretical or sociological pretensions; what follows is an analysis of modern law written by a legal scholar from his position of a participant in legal practices. However, this analysis is based on a certain general view of what is distinctive in modern society and modern culture.

As regards the structural characteristics of modern society, I shall content myself by referring to two features which Weber already emphasised and which Habermas has tried to capture with his concept of the System: the differentiation of two action fields, both based on purposive-rational action,