Law and tacit knowledge

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The autonomy of law is often understood as a binding legislation which forms a system, regardless of whether the system idea means a kind of contradiction-free legal order or a consistent normative legal positivism. The legal system perspective also includes the assumption that the legal system is based on itself and can and must therefore do without external normative legal foundations. This view is very common in the sociology of law, whether based on Kelsen's philosophy of law or on Luhmann's systems theory. Modern law is positive law for Kelsen as well as for Luhmann. The only controversy is whether the law should be *justified normatively* or *described factually*.[1] In the horizon of a *theory of society*, it makes sense to assume with Luhmann that modern law (in all consequences of the system-theoretical concepts) is an autopoietic system. However, there are also good reasons to believe that the sociological perspective on the law of society is not exhausted in stating the self-reference of a system alone. Society is not only *functionally differentiated*, as a broad legal-theoretical following of Luhmann describes it today, but it is also *culturally pluralized* at the same time. In theory of social differentiation, one speaks of the *multiple differentiation* of society (Renn 2014), in which these two forms of social differentiation not only exist simultaneously, but also intertwine, alternately reinforce each other, and form heterogeneous orders qua 'negative constitution' (Renn 2021: 231). In addition to functional systems, also organizations, social milieus and individuals have become differentiated in modern society. The fact that modern law is thus not only functionally but also multiply differentiated never becomes clearer than when one illustrates the role of tacit knowledge. Here tacit knowledge appears twice as a system-external source of law. First, to a certain extent

1 However, despite numerous parallels between Kelsen and Luhmann, it is obvious that this makes a difference all around: Nell 2020: 103 ff. It is only with Luhmann, for example, that one can speak of second-order integration having become the authoritative perspective of a now genuinely sociological view of law.

a) 'before' the constitution of the legal system as a historical a priori: that would be cultural social semantics (e.g.: the 'bourgeois' subject) as a kind of evolutionary antecedent condition for the autonomization of the legal system. Tacit knowledge emerges here as ethical and life-form-specific implications of a cultural pre-understanding. Uwe Wesel's access is to be mentioned, but with decisive reference to lifeworld origins of abstract codified law. In his 'Geschichte des Rechts' (Wesel 2006) he draws extensively on research on customary law among the Nuer people (ibid. 43). Wesel provides examples of the early forms of law in which neither the universal form of standardization of cases nor abstract role differentiations had existed. The normative order of the Nuer people is not characterized by the question of universal justice, which is specific to modernity, but by situation-specific forms of negotiation with reference to a concrete damage of a certain person (blood revenge: *personal/concrete*). In this perspective, the nation-state nominalization of the legal system of positive rights appears as a relatively late effect of social differentiation, preceded by the original (i.e. genetic and constitutive) adverbial use of law. Before one could even speak of the subsumption-based self-regulatory effect of a legal code, acts had been either decent or not. In Wesel's view, historical routines of conflict resolution can be understood as precursors of modern law, which ultimately gave the institution of law its external plausibility, social acceptance or function.

Also Thomas Vesting (2017) describes the *cultural reservoir* from which the legal system draws its normativity and its legally binding nature as 'instituted' normativity. Vesting speaks of 'semantic inputs' from literature that provide a certain idea of subjective law. However, Vesting does not speak here so much of tacit knowledge, but rather of semantic inputs as 'implicit conditions' (ibid. 106). Vesting emphasizes a specific connection between literature and law in a historical perspective: For example, one can put forward the thesis that a meaningful legal and juridical conception of contractual freedom can only arise in a broadly based, taken for granted cultural self-understanding of civic freedom which has to be created in a secular world in the first place (and literature has its part to play in this). This cultural self-understanding must be internalized and become part of one's self-image. In 18th century England, for example, the ideal of the gentleman stood for such a self-image. This demanded that individuals had to be sociable, had to be part of a community, to share the same orientations and values, on which individual liberties, such as freedom of contract, could be based. Thanks to implicit seman-

tic inputs, freedom of contract has become a legal phenomenon then according to Vesting. In this interpretation, *cultural knowledge* emerges as an evolutionary source of legally framed rights (Vesting 2017: 107).

The problem with both of these perspectivations, however, is that we do not strictly differentiate here between cultural knowledge

- that is not yet legally codified but still *explicitly* present on the one hand (such as life-form specific rules of etiquette, historical facts and cultural theories – like the image of the gentleman with identifiable characteristics) – knowledge that can be brought into propositional form and has discrete properties,
- and *tacit knowledge in a stricter sense* on the other hand, which answers the question of *'knowing how'* and cannot be completely transformed into explicit knowledge or *'knowing that'* (Loenhoff 2012: 16; see also: Ryle).

Often culturalist positions do not distinguish between a strong and a weak notion of tacit knowledge. For them, cultural knowledge, regardless of whether it is tacit or explicit, encompasses culturally *available* knowledge. In their perspective, tacit knowledge is fundamentally translatable *as such* and it is only a variant of cultural knowledge that is explicable in principle.

This is exactly what Gilbert Ryle called an intellectual misunderstanding that there is always manifest knowledge behind a skill (Ryle 1969). In contrast to the assumption that tacit knowledge is completely transferable into explicit knowledge, I would like to argue for a *strong notion* of tacit knowledge (following Loenhoff 2012: 8 ff. and Renn 2014: 51 ff.). Here, the *non-representational* character of tacit knowledge and its *epistemic unavailability* is assumed. When transforming into explicit knowledge, there are always *frictional losses* ('Reibungsverluste') due to translation (Renn 2006: 419).

b) Against this background, tacit knowledge appears as a non-systemic source of the *modern* law, too. Here, tacit knowledge emerges 'after' the law, within the contexts and orders of extra-systemic, practical applications of the law.[2] In other words, tacit knowledge has a certain socially functional effect in the transfer of legal subsumption into extra-systemic

2 At this point, we assume a system-theoretical notion of *system*. Refining system-theory, however, we distinguish different levels of aggregation of law (Renn 2021: 197 ff.; Nell 2020: 'multiple differentiation').

> coordination of action ('translation' and 'normative recharging of law', Nell 2020: 274 ff.). This transformation of legal meaning and validity is usually interpreted away in the legal system itself and it is necessarily neglected by the legal sciences. After all, from a Luhmannian perspective, even legal methodology (the reflection on legal interpretation as the practical side of the written law) is merely a product of self-observation that arises *within* legal sphere, but it does not yet constitute a (sociological) theory of reflection that describes the unity of the system, its function, autonomy, or even indifference (cf. Luhmann 1995: 11, 499). Hence, one has to take into account the characteristics of tacit knowledge with reference to the *societal* governance potential of the law. This means we have to consider radical *disruptions of meaning* (see: Renn 2006: 146) when law is practically applied. It cannot be a matter of obscuring the necessary translation relations on the basis of either purely normative assumptions or presuppositions inherent in the legal system.

First of all, only *tacit knowledge* allows the *appropriate* application of legal rules: The coherence of the law, its consistency and even its conditional programming are – always and in every act – joined by the criterion of *case justice* when it relates to real-life situations, respectively when a legal norm is practically applied. This has a hermeneutical and practical dimension, in which the appropriateness of practical application cannot be controlled solely within the legal system itself. The appropriate application of the rule in a concrete and in each case-specific situation is a matter of reflexive judgement (Kant), i.e. of *tacit knowledge of what it means to follow the rule hic et nunc correctly*. 'Tacitness' in this case therefore does not refer to *logical* but to *practical* implications, respectively to the complex of *meaning as use* (Wittgenstein: infinite regress). It is like *knowing how* the clarinet sounds instead of knowing the heights of the mount blanc *(knowing that)*. Only when we build upon this understanding of the theory of use of meaning, we obviously have a strong notion of tacit knowledge (which cannot be fully explicated as such without frictional losses).

The question of the practical qualification of judicial decision-making can be described much more sharply in terms of action-theory at this point (Nell 2020: 277). This position has become better known in the sociology of law through Regina Ogorek (in her habilitation of 1986). The judicial decision-making cannot be limited, as the legal doctrines of interpretation put it, to merely finding an existing meaning of the norm and being able to realize it *as such*. The authority of a judgement or even the validity of

law based on jurisprudential requirements do not guarantee and implement *the competence of rule application* in the respective situation *hic et nunc*. The judicial decision-making process always relies on a sense of *knowing how* to classify the case within the required category demanded by the norm. For social events do not fall under these categories by themselves, but law transforms (or translates) social events into legal facts. In this way, it can be said that judges are not only to be seen as mere appliers or users of legal norms, but also as creators of law. Günther Hirsch also speaks of the *requirement* of creative legal reasoning and the principle of interpretation (Hirsch 2003). The judge is forced to handle the legal norm freely, if they do not want to fail in their task of pronouncing law (Hirsch 2003: 19).[3] However, the legal decision should not be confused with a decision of will. The judicial competence is quite narrowly limited. The judge may not be guided by private legal or socio-political convictions that deviate from the legislator's ideas. The interpretation is always carried out according to recognized rules of interpretation of *legal* hermeneutics, *which, however (and this is the action-theoretical point), themselves have gaps of specificity!* The distance between the juridically determined case and the episode in the lifeworld remains the distance between the legal system and external heterogeneous normative orders. In return, when going through the *cascades of translation* (Renn 2006: 406 ff.), tacit knowledge as the ability to apply the law appropriately is made justiciable through long distances and multi-level translation relationships in the law.

From a sociological point of view it can be said: In the process of judicial decision-making, tacit knowledge represents the infiltration of the normative infrastructure of the environment into the legal system, which itself

3 An illustrative example of the scope for interpretation and the reliance on tacit knowledge within the law is provided by Anne Schlüter (2024). Schlüter analyzes credibility assessments in asylum claims based on religious conversion in Germany. The most important finding of the study is that '– although the written judgements often read quite similarly, partly using the same standard passages – the hearings were carried out very differently by the individual judges. While […] [certain] test strategies for assessing the "sincerity" of religious conversion were found to be typical, i.e., frequently applied at the courts examined, this does not mean that every judge used them in the same way. Indeed, it became apparent that the judges varied in terms of which strategies they applied and, even more so, in how they applied them. […] All of this resulted in extremely divergent recognition rates in conversion-based asylum claims at the courts under study, ranging from about five to ten to about 80 to 90 per cent among the judges interviewed' (Schlüter 2024). Only a strong notion of tacit knowledge can explain this range in terms of action-theory/sociology (which, however, does not call into question the legal validity!).

remains independent of morality (the legal system retains its autonomy, cf. Nell 2020).

So much on the effect of the extra-legal environment (horizons of meaning) on communication and decision-making within the legal system through the eye of the needle of judicial interpretation/application of rules. But what functional role does tacit knowledge play in the opposite direction?

The *sociological* interest in law tends to focus more on the functional role of law for or within society. Tradition places trust in the legal system to achieve normative integration of society (Parsons, Durkheim, Habermas). In our context, this means that the enforcement of the law would result in increased integration of society. But the role of tacit knowledge makes clear that the enforcement of law does *not replace* lifeworld normativity,[4] but rather that they coexist and interact with each other. Enforcing the law does not mean that the law now *directly* intervenes in everyday life and the lifeworld, but it requires its interpretative fixation of everyday events. Law is translated and this is where tacit knowledge reappears. Law enforcement compels the semantic subsumption of societal events under the general format, but the dispersion of deemed valid applications is inevitable: For the return of the explicit generality of the norm into the field of individual acts and practices does not reduce the ambiguity of 'falling under the rule' but rather increases it (Renn 2021: 217 f.). The difference between the legally characterized fact and the lifeworld episode remains relevant. The legal fact falls under the rule just as the individual instance falls under the category. The lifeworld episode follows a *narrative identification* of the event (not a subsumptive logical identification). In a similar manner, an individual is an unprecedented, non-identical individual, only connectable to habitus and implicit knowledge.[5] Lifeworld communication and an everyday conduct solely organized according to legal norms could not function.

Such a view on tacit knowledge in law can help to determine the role of law in a topological sense: Where and how is it situated in the society as a whole and how does it contribute to the heterogeneous social process in its normative dimension? In any case, law does not provide for normative integration of society (cf. Nell 2020). Emphasizing tacit knowledge allows

4 Habermas speaks at this point of the colonization of the lifeworld, which, however, would be a de-differentiation from our perspective.

5 This is Bourdieu's 'regulated improvisation', i.e. the habitus creates a space that is externally limited but internally infinite.

to take into account the complexity and mutuality of the relations between the legal system and other normatively relevant interactions. Hence, in order to make sense out of the term 'law and society', we have to *reconstruct translational relations between different normative orders*. Finally, we can say: The unity of *the legal system* always encompasses *more* than its systemic nature. Law always has a *practical basis*, too, which can never be completely caught up dogmatically or positivistically. A holistic account of law must be based on action-theory and take into account the systematic role of tacit knowledge.

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