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Friedrich Müller's experimental turn of legal positivism

The corpus method is not a panacea. The use of corpus data will not do away with disagreements as to the meaning of statutory terms. Instead, the corpus method removes the determination of ordinary meaning from the black box of the judge's mental impression and renders the discussion of ordinary meaning one of tangible and quantifiable reality."

With its scientific aspiration, Friedrich Müller's work stands post Kelsen and post legal positivism. However, here too, "post" does not mean application or uncritical extrapolation. For the way of applying science to law, as aspired by positivism, has proven to be unfeasible in practical legal work. The positivistic concept of science became a rhetorical facade of a decisionistic and power-driven practice. The further developed scientific aspiration of legal theory and the question of how legal practice actually functions constitute the field of tension, in which Friedrich Müller inscribes his texts. Only in this field the linguistic critical reflection unfolds its concrete efficacy.

Friedrich Müller sums up his discussion of legal positivism and of Reine Rechtslehre as follows: "Legal theory should not, like Kelsen, wall itself in a self-stylising way. Instead, it is better to conceive the movement of what really exists, and hence can be grasped with science, in its everyday processes. Among other things this means to structure it as far as the subject matter is not being harmed. What positivism has achieved, should be honoured, as far as it is necessary to deliver the most possible in scientific aspiration, objectivity and precision. Other than that, positivism must be transcended. It must be transcended from its roots, from where it closes itself arbitrarily against the continuum of reality and language. Its scientific goal, as far as it is inevitable, must be preserved, yet the field of work has to be shifted into the reality of life which surrounds us".

In Friedrich Müller's work, the fulfilment of the scientific aspiration of legal theory in practical reality starts with the question of what is actually happening when a legal system is valid. Starting from the method-related norms of the

constitution and the sub-constitutional law, these processes which actually occur are structured in a four-fold way: The concept of norm-structure creates a norm-theoretical basis for legal methodology. This concept is further clarified by extensively discussing the linguistic ideas which form the basis of the distinction between linguistic and real data, respectively primarily and secondarily constituted linguistic data.

1. The blind spot of reality

Law deals with reality all the time. No jurist would deny that. Yet, this does not concern the core of legal science, its exclusive characteristics, the normative core. This core is stored in the language of the statutes, and from the perspective of this secure armchair, one can comfortably watch reality passing by. However, this armchair has gotten old.

So, how important is empirical knowledge for legal science? This question was already asked in the 1970s, when the social sciences were at the gates of jurisprudence. The optimistic proposal to treat "jurisprudence as social science" was deemed in the discipline as an attempt of an unfriendly takeover: "German jurists deal with legal issues, not with social issues". The discipline has defended its identifying core as a technique of case resolution. "Jurists have managed to integrate parts of social science knowledge into their social contexts, i.e. to adapt it to their needs and interests, possibly also interests of power." Yet at least, since then there are pathways from social sciences into law.

The discussion of manifold forms of extra-legal knowledge has been inevitable for jurisprudence. The increase of social complexity leads to new tasks (environment, markets, media), which cannot be mastered without the necessary knowledge about the respective normed sections of reality or without considering the according consequences. Already in the 1980s the risk debate emerged. Internationalisation of law as well as the simultaneous effects of digitalisation were further drivers. Hence, public law borrowed concepts from political scientists, systems theory, from governance, network models or regulation theories. So, jurisprudence is faced with the problem of the responsiveness of doctrine. How can you adopt external knowledge without losing your own identity?

Old "legal methodology", as developed by Gerber and Laband, excluded extra-legal knowledge, in order to create the identity of law in the first place. The subject of the discipline was the definition of statutory concepts and their connection on principles modelled on Aristotelian logic. Any political and historical knowledge that had been contained in traditional public law was excluded.

Today, this direction is reversed. External knowledge is sought. The precondition for this was the overcoming of informational naivety which assumed that the necessary knowledge is easily accessible, suitably portioned and certain without doubt. As long as you exclude external knowledge, you can believe this. When you adopt it, you see that it is not easily accessible, does not come in the right

portions and that the underlying question does not exactly fit with the relevant question the jurist asks. Moreover, it is highly contested.

"Legal methodology" moved on since Gerber and Laband. However, for mastering these problems it still did not offer any help to jurisprudence. Classic legal methodologies did not even provide a place for external knowledge. The only way to enter a relationship with reality is through the facts of the case. Only by way of reception of philosophical hermeneutics did it become evident that one can only understand a norm-text in the context of reality. Meanwhile, with the keyword of "normative domain", a level of reflection of integrating external knowledge into the process of norm concretisation was provided for.

When dealing with empirical sciences, jurists are primarily interested in contents. Yet here too, it is risky to transfer them without any knowledge about the implications of their applied methods: "Social science, if it wants to become consequential in doctrine and/ or practise, goes through filters of practical suitability and experiences a shape shift (Gestaltwandel). The slogan is theory transformation, not theory transfer. Thereby it loses at least some of its explanatory function, that it is ascribed to by the professional staff of the social sciences. In tendency, the assimilation leads to a transformation which often consists in banalisation and trivialisation." Most of all, however, these contents have not been created as answers to legal questions, and they are valid only provisionally, subject to the proviso of further investigations. These the jurists cannot execute themselves: "The limited possibility of using scientific expertise becomes especially clear in predictions, e.g. in risk law. Who, as a jurist, would want to try and back all his or her facts, assumptions and predictions with warrants of empirical findings produced by scientific methods, would soon have to capitulate. I, for instance, could not do this presentation, and text books and monographs would have to be partly blue-pencilled. In some of them not even the table of abbreviations would remain." The jurist however, wants to decide in a final and compulsory way. This is why legal knowledge is incongruent with external knowledge.

Thus, when one wants to adopt external knowledge, this incongruence must be dealt with. As experiments are not available, as a second-best instance only argumentation remains. Through objections, their integration and refutal, the rationality of assumptions can be tested, at least to some extent. This, too, is a result of recent developments. For the integration of external knowledge procedure and argumentation are crucial.

2. The language of the blind spot

In the more recent methodological discussion, in a separate chapter on "interdisciplinarity", interrelations with other disciplines are being portrayed. History, economics, social sciences and natural sciences can be found in specific sections. There is also a section on interrelations with the humanities. Yet one discipline is missing: linguistics. Although, with legal linguistics, this discipline has developed a specific sub-discipline dedicated to legal problems, with a busy field of

publications and many conferences.

Taking into account the structural openness of language, applying the law by interpreting linguistically framed norms is never just an act of recognition, but also has a constitutive nature. "From a linguistic perspective, legal science – also: the science of case-resolution guided by law – therefore is never just a discipline of applied interpretation, but is always also a law-generating discipline of action and decision-making." So, linguistic reflection leads us exactly to the point where the problems of today are located. Yet now, language is taken out of the focus again. At first, it is granted "that legal science cultivates an implicit theory of language which denies a good deal of the results of the discipline of linguistics." Then you could think of overcoming this implicit theory of language by making use of the widening of the focus by newer legal methodology. However, the opposite is happening: "Apparently, legal science as the science of case-resolution guided by law is not allowed to question the basic assumption that such guidance is possible through the means of language – just like, regardless of the stance of the according determinism, in the dispute over determinism it is not allowed to question that the subjects addressed by norms can actually be determined by normative precepts. Without this basic assumption, law as a normative concept would, by and large, be invalid." Thus, the problem of language is deported into the realm of metaphysics and not to be considered for further analysis anymore. Obviously, this whole process of exclusion is taking place within a footnote.

This exclusion has a systematic reason. Jurists regard the language as their own. Which is astonishing, considering that many people can speak, even if not quite as well as the jurists. So, why the jurists? The reason given for this is that, when external knowledge is used, the normative standards, as far as they are capable of binding, must be adhered to. What must be adhered to though, above all, are constitutional standards. This is completely correct and central. But this does not force the jurists to take power over language. The idea this is predicated on is that the statute binds by way of applying its language. Here we are arriving at the core task of jurisprudence: to enable the transition between text and practise. The task of jurisprudence, hence, is to facilitate "the transition between text and practise, to translate the law in the books into social practise or vice versa." The solution of this task would require further thinking regarding "legal methodology" as it was developed by public law positivism. One would have to detach oneself from the "ideal of statutory solipsism" and focus the process of law generation. Thus, legal science must overcome the idea that its exclusive characteristics lie in the definition of statutory terms and their logical connection.

3. The experimental turn of the statutory language

In Friedrich Müller's texts law does not occur as a stable reference of legal speaking, as "subject law". He does not speak "about law", but the speaking of law is presented in a self-doubling way. "The strategies of silent exclusion become visible as well as the stylistics of conceptual scores with footnote armadas having to justify anticipated results." Not law and language as an external connection

in moments of legal contemplativeness, but also law as language and language as law are also up for debate, where they are not explicitly mentioned. It is the pleasure of language and the experience of its power which makes these texts sensitive to the diverse strategies of the semantic combat, and to the force which the language of law not only restrains but also exercises itself.

In the precise repetition of the chain of arguments produced by the judiciary. The cautious and passionate work with language leads to something new. The unity of the textual fabric bursts and a still white, blank area becomes visible.

The discussion of the legal argument of the "unity of the system of law" gives an example of this way of working. The seemingly firmly fixed wholeness dissolves by unfolding into argumentative burdens. Here, the scientist's exact patience is sharpened by the aesthetic sensitiveness to the textual unevenness of the lie. Though, the scientific analysis and the aesthetic sense have a concealed movens. The critical question about the legitimacy of dominion and law gives the texts an impatience which can be sensed succinctly in the technically-plain language and the brief descriptions.

The question of what is actually happening, has also been asked by Friedrich Müller with regards to language. One does not necessarily receive the answer to this question from the speaker. The reflective knowledge that speakers have available stays way behind their real know-how. One rather has to observe the speakers in their practical action, run the tape and log. It is the same with the jurists. When you ask a judge, what he does, he gives you an abridged presentation of what he once heard in a foundations lecture. Then, with some occasional cynicism, he goes on and distances himself from this, without ever fully elaborating his own real know-how. This way one learns nothing. Instead one has to analyse the texts of the courts; and namely not with regards to what they say in their self-description, but with regards to what they practically do in their connections.

The old theory of "legal method" defined the exclusive characteristics of legal science too narrowly and thus excluded the essence of the law-generating process from the theoretical reflection. Surely, the incorporation of external knowledge must be controlled by the language of the law. So, what is the meaning of a legal term?

The empirical method of co-occurrence analysis presumes that the meaning of a term is determined by the phrases that regularly co-occur in its textual environment. Today, in relation to certain textual corpora, this can be evaluated by a computer.

Yet of course, there are limits here too. For soon a level of complexity is reached which, on the one hand, does more justice to the holistic character of language, but on the other hand cannot be worked off practically anymore. If in a list of collocations, one evaluates the additionally appearing words with their collocations, the number of words in the specific lexical field will increase exponentially. Support by increasingly intelligent search mechanisms

and dictionary-based information-retrieval will be useful for legal linguistics. "Here, deliberations, ideas, techniques from very different areas of knowledge connect, by way of which, though, each of these areas experiences a significant increase of its performance and added value can be generated on the fly. According techniques have been developed in the context of statistical processes."

When one analyses the use of language through co-occurrence analysis as comprisingly as possible, one finds a multitude of divergent uses. This points to certain patterns, however, not to a decision on the preferability of these patterns. The computer is strictly bound to commanding sequences programmed in the past, that neither automatically nor autodidactically can adapt to unforeseen changes of context. As a basis for the decision one could apply different aspects. For instance, the narrowest or the widest use of language, or the most frequent in number. A common core of all uses cannot always be found, and the mere counting of the frequency does not yet present the preferability for a certain constellation of case.

Therefore, in the first place, analysing the use of language through co-occurrence analysis has a centrifugal effect. For deciding a legal question, however, we need a centripetal force of selection. On the basis of the addition of the uses of language this selection forms a shape. This is the task of doctrinal theory. Yet also this necessity of morphogenesis emerging in the realm of public discourse cannot always provide a decision of the case. For this, often a procedure-based argumentation is needed which selects the uses of language and synthesizes them by way of frame analysis.

The hope that for an interpretation of the statute you do not have to enter argumentation, but simply recognise it in the system, is not disappointed easily. We are dealing with a constellation of desire. Here, the desire for instruction is projected into the system. The machine-based evaluation of corpora of sources, too, cannot replace the decision.

Procedure-based argumentation will always be central to this work. Without argumentation, the increase of information by the new media would be a mere addition. The knowledge needs a qualitative interconnection that is orderly arranged and structured in itself. Technical access to information does not provide a semantics or interpreted knowledge, only dead quantities and characters. So, there is indeed a risk of the new possibilities of big data, namely that by means of masses of texts dischargingly little is said and that at the same time the decisive performance of processing information gets forgotten.

Yet, this risk existed in all media revolutions, and so far, after some time making use of the chances of the new medium was always successfully achieved. On the basis of corpora and more exact analyses one can make the diversity and interconnectedness of the specific language more visible. Exactly therein, though, lies the risk for the scientist. We can go and see the points of reference ourselves. This approach does not give us the meaning of the statute, but it gives us a plethora of possibilities to enforce or relativize proposed interpretations. Without

this basis we do not work according to the rules of the art. However, the best dictionary cannot take away from us the necessity to decide on the conflict of the interpretations in a professionally legal manner

So, dictionaries and computers can help us to discover a multitude of semantic variants and to relate them to contexts. But they do not show us the limits of the language. For the only limit in language is comprehensibility. Empirical analysis, hence, does not take away the burden of the dispute as to which of the found meanings might be the best one for our purposes.

So, what remains of the exclusive characteristics of the law? Obviously, the direct linguistic control through the statute in simple cases. More importantly, though, it guarantees and enables the process of argumentation in all the hard cases. Hence, in all the significant cases the control through the statute is an indirect one. Here the court must keep an eye on the relevant scope of the arguments and, if necessary, either expand or restrict it ex officio. Most importantly, however, it must guarantee equality of arms and procedural fairness in the dispute over the meaning of the terms. This is required by the standards of the constitutional state. Finally, the reasoning must lay out which arguments have reached the state of argumentative validity, i.e. have integrated or refuted all objections they are faced with.

So here too, the state is not an intervention state which takes away the language from the citizens. Nor is it a welfare state which speaks for the citizens and distributes the meaning according to need. Instead, it is a regulatory state which secures that the dispute about meaning takes place and is decided on the right level.