

# *The Sociology of Law and Empirical Research*

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The efficacy of law appears more and more to be a founding category for the sociology of law. But we must make distinctions. The term "efficacy" is consolidated in the general theory of law and in the western juridical dogma to indicate the "consequences" of juridical rules, consequences pre-established by the rules themselves and conditioned by facts external to those rules. The implied phenomena considered pre-eminently "juridical", are traditionally distinguished in constitutive, declarative, preclusive efficacy.<sup>1</sup>

The science of law intends therefore for efficacy only the juridical efficacy, and it is interested in the factual reality of the rules only in terms of "effectivity".<sup>2</sup> The sociology of law is interested, on the other hand, in such factuality also in terms of metajuridical efficacy, and, that is, the causal production, by the rules, of the substantial (and not only formal) effects in view of which they had been issued.

Moreover it is to be noted that only with the sociology of law of the last fifteen years has the attention given to factuality made it possible to distinguish metajuridical efficacy from effectivity; while the latter concerns the de facto respect for the rules, the former concerns the real suitability of the same rules to realise their aim.<sup>3</sup> *Ratio legis*, the simple hermeneutical criterion for the jurists, becomes, for the sociologists, the parameter on which to measure the actual efficacy of the *lex*.

The distinction between efficacy and effectivity – in effect present, even if not in a scientifically elaborated way, in Kelsen (1979) – met with opposition in the same sociological literature, if we remember the objections of Geiger on the theme of relevance of the aim in the study of law.<sup>4</sup> This delay in the scientific elaboration of the notion of efficacy in the metajuridical sense suffers, in effect, from the secular refusal (notwithstanding the intervention, among others, of Jhering and Pound) of juridical science to utilize the category of the "aim" of the rule beyond the interpretative moment,<sup>5</sup> as it suffers from the lack of the historical development of a true science of legislation.<sup>6</sup> The affirmation of the notion of efficacy of law in sociological terms is connected to the conceptual acquisitions of the social sciences on the theme of institutional *performance* and *policy analysis*. The distinction, in particular, between capacity, in the public sector, to utilize the available resources to the best (*efficiency*, concerning the output/input relationship) and the capacity to reach the pre-established ends (*effectiveness*, concerning the output/goal relationship) drives the juridical culture more and more to finally consider the problem of reaching the aims of the rules, and that is their efficacy, as well as the final *impact* of the decisions (or *policies*) expressed by the rules.

On the other hand the transition from the liberal state to the welfare state, implying the growth in the public assistance apparatus, marks a change in the same structure of law: the juridical rules are more and more concerned with, not only the "behaviours" but also the "organization"<sup>7</sup> and the "aim oriented programmes" as well as the "conditional programmes".<sup>8</sup> This explains on the one hand the emergency for the idea of aim for the juridical sciences; and the inadequacy on the other hand of the idea of law founded solely on the behaviour of individuals and on substantial authority in so much as it privileges obedience to the rule. Such a conception, in fact, leaves not only the moment of efficacy in the shadow, but also that of effectivity, given its disinterest in the organizational problems of the administration of justice in the general framework of disinterest in the organizational-administrative coverage of the law.<sup>9</sup>

Now, if the organization and the administrative coverage of the rules condition the same effectivity of these (whether they are of the type "conditional programme" or "aim-oriented programme") it seems inevitable to conclude that the effectivity of

law is a necessary but not sufficient condition for its efficacy. For example the real respect (even 100% of the effectivity quotient) of a penal rule in currency may not resolve the economic problem of a country which relies on such a rule to overturn (end of the rule) its economic conditions, precisely. Efficacy therefore corresponds to the *functionality* of law, if for functionality of law we mean precisely the adequacy of this last with respect to its aim, whether it is the specific aim of a single rule or the comprehensive one of the law in general (for example the reduction of social complexity).

To refer to a symbolic function<sup>10</sup> of law seems acceptable insofar as we consider that a symbolic function is included among the functions of law, and insofar as such a function does not undermine the others. Again: the level of efficacy of the rules in their entirety (it cannot be denied) conditions the legitimation of the institutions. Therefore excessive emphasis on the symbolic function (see the Italian "manifesto" statutes or the Austrian "Alibigesetze") of the rules, with consequent inefficacy regarding the substantial problems which the rules must face, delegitimizes the juridical system in particular and the political institutions in general.<sup>11</sup>

In other words, the law is more and more exposed to evaluations relative to its capacity to resolve the problems (see the growth of legislative interventions and the rapidity of their obsolescence, the end of the era of "codifications" *una tantum*, the studies on the efficiency and the efficacy of the courts, the analyses of implementation of the policies), and it is no longer legitimated only because of its abstract correspondence with values but also because of its efficacy.

A new era for law has therefore started, in which the criteria of values (value oriented rationality) or formality and positivity (legal rationality) are not overlooked, but there is a greater orientation also towards criteria of efficacy (aim oriented rationality), in the framework of that rationality which is "material" (= aim a/o value oriented) that Weber put as the basis of the "legal" type of power.<sup>12</sup>

The work of reflection and elaboration of the jurists is no longer enough, in the bill draughting, to guarantee the efficacy of the statutes. Bill draughting is necessarily founded above all, before the formal draughting controlled by the jurists, on the bases of the applied social sciences. Concluding this first point, it

seems clear that the traditional juridical science, in particular the category of the efficacy of the rules, finds itself in contrast with the statutes of applied social science. For the sociology of law, in itself interested in the social relevance of juridical phenomenology, the same category shows itself to be the foundation of the "new" discipline.

A second point to consider, connected to the first, is that of the role of the social efficacy of law in the empirical research of the sociology of law. Such an empirical research, if not intended as a simple "description" or "statistics" of facts, must be inspired by the need to discover and verify the "cui prodest" of the rules.

Here the need for a framework of conceptual reference of middle range, of middle level, realized by the "western" sociologists like those of the socialist countries, seem to impose a better definition, above all, of the historical model of law in the more advanced societies, a model that seems to be able to be defined as "legislative idealtypus". Regarding this, the contribution of Max Weber appears to be fundamental, even though the subsequent sociological literature has made the "bureaucratic" moment of the idealtypus famous and has left the "legislative" moment in the shade.

Such an idealtypus presents the following features:

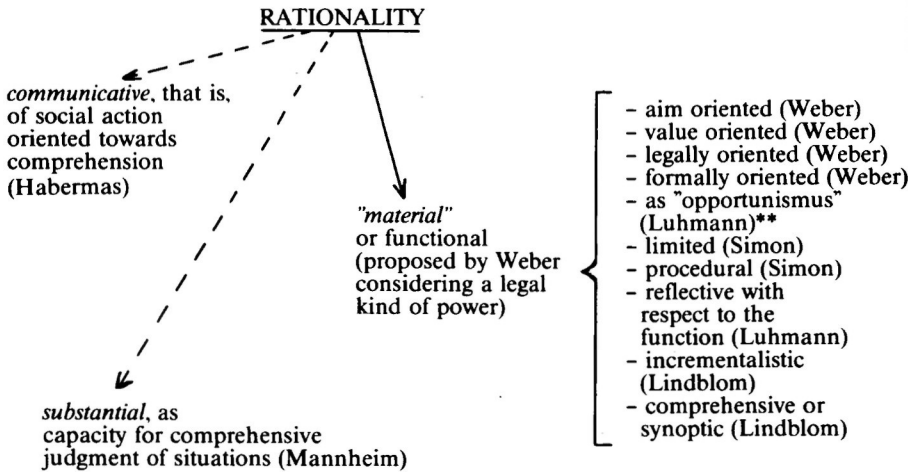
1. political and not technical or scientific character of its role;
2. intentionality, projectual character of its intervention;
3. conditioning on the part of implementative apparatuses already existing or to be created or reformed;
4. supremacy above apparatuses;
5. tendential decentralization of the normative production in favour of e.g. subnational assemblies or collective bargaining;
6. legitimation through principles and results at the same time, i.e. political responsibility for legislative decisions;
7. procedural, organizational, informative and monitorial complexity of the legislative decisions;
8. rationality of the legislative decisions as coherence between principles, objectives and results.<sup>13</sup>

The *pure* type intended to face and overcome various difficulties in human coexistence, of different depth and historical recurrence: so with feature no. 1 he intends to overcome the difficulties connected with reserving legislation for the experts,

the philosophers, the wise, and their dogmas; with feature no. 2 he intends to qualify himself regarding forms of legal decision-making incapable of programming and comprehensive government of the juridical system; with feature no. 3 he intends to escape from blind utopias before the complexity of the exigencies of social government and the necessity for consistent apparatuses, judicial and not; with feature no. 4 he reaffirms his pre-eminent even if not absorbing role with respect to every other possible and hopefully auspicious ulterior normative source; with feature no. 5 he intends to recognize the impossibility of a "centralistic" regulation of human coexistence, with feature no. 6 he does not intend to restrict his role to the enunciation of principles, but to be responsible for their implementation, aware of exposing himself to the future judgment of the society for whom he legislates, independent as well as dependent variable of his decisional horizon; with feature no. 7 he intends to utilize every possible procedural instrument, informative and of control for the most correct fulfilment of his role; with feature no. 8 he intends to utilize to the best of logical and prudential coherence the available resources.

Unfortunately, up to now sociological attention, as we said, has been concentrated, in this regard, on the feature of the implementative apparatuses (bureaucratic idealtypus), losing sight of the meaning and the comprehensive role of the legislative idealtypus. It seems relevant therefore to recall attention to the comprehensive and historical functionality of such an idealtypus, to the efficacy, in other words, of its manifestations.

In the studies of the sociology of law two inversions of direction appear crucial to me. On the one hand the close examination of the role of the implementative apparatuses, no longer interpreting it only in terms of "Selbstreferenzialität" but also in terms of correct draughting of their load capacity; on the other hand the verification - for every normative intervention - of the relative "aim a/o value oriented rationality", a rationality which Weber placed at the basis of a "legal" political system, and, that is, a "legal" power. About this second point it is perhaps opportune to ask ourselves if and in what terms the various forms of rationality, subsequently theorized by the Weber contribution, are not in effect to lead back again to that "aim a/o value oriented rationality".

*Forms of Rationality Considered by the Social Sciences\**

\* The diagram does not consider the "pathology" of rationality, e.g. the Habermasian category of the conscious (manipulation) and unconscious deception.

The dotted line expresses the preference of the writer for an eventual replacement of such rationalities in the framework of value oriented rationality.

\*\* Here the opportunism is positive in as much as it is understood as a choice of opportune ways and means to implement the values.

Carrying out its role of analysis of the efficacy of the juridical rules the sociology of law encounters certainly in the "rationality" the feature which is maybe most emblematic of the idealtypus; most emblematic for the contradictions (and this because of the irrationality) which often obscure the "pure" form of the same idealtypus. Aims, values, legality, reflectivity, synoptic character, are often declared and however always presumed in juridical phenomenology; but they are also, just as often, betrayed, both because of the reasons indicated by historical materialism and by those indicated by the theory of perverse effects.

But if rationality as a "form of life" is an analysable but not modifyable object of *empirical research*, it becomes, instead, scientific deontology in the programmes of *applied research* in general and "policy analysis" in particular. Applied research here becomes the "voice" of the constellation of available forms of historical rationality. This even if such a "voice" often remains "vox clamans in deserto", and the legislative, judicial, implemen-

tative decisions in general do not always know how to distinguish between the voice of reason and the siren song.

The problematic relationship between science and society, and in particular between the social sciences, politics and social evolution seems therefore to find the crucial moment of social progress in the confrontation with Reason. The bridge between the rationality of the idealtypus and the rationality of science is far from being built.

## Notes

1. Cf. Falzea, A., "Efficacia giuridica", in *Enciclopedia del Diritto*, Milano, 1965.
2. Cf. Kelsen, Hans, *Allgemeine Theorie der Normen*, Wien, 1979. See also the work of M. Borucka-Arctowa, *O Społecznym działaniu prawa*, Warszawa, 1967, p. 11. The distinction coincides with the distinction of *efficacy-effectivity* and *efficiency-functionalism* in R. Bettini, *Il circolo vizioso legislativo*, Milano 1983, in which efficacy-effectivity is a necessary but not a sufficient condition for efficiency-functionalism.
3. Cf. Carbonnier, J. "Effectivité et ineffectivité de la règle de droit," in *L'Année sociologique*, 1957-58; Rolin, H., *L'efficacité de la loi*, Paris, 1964, Blegvad-Persson, B.M., (ed) *Contributions to the Sociology of Law*, Copenhagen, 1966; Aubert, V., "The Housemaid. An occupational Role in Crisis," in Skolnick, H.H. and Schwartz, R.D., (ed) *Society and the Legal Order*, New York, 1970. Eckhoff, T., "Sociology of Law in Scandinavia," in R. Treves and J.F. Glastra Van Loon (eds.) *Norms and Actions*, The Hague, 1968.
4. Cf. Geiger, T., *Vorstudien zu einer Soziologie des Rechts*, Berlin, 1970. p. 105 ss p.200.
5. See for example Article 21 of the Italian Civil Code.
6. Podgorecki, A., *Ocerk sociologii prava*, Moscow, 1974. p. 314, and Kulcár, K., *Osnovy sociologii prava*, Moscow, 1981, p. 168 ss.
7. Cf. Ott, C., "Die soziale Effektivität des Rechts bei der politischen Kontrolle der Wirtschaft," in Rehbinder and Schelsky, H., (eds.) *Zur Effektivität des Rechts*, Düsseldorf, 1972.
8. There is a sociological ambiguity in the distinction, for example in Luhmann's work, between the "aim-oriented programs" and the "conditional programs". See my work *Circolo vizioso legislativo ...* p. 152-153.
9. *Ibid.*, p. 18.
10. Edelman, M., *The Symbolic use of politics*, Chicago, 1967.
11. Cf. Podgorecki, op. cit., p 323. and Bettini, op.cit.
12. Cf. Weber, M., *Economia e società*, Milano, 1981. p. 80, 212.
13. Cf. Bettini, R., "L'idealtipo legislativo tra opportunismo e razionalità," paper presented at the University of Bologna, 12-15 December 1984.

