

On the accumulation of cosmopolitan capital – a comment on Bourdieu and law

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I have been asked to comment upon the articles appearing in this issue of *Retfærd*. I will largely limit myself to comment upon the two texts outlining Bourdieu's 'analytical approach' to law: the excellent text by Mikael Rask Madsen (MRM) applying Bourdieu's theory to the construction of Europe as a new (legal) field; and Remi Lenoir's (RL) text featuring Bourdieu's encounter with law. The latter text in translation reached me very late in the process, and as it abounds with French references, I may be somewhat hampered in fully appreciating many of its insights. When relevant, I will refer to the various case studies launching Bourdieu into the field of law. Some of these case studies are excellent expositions in the tradition of historical sociology, and would probably have remained so also in the absence of Bourdieu's theory. Many sociological elite theories would have been as good in picturing how certain elite strata groups succeed in staying in power in the face of shifting power regimes.

To be in disagreement with Bourdieu's 'holistic' approach to the field of law, does not entail that I not also can appreciate

various details as fruitful advances for empirical research in the sociology of law. Above all, I believe that Bourdieu's analytical approach with different forms of capital has really enhanced the sociological understanding of the powerful professions generally, not the least the legal profession. Therefore, I very much hope that the efforts in this special issue of *Retfærd* to vitalize the field of the sociology of law will stimulate further research.

In his fragmented notes to a 'sociology of law', Max Weber outlined a distinction between a 'sociological' and a 'juridical' approach to law (Weber 1973, p. 892-895). It was meant as a reply and a comment to a previous attack on the 'sociological approach' by Hans Kelsen. These exchanges concerning the power or weakness of the emerging discipline of sociology at the time should be seen in the light of the wider antagonistic exchanges concerning the field of the sociology of knowledge in relation to philosophy. At the centre in both types of exchanges (law and knowledge) is the 'rupture' between the empirical and the normative; and the efforts of the empirical (sociology) to encroach upon

the normative (law and philosophy). In the more recent language of Bourdieu (and the Bourdieu-inspired authors in *Retfærd*), this power-struggle is renewed; lawyers (jurists) possess the cultural capital that structure the internal power dynamics of the legal field. In his *Pascalian Meditations*, Bourdieu mounted a similar attack on philosophers.

In order for sociologists to emancipate themselves from the symbolic violence exerted against their own thinking by powerful social actors, they are urged to distance themselves in a double sense from pre-given categories (common sense and expert categories). They need to construct new fields and new categories which can capture antagonistic positions in the field and undermine the performances of old players and their turfs. But it is unclear both in Bourdieu himself and in the reconstruction of his thinking by MRM and RL here, what the sociological construction of a (super) field is aiming at in the long run. It is in immanent danger of constructing its own 'circulus vitiosus' of infinite regression; that the power-game now is addressed in new epistemic categories unless its aims to 'transform' actual power in practice are also being addressed. Left in a (political-practical) vacuum, this is an instantiation of Bourdieu's famous plea for epistemic 'ruptures' – both with regard to expert and common sense categories. It is also an application of his 'reflexive methodology': a double distancing from the pre-given field now also applied to the researcher's own semantic wrap-up. Why not a triple reflexivity: apart from strengthening the field's methodological self-awareness, what are the consequences in the long run of these declared ruptures?

My point in referring to Weber's classic distinction between 'lawyers' law' and sociological approaches to the field of law has to do with what I (and many others) see as the blatant form of 'sociologism' inherent in Bourdieu's approach to normative fields, let it be law or philosophy. While Weber himself clearly recognized the validity and relevance of both types of approaches (law and sociology), Bourdieu-approaches seem driven by intents to unmask and deconstruct the legal field as harbouring antagonistic power-positions. RL accounts for this rather aggressive encounter by referring to Bourdieu's own personal background and kind of intimidation that he apparently felt in associating with his more privileged school-fellows on his way to world-fame. Neither MRM, nor RL make any serious attempt to justify Bourdieu's analytical approach to law (or any other normative field) as providing a good platform for better understanding the legal field. They merely account for it in descriptive language, now and then making piquant references to some immanent hatred between social classes as if such references would suffice to justify normative questions. With Bourdieu, sociology assumes the role of a warrior, whose mission it is to strike and impose the greatest possible damage on the enemy. If not the ruptures are complete, then there are good chances that the hegemonic powers remain in office, and that the sociologist-warrior resumes to the role of the loser. But how fruitful are such exercises in the long run? In the absence of addressing normative value-questions, it seems to me that the unmasking exercises appear as futile exclamation of failed revolutions! Bourdieu's early resentments

against diffuse power of all kind might have blinded him (and his followers) to the distinctions that were basic in Weber's approach to law and politics: there are legitimate and illegitimate powers; legitimate power in the modern world is to a very large extent based on the rule of law.

It seems to me in reading RL's exposition on Bourdieu and law, that the latter's view is tainted by an almost biblical understanding; that law acts as an oracle/God, it (the law professors) speaks, and shapes the world accordingly. Legal imperatives and declarations are not bounded by semantic systems, as in Kelsen's or in Luhmann's respective approaches, but are condensations rather of social power, now surfacing as 'legal rules' based on reason and arguments. It is in this regard that Bourdieu strives to 'deconstruct' law as a more refined form of brute force. But this form of dissection does not propose that law could be otherwise; hence, the reader is left with the impression that law by definition is but disguised force. Critique and dissection merely serve the aim of some wider social (class) justice which is never addressed in detail. Herein lays the legitimating base of Bourdieu's approach to law: the audience is now propelled to share in the diffuse class-resentment of Bourdieu's youth!

I find this approach to law quite primitive in several aspects: to denounce law as merely an expression of *Klassen-Justiz* seems to me a blatant oblivion of what goes under the name of the progressive movement in law in the 20th century. 'Social laws' enabled the less privileged, workers, women and children, a legal security not to be molested by the more powerful. Human rights legislation today allows a possibility

(although not always a reality) to those in the Brazilian favela or other outlaws to be included in a diffuse humanity. What other possibilities exist today apart from human rights to reach out to the powerless around the world? The evidence that it is a segment of the powerful legal stratum that was – and is – in the lead for such progressive legal strategies is easily gathered: who else but lawyers (as Gandhi himself) can bend the powers of law? The choice is often between law and revolution! As the consequences of a revolution are difficult to endure, the investments in legal (r) evolution appear a more prospective affair, even if it results in a government of jurists.

MRM does an excellent job in laying out Bourdieu, much clearer than the master himself, and in much better English than the often poor translations of the 'original position'. He describes the sociological field as follows: '[A] network of objective relations, the concept provides a broad conceptual ground for analysing both the social continuities and the construction of the *new* practices.' MRM makes a point that such a (war-like) definition of the field with 'its objective relations' is especially fruitful in the study of new emerging field such as Europe and European law. The reason is that here are new play-grounds in the making where previous elites can consolidate their already won positions, and eventually stake out new power-territories. On these new turfs, national and international interests meet, and long-standing heraldic trajectories are consolidated.

In Hammerslev's interesting study of the lines of continuity in the Bulgarian legal elite between the communist and post-communist era, we have a concrete

case of elite reproduction, and thus a good case for Bourdieu? Assuming that Hammerslev provides us with a correct description of what is going on in Bulgaria, I could use quite ordinary sociological explanations for why the elite, under normal and not-revolutionary circumstances, has good chances to occupy top positions also under new regimes. If the break in Bulgaria had been 'revolutionary', then the elites would have been dispossessed – and de-capitalized as in the French and the Russian revolution. The 'line of continuity' in the case of Bulgarian legal elites thus proves that the rupture in case of Bulgaria was less than complete. If there are no real alternatives to the existing 'power-regimes', then the shift of ideological labels disguises the fact that the regime is pretty much like before. But my attempts at explanation of elite-circulation owe nothing to Bourdieu; I find Tocqueville, Pareto, Weber and Raymond Boudon (Bourdieu's antagonist!) much more useful.

I would use the same arguments in relation to Dezalay's and Garth's study of 'the double game' of the patricians of the Indian Bar. It is a very well-written piece of historical sociology. It reminds me of the classic studies of the legal profession in Norway by Vilhelm Aubert, but Norway differs from India: with the advent of the modern welfare state, the legal patricians lost much of their previous position; they became, in the categories of Weber, specialized *technicians* rather than diffuse *honorarios*. I wonder whether this classic Weber-distinction is at all meaningful to Bourdieu-advocats; they all seem eager to press the preservation of power rather than

its dissolution. Can power ever dissolve, and if so, under what circumstances?

At the base in Bourdieu's theory of the field are social interests and classes, but these become frozen entities as

... the rise of a field implies a degree of structural consistency and autonomy, meaning a set of objective and symbolic relations between agents and institutions around increasingly specific issues. A field is centred on its own specific combination and forms of capitals – cultural, economic, political, legal, etc. – constructing a particular economy. The process of capitalisation, resulting from the struggle between the agents over gaining dominant positions in this social space, both structures and is being structured by a set of polarised and interdependent institutional positions held by the agents ... In other words, the field is marked by a set of internal dynamics that are expressed in the form of interest, dedication, belief, and which, *grosso modo*, explain the stakes of the agents in the field.'

Once the field is in place, the 'social' has power vis-à-vis the agents – or in the legendary words of Alfred Schutz: the agents are merely puppets as the scene is already set. It is for this reason that I think MRM makes a brilliant point in suggesting that the power-games are much more pronounced, perhaps also more subtle, when a field (as in this case the idea and interest called Europe) is under construction. Here is a struggle to consolidate the 'social' (as the field) so that equilibrium (normalcy) again can be re-assumed.

When I use terms as equilibrium or homeostasis in characterising the normalcy of the field, many Bourdieu-advocats are likely to react as they see a Parsonian flag being hissed on their turf. But in system theory, homeostasis and equilibrium just express the tendency of a field to restore its

original position after a rupture of one kind or the other. And it seems to me that this is exactly what is at stake in Bourdieu's theory; hence, the control over its constituent agents. It is true that in the case of Bourdieu, the system (the field) is 'a place of struggle for dominant visions and divisions' where semantic codes act as 'consecration mechanisms' in constructing the particular logic of the field. Because of such code-system (as forms of capital and capital-accumulation), agents translate issues of the external world into the specific code (of the system). This is, in the vision of MRM, what is happening in the battle of Europe. Its legal imperatives are essential in 'stabilizing' and 'balancing' the on-going battles between states, markets and professional interests. The settling of the legal field is the key to the further operation of Europe – hence, it is here we find its 'structured centre of gravity'. Once the centre of gravity is in place, the system (the field) can assume normal operations.

From within the system theoretic view of Niklas Luhmann, himself a trained jurist, Bourdieu's approach applied to the legal field appears as a yet not fully developed system theory (Luhmann 1993). The reason is that Bourdieu and his soldiers operate with an equilibrium theory of balancing power so that 'order' is achieved. The late Luhmann advanced a communicative theory of the legal system where the crux of operation lied in the relation between the system and its environments; in the extent to which the legal codes could 'operate' in a hostile environment by translating signals into its binary code of legal/non—legal, then law assumed power. But Luhmann's theory is free of agents and

social interests; such 'freedom' allows very different interests to operate under the power of law; if you try to curb law (as the field) and make it subservient to social interests, then law will soon loose its imperative power; other 'systems' will take control. My preference for Luhmann's sociological theory of the law to that of Bourdieu's, albeit the many splendid articles in this number of *Retfærd*, is the juridical pathos inherent in Luhmann's work. He was after all trained as a lawyer, and his system theory has always appeared to me as a generalized theory of Hans Kelsen's theory of law as a 'system' of interlocked regulations. Kelsen's and Luhmann's respective theories of the legal system have a degree of freedom and contingency vis-à-vis political power. Indeed, these theories possess revolutionary pathos suspiciously absent from Bourdieu's theory which is very good at explaining conservative powers: why things are they way they are; not how things could be different!

Strange as it may appear to those who consecrate Bourdieu-capital forms and believe in the construction of a social field with antagonistic positions as a good way to do sociology of this and that, the declared mission to seek 'ruptures' with both common sense positions and with the categories of the ruling experts has epistemic consequences, not the least for the sociologists themselves. Sociologists must now find legitimacy rules for their own discourse within the discourse itself; they must look for immanent validity of their social constructions. This can be done in two ways: (1) a weak version of epistemic validation relies on the premise that the rupturing field is a merely heuristic device

in doing research, and that no claims are being made as to its ontological status. In this sense, the field merely has the status of an 'ideal type' that helps the researcher to find 'meaning' in a complex world. (2) A stronger version wouldn't settle with such 'nominalistic' strategies, but claim that the field is not merely a construction, but 'correspond' to something out there! Also a correspondence theory of truth assumes a weak and a strong version: a weak version merely states a correspondence between the (purified) statements of science and the more diffused statements of common sense. But then there is no rupture with the world of common sense, but rather a line of continuity and refinements (enlightenment). A strong correspondence theory of truth takes possession of the world, and makes itself into its sovereign master: the field 'is'. A God-like observer need merely issue imperatives as to Being!

In the history of legal thought, theories of Sovereign Powers as far back as to Jean Bodin (1530 – 1596) have been struggling with 'unbound powers': are we in need of a Sovereign, unbound by law, in the construction of legal power; or are the Sovereign himself (it was always a male) a legal construction? The 'ruptures' of Sovereign Power can appear both as a threat and emancipation, depending upon what legal theory one subscribes to. To ordinary liberals, unbound powers are inherently threatening, and need to be kept under (legal) control: law is above power, and power is legitimate only in the extent to which it is exercised as the rule of law. However, to non-liberals such as the present Bush-regime in Washington, unbound powers present a possibility for the rulers to break

legal chains so that they can perform freely – either to the good of mankind, or to its disaster.

Ruptures in legal thought thus have a fascinating history, but how justify ruptures in sociological thought? Will such ruptures assist the sociologists to take command of sovereign power, and assist the world in its further evolving? But such 'absolute freedom' requires a break with the draining conservatism inherent in Bourdieu's field theory to assume homeostasis; and allow the old elites once again to take power! Hence, I see a very unhappy relation between the epistemic postulate of 'double ruptures' and the ontological necessity of a field in constant reproduction of its own forms. The declaration of the necessity of ruptures is merely a heuristic device in the construction of scientific theory; in the real world out there, ruptures are out-lawed! Bourdieu himself had difficulties accounting for his own 'rupture' as a world sociologist, given his modest social origin. Deviations do not have much value in the frozen optics of Bourdieu's theory. And a theory without deviation and ruptures runs an immanent risk of implosion for the reason that it is not well-adapted to changing environments.

If I can locate so many epistemic difficulties in Bourdieu's construction of a field with antagonistic position as a ground figure of general sociology, why is it that I still recommend students to read it seriously and seek to apply it empirically? I think that the value of Bourdieu's theory resides in its pedagogical strength: it is quite easy to grasp; the idea of the field helps young sociologist to see 'wholes' and not just separate parts; the field provides

'objective positions' which one can use as a platform to plot where people are located in a social matrix; and it is always of value to see what such an application of the field theory can result in; it may result in some very informative findings whose empirical value will have to be discussed from case to case. But perhaps most important, Bourdieu's theory of the field and of forms of capital-accumulation gives students in sociology a disciplinary identity.

It is precisely in this empirical (and contingent) sense, that I find the application of Bourdieu to the field of an emergent Europe as a social construction with inherently conservative features so appealing. MRM's text, a programmatic declaration of the superiority of Bourdieu's structural field-theory, is so brilliant and persuasive, so that I have to work hard to 'deconstruct' its claim to sociological sovereignty. A legally informed sociology needs to take cognizance of the power of legal thought to 'disrupt', if necessary. I have already referred to Hammerslev's article on the case of Bulgaria as largely preserving its legal elites, even if apparently the Americans have been hard working to disrupt such continuity. One could also ask the contrafactual question: if Europe had been better consolidated as a 'legal power' in its multiplied forms (human right, environment, market law), would it have had a stronger impact on the formation of post-revolutionary legal powers in Bulgaria?

As to the study of the reproduction of legal elites in Sweden, and their strategies to strengthen control through legal education abroad, I cannot rule out that such reproduction occurs. On the other hand, I am not at all convinced by the empirical

studies performed by my Swedish colleagues here. These studies, including the correspondence analysis in the spirit of Bourdieu, would gain a lot from ordinary common sense empirical reasoning. That the old law faculties at Uppsala and Lund (and later also Stockholm University) cater to a traditional legal career and recruitment pattern (judges and law administrators) is certainly true. Thus one is likely to find the traditional 'legal class' congregating at these faculties. Climbing to a legal top position is probably much facilitated by proper social origin and the right circle of friends – hence the symbol value of the old law faculties. The arguments of Börjeson & Broady are that such climbing now gets a boost if the students also have some foreign credentials, e.g. that they have studied law abroad for a year or so. They also say that those students who go abroad as exchange students on the whole have a more privileged social background; hence, they imply that transnational investments pay off.

My empirical conundrum lies in the fact that their correspondence analysis is unable to isolate causal factors, especially when viewed in a longer time-span. The method of correspondence analysis can at most 'measure' the correspondence of two variables along a spatial axel in a fixed time-span; it cannot study dynamic processes, necessary for establishing a causal nexus. If I were a student in law these days and could also foresee my prospective career, I would see to it to get through my studies at Uppsala or Lund (or why not Umeå) as quickly as possible in order to get a second degree somewhere else; at another faculty (economics!) or else at a foreign university.

I am not sure if I then would be a 'free mover' or an 'exchange student' in the vocabulary used in this text – nevertheless I am sure that my prospective career will be greatly enhanced. Stuck in law these days in Sweden does not seem to be a very ~~lucrative or exciting career prospect.~~ The problem with Börjesson's and Broady's study is that we have no information where the privileged or less privileged law students are heading – we only have data of their social origin. Law faculties no longer gather 'the best and the brightest', as they now go to medicine and perhaps even to social science. Elite capital can, under certain conditions, depreciate in value!

For that matter, Sweden seems to me now to be that country in Europe where the legal elite has been suspiciously absolved from power for quite some time now! Could it be that the declaration of the classic Social-Democrats (Arthur Engberg/Östen Undén) to crush the power of the jurists in order for them to ascend to political power actually has succeeded? Or is the absence of jurists from political power a result of an increasing feminization of law students in the case of Sweden? When women invade established professions, then their power also risk implosion from the inside. But the gender question is not really dealt with in this study (or in any of the other studies); it is only ephemerally mentioned. Why is that?

Already Alexis de Tocqueville in his journey to America observed how the role of the jurists in the making of the new democracy seemed a substitute for the noble classes in the old world. His arguments were that new democracies had need for some stabilizing forces (or 'fields')

which themselves were not democratic, but 'elitistic' in modes of selection. Toqueville's observations have become the platform for a rich number of historical-sociological studies of the legal profession in various countries with regard to its relation to political power (Aubert 1976; Abel & Lewis (eds.) 1989). These studies observe the relation between legal and political power as a contingent factor with variations between countries. I wish to conclude with a recommendation to the Bourdieu-advocates in this issue of *Retfærd*, that they stay closer to the findings of earlier historical studies in this regard.

PS. I was asked to give some critical comments on Bourdieu and law, and I took this task literally. In so doing, my appreciation of a new approach to the study of the legal profession came to suffer. This is a pity, as I believe – with MRM and the late Vilhelm Aubert – that the power of jurists increases considerably in time of social change. Since we live under such conditions, jurists (and other professional experts as well) are called upon to standardize and normalize social and material life. I can only hope for that this issue of *Retfærd* will stimulate a new generation of social scientists to study the inner and outer life of powerful professions.

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