25th IVR World Congress

LAW SCIENCE AND TECHNOLOGY

Frankfurt am Main

15–20 August 2011

Paper Series

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Jeffrey Alexander's Theory of the
Civil Sphere Between Philosophy
and Sociology of Law

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Jeffrey Alexander's Theory of the Civil Sphere Between Philosophy and Sociology of Law

Abstract: Alexander's theory of the civil sphere can be placed in the context of development of sociology of law. However, Alexander draws not so much on sociological theories but rather on the approaches of philosophy of law, particularly the ideas of Fuller, Dworkin and Habermas. The civil sphere is presented by Alexander as the embodiment of Dworkin's principal integrity. Locating law within civil morality Alexander reveals the similarity of his viewpoint to Dworkin's position. Drawing on Fuller's works Alexander singles out the procedural foundations of the democratic order. At the same time for Alexander the source of morality of law is not the legal system itself but a certain level of civil solidarity. Like Habermas, Alexander emphasizes the culturally embedded character of the legal norms. Alexander shares Habermas's understanding of law as a regulative mechanism affecting all spheres of social life. However, Habermas is more sensitive to the danger of colonization of law by the imperatives of the economic and political subsystems. Alexander's approach can be contrasted with Luhmann's sociological theory of law. Alexander concentrates on interrelation and mutual penetration of the civil sphere and law while Luhmann regards law as an autonomous system following its own logic. While Alexander claims that his theory is rooted both in sociology and philosophy of law in fact his approach is closer to normative philosophy.

Keywords: Jeffrey Alexander, civil sphere, law, legal norms, solidarity, democracy

Introduction

In contemporary sociology of law the contribution of Talkott Parsons to this field of research is often emphasized.[1] In Parsons's works a sociological approach to law was formulated which differed from sociological jurisprudence. His interest to the legal sphere was stimulated by his interaction with Roscoe Pound in the 1930s and with Lon Fuller in the 1960s. But the decisive role in formation of Parsons's approach was played by the classical traditions of European sociology of law. First of all Parsons synthesized the sociological theories of Durkheim and Weber.

There was a growth of interest in Parsons's ideas in American sociology in the 1980s when neo-functionalism as a new sociological paradigm emerged. However, this approach was at first underrepresented in the sphere of sociology of law. Neo-functionalists dealt mainly with the problems of political sociology, economic sociology, sociology of

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[1] Mathey Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, 2008; A. Javier Trevino, Introduction, in: *Talcott Parsons on Law and the Legal System,* ed. A. Trevino, 2008, 1– 36.

professions and so on. Thus Jeffrey Alexander first worked out a new approach in cultural sociology which went beyond neo-functionalism and only after that he turned to the problematic of sociology of law.

In the 1990s Alexander often referred to insufficiency of neo-functionalism since that approach had already played its role in rehabilitation and reconstruction of Parsons's theory. During that period Alexander started to work out his theory of the civil sphere. However, he remained 'rooted in Parsons's theoretical concerns'.[2] According to Alexander, an important contribution to macro-sociology that was made by Parsons was the elaboration of the concept of 'societal community'. Nevertheless, Parsons's ideas had to be complemented by other theoretical approaches, including those of micro-sociology such as ethnomethodology. But in his discussion of the issues of sociology of law Alexander draws mainly on other theoretical sources, sociological and philosophical.

I. The Theory of the Civil Sphere

Alexander's theory of the civil sphere is based on different perspectives in philosophy and sociological theory. In terms of philosophy Alexander refers to 'post-Marxist, neo-Kantian democratic idealism of Habermas'.[3] He also mentions Foucault's critique of the Enlightenment rationalism. But, unlike Foucault, Alexander believes that knowledge can be separated from power and such a separation leaves open a possibility for critical thinking and a more just social order.

In the sphere of sociological theory Alexander follows 'the often suppressed, and almost always neglected, democratic thread in Durkheim, Weber and Parsons'[4] which is complemented by the Marxian idea of contradictions within the civil sphere. On the whole Alexander emphasizes his connection with the classical sociological tradition as well as his desire to overcome some shortcomings of the classical theories.

Alexander defines the civil sphere as 'a social sphere or field organized around a particular kind of solidarity, one whose members are symbolically represented as independent and self-motivating persons individually responsible for their actions, yet also as actors who feel themselves, at the same time, bound by collective obligations to all the other individuals who compose this sphere'.[5] Thus Alexander proposes to consider the civil sphere as an

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[2] Peter Kivisto, In Search of the Social Space for Solidarity and Justice: Review Essay, *Thesis Eleven* 91 (2007), 110.
[3] JeffreyAlexander, The Long and Winding Road: Civil Repair of Intimate Injustice, *Sociological Theory* 19 (2001), 371.
[4] Alexander (note 3), 372.
[5] Jeffrey Alexander, Theorizing the "Modes of Incorporation": Assimilation, Hyphenation and Multiculturalism

analytically independent social sphere which 'articulates a distinctive cultural discourse via specific institutional activities and a specific solidary logic'.[6]

The structure of the civil sphere is formed by discursive and institutional frameworks. The former is represented by the democratic discourse which reveals the meaning of citizenship, the nature of democratic society and the characteristics of its opponents. The distinction between members of the civil sphere and outsiders is made on the basis of the universalistic values. Thus the democratic discourse is characterized by the existence of a binary code. The 'otherness' of outsiders is constructed in the terms of civil incompetence and their exclusion is seen as a means of strengthening the existing order and defense of the civil sphere.

The institutional level of the civil sphere includes public opinion, elections, political parties and new social movements. The main means of influence of public opinion is persuasion.[7] The efficiency of elections, political parties and social movements in maintaining the boundaries of the civil sphere is achieved by the use of law. Thus civil criteria can enter into other social institutions, but Alexander emphasizes that preservation of the civil sphere requires continuous collective efforts.

On the whole Alexander considers the civil sphere in a society which is characterized by a high degree of social differentiation. Apparently he shares the ideas of theorists of social differentiation – from Durkheim to Parsons – on interrelation between structural differentiation and civil emancipation.[8] In Alexander's analytical model each of the relatively autonomous social spheres presumably possesses its own criterion of justice, set of values and membership criteria. Competition between them is possible in the conditions of differentiation and plurality. The asymmetrical character of relations between different spheres presupposes the way of establishing preference for a certain standard of justice. The priority of the civil sphere over other social spheres is justified on the basis of the dichotomy 'sacral/profane' which is characteristic for the 'strong program' of cultural sociology.

According to Alexander, the civil sphere embodies the principles of equality and justice while various forms of injustice emerge in other social spheres. As a result the problem of maintaining the boundaries of the civil sphere and opposing the influence of economic and political structures is constantly reproduced. One of the aims of the civil discourse is to reveal the legitimacy or illegitimacy of inequality in other social spheres. The degree of influence of

as Varieties of Civil Participation, *Sociological Theory* 19 (2001), 239.
[6] Giuseppe Sciortino, Bringing Solidarity back in: Review Essay, *European Journal of Social Theory* 10 (2007), 563.
[7] Jeffrey Alexander, *The Civil Sphere,* 2006, 151.
[8] Sciortino (note 6), 569.

the civil sphere on the political and economic sub-systems largely depends on the activities of social movements practicing some form of 'civil repair'.

As Alexander argues, social movements are capable of transforming and enlarging the civil sphere. However, they should be capable to prove before the public opinion that their values are compatible with the universalist values of the civil sphere. Social movements can initiate changes but their implementation requires certain social institutions like the media, elections and the judicial system. In this context Alexander discusses the problematic of sociology of law.

II. The Role of Law in the Civil Sphere

In Alexander's view, the most influential legal theories 'have tended to bracket out the law's moral and civil role'.[9] This was characteristic for Hans Kelsen and representatives of realism in American jurisprudence. On the other hand, Alexander rejects the approach of Critical Legal Studies that regards law as an instrument of power. According to Alexander, all these different and often antagonistic traditions commonly ignore 'the cultural dimension of democratic law'.[10] However, this dimension of law has been emphasized in the works of Ronald Dworkin.

The conceptual program offered by Dworkin is based on the idea of 'law as integrity'.[11] According to Dworkin, law includes not only norms but also directives aimed at common good and principles which motivate decision making. Democratic law presupposes interaction of these principles and the unity of principles and actions. Dworkin connects law with morality and regards the history of law as realization of the principles of justice. Like the followers of the doctrine of natural law, Dworkin admits that the source of obligation to obey the law is the moral foundations of the legal system. However, he believes that these foundations are not some abstract ideal standards but concrete principles of political morality which are characteristic for a certain society.[12]

In Alexander's theory the civil sphere is the embodiment of Dworkin's principal integrity. It is not the judge or court as institution but the autonomous social sphere that concretizes the meaning of law or precedent. Alexander emphasizes the cultural bases of legal norms, their connection with civil values and the need to draw on the democratic discourse of

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[9] Alexander (note 7), 157.
[10] Alexander (note 7), 159.
[11] Ronald M. Dworkin, *Law's Empire*, 1986.
[12] Dworkin (note 11), 96-102.

the civil sphere. He shares the viewpoint of Habermas who regards law as one of the main forms of symbolic representation of civil solidarity.[13]

According to Alexander, legal norms are embedded in the binary logic of the civil sphere. As a result, law not only can justify social exclusion but also can serve as an instrument of correction of the previous exclusion. Alexander admits that the activities of excluded social groups aimed at changing the cultural classifications are formally illegal.[14] However, due to changing public opinion and the force of democratic discourse the conditions for 'civil repair' can emerge. The fact that law is localized within civil solidarity also demonstrates the similarity of Alexander's position with Dworkin's theory. Although Alexander accepts that in a secularized pluralistic society law is largely separated from morality, he believes that the theory of differentiated civil sphere allows us to reveal the moral limitations on the functioning of law.

Alexander argues that in a democratic society law defends both the individual and the collective interests. Law acts as a mechanism which forms universalist solidarity and clarifies its application in specific cases.[15] Legal mechanisms can influence different social spheres, for example, preventing family violence or regulating work conflicts. The degree of interference of legal institutions into conflict situations is largely defined by the boundary between the civil sphere and other social spheres. As Alexander believes, the more differentiated and autonomous the civil sphere becomes the less rigid is its boundary with other spheres. This allows for carrying out 'civil repair' including the widening of rights of the social groups that had previously been discriminated.

In Alexander's view, democratic constitution represents the clearest example of legal regulation of the relationships between civil society and other social spheres. 'In democratic societies, constitutions aim to regulate governing and lawmaking in such a manner that they contribute to solidarity of a civil kind.[16] Like in most other cases, Alexander refers to the American example and mentions the fifth amendment to the U.S. constitution.

Drawing on the works of Lon Fuller Alexander singles out the procedural foundations of a democratic legal order. Fuller's position is close to the functionalist understanding of law as social control. Fuller devoted special attention to working out the prescriptions of how to make law more efficient.[17] At the same time, according to Fuller, law contains the moral core which is deduced from the logic of the legal system.

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[13] Sciortino (note 6), 565.
[14] Alexander (note 7), 190.
[15] Alexander (note 7), 153.
[16] Alexander (note 7), 164.
[17] Lon L. Fuller, *The Morality of Law*, 1964.

For Alexander the source of the inner morality of law is a certain level of civil solidarity. In a democratic society law is subject to control by the civil sphere. As Alexander notes, the relation between legal norms and social facts 'is a matter for civil interpretation. It is not a matter for scientific determination or of simple assertion by the state. Only after being interpreted inside the civil sphere can law be forcefully applied'.[18]

III. Some Difficulties of Alexander's Approach

Alexander is aware that his description of law corresponds only to the realities of a genuinely democratic society. In other social conditions legal institutions are used systematically by the members of the ruling elite who pursue their own interests. This possibility has been discussed many times by representatives of the Critical Legal Studies. From the viewpoint of that approach the idea of equality before the law has been questioned. It has been argued that the legal institutions reflect and reinforce the existing economic, political and social inequality. However, Alexander regards this approach as one-sided, at least in relation to American society. On the other hand, he admits that in American history the principle of the rule of law has also been used as a façade for economic exploitation and racial segregation. The main example of this, in his view, was the factual exclusion of African Americans from political life of the Southern states after the Civil War which was accompanied by following the formal legal procedures.[19]

It should be noted that Alexander's theory of the civil sphere is based first of all on analysis of the social processes in American society. However, its applicability in other socio-cultural contexts can be questioned. This theory presupposes a high degree of autonomy of the civil sphere in relation to economic and political institutions but it remains unclear how this autonomy can be guaranteed. Alexander presents the influence of the civil sphere on other social spheres as always positive while he regards the influence in the opposite direction as largely negative. It is also noteworthy that for Alexander the civil sphere is thoroughly secularized although this is not actually the case in American society. It has been argued that Alexander does not pay sufficient attention to the challenge of religious fundamentalism to the secular institutions and ideologies of the civil sphere.[20]

Alexander also discusses the civil sphere in the conditions of globalization. As he claims, the main actors at the international arena are still the nation-states and international law

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[18] Alexander (note 7), 185.
[19] Alexander (note 7), 188.
[20] Bryan S. Turner, Civility, Civil Sphere, and Citizenship: Solidarity versus the Enclave Society, *Citizenship Studies* 12 (2008), 182-183.

protects national sovereignty rather than human rights. At the global level civil society does not possess such institutions as independent court and elections which allow the public opinion to control the power of the state.[21] At the same time he believes that world public opinion represented in the media is exerting increasing influence on the political institutions. Thus there is still a possibility of creating a global civil sphere. On the other hand, critics of Alexander's theory refer to the existence of various ethnic and religious enclaves with deep cultural differences even on the level of particular states.[22]

IV. Alexander's Theory of the Civil Sphere and Contemporary Sociology of Law

The theory of the civil sphere has been characterized as an important contribution to contemporary sociology of law.[23] However, Alexander's discussion of the legal aspects of the civil sphere draws not so much on sociological theories of law but rather on ideas of legal philosophers like Dworkin and Fuller. At the same time Alexander's approach has much in common with the socio-legal theory of Juergen Habermas which combines different perspectives of philosophy and sociology of law.[24]

Both Habermas and Alexander are seeking to create new versions of critical theory which transcend functionalism, on the one hand, and the radical versions of critical theory, for example, represented by Foucault, on the other hand. Following the Durkheimian tradition, Habermas and Alexander discuss the moral foundations of the legal order. Like Habermas, Alexander emphasizes the culturally embedded character of the legal norms. In Habermas's viewpoint, the legitimacy of the legal norms is guaranteed only by democratic procedures. According to Alexander, this legitimacy is guaranteed by reflection in the law of the universalist civil values and the principles of justice and equality. Both Habermas and Alexander understand law as an important regulative mechanism that influences all spheres of social life. But, unlike Alexander, Habermas is aware of the danger of colonization of the lifeworld by the imperatives of the economic and political subsystems.

Alexander's theory can also be compared with Luhmann's sociology of law since both scholars drew on the functionalist tradition, although they developed it in different directions. While Luhmann has worked out a sociological theory of law as an autopoietic system,[25] Alexander has relied on sociological theory as well as philosophy of law. Luhmann

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[21] Jeffrey Alexander, Globalization as Collective Representation: The New Dream of a Cosmopolitan Civil Sphere, in: *Frontiers of Globalization. Theoretical and Methodological Approaches,* ed. I. Rossi, 2007, 375.
[22] Turner (note 20), 180.
[23] Sciortino (note 6), 565.
[24] Juergen Habermas, *Between Facts and Norms*, 1996.
[25] Niklas Luhmann, *Law as Social System,* 2004.

emphasizes the autonomy of the legal subsystem in relation to other subsystems. Alexander considers the interaction of legal institutions and the civil sphere and discusses their mutual influence and interpenetration. For Alexander civil morality forms the foundation of the legal order. In contrast to this, Luhmann regards modern law as completely free from the influence of moral norms and following its own inner logic.

An original contribution to sociology of law has been offered by Bourdieu[26] in his theory of the juridical field. This sociologist analyzes the formation and development of the juridical field in a broad social context. His approach is more empirically oriented than most other perspectives in today's sociology of law. Bourdieu focuses on interaction in the legal sphere between groups possessing different interests and resources. He considers the impact of other social fields, particularly the economic and the political, on the juridical field. Luhmann, Habermas and Alexander have analyzed mostly the western societies characterized by a high degree of functional differentiation between the political and the legal subsystems. Bourdieu's theory can be used for the study of legal institutions under different political regimes, democratic and non-democratic. Apparently Bourdieu has offered a more radical version of critical theory in sociology of law than Alexander's version.

On the whole, Alexander's theory of the civil sphere occupies an intermediate position between neofunctionalism and critical theory. He has been largely influenced by the theories of philosophy of law. In fact Alexander's approach is closer to philosophy of law represented by Dworkin and Fuller than to sociology of law in the versions of Luhmann or Bourdieu. Today Alexander is often characterized as the founder of a school of cultural sociology[27] rather than a new approach in sociology of law. However, he is continuing to develop his theory of the civil sphere which can stimulate further discussions of the relationship between different approaches in contemporary sociology and philosophy of law.

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[26] Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, *The Hastings Law Journal* 38 (1987), 814–853.
[27] Mustafa Emirbayer, The Alexander School of Cultural Sociology, *Thesis Eleven* 79 (2004), 5-15.