“Law as the Study of Norms” – Foundational Subjects and Interdisciplinarity in Germany and the United States

VB verfassungsblog.de/law-as-the-study-of-norms-foundational-subjects-and-interdisciplinarity-in-germany-and-the-united-states-2/

Ralf Michaels

This article belongs to the debate » Perspektiven der Rechtswissenschaft
19 February 2014

The German Council of Science and Humanities’ report on “Prospects of Legal Scholarship in Germany. Current Situation, Analyses, Recommendations” has sparked a lively debate amongst legal scholars in Germany on how to adapt legal education and legal scholarship to the challenges of increasing internationalization of the law. The first contribution to our symposium on Prospects of Legal Scholarship takes a look at the state of interdisciplinary studies at German and US-American law faculties and compares the Wissenschaft’s report to the recently issued report by the American Bar Association.

In my view, the Wissenschaftsrat’s report hits almost all the right notes. One could wish for it to be bolder. But that would come with its own risks.

This is true in particular for one of its core points—the role of foundational subjects and of interdisciplinarity. At first, the report appears strangely ambivalent. On the one hand, the strengthening of foundational subjects and interdisciplinarity mean a turnaround from reforms in the 1980s. Legal scholarship and education should include “historical, philosophical, sociological, political, psychological, economic and criminological foundations of law.” On the other hand, the role given to such approaches and the underlying disciplines is clearly only a subordinate one: other subjects are relevant only insofar as they help to understand legal doctrine. Independent analysis or critique of law apparently has no place, it seems, in law departments.

This subordinate role for interdisciplinarity results from what looks at first like a rather narrow understanding of law, and of legal research and education, that emerges from the report. We learn that “the discipline of law is concerned with the study of norms,” that law is a “hermeneutic discipline”, and that the task of law as a discipline is “to understand and analyse the body of legal norms.” Is this all? Is law really just the interpretation of texts? What about unwritten law? Are we not also interested in the impact that the law has on society? The role of institutions for economic progress and political stability? The ideological tendencies of judges? The correlation between prison rates and crime rates? Etc.

Whoever criticizes the implied hierarchy between doctrine and other subjects may want to look toe the United States for guidance. Here, faith in legal doctrine as a sufficiently exact tool to deal with social issues has been destroyed. Much of the ensuing gap has been filled with other disciplines: economics, political science, neuroscience, literature, etc. Economic analysis has since become a standard language of talking about the law, but interdisciplinarity goes beyond this: regularly workshop presentations deal with legal history, political science, ethics, anthropological field research, etc. Many law schools even have non-lawyers on their faculties. Much of the best German scholarship would be laughed off as "merely doctrinal" for lack of interdisciplinarity, because mere doctrine is left to practitioners and their publications. The great freedom and variety in legal scholarships sometimes yields obscure results (especially from a German perspective), but it also creates the most exciting interdisciplinary scholarship.

Scholarship can do what it wants, but students must of course be taught doctrine. (Except at Yale.) However, the strong interdisciplinary focus has long had a beneficial impact on legal education, too. At least at the higher ranked schools—i.e. those whose graduates tend to end up in the most influential positions—legal education has long been a mix of strict doctrine and exploration of a broader political and societal framework. This means that foundational and other subjects are used to elucidate legal doctrine, as the Wissenschaftsrat suggests, but the influence goes the other way, too: economics is used to illustrate the functioning of tort law, but the role of tort law is also analyzed as a way to understand the economics of society. For law graduates to be not just good lawyers but also good citizens, we think an education must include social sciences and humanities, not as subordinate to doctrine but as essential parts.

Or so it was before the financial crisis. Today, law firms can no longer collect outrageous fees, and business volume has gone down. Consequently, they hire fewer law school graduates, and those they do hire they pay less. This means that law school graduates have difficulty repaying their debts from law school. And not surprisingly, law students now rebel against tuition of more than $ 50,000 per year; and they (and their future employers) are so anxious about job opportunities that they insist everything they learn is directly relevant to their job search and/or their job performance. We have a veritable law school crisis: lower schools can no longer recruit students; better schools are required to rethink their identity.

Into this situation comes a "Task Force on the Future of Legal Education" established by the American Bar Association, with recommendations for reform. Putting this document side by side with the Wissenschaftsrat's recommendations one would hardly believe that both deal with the same things. The triad of ideals for the Wissenschaftsrat—, foundational subjects, interdisciplinarity, internationality—is not mentioned at all. But it seems quite clear that the Task Force would not cherish it much. Although the report recognizes a tension between legal education as a public and as a private good, it largely gives short thrift to the public good aspect: law students are consumers, legal education is a private good they purchase, and law schools are too expensive and too insensitive needs of their customers. Indeed—if

all that matters in legal education is the private benefit to the student, students should arguably not spend time learning about the role of law in society that they could use to acquire more competencies sought after by potential employers.

In such a consumer-oriented law school model, the role of scholarship must obviously be restricted. Not surprisingly, the report refers approvingly to the critique that "law schools devote excessive resources to scholarship". The idea that "scholarship is an essential aspect of a faculty's role" as part of the conservative culture that stands in the way of necessary changes. Scholarship should count for less in tenure decisions. What is more surprising, perhaps, is that even where the report lists possible benefits from scholarship, it cannot think of anything other than "developing more intellectually competent lawyers and … improving law as a system of legal ordering." In this consumer model of legal education, the idea that scholarship could have independent value seems preposterous.

It may look merely ironic that US legal education should be asked to drop its strong interdisciplinarity at the exact moment when this is proposed as the way forward for other countries. But the contrast points to two problems of the US law school model—and thereby highlights two attractive traits of German education.

A first crucial problem for US law schools is that they are largely financed privately. For a long time, this made law schools more independent, and richer, than their counterparts in Germany, Today, in this model, it becomes harder and harder to justify spending significant resources on anything other than the recruitment of better students and on their ability to land well-paying jobs. As a consequence, legal scholarship ends up as subordinate to legal teaching, in the same way in which fundamental subjects and interdisciplinarity are subordinate to doctrine in German universities.

This alone would not need to be bad—many would want scholars to attune their scholarship more closely to practical needs. (And, truth be told, much scholarship today is.) But this is not so easy because of a second problem. The consumer model of legal education requires, ultimately, that law students are taught nothing other than skills. Doctrine itself has only instrumental value for students, but importantly, "mere doctrine" has no scholarly value for academics. The consequence for scholarship may be dire: interdisciplinary scholarship may decline, but doctrinal scholarship cannot take its place because academic understanding of doctrine has been thoroughly discarded. In the end, therefore, scholarship of any kind may be viewed as useless. Practitioners and journalists have long complained about the uselessness of law review articles to their work. (In reality, judges still use them, but that could change.) Law schools may, finally, turn into pure trade schools.

In Germany, this is unlikely to happen. Public financing of law schools guarantees that the public good aspect of legal education can be maintained. And the connection between foundational subjects and interdisciplinarity with legal doctrine, as proposed by the Wissenschaftsrat, makes it less likely that both will be separated in the same way as in the

United States. Further, the continued acceptance of doctrine as a subject worthy of scholarly attention means not only that scholars will continue to be able to produce scholarship; it also means that the quality of this scholarship will remain at its high level.

Globally, German law faculties will have a hard time achieving the same quality of interdisciplinarity as US law schools with their faculty who have PhDs in other subjects than law, at least in the social sciences. By contrast, German doctrinal scholarship will always be superior to that of other countries, and it will be even more so with more emphasis on foundational subjects and interdisciplinarity. Especially at a time when US law schools are forced to rediscover the value of legal doctrine, German law schools should not downplay the historic advantage they have in excelling at legal doctrine. In subordinating other subjects to doctrine, the Wissenschaftsrat seems to recognize this.

Each country's educational system is tied to that country's culture and history. The Wissenschaftsrat wisely builds on Germany's culture; by expanding the scope, it can help improve that culture. In the United States, the ABA report suggests that our culture of scholarship and education is untenable and must be, essentially, discarded. I hope they are wrong. But current developments undoubtedly hold warning lessons for other countries attracted to the US model.

SUGGESTED CITATION Michaels, Ralf: *"Law as the Study of Norms" – Foundational Subjects and Interdisciplinarity in Germany and the United States, VerfBlog,* 2014/2/19, https://verfassungsblog.de/law-as-the-study-of-norms-foundational-subjects-and-interdisciplinarity-in-germany-and-the-united-states-2/, DOI: 10.17176/20181005-171827-0 .

LICENSED UNDER CC BY NC ND