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Introduction to Legal Sociology in Switzerland

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ABSTRACT

The purpose of this text is to introduce Legal Sociology in Switzerland. In a first step, Legal Sociology is located as a discipline within legal science and its methodology is explained. In a second step, a case study exemplifies how legal sociology can be used to analyse the interrelationship between society, technology and the law with regard to the functioning of the specific form of direct democracy that exists in Switzerland and the constitutional safeguards that are in place to secure its prerequisites. Against the background of recent techno-economic developments in the media sector the question is how the use of artificial intelligence technologies by the Swiss Radio and Television Corporation (SRG) to personalise news reporting would relate to the public service broadcaster's constitutional duties. This question arises as a potential consequence of the formation of Admeira, a joint venture between SRG, Ringier (a media company) and Swisscom (the incumbent Swiss telecom company). Admeira allows SRG to benefit from Swisscom's large customer data volumes and broad experience in the use of targeting technologies.

KEY WORDS

Legal sociology, systems theory, political autonomy, personalisation, Admeira, public service broadcasting

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1. WHAT IS LEGAL SOCIOLOGY?

1.1 LOCATION OF THE DISCIPLINE

Legal Sociology, together with Legal History and Legal Philosophy, constitutes one of the foundations of the law as a discipline of scientific study. A common feature and particularity of these sub-disciplines of the law is a close relationship with a neighbouring discipline *outside* the legal realm. In the case of Legal Sociology this is obviously the relationship with sociology. According to Emile Durkheim, one of the discipline's founders, sociology is a science that studies social phenomena as *social facts*.¹ Durkheim understands sociology as a *positivistic science*. Positivism entails two things in this context: a particular view of social phenomena as objective data and a value-neutral way of looking at these phenomena.² Consequently, the purpose of sociology is to observe social facts as objective data in a value-neutral way. Such methodology contrasts with that of the law, which is a normative discipline. The law in general and legal doctrine in particular is preoccupied with the *form* of the law, that is, the systematic relationship between abstract principles from which decisions in concrete cases can logically be deduced. The particularity of legal language is its performative quality.³ Words in a statute or a contract, for example, do not merely describe a situation or narrate a story; they are supposed to have practical effects in the lives of individuals and within society.

Legal Sociology does not belong to the formally closed realm of legal doctrine nor does it merely describe legal facts in an objective way. This paradoxical location between the disciplines of law and sociology is mirrored in the various different names that are used to describe the field at issue; besides Legal Sociology, the terms Sociology of Law, Sociological Jurisprudence, Jurisprudential Sociology, Law and Society and Legal Realism are also frequently encountered in the academic literature. While most of these terms lack precise contours, Legal Sociology is used in this chapter to emphasise that we are dealing with a sub-field of the law rather than a sub-field of sociology. A legal sociologist is a jurist who is particularly interested in studying the law from an interdisciplinary perspective. Rather than formally closed and scientifically self-sufficient, the law is observed as a realm embedded within broader societal dynamics. This requires a temporary externalisation of the legal sociologist's observation perspective. On the other hand, a legal sociologist does not content himself with an external, sociological, observation and description of the law but is keen to re-import what has been learned back into the law in order to improve the law's workings.

The origins of the scientific study of law and society date back to the threshold of the 20th century when two lawyers, Eugen Ehrlich (in Europe) and Roscoe Pound (in

¹ Emile Durkheim, *The Rules of Sociological Method*, translated by W. D. Halls, edited and with a new introduction by Steven Lukes, New York: Free Press, 2013 (first published 1895 in French), at pp. 20-28.

² Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain*, Edinburgh UK: Edinburgh University Press, 1999, at p. 11.

³ John L. Austin, *How to Do Things with Words*, 2nd edn, Oxford UK: Clarendon Press, 1975 (first published 1962).

the United States), agreed that a formalist conception of the law, encapsulating it in a closed and self-sufficient realm of jurisprudence, should be rejected. To overcome legal formalism they invented Sociological Jurisprudence as a field of research that was more concerned with law in action than law in books, as Pound famously stated in 1910.⁴ They claimed that any scientific study of legal practice in general is a sub-domain of Sociology.⁵ Conceiving legal science as a sub-domain of Sociology, however, conceals the difference between “is” and “ought”. Whereas the statement that something “is” the case is a description of observed facts, the statement that something “ought” to be prescribes a normative end. Although it was some time ago that the pioneers were trying to resolve the paradox of a sociological analysis of the law, the distinction between description and prescription continues to be a methodological challenge for Legal Sociology.

1.2 METHOD

While Legal Sociology is not a sub-discipline of Sociology, it has, ever since its beginnings, been influenced by the writings of classic sociological theorists including Auguste Comte (1798-1857), Karl Marx (1818-1883), Emile Durkheim (1858-1917), Max Weber (1864-1920), Talcott Parsons (1902-1979), Niklas Luhmann (1927-1998) and Jürgen Habermas (born 1929), to mention just a few. A sociological perspective enables the legal sociologist to take into account social facts offering important information about the law’s causes and effects. Legal Sociology is thus an empirical science of the law, analysing its emergence and functioning. The approach is decidedly objectivist – aiming at a value-free observation and description of factual developments without letting normative preconceptions dictate the outcome. To better understand the operations and effects of the law, Legal Sociology builds on or develops *theories* offering perceptions of the social structure and the law’s function within a society of ever-growing complexity.

A theory is generally defined as an abstract scientific idea or model that is used to describe an extract from reality. Besides descriptions, a theory normally also provides for explanatory (causal) statements. A *social* theory, more specifically, aims at explaining social dynamics. To meet the ambitions of science, verification or falsification through empiric observation is required in addition. The purpose of using theory in the social sciences is primarily complexity management. A theory provides for a simplified model of the reality segment that the researcher is attempting to observe, describe and test. Without such simplification the observed would be overly complex and the observation would not be distinct from noise, making it unsuitable for drawing meaningful conclusions.

A theory thus enables a social scientist to make certain assumptions about the world and to build analyses, comparisons and predictions on this without being permanently required to take account of the world’s full complexity. Regarding the ways theories materialise, it is roughly possible to distinguish between inductive and deductive approaches. *Inductive* theories come about through the observation of a

⁴ Roscoe Pound, ‘Law in Books and Law in Action’ (1910) *American Law Review*, 44, pp. 12-36.

⁵ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, translation by Walter L. Moll, New Brunswick NJ: Transaction Publishers, 2002 (first published 1913 in German), at p. 25; Roscoe Pound, ‘The Scope and Purpose of Sociological Jurisprudence’ (1911) *Harvard Law Review*, 24 (8), pp. 591-619, at p. 594.

certain aspect of reality and a subsequent explanation that needs to be generalised and then empirically tested. *Deductive* theories, though, build on hypotheses that are designed by a theorist through abstract thinking. The persuasiveness of a hypothesis will be measured in relation to the results that its exposure to empiric verification or falsification produces.

As a rule, all types of social theories may find application in Legal Sociology. If several theories are simultaneously used, special attention must be paid to their compatibility. An even bigger methodological challenge for Legal Sociology is the mentioned distinction between “is” and “ought”. The question is how the knowledge that is gained within the descriptive context of social science can afterwards be transferred to the realm of legal practice, which is where normative conclusions are drawn and performative effects result. The way out of the paradox is to construct Legal Sociology as a two-step method of socio-legal analysis. The first step involves an empiric observation and description of real legal problems from the perspective of social science and social theory. While this is necessary to fully understand the social dimension of the legal problems at issue, a second step must follow aimed at a re-import of the gained insights back into the legal system. This second step requires a change of perspective from describing social facts to prescribing normative ends, which is essential if Legal Sociology wants to contribute to the law’s improvement.

2. INTERACTION BETWEEN LAW AND SOCIETY AND PREREQUISITES OF DIRECT DEMOCRACY IN SWITZERLAND

The political system in Switzerland is characterised by a specific form of direct democracy that exists within the framework of The Federal Constitution of the Swiss Confederation of 18 April 1999 (hereafter “the Constitution”). In what follows I will first analyse the autonomy of the political system in Switzerland from a sociological perspective. In a second step the societal preconditions of direct democracy in Switzerland will be identified. Third, I will elaborate on how the Constitution enlists mass media in general, and public service broadcasting in particular, to contribute to the effective functioning of democracy in Switzerland.

2.1 POLITICAL AUTONOMY IN SWITZERLAND

When I refer to political autonomy, something particular is in my mind: the understanding of politics as an autonomous sub-system of society in the sense of Niklas Luhmann’s theory of autopoietic social systems.⁶ Autonomy of politics then implies the system’s self-reproduction according to its own rules, that is, political rules (and not, for example, economic or religious). Luhmann conceives society as an *autopoietic system*, as something that is reproducing its elements out of its own elements.⁷ The elements of a social system are communications and not humans, or

⁶ Niklas Luhmann, *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme*, 7th edn, Opladen: VS Verlag für Sozialwissenschaften, 2005 (first published 1970), at pp. 194-223.

⁷ Niklas Luhmann, *Social Systems*, translated by John Bednarz with Dirk Baecker, Stanford Calif.: Stanford University Press, 1995 (first published 1984).

actions of humans, or other agents.⁸ The existence of a system implies a distinction between the system and its environment. Every system constitutes itself according to one specific difference, and everything that is not part of the system is in the environment. For the political system, for example, the juxtaposition of the values of “power” and “not power” is constitutive. Systems are operatively closed, which implies that for their reproduction they just monitor their own operations and exclude everything else. Within society, a number of sub-systems have differentiated. They differ from each other in the specific *function* that they fulfil within society. Politics is one of the social systems that Luhmann distinguishes in his writings – other sub-systems of society that he covers in his writings include the economy, science, art, religion, education, mass media and family.

The function of the political system consists in “providing the capacity that is required for assuring collectively binding decisions”.⁹ Although the political system is distinct from the legal system (whose function it is to generalise normative expectations), legislation and constitutions provide for important mechanisms of structural coupling between the two systems. Statutes are important for the law and for politics at the same time. In legislation, the law prescribes the form that statutes must have. Politics, on the other hand, needs legislation in order to implement political power. The legal system is internally structured through the distinction between the centre and the periphery.¹⁰ While courts are at the centre of the legal system, legislation (and contracts) are in its periphery, which is the contact zone between social systems. The periphery is thus the place where a democratic impulse given by the political system may trigger changes within the legal system. A constitution is another mechanism of structural coupling between the law and politics.¹¹ The constitution of a nation state has a double existence as a supreme text of legal authority and as a political foundation of society. A nation state constitution thus provides “political solutions for the problem of self-reference of the legal system and legal solutions for the problem of self-reference of the political system”.¹²

The democratic potential of a political system depends on the extent to which it is able to uphold its autopoiesis.¹³ The state is defined by Luhmann as the self-description of the political system. It is possible to observe the state’s operations from the perspective of society and from the perspective of interactions between citizens. From the perspective of society, a state is autopoietic as long as it is able to shape its self-reproduction autonomously both internally (i.e. in relation to the sub-systems of politics) and externally (i.e. in relation to the governmental and non-governmental entities in its environment). From the perspective of interactions, a state can enhance

⁸ Hugh Baxter, ‘Niklas Luhmann’s Theory of Autopoietic Legal Systems’ (2013) *Annual Review of Law and Social Science*, 9, pp. 167-184, at p. 176; Hans-Georg Moeller, *The Radical Luhmann*, New York: Columbia University Press, 2012, at pp. 19-24.

⁹ Niklas Luhmann, *The Reality of the Mass Media*, Stanford: Stanford University Press, 2000 (first published 1995), at p. 84 (translation by Christoph B. Graber).

¹⁰ Baxter, *supra* note 8, at p. 176.

¹¹ Niklas Luhmann, *Law as a Social System*, translated by Klaus Alex Ziegert, Oxford, New York: Oxford University Press, 2004 (first published 1993), at pp. 405-412.

¹² *Ibid.*, at p. 410.

¹³ Sandra Braman, ‘The Autopoietic State: Communication and Democratic Potential in the Net’ (1994) *Journal of the American Society of Information Science*, 45 (6), pp. 358-368, at p. 365.

its autopoiesis by maximising the conditions for citizen participation in the political process.¹⁴

Historically, the differentiation of politics as an autonomous social system developed in stages.¹⁵ In the terminology introduced by Jürgen Habermas, these stages can be described as “the bourgeois state”, “the bourgeois constitutional state” and “the democratic constitutional state”. Reconstructed within a framework of systems theory, these terms articulate self-descriptions of the political system at different junctures in the process of societal differentiation. In this sense, the bourgeois state describes an absolutist rule establishing “a sovereign state power with a monopoly on coercive force as the sole source of legal authority”.¹⁶ The bourgeois constitutional state describes a condition of advanced political differentiation enabling citizens to claim subjective public rights against the sovereign power before an independent authority.¹⁷ The division between executive and judicial powers leads to the taming of the administrative apparatus. The democratic constitutional state, finally, describes the condition of a fully differentiated political system with far-reaching inclusion of citizens in the reproduction of political communication. Within a democratically constituted order, citizens possess not only individual liberties which they can bring to the fore against the state but also the right to equally participate in the political discourse.¹⁸ The separation of power now manifests itself as an institutional differentiation of legislative, executive and judicial state functions. Political autonomy presupposes that decisions of governmental authorities are prepared, accompanied and checked as part of a competition between opinions “in the marketplace of ideas”. The market metaphor, particularly popular in the United States, was coined by Oliver Wendell Holmes, a famous justice of the US Supreme Court (and mastermind of the American tradition of Legal Realism). In a 1919 Dissenting Opinion, Justice Holmes wrote “that the ultimate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market”.¹⁹

In many existing constitutional democracies political participation is limited to the election of the parliament. In Switzerland, though, instruments of direct democracy have been broadened over several constitutional reforms in the course of time (a mandatory referendum on constitutional amendments has existed since 1848, a voluntary referendum on statutory amendments since 1874 and a popular initiative for the revision of the Constitution since 1891). When the right to vote and to be elected was extended to women in the Vote of the People of 7 February 1971, political equality was assured at federal level; at cantonal level this has been the case in all Cantons only since 1990.

¹⁴ Ibid., at p. 365.

¹⁵ Niklas Luhmann, ‘Staat und Politik’, in Niklas Luhmann (ed.), *Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft*, Opladen: Westdeutscher Verlag, 1987, pp. 74-103, at p. 80.

¹⁶ Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System: a Critique of Functionalist Reason*, translated by Thomas MacCarthy, Vol. 2, Cambridge: Polity Press, 2007 (first published 1981), at p. 358.

¹⁷ Ibid., at pp. 359-360.

¹⁸ Ibid., at pp. 360-361.

¹⁹ *Abrams v United States* (1919) 250 U.S. 616, Mr. Justice Holmes Dissenting, 630, available at <http://supreme.justia.com/cases/federal/us/250/616/case.html> (all online sources were accessed 25 October 2017).

2.2 PRECONDITIONS AND RESOURCES OF DIRECT DEMOCRACY

The model of direct democracy existing in Switzerland depends on societal preconditions which it cannot guarantee itself and on cultural resources that need to be renewed permanently. Among the societal preconditions, the following are the most important: acceptance of dissenting opinions and a spirit of compromise, tolerance towards other people, a sense of civic public spirit, a living civil society and plural societal structures. John Stuart Mill, one of the most influential political thinkers, considered the confrontation of dissenting opinions as one of the preconditions of social progress:

“It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar... Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.”²⁰

Immanuel Kant, the eminent philosopher of the enlightenment, coined the term “extended way of thinking” (erweiterte Denkungsart) to describe an individual’s capability to also consider a problem from the perspective of an adversary. In Kant’s words: “Through always impartially looking at my judgements from the perspective of others I hope to get a third point which is better than my previous one.”²¹

This capability to include the adversary’s perspective in one’s own considerations is a key precondition for rational discourse and any form of democratic politics. For the renewal of cultural resources, education is of primary importance. The frequent elections and votes on a wide range of political issues require knowledge about the institutions of a democracy and presuppose a minimum understanding of the most important financial, economic, environmental, cultural and social policy correlations. Citizens receive the education necessary for taking competent decisions about such challenging issues from a minimum set of public and mandatory offers from all education facilities. At the same time, Article 19 of the Constitution guarantees the right to an adequate and free primary school education as a fundamental right and Articles 61a to 68 of the Constitution provide for the concept of a high quality “Swiss Education Area” that is public, generally affordable and accessible, and extends to all levels of education. From an objective constitutional perspective, the Swiss system of extensive public education is supposed to provide for a type of civil and democratic education that will enable every citizen to form an independent opinion on the many issues that permanently need to be decided at the ballot box.

In Article 93, the Constitution recognises that radio and television have an important contribution to make to the functioning of democracy in Switzerland. Such a democracy-functional understanding of electronic mass media in Switzerland

²⁰ John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy*, edited by W.J. Ashley, 7th edn, London: Longmans, Green and Co., 1909 (first published 1848), 3rd book, 18th chapter.

²¹ Immanuel Kant as quoted in Jörg Paul Müller, *Die demokratische Verfassung*, 2nd edn, Zürich: Verlag NZZ, 2009, at p. 91 (translation by Christoph B. Graber).

corresponds with the case law of the European Court of Human Rights (ECtHR). Notwithstanding the significant rise of the Internet and social media in the recent past, the ECtHR emphasises the continuing importance of television as a mass medium with an “immediate and powerful effect” on the decision-making of the public in a democratic society.²² Accordingly, the duties of the Swiss radio and television system regarding “education”, “cultural development”, “free shaping of opinion” and “entertainment”, listed in Article 93(2) of the Constitution, need to be interpreted from a democracy-functional perspective. When implementing these four goals, radio and television have to pay attention to the “particularities of the country” and the “needs of the Cantons” and thus contribute to cohesion in Switzerland. As a means for reaching these goals, the principles of accurate presentation of facts and diversity of opinion are mentioned in Article 93(2) of the Constitution. These principles are justiciable and can be enforced, as a rule, against any radio and television broadcaster established in Switzerland. They are supposed to contribute to securing a generally accessible and diverse offering of the high quality information that people need to comply with their duties as citizens.

Hannah Arendt is one of those voices having most clearly and eloquently warned of the political dead ends and cultural confusions of modernity. Under the after-effects of National Socialism in Germany she asked in 1961:

“[I]f, the modern political lies are so big that they require a complete rearrangement of the whole factual texture – the making of another reality, as it were, into which they will fit without seam, crack, or fissure, exactly as the facts fitted into their own original context – what prevents these new stories, images, and non-facts from becoming an adequate substitute for reality and factuality?”²³

Her answer: It is, above all, philosophers, scientists and artists in their isolation, independent historians and judges as well as journalists adhering to facts, working according to an “existential mode of truth-telling”.²⁴ It would indeed be one of the most important duties of journalism to combat political lies with diligently researched and checked facts.²⁵

For their decision-making, citizens in a direct democracy particularly depend on the mass media distinguishing between factual accounts and the opinions of the newspaper’s or broadcaster’s own collaborators and guest contributors. For Arendt, facts and opinions are no antagonists as long as it is assured that opinions are formed on the basis of facts. Meanwhile effective freedom of expression presupposes the availability of sufficient factual information as a basis for opinion making.²⁶ The problem is that facts are expensive to research and to check and the mass media may thus be tempted to respond to the current economic pressure by replacing hard facts

²² See *Animal Defenders International v. The United Kingdom*, ECtHR, 48876/08, 22 April 2013, para 119 and J. Bratza concurring, para. 6; *Jersild v. Denmark*, ECtHR, 15890/89, 23 September 1994, at para 31; *Murphy v. Ireland*, ECtHR, 44179/98, 3 December 2003, at paras 69, 74.

²³ Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought*, New York: Penguin Books, 1993 (first published 1961), at pp. 253-254.

²⁴ *Ibid.*, at pp. 259-260.

²⁵ Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World*, New Haven, London: Yale University Press, 2016, at p. 202.

²⁶ Arendt, *supra* note 23, at p. 238.

with (cheap) opinions.²⁷ When facts are upstaged by unfounded opinions it is inevitable that the credibility of the mass media suffers – as the transatlantic fuss about “fake news” or “Lügenpresse” demonstrates.²⁸ Deflated citizens retreat into their echo chambers where any news is trustworthy as long as it is shared between like-minded people. Although scandals have always played a role in the economy of the mass-media,²⁹ the factual basis of news has ultimately been the touchstone of professional journalism. Is this about to change under conditions of online blogs and social media? Selected by personalisation technologies, outrageous or scandalous posts appear on top of a Facebook user’s newsfeed because they are most likely to match the type of information that had previously attracted her attention. During the 2016 election campaign, obvious lies including Donald Trump’s claim that Barack Obama was the founder of Islamic State and Hillary Clinton the co-founder went viral.³⁰ For Cass Sunstein there is no doubt that Trump’s insulting tweets about his political adversaries “put him at the center of what was, for many, an engine for group polarization – and helped vault him to the presidency”.³¹

An inclination towards “post-truth politics” and the turn to a “post-factual society” endanger the public sphere, which constitutes a structural principle of democratic politics. A democratic order presupposes that conflicts are solved in the way of public discussion. It is a premise of the public sphere that Kant’s “extended way of thinking” can unfold and that political actors are always aware of their decisions’ contingency. If Sunstein’s fear should prove true that personalisation technologies distort the free market of ideas and lead to fragmentation of the political discourse,³² the normative requirements of the public sphere are questioned. A parallelism of fragmented public spheres would not be able to establish the shared auditorium necessary for a democratic order. Competition between arguments in the political forum would no longer be possible and the political system’s cognitive openness and learning ability would be challenged.

There have been two important sets of objections against Sunstein’s theory in the academic literature. A first objection argues that newspapers and electronic mass media have always been biased, appealing to certain audiences only; thus, news personalisation is nothing new. From media sociology we know that selectivity is generally one of the key functions of mass media.³³ Through the selection of information, the mass media reduce overwhelming social complexity and protect systems and individuals from overload. Within a newspaper company it is the editing staff who are in charge of selecting the information that will be covered. The

²⁷ Garton Ash, *supra* note 25, at p. 195.

²⁸ See, for example, ‘America’s alt-right learns to speak Nazi: “Lügenpresse”’, *The Economist* (24 November 2016), available at <http://www.economist.com/news/europe/21710866-1848-1939-history-pernicious-word-americas-alt-right-learns-speak-nazi>.

²⁹ Luhmann, ‘The Reality of the Mass Media’, *supra* note 9.

³⁰ See, ‘The post-truth world: Yes, I’d lie to you’, *The Economist* (10 September 2016), available at <http://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and>.

³¹ Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media*, Princeton, NJ: Princeton University Press, 2017, at p. 83.

³² Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media*, Princeton, NJ: Princeton University Press, 2017.

³³ Luhmann, ‘The Reality of the Mass Media’, *supra* note 9, at p. 34.

newspaper's journalistic policy and internal standards will often strongly influence the angle from which facts will be examined or the op-eds that readers may encounter. The point is that this selection process does not happen blindly and readers will generally know what type of journalism and editorial bias they can expect from a particular newspaper, TV channel or radio station. Readers in Switzerland, for example, know – not in detail but on the whole – where a newspaper such as *Neue Zürcher Zeitung* or *Weltwoche* stands. This is different in the digital environment because no Facebook subscriber or Google search user will have a clue on which grounds the respective algorithms will choose the news that they recommend individual users to read or watch. The key difference therefore is transparency of bias.

A second set of objections question the empirical foundation of Sunstein's thesis that there is not much deliberation beyond "echo chambers" and that group polarisation is an effect of online content personalisation technologies. In one of the first data-driven studies on personalised recommender systems, Hosanagar et al. argued in 2012 that "the antecedent, that recommenders create fragmentation, is ultimately an assumption".³⁴ This study had a very limited scope and did not extend to the effects of personalisation on news programming. One year later Yochai Benkler and his colleagues at the Harvard Berkman Klein Center authored an empirical analysis of the SOPA-PIPA debate that also challenged Sunstein's thesis to a certain extent.³⁵ SOPA (Stop Online Piracy Act) and PIPA (Protect IP Act) were proposed by US Congress as new IP enforcement bills in 2011. They were stalled as a consequence of massive Internet protests including a 24-hour Wikipedia blackout on 18/19 January 2012, millions of e-mails and thousands of phone calls addressed to members of US Congress to raise awareness of the harm that the planned laws would mean for Internet freedom. The authors from the Berkman Klein Center argued that their study provided a perspective "on the dynamics of the networked public sphere that tends to support the more optimistic view of the potential of networked democratic participation".³⁶ In defence of Sunstein, one might argue that the SOPA-PIPA debate was very technology-centred and thus particularly capable of mobilising masses of tech-interested people in the US. Therefore, it may not be representative. Indeed, a 2013 book by Ethan Zuckerman seemed to partially confirm Sunstein's thesis.³⁷ Recently, the Berkman Klein Center published a study on online media and the 2016 presidential elections in the United States with an impressive sample of more than 2 million stories collected from a broad range of sources on the open Internet, including mass media sites, government sites, private sites, blogs etc.³⁸

³⁴ Kartik Hosanagar et al., 'Will the Global Village Fracture into Tribes: Recommender Systems and their Effects on Consumers' (2012), University of Pennsylvania, NET Institute Working Papers, Working Paper No. 08-44, available at <http://ssrn.com/abstract=1321962>, at p. 6.

³⁵ Yochai Benkler et al., 'Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate' (2013), Harvard University, Berkman Center for Internet & Society, Berkman Center Research Publication No. 2013-16, available at <http://ssrn.com/abstract=2296953>.

³⁶ *Ibid.*, at pp. 9-10.

³⁷ Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection*, New York: W.W. Norton & Company, 2013.

³⁸ Robert Faris et al., 'Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election' (2017), Harvard University, Berkman Center for Internet & Society, Berkman Center Research Publication No. 2017-6, available at https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_0.pdf?sequence=9, at p. 21.

They found a pronounced asymmetry between the structure and composition of the media on the right and on the left. Whereas on the right highly partisan pro-Trump reporting and strong polarisation tendencies prevailed, the situation was different on the liberal (in the US understanding of the word) side. While on the right the centre of gravity was clearly Breitbart, on the left long-standing mass media (such as the New York Times, Washington Post, CNN etc.) continued to play an important role as intermediaries and defenders of high quality journalistic standards and objective reporting. Hence, the public sphere continued to exist. From this important study one can thus deduce that Sunstein's thesis is partly wrong and partly right. What needs to be emphasised is the important effect that quality mass media continue to play. Where high quality mass media are able to reach a wide audience, the danger of group polarisation is clearly minimised.

2.3 INSTITUTIONS SECURING THE PERMANENT RENEWAL OF DIRECT DEMOCRACY'S RESOURCES: THE CASE OF PUBLIC SERVICE BROADCASTING

As mentioned above, public service broadcasting (PSB) is determined by the Constitution as one of the main institutions securing the renewal of those resources that are essential for the functioning of the Swiss model of direct democracy. The extent to which the Constitution requires broadcasting regulation for the purpose of safeguarding democracy may be striking for a foreign, particularly non-European, observer.³⁹ Before elaborating on the legal framework of PSB under Swiss law and an outlook on future developments under conditions of intelligent algorithms and personalisation technologies, some empiric data concerning media consumption in Switzerland is provided.

a) Introduction: Media consumption and the Internet

The most recent empiric research confirms that media consumption in Switzerland primarily takes place on the Internet and that the mass media have already been eclipsed by social media. Today, the Internet is the most frequently used medium, especially as regards the age group of 15 to 34 year olds.⁴⁰ Of the media offered on the Internet, the global search engines and social media (including Google, YouTube, Facebook, WhatsApp and Instagram) on average generate four times more attention than the online offer of the established Swiss mass media.⁴¹ Young people in particular very much focus their media consumption on the Internet on those global sources. According to fög, the Research Institute for the Public Sphere and Society at the University of Zurich, online news sites, web portals and social media are the main sources of information for 62% of 18 to 24 year olds, and

³⁹ For the discussion in the United States see C. Edwin Baker, *Media, Markets, and Democracy*, Cambridge UK: Cambridge University Press, 2002, at pp. 193-213.

⁴⁰ Bericht des Bundesrates zur Überprüfung der Definition und der Leistungen des Service public der SRG unter Berücksichtigung der privaten elektronischen Medien vom 17. Juni 2016, at p. 82.

⁴¹ *Ibid.*, at p. 77.

for 22% of all young adults they are the only source of information.⁴² For 43% of young adults the smartphone is the main technical means to access information online.

Google (mainly via YouTube), Facebook, WhatsApp, Instagram, etc. cooperate with the global media corporations and disseminate their content on their platforms. In collaboration with the Reuters Institute for the Study of Journalism at the University of Oxford, fög conducted a representative survey involving more than 2000 Internet users in Switzerland. According to this survey, 36% of the interviewed users already consume their news via Facebook.⁴³ These findings explain why Swiss media companies are now cooperating with the social media giant. Commuter newspapers and tabloids dominate the range of Swiss-origin media currently available on Facebook.

The fög survey also emphasised the formidable importance of social networks in the news economy. Since advertising revenues increasingly migrate to the Internet in general and the large platform firms in particular, this source is rapidly vanishing as a means for funding the mass media.⁴⁴ This development can only exacerbate the general difficulty for the mass media to develop alternative business models for the news market. The gravity of the mass media's financial problems is epitomised internationally by the large number of quality newspapers that are disappearing every year.

As research by Sunstein and others suggests the extended use of personalisation technologies by platform firms is reinforcing the already existing trend towards filter bubbles⁴⁵ and fragmented public spheres, with the worrying prospect that communication – including about political issues – is increasingly taking place only between like-minded parties. These mostly theoretical assumptions about the effects of personalisation technology match fög's empiric findings that people who primarily consume their news via YouTube, Facebook etc. are characterised as having less confidence in the media system. Conversely, those people who frequently use public service broadcasting for their news consumption are developing a higher degree of confidence in the media system.⁴⁶ Confidence in the mass media in general promotes a general interest in news and improves the willingness of consumers to pay for information. Meanwhile, the data about the Swiss market clearly shows that this alone will not be able to resolve the grave financial problems of information journalism.

As a measure against further migration of advertising to social media, Swiss media companies are increasingly investing in technologies of "behavioural targeting", allowing the personalisation of advertising and news on the basis of collected user data.⁴⁷ However, most of the media companies in Switzerland are too small to collect large amounts of data (Big Data) and they do not have the financial means or technical knowhow that would be required for their analysis and

⁴² Forschungsbereich Öffentlichkeit und Gesellschaft, Jahrbuch Qualität der Medien, Hauptbefunde (2016), available at www.foeg.uzh.ch/de/jahrbuch.html (März 2017), at p. 13.

⁴³ Ibid., at p. 16.

⁴⁴ Bericht des Bundesrates, supra note 40, at pp. 21-23.

⁴⁵ Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You*, New York: Penguin Press, 2011.

⁴⁶ Forschungsbereich Öffentlichkeit und Gesellschaft, supra note 42, at p. 2.

⁴⁷ Manuel Puppis et al. (eds), *Medien und Meinungsmacht*, TA-Swiss/Zentrum für Technologiefolgen-Abschätzung, Zürich: vdf Hochschulverlag, 2017, at p. 254.

aggregation (Data Mining) or to develop more sophisticated targeting technologies. As a way out, they are seeking to join forces with partner companies, as in the case of Admeira, the recently established joint venture between the Swiss Broadcasting Corporation (SRG), Swisscom and Ringier (a media company). The purpose of Admeira is to establish an alliance of the three companies in the field of online advertising. As a telecom company, Swisscom possesses detailed information about its customers, extending – in the case of mobile services – to their online behaviour. In the eyes of SRG, the fact that Swisscom has also acquired broad experience about targeting technologies such as Real Time Advertising or Real Time Bidding establishes the company as a particularly attractive partner for collecting and analysing data. Swisscom, on the other hand, benefits from cooperation with SRG and Ringier because they provide costly news and entertainment programmes that Swisscom can make available on its own TV and entertainment platforms rather than producing them itself.

b) Public service broadcasting and personalisation technologies

Admeira has raised the question of whether the use of personalisation technologies in the provision of content by the SRG would be reconcilable with the broadcaster's public service remit as defined by Swiss law. Machine Learning (ML), Data Mining, data analysis and other techniques of Artificial Intelligence (AI), have boosted the development of personalisation algorithms that allow companies to produce sophisticated user profiles, which can be employed to predict their future behaviour.⁴⁸ The more data that is available for training the algorithms, the finer-grained predictions they are able to make. If a media company knows exactly what kind of person a customer is, it may be tempted to use the personalisation technology to take person-related decisions not only regarding advertising messages but also the news and other types of content that a user is going to see on her screen.

This prospect creates a potential conflict between the SRG's commercial and technological preferences and the legal requirements arising from its public service remit. As mentioned, Article 93(2) of the Constitution provides for a public service mandate, requiring the system of radio and television as a whole to contribute "to education and cultural development, to the free shaping of opinion and to entertainment", thus supporting the renewal of the cultural resources necessary for the functioning of democracy and for safeguarding cohesion across different languages and mentalities in the country. Within a setting defined by the economic and cultural particularities of the country, different options on implementing this public mandate are possible. By order of a parliamentary committee, the Swiss Government in 2014 published a report reflecting on structural change in the media sector in Switzerland and asking how this was impacting on the fulfilment of the constitutional public service mandate by radio and television in particular and the media sector in general.⁴⁹ This reflection was paralleled by political steps taken by

⁴⁸ Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology*, Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2015, at p. 109.

⁴⁹ Sicherung der staats- und demokratiepolitischen Funktionen der Medien, Bericht des Bundesrates vom 5. Dezember 2014 in Erfüllung der Motion 12.3004 der Staatspolitischen Kommission des Nationalrates (SPK-N).

right-leaning groups requiring an open debate about the institutional implementation of the public service mandate. In a partial response to these pressures, the Swiss government in 2016 produced a further report reviewing the definition of public service broadcasting and analysing the relationship between private electronic media and SRG in the fulfilment of the public service mandate.⁵⁰ These reports and debates show a general awareness of the potentially far-reaching consequences of the ongoing structural change in the media system but there has been no consensus so far on how politics should respond.

Accordingly, there is a strong likelihood that the currently existing institutional setting will continue to prevail for the next couple of years. This setting provides for the legal obligation of the SRG (as the public broadcaster) and a selected number of private broadcasting companies to contribute to the fulfilment of the public service mandate. The law places the main responsibility for the provision of the public service mandate clearly on the shoulders of the SRG. The small number of private broadcasters, which are authorised with a licence and partly financed through the broadcasting levy, provide their services mainly at local and regional levels.

Article 24 of the Swiss Radio and Television Act provides for a comprehensive public service remit of the SRG. First, the SRG has to live up to high quality standards as regards the news and other content that it is producing. The SRG must ensure that its programmes are able to reach the entire Swiss population.⁵¹ Moreover, the public service broadcaster has to advance cohesion between different regions and cultures in Switzerland. For this purpose, the SRG is required to contribute to linguistic exchange between language regions and to financially equalise economic differences between regional media markets.⁵² As a consequence, less affluent Italian and French speaking regions are cross-subsidised by the wealthier German speaking area. This model ensures that the same range of public service programmes is supplied in every linguistic region in Switzerland. As compensation for fulfilling its broad mandate, the SRG enjoys *inter alia* financial privileges as it receives a major part of the broadcasting levy which all households in Switzerland are required to pay. The Swiss broadcasting levy currently amounts to roughly CHF 450 per household per year, which is expensive in international comparison.

If Swiss law justifies the privileged position of the SRG with the particular mandate that it fulfils in favour of democracy and cohesion it is of primordial importance that the SRG's content reaches the entire population. Personalisation of content would therefore potentially conflict with these stipulations. Considering the above-mentioned tendencies of fragmentation and polarisation it is rather the opposite that is expected to be pursued by the SRG. The SRG should ensure a counterbalance to the discussed tendencies of social media and online platforms and should provide that high quality content reaches the entire population in Switzerland.

The main challenge for the SRG will be to convince young people particularly that its programmes are sources of reliable information, which is essential for the future of democracy and cohesion in Switzerland. To achieve this, the SRG will need to explore to what extent personalisation technologies could work for the good of the public service mandate. The key question is: how can user targeting be combined

⁵⁰ Bericht des Bundesrates, *supra* note 40.

⁵¹ Sicherung der staats- und demokratiepolitischen Funktionen der Medien, *supra* note 49, at p. 14.

⁵² *Ibid.*, at p. 15.

with “translation services” making the young audiences aware of perspectives that are qualitatively distinct from those encountered on social networks and online platforms and sensitising them for quality in the media?

3. SUMMARY

Legal Sociology is an empiric sub-discipline of the law that is primarily interested in observing the emergence and functioning of the law from an objective perspective. It is only in a second step that a change of perspective occurs, from objective description to normative prescription. Accordingly, the legal sociologist is wearing two hats: the hat of a social scientist who is observing the law from an external sociological perspective and the hat of a jurist who is pondering the gained insights from a system-internal legal perspective and eventually makes recommendations for improving the law’s workings. The law, as an autopoietic sub-system of society, will understand the legal sociologist’s recommendations based on its own system-rationality and autonomously decide what to do with them.

A legal sociology perspective can be useful to analyse how structural change impacts on the interaction between law and society and the functioning of direct democracy in Switzerland. News selection through personalisation technologies and other forms of AI potentially interfere with the idea of direct democracy which presupposes citizens who are competent to take informed decisions on a diverse range of matters of political interest. The Swiss model of direct democracy depends on societal preconditions which it cannot guarantee itself and on cultural resources that need to be renewed permanently. The resources that direct democracy needs for its reproduction are citizens’ capabilities to build their own independent opinions on the many political issues they are supposed to take decisions on at the ballot box. According to the Swiss Constitution, two institutions are mainly responsible for enabling citizens to meet the requirements of this task: a system of generally accessible public education and a system of public service broadcasting. Under current law, the SRG is in charge of the latter. The *raison d’être* of the SRG is the fulfilment of a public service mandate requiring it to guarantee high quality and diverse information and to contribute to cohesion between the different cultures in the country. The SRG can discharge this duty only if its programmes are able to reach the entire population. Personalisation of content – a potentially tempting business strategy in the competition (with transnational platform corporations) for user attention – would probably contradict this aim. Further research is needed on content personalisation and on how this technology could be used to bring high quality information to the attention of younger audiences.