Perspectives in sociology of law

Håkan Hydén, 2015-04-13

Preliminary. Not for citation

1. Internal and external perspectives of law

One way of defining Sociology of law is to describe it as another perspective on law compared to the traditional legal science, i.e. legal dogmatic. At least every social science uses two perspectives on its object of investigation, one internal and one external perspective. For instance it is legitimate within micro economics to study an enterprise from within focussing on internal processes of decision-making, what actors within the company do and how things are organized within the company. Other scholars within micro economics might be interested in the relation between a certain enterprise and its external relations, or the relation between enterprises as such and other sectors of society, such as politics or actors in the industrial sector. In the same way scholars in political science may pay attention to internal aspects of the political system, such as the acts and organization of the political parties or the parliament, etc., while other researchers may take a step back and look at the political system from outside, asking questions like what role do the political system play in society as a whole, what are the interactions between the political system and economics or the social sector in society.

The same goes for the study of the legal system. Most scholars have an internal approach and are analysing the premises for legal decision-making, how the legal acts and the legal actors are systematized and organized. Some scholars, however, utilize an external perspective and look at the legal system from outside. One way of describing the difference is to talk about knowledge in law and knowledge about the law (Strömholm 1981, Hydén 2002, Banakar 2006, Tuori 2008). These two perspectives or dimensions of the study object tend to stimulate the development in the respective science. It creates dynamic tensions where the one perspective has to be complemented by the insights of the other and vice versa. In legal science, however, the two perspectives have drifted apart so they are not any longer regarded as belonging to the
same science. The internal perspective is the rationale of legal dogmatic while sociology of law employs the external perspective. Even if both can be regarded as legal science they belong to different scientific disciplines. In Sweden Sociology of law is not even deemed as so important that it is a part of the four and half year curriculum of legal studies. Sociology of law is on the other hand an academic subject of its own and can be studied at Lund University on undergraduate, graduate and post-graduate level.¹

Another peculiarity with the relation between the internal and the external perspective within legal science is the ratio of the two. While the proportion of internal and external aspects in other sciences are more or less even, the relation within legal science is dominated by one of the perspectives, the internal one. Legal dogmatic stands on its own. It is not dependent on support from other disciplines.²

Another way of expressing the same is to say that the legal system is a closed system in the way Luhmann och Teubner have described it (Luhmann 1999, Teubner 1993). This can probably be derived from the common tendency in the modern and post-modern industrial society of functional differentiation. Law and the legal system is in our time – as all the other systems - highly specialized and in the hands of professional (legal) experts.

The relation between the internal and the external description of the law has lately been object for scholarly discussions within jurisprudence and socio-legal studies. The Finnish legal philosopher Karlo Tuori has written an article about self-description and external description of the law (Karlo Tuori 2006), where he refers to the same distinction made by Niklas Luhmann in his book Des Recht der Gesellschaft (1993). Luhmann talks about Eigenbeschreibung and the Fremdbeschreibung of law and he explicitly applies it to the characterization of legal scholarship´s and sociology´s view on law. Tuori understands the internal perspective of legal dogmatic as dealing primarily with the interpretation and systematization of the legal material appearing on what he calls the law´s surface, such as legislation and court decisions. Legal theory is

---

¹ Lund University, Sweden, is the only seat of learning with Sociology of Law (further on shortened, SoL) at all levels in Europe. SoL was initiated in 1972 as a department in Social Science Faculty. For some 10 years SoL was within the department of Sociology but from January 2006, SoL is an autonomous department in Social Science Faculty. SoL is an academic discipline including a complete undergraduate and graduate education with separate courses for 120 plus 60 ECT and a postgraduate education. SoL encompasses today 25 researchers and has some 400 students in different undergraduate courses every year.

for Tuori something which is related to the normative and conceptual structures of the
law’s sub-surface (Tuori 2006, Tuori 2002).

Legal science has, according to Tuori, a dual citizenship (Tuori 2002:283 pp). It is both
a legal practice by taking part in legal discourses and a (legal) science. Tuori regards
legal practices as social practices which have specialized in a specific function in
modern society: the production and reproduction of the legal order. Reza Banakar has
also underlined the difference between the internal and the external perspective on law.
He claims that these two perspectives are inter-related and “do feed-back into each
other” (Banakar 2005:84). Banakar describes legal dogmatics not only as normatively
closed but also inward looking activities, which make them ignoring the interaction
between law and its social environment.

Roger Cotterrell is viewing the role of legal science as legitimizing the ideological
closure of legal discourse that prevents it from being a science. For Cotterrell the
internal perspective of law is dominated by ideological legal thinking based on
discursive closure. He uses Ronald Dworkin as a prominent example of how legal
discourse generates its own closed world (Cotterrell 1996:103 pp). Sociology (of law)
and legal science relate to each other, according to Cotterrell, as science and ideology.
He argues for sociology having superior form of knowledge in comparison with
ideologically tainted legal scholarship. Sociology is thereby able to open the law´s
normative and discursive closure and produce more adequate knowledge about social
reality, including law and legal ideas (ibid. p 110). Thus, Cotterrell in a sense dissolve
the dichotomization between the internal and the external perspective of law.

Tuori feels unsatisfied with this position and he tries to get support from Luhmann who
regards law and science as two different, autopoietically organized and operating social
sub-systems, each with its own communicative network, closed to its environment.
Luhmann sees legal science as fulfilling specialized tasks in the autopoietic functioning
of the legal system. It is a question of internal differentiation and division of labour
within the legal system. Legal scholarship participates in legal discourse while the
external perspective of sociology of law is geared towards the scientific discourse. How
these two systems via structural coupling or else influence each other is not clear. The
normative claims within legal science are not related to the same facts that interest the
socio-legal scholar. Legal argumentation is normative argumentation. Legal science, as
Tuori points out, does not aim at providing us with true descriptions of extra-legal social reality or with casual explanations of processes taking place therein. In law, facts are dependent on legal rules and observed through legal rules. Legal truth is different from sociology’s truth. The validity claims of legal discourse are different from those of sociology. Legal truth is only attributed to facts which are accorded legal significance by the legal rule to be applied in the case at hand. In this way it is easy to agree with Niklas Luhmann and Gunther Teubner in the description of law as a self-referential system.

It seems like Tuori, like so many other scholars in the field, such as Cotterrell and Zamboni, discusses in terms of what science would be the best in understanding legal practice and law in general. The critique from sociology of law remains a critique from the outside, Tuori writes (ibid. p 36); it employs standards that are not equivalent to the yardstick of legal discourse. Even if, as both Tuori and Cotterrell emphasize, socio-legal scholars include the lawyers’ understanding of law in their descriptions, it does not make them participants understanding the internal conceptualisation; “their talk remains talk about law also when discussing talk in law” (ibid. p 38). With address to Cotterrell, Tuori stresses that the well-known inertia of legal concepts and dogmatic theories should not be attributed to an ideological blindness (as Cotterrell states); it performs an important task in the functioning of the legal system. The consistency of adjudication and the legal, is the argument. What sociology can do is to try to expose the conception of society implied by dogmatic theories and assess it by social scientific standards, according to Tuori. My point, however, is that this is not the task for the external perspective on law. Sociology of law has primarily another agenda, another interest of knowledge, than the one present in the contemporary discourse on the relation between legal dogmatic and sociology of law, or between the internal and the external perspective on legal matters.

2. Sociology of law as another perspective on law

Sociology of law, or other external views on law, such as law and economics or law and politics, can never in the present situation compete with legal dogmatic in understanding and explaining legal phenomenon. In the relationship between facts and rules, the latter have the last word within legal science. But what are overlooked in the whole
discussion about internal and external perspectives of law are the different dimensions of law. Tuori talks about the double citizenship of law, the legal scientist and the legal practitioner. Another distinction is to focus on law as a system of normative standpoints, of rules, and as an instrument of regulating behaviour in society. In the first mentioned function legal science is about finding the authorized content out of legitimate legal sources. This is the democratic function within a system of representative democracy. The role of law is to be one of several aspects influencing behaviour in society. Law points out certain values which should be taken into account together with values emanating from other (action) systems, such as economy, politics, technique, social care, etc. This could be labelled the moral function of law. The most important function of law in this perspective is to safeguard (moral) values in a material world dominating by other rationalities. I have used the distinction between the perspective of the judge, who is the archetype for law, and the practitioners’ more or less daily use of law as private lawyers or civil servants within public authorities. The interest and structure of legal knowledge is quite different in the case of a judge compared to a user in daily life. The two dimensions can graphically be set up in the following way:

*Figure 1. Two perspectives on law – the internal and the external perspective.*

The judge and the legal dogmatic are located in the vertical dimension. The epistemology can be described as deductive, i.e. as a question of deducing answers from a higher level of information. Law as an input to the legal order can be derived from
politics, answers to specific legal questions have to be derived from a higher legal order and when law is going to be applied in a concrete case it builds upon a correct interpretation of legal texts. The legal system can be seen as the lawyer’s toolbox, something which is used in order to cure and repair problems in society. In this perspective it is important to have a good order among the instruments so they not are mixed up. The tools of civil law should not be used in an administrative case, penal law arguments cannot be used in a tort case, etc. The interest of knowledge in relation to legal dogmatic is to learn the content of the different legal provisions belonging to different parts of the legal system and understand the normative rationale in these separate legal branches.

The function of the legal system is in a sense to standardize politics. Via the legal system institutions are built up and rules are set up in order to solve frequent problems in society. From an economic point of view this lowers the so called transaction costs, something further underlined via rules of the game for both social and economic life. From a social and political perspective there is a link between legal and social order. Through legal rules and institutions the society is prepared to take care of and soften social tensions. Certain professions are created to deal with dominating problems, like social workers for social problems, biologists and ecologist for taking care of environmental problems, occupational health service for working environment problems, etc.

If we regard law as standardized politics, it follows that the legal system as such and the work of the lawyers are expected to interfere as little as possible in the mediating process from political decision to the consequence for the citizen. The law ought to be understood in the same way and applied uniformly by the legal decision-maker. This is lying behind ideals like legal certainty and predictability. In order to uphold these values law has to be in the hands of a specialised profession and elaborated by a certain (legal) science. The role of the latter is to chisel out general principles and values inherent in the legal system.

To be able to interpret and apply law in a proper way it is enough to use the legal sources. Politics turn into law via the legal statutes (especially in our continental, European, civil law tradition) and the preparatory work, which is quite developed and extensive in a Scandinavian context. The investigation of the parliamentary committee
(or else) of the subject in combination with the opinions expressed in the process of referral by the bodies to which the proposed measure is submitted for consideration form the base for the minister in charge – within the government – to express the expected content of the law. These opinions are later on confirmed or modified in precedent cases by relevant public authorities and courts. Lawyers are not expected to take into account other information than the one mentioned in the legal sources. They do not have to bother about, neither the socio-political background nor the socio-economic consequences of the application of the law. These factors are already paid regard to in the construction of law. Sometimes the legal regulation is vague and without statements how to be applied in a specific case. This is very common in relation to modern and post-modern law, like regulation of the health care sector, the educational system, the environmental law and so on and so forth. In these cases we can talk about frame-law, characterised by end-means and balancing rules. The application of law is in these situations only partly meant to be in the hands of lawyers. Instead law delegates to the medical profession, when it comes to health care legislation, pedagogues in relation to the regulation of the school system, natural scientists in the case of environmental legislation, etc. to fill the law with its specific content.

In these last mentioned cases, the legal knowledge ought to be complemented by the horizontal perspective in the figure above. The horizontal dimension in the study of the legal system represents other interests of knowledge than the one usually dealt with in legal science, namely the questions about the background to law and the consequences or functions of law. These questions cannot be given answers by just consulting the legal sources. They can be regarded in a sense as extra-legal. In any case they are of utmost importance for ordinary people interesting in legal matters. To get answers on these questions one has to apply social science methods of different kinds. What to choose is dependent on the more specific interest of knowledge one has. If you are interested in Currency legislation, economic aspects may dominate in relation to causes and consequences, while if you study, for instance, law relating to the protection of animals, other aspects have to be considered, like political, sociological and perhaps religious factors. When it comes to consequences you can use different parameters in order to map the outcome of the legal regulation, as impact for minorities, for the environment, if law can be regarded as efficient, etc.
3. Legality vs. Legitimacy

Predictability is a key function of law. When the application of law goes from being flexible to becoming unpredictable this key function is lost. These questions are, as mentioned above, left out in the approach of legal dogmatic and thereby in legal education. It is not the same to know how to apply a legal provision in a correct way and to have an insight in what consequences will follow. It is one thing to know when to sentence somebody to two years imprisonment for assault and battery and quite another thing to understand what this means for the perpetrator of the crime, for the victim and for the society as such. The application of law might affect the consequences which in its turn might have an influence on politics and cause changes in the regulation. The same is relevant if there will be a gap between the background of law and the application.

Even if the logic of the law is deductive, the understanding of the law benefit by being aware of the purpose of the regulation. There is always an aim behind the regulation and fulfilling this aim has to do with the horizontal forces of society. Law is never set up in a social vacuum. A certain task is going to be pursued via the regulation. Law is therefore always a compromise between the two dimensions, between legality and legitimacy. For Luhmann legal decision-making is the “continuous striking a balance between responding sensitively to the external (justice) demands of its environment while adhering to the (positivistic) demand for high internal consistency when applying the rules of law”.

If one exaggerates the one on behalf of the other a suboptimum will be reached. The optimum lies in the bull’s eye. See the following figure:

Figure 2. Law is a compromise between the two dimensions, between legality and legitimacy

---

3 Teubner (2014)
For Luhmann this has to do with justice. He conceptualizes justice as “law’s contingency formula” that has the same function as god in religion or scarcity in the economy.\textsuperscript{4} Law-making as well as legal decision-making has to cope with these two dimensions at the same time. They are, furthermore, representing forces that are pulling in different directions. The result has to be in accordance with the principles of the legal system, while as closely as possible fulfilling the function which has generated the need for the regulation or the legal decision at stake. The legal rule and/or the legal decision have to be at the same time coloured by the rule of law and the quest for adequacy. It has to be both legal and legitimate. This is an inevitable consequence of law-making having the double affiliation to both law and society. One way of trying to solve this problem is cooperation. By organizing the regulated activity in such a way that affected interest and relevant stakeholders come together in the decision-making body, compromises can be created which fulfils the ambitions from the two dimensions. Another way of dealing with the problem is to use general concepts and clauses, like reasonable, fair, good faith, etc.

The problem the legal system is exposed to vary over time in relation to societal development. In order to just make a brief note here about this phenomenon, the

\textsuperscript{4} Ibid p 9
following hypothesis can be stated: The more stable and homogeneous the society is, the less is the problem in relation to combining the two dimensions. One reason for this is that knowledge about the context and cognitive factors – the external factors – play an important role in relation to legal articulation – the internal aspect. Thus, when the society or a specific sector of the society is stable and well known, the risk for a gap between the two dimensions is lower. In situations when the normative and/or cognitive aspects of the society are undergoing change the decision-making system will come under stress. In these situations there is a risk of exaggerations of the one or the other dimension. The consequence will be that if too much emphasis is put on the functionality, a loss of legality will follow. There will be a move towards the upper right corner of the figure above as the broken line in the figure indicates. Vice versa, if the ambition to follow the legal principle dominates the focus, there is a risk of loss in relation to adequacy and legitimacy. As a consequence there will be a move on to the lower left part of the figure.

In order to create optimal functionality and ditto, legal consistency, there is a long distance to overcome, and the optimal point might never be reached. Gunter Teubner has discussed the same problem on a macro level in relation to the partial failure of the welfare state, which relies on legal intervention to facilitate social change. Regulation can, according to Teubner, fail in three ways:

1. *Incongruence of law, politics and society*: here the regulatory action is incompatible with the self-producing interactions of the regulated system. The regulatory action becomes irrelevant and the law is ineffective, as it creates no change in behaviour.

2. *Over-legalisation of society*: regulatory action influences the internal interaction of elements in the regulated field so strongly that its self-production is endangered. Thus law destroys other patterns or systems of social life.

3. *Over-socialisation of law*: here the self-producing organisation of the regulated area remains intact, while the self-producing organisation of the law is endangered. The law is captured by politics or economics, for example resulting in the self-production of law’s normative elements becoming overstrained.”

---

5 An apparent example these days is how the digital technique challenges the legal system based an analogue and physical objects. See Lessig (2006), Marcin de Kaminski et al (2013)

6 According to Teubner, (1983), if regulation does not conform to the conditions of the structural coupling of law, politics and society, it inevitably ends in regulatory failure.

7 Ibid.
4. Law as a Social Order within Legal Institutions

Sociology of law works with living law, to use Eugene Ehrlich expression, in order to understand how human actions look like from the perspective of norms operating in real life. Ehrlich is in his book, *Fundamental Principles of Sociology of Law*, arguing for a norm-perspective on the study of law (Ehrlich 2001). For Ehrlich the domain of law is much broader than the legal provisions. Ehrlich can imagine a legal system consisting of nothing but social order (Banakar-Travers, 2002:44). The role of the legal scientist is in this situation to articulate those norms that are present in a society and as such lay the foundation of living law. The distance between living law and the formal, state, law is creating greater or lesser problems of legitimacy in upholding the legal system.

By looking at the legal practice as a social practice legal science could gain better insights in the premises of law. Banakar’s recommendation in order to understand legal practice is to examine “the institutional practices which constitute law and legal behaviour” (Banakar 2006:79). It is the dialectical relationship between law as a body of rules and law as a complex of institutional practices which according to Banakar makes it possible to transcend the separation of the internal and external perspective of law. However, the main problem in this discourse, remains: How are the institutional practices influencing the normative understanding of the legal rules, i.e. to what extent do the institutions (externally) decide the interpretation and application of law and to what extent can law be regarded as (internally) determined by arguments stemming from legal dogmatic?

In order to take this strategy seriously one has to modify the earlier used model over the legal system and try to de-think law and the legal provisions. An empirical approach has to start with an empty box, consisting only of institutional actors. The research task is to fill the box with whatever the actors put into it when arguing in a case. The hypothesis is that institutional practice results in norms for decision-making that are articulated independent from the legal rules, even if they might be influenced by them to a larger or smaller degree. We can illustrate this by using the earlier model.

---

Figure 3. An empirical approach has to start with an empty box, consisting only of institutional actors.

This model for understanding legal decision-making is much more open than the traditional which we started with. It represents in a sense the possible integration of the two dimensions, the internal and the external perspective on law. One example of using the underlying ideas of this model I would say that Philip Selznick’s study of *TVA and the Grassroots* represents (Selznick 1947). The external, horizontal dimension would then be transformed into the vertical by understanding the decisions taken by the involved actors in relation to the application of law. This way of looking at legal decision-making can also be said to transcend the dichotomy between the internal and external perspective on law. The horizontal – cause and effect-oriented – perspective is naturally translated by the decision-makers into the normative dimension when they are taking decisions.

The epistemological consequence of this for Sociology of law is that it presupposes an inductive process. Understanding and investigations of legal decision-making become primarily an empirical exercise. With this material it is possible to reconstruct the normative premises lying behind. And if one finds stable patterns within different
institutional contexts it would be possible to figure out what principles and norms are operating in the specific context.

5. Sociology of law as empirical study of the use of law.

5.1. Pioneers

The introduction of Sociology of law (hereafter SoL) in Scandinavia is connected to a couple of scholars. SoL mainly grew up in the postwar period, i.e. the second half of the 20\textsuperscript{th} century. It was associated with the beginnings of the welfare state establishment. The characteristic of SoL as a legal science was the empirical study of law. Those mainly to be counted as pioneers are Vilhelm Aubert (1922-1988), Per Stjernquist (1912-2005) and Agnete Weis Bentzon (1918 - 2013). Aubert dealt with topics as conflict resolution, equality before the law and the legal profession. Stjernquist’s main interest was about law as a political instrument. Weis Bentzon’s main contribution is related to laying the foundation for regulation of the Greenlandic society through a survey of the customs of the people of Greenland.

Each of the pioneers has from a legal background moved towards sociology and social science. It can be regarded as an indication of that the emergence of the subject Sociology of law is a reaction among some lawyers to the challenges the Welfare State legislation put on mainstream legal dogmat\textsuperscript{ic}.

Agnete Weis Bentzon showed interest by the Greenland study for the foundations of law (substratum), i.e the relationship between legal and social norms through custom. She was also interested in the role of law to the situation of women, resulting in the development of legal science in general. Agnete Weis Bentzon has had many followers in the women's legal studies especially in a third world context (e.g. Hellum 1999).

Vilhelm Aubert is the one who did the sociology of law known in Scandinavia. His broad and extensive writings have inspired the emergence of the discipline in Scandinavia. Per Stjernquists most significant scientific contribution is the idea that the explanation of human behavior is related to the understanding of people's motives for their actions. Stjernquist argues for this approach in relation to the

\footnote{It seems that the same background goes for Germany, see Machura, Stefan (2011) pp 513}
understanding of the implementation of law but it is equally valid in all social science fields. Per Stjernquist had a more pragmatic knowledge interest which manifested in his interest in legal steerage. His overall knowledge interest was about how law as a political instrument could be made more efficient and accurate. Per Stjernquist was originally professor of civil law at Lund University. He had an interest in land and natural resource issues.

5.2. The interest for legal implementation

Stjernquist was interested in the study of the effects of laws and engaged in a kind of operational sociology of law. In his most famous book, *Laws in the Forest*, which became a Magnum Opus for him. The book came out 1973. The model is central to the understanding of Stjernquist’s interest in sociology of law.

Stjernquist discern five different levels relevant to study for understanding the factors that influence the laws effects. The starting point is (1) the study of the extent to which behavior has changed / affected by the law addressees. Then Stjernquist claims that as scientist one must search for relevant influencing factors. He talks about these in terms of norms. Important is then to study the (2) source of the norms which apply in the relevant field, and (3) the characteristics of these norms, and (4) how they operate. Lastly, Stjernquist means that there is reason to

---

10 Dalberg Larsen, Lovene og Livet, Köbenhavn: Djøf forlag 2005
analyze (5) the psychological processes of the recipients, the law addressees, which occurs in the form of acceptance and the formation of motives.

Stjernquist believed that the formation of the individual’s design must be affected by methods which can be reduced to four main types. He talks about
1) Try to actualize latent goal of the governed, such to persuade the individuals to understand what is useful to them in the long term,
2) Try to convince people that the new behavior better meet their overall needs,
3) Reward the new behavior by example financial aid or relief,
4) Punish the old behavior in one way or another.

The conclusion from Stjernquist’s own study, which included the implementation of forestry legislation during the 1900s until 1960, was that the law itself had not had any direct guiding effect. It was rather activities from authorities, forestry boards, which had effects on forest owners’ behavior. The law could thus be said to have had an indirect effect in that it legitimized forestry personnel actions. Stjernquist was one of the first to highlight within implementation research the recurring dilemma of supervisory personnel are expected to behave as both inspectors and advisers, a choice between a harder more police oriented versus a softer line that bases its legitimacy on the supervisory staff assume the expert role. Stjernquist’s own study was an example of successful implementation by forestry staff preferably using the softer line. Although the legislation program for better forest management were not accepted as such by forest owners, legal requirements by forestry personnel working in the field were accepted when they do not rely on or threatened with legal sanctions. The end result was thus that the landowners motives had changed and thus their behavior.

The actor-oriented approach Stjernquist represents in the understanding of laws impact is a matter of psychological processes. Competing views are explained in terms of other groups´ social norms. This approach can in a social science perspective be complemented with an analysis of to the law and the legal steering competing norms at a macro level. The legal regulation does not take place in a normative vacuum. Recent research suggests that forest owners for this reason cannot be regarded as a uniform category (Appelstrand 2007). They represent interests that are influenced by different general norms, something that must be
considered in the legal implementation process (Gunningham and Grabosky 2009).

Sociology of Law has continued to have an interest in legal implementation, which also led to an interest in categorizations of different legal governance regimes and what characterizes them. Here you can see Phillip Nonet and Philip Selznick’s discussion of responsive law and Gunther Teubner’s concept of reflexive law (Nonet & Selznick 1978 and Teubner 1983). In both cases legal developments considered to have undergone stages of formal/autonomous law to substantive/material law and then switch to something Nonet-Selznick called for responsive law and Teubner labeled reflexive law. These concepts have been used extensively in Nordic sociology of law over the years (e.g. Dalberg Larsen 1983 and Hydén 1984).

Another characteristic of SoL at an early stage was the application of law in many fields. Both the strength and the weakness of SoL in relation to implementation of law are that it can be applied in almost all social fields. This give rise to something where a cake could be used as a metaphor. The center of the cake consists of general theory of SoL followed by a layer of theory and method specialized in relation to the specific field under study. Compare the following figure:
According to this model the raison d’être of SoL consists of the application of law within different societal fields, an application which is not about the interpretation of law but about finding out the functions of law in these different areas.\textsuperscript{11} The relation to general socio-legal theory and method is not very prominent depending on a lack of knowledge. As a consequence the specific SoL theory and method within the different fields did not develop.\textsuperscript{12} The knowledge accumulated was instead influenced of the research field in question, so that SoL produced knowledge for instance within gender or environmental issues which was hard to distinguish from the general scientific knowledge in that area. With the cake metaphor in mind you can say that the cake do not really kept together. It was a dough at the edges which in itself was reasonably solid, while the farther into the middle you get the looser become the cake in its consistency. Thus, the detriment of this perspective is that it does not promote any accumulation of knowledge in SoL as such. The application of SoL will be scattered and the scientific results to a certain extent random.

5.3. The Identity Crisis of a Stepchild

SoL can be described as the study of legal phenomenon with social science methods. This is something that also distinguishes SoL from the legal dogmatic within legal sciences. On this basis, SoL can be said to have a different perspective on the law than jurisprudence mainly work with.\textsuperscript{13} One can speak of, as we did in the introduction of this article, an internal and an external perspective on law, where SoL stands for the latter.\textsuperscript{14} The drawback with this approach is that it puts SoL in a kind of dilemma where it is squeezed between two strong scientific traditions, a centuries-old tradition of jurisprudence and an - admittedly somewhat younger - social science research tradition and none of them really want to know of the "Bastard".

This identity crisis has been addressed by researchers in the field. Reza Banakar have in the Nordic journal Retfaerd initiated a debate that attracted much attention, in which he argues that the key to developing a scientific identity of sociology of law lies in overcoming the dichotomy between law and society, and between jurisprudence and

\textsuperscript{11} Law is many times in these cases regarded as a black box, something which not necessarily has to be taken into account.

\textsuperscript{12} The model resembles the distinction made before by Per Stjernquist between SoL in a narrower and a broader sense, Tidskrift för rättssociologi Vol.1 Nr 1 1983 p 7

\textsuperscript{13} Hydén (1986)

\textsuperscript{14} Hydén och Wickenberg (2008), Banakar (2003)
Along this line, the Department of Sociology of Law started developing the concept of norm as a tool for integrating the different perspectives. Numerous doctoral theses have in the 2000s applied a norm perspective.

6. Norm Science – giving Sociology of Law a significant scientific field.

6.1. The Norm concept

The norm concept SoL deals with is broader than the one in current sociological theory experiments. Norms not only informal social norms. Norms in SoL are defined as (i) action instructions (imperative) that are (ii) socially reproduced and (iii) expression of the individual's perception regarding other people’s expectations of my behavior. This constitutes the basic norm essences. SoL is also working with a norm concept based on expectations which include "norms without a subject", i.e. such expectations which are a result of structures and / or emanating from the rationality of different systems. This is an application that one finds more and more in areas such as gender studies.

Appearance or presence of a norm is not only related to individuals' preferences. It also depends on what knowledge and cognition that makes itself felt. Without knowledge of how the preferences individuals have could be realized, there are no norms. Finally, the emergence of norms also depends on the actual opportunities that exist to realize that individuals are willing and able. These opportunities are often structurally determined by the different systems that exist in society. Here is a link back to Per Stjernquist’s early attempts to referring to the motif-forming factors explaining why people follow the law. In Stjernquist’s case it was above all to understand why forest owners and representatives of the authorities follow or not follow the law. Through the development

16 Hydén 2002a, Hydén & Svensson 2009, Baier 2013
17 In addition to my own and others' writings more than 10 theses have applied a norm perspective in one way or another. See Acknowledgment in Baier (2014)
19 Hydén (2012)
of SoL this problem has been transferred to cover why people in general, including representatives of the authorities follow norms. Now that we are talking about social and professional and not legal norms, it becomes an empirical question to examine how the norms look like and manifests themselves in different social areas. The argument may be represented by a model for understanding the motif formation processes in connection with norms or generally decision-making:

![Figure 4 The three Dimensions of Motif Building](image)

These three dimensions are interdependent of each other. The system conditions tends to dominate in the modern, industrialized society. Thus the will is to a large extent determined by what the system conditions promote. In the same way, what counts as knowledge is dependent on the need of the systems. Human value and will are subordinated and related to common sense in a knowledge perspective.

The Norm science can be viewed as being primarily a social science, understood broadly to include both behavioral science and social science and jurisprudence. Allow me to state clearly, so as to avoid misunderstanding, that the science of norms is not a normative endeavor, that is to say a practice that prescribes what is right and wrong in different situations. The subject of the science of norms is what people believe to be good or bad, right or wrong in different situations, and how this impacts their inclination to act in a certain manner. To the extent that norms that guide action are
widespread and comprehensive, the actions of people can be predicted. This is something quite different than saying that such action is prescribed. It is a statement of fact that certain norms and values dominate in a given social situation in time and space.

The concept of norm can be understood from its many aspects, and the aspect that one infuses the concept with tends to determine how one defines it. Thus, one can understand norm as an expression for what is normal or accepted behavior. From this perspective, norm becomes the equivalent of a yardstick, something which normality is measured with. Norm can also be understood as a rule, as advice on how to act. Here, the norm has a prescriptive character. It is an expression for how actors should act.

6.2. Hume’s law – norm as connecting is and ought

What is interesting in these and similar cases are that the scientific work is empirical and aims at mapping out and analyzing conditions which implicitly lead to certain normative conclusions. How is this possible? How can one go from a purely descriptive activity to making normative prescriptions? Concisely, how can one go from is to ought? Is it possible to transcend David Hume’s old dilemma?²¹ David Hume has been described as the thinker who was first to, in a serious fashion, describe the importance of norms ([1740], 2003). Hume’s most important contribution to the understanding of norms is his famous thesis (Hume’s law), which stipulates that you cannot derive ‘ought’ from is. This thesis is still widely accepted and carries a high relevance to SoL. There are doubts about Hume’s law – for example in the field of social psychology. Torgny T Segerstedt writes in his classical book Reality and values (1938, p 240): The result of this analysis, and the earlier examination of emotion and the understanding of objects, must be that there is no use distinguishing between the immediate understanding of reality and the immediate understanding of values. There is no difference between the understanding of a thing as real and the understanding of a thing as valuable. Nothing will be regarded as real if it represents no value to the individual or the group.

²¹ David Hume, Scottish philosopher (1711-1776), who claimed that the ‘ought’ can never be derived from the ‘is’.
Another argument for avoiding Hume’s law represents the American sociologist George C. Homans (1910–1989) who claimed that there are indeed social facts as Emile Durkheim described – and that they do apply a significant force on individuals and their actions. He also claims that the best example of a social fact is a social norm and that norms within a specific group undoubtedly forces individuals to a degree of uniform behavior. (Homans, 1967). Durkheim himself argued: that “the first and most basic rule is to consider social facts as things.” ([1895], 1982, p 60). He continued: “To treat phenomena as things is to treat them as data, and this constitutes the starting point for science”. ([1895], 1982, p 69). By doing so Durkheim avoided the impediments of Hume’s law. His position is that norms (although he did not name them so) are facts that can be studied as they interact with other facts in society (material and non-material).

Gunther Teubner argues with reference to Luhmann that social sciences cannot in principle (only for its own practice) supply other action contexts with normative criteria. He claims that normative recommendations are always trans-scientific issues. This concept is developed by a nuclear physicist, Alvin Weinberg to label those questions which, though they epistemologically speaking are questions of facts and can be stated in the language of science, they are unanswerable by science; they transcend science. The examples Weinberg refer to are all side-effects of some scientific based recommendations. What makes them trans-scientific is that they are examples of a growing problem in the differentiated and specialized modern world, namely that different systems collide in praxis. Modern production give rise to environmental problems which makes economy interferes in ecological systems. Lean production and New Public Management theories tend to exploit human resources whereby economic and management systems interfere and collide with the social system of individuals, etc. In these situations different normative claims belonging to different systems compete with each other. It is the role of politics to try to create compromises in these cases. They cannot be solved by scientific argument unless you prioritize one system before the other. Norms emanating from the economic science are many times dominating. Compare what is said about the norm model above. It is the role of politics to create

---

22 Homans, George (1967)  
23 Teubner 2014:208  
24 Alvin M Weinberg (1992)
space for norms from other systems, like ecology, social aspects, bureaucratic principles and so on. The most important tool in the hands of politicians is law. There is a special branch of the legal system, which lawyers have not discovered due to their internal perspective and blindness of the societal coupling, which can be labelled intervening legal rules. This is a phenomenon which dominates the legal system during the last 40 years or so. Intervening legal rules emerge when politics in the Western world altered from distributive and welfare politics to be forced to turn into crisis management.

Here we can mention the introduction of environmental legislation, legislation about consumer protection, employment protection, work environment legislation, equal opportunity regulation, etc. They all grow during the 1970s and 80s.

6.3. Norms stemming from the rationality within different systems

Norms are related to different systems. Within the system that is investigated, there is an in-built, and taken for granted, rationality that decides what is right and what is wrong. What empirically oriented science is engaged in these cases is trying to find out how the system operates and takes form in a concrete case. Economics analyzes how the economic system operates in various cases, with the intention of being able to offer dependable normative advice about how one should act in various situations. We are here talking about cognitive expectations that become normative when they turn into practice. It is this part of scientific activity that legitimates it as non-normative, neutral and objective science.

Rationalities are thus bound to systems and the more unambiguous the system is constructed, the stronger the normativity that follows from analyses of the system’s relationship to a given empirical reality. This normativity is even more pronounced in systems that are associated with laws of nature. Phenomena like gravity, thermodynamics, photosynthesis, etc, give rise to knowledge systems about how nature operates in various areas. By understanding how these phenomena operate, one can also give advice about how to act to attain various ends. These norms are just as invisible and unknown before they are articulated through science. These systems give rise to a sort of conditional normativity.

26 Cf Niklas Luhmann (1971) with his distinction between cognitive and normative expectations. Expectations are maintained in case actors do not comply (normative expectations), or they are adapted to the new “unexpected” situation (cognitive expectations).
If one wants to accomplish things, one has to pay attention to the laws of nature which rise to prescriptions about how one should act to attain a given goal or secure a given value. If, for example, one wants to build a bridge, in order to be successful in this endeavor, one should pay attention to the insights from natural science about things like weight-bearing capacities. These insights give us prescriptions about how the bridge should be built if it is to hold up, etc. These technical prescriptions from the natural sciences display the same characteristics that philosophers of law call authentic/true legal propositions/ clauses; that is to say they are based on conditional propositions/ clauses: If a given condition is present, then a given effect will occur. In both cases one goes from the abstract to the concrete. The difference lies in that the conditions for the true legal proposition/ clause is decided by the rule’s open normative property, while the basic conditions in technical and similar knowledge systems are derived from the knowledge system’s causal(ly oriented) relations.

The type of normativity that I discuss here manifests itself practically within the framework of professional knowledge systems. The natural sciences lay the foundations for technical applications, where engineers in different fields follow prescriptions for action which derive from a delimited norm system tied to a knowledge system about a phenomena defined by nature. The normative is defined from the cognitive. It might not be possible to predict the behavior since norms stemming from one system might in practice have negative external effects and collide with other norms and values in society, what give rise to intervention from the State, most often in terms of what I called intervening legal rules. Knowledge in these cases works, and has the same function in interpreting technical norms as preparation of a law has for lawyers when the lawyer seeks to understand the content of a law.27

In the sociology of law, the analysis of norms studies and analyzes the presence and use of norms. The paradox I mentioned in the introduction can be taken a step further. The only scientific perspective that is not implicitly normative is that which explicitly deals with norms. The science of norms is about what it is that steers people’s behavior and actions. Action is subjectively determined, and the social science has to employ categories and concepts that allow us to deal with the subjective on a general level. This is where norms come in. The concept of norms can be seen as the bridging link between

the existing and the desired, between is and ought, or, in social scientific terminology, between system and actor. System is objectified and articulated in science, and scientific conclusions are then used in forming the normative prescriptions behind people’s actions. Norms operate in the borderlines between knowledge about what exists and various value positions about how we should act in various situations.

A science of norms means a new way of looking at things that lie in or near many other sciences. Norms are not just part of action in the social sphere. In the respect that we divide society into economics, politics, administration, technology, etc, we can also see economic norms, political and administrative norms, norms in technology, etc. The advantage of the concept of norms is that it has purchase in virtually all the subsystems of scientific inquiry that humans have created through the functional specialization that during the past centuries has created the material welfare that industrial society has brought. In the concept of norms we have a common denominator which makes it possible to translate and understand human and organizational action, which may have different and competing backgrounds. The concept of norms can also be used as a sort of screening device, a tool to get us to notice what it is that produces a new pattern of action and new practices in society. This is especially important in the time of change and innovation we live in today, which is characterized by new ways of meeting human needs as the information society displaces the ways of thinking and acting which dominated during the era of industrial society. The science of norms is thus a science for the 21st century.

References

Banakar, Reza (2003), Merging law and sociology: beyond the dichotomies in socio-legal research, Berlin: Glienecke
Banakar, Reza (2005), The Policy of Law: A Legal Theoretical Framework, Retfaerd, Copenhagen: Jurist- og Økonomförbundets Forlag
Banakar, Reza (2006), How Can Sociology and Jurisprudence Learn from Each Other?: A Reply to Maruo Zamboni, Retfaerd, Copenhagen: Jurist- og Økonomförbundets Forlag


Hydén, Håkan (2002), *Normvetenskap*, Lund studies in Sociology of Law


Luhmann, Niklas (1992), *Autopoiesis*, København


Martinsson, Lena & Reimers, Eva (red.), (2010), *Norm-struggles* [Elektronisk resurs]: sexualities in contentions


Segerstedt, Torgny T., 1908-1999, (1938) , Verklighet och värde : inledning till en socialpsykologisk värdeori


Teubner, Gunther (2014), Law and Social Theory: Three Problems, ANCILLA IURIS 2014:135

Synopsis

Tuori, Kaarlo (2002), Critical Legal Positivism, Aldershot

Tuori, Kaarlo (2006) Self-description and External Description of the Law, NoFo 2

