Contributions in Sociology of Law. Remarks from a Swedish Horizon.

Hydén, Håkan; Wickenberg, Per

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Remarks from a Swedish Horizon

Håkan Hydén &
Per Wickenberg (eds.)

LUND STUDIES IN SOCIOLOGY OF LAW 29

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Kjell E. Eriksson

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Ilgot Liljedahl

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Jonas Eriksson

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Foreword

Lund University, Sweden, is the only seat of learning having Sociology of Law (hereafter SoL) at all levels in Europe. SoL was initiated in 1972 as a department at the Social Science Faculty, with professor Per Stjernquist as chair. Later on, for some 10 years, SoL was a division within the department of Sociology but from January 2006, SoL is an autonomous department at the Social Science Faculty. We will take the opportunity to introduce ourselves with this anthology containing different contributions from the colleagues in SoL at Lund University. What the various articles have in common – besides originating from the department of Sociology of Law in Lund – is that most of them were presented in different sessions at the Law & Society conference in Berlin, July 2007. Even if many of the articles are or will be published in different Journals and books, we want to collect them in one volume in order to show the breadth and depth of our research.

SoL is an academic discipline including complete undergraduate and graduate education with separate courses for 120 plus 60 ECT and postgraduate education. This forms a unique situation for qualified training with many professional applications. SoL encompasses some 25 researchers including 2 professors, 5 lecturers, 2 researchers and 15 PhD students. In terms of gender, 14 are female and 11 male. We are organised through an administrative director, a director of studies (basic education), a director of PhD-studies and a representative of the subject (professor in chair). SoL has proper administrative services and an ombudsman for our PhD-students. We have some 400 students every year.

SoL is researching the relation between law and society and we have a specific focus on *norms*. A SoL perspective on law does not mean that the focus is on some single enactment but on law in its social context. SoL is at the same time a legal science and a social science – mutually influencing each other. The argument for this is that one research project could be relevant in both directions and disciplines – theoretically as well as methodologically. What is common for jurisprudence and SoL is the interest in the legal system and the dependency between (social) norms and legal rules. In the introductory article of this anthology, a special interest is geared towards a discussion about the relation between a legal and a social science perspective on decision-making. The article starts with a description of the legal dogmatic perspective

on law and continues with an explanation of the role of SoL as a complement and a competitor when it comes to understanding legal decision-making. In this introductory chapter, the different contributions of the different authors are put into context and shortly introduced.

Research in SoL in Lund covers a broad spectrum. We have *three* strong and well established research areas – many of them with a focus on norms as shown in this volume:

Social Welfare, Democracy and Social Politics: has a focus on Swedish welfare issues having some 15 dissertations and research reports: Social Welfare Legislation in Politics and Administration; Norm Creation and Democracy through Consumer Collaboration; Headmasters and Norms in School Development; Legal Security and Compulsory Care; Work Environment within the Elderly Care; A socio-legal study within the area of Autism; Social Investigations on Children; and Victims of Crime.
Children, Youth, Family and Victims of Crime: in this field of research we have at least 15 dissertations and research reports: Custody Disputes, Mediation and Collaboration as New Alternative Methods in Swedish Child and Family Practice; Child Rights and Child Labour in Paraguay; Violence against Women; Social Investigations on Children; Working with Children as Victims of Crime; and Evaluation of National Experimental Work in Child Advocacy Centres 2006-2007 (7 different research reports).

Environment and Sustainable development: has 10 dissertations or ongoing PhD projects and some 15 research reports since 1997. That is also an established and strong field of research: Urban spatial planning; Acid Rain and the Law Processes; Environmental Education & Education for Sustainability; The use of Models in Policy Making related to Environment and Sustainable Development; Infrastructure for the Third Generation Mobile Telephone System in Sweden; Space Information for Sustainable Development; An Investigation on the Tunnel through the Hallandsås Ridge, Corporate Social Responsibility (CSR); Sustainable Development in Public Procurement; The Environmental War; Eco-Strategic Forestry and Swedish Forest Policy.

Many of these research projects have had an impact on legislation processes and on legal & administrative actors. Several of our research projects have also attracted interest from the mass media, professional journals and national agencies & municipalities. Worth mentioning is the interest in research on law in transition. All the mentioned research areas will offer many opportunities for the renewal of SoL and contribute to the international development of norm science within social science and law, which this anthology hopefully will give a flavour of.

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Håkan Hydén Per Wickenberg

Contributors

Ellen Almers, lecturer and PhD Student in education at the School of Education and Communication, Jönköping University, Sweden

Matthias Baier, LLM, PhD and senior lecturer at the Department of Sociology of Law, Lund University, Sweden

Anna-Karin Bergman, LLM, PhD Student at the Department of Sociology of Law, and Lund University Centre for Sustainability Studies (LUCSUS), Lund University, Sweden

Lina Carlsson, LLM, PhD Student at the Department of Sociology of Law, Lund University, Sweden

Karl Dahlstrand, LLM, PhD Student at the Department of Sociology of Law, Lund University, Sweden

Lars Eriksson, LLM, PhD, senior research fellow at the Department of Sociology of Law, Lund University, Sweden

Håkan Hydén, LLM, professor in chair at the Department of Sociology of Law, Lund University, Sweden, holder of the Samuel Pufendorf Professorship

Stefan Larsson, LLM, PhD Student at the Department of Sociology of Law, holds a Licentiate of Technology in Spatial Planning, Lund University, Sweden

Johanna Alkan Olsson, PhD, research fellow at the Department of Sociology of Law, and Lund University Centre for Sustainability Studies (LUCSUS), Lund University, Sweden

Ilhami Alkan Olsson, LLM, PhD, senior lecturer at Faculty of Political Science, Istanbul University, Turkey

Måns Svensson, PhD and senior lecturer at Sociology of Law, Lund University, Sweden

Per Wickenberg, PhD, senior research fellow and director at the Department of Sociology of Law, Lund University, Sweden

Karsten Åström, LLD, MA, professor at the Department of Sociology of Law, Lund University, Sweden

Håkan Hydén

Using Law as a Model

Different Approaches to the understanding of normative decision making

The internal and external perspective of law

One way of defining Sociology of Law is to describe it as another perspective on law than the traditional legal science, i.e. legal dogmatics, falls back on. 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 microeconomics 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 microeconomics 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 other 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 such as what role does 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 scholars studying 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 of the study object tend to stimulate the development in the respective science. Dynamic tensions are created where the one perspective has to be complemented by the insights of the other and vice versa. In legal science, however, the two per-

spectives have drifted apart such that they are no longer regarded as belonging to the same science. The internal perspective is the rationale of legal dogmatics 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 important enough to be part of the four and a half year curriculum of legal studies. Sociology of Law is on the other hand an academic subject on its own and can be studied at Lund University at undergraduate, graduate and post-graduate level.[1]

Another peculiarity regarding 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 is more or less even, the relation within legal science is dominated by one of the perspectives, the internal one. Legal dogmatics stands on its own. It is not dependent on support from other disciplines. 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 are in our time – as all other systems – highly specialized and in the hands of professional (legal) experts.

The relation between the internal and external description of the law has lately been the object of 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 dogmatics 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 to Tuori is something that is related to the normative and conceptual structures of the law's sub-surface (Tuori 2006. Cf 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 nor-

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 post-graduate education. SoL encompasses today 25 researchers and has some 400 students in different undergraduate courses every year.

matively closed but also as inward looking activities, which makes them ignore the interaction between law and its social environment.

Roger Cotterrell views the role of legal science as legitimizing the ideological closure of legal discourse that prevents it from being a science. To 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 that sociology has a superior form of knowledge in comparison with the 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 dissolves the dichotomization between the internal and the external perspectives on law.

Tuori feels dissatisfied 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 through structural coupling or otherwise 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 that 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 terms of 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 of 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 dogmatics and sociology of law, or between the internal and the external perspective on legal matters.

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 dogmatics in understanding and explaining legal phenomena. In the relationship between facts and rules, the latter have the last word within legal science. But what is 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 extracting the authorized content from 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 dominated by other rationalities. I have used the distinction between the perspective of the judge, who is the archetype of 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 be illustrated graphically in the following way:

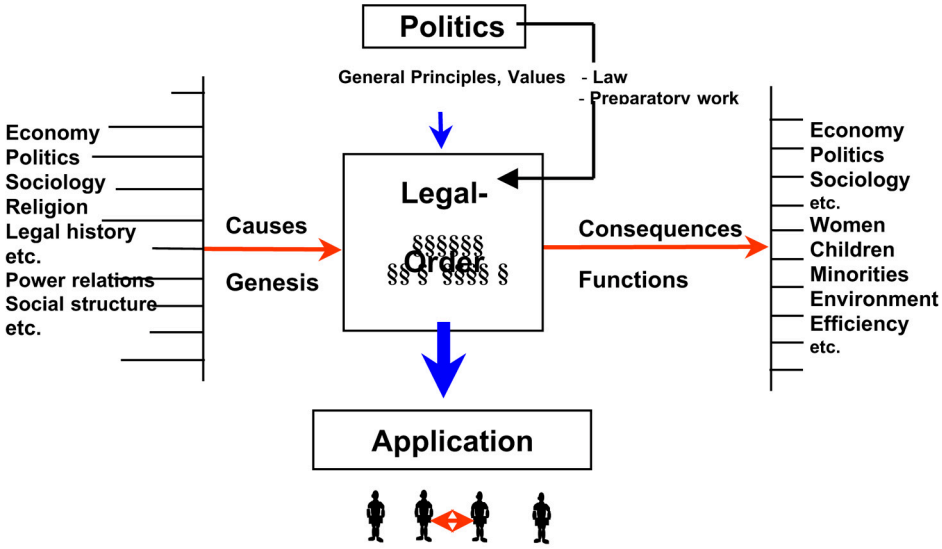

Figure 1 *Two perspectives on law – the internal and the external perspectives*

The judge and the legal dogmatics 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 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 such that they are not 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 dogmatics 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. By way of 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 which is further underlined through the 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 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 ecologists 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 among the legal decision-makers. This lies behind ideals such as 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 through 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 by the parliamentary committee (or otherwise) 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 of which the minister in charge – within the government – expresses the expected content of the law. These opinions are later confirmed or modified in precedents 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 neither have to bother with the socio-political background nor the socio-economic consequences of the application of the law. Theses factors are already attributed in the construction of law. Sometimes the legal regulation is vague and

without statements of 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. In these cases we can talk about framework 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 merely by consulting the legal sources. They can be regarded in a sense as extra-legal. In any case they are of utmost importance to ordinary people interested in legal matters. To get answers to these questions one has to apply social science methods of different kinds. The choice of method depends 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, whereas if you study, for instance, law relating to the protection of animals, other aspects have to be considered, such as 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, such as the impact for minorities, for the environment, if law can be regarded as efficient, etc.

Predictability is a key function of law. When the application of law goes from being flexible to becoming unpredictable this key function is lost. **Stefan Larsson's** article shows how legal application can deviate from formal agreements and law, how legal predictability experiences a setback when other forces or values affect the decision making that is supposed to be strictly legally controlled. Non-legally acknowledged factors can affect the decision-making tacitly. This means that causes like economy and politics can affect the application of law, although not admittedly, and the legislative process in order to change the application. The example used for this demonstration is taken from the Swedish development of the third generation of mobile phone infrastructure, 3G, and more specifically the responsible authority's, the Post and Telecommunications Agency, supervision of the four licence winning operators during the infrastructure roll-out. The paper addresses the difference between the intentions of the law and the application of the law, analyses and aims to explain parts of the legal complexities or inconsistencies from a socio-legal perspective.

These questions are, as mentioned above, left out in the approach of legal dogmatics 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 into 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 to understand what this means for the perpe-

trator of the crime, for the victim and for society at large. The application of law might affect the consequences, which in 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 its application. Compare the following figure:

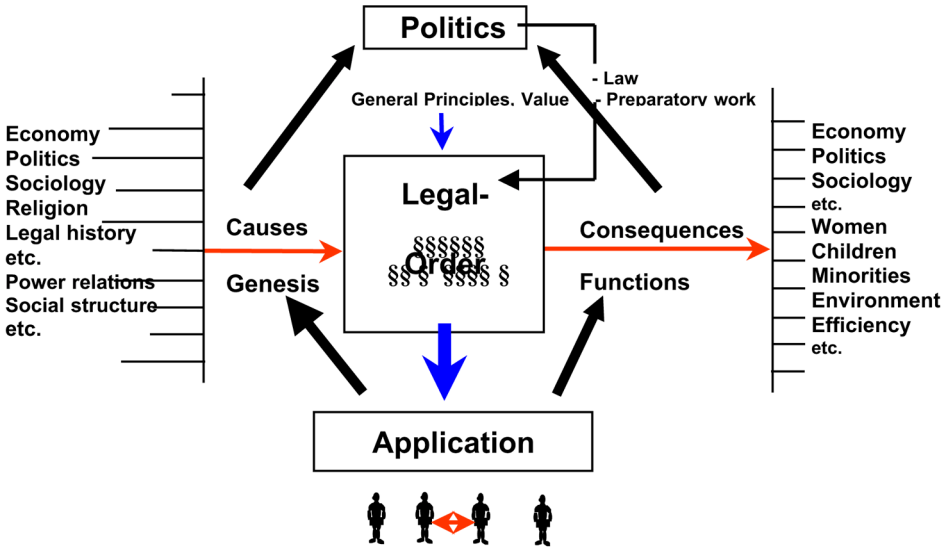

Figure 2 *The external effects on politics and law*

I will claim, lawyers mainly work in the horizontal perspective. This is true for all civil servants within public authorities working with social, educational, environmental and other issues related to the modern legislation of the so called framework legislation, where the law is just one of many aspects that have to be taken into account. A social worker, for instance, who is to decide on a case of compulsory institutional care, indeed has to be aware of what requirements the law sets up in these cases, but in order to make the right decision he or she also has to be conscious of the best treatment of the child from a social point of view. The use of the horizontal dimension is still more apparent in relation to lawyers within law-firms. Their main job is to arrange things, set up organizations and be helpful in creating contracts between clients and their business partners. Contract is a very frequently used legal instrument, actually more than the legal statutes. A contract cannot be understood, let alone written, if you do not take the background of the contract into account. You do not write a contract out of the blue. You must know the intentions of your client and his partners in order to adequately set up a contract and you have to be aware of the different consequences if you formulate yourself in the one way or the other. Thus, lawyers are educated in the vertical tradition of deducing epistemology, but to a large extent working along the horizontal line of cause and effect understanding of the world.

This equation cannot be solved without the additional information of training on the job. However, much could be done in order to develop legal science by bringing this missing dimension on law into science and curricula. There is in our time a difference between legal science and other sciences when it comes to integration of the internal and the external perspectives on law. In the modern legal tradition the internal perspective dominates the scene. In relation to internally generated knowledge what we know from an external perspective is very poor and suppressed. This is a problem both from a scientific and practical point of view. The two perspectives represent to science different dimensions of the same object of knowledge. Legal regulation is always a question of combining a practical purpose within a normative domain. It is, furthermore, only by using both perspectives that reflections and a comprehensive view are possible. The external perspective on law is in other words necessary for the internal understanding of the development and application of the law.[2] The negligence of the external perspective in present legal culture is a stressing factor for judicial decision-making (Hydén, Staaf, Åström 2004)

We would characterize legal regulation as a question of making compromises between two dimensions of law. This holds for law as well as for contracts. The internal dimension, which is about principles and norms, and the external dimension which is about functions and consequences of law. The aim and focus of the internal perspective is related to the rule of law and legality. The argumentation and guiding principles are inspired by goals**,** such as coherence and consistency within the normative system**,** and the rationality is value-oriented in a Weberian sense. Against this normative dimension the functional dimension can be set up. Legal decision-making is always a compromise between the normative and the functional dimension. This last dimension is geared towards adequacy and functionality. The difference between the two dimensions can also be represented by the distinction between legality (the internal aspect) and legitimacy (the external aspect). There is also a difference related to the concepts of value rationality, on the internal side, and instrumental or goal rationality (Zweck-rationalität), on the external side.

Even if the logic of the law is deductive, the understanding of the law benefits from 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 pursued by way of the regulation. Law is therefore always a compromise between the two dimensions, between legality and legitimacy. 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:

2 Cf. Reza Banakar, 2001:14, where Banakar argues for a reflexive matrix based on the distinction between an outside and an inside perspective of law. Banakar's point is that sociological and legal analysis play a role within both perspectives complementing each other.

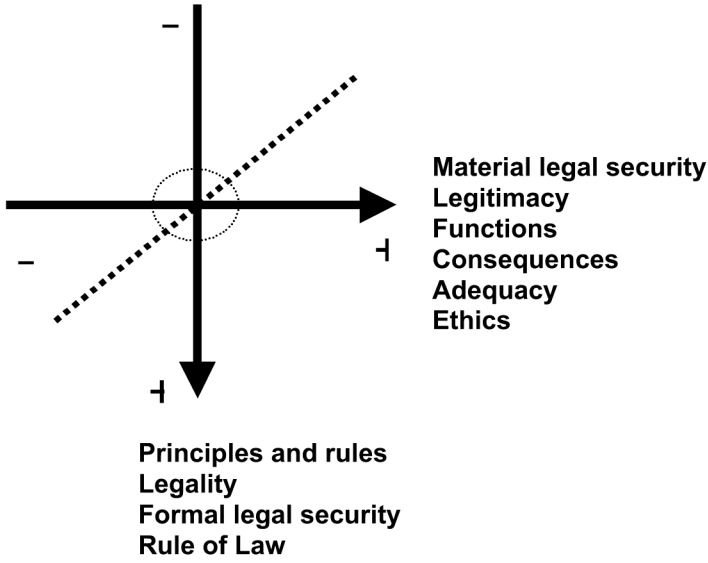

Figure 3 *Law is a compromise between the two dimensions, between legality and legitimacy.*

Lina Carlsson & Karstens Åström are studying court decisions in Public Procurement. To remain effective within the public procurement process it is important to avoid revisions on contract award decisions, which prolong the procurement process and take their toll on public resources. The paper aims to delineate the grey zone within public procurement legislation and clarify how the court interprets it, which will aid procurement officers in achieving best practice. Findings indicate a bias in favour of the procuring authority in terms of outcome of the court decisions through the use of a principle allowing for imperfect Requests for Tender (RFTs) and evaluation models due to fluctuations in the economic sector. The findings show that some of the most litigious issues are flawed RFT, inconsistent RFT and award evaluation and a lack of clarity in the RFT and/or the procurement process.

Law-making as well as legal decision-making has to cope with the 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 fulfilling the function that has generated the need for the regulation or the legal decision at stake. The legal rule and/or the legal decision have to be, simultaneously, 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 through cooperation. By organizing the regulated activity in such a way that affected interests and relevant stakeholders come together in the decision-making body, compromises can be reached that fulfil 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 problems the legal system is exposed to vary over time in relation to societal development. In order to make a brief note here about this phenomenon, the following hypothesis can be stated: The more stable and homogeneous the society is, the lesser 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 of 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 towards the lower left part of the figure.

In order to create optimal functionality and ditto, legal consistency, there is a long distance to cover, and the optimal point might never be reached. Gunter Teubner has discussed the same problem at a macro level in relation to the partial failure of the welfare state, which relies on legal intervention to facilitate social change.[3] Regulation can, according to Teubner, fail in three ways:[4]

> "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."

An example of the last mentioned problem is shown by **Lars Ericsson** in his article "Nature – a question of order?" Since the discovery of fire humans have contributed to the global warming. Now, we are probably facing one of the most threatening environmental problems humankind has ever created. One of the most difficult problems is that nature lacks rights – there seem to be no way whatsoever of finding a solution to that problem. Even animals, made into subjects by us, lack any right that has not been stated by humans. The problem is connected to the inability to communicate – nature and animals cannot claim rights therefore they do not have any. This is not controversial in any way. On the other hand it seems that the rights belong to us and to preserve ourselves we have to create norms on how to behave in our

3 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.

4 Ibid.

relations to nature. To avoid mistakes we have to create legal acts that restrict our use of natural resources. This problem seems to be epistemological since there is no guarantee of truth. Science has transformed into ideology and in modernity this is the only way open to us to solve environmental problems. Since the discovery of science does not mean the same as the eternal truth the salvation seems to be out of reach? There might be another way out of this problem. It might be hidden in the language itself – one possible turn seems to be to reformulate concepts that lie behind the way of looking at life itself. We might be forced to return to the ontological question of what it means to live a good life?

Problems in the above mentioned aspects might be related to societal changes due to technological development. In every period of transition, the tension between functionality and legality increases. This was the case when the large-scale industrial society – both in its capitalist and its socialist version – established itself. The social changes were enormous and the need for new rules of the game became manifest. In these situations, the existing institutions contribute to upholding old rules even in new situations, which are stressing the legal system. It is like changing processes within science. The old paradigm tries to maintain its relevance by interpreting and altering the new phenomenon it terms compatible with the premises of the old paradigm. This is possible, according to Thomas Kuhn (1996) until a crisis and such strong reactions occur that new solutions and new paradigms become necessary. We also meet this phenomenon in the post-modern era with its transition towards a new information society. The old legal concepts built on physical realities have to adjust to new intangible virtual realities. The large-scale society with its centralism and state regulation has to be converted into the logic and rationality of a small-scale society based on self-regulation, diversity and pluralism. It is the same for the growing development within biotechnics. The new technique creates hitherto unknown value- and ethical problems about cloning, stem cells, transplantation, organ donations and so forth.

The transition from a communist to a capitalist oriented industrial society in Eastern Europe and in the former Soviet Republic represents the same kind of tensions between the old rules of the game and a new play with a new script. These countries might face a situation where the society, the horizontal dimension, has shifted while the legal logic in the vertical dimension has not undergone the same changes.

Competing explanations of legal decision-making

The role of extra-legal factors

We have so far reached the conclusion that the perspective of Sociology of Law complements legal dogmatics within legal science by raising other questions than the ones occupying legal dogmatics. But Sociology of Law not only complements legal

dogmatics, it also under certain conditions competes with legal dogmatics in explaining legal decision-making. One aspect here is that the societal forces in the horizontal dimension become so strong in the individual case that they push aside the legal regulation. Compare the following figure:

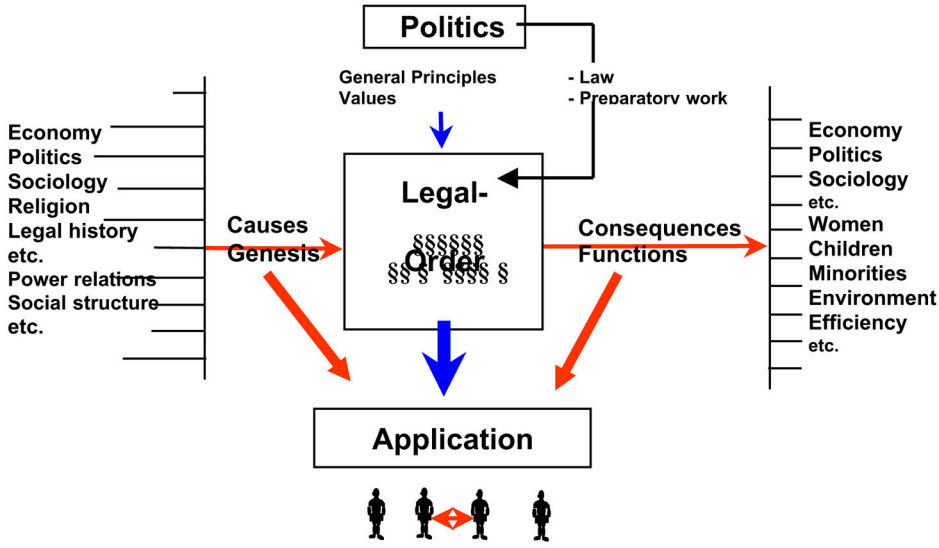

Figure 4 *The external societal forces push aside the legal regulation*

This is not acceptable for many reasons. It would be to set aside the ideas of the representative democracy. It contradicts the ideals connected to legal certainty and the *Rechtsstaat.* It de-stabilizes the social order following on the legal order, etc. There might be several reasons why this situation occurs. But since this problem lies outside the scope of the legal dogmatic paradigm, the question has never been raised within legal science. Do courts follow the law? Do public authorities always follow the law? The paradigm of legal dogmatics rests upon the unarticulated axiom that the application of law follows from the legal system. But within sociology of law we know that this is not always the case, even if it is hard to prove.

The easiest cases are those where someone has been found guilty of corruption. Here it is obvious that the legal answer to a problem has been manipulated in one way or another. Other situations where extra-legal factors have influenced the legal decision-making in the individual case are those connected to studies of equality before the law. Some studies have claimed that individuals are not treated equally. This is for instance the case in relation to discrimination of different kinds (Christian Diesen m fl). Furthermore legal decision-making can deviate from the content of law.

When looking for the proper content of law legal dogmatics is the most adequate and the superior method to use. In these situations legality is necessary for legitimacy. The interest of knowledge is about finding out the authorized given content of law

which at the same time has the acceptance within the whole branch of legal actors. Here one can talk about inter-subjective validity (Aulis Aarnio 1977, Hydén 2002). Tuori is right when he underlines that valid law, law in force, is always a temporary result of a discourse where the main interventions are those by the legislator, the judges and the legal scholars (Tuori 2006:28). The relative weight of their interventions is determined by the prevailing doctrine of legal sources. An open and by Tuori ignored question is related to the influence that comes from outside, from the general discourse – mostly mediated by mass-media – and from what can be called custom or tradition. If we want to stretch these ideas even further we have reason to infer the concept of norms in a non-legal sense.

Håkan Hydén's & Måns Svensson's article is about the concept of norms in Sociology of Law. The aim of their article is to propose a *method* for creating a more coherent concept of norms – and to deliver a tentative and open suggestion on how to define norms in a way that might fit into the context of Sociology of Law. The idea is that the norm concept can be chiselled out through ontological analysis, and that this analysis can be conducted in a way that allows every aspect of the norm concept to be scrutinized separately. The result will in the best case scenario be a kind of 'open source' construction where every individual research project can formulate its view of the common concept. The suggested ontological analysis is mainly founded on the Aristotelian concepts of 'essence' and 'accident'. Thus the method is concerned with distinguishing between norm attributes that lie in their (the norms') nature (collectively they form the definition) and other attributes (that are essential for the categorisation of norms).

The relation between law and society ought in this perspective be complemented by the concept of norms. We can illustrate these relations with the following simple figure:

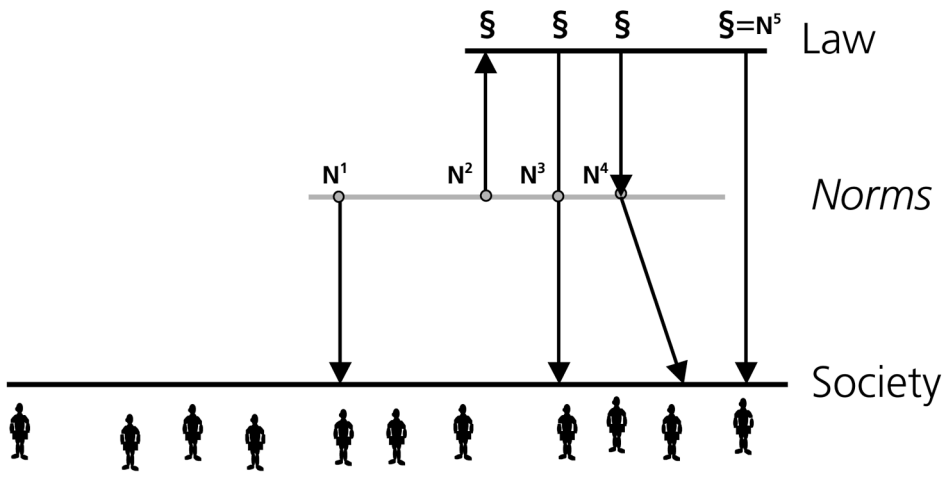

Figure 5 *The relations between Law, Norms and Society*

The construction of the figure is made for analytical purposes. In a sense the illustration can be said to be misleading, since both law and norms operate within society and cannot be separated from the society they "belong to". But by introducing norms as something operating in-between law and society we want to underline that norms can be seen both as something lying behind legal rules and also something that may distort the legal regulation. When it comes to central parts of the legal system, such as civil (private) and penal law, behaviour is not primarily guided by the legal rule as such, but by the social norms we have internalized, about prohibition of violence, pacta sunt servanda and other socio-legal principles. Furthermore, human behaviour to a large extent can be said to follow norms that do not have any necessary connection to legal rules. Legal rules correspond only to a smaller part of all norms operating in society.

Mathias Baier's analysis in his contribution, "Division of Responsibility – Forms of interaction, division of responsibility and preparedness between actors responding to disasters at sea", uses a norm perspective in an EU-project (Baltic Master – an international project which aims to improve maritime safety by integrating local and regional perspectives). The purpose of the report is to serve as a tool for further discussions on preparedness and its format must therefore be suited to this purpose. After the organisation of the data, the analysis of its normative structure will take place. This part goes beyond the mere description of the norms that guide actions and analyses how the norms are configured. As has been pointed out before, the identified norms are merely a symbolic representation of a greater process. As with legal statutes, there is a background to the norm that includes considerations of a very different kind. The big difference is that legal statutes are deliberate, while the formation process of social norms seldom is explicit in that sense. A social norm can emerge over a long period of time and thus be a kind of generalised best practice (if you want to do a certain thing, take a certain role, etc.), at the same time it considers available knowledge. One function of norms is actually to reduce complexity; all the considerations done by many people in the past is passed on to other people but concealed in the formula 'you should treat people well', 'at this company we...' etc. Study III in this Baltic Master project is about describing the configuration of the normative structure in terms of values, cognition and system conditions.

Law and legal rules are always operating in a crossbreed of norms. This means that legal rules do not always determine the outcome of the judicial decision-making, at least not in its entirety. The internal perspective of legal science, legal dogmatics, is impaired by the paradigmatic limitation of having as an axiom that it is the legal discourse that decides the outcome of the legal decision-making. Lying outside the paradigm, the most interesting question to ordinary people and journalists – do courts and public authorities follow the law, never becomes a part of the research agenda or the legal discourse. It is – like all paradigmatic prerequisites – taken for granted and therefore never disputed, at least not before the paradigm is challenged due to producing inconsistent answers to questions raised in relation to the field of knowledge covered by the paradigm. In relation to what we have discussed in this introductory chapter we have reason to claim that sometimes the external perspective of law seems

the most relevant and superior to the internal one, namely when explanations of legal decision-making and arguments therein, display incompatibilities from an internal point of view. This is a strong indicator of other norms "taking over" in the process of reaching a decision.

A prerequisite for the internal perspective is that the law has a normative content of its own. This is the problem in relation to what we call framework laws, i.e. laws that are open-ended and dependent on knowledge from other fields, as commented upon above. In these cases there is a need for knowledge before application is possible. From the field of environment research we know that there is a huge gap between scientific understanding of a phenomenon and changes of action patterns among the actors involved. On average one can count on a time lag of approximately 20 years from the discovery of an environmental problem to adequate protective or pro-active actions (Lundgren – Thelander, 1989). The task for Sociology of Law is to shorten this delay. In our scientific work this is a question of understanding norm-creation processes. How are the norms that guide human and professional actions constructed? Sociology of Law at Lund University is working with a norm-science perspective, which gives us an analytical tool to systematize our experiences from participatory approaches and social learning.

Per Wickenberg's and Ellens Almer's article on "Breaking and Making Norms" uses a norm perspective to analyse young people's stories of changing consumption actions for sustainable development. According to the assessment of the most comprehensive UN climate report to date, it is highly probable that humans are the primary cause of the recent increase in the average global temperature. On editorial pages and in political arenas, voices are being raised that in addition to investing in new technology, we need to establish norms that support actions enabling sustainable development. The goal of our research on stories that describe action patterns is to acquire in-depth knowledge on educating people for sustainable development. This is significant as the UN is again highlighting Education for Sustainable Development (EDS) as a tool for change. Our information providers are young Swedes who, several years before the autumn 2006 sustainability boom in Sweden, had already started searching for a lifestyle in line with their desire for long-term sustainable global development. The questions could thus be: What can we learn from their experiences and why do they break the existing social norms?

There can also be a gap between different legal cultures within one and the same legal system due to different stages of societal development. That was probably the reason why Eugene Ehrlich once coined the concept of living law. There is a close link between law and society which presupposes that each legal system belongs to a certain societal formation. In the case of Ehrlich he lived in the outskirts, Bukovina, of the Austrian-Hungarian empire of that time, which gave rise to dissimilarities both in terms of law and society.

Håkan Hydén makes this point in relation to the legal development in China in his article, "Putting law in Context – Some Remarks on Implementation of law in China", where he points out that the different societal developments in the 17 provinces in China create totally different legal cultures and stages of legal development.

The same aspects are apparent if we consider the harmonization processes within Europe and the EU. However, the gap between legal cultures within a country can in our time be an effect of increasing multicultural features within a society due to migration. Not only ethnic, but also social and gender differences might create changes in the conceptualisation of law and thereby cause a gap between law and norms in society among groups of individuals in society.

Thus, it is not only in terms of time lag that we can talk about a gap between legal regulation and its substratum, to quote another of the founding fathers of Sociology of Law, Karl Renner (Renner 1976). One reason for a misfit between law and its substratum is when new technology puts reality upside down as in the case of information technology and law. Many of the fundamental, existing legal principles do not match the new information technology. As an example one can point to the fact that law in its present understanding is connected to a certain territory. There is Swedish law covering activities in Sweden, Danish law regulating activities in Denmark, German law, etc. The same even goes for parts of the international law. For example EC law is related to the territory of the EU, etc. A legal system requires an authority and legitimate body entitled by the affected people to issue rules, a sovereign of some kind which people obey, a parliament the people have elected, etc. This is not yet (at least) in place on a global scale. International law therefore has to be built on mutual agreements, conventions, which state parties can enter into freely.

If we consider that the information technology with the Internet and the WWW is without borders, we can easily understand the need for changes in the future in relation to the background of the legal system. The upheaval of legal borders is obvious in relation to the outer space and the regulation of monitoring activities.

Anna-Karin Bergman's article represents an interesting example of the need for understanding international norm-making as a complement to national law-making. Space technology is an area that demands specific knowledge, both on how it is developed and how it is utilised. In 1998 an initiative was introduced within the European Union; Global Monitoring for Environment and Security (GMES). GMES aims at implementing information services (foremost by way of Earth Observation technology) dealing with environment and security. GMES has approximately 400 actors, all from different backgrounds and with different interests (political entities, organisations and European institutions). In order for GMES to be realised and utilised in an efficient manner, most of the stakeholders believe that a common regulation steering the utilisation of the initiative is pivotal. Since the area, in which GMES is presented, demands specific knowledge, an understanding of *what* needs to be regulated is crucial for the legislator to obtain. In this context, the concept "norm-creation process" becomes important. The norm-creation process foregoes the regulation process and discloses underlying conflicts and common strategies, i.e. the norm-creation process generates information about informal structures that are important to understand in order to develop an efficient regulation. The article discusses the importance of norm-creation processes when regulating an area encompassing specific knowledge.

Another example where the information technology changes the conditions of regulation is the concept of property. Karl Renner has described how the legal content of property has been the same from Roman law onwards, despite the fact that the socio-economic consequences have changed in significant aspects over the years. By being connected to different complementary legal instruments, related to the contract, the credit system and the concept of the legal person. In the perspective of the information technology, property as a legal institute has gotten into trouble in relation to the question of how property is transferred from one owner to another. In classical legal understanding this is constituted by the Latin word *tradera*, which means that the thing or a representation of it in paper literally is handed over to the other person, to the new owner. In a situation where more and more transactions and shifts of ownership take place in the form of e-business, the old fashioned way of talking about handing over in terms of tradera no longer fits. This becomes even more apparent when more and more goods take the form of software. The challenge here is if intellectual property rights will be developed in a way that fits into the new regulation needs or if the legal concept, property, has come to a dead end. Karl Renner became federal chancellor in the Austrian empire. Eugene Ehrlich was one of his contemporaries. However, while Ehrlich had the view from the periphery, Renner belonged to the centre of the politico/legal power of the empire.

Law as a Social Order within Legal Institutions

Sociology of Law works with living law, to use Eugene Ehrlich's expression, in order to understand what human actions look like from the perspective of norms operating in real life. Ehrlich, in his book *Fundamental Principles of Sociology of Law*, argues for a norm-perspective on the study of law. To 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 the 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 creates 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 into 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 perspectives 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 dogmatics?

In order to take this strategy seriously one has to modify the model of the legal system, used earlier, 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[5]. The hypothesis is that institutional practice results in norms for decision-making that are articulated independently of the legal rules, even if they might be influenced by them to a greater or lesser degree. We can illustrate this by using the earlier model.

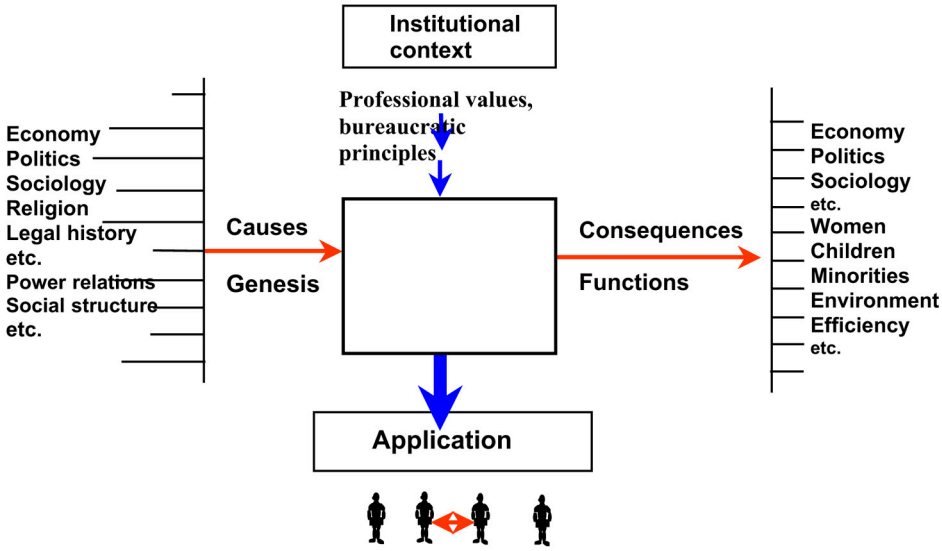

Figure 6 *An empirical approach has to start with an empty box, consisting only of institutional actors*

This model for understanding legal decision-making is much more open than the traditional one we started with. It represents in a sense the possible integration of the two dimensions, the internal and the external perspectives on law. 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 perspectives on law. The horizontal – cause and effect-oriented – perspective is naturally translated by the decision-makers into the normative dimension when they are making 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 underlying normative premises. 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. **Karl Dahlstrand** explores this way of

5 Cf Graver (2008) who talks about classic rhetoric as a model for modern legal thinking.

reasoning in relation to claims for indemnification regarding non-material damages. As a form of a inductive case study in Sociology of Law one can select a particular branch of law or rule of law and locate it in time and space to illustrate how society influences the legal field and how the legal field can influence norms and behaviour in society. One of the most characteristic tendencies in Swedish tort law today is the increasing importance of compensation for "non-pecuniary" harms. The compensation of non-pecuniary harms consists of incommensurability and the only way to calculate this compensation, so it serves as rectification or redress for the victim, is in reflection and influence of the informal norms or the "common sense of justice". His topic presupposes that the legal field is influenced by the theory in jurisprudence and we can therefore talk about an idealistic tendency or "critical legal realist" movement that maybe is illustrated in these compensations. In a more concrete perspective these compensations bring to the fore methodological questions in social science of how we can get empirical knowledge about norms in our society. Finally, his topic emphasizes the negative rights (as for example non-violation) in Sociology of Law and how these rights raise positive rights (to compensation) that challenge traditional borders.

Stig Strömholm claims, with support from the American legal scholar, Wasserstrom, who in his turn makes use of Karl Popper's distinction between "process of discovery" and "process of justification", that legal decision-making in its initial phase is quite open and unprejudiced (Strömholm 1981). The decision-makers take a stand in the case based on pragmatic arguments. But, Strömholm states, thereafter the decision-makers have to continue to the process of justification by checking within the legal system that the solution within the process of discovery holds legally. This gives lawyers a rather wide range of possible solutions in a legal case, even when law on the surface is more or less exact. The relation between law and society never has that point to point relation that legal textbooks many times presuppose, i.e. that every societal problem corresponds to one legal solution and vice versa (cf Graver 2008). Legal decision-making is much more flexible. And this situation becomes more and more relevant over time when society becomes increasingly pluralistic and heterogeneous.

The strategy of open decision-making has already since long been practiced within the part of the legal system we can call framework laws. These are characterized by being open-ended and general. Law can be understood in terms of legal regulation of who, how and what. Who stands for the legal addressee and competency rules, how is equal to procedural rules and the content of the material action rules guiding the specific behaviour. Framework laws belong primarily to the administrative part of the legal system. Administrative decision-making differs a lot from what is going on in the court system in relation to civil and penal law. Courts are used to settle conflicts and impose sanctions. They are therefore looking at law ex post, i.e. after something has happened. Law therefore has to be as exact as possible in order to be legitimate. One can say that legitimacy in these cases is much dependent on legality. Administrative decision-making, on the other hand, takes place in the shadow of law. Law is here used ex ante, before something has happened. The legal regulation there-

fore has the character of end–means rules. Law is about steering and we are talking about implementation of law instead of application of laws, as in the case of "ordinary law" within the civil (private law) and penal parts of the legal system. The what-regulation is as a consequence of its function quite inexact from a legal point of view. Law is mainly a question of communicating the political decision to the executive, the public administration, and it can therefore not function as a cookery book telling in detail how to act in the best way in order to reach the objectives of the law. The content is instead meant to be determined by other than legal professional knowledge, such as medical doctors in relation to health care legislation, civil engineers when it comes to construction of roads and other infrastructural systems, pedagogues are in charge of the interpretation of law about the school and education system, etc. Law is in these cases integrated with other means of regulation, such as professional norms of different kinds and bureaucratic principles. While the what-rules are legally vague, the same law can be very exact in relation to who and how. The law points out who is competent to act and within certain limits. Usually the law also sets up specific instructions of how a case should be handled by the administrator. These rules can be about impact assessment, about submitting the case for consideration by the parties concerned, etc. There are also general rules of the game set up in the relation between the citizen and the public administration about the right to have a say in a case, a right to comment on material which is brought into the case by someone else, the right to an interpreter if you do not master the language, etc.

Framework laws have no immediate outcome following from the legal text, but have to be investigated empirically to get the answers about content in application and practice. Framework laws are not in accordance with the methods of legal dogmatics and are therefore mostly left out in legal education and research. There are not very many studies in Sociology of Law either. Studies of framework laws usually have an implementation or evaluation research design (See for instance Stjernquist 1973, Edlund and Hermerén 1983). These kinds of studies tend to have the legal regulation both as a starting point and parameter for comparing the results. What have the public authorities done in order to carry out the content of the law, as in implementation studies or to what extent have the objectives of the law been fulfilled, as in evaluative research? In other studies the law is regarded as a black box ignoring the inner mechanisms of the decision-making body leaving us with statistics about the implementation of the law in different respects (cf Hetzler 1983 and 2005).

Johanna Alkan Olsson and **Ilhami Alkan Olsson** portray the role of soft law in the international climate change regime (CCR). International soft law, which is located in the "twilight between law and politics",[6] and employed in this contribution referring to both "treaty soft law" and "non-binding soft law", makes the aforementioned differences between the internal and external perspective on law less clear and the use of the vertical perspectives employed by legal dogmatics less self-evident. Soft law also raises crucial questions regarding power, politics, social and legal practices,

6 Thürer, Daniel, *Soft Law* in Encyclopaedia of Public International Law (2002), 4th edition, p. 452

legitimacy, legal basis of obligation and rule development, which yield valuable insights regarding the normative structure of international law. The peculiarities of international law-making, which essentially is decentralised and frequently implies varying degrees of normativity, somewhat eases the tension between the external perspective of Sociology of Law and the traditional legal science by breaking boundaries between the legal/non-legal and binding/non-binding binary codes, and by switching the focus from the structure of norms to the process of law making. Furthermore, these peculiarities of international law, it can be said, also increase the opportunities for Sociology of Law to redefine the boundaries of the realms of legal and non-legal, emphasising the normative role of non-formal norms and sets of implicit or explicit principles, rules and decision-making procedures, as well as institutional practices in the international system.

Without discussing normative questions surrounding soft law such as whether soft law is a new mode of international law-making in its own right, the article explores the use of soft law in the international climate change regime from a broader legal, institutional and social perspective and attempts to examine the effectiveness of the regime – that is to say how soft law and hard law work together in meeting the expectations and solving the defined problems, in four parts: The first part defines three key concepts, used extensively in this paper. Part two discusses factors promoting the increasing use of soft law in international environmental management in general and the climate change regime in particular and overviews the international legal foundations on which the climate change regime is built. Part three briefly analyses of the norm structure of the CCR, including the reporting, review and non-compliance mechanisms as well as the flexibility mechanisms that this regime lays down. Part four reflects on the current interaction between hard and soft law and discusses the future normative development of the CCR. The authors argue that hard and soft law in this regime serve different purposes and often complete each other to forge a link between environment, economy and trade. It is concluded that both hard and soft law may have differential effects on both rule development and the effective implementation of climate change rules, which mainly depends on economic-political saliency, the perceived state of scientific knowledge and the bargaining power of the states that favour either hard or soft law respectively.

Commitment and Norms

There are, however, a few studies that utilize the research approach argued for in relation to the figure above. One such study is Philip Selznick's classical study of the *TVA and the Grassroots* from 1949, which deals with the practice of Franklin D. Roosevelts´ so called New Deal[7]. The TVA was envisioned not only as an electricity provider, but also as a regional economic development agency that would use federal experts and electricity to rapidly modernize the region's economy and society. The TVA's *jurisdiction* covers a territory the size of a major state, and with some state

powers (such as *eminent domain*), but unlike a state, it has no *citizenry* or *elected* officials. It was the first large regional planning agency of the federal government and remains the largest.

An organization as a decision-making body can of course be approached in different ways and by different methods. We will here in the footsteps of Selznick display the inquiry he used, inspired by sociology of formal organizations and shaped by sociological directives which can be regarded as a frame of reference for the theory of organization (Selznick 1949:250).The fundamental elements of this "frame of reference" are as follows:

1. Formal organizations are shaped by forces separate from the stated structure and goals of the group. Each person in the organization functions as a "whole", with actions and alliances separate from the formal organization. The organization is also affected by the environment. Overall, "the organization is an adaptive social structure", facing problems independent of its creation.
2. Informal structures and communication lines will develop from the actions of individuals to "control the conditions of their existence".
3. The informal system is "indispensable" for the formal control and delegation structure. Leadership uses the informal system, but at a price (changed power distribution, etc.).
4. Every adaptive structure evolves to meet its basic needs for survival, and develops methods of self-defence. One can explain organizational behaviour by examining the function/structure of the organization in relation to these needs. The organization strives for security and stability of formal and informal relations.
5. This type of analysis relatively ignores the external progress of the organization and focuses on how this progress (decisions) affects the internal organization.
6. This analysis focuses "on the structural conditions which influence behaviour", and emphasizes constraints, the limitation of alternatives imposed by the system upon its participants.
7. The tensions and dilemmas caused by structural constraints are highlighted. Social action is always, according to Selznick, mediated by human structures, which generate new centres of need and power and interpose themselves between the actor and his goal.

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7 President Franklin Delano Roosevelt signed the Tennessee Valley Authority Act (ch. 32, 48 Stat. 58, *codified as amended at 16 U.S.C. § 831, et seq.*), creating the TVA on May 18, 1933. As a supplier of electric power, the agency was given authority to enter into long term (20 years) contracts for the sale of power to government agencies and private entities, to construct electric power transmission lines in areas not otherwise supplied and to establish rules and regulations for electricity retailing and distribution. The TVA is thus both a power supplier and a regulator. The Tennessee Valley Authority (TVA) is a federally owned corporation which should provide navigation, flood control, electricity generation, fertilizer manufacturing and economic development in the Tennessee Valley, a region particularly impacted by the Great Depression.

Selznick uses these principles to define a set of guiding ideas, which justify and explain the kind of selection the sociologist will make in approaching organizational data. The researcher in this type of study must focus on only a few aspects of how policies affect the internal organization, and must ignore many other issues or explanations. To properly analyze the situation, he must focus on those environmental effects (from policy) that affect the organization, and ignore the other effects the policy may have. Unanticipated consequences of "purposeful action" are particularly interesting to the sociologist, because they often point to underlying social forces and informal structures within the organization. Selznick mentions two main sources of these actions:

1. The limiting function of the "end-in-view". Every time you focus on the goals, you may miss some unexpected consequences.

2. Commitment is a basic mechanism in the generation of unanticipated consequences. Any commitments (goals) made by the organization serve to limit the freedom of actions. A commitment in social action is, according to Selznick (1949:255), an enforced line of action; it refers to a decision dictated by the force of circumstance with the result that the free or scientific adjustment of means and ends is effectively limited. Different types of commitment can imply different unintended actions:

A. Commitments enforce by uniquely organizational imperatives, such as discipline, unity, defence and consent to survive.

B. Commitments enforced by the social character of the personnel. People tend to be resistant to changes of their traditional views and habits, and employers may have to conform to these views or will face unintended consequences. Selznick gives the example from TVA´s agricultural leadership which brought with it ideological and organizational commitments which influenced overall policy.

C. Commitments enforced by institutionalization. Some policies become so ingrained in the organization that they may become ends in themselves, causing unintended consequences.

D. Commitments enforced by social and cultural environment. The outside environment (other institutions, changes in public opinion) can have large unintended consequences if not anticipated.

E. Commitments enforced by the centres of interest generated in the course of action. Any delegation of tasks to others (who may have different interpretations of company goals or just different goals) may result in unintended consequences. These areas can cause tension, dilemmas, and are key points of organizational breakdowns. There is always tension inherent in goals vs. the tools and means (read people) that work to meet them. "Day-to-day decision, relevant to the actual problems met in the translation of policy into action, create precedents, alliances, effective symbols, and personal loyalties which transform the organization from a profane, manipulable instrument into something having a sacred sta-

tus and thus resistant to treatment simply as a means to some external goal (Selznick 1949:258)."

To Selznick the systematized commitments of an organization define its character. The analysis of commitment is thus an effective tool for making explicit the structural factors relevant for decision in organized action. Another way of explaining the same could be to substitute commitment by the concept of norms as elaborated in several of the articles within this volume. Either way, commitments seem to be the foundation of norms and as such have a high explanation value when it comes to understand decision-making in organizations. Legal regulation is a part of those external factors which influence the behaviour of "human actors mediated by social structures", but should not be taken for granted neither as a starting point for understanding how the organization operates nor as valid norms guiding the behaviour. Legal rules should at the most be regarded as potential norms. The analysis of legal decision-making in this perspective has to be unbiased and empirically determined. The legal regulation and the formal organization represent some aspects out of many in the course of an organization's life. Selznick gives us tools to come to grip with the other, more hidden and nuanced, causes. Law might be the model but not the actual facts for the analysis of legal decision-making.

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Matthias Baier

Norms and rules governing the preparedness for oil catastrophes at sea

Baltic Master is an international project which aims to improve maritime safety by integrating local and regional perspectives. The focus is on the Baltic Sea Region and issues concerning preparedness, prevention and marine spatial planning. The Baltic Master project started in 2005 and came to an end on December 31, 2007. The Baltic Master project is partly financed through EU Baltic Sea Region (BSR) Interreg III B Programme. The project has been very successful and generated a number of results and practical achievements. Baltic Master won the maritime category and was considered the best European maritime project in European Regional Champion Awards (Nov, 2007). A continuation of the project is currently being developed in a preparatory study which hopefully will result in a new project, a Baltic Master II, sometime during autumn 2008. This article is a Baltic Master Sub report using a Sociology of Law perspective.

Background – problem focus

In the Baltic Master-brochure it is stated that:

> The Baltic Sea is one of the world's most heavily trafficked waters. Transport by sea is expected to increase dramatically in the next few years.

> The export of oil is increasing. The oil is often carried in older vessels where safety is inadequate.
>
> Oil terminals in the Eastern Baltic are being expanded rapidly. On average, the Baltic Sea is the scene of one major oil related accident every year.
>
> The oil tanker Prestige, carrying a large amount of oil, sank off the coast of Galicia in Spain in 2002. On her way she passed through the Baltic Sea.
>
> This environment is fragile with a limited water flow from the Atlantic. It takes 25-30 years to renew the water of the Baltic Sea.
>
> The use of the sea and the coastal zones is increasing. Shipping, fishing, tourism, offshore wind power plants, oil drilling and other interests are operating in the same area.
>
> In the event of a major accident, the coastal and local regions will have to bear most of the consequences – like polluted beaches; a decline in tourism and the collapse of the fishing industry.
>
> Regional and local governments have a very little influence on matters concerning maritime safety.

According to the same brochure, one *main objective* of the Baltic Master is:

> To increase preparedness for preventing and managing a catastrophe, through integrating local and regional zones in the planning and implementation processes.

Continuing with the *purpose* of the EU-project:

> Two heavy oil tankers collide somewhere in the Baltic Sea in severe weather. Who is in charge of doing what? Who will suffer the consequences? Are we prepared for this? As a first part, the Baltic Master creates a worst-case scenario and determines who is responsible for the various aspects of managing the consequences of a major ship accident involving more than one country. In a later stage, guidelines on local and regional preparedness will be presented.

Purpose of the report

According to the contract the title of the EU-project is “Preparedness and division of responsibility regarding disasters at sea”. Its strategic focus is “Forms of interaction, division of responsibility and preparedness between actors responding to disasters at sea”. Planned results are “Increased knowledge about the division of responsibility within as well as between nations of the SBSR and guidelines for local and regional participation in the existing structure of preparedness.” Outputs are a “report of responsibility and liability together with guidelines for local and regional preparedness”. Keywords of the EU-project are preparedness, division of responsibility, forms of interaction and disasters at sea.

The field of interest for The Baltic Master with respect to the EU-project is how single countries can cope with big accidents at sea concerning environmental problems. These accidents are supposed to stress the cooperation within authorities and countries as well as between authorities and countries. Of interest are also the local

and regional levels. The EU-project is supposed to give an understanding of the nature of the cooperation in case of a big accident at sea. This understanding is in turn intended to be used for policy recommendations. Thus the EU-project is concerned with a description of the preparedness, an analysis of the preparedness and guidelines on how to change the preparedness when necessary.

Delimitations

The EU-project is delimited to the South Baltic Sea region and to Denmark, Germany, Poland and Sweden representing this region. Furthermore, Baltic Master focuses on accidents with environmental consequences rather than personal injuries like e.g. the Estonia accident. Concerning the accidents, the focus is primarily on big ones and the smaller, often deliberate, discharges are omitted. Accidents resulting from terror attacks are also excluded.

The commission of this report is to describe and analyse the structure of the preparedness for big accidents with environmental consequences. It should be possible to connect the report to the subsequent considerations on guidelines for local and regional preparedness.

Outline of the report

After some important points of departure have been laid down, the report will look like this: The next chapter will discuss the socio-legal theory that determines the perspective and many of the concepts used later on. The theory also determines many of the methods used to collect and analyse the empirical data. Chapter 3 will demonstrate the methodological considerations made, the methods used, present an overview of the empirical data and the scenario used for collecting data. Chapter four presents the data structured according to a norm-model. The model is divided into three major parts: driving forces, cognition and system conditions. These data are close to raw data. Chapter five presents the data analysed from an action point of view. How are the driving forces, the cognition and the system conditions structured when making up actions? The last chapter is devoted to some reflections on how possible change should be done. Appended to the report is a matrix of the four countries studied. The matrix focuses on the formal rules.

Theoretical considerations

The EU-project, Milestone 2 talks about a matrix of responsibility for disasters at sea. The keywords are preparedness, division of responsibility, forms of interaction and disasters at sea. The field of interest for The Baltic Master is previous and future accidents at sea concerning environmental problems. These accidents are supposed to stress the cooperation within authorities and countries as well as between authorities and countries. Another focus is local and regional levels. The matrix is supposed to give an understanding of the nature of the cooperation in case of a big accident at sea. This understanding is in turn intended to be used for policy recommendations. Thus the matrix is supposed to serve three purposes: as a description of the cooperation, as an analysis of the cooperation and as a tool for how to change the cooperation if necessary.

Hitherto the Baltic Master concepts of 'preparedness', (division of) 'responsibility', and 'interaction' have been used to describe the field of interest and problem focus. In order to carry out a scientific study, other – scientific – concepts have to be used. The Baltic Master concepts concern very much actions (who will act, who is responsible if there is no action, the nature of the action between several actors). A focus on actions need however some sort of operalisation of these concepts. A common sense understanding of the Baltic Master concepts would be: *who*, will do *what*, *when* and *how*. If we can answer these questions with reference to big accidents on the Baltic Sea, we will be able to make a simple, yet useful description of the preparedness. Therefore, these questions make up the basis of the matrix in the appendix. It is also these kinds of questions that are the focus in compilations like the response manuals from Helcome.

These kinds of compilations normally answer the question of who will do what, when and how according to a plan, a manual, a legislation, an international convention or any other kind of formal set of rules. However, it does not answer the question of who will *actually* do what, when and how. To describe who will do what, when and how according to formal rules is certainly not the same thing as a description of what measures persons or organisations will actually take. The former question takes its starting point in an analysis of a set of rules while the latter question is concerned with empirical studies of actual behaviour like statistics of operations, exercises, in depth studies of big cases etc. Furthermore, questions of who does what, when and how lack another important question crucial for analysis and for the suggestions for changes – namely the question of *why*.

From a sociology of law perspective, this difference can be interpreted in two different ways. It can on the one hand be understood as the study of a set of rules that gives assignments, instructions and competence to certain actors or organisations to act in a certain way. On the other hand can it be understood as a set of informal norms that actually guide the actions observed. The difference between these two perspectives is commonly known as the difference between 'law in books and law in action'. The basis of these two perspectives is the numerous observations showing a

clear difference between formal rules and actually applied rules: the observance of rules can vary from practically total observance to almost no observance at all, all depending on context and various reasons. Subsequently, the important questions are how to explain the high level of observance and how to explain the reasons for the actions behind the low level of observance. Put simply: why do we follow the law, and what is the rationale for not following the law?

In sociology of law the difference between what the law says and what people actually do – be it lay people or professional lawyers – can be theoretically understood and studied in different ways, see Cotterrell (1992) for an overview. When studying the legal profession, theories about professions or organisations are used, e.g. Max Weber and when studying people in general Eugen Ehrlich could be used, taking two examples. The character of the field and the problem focus determine the theories and methods chosen as well as the purpose of the study.

Except for the matrix, the Baltic Master focuses on actions taken rather than on the formal set of rules. When talking about the rationale for actions, we are presupposing a complex and broad perspective; the rationale for actions is theoretically a very complex question. The same is true when we try to understand the rationale for action in order to suggest changes; we have to use a complex and broad perspective and relevant methods to study this rationale. The reason is validity: if the suggestions for change are to work, they have to consider the conditions that influence the actions in question. If we do not know about the past, we have little chance to successfully change the future. In sociology of law this is a commonly known principle: the success of a legislation is dependent on the structure of social norms acting in the field. The more the legislation is in touch with people's social norms, the more successful it can be.

Traditional sociology of law focuses on one perspective at a time, e.g. professions. In Sociology of Law in Lund, however, a new paradigm in sociology of law is developing: the norm perspective. The socio-legal norm perspective was introduced about ten years ago and has been applied and developed since then (Hydén 1998). Today this perspective has been used in matters like sustainable learning, infrastructure conflicts and planning, sports, housing and cooperation. The idea of the perspective is to serve as a platform for three different tasks: to collect data, to analyse data, and to communicate within the socio-legal field and between it and other fields. The perspective is in principle integrative, which means that emphasis is put on synthesising different kinds of knowledge into a format that has its focus on actions.

The norm perspective has been used explicitly in several dissertations, e.g. Wickenberg (1999) and Baier (2003) as well as in many reports. "The Sustainable Island Ven" evaluative study of planning and conflicts on sustainable development was an integrating research project including disciplines from three different faculties at Lund University in cooperation with local practitioners (Tekniska förvaltningen, Landskrona kommun). "The Landskrona study 1970-2010" was also based on this norm approach integrating researchers and practitioners from different fields. The norm approach is also used in the scientific evaluation (2005-07) of the national and multidimensional national project "Barnahus" (Socialstyrelsen, Åklagar-

myndigheten, Rättsmedicinalverket and Polismyndigheten). Other projects work with cooperation between different authorities and local NGO:s. The norm perspective has also been used in the multidisciplinary research application for a FAS-centre on work life, welfare systems and public health and thus integrating eight disciplines from five faculties at Lund University (this application is nominated from Lund University).

A study of formal rules thus differs from the study of norms. Formal rules are normally studied by jurists in general or by lawyers if the matter concerns an actual case or conflict. The result of such a study is directed by the question 'what are the rules concerning X', while the study of norms is directed by the question 'what do actors normally do and why concerning X'. This question is answered in terms of norms. The question is then how to describe norms.

First, the difference between rules and norms must be clarified. For an overview and an in depth discussion about norms and rules, see Baier (2003). (Formal) rules are a certain branch of norms that normally is defined as explicit norms with formal sanctions attached to them passed in an authoritative manner. Hence, the concept of norms used here includes formal rules. The concept of norms is defined here as "anything that guides action". Of importance here is that norms in this sense are strongly associated with action. It is thus an empirical matter if and how norms exist, i.e. guide action and what their content is. In traditional sociology the concept of norms is limited to the social life, e.g. manners or etiquette. In the norm perspective however, the concept of norms is broadened. In fact, anything that guide action is considered as making up the norm. Therefore, conditions within the economic sector, taking one example, are to a high degree 'normative' and have the potential of guiding action.

This concept of norms can be visualised through the norm model, see further the chapter on method. The model is a heuristic tool that assumes that actions or patterns of actions, big cases and the like can be interpreted as a result of values, cognition and system conditions influencing the action in a certain way, as an example, see Baier (2003). The content of these factors and the dynamics of the norm formation process is a matter of empirical analysis. The analysis can start by identifying the value structure. Values like material success, solidarity, human safety, biological diversity etc. have to be discovered. This value structure has to be analysed. Are there value conflicts, priorities etc.? A consensus about values is more likely to serve as a base for actions than conflicts about values. The way facts about the social and the natural world are looked upon is important. Do certain professions take certain knowledge for granted, is there certain ways to talk about problems, how is nature looked upon? The last factor is about system conditions. This part is about the subsystems of society and how they are normative when setting the rules of the game. It is e.g. important to ask what role economy plays, how the political and legal systems function etc.

The model is deliberately broad and different kinds of data can be collected. At the same time it serves as a communication device with respect to other fields of science but also to non-scientific institutions of different kinds. The primary purpose

of the model is to serve as a heuristic tool for the analysis of the architecture of a certain norm or how it works. The existence of a norm is studied by ordinary social science methods like interviews, questionnaires, statistics or observations.

The matrix in the appendix is conceived as a set of formal rules and consequently studied as set of formal norms. This is considered to be the 'top down aspect' of the matrix, i.e. a rule-perspective assigning competence, duties, etc. to certain actors to act in a certain way. This perspective can answer the question of who is supposed to act, when, and how. It is sometimes argued that such a description can be accompanied with an analysis or a comparison of other sets of rules in for instance other countries. But to compare formal rules in different countries requires a certain method – functional – to be successful. Still, such a functional comparison is always limited to the fact that we do not know if the actors actually follow the rules. The socio-legal perspective instead takes a 'bottom up' aspect and studies what actions actors really take in case of an accident, as well as the reasons for these actions. These actions are understood and looked upon in terms of norms.

Another focus of The Baltic Master is the local and the regional levels. Sometimes national regulation is supplemented by regional and local regulations or supplemented at lower levels in a certain sector, environmental regulation. Thus, we often experience different normative centres instead of a logical top down regulation; the phenomenon is known as the polycentricity of law. This fact calls for a non-national, non-regulative perspective like the norm perspective. Another focus of the Baltic Master is big accidents. We can assume that the everyday, small release of oil is handled different and probably in accordance with the regulations from the very big accident in the scenario. We can thus expect more 'a-typical' behaviour in case of a big accident that requires much national and international cooperation. Although the rules for ordinary and extra-ordinary releases most often are the same, an organisation that has to cope with extra-ordinary accidents is challenged in quite another way. Of importance here is the obvious lack of routine and the problems to perform exercises on this scale. It is very likely that different mechanisms influence the actions taken when a small or a major accident occurs. Hence, it is motivated to study these two types of accidents in different ways.

Methodological considerations

The purpose of the study and the theoretical considerations, accounted for above, provide the criteria for how to design this study. First of all, there has to be a description and an analysis of the preparedness for big accidents with environmental consequences, taking into account the delimitations given by the Baltic Master contract. Second, it should be possible to connect the result to the subsequent considerations on guidelines for local and regional preparedness.

The 'who will do what, when and why' – questions will be answered in one study and with one method and one type of data. The question of what will actually hap-

pen will be answered in a second study, with a second method and with a second set of data. We now need a framework that can handle these requirements as well as possible.

The overall framework is the norm perspective outlined above. This framework uses the concept of norms as a key element for several purposes: It is possible to describe actions or patterns of actions in terms of norms. It shall be stressed that there are limits to e.g. rational choice as an explanation of actions or other explanations like affective behaviour. The difference between norm guided action and rational choice is normally that the former is grounded in the past while the latter is grounded in the future. Rational choice is normally studied on an individual level, while norm guided action often is studied on an aggregated level. Norms are general due to the similarities in social life while individual action can take different forms due to the different preferences at individual level. By traditional means of data collection, it is possible to track down norms that guide actions or behaviour. Using the norm model, it is possible to study the architecture of the norm in question. The emergence of the norm, its function and how its key elements operate are possible questions to answer this way. These two parts concern description and analysis.

The last part of the norm perspective concerns the norms as a strategy. If we consider the time dimension of norms, we can see i) that norms are a trade-off between different considerations regarding the future and the past, ii) that the 'norm' guiding the action emerges and iii) the result of the norm as actions. If we consider all three parts of this 'cycle', the function of norms are to transform the past into the future; norms are in this sense not static. Knowledge about which norms guide certain actions thus gives information on the possibility of how to change the actions. Such an analysis is far more likely to be successful than when just changing the rules.

It is now possible to sum up what kind of studies have to be done in a simple matrix. This way we get an overview of the different studies and the different data, but we can also put names on the studies.

	Purpose	Questions asked	Theoretical Framework	Method	Data
Study I	describe the formal preparedness	who what when why	norm perspective	analysis of rules, (legal)	compilations of formal set of rules (Helcome and other)
Study II	describe the actual preparedness	actually who what when why	norm perspective	tracking down norms	"actual" actions taken in case of a scenario
Study III	analyse the actual preparedness	why	norm perspective	analysis of norm structure	study II and additional sources

Figure 1 *The different studies*

Study I

The focus in this report is not on the formal set of rules. One purpose of this study is rather a pedagogical one, to show how little significance these studies normally have if one wants to understand the reasons for why people act or how to change the way people act. It is however important for other reasons to look at the formal structure. In a bureaucracy the formal rules are often important for reasons of e.g. justice. It is also important to understand the formal set of rules to avoid ambiguity or to establish liability. Formal rules can of course be of different "quality" in the sense that a rule has to be clear, possible to observe, monitor, implement etc. But it is normally not possible to evaluate a formal set of rules in terms of effectiveness without knowing anything about the social or economic context.

The study made in this report is really not more than a compilation of already existing compilations normally based on information from each country or authority. Much more effort could easily be put into describing and analysing these country specific regulations. The regulations often have a top down character when national laws or EC-regulations are at the top, together with conventions, down via different decrees to instructions at executive level. But to account for all these rules is a big task and in this instance not worthwhile.

Study II

If study I is more or less traditional, study II needs more explanation when it comes to the realization of it. The purpose of study II is to get information on what actually happens when a big accident occurs. One big problem with this question is how to retrieve data about such accidents. One strategy is to study real cases. The Baltic Master already includes one such case study – the Baltic Carrier accident. Normally, case studies are in-depth studies and the data is limited to the case at hand. Another strategy is to study several accidents and try to generalise from them. One problem is however that there are too few big accidents, especially in the Baltic Sea. The third strategy, chosen here, is to simulate accidents and the subsequent measures taken.

When asking what will really happen, two relevant types of answers are possible: People that have participated in an accident can inform about the actions taken and people with no experience can inform about the actions that would have been taken. The scenario works as a common context for those with no experience and those with experience. The scenario thus generates the data that is retrieved at the scenario workshops (see the matrix for an overview of the scenario workshops). At the workshops, the scenarios have been presented and one basic question has been asked: what would you do now? The answers to this question have to a varying degree been 'exact'; often certain aspects have been discussed longer, while more simple aspects have been rather obvious. The data has thus been retrieved by means of interview and in this case, when several people have been interviewed at the same time, on the same question, this technique would be referred to as focus groups.

Country	Date	Nr of informants	Experience of major accidents	Scenario
Denmark	24th of April	7	Yes	Yes
Germany	22nd of June	1	No	No
Poland	27th of April	6	No	Yes
Sweden	20th of March	9	Yes	Yes
Sweden II	11th of April	Approx. 60	Some	Yes

Figure 2 Overview of the scenario workshops

Baltic Master staff contacted each country and asked for participants in the workshops. Different authorities decided to send one or more participant and in general most aspects and authorities were represented. Most of the people were senior officials and had an operative function. The list of all participants will not be accounted for here. In the German case, only one person from the Havarikommando participated. In the second, Swedish, case a scenario workshop was arranged by the Swedish Rescue Services Agency. The purpose of the workshop was educational, but part of the structure resembled the Baltic Master workshops. The second Swedish workshop thus served as an additional data source and the first Swedish case could be compared to this one. Due to the large number of participants, the second Swedish workshop also served as aggregated control data; otherwise, the workshops are treated as cases studies in a qualitative design.

The scenario used was developed by the Swedish Rescue Services and adapted somewhat to the Baltic Master context. It is a power point presentation where 100.000 tons, double hull, age 15 oil tanker collides with an unspecified freighter just at the point where the EEZ of Denmark, Sweden and Germany coincide. The tanker carries heavy fuel oil with a density of 950 kg/m3 and viscosity of 500 cSt at 10°C water temperature. Oil spill of 10.000-ton fuel oil. The ferry is carrying dangerous goods and the ships are badly damaged. The wind speed is 10 m/s and there is a 4 knots current towards the shore. After this basic information comes a short film showing the dynamic of the oil spill. The program Sea Track Web developed by the Swedish Meteorological and Hydrological Institute (SMHI) is used showing the calculated drift of the oil spill. There are three different versions: one for Denmark/Sweden, one for Germany and one for Poland based on different conditions. The drift is arranged so that there is a major oil spill drifting towards a substantial part of the shore. The oil spill is drifting over more than one EEZ in the beginning.

The data retrieved from the scenario workshops will not be presented at length. The obvious reason is that there is too much material – every scenario lasted approximately 3-4 hours. A second reason is that the data could be interpreted as an evaluation of each country's preparedness, which is not the purpose of this report. Moreover, it is not possible to draw such conclusions from the data since the data from one single country is not necessarily generalizable The data is not valid in a quantitative sense and it can easily be argued that the interviewees would act in another way if an accident would occur.

Instead, the strategy of this study is qualitative. This means that the data is not statistically significant, on the contrary, the data is collected and interpreted using an analytic tool – the norm model that will be used as analytical tool in study III. The answers retrieved as raw data will thus be organised according the norm model. The qualitative character of the design has consequences for how the report can be used. As recently stated, it is not possible to evaluate the four countries rather, the data is used to describe the normative structure of the preparedness. Every country with its authorities has subsequently the possibility to evaluate, assess or discuss its own preparedness with this structure as a background. This way the structure is in itself important as a means of formulating questions.

Study III

The last step is the analysis of the previously organised data. Again, the purpose of the report is to serve as a tool for further discussions on preparedness and its format must therefore be suited to this purpose. After the organisation of the data, the analysis of its normative structure will take place. This part goes behind the mere description of the norms that guide actions and analyses how the norms are configured. As has been pointed out before, the identified norms are merely a symbolic representation of a larger process. As with legal statutes, there is a background to the norm that includes considerations of a very different kind. The big difference is that legal statutes are made deliberately, while the formation process of social norms seldom is explicit in that sense. A social norm can emerge over a long period of time and thus be a kind of generalised best practice (if you want to do a certain thing, take a certain role etc.), at the same time it considers available knowledge. One function of norms is actually to reduce complexity; all the considerations done by many people in the past is passed on to other people but concealed in the formula 'you should treat people well', 'at this company we...' etc. Study III is about describing the configuration of the normative structure in terms of values, cognition and system conditions.

When describing the configurations of the normative structure, a heuristic has been used. The heuristic is made up from three components: values, cognition and system conditions. These components are in turn a result from the assumption that an action is guided by a will (there has to be a certain kind of intentionality behind an action apart from habits, actions guided by emotional stress etc.). The action also has to take into account certain facts about the world, be it the social world or the physical world. Finally, the action has to be feasible, i.e. the conditions of the social and natural systems have to be 'affirmative' regarding the action in question. The systems mentioned are e.g. economy or politics but also the natural systems. These systems are normative in that they do not point out certain actions but affect actions that will be carried out; one metaphor is to say that they make up the infrastructure for actions. It is e.g. not possible to carry out many actions against the conditions of the economy; such an action will be 'sanctioned' by the economy and thus will be uneconomical.

This heuristic can be summed up in a figure:

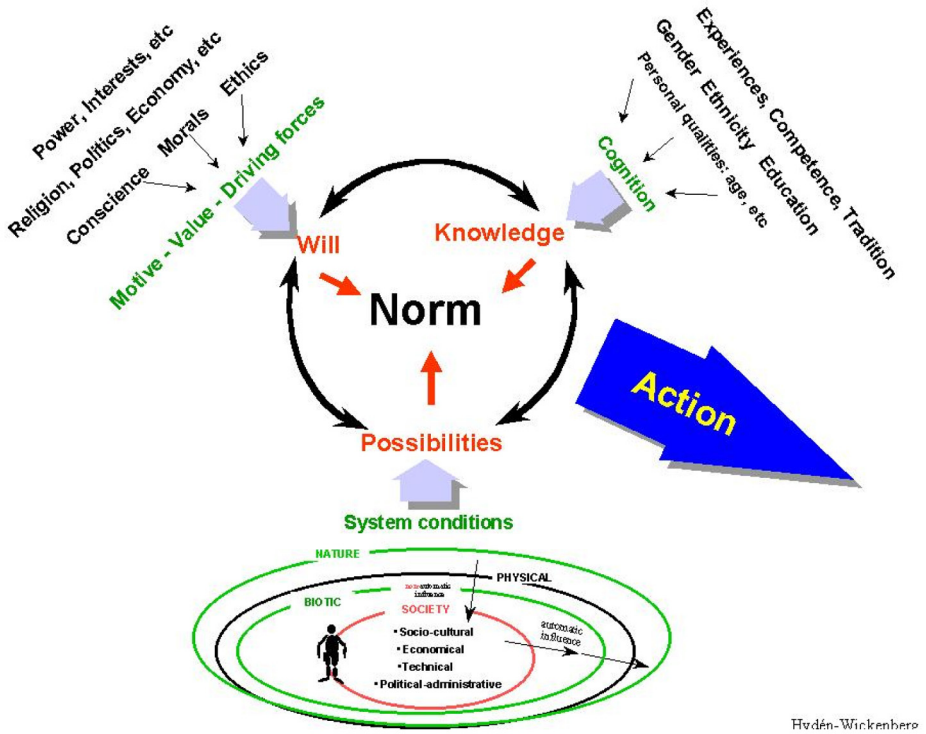

Figure 3 *The heuristic in use*

Study I – the matrix

As discussed earlier, the purpose of this matrix is to describe the formal preparedness. The questions asked are who, is doing what, when and how regarding an extraordinary accident. The data has mainly been collected via Helcome's Manual on Co-operation in Combating Marine Pollution, Vol I and the European Community Civil Protection, Community Information System (CIS). In some cases, national databases have been used.

The data collected gives a good picture of the who-question, at least on an overall level. In this report this part has been divided into responsibility at sea and on land. Left out of the matrix is the fact that in some cases ports and harbours are entities that have special administration and often the harbour master or the like is responsible for the preparedness. Sometimes the responsibility includes the coast, but in practice (study II) the operative responsibility lies within the land based authorities. The coast is a problem, in the sense that it is a grey area between the clear responsibilities at sea and on land. One reason for this is that the land based organisation nor-

mally does not use boats or other sea vessels, but the boats and vessels used at sea often have problems getting close to land and still maintain their oil combating function. The problem is solved ad hoc.

When it comes to the what-question, the data does not answer this question in a systematic way. In general, this part is not covered in this report when it concerns practical matters like how to deploy a boom, what kind of skimmers and pumps to use etc. Answers to this question will most likely be found in the instructions to the operative functions, the On Scene Commander or the like. The same is true for the when-question. But general instructions on what to do in terms of communication and responsibility between countries can be found in the Helcome Manual vol I. The manual covers mainly the cooperation at sea.

This matrix concerns four countries. But for some time, the European Community has been active in the field and there is reason to mention two institutions. The main institution is the Community Mechanism for Civil Protection. The main role of the Community Mechanism for Civil Protection is to facilitate co-operation in civil protection assistance interventions in the event of major emergencies that may require urgent response actions. The Monitoring and Information Centre (MIC) is the operational heart of this mechanism.

The European Maritime Safety Agency (EMSA) is another important institution. The purpose of EMSA is to contribute to the enhancement of the overall maritime safety system in the Community. Its goals are to reduce the risk of maritime accidents, marine pollution from ships and the loss of human lives at sea. Besides this, EMSA has also chartered five oil pollution response vessels to "top up" the preparedness in the Baltic Sea. Two of theses ships participated in an exercise on the 5th of September this year.

On a general level, the Helcom organisation is important for the implementation of the Convention on the Protection of the Marine Environment of the Baltic Sea. Helcom manages e.g. exercises, monitors implementation and facilitates the international cooperation by setting up a framework for cooperation (Helcom manuals I and II). Besides providing information in the Maris databases, Helcom is not an operative organisation.

Study I	At sea	On land
Denmark	Operative: Ministry of Defence → Defence Command Denmark → Admiral Danish Fleet Administrative: Ministry of Environment and energy, → Danish Environmental Protection Agency	Operative: Danish Emergency Management Agency, Local authorities and others. Administrative: Regional/local Councils, Ministry of Defence (DEMA)
Germany	Operative: Federal Ministry of Transport, Building and Houses → Central Command for Maritime Emergencies Administrative: Federal Government + Coastal States → Federal Ministry of Transport, Building and Houses + Coastal St. Ministries	Operative: Coastal States → Local authorities Administrative: Coastal States Ministries
Poland	Operative: Ministry of Infrastructure → Maritime Search and Rescue Service Administrative: Ministry of Infrastructure → Directors of Maritime Offices	Operative: Local Authorities Administrative: no info
Sweden	Operative: The Swedish Coastguard Administrative: The Swedish Ministry of Defence	Operative: Municipal Authorities, Swedish Rescue Services Agency Administrative: Municipalities, The Swedish Ministry of Defence

Figure 4 *Matrix it describe the formal preparedness*

Study II

The purpose of this chapter is to describe who will do what and when in case of an extra ordinary accident at se. The data is retrieved from scenario workshops and the following description is the result from those workshops. The results are not accounted for in a country-specific manner, but the description is a qualitative summary of the four workshops. In some instances examples from a certain country will be given for pedagogical reasons.

The accident – the course of events

By way of introduction, I will outline some steps when there is an extra ordinary accident. Most of the ordinary oil spills are deliberate and result from cleaning the tanks. In such a case the oil spill is much smaller; from a few tons of oil up to thousands of tons. The extraordinary case used as a scenario is not necessarily representative of all big accidents, rather it represents an extraordinary accident with substantial environmental consequences. The ambition, though, has been to make the scenario realistic.

The accident in the scenario is caused by a collision between a 100 000 ton tanker and a freight ferry. The ferry carries dangerous goods. The collision takes place somewhere at the crossing of the Danish, German and Swedish EEZs. There is a 10 000 ton oil spill due to damages to the tanker's hull. At first, the oil slick is drifting around, but quite soon it is spreading and drifting towards land. It reaches land and approximately 50 km of coastline is affected. The kind of coast is not specified.

An extraordinary accident like the scenario will result in a huge rescue operation. And it will certainly be considered as a potential catastrophe. A multinational rescue operation will start and all available resources will be taken into consideration when trying to cope with the accident and its consequences.

Who

In a case like this, the communication normally goes through the Marine Rescue Coordination Centre (MRCC) or a Joint Rescue Coordination Centre (JRCC), mainly because of the size and the nature of the accident. Initially no one knows if there are casualties or injuries, yet it is reasonable to assume so. (Smaller oil spills can be reported directly to the contact point.) Some sort of assessment of the accident has to be done quickly in order to find out the nature of the accident, facts on the ships involved, position, weather and current, type of cargo, injuries, other ships in the area, etc. An interview with the captain of the ship in question is conducted. The assessment is important in order to determine and direct proper resources.

The MRCC, responding first, additionally has to decide what country will initially be in charge of the operation. In most cases, the place of the accident determines this. The place of accident is matched with the borders of the exclusive economic zone (EEZ). When the accident is found to be within a country's EEZ, this country will be responsible for responding to the accident. Today it is possible to quite accurately determine the place of accident and borders of the EEZ due to different surveillance systems like global positioning system (GPS) or automatic information system (AIS). Once a country is singled out it is also the 'lead country' and the 'requesting party' according to the Helcome terminology. This means that this country is in charge of the operation, even though the oil slick is drifting into other countries' EEZ.

When the proper country is identified, the proper authority has to be identified. Often, there is an administrative and operative division between handling injuries, damages and environmental consequences. The search and rescue services (SAR) are administrated differently than the environmental accident. Each country arranges this differently and according to its own political and administrative structure, tradition, efficiency aspects, etc. Some countries separate these two functions and others do not. (These different structures are not illustrated in the matrix). See also the Helcome response manual for more examples. One and the same authority can thus be responsible for both life and environment (e.g. Poland) or there might be a division between these tasks (e.g. Sweden). When it comes to an accident with environmental consequences, normally there is one authority that serves as contact point. This contact point might however be MRCC or a similar authority. This contact point then has to contact relevant authorities or functions. What is relevant of course depends on the nature of the accident.

When the proper authority is alarmed, it will most likely request help from an aircraft in order to get an overview of the accident and of the oil slick. At the same time, some sort of emergency organisation will start to function or will be set up. These kinds of accidents require many resources in terms of experts, information and communication equipment and practical things like food, etc. Apart from the obvious functions such as coastguard, marine, police or environmental experts, it is important that different interests are represented at the command central. If for instance the oil slick risks having consequences for two countries, it is important for the assisting party to send a liaison officer to the central. Representatives from e.g. the shipowner or the insurance company might also be useful. One reason is that they often have the necessary knowledge and contacts, but also the fact that they will perhaps have to stand economic liability. A media officer might also be very useful, since the media will keep in touch anyway. Often the media will try to get in touch with other officers and in this way almost block the communication. (A sinking tanker perfectly matches the media logic, as well as oil-polluted birds.)

In case of a big accident, quite soon the authority in country one will realise that help is needed. This country can subsequently request help from other countries. One obvious reason for this is that other countries might have ships close to the location. Probably the operation starts with a first multinational force, which will be

completed by other national or international forces. It is e.g. neither possible nor desirable for one country to use all available resources at one point. There is a communication format in the Helcom manual regulating rights and duties concerning assistance. Nearby countries tend to have more established forms for cooperation, especially when experiencing a big accident. (According to the Helcome manual, still many countries lack agreements with their neighbours.) Nearby countries also have special agreements for transfer across boarders, custom etc. In these instances the cooperation tends to be better: "we like the country X, but we do not know much bout the country Y".

If the sea is a matter for international cooperation, national cooperation is crucial when the oil reaches the coast. Mostly, there is one organisation dealing with the operative matters concerning oil at sea (perhaps except for the question on how to decide a place of refuge), but in coastal zones the demand for cooperation increases. One obvious reason is that the equipment designed for use at sea only to a certain degree works in coastal zones. Big ships can seldom operate close to land and some countries have developed smaller vessels with the ability to operate close to land. Oil on land also has to be dealt with by other techniques and they are still in development. The sea-based organisation now needs help from land based organisations.

Often it is quite hard to find information on which organisation is responsible for the operation on land in case of a big accident. Obviously, at the municipal level there are organisations and authorities that will act, but the overall impression is that the accident has to be dealt with within the ordinary structure for accidents: fires, car accidents, etc. First, an operative organisation with a command centre has to be set up. Depending on the structure, this can be at a police station, a fire station or the like. The need for a structure with experience of crisis management is clear. The police might need to block roads in order to prevent access to the affected coastline; the local fire brigade assists if their competence is needed or if they have suitable equipment. The challenge for a municipality is the different techniques that have to be used and often tested, as well as the complex problems that have to be solved with reference to environmental consequences. Access to expertise on chemical issues, biological and ecological issues, technological issues, etc. have to be secured. In a small municipality, this might be problematic. Another problem is the need for personnel. If relatively few people are needed at sea, the opposite is true for the land-based organisation. Volunteers with some minimum knowledge have to be called in, trained and served with food, etc. Often the cleaning up of beaches has to be done by hand and, furthermore, the oil has now increased enormously in volume. Therefore much labour is needed for transport of the oil, maintenance of equipment, etc.

If the municipalities are small, there might be many municipalities that are affected in case of a big oil spill. This means that cooperation between the organisation at sea and several municipalities has to be established, a fact that calls for another level of cooperation. When a problem like this happens to several small municipalities, there is need for coordination. The different experts, the labour, technical resources, etc. also need to be prioritised. The sensitivity of the coastline varies according to the type of coast and thus different measures have to be taken in terms of protection,

clean up, etc. Often a clean up measure itself can affect the environment to a certain degree. Some sort of regional or central command has to deal with these kinds of questions. The cooperation is not very structured and more or less ad hoc. Established contacts and communication channels are often used, even though they are less relevant: "do you know anyone who...". There is clearly an uncertainty about the land-based organisations and the way their preparedness is organised. One problem is the lack of communicative infrastructure between the organisations at sea and the organisations ons land. In some instances the difference appears to be bigger between sea and land than between different countries.

On land there is actually another level besides the coast. After the coast has been cleaned, the residue has to be taken care of. Thousands of tons of oil residues as well as sand, stones, etc. have to be stored somewhere and then transported to some sort of plant that can take care of the residues, by separation, burning or the like. Often is this part of the complicated process and requires many resources, but also needs to be assessed in terms of environmental consequences.

To sum up: At sea there seems to be an established system of actors. The kind of organisation differs considerably between countries but there is a clear understanding of who is responsible for certain actions. Contact points are assigned according to the Helcome manual. When it comes to the coast, there seems to be uncertainty regarding who is responsible – either according to a formal set of rules or according to the norms (who will actually act). This is also the situation on land. This means that if communication has to go from sea, via coast, to land, there is a risk of some sort of communication disorder, especially when pressed for time.

Do what

Now knowing who, the following question is what will be done. There seems to be good knowledge about what to do at sea. The overall impression is that the measures taken depend very much on the circumstances. If we assume that possible injuries have been taken care of, the initial focus is on preventing the oil from leaking out into the sea. If a tank is leaking it is possible to pump the oil to another tank. It is also possible to pump the oil to another ship or tanker, if available. Almost immediately, a prognosis of the oil drift will be performed. This prognosis is made with the help of a computer-based program and requires data about the oil, weather conditions, current, position, etc. Thus, an analysis of the property of the oil has to be done unless reliable information about the oil is available. The prognosis is quite reliable and gives a picture of how the oil slick will drift and subsequently what parts of the coast will be hit.

At an early stage, it might also be relevant to move the ship to another place that gives shelter from wind and waves, or that is a better position from an environmental perspective. If the ship is severely damaged, this operation – to find a place of refuge – requires one or more tugboats.

The next step is to try to contain the oil slick by means of booms and thus prevent it from spreading further or just to keep it available to the skimmers – the devices that remove the oil from the water surface. There is a range of mechanical devices suitable for different conditions. If the conditions are good, quite a lot of oil can be taken care of which stresses the ability to contain the oil and then transport it to land. Vessels that can hold the oil adequately is necessary, e.g. high viscosity oil has to be heated in order for it to be possible to pump.

What will be done depends on the properties of the oil, the weather and sea conditions, the time elapsed, if a ship is sinking, etc. If the weather is bad and there are high waves or swell, much of the material cannot be used. Some countries use detergents in order to make the oil spread easier and thus increase the weathering process. It is also possible to burn some types of oil at an early stage.

Parallel to this work, other things have to be done. Often a criminal investigation must be done. It is good if it is performed by another organisation since the response organisation depends on the cooperation with the shipmaster. A second important task is to document the accident, preferably with photographs, for several reasons. A third important task is to document all measures taken by all parties, especially with reference to its economic value, since there will most likely be discussions about the extent of the liability. The legal processes can last for a long time if necessary costs are not well documented and thus become matters in dispute.

The primary task for the sea-based organisation is to prevent oil from leaking into the sea and to prevent oil already in the sea from spreading and to recover as much as possible. Another important task is to communicate the drift of the oil slick to coastal organisations as early as possible so that they can be prepared for actions.

If a very big oil slick is drifting towards land, there is very little chance of preventing the oil from actually hitting the coast. Handling oil on land is normally several times more complicated and requires much more personnel of different kinds compared to the early stage at sea. One reason is that the oil often emulsificates at sea and thus acquires a several times bigger volume; on land this volume is increased further when sand, stones and the like mixes with the emulsification. The oil also adheres to stones, cliffs and must be taken away by other means than at sea. The coastal organisation thus has to prevent the oil slick from entering sensitive land areas if possible. This is done by booms – floating barriers. This way the damage can be reduced. The remaining oil has to be taken care of somehow. There are different techniques for this and, as for the sea, the technique depends on the circumstances. The amount of oil, type of coast (marsh, sand, rocks etc.), length of the coast, temperature, level of salt, etc. determine the effects of the oil and thus influence the choice of clean up method. Much oil can be recovered manually with shovels, high pressure and hot water, etc. while some oil is best left to disappear through biodegradation.

On land the remains of the oil have to be contained before transported to a plant where it can be taken care of. What will be done with the oil depends on the character of the oil and its properties at this stage. If the oil is too contaminated with e.g. water and sand, it can be difficult to refine or burn. Instead it might be necessary to try to separate the water from the oil. Many of these operations require special kinds

of facilities and there are not that many of them. This is also a matter of environmental concern and might require special licenses or permits according to environmental regulation.

The overall impression is that these kinds of practices are quite rare. Extraordinary accidents do not occur often and the smaller ones might have another character when it comes to complexity, press for time, etc. Staff with long experience of combating oil has developed a know-how that is very important for the organisation. There is a certain degree of trial and error when combating oil and there are few opportunities to try new methods, new equipment, etc. under realistic conditions. The high level of contingency is characteristic of responses to oil at sea and on the coast. There are manuals describing the characteristics of oil with different properties, how oil behaves in water, how oil and water emulsificates, etc. But making the right decision at the right time is not easy and it takes experience to do so. One informant told about an oil slick that was combated and no oil could be detected, until an oil slick appeared far away some time later. The oil had acquired almost the same density as the water and went down in the water column for some time, yet surfaced when the temperature or level of salt changed.

In the scenario, a tanker collided with a freight ferry carrying dangerous goods. This condition was not considered to have any substantial effect on the operation. Later on, however, most participants stated that there is a lack of knowledge and experience when it comes to chemicals. The first problem is that it might be difficult to find out what kind of chemicals are aboard the ship. Apart from bulk freighters, many container freighters might have a range of different kinds of chemicals and substances on board. In case of a collision, containers might brake and contaminate the environment. This might severely complicate the combating operation or at least delay it. Liquid gas might evaporate and hinder any access to the freighter and the tanker. A fire might also start chemical processes that complicate the operation. The means and techniques for solving those kinds of problems do not seem to be of current interest or practice. (There is however Helcom Manual vol II, devoted to chemicals.) The same can be said about the knowledge of these kinds of accidents.

Responses to oil at sea, on the coast, or on land also have to be performed with respect for the environmental consequences. There seems to be little or unstructured knowledge of what the environmental effects are of certain actions. Mind that decisions taken under stress at sea most likely have environmental consequences on the coast or on land. In many cases the staff has to rely on assumptions about the total environmental effects of a combating strategy.

To sum up: The field of combating oil is contingent. There are several dynamic processes involved when oil mixes with water and the result depends on many factors. Similar problems can be identified when the oil hits the coast. The complex problem is more complicated when the discharge is extensive. It seems difficult to state clear-cut rules on how to cope with these problems. Instead it seems that know-how is what is important and experience thus plays an important role. A big difference could be noted between the informants in this respect. Furthermore, it seems to be as complex when it comes to other noxious substances and this kind of experi-

ence seems very rare. Finally, there seem to be no structured knowledge about the environmental consequences of the oil (or noxious substances).

When

It is important to act quickly when an accident occurs. Many effects are strongly connected to dynamic processes that are irreversible and cause severe damage. The difference between contained oil and oil in water is obvious and many of the actions taken later are more complicated and require more resources. Several accidents have had such a course of events that there was a chance of reducing the oil spill substantially if actions were taken at an early stage. Shifting the ballast or taking the ship to a place of refuge could reduce the consequences significantly. One problem here is that it is difficult to get the right people together to make such decisions – with the consent of the shipmaster.

Initially, the operation is focused on injuries or to evacuate people. The response to oil is thus secondary, unless there are resources and possibilities to do both. When the oil spill is a fact, the time before an operation can start depends on how quickly an emergency operation can be set up. If people are on duty and the stand by time for vessels and their deployment is of great importance. The number of vessels is also of importance. Today there is a mechanism called maritime assistance services (MAS), with the function of offering services to ships in a potentially dangerous situation. MAS can thus be alerted and while operating, the MRCC and other functions can be on standby.

Study III – why these actions?

The previous chapter described the preparedness as a result of the discussion at the scenario workshops. The purpose of this chapter is to analyse the reasons for the preparedness, to describe the underlying structures that are important for the status of preparedness. The purpose of the chapter is to answer the question why. The question why will however be answered by a heuristic that is used to reconstruct and analyse normative structures. The model is presented in the methodological section above. Put simply, three questions direct the analysis: what do we want to achieve? (driving forces, values), what do we know about it? (cognition) and is it possible to do? (system conditions). The data used is the result of the scenario workshops as well as other sources like books, reports, web pages, interviews, etc.

Driving forces

What is the reason for a response to oil? The question might seem strange, but it is important to look behind the prima facie answer – the environment. Let us say that we did not do anything and instead let a ship or two meet their fate. Who would complain and for what reason? The first answer would most certainly be that human beings would suffer and perhaps die. We can call this value for 'life'. Life is always priority number one and we have seen several examples of this. The search and rescue operation comes first if more than one operation cannot be done. This means that at any occasion when there is a conflict between life and other values, life will come first. Although life is not the first priority for an oil response activity, rescuing lives will supersede the oil response.

Another value is the general security at sea. If ships in distress are not assisted, there would be a general insecurity for all ships at sea, be it tankers, ferries, ropax vessels, etc. Ships in distress can also pose a risk to other ships nearby, especially in the Baltic Sea where there are many narrow fairways. The entire transport system depends on secure, reliable and punctual transports. Today, the industry is more than ever depending on a transportation system that is "just in time".

Another value is property. Through the discussions it has been clear that there is property of considerable economic value at stake in an accident. The value of the ship and the cargo amounts to hundreds of million euros. When a rescue operation or oil combating operation is going on there is a risk that some interests or values will conflict with that of property. This is one reason why representatives for ship owners and insurance companies want to follow the operation as close as possible. Some measures might risk the ship or the cargo and there might be discussions of what measures will satisfy as many different interests as possible.

Another value is the environment. Prima facie, concern for the environment is the most important driving force for oil combating. This is also the starting point for the various conventions on protection on the marine environment. There is a point of dividing the environment into the biotic system (including anything alive like birds, fish, plants, etc.), and the physical system (all things not alive like water, rock, sand, etc). We have often seen a clear division between the two when it comes to oil discharges. One is that the public opinion prioritises animals that suffer from the oil. White sea birds full of oil is the typical symbol for this. A further question is if the environmental concerns are for the environment in itself or primarily as mean for the humans? The question is important in deciding how much money should be spent on oil combating. Are oil combating measures taken in order to protect the environment (life and nature), and if so are there other measures that can do this better and to a greater extent?

Freedom is highly valued in general in our western society. On the sea, however, we can notice that this value is predominant due to a long-standing tradition, Mare Liberum doctrine, but also due to a lack of other conflicting values. Furthermore, it is also possible to exercise this freedom out on the sea and even in the narrow Baltic Sea; there are clear examples of the Mare Liberum-principle. Without going into de-

tails, in the EEZ the shipmaster is really the master and any measure that will be taken with regard to the ship has to be done with consent of the master (as a representative of the owner of the ship and the cargo). When it comes to rules, this freedom normally sets aside the powers of the nation-state, which are bound to its territory and its territorial waters, but only to a small degree to its EEZ. International conventions are thus the instruments to organise the relations between ships and ship owners on the one hand and nation-states on the other. Many arrangements on insurances etc are unique to shipping. At the same time the effects of an oil discharge are a public problem due to the externalisation of the consequences.

Having sketched the value structure, we can now ask some questions referring to the organisations working with responses to oil disasters. The first question concerns the response organisation. Is it value based or is it rule based, i.e. is there an overt set of values operating in the organisation? We can assume a difference between a clearly value oriented organisation and an organisation that is rule based, a bureaucracy. The bureaucracy organises its work by means of rules and professional values like the importance of doing a good job. The value-based organisation organises its work by means of rules, but also has clear values generated within the organisation. This means that in case of a rule conflict or the absence of clear rules, the value-based organisation can operate and solve the conflict with reference to the values. We can find this situation when it is hard to formulate clear and simple rules that are possible to follow. It is not possible to say that one type of organisation is better than another. But it is important to understand what kind of organisation we are dealing with, especially when the task for the organisations is defined in terms of solving the problem. Another aspect is the high degree of necessary cooperation with other organisations within and between countries.

Having discussed the bureaucracy versus the value-based organisation, the subsequent question concerns the overt values. We can assume a difference between two value-based organisations with differing value structures, yet the same rules. Are they oriented towards the environment or towards material values, trade, profitability, etc.? We can thus ask how the implementation of e.g. the Helsinki Convention and its response manual will work within an organisation under let us say the transport ministry compared to under the environmental ministry. Apart from its internal operations, we can assume that the cooperation between these two value-based organisations might experience problems, despite the common set of rules. The ground for this assumption is the socio-legal first principle that rules are followed only to a certain extent and that other norms with reference to certain values can explain the discrepancy. It is important whether there is a consensus on values in general or whether they coincide in each case, or if there is a substantial difference concerning the value structure.

Another question concerns the organisations everyday activity. Does the organisation have tasks other than response to oil, and if so – do they refer to the same values or is there a risk of conflicting values within the organisation, between different sections of the organisation or even within one section? It is also clear that the response at sea needs to be started immediately and decisions have to be made quickly.

Some bureaucratic organisations might experience a risk that the bureaucratic structure conflicts with the demand for speedy decisions. The values supporting bureaucratic decisions (equality, legality, etc.) might conflict with other values.

Cognition

If norms in general and technical norms in particular are supposed to work sufficiently, the norm has to consider knowledge of different kinds. This means that there has to exist knowledge to some extent about the problem or the field in question, be it how to achieve sustainable development, to function socially or how to tie a knot. Knowledge can be of different kinds, e.g. academic – produced in a scientific way and communicated through books, or common sense knowledge – derived from trial and error and communicated through tradition. The way we relate to knowledge is important in terms of the norm formation process. The notion that men are better suited for technology reinforces the gender norms about who will use the car, the drill, etc. How lack of knowledge is coped with is also of importance; does lack of knowledge hinder action or will things just 'straighten themselves out'. Moreover, how will cognition depend on and cooperate with the driving forces discussed above and the system conditions to be discussed below?

From the scenario workshops, but also from looking through various readers in response to marine pollution, the overall impression is that the field is complex and complicated. There are several types of knowledge involved, like biology and marine biology, chemistry, physics, technique, hydrograph, ecology, etc. To understand the fate of an oil discharge an ability to combine many different types of knowledge is required. Much of this knowledge is in its origin scientific but applied to this specific field.

We can distinguish between knowledge and information. 'Knowledge' refers to knowledge about general relations in nature or elsewhere, while 'information' here entails the initial values (like in facts), which combined with the relations will result in different outcomes. In order to act, it is of course important to know how oil reacts in water, what happens and why? Obviously, the oil will spread when leaving the containment. The oil follows the wind and currents and will become an oil slick. Much as a consequence of the spreading of the oil, and quite soon after, the oil evaporates and lighter distillations turn into gas. This process changes the remaining oil slick and the evaporating gas might combust. The next process is emulsification. This means that, under certain circumstances, oil mixes with water. The mix is an emulsion, which means that very small drops of oil and water hold together, rather than form a new substance. The emulsion can thus revert. The emulsion increases substantially in volume, often several times. The process is rather quick; a matter of hours. The oil slick and the water-in-oil emulsion can also disperse. This is the process when the oil droplets mix in the water. This process is much slower, unless dispersants are used. Oil is generally lighter than water, but under certain circumstances – especially after emulsion – the oil can sink into the water column. One reason for

this can be sedimentation, especially in shallow waters. Finally, oil can degrade through micro organisms or oxidation or photo oxidation. These are very slow processes, especially the latter one.

These are the general laws of nature that make up the knowledge considering the oil-water phenomenon in the open sea. Another part of the knowledge concerns the environmental impact of the oil. In general, the environmental impact assessment is based on resources at risk and their capacities to recover. We can identify impacts in the air, on the surface of the water, in the water column and on the coastline. When it comes to the air, the effects of evaporating oil fractions must be put in relation to the general condition of the air. No local effects on wildlife would be expected. Oil slicks can coat living organisms and thus have impacts on e.g. seabirds. Oil in the water column is dispersed and will affect living organisms differently. Of importance is also the loss of concentration downward in the column. There might be impacts on animals like shellfish, plankton or fish eggs, especially filter feeders. Ashore, the mechanisms are about the same, but now there is an accumulation of the oil and also an interaction with the bottom of the sea due to the breaking waves. Molluscs, seaweed, sea birds and the like might suffer. Another assessment that has to be taken into consideration is the effects of the response actions themselves. A zero option should also be assessed.

When it comes to the general effects at sea or ashore, they have to be calculated in a general way by means of statistics, long term observations and the like. Effects on certain populations require detailed knowledge on the risks but also on the locations. Priorities have to be made based on sensitivity, how resources are valued, etc.

Another field that requires knowledge is the socio-economic consequences. Extraordinary accidents very often have substantial effects on tourism, the fishing industry, marinas, ports and harbours, industries that need fresh water, nuclear power plants, etc. Due to the oil spill but also the response actions, parts of the coast might be closed off entirely for a long time. The economic consequences will be calculated in terms of money or loss of profit. It is more complicated to evaluate the loss of values such as recreation, integrity, aesthetics, good-will, etc.

It is obvious that the fields of knowledge accounted for above are very complex and dynamic. One important question in relation to norm formation processes is how to retrieve, keep and update this knowledge. The point of departure is that without sufficient knowledge, the actions taken are not rational. Instead, the steps taken will be random, at worst counterproductive and at best based on trial and error and limited by some experience. The question is how to learn about this field while sustaining the ability to act quickly. One way is to engage experts in different fields. The question, then, is how to arrange for access to these experts. Are they supposed to work within the organisation or become involved on a contract basis? What will this mean for the information and decision process, particularly with reference to the time factor but also to the organisation's dependency on external knowledge? Today there is the opportunity to describe parts of this knowledge in models. There are computer-based programs that through mathematical models can predict the fate of the oil discharge. It seems that the model is used mainly for purposes of predicting

the oil slick drift. However, it is also possible to use it for describing the fate of the oil discharge while still at sea. Due to powerful computers and Internet technique, these programs can be used on different levels in the organisation and also on mobile entities. When it comes to the fate of the oil in water, this knowledge is still based on experience combined with continuous observations.

To evaluate the outcome of all these relations, be it natural laws or social, we need initial values, which have been referred to as information. To begin with there is a need for information about the place of the accident and information about the ships involved and their cargo. When an oil discharge is noted, there is need for information on the rate of the outflow and certainly the properties of the oils (a collision might render more than one discharge, e.g. the cargo oil but also bunker oil and diesel). Facts on the weather, the current, and the waves are crucial to make a drift prognosis and a prognosis of how the oil slick will behave. These facts applied to the knowledge discussed above, make up the character of the 'problem' as it develops at sea. Most of this information is available through established channels like telephone or radio. By combining different information channels, it is possible to develop multi-layered tools that reduce the information access time considerably. The AIS system can thus be combined with a freight registry system (FRS) and in this way present a simple yet informative picture of a vessel and its cargo, which is useful for risk assessments.

However, the problem has consequences. There is thus a need for information on environmental characteristics primarily on the coast but also at sea. Concerning the coast, there are maps that point out environmentally sensitive areas. These maps can also be digitalised and accessed through computers. It is also possible to invoke more functions within such a program, e.g. demographic structure, road maps, real estate registers combined with tools for calculating distances, areas, etc. Such a programme could thus facilitate an assessment of both the problem and its consequences. The over all function of such a tool is to reduce the complexity of the situation given the press for time.

System conditions

The last part of the analysis of the normative structure is the system conditions. Since norms are closely connected to actions, the societal subsystems that effect actions make up an important part of normative structures. Few areas are e.g. unaffected by economical conditions, conditions that are hard to ignore.

When it comes to economy, there has been no remark that this is a problem when responding to oil. Instead, some have pointed out that when the organisation turns to operative mode, money is no object. The organisations' ordinary budget is not used; instead there is an extraordinary account that is used. Thus there are no explicit considerations made whether e.g. to use a certain technique or to take certain steps related to their costs. In fact, the decision to shift from ordinary budget to an operative budget short circuits the otherwise strong economic incentives. However, im-

plicit economic considerations have been noted. Expressions like "of course not at any cost" indicate that there are limits to what can be done in terms of economy, related to the goal. One reason for this is probably that the response organisation always has some ordinary everyday activity that influences the organisation even in the operative mode. There are also economic considerations made in the contingency planning phase. It is too costly to maintain preparedness for the worst-case scenario when it comes to all possible techniques, best standby time, best training, best education, all kinds of vessels, etc. This fact is one reason for the cooperation between states in forums such as the Helcom or the Bonn agreement.

Hence, of some importance for the contingency planning is the liability for the costs resulting from the accident. If the compensation system works well, this would probably affect the contingency planning and indirectly the quality and quantity of the preparedness. A direct consequence of the compensation system is the need to account for every measure taken by the response organisation. Simultaneous with the response operations, extensive bookkeeping has to be done. This is due to the enormous costs of a big accident and the incentive to pay only necessary costs. Several of the big oil discharges in modern time are disputed and take years to resolve. The implementation of the polluter pays principle is one example of how to change the effect of economic externalisation.

Another system important here is the political/administrative system. This system decides who is responsible (competence), what will be done and how this will be done, it also allocates resources. Through this system the organisational framework is set up and thus it operates at an organisational level. This system decides the overall goal for the preparedness and the oil response. What kind of result is expected and how is it achieved? Here we can refer to the discussion above about value oriented organisations. The question is how the values are communicated through the organisational structure and if they are interpreted in terms of e.g. measurable units. Changed priorities or new information might lead to an increase in the goals of the response organisation, e.g. an ability to handle 10 000 tons of oil instead of 5000 tons. Conventions and other political documents concerning the response to oil are transferred through this system to the proper authority, and if there is no authority, this system will create one. Apart from how the overall goal is explicated, several other organisational factors are important for the structure of the preparedness.

The response structure at sea seems to be organised within one organisation. The reason for this is the absence of or at least limited number of administrative borders at sea within each country. On land, there are many more administrative borders where administrative conflicts can occur or where the chain of command might be blurred. The more natural division at sea can however not be found easily on land. The often specially assigned organisation on the sea has to correspond with any available organisational structure on land. The nature of the problem seems to fit quite badly with the administrative structure on land. To put it very simply: specialists at sea and generalists on land. There are however examples of organisational structures on land, e.g. mobile supplies with equipment for shore cleaning. This means that any organisation on land whose contributions can be requested also is part of the prepar-

edness. It is however difficult for any available organisation to maintain a good preparedness for events that almost never occur.

Another fact is that the oil slick might cross several administrative borders on land. This is a problem since quite many organisations suddenly must cooperate on an issue that is seldom or never experienced. The fact that several organisations on the same level must cooperate calls for an organisational level with cooperative or command functions at a regional level. One problem that has to be solved is the matter of necessary priorities. In case of a big accident, the resources will most likely not suffice. One reason for this is that special equipment has to be maintained and updated and personnel have to be trained continuously. It is not likely that this cost will be paid off, and a prisoner's dilemma situation arises. There are however examples of where at the regional level the operative function is less developed than at a local level. The German Havarikommando is one clear example of the necessity to – in case of a big accident – transgress the German bundesländer organisation.

Another organisational matter is on what level and through what procedure operational decisions are being made. We can assume that is important to decentralise the operational decisions since often the time is limited and a long chain of commands might slow down the decisions, especially in the beginning.

The last system of importance is the natural system, a system with another character than the other – social – systems. The main difference is that it is not negotiable in itself. The laws of nature are as they are; however, their effects might be conceived very differently and even socially constructed. We tend not to understand long-term changes without explicit characteristics whereas we tend to recognise instantaneous, explicit changes. If, however, there is a direct connection between our actions and nature's feedback, we tend to understand the relations in question. Knowledge about the oil-water relations accounted for above stem from experience and scientific, controlled studies. Technology is our way of relating to or handling the laws of nature by physical means.

Of importance for the normative structure are two aspects; the first is considered under cognition. To be successful when it comes to oil response, we need to know about the laws of nature, either by experience or by science (often a mix). What can be mentioned here are the means that the response organisations have at their disposal. The technical system and its standard are however not discussed in this report. At the scenario workshops there was a remark that the technical systems are not always compatible.

The second aspect concerns the laws of nature that are not easy to control or adapt to. It is clear that the available technical systems used for oil response are limited in its use. When there is too much wind, too strong currents or too high waves, many of the technical means cannot be used. Circumstances concerning the weather can thus be of very big importance when responding to oil discharges. It might seem meaningless to relate to bad weather, but there are several measures that can be taken in this respect. In case of bad weather, an increased level of preparedness might be necessary. If possible, it might also be necessary to direct ships differently. In case of bad weather and the risk of no or little success of recovery at sea, the alert to coastal

and land authorities must be swift. The same goes for alerting other countries. The abovementioned mechanism MAS is relevant in this perspective.

Close to the laws of nature is time. Due to the laws of nature, it is apparent that the oil spill and its consequences have a dynamic character. Oil spills occur at sea but have effects also in the air, on the coast and on land. Contained in a tanker, the oil becomes very large quite soon after an accident. Oil spills follow the current and the wind. Oil leaking out into the water disperses and evaporates depending on the properties of the oil, the temperature and other factors pertinent to the water and the air. The properties of the oil thus changes and it can evaporate into the air, emulsificate but also remain solid in the water, at the surface, in the water column or on the seabed. Eventually, all of the oil transforms through e.g. biodegradation. Time is an important factor and several processes are dependant on one another. As mentioned above, some of the processes take a couple of hours; so while thinking, things happen.

The response to this strong dependency on time is referred to as 'technology windows-of-opportunity'. These principles are indeed norms formulated with respect to the laws of nature and combined with the time element. The essence of this technology is that during a time laps, there are certain time periods under which certain response measures are possible and effective. This means that this technology facilitates the choice of measures, yet also facilitates environmental and cost benefits. One reason for being prepared with such technologies is that there often is very little time to collect information, assess it and decide on what measures to take.

Worth mentioning here is the tendency to ignore the effects when they are not seen or obvious. When oil is evaporating, nothing can be seen, and oil can "disappear" in the sea. Black sticky oil on the cliffs or on the beach is the obvious opposite position, a fact that activates certain values, for instance environmental. The mass media always react to black sticky oil, especially on white seabirds. Several informants have noted that there are examples of actions taken that to some extent are influenced by this social mechanism. News on oil on beaches activates security, environment, property, etc.

Recommendations

The overall impression is that such an extraordinary accident assumed in this Baltic Master EU-project stresses every organisation in every country enormously. Several informants were of the opinion that such an accident is not possible to handle and that even 5000 tons of oil is enough to constitute an extraordinary accident. Probably the preparedness is not designed for these kinds of accidents regarding physical or administrative resources. The problems with physical resources are however beginning to find at least one solution when EMSA is allocating five response vessels to the Baltic Sea area. Despite these additional resources, the common pool of possible resources the countries in the Baltic Sea in combination with EMSA possess,

requires a great deal of cooperation – both on an international level and on a national level. This cooperation is in focus for this last section of the report.

The extraordinary accident we assume is very difficult to imagine unless one has experienced something similar to it. At a seminar with many participants from Swedish rescue organisations, it was clear that most professionals never experience a major accident, even less an extraordinary accident. One problem is thus how to increase the awareness of the still relatively high risk of a major accident among all levels in an organisation. From the workshops we learned that people that had experienced a major accident viewed the problem very differently compared to those who had not. It seems very important to substitute this experience with something that might have similar effect, e.g. a scenario, perhaps built in a simulator or a PC platform.

Another finding is the significant difference between sea and land. Even though the oil slick is the same all the way, it is conceived differently and treated differently at sea compared to on land. The problem changes character when it moves from sea to land. On sea the time frame is very limited, while this is not a problem once the oil has hit the land. At sea, one organisation is responsible, while several organisations are responsible on land. The technique and strategy for handling the oil is different at sea and on land. At sea there are few specialists, on land are there many generalists. Still, it is important to regard the problem as one problem and try to place the strategy for handling the problem on one hand.

Connected to this division is the need to define a structure for on-land response. Today there is no clear structure of contact points that the sea based organisation can work with; rather, the problem is handed over when the oil reaches land. It is however possible and important to include and involve the land based organisation at an early stage. Exercises including land should be possible.

There is scattered experience of cooperation between different countries and many sections of the Baltic Sea region lack special agreements for cooperation. This is however ongoing work within the Helcom framework.

It is suggested to further use (common) tools that can facilitate the decisions that have to be made when pressed for time. This is one way to reduce the complexity that the oil spill presents including its environmental and socio-economic consequences on land. At sea there is e.g. Sea Track Web to solve the problem of how to forecast the oil drift. On land The German VPS-system is one example and Sweden is developing another tool for contingency planning, sensitivity analysis, etc. However, an extraordinary accident might as well affect more than one country and thus the need for a common tool is obvious.

Regarding the actual work, there is a need for as many as possible to experience a major accident; it would be desirable to arrange for the opportunity for "trainee officers" from other countries to participate in response operations around the Baltic Sea region.

The knowledge seems to be focused on oil rather than chemicals. There is a need for upgrading the awareness and the preparedness for chemicals.

There should also be common pool resources on land and some sort of system at a regional level with equipment and personnel for response to the oil on the coast and beach cleaning, etc.

It is recommended to focus more on preventive measures within the response system. Adequate measures taken at an early stage have great effect on reducing the later consequences. Changed levels of alert and on duty time for bad weather or other risk scenarios might be fruitful. Make use of the MAS mechanism.

Finally, many informants have stressed the importance of exercises of different kinds. It is recommended to enhance and expand the number of exercises within countries. The exercises should be as realistic as possible, including the land based organisations, crossing geographic and administrative borders, etc. Why not mix personnel from different countries?

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Anna-Karin Bergman

The importance of understanding norm-creation processes in the work towards efficient regulations

Abstract

Space technology is an area that demands specific knowledge, both on how it is developed and how it is utilised. In 1998 an initiative was introduced within the European Union; Global Monitoring for Environment and Security (GMES). GMES aims at implementing information services (foremost via Earth Observation technology) dealing with environment and security.

GMES has approximately 400 actors, all from different backgrounds and with different interests (political entities, organisations and European institutions). In order for GMES to be realised and utilised in an efficient manner, most of the stakeholders believe that a common regulation steering the utilisation of the initiative is pivotal.

Since the area, in which GMES is presented, demands specific knowledge, an understanding of what needs to be regulated is crucial for the legislator to obtain. In this context, the concept "norm-creation process" becomes important. The norm-creation process foregoes the regulation process and discloses underlying conflicts and common strategies, i.e. the norm-creation process generates information about

informal structures that are important to understand in order to develop an efficient regulation.

This article discusses the importance of norm-creation processes when regulating an area encompassing specific knowledge.

Introduction

This working paper discusses the importance of norm-creation processes when regulating an area encompassing specific knowledge. On a more descriptive note, the paper highlights the importance of understanding how political, economic and technological systems affect and influence strategies underlying an implementation- and regulation process. The content of the paper is included as an element of my PhD thesis (in progress) with the working title "*Information for sustainable development – A study of the norm-creation process within the European Earth Observation (EO) initiative GMES*", thus this paper will commence with a short description of the research context which the content ought to be related to.

Research context

The thesis takes its point of departure in the contribution of Earth Observation (EO)[1] technologies as a tool for managing regional and global environmental challenges and sustainable development. The research is focused and analysed in relation to a European initiative for the implementation of information services dealing with environment and security; Global Monitoring for Environment and Security (GMES).

In 1998 a group of institutions involved in the development of space activities in Europe called for attention in "political and policy making circles to global environmental change" (European Commission, CNES et al. 1998:1).[2] The document, also known as "the Baveno Manifesto", emphasised "the strategic importance for Europe to develop global monitoring capabilities that can inform on a regular basis on the conditions of the environment around the world" (ibid.). This will to contribute to a common European vision and strategy towards environmental monitoring was eventually realised through the joint initiative, supported by the European Commission (EC), the European Space Agency (ESA) and their member states, Global Monitoring for Environment and Security (GMES).

1 Remote sensing, i.e. monitoring of planet Earth from space.

2 Institutions involved in the creation of the manifesto: ESA, EUMETSAT, CNES, ASI, BNSC, DLR, EARSC and European Commission.

> The 'Global Monitoring for Environment and Security' (GMES) represents a concerted effort to bring data and information providers together with users, so they can better understand each other and make environmental and security-related information available to the people who need it through enhanced or new services (www.gmes.info).

EO is developing rapidly in the EU and around the world and can be considered to have a *crucial role* in promoting sustainable development through monitoring *regional to global* environmental issues[3] and disaster management[4]. EO provides its users with timely and long-term information about the status of the Earth's environment and offers a valuable foundation of information regarding these concerns. However, in order for the Earth Observation (EO) to promote sustainable development through its vital information the initiative has to be effectively implemented so that the "environmental and security-related information [is made] available to the people who need it [the users]" (www.gmes.info). Nonetheless, in light of this approach conflicts appear that can be pertained to informal structures of which has a capital influence on the implementation and future regulation of GMES.

Before we proceed with the dilemmas (i.e. the result), the empirical material will be presented in short.

Empirical material

The empirical material consists of 15 interviews made by, in their own view, the most important stakeholders. The interviews are semi-structured and the character of the questions varies between informant (where the answer is used to obtain information about certain facts) and respondent (where the interviewee is asked to elaborate his/her view on certain aspects or areas). Since the interviews are double in nature they can in the present research hence, assist in 1) obtaining information *about* the relevant stakeholders and 2) obtaining detailed information *from* the stakeholders that might not be presented in the official document and that could be interpreted as having an impact on the interests and strategies of the stakeholder related to GMES.

The interviews were conducted over the telephone and all in all the empirical material was obtained over a period of approximately 1 year. The interviews varied from 30 minutes to 90 minutes depending on how much time the informants were willing to reserve; the interviews were recorded and subsequently transcribed. The transcribed answers were subsequently analysed according to the analytical framework.

3 e.g. climate change, loss of biodiversity, land degradation, and food security.
4 e.g. early warning and disaster relief.

Norm-creation as an analytical framework

The analytical framework of this article builds on a particular perspective on norms ("norm science"); a perspective which is foremost advocated and utilised by the Sociology of Law department at Lund University, Sweden (Hydén 2002).

Norms

The phenomenon "norm" has scientifically been dealt with by many academic disciplines and has been encompassed by as many definitions. Within social scientific disciplines there are however seemingly one common denominator explaining the concept; something that *guides human behaviour/actions*. Thus, within the social sciences norms are said to be positioned behind human behaviour and therefore potentially guides individuals towards the desirable or routinely behaviour; the "normal" social behaviour (Hydén 2002; Baier 2003). Most commonly used e.g. within sociology, norms are seen as something that only encompasses social life (social interaction) thus are also only established and determined within this sphere (Hydén, 1998).

In Sweden Sociology of Law is considered a social science, hence is also advocating the connection between norms and social life. However, it has through its notion of norm added on to the perspective to also include connections established between norms and elements *outside* social life (Wickenberg 1999; Hydén 2002; Baier 2003). Hydén et al. believes that norms not only emanate from social interaction between individuals as is done in social life but that they also originate from *systems* such as economy, politics, technology, environment and law. This extension means that systemic norms might be as potentially guiding (action directed) towards desirable behaviour as social norms are.

Norm-creation process

Norms can be studied as something observable in the "real world" (in this case we are dealing with an *existing norm*) e.g. we can go out in the world and suddenly we observe that people are standing in line waiting to pay for merchandises. We can understand and explain this behaviour by articulating what lies behind the actions; in this case a social norm. The norm is said to guide individuals towards the desirable behaviour (standing in line) if they do not want to be socially sanctioned (whispering, looks, angry comments, etc.). Norms can also be used as an *analytical mechanisml*, which rather means that one reconstructs the normative implications behind a norm. This however, entails having an existing norm. In the context of the article there does not exist a norm that sets the premises for how the actors should act in order to implement and regulate GMES. But even if there does not exist a norm, the

norm perspective still gives you one more option; to reconstruct the prerequisites for a *potential* norm i.e. to analyse the conditions for a future regulation. The reconstruction of the prerequisites for a (potential) norm is (in the language of sociology of law) translated into the study of a **norm-creation process**, something the thesis and this paper is centred around.

The study of the norm-creation process allows us to map out the infromal structures behind the actions conducted by the different GMES actors and it can hereby produce a comprehensive view of what may influence and/or limiting a future regulation of the initiative GMES.

The analytical tool

To be able to study the norm-creation process a method or analytical tool is required that will allow for this process to be studied.

The analytical toll has been constructed by Hydén-Wickenberg at the Department of Sociology of Law at Lund University and it builds on the idea, with references to Lennart Lundquist and Ulrich Nitsch, that norms generates out of three variables; what societal actors *want/value*, *know*[5], and *are able to* (Lundquist 1987; Lundquist 1992; Nitsch 1996; Hydén 2002).

It is worth mentioning that compared to Lundquist and Nietsch's dimensions/variables, will and knowledge is consider to have the same content in the Hydén-Wickenberg tool (Hydén 2002:281). This however, also means that the *are able to*-dimension differs in the respective idea. Because of what Hydén considers to be an external element, the tool, in contrast to Lundquist and Nietsch's idea, is thus seen as both actor-driven (internal) and systems-driven (external).

The analytical tool does not possess a normative content in itself but is rather filled with one depending on what area/problem it is applied on. The analytical tool has a synthesising effect in that it assembles rather than separates existing knowledge. As mentioned above, the tool has three variables: will, knowledge and possibilities and the norm-creation process is said to constitute a synthesis of and/or trade-off between theses three variables.

Result of the empirical study

The analysis of the empirical material provides an image of value-based conflicts and a need for streamlinging knowledge amongst the stakeholders of GMES.

The analysis shows that two, seemingly, opposite values are dominant amongst the stakeholders; Environmentalism (cf. Smith 1998; Dobson 2000) and Econo-

5 Lundquist refer to this category as "comprehend". Hydén, however, include the category "comprehend" into the knowledge-dimension (Hydén, 2002, p. 281).

mism[6]. The first relates to the concern for the environment and is advocated by e.g. European Environment Agency (EEA), whereas the latter connects to the strive for competitiveness and is advocated by e.g. national space organisations. The analysis further shows a lack of communication among the stakeholders, mainly depending on different scientific backgrounds (knowledge) and native languages.

The third result relates back to what Lundquist describes as the *are-able-to*-dimension or what Hydén calls the systems-dimension. The empirical material provides an image of areas that may be interpreted as systems, a sort of systems analysis if you will, not however to be confused with systems theory (see von Bertalanffy, 1968; von Foerster, 1960). In the result, three such systems are dominating; political, economic and technological and dilemmas generated within respective system have subsequently been identified. It should be noted that the dilemmas described under repsective system may have a connection to other systems and/or to the value- or knowledge dimension as well.

Political dilemmas

Within Europe collaboration is important (no matter what area). However, although GMES provides a structure for collaboration e.g. through political negotiations and agreements, the political interests within each stakeholder may differ and thus produce strategies on what the respective stakeholder wants a future regulation to include.

The political dilemmas are thus somewhat overarching dilemmas that can be attributed to other systems such as technology and economy.

Economic dilemmas

This also related back to other systems and or value- and knowledge variable. The second category of dilemmas that is dominating the development of GMES is how the owners of the EO satellites and the distributors of the generated EO information can be compensated enough so that an incentive to continue to be an actor in GMES is upheld while at the same time upholding an incentive and possibility for the users to continue to be actors in GMES and utilise the information i.e. access to data at low cost. This is illustrated by a statement put forward by one user:

> I mean they [the users] simply have to pay a lot of money or they don't have the access. I for example worked 14 years in climate impact research and never could use the existing data because I didn't have access to it, it was not available and this blocks a lot. **I am convinced that a lot of**

6 In this context the term is used as a psychological account about the motivation that drives human action, which is assumed to be predominantly steered by economic motives so to support one's own financial interests and improve one's own material well-being.

> **jobs and research capacity is also migrating to US by the fact that you don't have easy and accessible data** (my emphasis).[7]

Technological dilemmas

The third category of dilemmas to be presented here are the technological. The technological dilemmas are represented by different groups having different interests in the technology per se. These interests are foremost made visible through connections to other systems, e.g. the economic dilemma, i.e. the industry have an (economic) interest in the technology, while some users might see the technology as a means of promoting other interests e.g. the monitoring of emissions, desertification, etc. This dilemma is also highlighted by a statement made by from DG Enterprise as they unveiled the new European Space Policy.

> Simply stated, space is a strategic asset underpinning a high value-added industrial sector, a driver for the Lisbon process aimed at improving citizen's lives and contributing to the knowledge-based society. This is why **Europe needs a competitive space industry**, served by strong and long-term investment in new space technologies.

An additional technological dilemma is the one presented between the space component and the *in situ* component, both used in the GMES initiative, and how they are valued (as promoting ecologism or economism. Some users argue that the space component alone cannot produce the information needed to meet their interests, thus, the ground segment has to be included as a technological complement to the space infrastructure, something that (apparently in practice) does not lie within the long tradition of 'European space industry'.

The dilemmas are some examples that have been identified when conducting the empirical studies. They present a holistic perspective and make visible the complexity a joint European initiative is facing in the work towards implementation.

Conclusion

This paper has produced an image stating the importance of understanding a norm-creation process as it discloses informal structures important for an efficient regulation. The article has analysed these structures in relation to a specific knowledge-area; Earth Observation (EO). Regulating such a particular area calls for an understanding of the area *per se* and what eventual conflicts, dilemmas and common strategies are presented. It is therefore of utmost importance that the underlying informal structures are disclosed to the legislator. This means that the law in an initial stage has to be produced from a bottom-up approach (in cooperation between actors) so as to highlight and transfer the knowledge.

7 Interview with actor positioned in the user category.

The particular empricial material shows that, at the moment, two parallell norm-creation processes are taken place; one steered by the value of Economism (competitiveness, money, etc.) and the other steered by the value of Environmentalism (sustainable development, environmental management etc.). In order to realise and utilise GMES in an efficient manner, the legislator ought to create a regulation that will try and streamline the parallell norm-creation processes into one. The understanding of informal structures will, in my opinion, lead to regulations that are firmly established in society and subsequently also more in line with the practical side of reality.

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Lina Carlsson & Karsten Åström

Court Decisions in Public Procurement: Delineating the Grey Zone

Abstract

To remain effective within the public procurement process it is important to avoid revisions on contract award decisions, which prolong the procurement process and takes its toll on public resources. This paper aims to delineate the grey zone within public procurement legislation and clarify how the court interprets it, which will aid procurement officers in achieving best practice. Findings indicate a bias in favour of the procuring authority in terms of outcome of the court decisions through the use of a principle allowing for imperfect Request for Tender (RFT) and evaluation models due to fluctuations in the economic sector. The findings show that some of the most litigious issues are flawed RFT, inconsistent RFT and award evaluation and a lack of clarity in the RFT and/or the procurement process.

Introduction

The legislation on public procurement, Swedish and European, allows aggrieved tenderers to bring a complaint before the courts, given certain conditions.[1] Although this remedy was available previously, it was really only available in theory prior to the

amendment to the legislation in 2002.[2] A complaint could be brought against the procuring authority once the award decision had been made but not after the contract had been signed. Firstly, the procuring authority was not required to inform aggrieved tenderers of the award decision; and, secondly, the requirements of the Official Secrets Act[3] ensured confidentiality of the tender documents prior to the award decision.[4] In practice, this meant that the procuring authority could make the award decision and immediately sign the contract with the winning tenderer, leaving the aggrieved tenderers little or no ability to complain based on the award decision. Subsequent to 2002, however, the theoretical possibility became a practical possibility through the requirement that the award decision had to be communicated to all tenderers and that a ten-day period had to pass after the communication before the contract could be signed. Although the direct relation is difficult to prove, there is evidence that this change led to a dramatic increase (from 153 in 2001 to 1124 in 2004) in the number of complaints brought before the Swedish County Administrative Courts (Lennerfors, 2007).

A study conducted during the years 2003-2006, entailing interviews with public procurement officers within municipalities and regions all over Sweden, indicated that there were concerns regarding the number of complaints brought against the procuring authorities regarding various aspects of the procurement process. The exercise of the revision in public procurement in Sweden has additionally been highlighted in the literature as a contentious issue (Lennerfors, 2007). The focus of the study behind the interviews entails the use of multiple criteria in the public procurement process, primarily in construction procurement. Construction was chosen because of its economic importance, and half of the interviewees were engaged in construction procurement only and the other half from central procuring functions. In the procurement process, the procuring authority has the option of selecting the tenderer with the lowest priced tender or the tenderer with the economically most advantageous tender, and must state which in the Request for Tender (RFT). It is through the evaluation of the economically most advantageous tender that the procuring authority has the ability to use multiple criteria in the award evaluation stage, which furthermore tend to have litigious effects (Carlsson and Waara, 2007:21-22).

Throughout the interviews, there were also statements to the effect that the legislation was considered vague and complex, resulting in uncertainty on behalf of the procurement officers with regard to their decision-making in the procurement process.[5] In order to make informed and appropriate decisions, it is essential that the procurement officers have up-to-date knowledge of the current legislation and in partic-

1 This paper deals with cases brought under the auspices of the previous Swedish legislation on public procurement, (SFS 1992:1528), although it should be noted that there is new legislation in place on public procurement as of January 1st, 2008. (SFS 2007:1091)

2 The amendment was a result of the European case C- 81/98, Alcatel Austria, Reg 1999 p. I-7671, in which it was held that the unavailability of aggrieved tenderers to a revision of the award decision was contrary to EC-legislation DIR 89/665/EEG and DIR 92/13/EEG.

3 The Official Secrets Act (1980:100).

4 Falk and Pedersen, 2006:175.

5 Carlsson and Waara, 2006.

ular its practical implications. Legal information is generally available through conferences, seminars, books and legislation or court decision updates, and the information they obtain is an interpretation of the legislation or the court decisions in a legal language communication. To contribute to the understanding of the implications of the legislation, this paper discusses some of the case law that has evolved over a 3-year period, 2003-2006, and how the courts have interpreted the legislation with regard to construction procurement. The main emphasis of the study lies as mentioned on construction procurement. For that reason, as well as in order to limit the number of cases to be studied for practical reasons, the cases studied related to the construction sector only. This does not mean, however, that the findings are not applicable to other sectors, since the same courts deal with similar legal principles and dilemmas.

Purpose of Study

This paper aims to delineate the grey zone within public procurement legislation as interpreted by administrative courts. By the grey zone we mean the area of legal uncertainty pertaining to the public procurement legislation, in particular with regard to the legal content of the established principles stipulated in the public procurement legislation at Swedish and European levels.

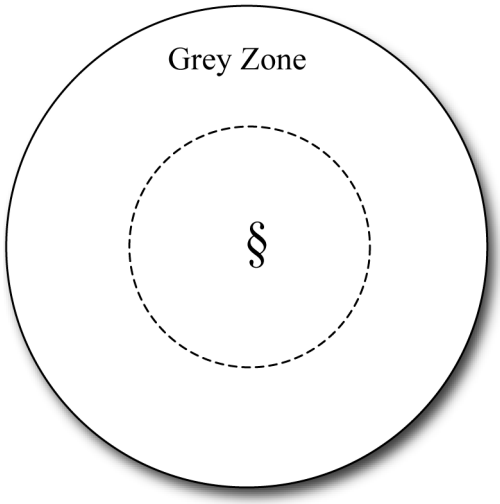

Figure 1 *The grey zone relating to legal application.*

The reason why a revision procedure is available, besides enabling an aggrieved tenderer to obtain redress, is to create a foundation for a uniform application of the law and thereby serve as guidance for tenderers, increase predictability and thus uphold the rule of law. One research question is whether courts contribute to a more uni-

form application by clarifying the often vague prerequisites the legislation is built upon.

The grey zone opens for discrepancy in two ways; leading to lack of legal certainty and equal opportunities. In essence, this discrepancy counteracts the flexibility available to the procurement officers with regard to formulating the RFT, evaluating received tenders and making the award decision. A second research question is to delineate to what extent courts support legal certainty and equal opportunities on the one hand, and support or hinder flexibility on the other. From a theoretical perspective outlined in the next section, the third research question is concerned with a better understanding of legal reasoning in court when applying framework law.

Theoretical Perspective

In legal science, law is generally seen as a system of rules that manifests general principles, applied by courts or other institutions to make decisions in individual cases. To find the content of the rule the lawyer uses legal sources such as wordings, preparatory works, precedents and doctrine. This is an internal perspective, taught in law schools. Sociology of Law takes an external perspective, looking at rules and the legal order from the outside putting law in context.[6] To answer the question of what does the law require, the legal dogmatic method deduces the answer from the sources of law, while the socio-legal scholar in addition looks at the functions of law; empirically placing the legal framework in its societal context.

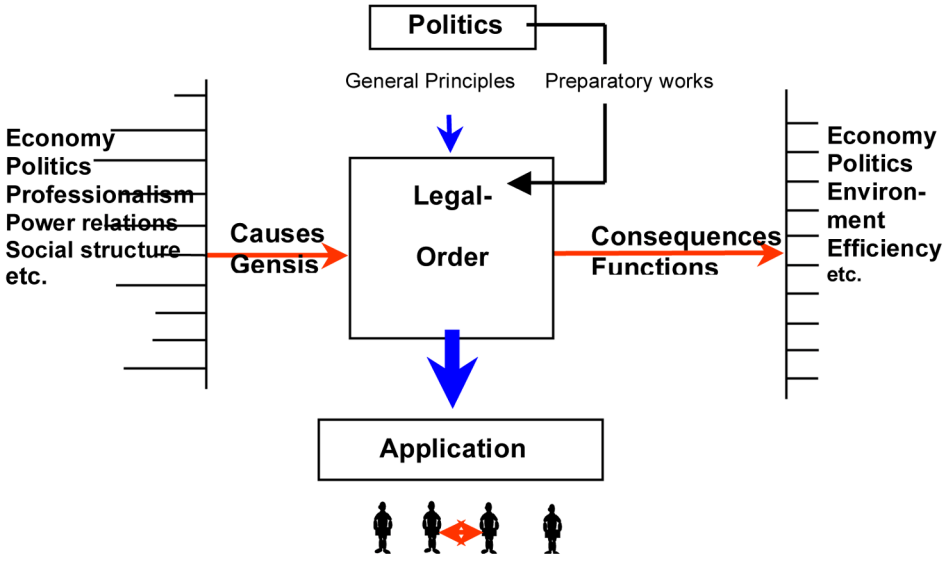

Figure 2 *Legal order in two dimensions*

6 Hydén (2005), Hydén and Wickenberg (2008).

The process of administering public procurement legislation involves four different forms of rationality; local politics, professionalism, market and legal application. In politics, among professionals and in the market, people act in order to fulfil goals defined in the respective setting – goal rationality, but judges shall make decisions according to rules decided on by parliaments – norm rationality. It is an empirical question if legal application in the administrative courts actually follows this formal way of decision making. Framework law puts this matter at stake, as framework law in a way lacks normative content. Normativity is a matter for legal practice, since the legal content is formed in its application in individual cases. Swedish procurement legislation does not stipulate one particular solution rather that a decision does not infringe the normative provisions required by law.[7] Legal application is not just a matter of deciding between right and wrong.

Methods

The context of the empirical investigation is construction-related public procurement in Sweden and the data were gathered using empirical findings from a previously conducted quantitative study of the same cases.[8] This paper uses the gathered cases – to conduct a qualitative study of the legal content of these cases. The sample of empirical data was obtained from a database containing court cases related to public procurement.[9] The dataset originally included 574 construction-related cases in County Administrative Courts, constituting a subset of the 4,742 total number of public procurement cases during the same period.[10] The dataset was identified as "construction-related" based on the assignment of court cases to a certain code,[11] through which their relevance for construction procurement can be identified.[12]

Furthermore, due to the objective of analysing the legal content of the cases, those cases containing very limited information regarding the legal argumentation, primarily the plaintiff's complaints, were excluded from the analysis. This has the implica-

7 The Act (SFS 1992:1528) on Public Procurement. Chapter 7. § 2. If the contracting entity has infringed the provisions of Article 4 of Chapter 1 or any other provision in this act and this has occasioned injury or the risk of injury to the supplier, the County Administrative Court shall order that the award procedure be recommenced or that it may be concluded only when rectification has been made. In cases concerning procurement as set forth in

8 Carlsson and Waara, 2007.

9 Allego, www.allego.se.

10 There is a possibility that the digit representing the total number of cases is not entirely accurate, see Carlsson and Waara, 2007:13. However, the discrepancy is not believed to be of major importance of the purposes of this study.

11 The Common Procurement Vocabulary (CPV) classification system used within the European Union.

12 See Carlsson and Waara, 2007:14-15, for a more in-depth description of the selection of construction-related cases.

tion of excluding those cases that had been dismissed by the courts,[13] since insufficient detail on the contentious issue is given. This left the analysis with 353 cases that had been either rejected or approved. Another reason for exclusion for the purposes of this paper is where the case relates to an interim decision by the court, in which it was decided to postpone the decision on the legal content until a later date. These cases totalled 23. Consequently, 330 cases remained. These cases were analysed with regard to their legal content; that is, the complaint, the respondent's legal counter-argumentation and the court's legal reasoning and resulting decision. The purpose is to analyse the court's legal reasoning in an effort to delineate the grey zone of public procurement legislation through its application. Do the courts contribute to a better understanding of the content of the legal rules of public procurement and thereby to a better application in the individual cases increasing legal certainty, equal opportunities and reducing uncertainty among tenderers?

Results

The primary focus of the current study is the specific legal reasoning by the courts with regard to the complaints at hand. Prior to a statement of the more detailed results a number of general findings regarding the cases will follow in order to aid in the presentation and understanding of the detailed findings.

General Findings

There are some statistics related to the cases being studied that will be presented initially. These constitute the results of a study documented elsewhere and finds that 50% of the total 541 submitted revisions were rejected (Carlsson & Waara, 2007, p.15-16).[14] This means that the complaints were unsuccessful and there was no evidence that the procuring authority had acted outside the scope of the legislation. Furthermore, 26% of the complaints were approved and the procuring authority had to correct parts of the procurement process in half of the cases and had to reinitiate the entire procurement process in the other half of the cases. The remaining 24% were dismissed by the courts for various reasons, including bringing the complaint to the wrong court or too late.[15]

General findings of the current study involved the complaints of the cases and the general types of arguments highlighted by the courts. The complaints generally concerned flaws with regard to the tender documents – lack of transparency and clarity,

13 There are several reasons for a court to dismiss a case, including submitting the revision to the wrong court or too late.

14 The number was originally 574 as stated earlier in this paper, but 23 of those were interim-decisions and did not contain final decisions of the courts.

15 See Carlsson and Waara, 2007:16, for a more exclusive list of reasons.

the evaluation of tenders – breach of the Swedish principle of *affärsmässighet*[16] or businesslike manner (authors' translation),[17] and finally inconsistency between the tender documents and the evaluation of tenders – lack of objectivity and predictability. Generally, the courts referred to the EC principles of transparency, objectivity and the Swedish principle of *affärsmässighet* in their legal reasoning. The tender documents are required to be transparent and clear enough for the tenderers to be able to predict what the procuring authority is going to evaluate, and the award decision must contain enough information to allow for revisions based on its content, i.e. the qualification and evaluation process.

Specific Findings

A large number of complaints (42%) specifically concerned errors at the evaluation stage of the procurement process. In particular where the complaining tenderers felt that their tender had received too few points in some respect or that the evaluation had not been conducted in coherence with the procedure stated in the RFT. Some of the complaints in this group of cases consisted of arguments that evaluation criteria additional to those stated in the RFT had been applied in the evaluation of the tenders. Yet other complaints contained criticism of the way different criteria had been evaluated. Interestingly, 63% of these complaints were rejected and 37% were approved.

Another substantial part of the complaints (30%) related to the qualification stage of the procurement process. The complaints primarily concerned a lack of clarity with regard the differentiation between the qualification stage and the evaluation stage, an erroneous inclusion of another tenderer, or the erroneous exclusion of the aggrieved tenderer. 55% of these were rejected and the other 45% were approved.

A smaller number of complaints (15%) related to a criticism of the RFT and its predictability and transparency. Principally, the complaints related to flawed evaluation models or criteria for qualification, and to the absence of stated weighting or order of preference between the different evaluation criteria. The remaining part of the complaints related to mistakes in terms of the award decision – insufficient information offered in the award decision or absence altogether, and wrongful complementary addition to the tender. 52% of these were rejected and the remaining 48% were approved.[18]

The legal reasoning behind the judgements of the courts generally referred to the broad legal principles mentioned earlier. In more specific terms, the Swedish principle of *affärsmässighet* was referred to the most in the cases (35%), while the principle of equal treatment came second (19%) and the an emphasis on transparency came third (13%). In the remaining cases the principles of objectivity, proportionality and

16 For a discussion on the concept of *affärsmässighet* see: Åstrom and Brochner (2006).

17 It should be noted that as of January 1st, 2008, the principle *affärsmässighet* has been removed from the Swedish legislation partly since it was considered superfluous in light of the EC principles relevant to public procurement. See: (Swedish Government Bill) Prop. 2006/07:128, at pp.151-157.

18 These figures correspond with the findings in Konsumentverket 2007:2

predictability were highlighted. Furthermore, it should be noted that in many cases more than one principle was referred to.

One example of when the Court agreed that the procurement had not been conducted in a businesslike manner, i.e. according to the Swedish procurement legislation, was when the procuring authority had evaluated the tenders using the "good" or "not good" as units of measurement for the evaluation criteria (Case no. 161-03). Another example is when the procuring authority added new evaluation criteria during the evaluation process, compared to those stated in the RFT.

The principle of equal treatment was decidedly breached when the procuring authority not only had used flawed information as the basis for the evaluation, but the reasons for the evaluation could not be construed from the evaluation protocol (Case no. 496-03) Another example of when the principle of equal treatment was breached was when the procuring authority decided to go back on the qualification requirements during the procurement process and allow complementary additions from some of the tenderers, which goes against the purpose of the requirements (Case no. 1054-04).

The last principle to be dealt with explicitly here is that of transparency. One clear example of when this principle was breached was when the procuring authority had omitted information about the reasons for the award decision (Case no. 2809-04). An additional example is constituted by the situation where the procuring authority had failed to weight or place the evaluation criteria in order of preference (Case no. 1216-04).

Apart from the specific legal principles derived from European or Swedish legislation on public procurement, the legal reasoning in the cases additionally reveal other legal principles or guiding legal arguments. The first principle constitutes a bias in favour of the procuring authority in that it states that: "During public procurement, the starting point must be that the procuring authority itself holds the best prerequisites for determining how the tenders fulfil the requirements". (Case no. 2664-03:11) This "principle" was stated in a large portion of the cases and primarily when the Court rejected the complaint. The second principle draws upon the Swedish Supreme Administrative Court statement that "the changing conditions that occur with regard to market conditions allow even for those RFT:s and evaluation models that are not optimally drawn up to be accepted, provided that the principles stipulated in the Swedish Public Procurement Act and Community legislation are not breached". (Case no. 2664-03:11) (Authors' translation.)

Discussion

The legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority for various reasons. The successfulness and purposefulness of the revision mechanism can be discussed, and it has been (Lennerfors, 2007), yet through the amendment in 2002 it

is a factor to be considered in the decision making of the procurement officers. It can serve as an appropriate "check against illicit influence" on the part of the procurement officers (Marshall et al, 1991:22).

The cases reveal that some of the most litigious issues relate to the evaluation of criteria in the public procurement process, although the qualification requirements additionally constitute contentious issues. The litigiousness depends upon the clarity of the RFT:s as prepared by the procuring authority and the correlated qualification and evaluation processes. As stated, the evaluation stage was found to be the most contentious issue with regard to complaints, which is not surprising seeing that it is an area where the procuring authority has much discretion requiring a great deal of knowledge on the part of the procuring authority; knowledge that the procuring authority may not be able to obtain.[19] Furthermore, as mentioned at the outset, it has been revealed as a contentious area of public procurement. The qualification stage was another area of controversy where the tenderers complained about being excluded or another tenderer being wrongfully included, which are valid complaints. More disconcerting, however, are the cases where the procuring authority has been unclear about the difference between the qualification stage and the award stage. This is fundamental to public procurement and fundamental to equal treatment of tenderers. Another criticism related to the RFT and its lack of clarity, which is alarming since the RFT is what enables realistic tenders to be submitted.

The Swedish principle of *affärsmässighet* is repeatedly referred to in the complaints and legal reasoning, which is particularly interesting seeing that it is no longer explicitly part of Swedish procurement legislation as of January 1st 2008, when the new public procurement legislation came into force (SFS 2007:1091). However, the underlying legal reasoning behind the principle persists and entails ensuring competition and avoiding irrelevant considerations,[20] although a review of revisions with regard to public procurement subsequent to this change would be an interesting issue for future research.

The principle of equal treatment, one of the fundamental principles of the EU, implies treating all tenderers equally. In other words, all tenderers are given the same opportunities to submit tenders or to submit complementary additions.

The transparency principle entails the procuring authority communicating all necessary information and being clear about what circumstances are taken into consideration in the procurement process and how, i.e. what their order of preference is and/or what their weightings are.

Finally, two additional principles have been identified in the cases studied. The fact that the market conditions fluctuate allows for some discrepancy in the drawing up of the RFT and the award evaluation model, in other words they do not have to be perfect[21]. Furthermore, the other principle states that the procuring authority possesses the best prerequisites to make determinations with regard to how the ten-

19 See Carlsson and Waara, 2006, for a further discussion on the perceived lack of knowledge on the part of the procurement officers.

20 Prop 2006/07:128

21 See also Hettne and Öberg (2005)

ders fulfil stated requirements. In other words, there seems to exist a bias in favour of the procuring authority, perhaps in order to minimise the distortion of the procurement process, which prevents the procuring authority from having to remake parts of or reinitiate in its entirety the procurement process. The procurer has the advantage of setting up the RFT and thereby the procurement procedure to some extent. The court's task is to review if this procedure is followed.

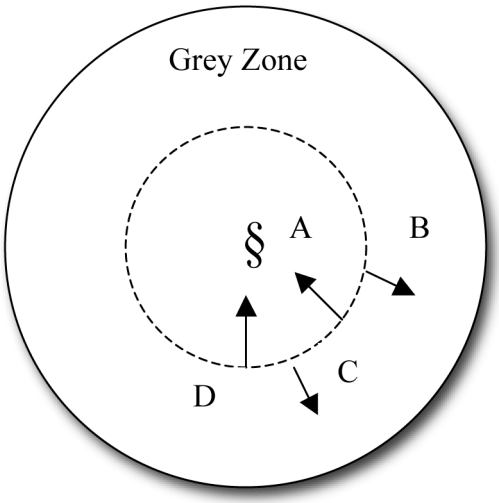

Figure 3 *Enlargement or reduction of the grey zone*

Furthermore, these additional principles could entail either an expansion of the grey zone (figure 3, arrow C) in that they add to the principles relevant in the application of the legislation, or, alternatively, the principles increase the clarity of the legislation in that they represent a further clarification of how the legislation is to be applied (figure 3, arrow D). The increased discretion inherent in these additional principles could be said to constitute a clarification of the flexibility available to procuring authorities, while on the other hand it has been said to confuse the current legal situation with regard to the abovementioned flexibility or discretion.[22]

Concluding Remarks

Although the legislation on public procurement in Europe and in Sweden permits and enables aggrieved tenderers to bring a complaint against a procuring authority, it is not entirely straightforward for them to resort to. Not only must the aggrieved tenderer show that it was harmed or risked being harmed by the actions of the pro-

22 Hettne and Oberg (2005), at p. 204.

curing authority, it seems it must overcome the bias that exists in favour of the procuring authority.

Our assessment is that the courts have not appreciably contributed to a more uniform application of the law, since they have not been able to clarify the often vague prerequisites present in the legislation. Additionally, the Swedish Competition Authority, in its review of court decisions (not limited to construction procurement cases) found that case law varies in-between and sometimes within the same county administrative courts,[23] which further expands the grey zone (figure 3 - arrow A). Other studies of administrative courts in Sweden also indicate that courts do not succeed in clarifying the normative content of the law with regard to the application of framework law.[24]

If we analyse the court decisions based on the theoretical perspective that differentiates between the vertical and horizontal dimensions of the law, we are in a better position to understand the role of the courts. It is not possible to handle these cases in the vertical dimension only. Rather, to enable a clarification of material rules, it is required to put the legislation in its context. This allows for the horizontal dimension to complement the vertical dimension and ways can be found to develop means of ensuring the rule of law while safeguarding flexibility.

However, when in court, what should matter is the strength of the legal argument behind the complaint and when the procuring authority has acted in breach of the ruling principles of public procurement, the procedure should be straight forward. Where the complaint is unwarranted and the procuring authority has acted in accordance with *affärsmässighet*, equal treatment and transparency, the Court is most likely to find in favour of the procuring authority. The open character of the legislation, with a large grey zone, invites the court to deal with the issue with the procuring authority's decision as a starting point. The discretion available to the procurement officer can be said to entail a preferential right of interpretation by, in the RFT, allowing for the procurement officer to establish what will later be the basis of a potential revision. This is furthermore elucidated by the second principle or guiding legal argument developed by the courts.

The courts tend to avoid taking a stand on material or normative issues and prefer to review the procedures. The revision often concerns whether procedural requirements have been adhered to and more resembles a test of legality, where the legality and not the expediency is subject to the court's review. However, according to the Act of Public Procurement, the review shall take up a definite position on the issue at stake, i.e. the material question, and not only determine whether procedural rules have been followed.[25]

Often courts avoid confronting normative issues other than in a vertical or internal manner. We argue that the horizontal, or external, dimension must be considered. Otherwise courts will not be able to review material issues like best value for money with respect to social, ecological and economical sustainability. It is clear that

23 Konkurrensverket 2007:2, at p. 80
24 Åström and Werner (2002)
25 Prop. 1992/93:88 p1-2. See also Hettne and Öberg (2005)

the court has difficulties with regard to legal reasoning in a traditional legal dogmatic way and with regard to finding the answer to the legal issue in the legal sources alone. The answer is not to be found there, but must be sought in the context particular to the legislation. Accordingly, it is necessary that the court, in the legal reasoning, combine the vertical, legal dogmatic perspective with a horizontal perspecive, which means a consideration of matters such as technical, economic, social matters and issues related to sustainable development in the decision making. Although some progress is made with regard to delineating the grey zone when legal principles gain actual, practical content, (figure 3, arrow B) our empirical study of court decisions indicate that the courts have failed to do so in a clear manner that provides efficient guidance to procuring authorities and to tenderers.

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Karl Dahlstrand

Non-Pecuniary (Idealistic) Damages in Tort

How to break up the Distinction between an Internal and External View of Law

Introduction

In Swedish law of damages in tort one would most often distinguish between ordinary economical or pecuniary damages and non-pecuniary damages.[1] Non-pecuniary or nonmaterial damages can also be called idealistic damages because they do not have any objectively economic value and the loss is not material. These damages cannot be evaluated in terms of money. Instead the loss is some value of normative art like a public concept (*cf.* ordre public), such as human rights and therefore interesting to sociology of law with a focus on norms.[2] Law of damages in tort is about personal injury and this article emphasizes the absolutely non-pecuniary damages for violation or injury of personal integrity. When somebody's rights or interests are violated that are protected by law, the question arises as to how to compensate the injury. How the court of law estimates the value of the non-pecuniary damages in tort shall reflect the common or general sense and feelings of justice. These idealistic

1 Malmström, 1987, p. 290. Hellner & Radetzki, 2006, p. 366.

2 Ordre public or public policy is the body of fundamental principles that underpin the operation of legal system and addresses the norms and values that tie a society together: norms and values that varies in different cultures and change over time. Bogdan, 2004, p. 73. Law of damages in tort and penal law are historically and philosophically related to each other as reactions about unlawful acting. The point of departure for non-pecuniary damages is an attack against the private life, freedom, peace or honour. Hellner & Radetzki, 2006, p. 58ff.

damages often come up after a violation of personal integrity or human dignity and are therefore in practice an important part of the compensation to a victim of a crime or another grave violation. The damages in tort must reflect the social norms to repair the injury and therefore highlight the need for empirical research as part of norm science in sociology of law.[3]

One of the most characteristic tendencies in Swedish law of damages in tort today is the increasing importance of compensation for these non-pecuniary harms. Typical for "pure" non-pecuniary harms without any physical elements is the so-called infringement damages, which often rest on punishable offence incompatible with the European Convention on Human Rights (ECHR) or the criminal law. The characteristic is therefore the mediate and defence of a fundamental value from the deep structure of the law. But the judicial system has difficulties handling this type of emotive injury, which has its ground in public law without challenging traditional principles in civil law and the legal professionalism as such. The traditional restrictive attitude towards claims for compensation about non-pecuniary harms in both the application of the law and legislation seem to become weaker even if the theoretical and practical reasons behind the old exception-construct remain.

My purpose for this article is to put the development in an external perspective and shed light upon the legal culture has constructed and maintained the "exception-construct" which has dominated the these idealistic damages. Therefore the topic refers to some central questions about ontology and epistemology in both science and law in the meaning that these damages show the borders in both. We will also find that this compensation challenges the traditional dichotomy between an internal and external perspective of law.[4]

The term idealistic damages about non-pecuniary damages in tort has been used since the 19th century and the term comes from German idealistic philosophers like Fredrich von Schelling who was interested in the contents of the subject's consciousness and the "public property" or common knowledge in relation to reality.[5] Non-pecuniary or idealistic damages stem from both the harm to the "soul" as mental suffering and actions that are contrary to our basic values or norms within the context of a complex and reflexive relation. In the Swedish Tort Act (Skadeståndslagen) (1972:207) 2 ch. 3 § it appears that an infringement of one's person, freedom, peace or honour should be compensated for by the harm the infringement gives. Swedish law of damages has a tradition of restrictiveness about these claims for damages because they do not fit with the ideology of full mending within the law of damages because they are irreparable and they also challenge aspects of both ontology and epistemology in law. Can we evaluate a violation of a person or that person's right to integrity in fiscal terms? If the answer is yes: some tricky questions in epistemology

3 The fundamental approach is knowledge about the interplay between legal rules and the application of the law and other social life. Svensson, 2008, p. 33ff.

4 Hydén, 2008.

5 Ekstedt, 1977. Schelling was undoubtedly in the shade of Hegel but he gives inspiration to both Heidegger in his phenomenology and Kierkegaard in his subjectivism.

arise.[6] If the answer is no: our attention turns to the difficulties surrounding the possibilities of acquiring empirical knowledge about the "common sense of justice" in our society. Additionally, we can talk about the importance and relevance of discussions about the role of traditions, methodologies, research designs, paradigms and different disciplines when we examine or inspect these idealistic damages and how professionals like lawyers and bureaucrats have treated them historically. This perspective reflects some Foucauldian perspective in social science today like other perspectives, including Donna Haraway's critique of science from a feministic viewpoint.[7]

The relevance of idealistic damages to sociology of law

In the last few years the focus within sociology of law at Lund University has been on different aspects of victims of crimes and human rights violations. These projects reflect the ambition of the legislator and the criminal and social policy in our society today. Common to the ambitions towards victims of crimes, discriminated against and whose rights and privileges have been removed is the legal possibility to give idealistic (non-economic) compensation to the victims and at the same time send a signal or message that conveys the prevailing legal and social norms (preventive). Even fundamental aspects of the conceptions of fairness (for example the difference between retributive and compensatory damages) are relevant.

Restorative justice (mediation) and the retributive justice co-operate in my opinion because the general goal is satisfaction. The difference exists in the fact that the retributive or commutative justice has explicit social-minded and principle-shaping essences in relation to the more practical and private restorative justice. I think it is correct to compare the compensation for victims of crime with retributive justice even if Swedish law of damages does not accept punitive damages in these cases in relation to idealistic damages for discrimination which shall have a preventive role. It is a central question to commutative justice how to judge a reasonable and proportional compensation in consideration of values and norms in both the legal system and the sense of justice. But mediation can also result in an agreement about economic compensation. The law only acknowledges a reasonable compensation, but how can the mediator decide upon this when there it no market for these types of values? So in practice, the possibility of being successful when it comes to the ambition of the victim's satisfaction is to some extent dependent on knowledge in the effects of the law and the social norms in the society, in my opinion. I will also point out that compensation to the victims of crimes also challenges the Aristotelian dis-

6 Because there is an incommensurable relation between money and violation of somebody's human dignity, compare with Margaret Jane Radins article "Compensation and Commensurability", Duke Law Journal,1993, No. 1, p.56-86.

7 Schneider, 2005, p. 88ff. At Foucault there is his theory about the importance of difference and divergence in relation to power and knowledge that is of interest here.

tinction between distributive and corrective justice because the corrective justice deals with the victim in relation to the offender and distributive justice deals with the rights a person has towards the state.[8] In practice the offender often lacks money and the Swedish Criminal Victim Compensation and Support Authority funds to finance the compensation.

The study of the sociology of law refers to both a sub-discipline of sociology and an approach within the field of legal studies.[9] "Legal philosophy and legal sociology are co-workers in a common enterprise of legal explanation" as Jürgen Habermas has pointed out.[10] Sociology of law is a diverse field of study that examines the interaction of law within society, such as the effect of legal institutions, doctrines, and practices on society and vice versa. Some areas of inquiry include the development of legal institutions, the social construction of legal issues, and social change. The focus is on law in a social context and especially at Lund University the relationship between formal and informal norms is the core object in sociology of law. Therefore sociology of law is a good example of the open social science where different disciplines and cultures meet and reflect each other.[11] There are several legal scholars who have taken an interest in social norms at present time even if the normative approach has an ancient tradition influenced by the natural law tradition.[12] Especially for the branch of law that is the focus of this paper where the ordinary internal (legal dogmatics) perspective of law fails to find the rule of law are the social and informal norms of specially importance. These damages must instead be analysed from an external perspective of law where the legal culture takes into consideration. Lawrence Friedman define legal culture as public knowledge of and attitudes and behaviour patterns toward the legal system which consist "of attitudes, values and options held in society, with regard to law, the legal system, and its various parts" or "ideas, attitudes, values and beliefs that people hold about the legal system."[13] In Håkan Hydén's model we adopt the horizontal perspective where the focus is on the causes of legal order and legal application.

8 Schultz, 2007, p. 155.

9 The question "how can sociology and jurisprudence learn from each other?" has recently been the subject of a discussion between Reza Banakar and Mauro Zamboni in Retfaed; No. 2, p. 75ff, 2006.

10 According to Jürgen Habermas, a philosophy of justice and sociology of law must complement each other. Habermas, 1997, p. 29ff.

11 Or as Reza Banakar writes; "the interdisciplinary character of socio-legal studies enables it to highlight aspects of law, legal institutions and legal practice which neither law nor sociology can articulate by itself." Banakar, Retfaerd, 2006, No. 2, p. 78. For a discussion about inter-disciplinary and social science in general, see Wallerstein, Immanuel. et al., 1995, p. 11ff.

12 Friedrichs, 2006, p. 134. See also Etzioni, Law & Society Review, Volume 34, Number 1, 2000, p. 157ff.

13 Cotterrell, 2006, p. 83.

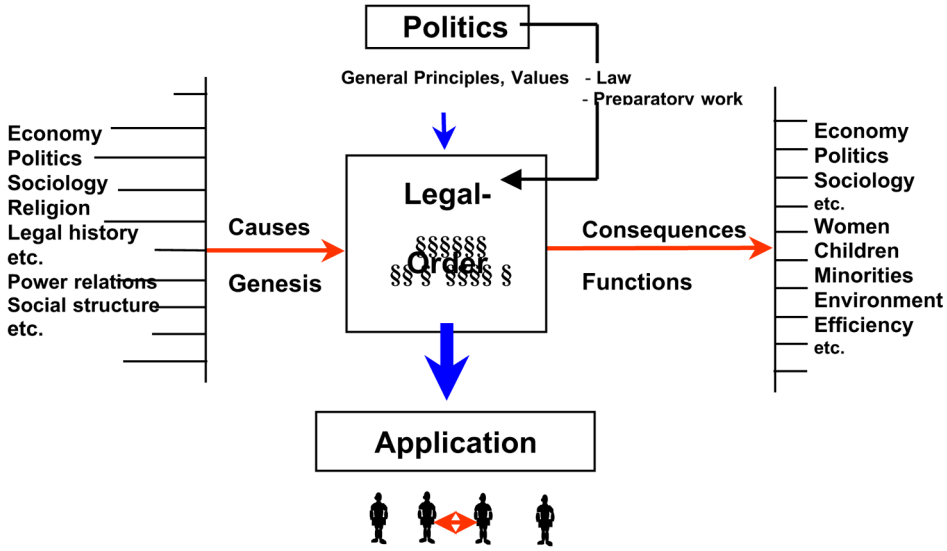

Figure 1 *Two perspectives on law – the internal and the external perspectives*

The importance of the external or the horizontal perspective for the topic follows from the description in the preparatory work to the law, where it states how the judge shall take the dominating social and ethical values in consideration when the judge with discretion determines the amount of damages.[14] For example, if the violation particularly conflicts with fundamental values in society, should that be taken into consideration. When it comes to damages for discrimination, the preventive function of the damages plays an important role and actualises the right part of the horizontal perspective in the model (consequences and functions of the legal order or legal application). In common to the idealistic damages for violation is that they bring the interaction between law (or the application) and its social environment to the fore. This is valid both for the legislators' considerations when it comes to for example strengthening some minority groups as a means of identity politics or the legal practice because there are no formal norms when it comes to ideals like legal certainty and predictability when calculating these damages.[15] Perhaps this context dependent and political dimension has been too obvious for the legal culture because the idealistic damages challenge the traditional vertical perspective. But what happens when our legal culture becomes pluralistic and with less clear borders, at the same time as it becomes more "emotive" towards both its political and social context and towards rights and duties? Because the issue is how the law as a normative order handles the loss that threatens norms and values that are central to the legal system and I shall devote the rest of this article to this question.

14 Prop. 2000/01:68 p. 51.
15 Prop. 1972:5 p. 121. Norms can in this connection be understood as expected acting.

What have more modern theory like social constructivism, postmodernism or phenomenology to say about these damages and the epistemological and ontological questions they raise? What should we call them today (if idealistic was a dominating term in the 19th century, what characterizes our time, given that the non-pecuniary or non-economic damages are the same in general)? These damages raise questions about subjectivity and the boundary of both legal science, and more practically, the concept of justice. My thesis for this paper is that the theoretical climate in the social sciences, which sociology of law is a part of, has been more "forgiving" to the ontological and epistemological problems of these kinds of compensations. One method to try out is to analyse some of the contemporary theoretical texts in the social sciences and theory of science in general. My method is consequently ordinary text-analysis of equivalent material given my issue and the thesis.

From exception to something else? About idealism and the "Swedish model"

I must, by way of introduction, say something about the background to the exception construct witch is characteristic for the idealistic damages in Swedish tort law. The principal rule in Swedish tort law is that only economic damages can been compensated.[16] The idealistic damages have been defined as non-economic because they are not measurable in terms of money and are therefore too subjective for the prevailing rationality in jurisprudence and the "machinery of justice". The head of the ministry in the 1970's, Lennart Geijer, even declared that "there exist no norms for appointment of the compensation" for non-economic injury. Instead there will be a general inquiry of reason.[17] This perspective has been reflected in a judgement from the Supreme Court in the following way: "Swedish law has by tradition assumed a restrictive attitude to the possibility of imposing entirely idealistic damages on the foundation of a violation of somebody's rights or interests."[18] This declaration is a good example of the restrictive attitude or the exception-construction I described above. Earlier, I described the paradox that the legal system cannot handle or mediate its own normative grounds (because of the idea that there exist no norms to calculate the compensation) when it comes to violations of somebody's rights or interests and therefore coin the critical conception "the anomic law".[19]

Objectivity and the possibility to empirically measure quantitative data and so on have been the dominating theory in both sciences and in the dominating directions of legal positivism or legal realism. This is particularly valid for Sweden as one of the

16 Prop. 2000/01:68, p. 17.
17 Prop. 1972:2, p. 121. Therefore these damages bring to the fore some aspects of the relation between distributive and corrective justice witch goes back to Aristotle.
18 NJA 2005 p. 462.
19 Dahlstrand, 2007.

leading nations in the family of theories generally known as Scandinavian Legal Realism witch characterizes the conceptions of justice in the 20th century. Axel Hägerström believes that legal concepts, terminology and values should be based on experience, observation and experimentation and are thus 'real'. Therefore the conclusion was "it is nonsense to consider the idea of ought as true"[20] witch of course made normative statements within the conceptions of justice impossible. This hypothesis is also interesting in a comparative perspective given the premise that the Scandinavian Legal Realism has had an influence on the Swedish judicial culture. This follows from two circumstances: (1) Given the Scandinavian Legal Realism it is impossible to set up a legal claim from a violation of justice or somebody's rights and (2) even if it were possible, it is impossible to imagine the basis of calculation of these compensations because there is no way for informal norms from society to influence the formal legal norms and the application of the law (only the opposite) given the Scandinavian Legal Realism. The last circumstance is relevant because the compensation of non-pecuniary harms consists of incommensurability and the only way to calculate these compensations, such that it makes it serve as rectification or redress for the victim, is in reflection and influence of the informal norms or the "common sense of justice".

The exception-construction can also be an illustrative example of how Swedish law of damages can be influenced by another dominating legal theory under the modernity, namely Hans Kelsen's pure theory of law. Given his theory it is decisive to maintain the borderline between "sein und sollen" with devastating consequences for consequence considerations within legal decision-making. There are no possibilities to fill the law with the is-side of norms from the social world around the legal system when there is no ought within the norms in the legal system when it comes to idealistic damages. As professor Håkan Hydén goes into particulars about in his introductory chapter, the separation between the external and the internal description of law has been very dominating. Legal dogmatics has dominated the inward looking internal field. The legal system has even been described as a closed system. Mauro Zamboni has described how different schools of jurisprudence describe and theorise the relationship between law and politics as the autonomous, the embedded and the intersection model. It is pretty clear that the idealistic damages fit and even bring out the embedded model (Critical Legal Studies, law and economics and natural law theories) where politics influence the process of lawmaking both at the stage of legislation, interpretation and enforcement.[21]

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20 Bjarup, "Ought and Reality", Scandinavian Studies in Law, 2000 (40), p. 13.

21 Zamboni, 2004. Banakar, "The Policy of Law: A Legal Theoretical Framework", Retfaerd, 2005, No. 4, p. 83. In this connection it can be suitable with some words about Critical Legal Studies because the movement is of interest in relation to my topic. The legal materials do not determine the outcome of legal disputes and at the end of the day, all "law is politics" to CLS. In one classical article of Roberto Mangabeira Unger he criticize the traditional legal thought in form of it's objectivism and formalism, Unger, "The Critical Legal Studies Movement", Harvard Law Review, 1983, No. 3, p. 567ff. According to CLS, legal argumentation either could or should bee sharply marked off from its surroundings like ideology, philosophy or politics. The application of the law should reorganize against a more open debate about basic values within the society. SOU 1999:58, p. 40.

My thesis presupposes that the legal field is influenced by the contemporary theory in jurisprudence. We can perhaps talk about an idealistic awareness or "critical legal realist" movement that possibly illustrates the increasing importance of these compensations. They show the process about how the application of the law is a product of the consciousness and the intellect of the subject and in that meaning dependent on the subject and the context even if the ground for the claim of damages is the deep structure of the law and in that meaning less dependent of time and place [22] In a more concrete perspective these compensations bring to the fore methodological questions in social science of how we can get empirical knowledge about norms in our society. Some questions from theory of science can consequently in a sense throw light upon some questions in legal thinking and definitions by legal means. This presupposes that you get a reflexive approach between legal thinking as a part of jurisprudence and theory of science in general. In that sense you can talk about some kind of discourse analysis of the legal field where the language and communication through legislations and judgements is regarded as social interaction and struggles about different important concepts. I intend to return to this question later. For the moment we can note that the idealistic damages illustrate the importance of the professional values and bureaucratic principles that the lawyers get from education and doctrine. It is not hard to consider that these damages are provocative to that institutional context and its practices if law has been described as standardized politics. These circumstances can also describe why professors of law go outside the professional role when they make notes on different claims for compensation and then compare them to love or Santa Claus (!). Accordingly, not only the horizontal perspective is of interest here but also the vertical in the model below. The two descriptions unite how the idealistic damages makes projections about people's identity or worth, which is a consequence or function of the application of law that make sense in a society where media plays an important role as an intermediary between concepts of reality.

22 Law is partially closed in relation to the context within the application of the law. There is the outcome that defines the valid law but this law can be criticized in relation to ethics and values. The traditional realist movement has a too narrow ontology that misses that dimension of reality and its mechanisms. There is a dimension about norms and values that is hard to directly examine, even if norms are understood as social facts, yet not impossible, and another that is socially constructed and observable in social practice as the application of the law.

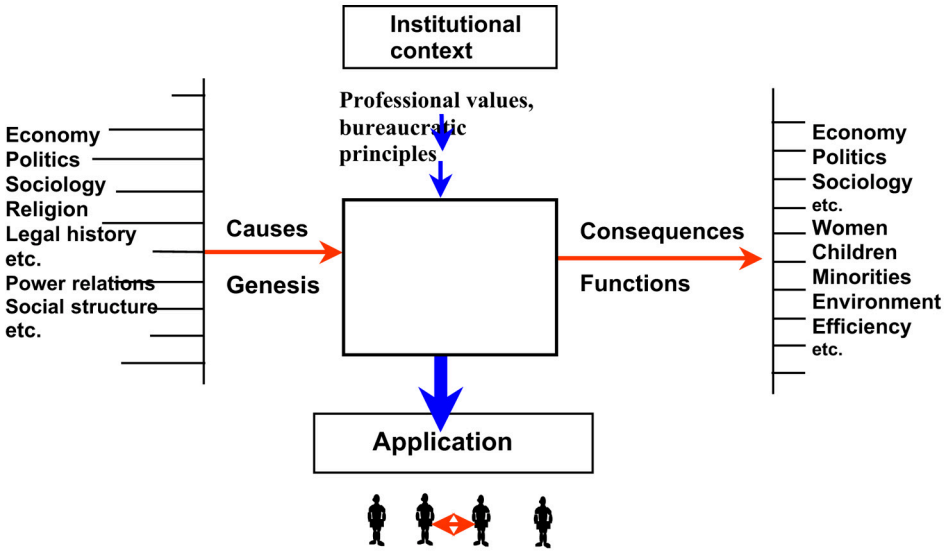

Figure 2 *An empirical approach has to start with an empty box, consisting only of institutional actors*

Idealism is a term that has various meanings depending on where and of how it is used. Central is however the apprehension that the only thing that can exist independently from everything else are spiritual or idealistic phenomena. The opposites of idealism are from a general point of view realism and materialism. Idealism is usually ascribed to the Greek philosopher Plato and his opinion that the only thing real is the idea. Idealism dominates in the nineteenth century in Germany with influence of thinkers like Leibniz and Kant. Schelling and Hegel was some of the lading names. Other names are Fichte (romantic idealism), Hume (sensualism or subjective idealism), Berkeley (more theological) and the Swedish leading philosopher in the 19th century, C. J. Boström, who propagated for the perception of the subject and the formation of concepts as the most important aspects in ontology. Swedish jurisprudence has also been influenced by these German thinkers and jurisprudence from Germany (the so called historical school), which makes a connection between these two.[23]

If Swedish jurisprudence historically has carried the stamp of idealism, this tendency takes a dramatical new turn within Scandinavian realism and legal positivism in the 20th century. Axel Hägerström, as we note above, protest every form of subjectivism and metaphysical ideas as rights or values according to his value-nihilism. Instead he perseveres objectivity and statements without contradiction as criteria about truth and science. Only what is founded on facts and can be categorized in time and space make excuses to be the real in his form of materialism. The idealistic

23 The development can be described as a movement from influence of Germany under late 19th century and beginning of the early 20th century to more common law in resent days. Schultz, 2007, p. 200, Andersson, 1993, p. 17, Kleineman, 1987, p. 20ff.

metaphysics was rejected radically as unscientific and values as simply emotions because for Hägeström legal science was a part of natural science. Even traditional legal conceptions like fairness and blame were concepts of appearance only with an emotive meaning since the Scandinavian Legal Realism got the dominating position in Swedish tort law.[24] The Swedish tort law came to be dominated or bear the stamp of a far-reaching collectivism and insurance policy where the economic compensation was far more important than the preventive or normative aspects. In some aspects you can talk about something like anti-idealism and rigidity in the modern Swedish legal culture. In the optimistic and radical 1950's the political and jurisprudential critique against the traditional self-regulating systems in law – consisting of penal law and a claim for damages – culminated, represented by professor of Ivar Strahl.[25] The "Swedish model" as it comes to the law of damages in the welfare state distinguishes itself with the wide insurances and consequently in the form of mending before prevention, collectivism and the public welfare, as well as different panels of lay assessors instead of self-governed law courts. The system was rational and effective but the individual and his or her needs negligible and in combination with a small amount of compensation, in particular for idealistic damages in a comparative perspective, the model of legitimacy was lost and the government has to appoint a committee in the late 1980's to evaluate the situation.[26]

Idealism related to critical realism as an example

Even if idealism maybe in some way has played a bigger role previously the term is still of current interest in contemporary theoretical discussions. For example, one of the leading names in the "critical realism" movement Andrew Sayer wants to combine theory with reality and refers to the concept of idealism when he discusses critical realism.[27] According to Sayer critical realism is something of a superstructure: "Whereas naive objectivism and realism reduce this to a matter of reference, and idealism reduces it to intra-discursive relations in abstraction from reference and practice, critical realism argues that meaning is a product of both intra-discursive and referential relations."[28]

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24 Vilhelm Lundstedt was one leading critic of the conception about fairness in tort law, Schultz, 2007, p. 184f.

25 To question the traditional ideas of right and justice has been popular under different labels such as Critical Legal Studies movements, alternative jurisprudence or reflexive law but in a broader perspective there is a renaissance of natural law and crimes against humanity since the holocaust and the occidental ideas about a state governed by law disseminated around the world and superseded alternatives and criticism. One salient feature with the alternative or reflexive doctrines was its neglect of some idealistic or normative value in the legal field in relation to teleological or pragmatism. Hydén, 2002, p. 199.

26 SOU 1992:84.

27 Sayer, 2000, s. 6ff.

28 Ibid, p. 32f.

When Sayer later on the same page writes that "(o)n the face of it, while many might readily accept that the physical world is independent of our knowledge of it, the idea that the phenomena studied by social science exist independently of our knowledge seems implausible, indeed as is particularly clear in subjects like the study of education or management, the researchers are likely to encounter the influence of their own theories within their object of study."[29] Therefore Sayer rejects the realist position and argues that since social phenomena are content-dependent and the social world cannot be independent of our knowledge of it.[30] In my opinion this gives a simplified picture of natural science witch studies the physical world and therefore has access to "pure" knowledge while the phenomena studied by social science exist dependent upon our knowledge. This means that things like the human rights are concept-dependent and therefore not universally applicable. This also means that a person who experiences some violation of his or her human dignity must first know that he or she has this dignity or some right or freedom. But if we look at how people have defended their right or freedom, this movement has not been dependent upon the knowledge of them. Instead we can talk about some intention for or instinct of a life with dignity, which in my opinion is a theoretical predication about the reality.

About dualisms and deconstruction

Idealism is usually put in relation to realism.[31] This dualism mirrors or follows a pattern in our thinking and is often a term treated as superior.[32] Feminists have criticized this phenomenon. For example Donna Haraway writes the following about reductionism: "Science has been about a search for translation, convertibility, mobility of meanings, and universality – which I call reductionism only when one language (guess whose?) must be enforced as the standard for all the translations and conversions. What money does in the exchange orders of capitalism, reductionism does in the powerful mental orders of global sciences. There is, finally, only one equation. That is the deadly fantasy that feminists and others have identified in some versions of objectivity, those in the service of hierarchical and positivist orderings of what can count as knowledge."[33] One of Haraway's main ambitions (or visions) is to avoid these binary oppositions. Further she writes: "I would like a doctrine of embodied objectivity that accommodates paradoxical and critical feminist science projects: Feminist objectivity means quite simply *situated knowledge's.*"[34] I think this is an interesting and important aspect or ambition for my topic in this paper.

29 Ibid, p. 33.
30 Ibid.
31 Ibid, p. 39.
32 Ibid, p. 55.
33 Haraway, 1991, p. 580. In Sweden, one feministic theorist in legal science introduced the term "the separation logic" to illustrate how some aspects in legal science fall outside and are therefore non-legal. Svensson, 1997.
34 Haraway, 1991, p. 581.

This statement can be seen in light of some relativistic or more subjective movements. Sayer writes: "To summarize: there is not a single distinction between objectivity and subjectivity but three."[35] Haraway on the other hand writes "'(s)ubjected' standpoints are preferred because they seem to promise more adequate, sustained, objective, transforming accounts of the world."[36] And she continues: "I want to argue for a doctrine and practice of objectivity that privileges contestation, deconstruction, passionate construction, webbed connections, and hope for transformation of systems of knowledge and ways of seeing."[37] The anti-dichotomous, generally understood ambition of deconstruction, challenges the favouring of the material or realistic before the idealistic concept. Sayer writes: "While I think such a view of deconstruction need not be anti-realist, much that is advanced under the banners of deconstruction and postmodernism does involve a flip from empiricism and naïve objectivism into idealism, and it is this defeatist postmodernism that I want to criticize."[38] He also discusses "(h)ow far postmodernism represents a shift towards idealism and relativism, making knowledge relative to the holder or to particular social group is controversial, but a certain anti-realism is much in evidence in sociology and cultural studies."[39]

Sayer writes about the shift from foundationalism to idealism (with relativism in terms of postmodernism) as a "flip from the idea of absolute truth and absolute foundations to the other extreme of relativism/idealism."[40] I disagree with Sayers negative view on the matter. Postmodernism challenges the truth in both idealism and realism because they both believe in the possibility of truth but put it in different types of ontology. And if relativism and postmodernism in general raise objections to the dominating ideology in modernism (like one-dimensional materialism, empirical knowledge, realism and so on), they also raise a pre-modernity view of epistemology and ontology. We can therefore talk about some kind of thesis and antithesis and maybe a synthesis in a Hegelian way.[41] This indicates that we have to live with a pluralistic view on these questions (specially when it comes to the answers). My topic also shows that an idealistic or postmodern tendency is not incompatible with an emancipatory ambition in social science where the theory of science contributes to pragmatic considerations grounded in social needs.[42]

A critique of idealism

Some associate idealism to the religious current witch was dominating when idealism was influential in science. Others will probably associate idealism with romanticism

35 He writhes that the relations between the three distinctions are contingent. Sayer, 2000, p. 61.
36 Haraway, 1991, p. 584.
37 Ibid, p. 585.
38 Sayer, 2000, p. 67.
39 Ibid, p. 68.
40 Ibid, p. 69.
41 In Lund has Kjell-Å Modéer, professor in legal history, has argued for this perspective.
42 Compare with Sayer, ibid, p. 79.

and a consensus perspective in sociological research that for a long time has been in the shadow of some kind of paradigm where the conflict perspective and a materialistic (from Karl Marx) understanding have dominated under the modernity.[43]

As we have seen above, Andrew Sayer is negative of idealism. For example he writes that "(i)dealism makes discourse both inconsequential and all-powerful: inconsequential because it refuses to acknowledge that it can causal and that its casual efficacy depends on how it relates to extra-discursive processes; all-powerful because it also makes it seem that we can re-make the world merely by redescribing it."[44] The question is if this cannot be said about discourse in general and not only about idealism?

When we talk about idealism and social constructivism in the same context as these, where rights and duties play an important role, a paradox can arise. If everything is dependent upon our subjective consciousness and the common discourse, there will be a problem if you talk about a right to compensation for a violation of human rights and for example the right to personal integrity simultaneously. Even Sayer has paid attention to this relativism. "While the humanist doctrine of ethical naturalism – that the nature of the good can be derived from our nature as human, social beings – does not adequately deal with the conventional or 'socially constructed' character of values and the striking diversity of cultural norms, a total rejection of it undermines any criticism of oppression because it cannot say what oppression is bad for, or what it does damage to. It does not help to refuse talk of nature as essentialist because it is not nature that is the main source of the problems which progressive movements oppose, but rather oppressive cultural practices which wrongly invoke nature in their defence."[45]

What Sayer writes about is the (in legal theory) well known ontological problem of natural law and how it limits the human freedom of action and the ground on witch these are politically plausible. Some kind of essentialist ground therefore seems important for the critical social science.[46] So in the same extension as a social constructivism with its pluralistic view opens up the possibility for the idealistic damages or compensation, this theory undermines the theoretical foundation of the "right" to these damages. Since there is the legal claim from a legal entity that should be based on some right or freedom given the state governed by law which establishes the damages of violation or the non-economic claim for damages, it is interesting to note that the idealistic theory was a reaction to the French revolution and that French materialism was dominating in that time. The French revolution is often described as a

43 Historical increase of the consensus theory in sociology of law from Karl von Savigny in Germany. He was interested in "det Volksgeist" and people's ideas about legal things or their sense of justice and von Savigny means that this was even more real than the material law given legal positivism in a nationalistic and conservative way. Eugen Ehrlich develops this and introduced the term "living law" as an important aspect of social integration. Other idealistic authors like Maine, Durkheim and Weber mean that people's ideas and values are the driving factors in the development of society and not the materialistic circumstances. Stjernquist & Widerberg, 1989, p. 35f.

44 Sayer, 2000, p. 97.

45 Ibid, p. 98

46 This is something Martha Nassbaum maintains. Ibid, p. 99.

foundation of the state governed by law and an individualization of rights and freedom (the non-socialist revolution). The point of departure of the scenario above is partially based on Jean-Francois Lyotard's description of the collapse of meta-narratives – sometimes 'grand narratives' in the late modernity. Roger Cotterrell writes about what comes instead; "The result of postmodernity is a privileging of the local and the specific 'local knowledge' as Clifford Geertz calls it.[47]

From a Nordic perspective it is in particular Thomas Wilhelmsson who has shown an interesting connection between what he calls law of responsibility, which includes both liability of damages and contract law, and small narratives of goodness in our society.[48] According to Wilhelmsson civil law can work as a tool for micropolitics in society to promote values and morality. He is influenced by Zygmunt Bauman and his description of how the ethical systems become weaker and therefore an opportunity for a deeper discourse about morality arises.[49] Wilhelmsson is also of importance for my topic in relation to his description of how the law can become an arena for a discourse of morality and points out why law of damages is specially relevant for this discourse of morality in the late modernity: (1) the emphasis on the personal responsibility (2) the law of damages near connection with morality (3) the flexibility of the law of damages, and (4) the natural contextualisation of the law of damages.[50] A requirement for this possibility should be a more self-governed application of the law but by tradition this has been understood as a threat against the parliamentary (sovereign) power. This ideology can also explain why the idealistic damages get that exceptional position I described earlier because they tend be encompassed by a relatively free application of the law as there is no objective way to estimate these damages.

But if we leave the causal explanation and instead look at the topic from a more hermeneutic way, this scenario can be compared to a narrative picture of how a tendency "balance" with its context so that there is not any radical change.[51] Paul Ricoeur, for example, interprets society as a text and the researcher interprets its meanings.[52] According to Ricoeur actions should be seen as texts that have inherent meaning. This method and theory is consequently context dependent and subjective. However, in contrast to a more quantitative model, one makes it into an asset instead of the researcher trying to hide this inevitable dimension in social science (because that is how the matter stands). But when something is attained something else is lost; Sayer writes "although this interpretative understanding is indispensable, it is not sufficient to explain material change: causal explanation is still required."[53] And

47 Cotterrell, 2006, p. 19
48 Whilhelmsson, 2001.
49 Bauman, 1993. Whilhelmsson, JFT 5-6/2007, p. 366f.
50 Ibid, p. 369ff. Whilhelmsson emphasize so to say the space for common sense-judgement and the character of framework law that characterize the law of damages in general and which is specially relevant for the non-economic damages we talk about here.
51 The history of hermeneutics (the philosophy of understanding and interpretation) goes back to controversies on how to best interpret texts, for example legal texts.
52 See above concerning idealism and linguistic. Sayer, 2000, p. 143.
53 Ibid.

therefore the conclusion in this chapter becomes somewhat pessimistic, but at the same time points to the complexity when it comes to theoretical questions and choices. At the same time it is clear that the exception-construction witch surrounds the non-economic or idealistic damages reflects well founded theoretically premises that say something fundamental about ontological and epistemological matters in modernity. One other question is what postmodernity makes of these aspects on the ground where the exception-construction rests.

The relevance of Social constructionism

This sociological theory (introduced by Peter L. Berger and Thomas Luckmann in the 1960's) of knowledge is relevant because of the idea that meanings are not enforced by nature but are negotiated in social communication. A social construction is an invention or artefact of a particular culture or society. The theory focuses on human choices, our creation of social reality, how social phenomena are institutionalized through people's interpretation and their knowledge of it rather than (social) laws resulting from divine will or nature (anti-deterministic) and are opposed to essentialism in some way. Therefore it's somewhat surprising when Sayer writes that "(s)ocial constructionists often deny the charge of idealism and acknowledge the existence of a real world independent of their 'constructions', but the use of the hopelessly misleading metaphor of construction invites idealist slippage, for it evades the question of the relationship of our social constructions to the nature of their referents. They might further insist that social constructions such as institutions are real, but if they also assume that they must be identical to what their constitutive discourses construct them as, then they slip back to into idealism by transposing foundationalism into social ontology by projecting it onto actors."[54] It seems that Sayer advocates some extreme relativism where not even constructions or our discourses can be taken seriously without the risk to "invite idealist slippage". Social constructionism and idealism have in common the interest in the subject's consciousness and the understanding that this consciousness is important when it comes to what knowledge is and how we can get knowledge of social aspects of everyday life like that we are studying in social science.

Social constructivism can accordingly be described in relation to idealism. Particularly this has been done as universal social constructivism in relation to linguistic idealism (witch descends from the theologian and philosopher George Berkeley).[55] According to linguistic idealism, nothing is real until it is written down or has been an utterance and therefore everything, which exists, is mental. Besides idealism phenomenology has also contributed to and inspired social constructivism. This applies particularly to Alfred Shütz who was influenced by Edmund Husserl and Max Weber. This becomes clearer when you think about phenomenological research as a "systematic investigation of subjectivity" and the ambition "to study the world as it

54 Ibid, p. 92.
55 See Hacking, 2000, p. 41.

appears to us in and through consciousness."[56] The vague character of the idealistic damages and the legislator's positive orders to the courts in terms of their own discretion within the context of their application of the law, gives topical interest to the theory of social constructionism. But also the traditional dichotomy between idealistic and economic damages can been seen as a social constructionism and judgement of a later date has reversed this division in creating ecological-damages with obvious influence from the external discourse about the indignation of environmental crimes.[57]

Freedom of action?

To sum up: idealism deals with the circumstances between the human thought and conceptions about reality. The primary object of study is therefore our consciousness. Demands or tort for damages can be both economic (for material damages) and non-economic (for idealistic damages). But when the non-economic damages are to be adjusted monetarily some problems arise concerning valuation. In lack of an objective model or pattern for the valuation, the court of law has to seek the knowledge and foundation for their decision without any secure ground. This decision-making is contrary to the rationality or ideal picture of the law according to the rule of law. But at the same time the ground for these damages emanates from those rights and duties and especially in terms of defending the individual dignity that we usually associate with a community founded on the rule of law. Therefore the question has arisen about our comprehension of "the price of suffering" and if there can be any general norms on empirical grounds for this valuation.

The new dimension in this field, and for my topic, is however the traditional exception-construction of idealistic damages in relation to economic damages, within legal science this can be problemized in light of later theoretical movements. Does the old and traditional restrictive attitude against idealistic damages depend on their difficulty to be estimated on objective grounds? My description here assumes a reflexive relation between jurisprudence and the application of law and a contemporary concept of reality as an example of causes to the legal system within a horizontal perspective on law. Sayer writes for example "(t)he charge of empiricism might derive from an unacknowledged supposition that theory-neutral research is even possible. As I have argued elsewhere (1992), taking this impossibility seriously requires us to adopt a less exclusive concept of theory as 'examined conceptualizations' which make claims about the nature of objects, particularly their structures and powers."[58] The traditionally monistic conceptions of justice dominating under the modernity have

56 Bullington & Karlsson, Scandinavian journal of psychology, 1984, Vol. 25, p. 51.
57 NJA 1995 p. 249 "the wolveine-case".
58 Sayer, 2000, p. 147.

now become weaker and several write about legal pluralism.[59] In recent years the right to the mention compensation for damages has increased and at the same time a shift in the social sciences has come about which makes this more humble. What I refer to is the phenomenon whereby researchers talk about their informant having the preferential right of interpretation in epistemology. It is also popular in sociology to talk about participation within the exploration of knowledge and theory of knowledge.[60] This means that qualitative aspects have gotten some acknowledgement that can influence victimology. The system-perspective has to decrease in relation to the lifeworld and the "actors", which can weaken the economic damages in their role as the privileged in relation to the non-economic (idealistic) as an exception to the rule.[61]

These themes therefore refer to many aspects in social theory, which are of immediate relevance today. These circumstances (idealism, postmodernism, social constructionism, situated knowledge) can support the victims of crimes, such as discriminated people, to get compensation in form of pecuniary reward for non-economic damages (for mental suffering for example). And this is what I mean by the possibility of a more permitting situation for these damages in relation to the victims of crimes.

In general, we can now narrow down some aspects of theory of social science that are relevant for my topic. For example we can establish that the topic deals with hermeneutics and individualism before naturalism and holism.[62] Human nature and consciousness explain action and for example the legal system. At the same time historical environments like social and intellectual conditions cooperate which sets the conditions for the operation of human structuring agency (like legal science, application of the law, criminal and social policy or the sense of justice).[63]

The ambition of this paper was to discuss some interesting and immediate theories in social science today and to try to put these in relation to a concrete legal field. For example post-structuralism because of its ontology (antiessentialism and discursively constructed reality) and its epistemology, with contextually based knowledge and localised knowledge, can constitute an example. This perspective will also be taken on using discourse analysis, deconstruction and breakdown of representations and so on. Another alternative should be critical realism.[64] One of my points of departure is the ontology that non-observable phenomena exist and can be used in explanation. Like post-structuralism and critical/relational relativism the ontology will be distinguished by anti-essentialism and the focus on relations. The problem, as I mentioned

59 Dahlberg-Larsen, 1994, p 14f. Dalmas-Marty, Axess, 2006, No. 4, p. 20ff. If every concept of reality is more or less metaphysical why should idealistic damages become the exception in relation to the materialistic one? Compare Peczenik, 1995, p. 397.

60 Another example is how theorists like Sayer write about and problemize things like lay-knowledge. Sayer, 2000, p. 147.

61 My topic also deals with the relation between law as a subsystem and what Habermas called lifeworld, Habermas, 1997, p. 53ff.

62 Hollis, 2004.

63 Lloyd, 1993.

64 In the jurisprudence we also talk about legal realism but not about critical legal realism even if for example the Scandinavian legal realism has be thoroughly criticized.

above, is if you as a researcher have an ambition to go from a critique to a more normative argumentation. Sayer argues in favour of a normative turn in social theory and in my opinion this is an important aspect in sociology of law and especially in victimology, as a project to promote the victims of crimes and their rights, interests and needs.[65] A more or less relativistic and non-essentialist approach can make it hard to create a foundation on which ethics, normative argumentation or even critiques, can be built upon. It is not possible to solve this problem here, but an awareness of these problems and aspects, which also can have a political dimension, are good things to carry into the future.

The importance of compensation for damages to individuals who have been offended has increased as a consequence of political, social and legal changes. The thesis in this paper has been that even theoretical changes can be connected with these idealistic damages and the weakening of the early restrictive attitude towards the possibility to get compensation for non-economic injury. These issues are important as aspects of victimology and a concrete question of the relation between formal and informal norms in sociology of law today.

One thesis of this paper is that the theoretical climate in the social sciences, of which sociology of law is a part, is today more "forgiving" of the ontological and epistemological problems regarding these kinds of compensations than in the past. Even if it is hard to find a causality in these questions, in my opinion a lot speaks for a new theoretical climate that maybe can have an influence on the argumentation and descriptions in sciences such as victimology, sociology of law and jurisprudence and even in practical legal usage, politics and general public debate. We can make a note of a demand for more flexible and open forms of conceptions of justice. To sum up, this situation promotes pragmatism in theoretical questions that have brought some civil rights movement in society. Ontology is not about confining oneself to epistemology as in the case of realism. So my thesis ends up in a more or less idealistic picture of how the theoretical development cooperates with both social science and social movements. Even if the social reality is more complex than mentioned here (of course), I think it is hard to deny the relevance of the topic in this paper because it brings out both very concrete and abstract aspects of social science today.

We have so to say two paradoxes. The first is the problem the legal system gets in order to guarantee its normative ground when somebody's rights or interests are violated. We can see how the will to keep the legal system coherent and loyal to its internal rationality comes to stand in conflict with the political will and also with defending the human rights when Sweden shall implement directives from the EU that demand damages to be effective, proportionate and dissuasive. As an explanation can we therefore emphasize the theoretical climate that was dominating under modernity when law and science became an isomorphism.[66] The other paradox is that the theoretical climate is more permitting now (given that theoretical movements have

65 Sayer, 2000, p. 172ff.
66 Peczenik, 1995, p. 397. Santos, 1995, p. 57.

dominated the last decades) while at the same time undermining the normative ground for these damages.[67]

Idealistic damages between legality and legitimacy – exemplification and summary

Accordingly, we have seen how the idealistic damages challenge the traditional division between external and internal perspectives of law because legal dogmatics runs into problems when the law lacks guidance, or norms in the meaning of expectation in relation to the valuation of the damage, when it comes to the application of this law.[68] This situation would not have generated so much interest if it at the same time had not been the central values and norms within the legal system that rose these claims for damages in a form of protecting the human dignity and the rule of law. It is important to understand that this resolving power within the fundamental values in the law is a consequence of connecting an economic amount of damages to somebody's violation, but since this is the order in our legal system and the legal and the political importance and interest of offended victims or members of some minority group increase this condition is relevant. On the other side these vague and context-wrapped damages involve a potential for integration between legal practice and legal science in a broader meaning including sociology of law and at the same time a break with the normative and discursive closeness and inward looking character of legal dogmatics.[69] And the most sensational is that this potential only presumes that the legal claim is assumed from a protection of the goal of the juridical system, manifested as the individual's needs for protection towards violations of the individual's rights and dignity. The sociology of law does not need to convince about the demand for the external perspective here, provided that damages in tort is the remedy after an injury of somebody's rights, because the norms and facts meet in the calculation of the non-pecuniary damage. The internal-external distinction evaporates so to say and I think this is something that makes the application of the law more serviceable. The distinction between internal-external is maybe mostly a law of thought among the theorists that have a restraining influence on the function of the laws (the ratio or validity) but is complexity reduced when the legal system shall be described theoretically?[70]

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67 Through antiessentialism and pragmatism, Rorty, 2003, p. 78. Touraine, 2003, p. 20ff.

68 Norms consist of an imperative dimension and expectations about acting; compare Svensson, 2008, p. 45.

69 Zamboni argues for example that both Kelsen and Hart have a rigid understanding of the relationship between law and politics. Banakar, "The Policy of Law: A Legal Theoretical Framework", Retfaerd, 2005, No 4, p. 83. Zamboni, 2004.

70 Kaarlo Tuori for example employ the internal-external distinction in the "portrayal of legal science and legal sociology", Touri, "Self-description and external description of the law" NoFo, 2006, No. 2, p. 32.

In practice we can for example look at the activity that the different ombudsmen or corresponding private activists are running and how the claim for damages plays an important role. In these legal processes the law's deep-structure on the surface of the law concretize but also facts and rules or is and ought because without considerations about the horizontal perspective of causes and consequences the process gets rather meaningless and the normative background about principles and values becomes unarticulated. The legislator's awareness of this possibility (damages as a normative medium) can maybe explain why the right to idealistic damages has increase in resent years. The political will can therefore defy the professional identity of lawyers. Previously, the idealistic damages challenged both the division of power between the legislator and the lawcourt and the professional identity amongst lawyers, which can explain their limited role. Still they threaten ideas like legal certainty and predictability but the difference is that these damages go from a situation as something negative to an advantage, in particular when it comes to the legitimacy of the legislator. But as we have seen this picture is not complete because the right to idealistic damages emanate from and put force behind the rule of law, human rights and so on. In that meaning the application of the right to idealistic damages ties legality and legitimacy together in a very concrete way. We can compare with the following model:

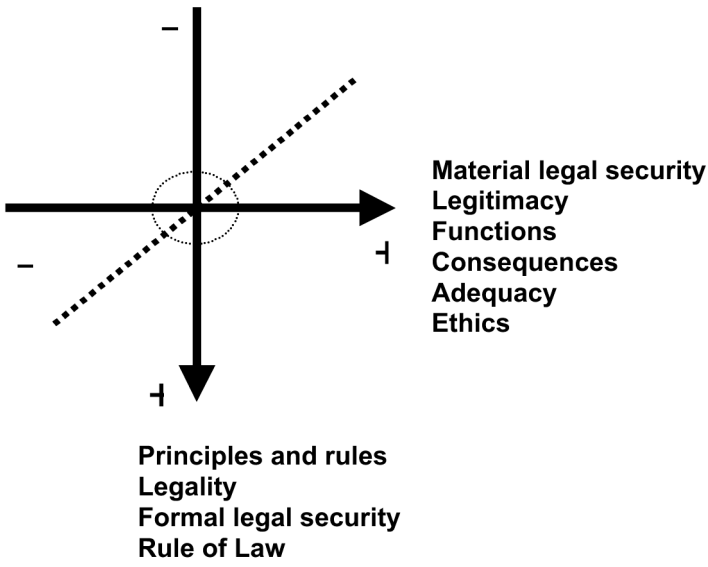

Figure 3 *Law is a compromise between the two dimensions, between legality and legitimacy*

The starting point for every right to idealistic damages is some normative statement from the legal system that is worth protection. The old catch-rule for idealistic damages demands a grave crime and legal support (legality) and when it comes to the assessment of the amount of the damages the preparatory work talks about a quest for adequacy and consideration of the sense of justice within the society (legitimacy).

When the exception-construction got a heavy emphasis the focus is on the legality and formal legal security, but since the normative engine for these damages is the defending of the individual's rights and freedoms within the rule of law the legal system somehow become valueless (the anomic law). According to Habermas, legitimacy can been compared to what he writes about validity – the law's normative character, its nature as a coherent system of meaning, as prescriptive ideas and values. Validity ultimately lies in law's capacity to make claims supported by reason, in a discourse that aims at and depends on agreement between citizens in relation to law's facticity that is its character as a functioning system, ultimately coercively guaranteed.[71] So, idealistic damages can be seen as a conduce to inter-system conflicts within the legal system since they challenge a rigid internal and dogmatic view upon a law without any normative ambition to defend the individual's interest governed by the rule of law. But as we have seen the legal system loses in homogeneity and there is no single point from which a uniform exception-construction can be successfully built, whether it is political, scientific or legal. In this pluralistic environment the "ought" also increases within the legal system as a consequence of for example the Europeanizing, in the form of rights and duties according to the European Convention on Human Rights, of the national law. Axel Hägerström turns in his grave!

Without such normative "ought" from the law how people should behave, no right to idealistic damages exists and there exists no thirst for knowledge about "is" in the form of empirical knowledge about the horizontal perspective and the social norms within that context in which these damages communicate. This also includes an interest about how different legal institutions without their different professional values and so on make their decisions and calculations about idealistic damages. There is an uncertainty about what norms and which principles shall regulate the valuation of idealistic damages, for example the office of the chancellor of justice (JK) about the long waiting time for court proceedings, discrimination lawsuit by the Supreme Court of Judicature, or compensation to victims of crimes by the Crime Victim Compensation and Support Authority. And since people make comparatives within their interpretation of reality, this situation is somehow infelicitous and makes sense of professor Håkan Hydén's hypothesis that the more stable and homogeneous the society is, the less the problem in relation to combining legality and legitimacy is.[72] Even in this case I think research with an external perspective as sociology of law can help obtain knowledge, not in the set of rules and regulations, but how the normative context looks like where the damages interpret and at the end perform the function of mending or redress to the individual and are preventive towards the future.

71 Habermas, 1997, Cotterrell, 2006, p. 83.
72 Hydén, 2008, p. 8.

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Lars Eriksson

Nature – a question of order?

Introduction

Nature, as with everything else, we like to have control of. This is mainly done through natural science and technology. The problem is that we know very little but act as if we knew everything about it. This has caused a lot of problems of which we also know little. If it will take a turn for the worse, we do not know – science at least will not help us out since scientists tend do disagree with each other on what is wrong. To make it even worse we have to trust science and technology to save us from the danger that was caused by science and technology.

Since there are different opinions about the environmental crisis, both according to what they are and what their causes are, some societal authority has to decide what to do – if something shall be done. I am going to use my native country as an example and therefore there is a need for a brief sketch of how the decision-making is organized.

Basically I will argue that our view of nature is a central obstacle to how we use nature and what we try to do to repair it when it gets disordered. In modernity we become alienated from nature; birth, death and our own bodies become strangers to us. In an archaic society we could live with nature through the myth, in modernity we live against it through science and technology. Anthropocentrism, which was put on the agenda by Descartes' and his method, seems to be a problem since we can neither live with it nor without it.[1]

Theoretically I will use Habermas' concept of legitimation and collective will formation.[2] I will argue that there is a tension between what must be done and what is

1 Descartes 1979

2 Since Habermas started to use the concept of legitimation in Habermas 1976, he has softened the consequences of possible legitimation crises (see for example Habermas 1979). He has also leaned on the communicative ability and possibility to solve problems in the sphere of collective will formation, which could mean even less possibilities for a deep legitimation crisis. In the paper I will use the definition from 1976.

economically possible to do. Everyone must want a healthy environment, it is what Habermas calls "a generalized interest, but that is not possible to attain within the existing economic structure based on mass consumption and an ever-increasing consumption. Politicians cannot obtain legitimacy if they do not do something about the environmental crisis, but on the other hand they cannot make decisions that lower the welfare and threaten the mass consumption. To solve this problem, I will argue, they use law as a medium to show they are able to act without action. I will also pose the question if law making is a possibility politicians are eager to use to transfer the responsibility to the administrative system.[3]

Finally, I will argue that even if the political system succeeds in the process of redirecting the problems to the administrative level, it is not obvious that the administration can solve the problems. This is due to internal organizational problems, where interests and power matters. It is also a question of how nature is viewed and this can be attributed to the burden of anthropocentrism. The problems aroused by anthropocentrism may not be solved, but if they were we would probably have other means to take us out of the environmental crisis.[4]

Nature – is it somebody I know?

Nature might be based on order; at least we like to think so. Natural scientists try to find out some kind of law like order that will make it easier for us to live our lives. Natural laws are regarded as eternal and in no way alterable. In spite of that we have to change them every time something new emerges. What could, and should, be said is that we know very little about nature.

If nature refers to wilderness we can probably not find nature anywhere – man has been almost everywhere and made his impact on it. If he has not been there he has contaminated nature from a distance. On the other hand nature might be closer than we think – we are, as human beings, biological mass. How biology influences us is a debated question in sociology that has emanated from the question of the strain between culture and nature. Today it seems that the point of view is that culture dominates.

Leaving Freud behind by leaning on more psychological theories, like Meads' symbolic interactionism, we have more or less tried to cut off our nature. There does not seem to be room for a discussion of man as a natural being – in some ways deserted to nature, following his or her instincts. Instead culture is seen as the determine man's actions – behaviour is a question of learning and the child can grow up and become anything and anybody by internalizing behavioural codes.

3 This means that I am not following Habermas in his three-system sketch in "Legitimation Crisis". Instead I want to see a divorce between the administrative and the political system.

4 I am not advocating any new wave solutions – it is not possible to turn the clock back to an archaic time.

Natural order

As well as making ourselves fit in with culture we seem obsessed with the idea of incorporating nature with culture. It is not always as innocent as when Donald Duck and his nephews are eating turkey at thanksgiving. Gene manipulation is an everlasting problem: how much can we, and should we, alter a species? Even in our leisure time we are trying to bend nature – at the cottage the city-people are mowing the lawn and trimming the hedge hoping to keep the wilderness off the doorstep.

We are very keen to intervene in nature. Hunters find themselves indispensable to balance the game that seems to result in an accelerating imbalance. Shooting foxes results in a growth in the deer population and the hunters are satisfied. The forest owners on the other hand are not that pleased, as the young trees become the larder for the growing population of deer. At the same time voices are raised arguing for animal rights. And if they got what they wanted animals would meet a painful death *en masse*, because nature is out of balance as it is.

When we try to bring order to nature and control it, it takes place on several levels. How these levels relate to each other is not an issue for this paper. What is interesting is that we always do it. We must also be aware that there are differences between bringing order to nature and controlling it. Bringing order to nature refers, in this paper, to making nature comprehensive, to find patterns that we can recognize. We do not want to stand in front of nature totally lost, not knowing what to expect. That is why the witch is so important in Duerr – she mediates between wilderness and culture.[5]

With control I refer to our use of nature for our own benefit. With Descartes method we think of ourselves as masters of nature.[6] This dominion of nature has turned on man himself: environmental crisis in terms of pollution and climate disorder. Now we have to use the same means to restore nature as we used to destroy it. These means will be used not only as directed by the natural sciences but also through political decisions; at a global level through treaties and at a local level through law. This means that decisions of what is to be done are made, not in terms of "what has to be done", but "what can be done".

Natural sciences reach conclusion through scientific methods. This means that we cannot be sure about the conclusion but we can be sure that it is reached in a good methodological way. Scientific research can be in competition since different researchers can come to diverse conclusions. Which conclusion comes out of the competition victorious is a delicate problem based on status connected to researcher and research institution. It also has to do with what is politically possible to do.

Some problems will not be recognised as problems. Research policy determines to a large extent which problems are regarded as problems. Research boards have a lot to do with the distribution of money and as long as they do not recognise a problem as a problem or not as a central enough problem it will not be a problem. Probably

5 Duerr 1978
6 Descartes 1979

it is also a question of getting "your" problem exposed in the media, otherwise your research will not be "rocking".

How it is done has changed over time: from Odysseus search for his home to modern technology.[7] The question why we want to control nature has been answered in several ways where the most simple and obvious answer seems to be that we need to plan for our survival. We have to store food for cold winters in the north, for example. On the other hand there are places on Earth where this is not necessary. I have to leave this highly debated question without answer and hold on to my assertion that we do try to order and control nature.

The managing of nature

Nature behaves in a law-like way, natural laws that we try to interpret to make use of nature. Anthropocentrism is the key word – nature exists for us and not for its own sake. There are movements trying to prove that nature has its own value, the animal rights movement for example. They do not seem to be very successful though. The closest they get is by defining every biological mass as an entity witch has the right to develop in its own accordance. This, of course, is a right given to it by us.

Since nature cannot claim its rights it cannot have any. Nature lacks communicative abilities and this excludes it from rights. On the other hand nature might try to communicate with us and we do not understand what it is saying, which is as bad as if it was not saying anything at all. From the standpoint of anthropocentrism we as humans state the rules and we are doing this from the standpoint that we are something other than nature. We regard ourselves as not being nature, we are not animals. We are humans and that is something other than nature, giving us the right to eat animals and use nature for our own purposes.

Animal rights movements might be making progress in accordance with new research on animals. Chimpanzees are not that different from us – they eat meat, live in organized societies, have families and fight out small-scale wars. At least the latter must mean cultural progress according to our standards. According to a study carried out in Sweden mice are able to feel empathy. This can imply that slaughterhouses really are cruel places for animals. We probably built them in the full conviction that animals were unable to have feelings.

As humans we have seen ourselves as special, diverse from animals and nature. Philosophers have tried to explain what makes us different and have come up with far-reaching explanations. These have now been disrupted by later research and the differences between us and other animals seem to shrink. Nature, on the other hand, can still be used as we please without any scruples, although it seems to turn on us. It is dawning upon us that we cannot use nature as we please.

7 Horkheimer & Adorno 1971

The Cartesian dominion of nature has backfired in a way we can no longer control. But we also seem to be unable to stop it. Even worse is that we have to deal with it using the same means that we used to start it. We are also victims of our own economic structure that we do not control. Since we live in societies where economies are built upon an ever-increasing production, the burden on the environment is also increasing. Natural resources are used in production and some of these seem to wear out. We seem to be unable to stop the environmental crises without destroying the economic foundation, a phenomenon that leads to a total collapse.

The environmental crises are a delicate problem, in fact it is a completely new phenomenon and we have never had to deal with something like it before. How deep it cuts is debated but it seems that most leaders agree that it is global and it is a threat to all humankind. The closest in comparison is probably the total nuclear war. It seems to be acceptable that we kill ourselves when at war but a total annihilation of humankind is not; in fact the thought of it is unbearable.

Lawmaking – a way out of legitimation problems

Solving the environmental crises is what everybody could want; it can be seen as a generalised interest. It is also what everybody must regard as a very strong ought. Moreover it has to be regarded a common will. But how do societies deal with it? Firstly it is agreed to be a technical and a scientific problem. This is a twofold problem. Scientists do not agree on which solutions to choose, they do not even agree on what the problems consist of. Secondly it is not obvious that the environmental crisis should be solved with the same means that started them.

What further complicates it is that the means to solve the problems must not intervene economically, since this would threaten the political structures. Every decision that decreases the common wealth has political costs since the politicians build their legitimation on increasing consumption. This narrows the possible solutions further to technical and scientific solutions – the upholding of low unemployment rates and at least a stable consumption.

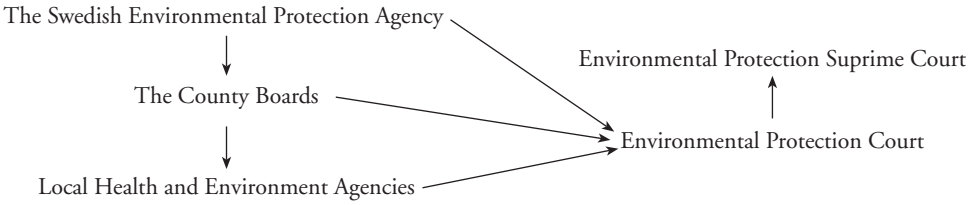
From the point of view of the powerful leaders the predicament is delicate: to do something threatens the legitimation and to do nothing also implies political costs. Whichever they choose leads to a possible legitimation crisis. The salvation could come through lawmaking – through make-believe. Law can make it possible to do something without doing. It also makes it possible to shift the problem from the political system to the administrative system. I will in the following text argue that this is exactly what takes place.

Law!

The latest revision of the environmental protection law in Sweden took place during the last decade. The changes were not overwhelming; the only news was that a lot of laws were put under a common section. It is still the same vague act and there is still the same difference between nature preservation and environmental protection as before. The latter distinction is worth elaborating.

Organization principles

In Sweden the environmental protection and nature preservation is organized as follows:



The Swedish Environmental Protection Agency (EPA) is the supreme agency regarding both the environmental protection and the nature preservation questions. It is the agency that provides for the interpretation of the acts in the field. The Swedish EPA has to keep up with the development in every environmental and nature preservation aspect. The county boards have the regional responsibility while the Local Health and Environment Agencies have the local responsibilities.

The courts dealing with environmental cases decide on applications from companies whose production is environmentally hazardous. These companies reside on a list in the Environmental Protection Code. The courts also decide on water protection cases. Further, the courts make decisions in cases where the Environmental Code has been violated. Those who are not satisfied with the decision of the court may carry the case to a higher court..

The county boards in Sweden commonly make decisions on nature preservation. This implies several problems from the environmental protection movements' point of view. These have the character of judicial as well as organizational problems. One obvious problem is that the decision makers have no legal education; they are mainly educated in the natural sciences. This means that they are cautious when it comes to practicing law.

Other obstacles lie within the county boards themselves. The county boards are organized as departments, each with its own speciality. Incongruity has, for example, been expressed between the preservation department and the department that handles economic growth. These have been based on what interests each department represent, economic growth does not go hand in hand with nature preservation. Economic growth is something society is very anxious to uphold; it is even looked upon as a central objective of society. Nature preservation, on the other hand, is looked upon as a burden that only benefits society in terms of leisure time quality. Lately, arguments have been put forward stating that having nature close to the cities might make people healthier, but these effects are hard to measure in terms of money.

The different interests also raise the question of asymmetrical power conditions: economic growth is possible to measure in terms of profit while nature preservation is measurable in terms of cost. Since late capitalism build its legitimation on a steady growth of mass consumption it is obvious that the interest in exploitation is given priority over preservation, the latter meaning stagnation. It is, of course, impossible to blame a department for doing their job but it is a problem that is rarely spoken of.

Nature preservation

When it comes to nature preservation there is also a problem connected to science. In a project related to reconstruction and new construction of wetlands, there were different opinions on how and if it should be done. One problem was the old interests in fishing. If a wetland is reconstructed there were new kinds of fish entering the wetlands, often it was fish of prey. Since the interest in fishing is an old one in Sweden it always has priority. When wetlands were newly constructed they almost always pushed some existing species away and this could very well be a very precious species.

When building new wetlands it is almost certain that species will disappear and new species will enter. If one rare species is replaced with another rare species it is hard to decide what is gained and what is lost, not least in terms of natural science. There is also an aesthetic aspect that cannot be neglected; the landscape will change in appearance. How to decide what is gained and what is lost, and even worse: which argument should be given priority over the other?

What was new during the project was the way arguments turned around, developed, and it seems that new arguments are gaining in force. During the development of new wetlands close to rather big cities, the health argument gained in popularity. The County Board accredited it, not only the project group. It was said that if beautiful wetlands were close by, available to everyone, people's health would be better. Another phenomenon that hitherto had been kept in the dark, horse back riding, also gained in popularity. Certain riding paths were laid out, also falling under the health argument. This is especially interesting because horseback riding is a very popular sport in Sweden, almost in parity with football if you look at the number of participants, but has never gained much support from society.

Nature preservation means that certain territories will be protected against exploitation. Which areas get that special status is, as we have seen, almost always based on subjective arguments. For example decisions can be based on beauty or its specific nature. On the other hand there are cases when preservation of a specific rare species is the basis of the decision. But in all cases the basis of the decision is preservation, an argument that is weak because there is no equivalence in money.

When hard cases come up, when preservation is up against exploitation it is much harder to argue for preservation because there is no gain, just costs. If it is possible to prove that there is profit to be made by exploiting the countryside, it is hard to argue preservation on the ground that it is beautiful. Interestingly, new arguments seem to gain strength – arguments that were formerly overlooked. Our need to enjoy nature, a stay in nature makes us healthier by giving us peace and exercise, is starting to become a favoured argument. Other areas, for example health care, also starts to use nature as a cure for stress symptoms.

Still, though, arguments have to be based on anthropocentrism. If it is hard to argue preservation it is even harder, not to say impossible, to argue that nature has a value in itself. This could mean that we do not have to overcome the anthropocentricity to preserve nature as long as we do it for our own sake. If we, on the other hand, want to preserve species under threat of extinction, we cannot come all the way by referring to our own needs. There might be a back door for this situation but it is only valid for big and beautiful species. Here we can argue that they have to be preserved for their beauty, in other words: we like to look at them and have them around us. If we look at animals that have been protected by law, the overwhelming part is nice and furry animals – almost never some disgusting small insect.

During research performed during the eighties I was interviewing Swedish civil servants in both the environmental protection- as well as in the natural preservation field, asking them questions about decision-making. I also asked about the more philosophical question of nature's value. All the staff answered that it was, almost obvious, that nature had its own value. On the other hand nobody was able to point to a decision where this answer was the base of the decision. The conclusion must be that they want to think of nature as an entity with its own value and its own right to exist, but when they have to argue their decisions they fall back in traditional ways of arguing, that is; on anthropocentrism.

What complicates the above-mentioned is that the law makes it possible to decide in terms of preservation for the sake of preservation. Despite this these civil servants feel obliged to argue in terms of hard data. It is difficult to find a decision that is based on preservation, in those cases they are keen to point out that according to a specific act and paragraph they have come to the specific conclusion.

Environmental protection

In cases regarding environmental protection it is both harder and easier to make decisions. It is easier because mostly you are not left on the thin ice of practical argumentation, there are standards of what you must uphold. There are lists of what you can emit both into the air and the water; lists that are the result of negotiation in the EU. It is harder because there are questions where the court does not get any guidance at all by the law. This can be the case when it comes to questions of the location of hazardous plants.

One problem that existed for a long time was that companies, during the application process, promised to limit their discharge according to what the court stated. When production started it soon became obvious that there was no chance whatsoever that they could live up to their promises. The plant was in place and employees were hired so what do you do? The court had to revise the decision according to the plant's standards.

If there are no EU-standards for discharge then, according to the law, the company should have limits imposed in relation to the benefit of the activity and in relation to what was technically possible and economically justified. This makes one raise more than one eyebrow: what on earth is meant by this?

The benefit of the activity means how many employees can be hired or what benefit it means to the local society. It could also mean the benefit to the society in total. According to the law it could also mean that the production is beneficial to society in terms of what is produced. This could refer to environmentally good products manufactured under environmentally friendly production methods. Unfortunately the latter does not matter, we live in a society were legitimation is based on an ever growing mass consumption.

What is technically possible and economically justified means that they have to use the technology that exists. The cost should be kept at a reasonable level. It is not possible for the authorities to intervene in the production process and force the factory to use other production methods than what they have chosen. In Sweden we had a factory producing artificial kidneys, which were quadrangular in form. These had to be sterilized with a very carcinogenic fluid that was emitted from the factory's roof. If the artificial kidneys had had a round form, which it had in the factory's affiliated company in Japan, it would have been possible to sterilize them with water vapour, totally harmless to humans. When questioned why they did not produce in the latter way the company answered that the Swedish doctors liked the quadrangular form and disliked the round ones. The authorities could not force the company to produce round kidneys, only to purify the discharge.

On questions of locating plants falling under the law it is just stated that the place to be chosen has to be adequate and the aims should be fulfilled with the minimum of encroachment. Here we are also dealing with a question that has to be settled on the basis of free judgment. It is also in these cases that environmental protection often gets in conflict with nature preservation. This seems to be an organizational

problem, in fact due to the lack of communication between the departments that deal with environmental protection and nature preservation.

When a case of environmental protection comes before the court dealing with environmental cases the department of nature preservation is not involved, only the department that handles environmental protection cases. This means that it is never a question of nature preservation – that question is neglected. There have been a few cases when factories were located to areas that were thought of as future nature reserves.

To solve the question of location the court for a time being took an easy way out. They stated that the chosen location of the plant was not in conflict with the act. This was smart since the act did not state anything, any decision could be legitimate. Since this prank attracted attention they started to argue for one place or another but it did not change much. The only change was that dirty areas were even more polluted since this became an argument for more dirty plants. Clean and beautiful areas on the other hand were harder for the polluter to get into.

The question of where to locate dangerous plants is very problematic. But before this question comes up on the agenda another, more problematic question, ought to be decided. That is the question related to whether the establishment of the plant should be allowed at all? This is the overall practical dilemma. What should be answered is the following: is the product that is produced necessary and of any good for society and its members? Do we really want this product at the cost of the environment?

The above-mentioned question is possible to put forward without stressing the law. Why is it not done?

The nature of law

To answer the question of why some problems and arguments are neglected we could use several theories. One that immediately comes to mind is ethnomethodology. What is spoken of and what is not spoken of is related to common sense. Some things cannot be said; they do not even come to mind. To put forward and discuss the question of a product's qualities is very difficult, it would force the authorities to take a standpoint. This they are not trained to do, in fact they are trained in the opposite direction – to be objective, factual. On the other hand they are obliged to take standpoints, the law imposes upon them to do so. This since the politicians while imposing such a vague law transfer the question of what ought to be, to the authorities.

The content on what can be said is produced in the organization. The everyday life in the organization is built on some kind of normality that is internalised by the participants. It is probably almost a rule not to speak of value-oriented questions that are seen as hard cases. To circumscribe phenomena to factual sentences gives the involved parties security. The facts they are so keen to lean on, are nothing other than social constructions, established through everyday interaction. The facts can change

very fast with new ones taking the place of the old ones. New facts are immediately true, mostly because they are grounded on science – drawing on the ideological truth that is connected to science.

If they, on the other hand, went public with value oriented decisions they would have to argue their cases and then their routines soon would be broken down and the efficiency would come to a halt. This could be the answer to the question why they do not use the opportunities the law gives them – they actually understand their purpose as being factual. In interviews they answer something like that; it is not what we should be doing, our objective is to be factual.[8]

In a larger context this is good for the political system. They do not need to take a standpoint and get away with a very vague law. At the same time they gain legitimation by showing that they are responsible leaders that really do something and care about the environment, this by non-action – the law they provide is without content. If the public raises questions, in exactly social movement, they can blame the civil servants. This is exactly what happened a few years ago. There was, following a scandal, an acerbity in the law regarding the supervision of hazardous plants. At the same time there were economic cuts within the supervising authorities. On the question from the news why nothing was happening, the Minister for the Environment referred to the law and the authorities – they were not fulfilling their tasks according to the law.

This technique of law making, creating laws that give authority to make decisions but no guidelines as to the content of the decisions, is probably necessary and we have to learn to live with the resulting laws. The argument for them is that the world is too complex for any casuistic laws, laws that must be re-written several times a year because of technical evolution. For example, the Swedish EPA had for several years recommended the use of chlorofluorocarbon compounds for cleaning electronics components. Suddenly the hole in the ozone layer was discovered. Now the vague law was convenient, giving the authorities authority to change direction in a heartbeat instead of a time-consuming lawmaking process.

As society becomes more and more complex and differentiated, which is a way of dealing with complexity; there will be more vague laws. This is good for dealing with complexity but at the same time it is bad for legal security, at least in the classical liberal sense. This seems to have been one of the ideas in Nonet & Selznicks book from 1978 where they are advocating a substantial justice.[9] One of the main effects of a substantial justice seems to be the lack of criteria for decision-making. The loss of legal security is, in their view, compensated for by expertise that seems to have good intentions. It seems they were right – in fact the experts have, during the last decades, replaced, or at least complemented, the lawyers.

On the subject of environmental protection and nature preservation we can see that Nonet & Selznick's forecast has turned out right: the experts have made their way in to the bureaucracy. If they have good intentions is hard to tell. According to them they probably do but it is not certain that we want their good intentions. The

8 Ericsson 1987
9 Nonet & Selznick 1978

social movement as a whole does obviously not, continue the strive for more democracy. The bureaucrats themselves seem to look for something to lean upon when making decisions, continuing to lean upon empty legal paragraphs while trying to keep out of trouble. As experts they are not at ease with the law. Often they complement it with the automatic legitimating power of science; they look upon themselves as "scientists".

From a democratic perspective there might have been progress. The juridical process, where the plant owners get permission to start their business, is open to everybody. Any person can put forward their argument and the court members have to listen. This could be what Alexy, followed by Habermas, calls a "special case of discourse".[10] Certainly, the possibilities are endless – but it has not changed much. The civil servants have to listen but they do not have to take it in. We also have to bear in mind what was previously mentioned; they do not like the idea of practical reasoning – it is regarded as a problem they cannot deal with. Another obstacle to the "ordinary people" is the lack of information and knowledge. Most people are not familiar with natural science and cannot commit to the discussion. The problem with information is connected to noise; there is too much information and it is hard for us to filter it. The press, that should provide us with information, has their number of editions to think of. Therefore there is not much serious information provided by newspapers – news has to be sensational to sell and serious information is seldom sensational, it is in fact rather boring.

Another problem related to democratic possibilities are the asymmetric power relations. The applicant and the civil servants manage and process information, giving away information to the public as they please. This means that even if the public has requisite knowledge, it will lack information and knowledge of what is going on. If the application process is a special case of a discourse, it still has a long way to go before it is time to talk about democracy.

Conclusion

Since our knowledge of nature is limited it is hard for us to bring it to order, it seems much easier to bring disorder to it. We have for a long time exploited nature, regarding it as an inexhaustible source of fuel to feed our well-being and without limits to consume our garbage. For a rather long time we have been aware that we exhaust nature and we are now discussing how to put it all right again. Unfortunately we are only doing this half-heartedly. There are too many political and economic obstacles to be fought before we can learn what well-being is all about. One could put it another way and say that the environmental crises are not serious enough, the threat is not yet grave enough for it to force us to seriously take on the problems.

10 Alexy 1983, Habermas 1981, 1991

The main problem seems to be that of legitimation. It seems politically impossible to trust an open democratic process, deeply involving the public. Instead the politicians hold on to the economic system and their need for legitimation through mass consumption. On the other hand parts of the public are aware of the environmental threat and demands action. The political system responds to this with evasive action in the form of law making, laws that do not give any direction, just authority for the civil servants to do what the politicians should have done. The administrative system answers with another evasive action; they lean on natural science.

The main question: what is the right way to behave never gets answered. It might be the case that, in spite of not wanting to change our behaviour, we might become forced to do so. The climate crisis might be the one that is ultimate, the crisis that has to be solved unless we do not want to face the extinction of all life on earth. If the case is that the global political system defines the problem as a definite problem, it will be interesting to see how it is solved. Will it be possible to go beyond politics?

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Håkan Hydén & Måns Svensson

The Concept of Norms in Sociology of Law

Introduction

Over the last ten years Sociology of Law in Sweden, under the leadership of Håkan Hydén, has acted within the framework of the common theme of *norms*, engaging a large research group. The list of publications emerging from the project includes ten doctoral theses, a number of senior monographs, as well as numerous research reports, articles, and contributions to different anthologies. The scientific exchange also includes regular lectures and seminars with frequent elements of domestic and international guests. The amount of knowledge accumulated throughout this journey is immense – however in part disparate. The shortage of coherence is mainly a result of an intentional strategy not to form a common apparatus of definitions. Foremost the group has, in respect of the creative process, avoided establishing a common definition of the concept of norms. Given the historical circumstances this was probably the most sensible approach, especially since the surrounding social sciences hold a great number of different perspectives on norms (See for example a small sample of the extensive literature: Coleman, 1994; Hetcher & Opp, 2001; Posner, 2002; Sumner, [1907], 2002; Lewis, [1969], 2002; Ross [1910], 2002, Sugden, 2004; Bicchieri, 2006; Pound [1942], 2006; Posner 2007). It would seem irrational to exclude any of these perspectives at the initial stage. Both time and creative space have been necessary in order for the group to begin navigating the scientific field of social norms. However, now we move towards more stringent definitions. The increasing amount of empirical research projects that lay ahead raises new demands.

The aim of this article is to propose a *method* for creating a more coherent concept of norms – and to deliver a tentative and open suggestion on how to define norms in a way that might fit into the context of Sociology of Law (further on shortened, SoL). The idea is that the norm concept can be chiselled out through ontological analysis, and that this analysis can be conducted in a way that allow every aspects of

the norm concept to be scrutinized separately. The result will in the best case scenario be a kind of 'open source' construction where every individual research project can formulate its view of the common concept. The suggested ontological analysis is mainly founded on The Aristotelian concepts of 'essence' and 'accident'. Thus the method is concerned with distinguishing between norm attributes that lie in their (the norms') nature (collectively they form the definition) and other attributes (that are essential for the categorisation of norms). We shall however begin with a short description of how we view the role of the norm concept in SoL.

Context and Ontological Issues

Sociology of Law as a science takes its departure from two distinct traditions and areas of concentration. First and foremost the discipline is a social science and has a sociological foundation. This gives SoL a solid anchorage in empirical and inductive method. Secondly the discipline is of course closely tied to the legal sciences. It is impossible to attain a deeper knowledge of the law without acknowledging the internal nature of the legal system. This forms an assumption that SoL must be able to take both an inductive and a deductive approach when handling normative statements (legal rules). In a somewhat exaggerated sense, it could be said that SoL is supposed to explain normative structures from their material (empirical) context, something considered impossible by scientific philosophy since a long way back. Hans Kelsen (1881-1973) and Emile Durkheim (1858-1917) represent opposite traditions and their perspectives will be used to illustrate the problem. Taking these two traditions into consideration the norm concept appears almost impossible in SoL. Particularly when considering the thoughts of David Hume, Scottish philosopher (1711-1776), who claimed that the 'ought' can never be derived from the 'is'.

Whenever SoL is described in a general manner the presentation revolves around some variation of the theme: "deals with the relationship between law and society"[1] – a description as pedagogically efficient as hazardous. While this presentation makes SoL seem concrete and easy to grasp it runs the risk of hiding the very core question: what aspects of law and society are comparable? One consequence of neglecting that question is the constant problem of trying to make SoL legitimate to both legal and sociological academics. David Nelken has discussed this problem in terms of identifying different "truths about the law" (1993) and Roger Cotterrell comments: "In a rich discussion of relationships between law and scientific (including social science)

1 Thomas Mathiesen, professor of Sociology of Law at Oslo University, has for example, with reference to the classical Scandinavian legal scientist Ragnar Knoph (1894-1938), demarcated Sociology of law to the study of three basic questions: (a) to what extent, and how (when applicable), does the rest of society influence legal rules, legal decisions and legal institutions; (b) to what extent, and how (when applicable), do legal rules, legal decisions and legal institutions influence the rest of the society; and (c) to what extent does there exist a reciprocal action between legal rules, legal decisions and legal institutions on the one hand and the rest of the society on the other.

disciplines, David Nelken describes the efforts of these disciplines to tell 'the truth about law' as being confronted now with law's own 'truth'. In other words, law has its own ways of interpreting the world. Law as a discourse determines, within the terms of that discourse, what is to count as 'truth' – that is, correct understanding or appropriate and reliable knowledge – for specifically legal purposes. It resists scientific efforts to describe consequences (for example, in economic cost-benefit terms, psychological terms of causes and consequences of mental states or sociological terms of conditioning social forces). None of these interpretations, it is claimed, grasps law's own criteria of significance." (1998) However, in the concept of norms lies the potential to supply a term that is accepted within both the legal field and the social sciences. A prerequisite for this, however, is that the concept is formulated so that it corresponds to the basic ontological presumptions of each respective field. In this text we will assert that the concept of norms is crucial when trying to understand the relationships between law and society and that the concept of norms is as central to SoL as for example the concept of attitudes is central to Social psychology. The idea of norms as a cardinal phenomenon in society is older than empirical social science itself. David Hume has been described as the thinker who was first to, in a serious fashion, describe the importance of norms ([1740], 2003). He did not, however, use the term norm. Instead he recognized *mutual rules* as the natural solution to problems that emerged when different shortages limited the access to resources in demand, given that morality essentially is a product of human selfishness. 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. [2]

Emile Durkheim was the first scholar to formulate and practise an empirical science that had its point of departure in the understanding of normative structures in society. His use of the concept of *social facts* works as a guide to many scholars who are interested in social norms. The American sociologist George C. Homan (1910-1989) for example claimed that there are indeed social facts as 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 behaviour. (Homan, 1969, s. 57). Durkheim himself argued that[3] "the first and most basic rule is to consider social facts as things." ([1895], 1982, s. 60) and that "To treat phenomena as things is to treat them as *data*, and this constitutes the starting point for

2 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.

3 Durkheim himself was of the opinion that it was Montesquieu who, through his philosophy cleared the way for Saint-Simon who was the first to start the real work with formulating a science about the social. Furthermore, Durkheim pointed out Comte as the one who brought order into the work of Saint-Simon.

science". ([1895], 1982, s. 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). A position that leads away from the study of human beings as mental figures. "Social phenomena must therefore be considered in themselves, detached from the conscious beings who form their own mental representations of them. They must be studied from the outside, as external things, because it is in this guise that they present themselves to us." (Durkheim, [1895], 1982, s. 70). Durkheim, in other words, places the forces of social life in an external (compared to individuals) structure of society. Furthermore, he makes an ontological statement through which he declares that the forces exist as things and that they in that sense are objective. The *ought* is thus linked to an individual level, and falls outside any sociological or social analysis. Durkheim's concept of social facts is broader than the modern concept of norms. However, it is clear that Durkheim's ontological and methodological analysis of social facts are highly relevant when trying to understand the concept of norms. Not solely because that would be a recipe for success in terms of finding a scientific method that could capture norms, but because it would be the way to understand the ontology of the norms. However, when claiming that norms are things it is also understood that the most essential characteristic of those things is as carriers of normative messages. In other words norms in this perspective are objects (things) containing messages of how reality 'ought' to be.

The actual word norm was used for the first time in the English language in the Blackwood's Magazine by the English poet, critic and philosopher Samuel Taylor Coleridge (1772-1834) in 1821: "Each after its own norm or model". He derived it from the Latin language, where it meant a variety of things: etymological encyclopaedias often mention "square" used by carpenters for making right angles (synonymous with "regula"), or a rule, pattern or precept, such as was used by Marcus Tullius Cicero (106 BC – 43 BC) when he said: "hank normam, hank regulam, hank praescriptionem" or when he spoke in de Oratore, of the "very sharp norms" of musical rhythm. (Long, 2005). When the norm was first used in England it was to signify a pattern or standard. It entered into English language philosophical discourse when Edward Caird, philosopher and professor at the University of Glasgow (1835-19089) presented Kant's philosophy in 1877 and wrote: "The mind must find in itself the norm or principle of unity upon which it works." (Long, 2005).

One of legal positivism's leading representatives, Hans Kelsen introduced the word norm to the legal discourse as a central concept, and he made an opening towards integrating legal- and social sciences by introducing his "grundnorm" or *basic norm*. When explaining his *pure theory of law* he argues that law is a system of norms, norms being 'ought' statements describing certain modes of conduct. The legal system is in that sense a structure of legal 'oughts' rather than social facts as described by Emile Durkheim. Kelsen formulated his theory in polemic with the dominating discourse at that time, a discourse that he found to be hopelessly contaminated with political ideology and moralizing on the one hand, or with attempts to reduce the law to natural or social sciences, on the other hand (Marmor, 2002). He considered

these approaches to be reductionisms in a way that he could not accept. Instead he argued that jurisprudence should be the pure theory of law because it aims at cognition focused on law alone. Kelsen was convinced that if the law is to be viewed as a unique normative practice, methodological reductionism should be avoided entirely. But this perspective is not only a question of method. Reductionism must be avoided because the law *is* a unique phenomenon, quite separate from morality and nature (Marmor, 2002). Furthermore Kelsen was influenced by Hume's law and firmly believed in the distinction between 'is' and 'ought', and in the impossibility of deriving 'ought' conclusions from factual premises alone. The consequences of this reasoning are intriguing. Kelsen was convinced that law can not be reduced to the natural actions or social and political contexts that give rise to it. The procedure of arguing, voting and so forth is not the actual law. The legal system consists essentially of 'ought' statements, and as such, they cannot be deduced from factual premises alone (Marmor, 2002). This perspective forced Kelsen to explain how law is possible. If it doesn't emerge from human actions and societal substances in a direct manner there must be another source. Kelsen's solution is the notion of an 'ought' presupposition at the background, rendering the normativity of law. "As opposed to moral norms which, according to Kelsen, are typically deduced from other moral norms by syllogism (e.g., from general principles to more particular ones), legal norms are always created by acts of will. Such an act can only create law, however, if it is in accord with another 'higher' legal norm that authorizes its creation in that way. And the 'higher' legal norm, in turn, is valid only if it has been created in accordance with yet another, even 'higher' legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing norm is no longer the product of an act of will, but is simply presupposed. This is what Kelsen called the Basic Norm. More concretely, Kelsen maintained that in tracing back such a 'chain of validity' (to use Raz's terminology), one would reach a point where a 'first' historical constitution is the basic authorizing norm of the rest of the legal system, and the Basic Norm is the presupposition of the validity of that first constitution." (Marmor, 2002). Whereas Durkheim avoided breaking Hume´s law by claiming that social facts (such as legal norms) adhere to the 'is', Kelsen chose to claim that the law should in its entirety relate to the 'ought', and that the law takes it source not from a concrete context, but from a "basic norm" that belongs to the social 'ought'. In the following pages we will argue in favour of a norm concept that is capable of catching the 'ought' as well as the 'is', and that thereby can work as a link between the two dominating "truths" concerning the legal system. By agreeing with Durkheim as well as Kelsen, it is possible to avoid abuse of 'Hume's law'. Since norms are bearers of characteristics that represent both the 'ought' and the 'is', it is possible, through norm analysis, to derive the 'ought' of the legal system from the 'is' of society. Furthermore, we will present a third basic characteristic of norms, related to their relationship with cognitive processes. Unless the individual level is taken into consideration, it will not be possible to understand, for instance, enforcement.

Identifying the Essences of Norms

The world-renowned philosophy professor Irving M. Copi wrote an often referred-to article in 1954 called *Essence and Accident*. He argued that the notions of essence and accident play important unobjectionable roles in pre-analytic or pre-philosophical thought and discourse. According to Copi, the notions of essence and accident cannot be ignored by philosophers. They must either explain them or (somehow) explain them away. Our suggestion is that SoL embraces the notion of essence and accident, and explains them in the process of understanding the concept of norms. In Copi's view the conceptual pair is most appropriately discussed within the framework of a metaphysic of substance. The "Durkheimian" opinion on the ontology of norms allows us to regard social control as the result of substances (norms) in society. The natural path towards understanding and describing the concept of norms is thereby through the understanding of the essence and accident of norms. Finding the essences will be necessary when working on definition and the task of categorisation demands an understanding of accident. Every essence can be scrutinised separately and new ones can be added in forthcoming work.

A fundamental part of the ontology is the attempt to describe what is in a being's essence, and what exists through accident. Essence is a philosophical term that is closely tied to the concepts of eternity and existence. If a being loses its essence, it seizes to exist as itself. An often quoted example of this is human reason, as humans are defined as beings with an ability to reason. Attributes of essence are eternal as opposed to phenomena, which are temporal (herein termed accidents). Phenomena (or accidents), philosophically, are attributes that are not essential for a being's nature or existence. The term is derived from Latin translations of Aristotle, and touches upon ontological descriptions of things and their nature. The accident of a being is considered to counterpart its essence. The attribute of a car being *the colour black* is an accident, since this attribute does not affect the being's existence as a car, whereas the *ability to move on its own* is one part of the car's essence. If a being is devoid of one or more of its natural attributes, the being is said to have an ontological privation; in other words, it lacks a part of its being. An ontological privation does not make the being seize to exist in an ontological sense, but merely that it lacks this attribute. A blind person, for example, has an ontological privation since being able to see is a part of human nature, but the person does not seize to be human because of it. For the norm concept in SoL, the question of ontological privation attains a primary importance. If any of the essence-related attributes of a norm is missing, it means that one is dealing with a special case that probably requires deeper explanations. The question of when a norm seizes to be a norm as a result of the lack of basic attributes will probably be as difficult to tackle as, for instance, determining when a human being seizes to be human as a result of being robbed of human attributes. Interesting in this discussion is that the concept of inhuman is reserved for descriptions linked to a lack of empathy and solidarity. In other words the attributes linked to an 'ought' draw the borderlines between human and inhuman. There would appear to be more

understanding with a human lacking the attributes linked to an 'is'. This probably works the same for norms – if a norm is robbed of its 'ought', it most likely seizes to be seen as a norm.

Regarding the norm concept it is necessary apart from linguistics, also to use semiotics(from the Greek semeion, meaning sign) as a starting point. Semiotics is the study of signs or sign systems. The most obvious and also the most conventional area of study is spoken and written language, but in contrast to semantics, from a semiotic viewpoint the definition is broader and may include pictures, traffic signals, wrestling, symptoms of illness etc. The scientific discipline is sometimes also called semiology. Modern semiotics is an independent discipline building partly on Peirce's studies of the relationship between different signs (1991) and partly on Saussure's studies of the "social lives" of signs (2006)[4]. The term, however, was used by Locke as early as at the end of the seventeenth century. A sign consists of two parts: the word/picture and the concept/idea. Take for example the word 'tree'. The word and what you see in front of you when you read the word combine to form one sign. The two parts do not exist independently but only exist together. However, it is the relationship between them that create a meaning. If we stop to look at the norm concept, the word is 'norm' and the concept 'instruction'. The first ontological essence of norms is therefore that they are (a) behavioural instructions (imperatives). This essence can unquestioningly be accepted within the framework of Kelsen's 'legal' norms. He views the legal system as a system of 'oughts', and it is for Kelsen as if norms become norms exactly because they are action instructive. But this is also an essence that is acceptable from a socio-scientific and sociological perspective. Durkeim claims that norm (or in reality social facts) are things in the sense that they can be viewed through their signs.

An important task for the ontology is to determine in what way different types of being exist. The starting point then is that all forms of being can be categorised, and that it can be understood *what the existence entails* for different types of being. There is also a differentiation between real and fictitious beings. A common differentiation is into the following four categories: (1) physical objects; (2) psychological beings such as souls and apparitions; (3) abstracts such as numbers and geometric shapes; and (4) phenomena at the limits of perception. The question is where norms are placed in this context. They are neither physical objects nor phenomena at the limits of perception. We are rather dealing with psychological and abstract beings. This does not exclude, however, parallels to physical things. Elementary for physical objects is the *longevity of their perceived existence*. They look the same to different witnesses at different times, and these witnesses can confirm each others' observations. The same applies to norms; they are inter-subjective in character. They are perceived and experienced similarly by the people subjected to them. Norms exist in a social context. Also, the longevity of our experiences of them make us confirm their existence. This gives us the second essence of the norm concept, namely that norms (b) are socially reproduced. For example, a mountain slope cannot be a norm in and of

4 Other important contributors in the field are Morris, Barthes, Lévi-Strauss och Eco.

itself – despite that fact that it provides information that forms a guide and basis for action. It can probably be claimed that a mountain slope represents an imperative (for example: "Walk around me"), but it is not until an opinion as how to relate to the slope is reproduced socially, that it becomes meaningful to speak of a norm. In a similar manner, an individual person's 'commands' do not become a norm until an opinion as how to react upon the command is spread. A judicial rule that hasn't been spread in a social context therefore lacks a norm-defining attribute. This second essence-defined attribute is highly natural to the social sciences, and that the imperative is given a social context is completely in line with for example Durkheim. In contrast it is probable that Kelsen would ignore this type of descriptions – to Kelsen the legal system is solely a system of action guidance ('oughts'). However, the fact that SoL needs to study the spread of norms does not mean that Kelsen's view of the legal system is violated – given that the prerequisite of norms being guides for action is intact. A lawyer can accept that norms are spread without compromising his basic view on norms (this is not legally relevant, however).

The existence of physical objects can be confirmed simply through the use of our senses. I can see a cherry. I can also hear it if I throw it at the window. I can feel it if I press it against the forehead, and I can taste it if I eat it. The testimonies of the senses are interpreted by the mind as corresponding with each other. Everything points at the same cherry, and therefore we acknowledge its presence. For intellectual and abstract concepts such as norms, the corresponding process is termed cognition. This is a psychological term that in short functions as a collective term for our thought processes. Cognition and perception are the active psychological processes as we interpret the information collected through the senses[5]. The difference between physical objects and norms is that the latter exist as linguistic and semiotic signs, and can only be perceived in terms of their effects. The branch of cognitive science called situated cognition views thought processes as a type of dynamic system where the brain controls the body's interactivity with the surrounding world. In situated cognition there is a basic distinction between signals that describe reality and signals that describe human opinions. In both cases the result may be that the individual experiences these signals as an expectation to act in a certain manner. Thus we have established the third essence of norms namely that norms are (c) the individual's understanding of surrounding expectations regarding their own behaviour. Through this third essence the socio-legal norm concept is shifted towards social psychology. It is important to point out, however, that the third essence must be interpreted so it is not confused with the attitude concept. The psychological definition of attitude is that it provides a positive or negative feeling before a so-called attitude object. Apart from the affective component, attitudes are also said to include cognitive and behavioural components. The affective component consists of positive or negative emotions associated with the attitude object. The behavioural component is linked both to our intentions to act in a certain manner, and our actual actions in relation to the attitude

5 Atoms are physical objects as well, but still carry a different ontological status. For hundreds of years, they existed only in theory, but in the last hundred years, atoms have come in closer reach of our senses.

object. The cognitive component involves positive and negative thoughts about the attitude object (Eisle, 2003). Attitude are to a great extent formed during childhood and provide the individual with cognitive rules of thumb, helping the individual to manoeuvre in a complex environment without the need to 'think through' every move. When a norm corresponds with an individual's attitude, the norm is said to have been internalised. This third essence is also irrelevant from a purely judicial perspective. Since the legal system from Kelsen's perspective is a highly autonomic system consisting of 'oughts, the question of the individuals' understanding is irrelevant. Even from a Durkheimian social science perspective, it is still doubtful whether it is useful. Durkheim was clear in his view that sociology is the science of the shared and not of the individual. For SoL, however norms are only interesting as long as they influence human behaviour. Therefore the link between the general norm and the individual behaviour has to be elaborated. The question, how is the norm imposed on or transferred to the individual, has to be understood. We will come back to that question.

Accidental Attributes

The aspiration of this article is mainly to create conditions for a more cohesive definition of the norm concept. Focus has therefore been on determining which of the norm attributes are essence-oriented, and we found three such attributes. Accidental attributes should not be regarded as less important. Rather it seems that the greater scientific challenge lies in analysing the accidental norm attributes, which is necessary in order to, for example, try to categorise the norms.[6] In this lies for example a description of what separates legal norms from social norms, or whether technical norms constitute its own category etc. At Lund university, the work within SoL of understanding norms and implementing analyses has often taken a standpoint from a norm model focusing on three fundamental areas within which accidental attributes are found: (a) the cognitive context in which the norm is active; (b) the system conditions that apply to the relevant situation; and (c) the values associated with the imperative. The result becomes a description of the environment from which the norm originates and a deepened knowledge about the norms' driving forces.[7] The lack of a common view on what essentially constitutes a norm has made it difficult though to draw any general conclusions. Hopefully a clearer norm concept will also be able to cast new light on the accumulated knowledge.

It is obvious that the characteristics of norms differ in relation to their accidental attributes. The accidental attributes are related to factors like background and con-

6 A first attempt at categorising norms was conducted by William Graham Sumner ([1907], 2002) in his work *Folkways – A Study of Mores, Maners, Customs and Morals*. Sumner's categories have afterwards been criticised for being arbitrary.

texts, which afford them different characteristics. These characteristics make it possible to classify the norms in certain categories and thereby accumulate knowledge in relevant respects. There is in the present stage of the development of a Norm Science a need for a taxonomic approach before we can elaborate more on a pure theoretical basis. The most important step for the time being is to create a firm understanding about what we mean with the concept of norm, how we can categorize a norm and what characteristics follow with different types of norms.

The first step in a taxonomic sense is to enumerate different types of norms and thereafter relate the essential and accidental attributes to these norms. When we should list different norms, we make use of our experience of the norms existing in society. Following that strategy we spontaneously will find legal norms, social norms, technical norms, economic norms and bureaucratic norms. Other norms can easily be identified. We use these as prominent examples of norms. The organising principle lying behind this classification can be said to be the function or the raison d´ etre of the norm; legal norms have a legal function, social norms are fulfilling social functions, economic norms are telling us what to do in an economic sense, etc. This gives us certain categories which we can set up in one dimension and then relate these norms to the essential and the accidental attributes. We have commented on the essential attributes above. If we continue by looking for accidental attributes we find aspects like the presence of sanctions (related to the third essential attribute, i.e. how the surrounding expectations are realised), the origin of the norm (i.e. where does the imperative come from), the context or arena in which the norm is socially reproduced, if the norm is system-oriented or value-oriented, the internal function of the norm, the purpose of the norm, etc. In this way we can set up a norm classification scheme or a matrix where we can correlate different norms with corresponding essential and accidental attributes.

7 Håkan Hydén has published a number of works on this subject, for example the book *Normvetenskap* (2002). Some other examples: Per Wickenberg has studied norm supporting structures in relation to the introduction of environmental themes in schools (1999). Minna Gillberg has studied how activities in environmental work are norm building; in other words, norm build on each other and thus establish new practices (1999). Matthias Baier has studied and described norm structures in the tunnel project through Hallandsåsen i Southern Sweden and compared it with the legal structure (2003). Patrik Olsson has studied how legal ideals in the form of children's rights face a norm building reality in Paraguay (2004). Staffan Friberg describes norm building processes through user cooperation (2006), and Helena Hallerström has researched principals' norms in leadership situations in the development of schools (2006)

NORM	Essential attributes			Accidental attributes					
TYPE	Imperative	Socially reproduced	Surrounding expectations	Sanctions	Origins	Arena	System oriented	Value Oriented Internal functions etc.	Etc.
Norm Type 1 Legal									
Norm Type 2 Social									
Norm Type 3 Technical									
Norm Type 4 Economical									
Norm Type 5 Bureaucratic									

Figure 1 *Norm classification system*

To elaborate a bit on these accidental attributes the following comments can be made. Many scholars, not least in the legal science, might regard sanctions as an essential condition for the norm concept. In our understanding it is not. Sanctions might be inbuilt in the norm, as in system-oriented norms. This category of norms are a consequence of the rationale the system is built upon. To give a pregnant example we can look at technical norms, for instance in relation to building of houses or cars or whatever. If you as a constructor do not follow the instructions stemming from the strength of materials or other laws of nature, you are deemed to fail in your mission. The sanction has not to be articulated, it is more or less an automatic consequence of deviations from the norm. The same can be said about economic behaviour according to the rationale of the market or another economic system. If you do not invest in accordance with the imperatives of the market, you are expected to fail and lose money, contrary to the rationale of the economic system. Even rules and norms which are about definitions have no explicit sanction, but they are imperatives, which are socially reproduced and expressions for the expectations from the surrounding environment. The sanction can here be said to be indirect. If you do not accept the imperative in terms of a definition, you are out and without possibilities of communication and action within that sector of society where this definition belongs to. We can thus conclude that there are many ways in which the expectations of the surrounding environment might appear and be made clear for the individual actor.

The origin of a norm is a fundamental distinction when making categories of different norms. Thus, if a norm emanate from a public institution within the political system, we deal with legal norms or rules. They have in its turn certain attributes in terms of being formalised, belonging to a certain science, used by a special profession, etc. (Hydén 2002, ch 4, Posner & Rasmusen, 1999). We put norms having their origin within the social system in the category of social norms. These norms may also assert themselves within the operation of a practice guided primarily by other systems but can then be said to have their origin from the social system. Social interaction must be separated from professional communication and considerations following

the logic of another system within an economic or technical practice. Norms belonging to the technical system actualizes as enabling or constraining imperatives within the new technology or as conditions derived from natural laws in relation to mechanical constructions within the industrial production. It is though important to keep in mind that the technical arrangement as such do not constitute the technical norm. The imperative has to be socially reproduced in such a way that it represents the individuals´ understanding of surrounding expectations regarding their own behaviour. Thus the imperative does not consist of the technical arrangement in itself but of the expectations created by it among those individuals that are relevant in the context or practice in which the norm operates.

Another accidental attribute to the norm is the arena in which the norm is socially reproduced and where the expectations emerge. It might be in the courts and public authorities as in relation to legal rules. These play also a role in daily life of a company and private life, but are then combined with other imperatives. Social norms are mainly operating in social spheres, like the family life, in the neighbourhood, within the circles of NGOs and leisure activities. You can, however, sometimes find social norms intervene in situations related to legal rules or economic and even technical norms. It depends on the strength and outcome of these other norms. If they collide with social life social norms tend to be invoked. Both economical and technical norms operate in professional arenas, like business life. Ecological norms have their arena in the borderline of business and nature. It is when the human economic activities impinge on nature in one way or another that the articulation of ecological norms take place. This can be a part of a legal case, or in relation to environmental impact assessments, in a public hearing or in the mass-media. On the whole, mass-media plays an important role in mediating values and opinions in relation to certain events. This state of affairs lay the foundation for imperatives, which due to the social reproduction following on the views of mass-media, give rise to surrounding expectations.

We have already above touched upon the accidental attribute, system-orientation. It goes for imperatives which can be derived from the rationale of the system involved, such as economics, technique, bureaucracy, etc. The imperatives are often articulated in different relevant sciences, like business administration, civil engineering, political science. The social reproduction is determined both by education and by professional knowledge. In contrast to system-orientation, value-oriented norms are articulated and uphold within the social system, as mentioned above. Parents, partners, relatives, neighbours and friends are here important representatives for the environment that put pressure on the individual to act in a certain way. Social norms are most often about how to behave properly in relation to other people, in traffic, as a mate and friend, etc. But it can also be about nice social behaviour, i.e. behaviour following good values and high moral standards. But moral or good values per se do not constitute the norm. It has to be socially reproduced and of such distribution that it can be said to be an expression of the surrounding expectations.

If we look at functions as an accidental attribute, characteristics as constitutive, regulative and intervening functions are relevant. These functions are derived from

an internal normative perspective. Different norms can also be said to have significant external functions, i.e. they fulfil certain roles in society. Then we approach the classification of norms in terms of legal, social, technical, economic, bureaucratic, etc. norms. We can also regard the addressee of the norm as distinctive in relation to different accidental attributes. Thus, it makes a difference if the norm points out who is going to act, who has the competence and authority to act according to the norm, competency norms, or if the norm tell us how we are expected to act, i.e. procedural guidance how to handle a certain situation. We can here talk about procedural norms. Finally we can distinguish a third category having the function of telling us what to do according to the norm. This last aspect is about the material content of the norm, the action guidance.

Some Reflections on Methodological Issues within SoL

We have concluded in this article that SoL as a discipline has its roots in two completely different epistemological systems, sociology and legal science. This has caused problem over the years. Above all SoL has had difficulties in articulating a paradigm of its own and thereby been confusing in relation to methodological issues. Sociologically oriented SoL has not been accepted within legal science and legally based SoL has not been legitimate within sociology. This dilemma has been called the double isolation of SoL. The problem is accentuated when the two epistemological systems compete in the explanaitions of one and the same problem. One of the most important aspects of SoL is that it complements legal science by bringing up other aspects of law compared to main stream legal science. While main stream legal science is focussing on the proper interpretation and application of law in individual cases, SoL asks questions like, why do we have law, what is lying behind certain provisions, etc. and questions about consequences and functions of law. What does it mean for certain groups in society, for the environment, or the efficiency, etc. that we have regulated some activities via legal norms?

Traditional legal science and SoL – which also in its parts can be said to belong to the sphere of legal science in a broader sense – compete with each other in the understanding of what is actually deciding in legal decision-making. Clashes arise when the empiric sociology is brought together with legal dogmatics. The two scientific bransches represent such diverse perspectives on reality that they cannot at all accept the conclusions of each other as relevant. It is with this background SoL in Lund has developed the idea that the concept of norms has the potential of reconcile the differences between sociology and main stream legal science (Hydén 2002, Svensson 2008). A refinement of the concept of norms might contribute to both sciences. The idea is that norms ontologically represent attributes which can be investigated and analysed by using the inductively inspired empirical methods of SoL as well as the deductively based conclusions within legal dogmatics. Norms, for instance legal norms, can fairly well be analysed and understood by empirical sociology due to their

social reproduction, while legal dogmatics can cope with the same phenomenon as imperatives which can be related to other norms and imperatives.

If one wants to understand how norms and legal rules affect behaviour, one has to study the norms as expressions of the individuals´ understanding of the surrounding expectations regarding their own behaviour. This means that we cannot – as the usual procedure – try to find out about the interviewee´s opinion about things at matter, but instead ask how the interviewee thinks about the opinion from relevant persons in the surrounding environment, what they think about proper behaviour and also relate this to how much the interviewee assess the opinion of these different relevant persons in the environment (Svensson 2008, cf Ajzen & Fischbein 1975).

If norms are conceived as having the three essential attributes we have described in this article, it would be possible to illuminate different aspects of norms from respective epistemological system. Sociology can focus the guidance influence on human behaviour and on social aspects, while legal dogmatics can systematize the imperatives as such and the normative dimension. SoL still though faces the problem to understand law from both the perspective of the internal premises and the external context. How would it be possible to combine the inductive methods of sociology with the deductive methods of legal dogmatics? One way to do this is to try to figure out how reality would look like in the perspective of law, i.e. if we "translate" law to reality, and thereafter compare that picture with how reality stands out in the sociological construction based on empirical studies. The scientific outcome lies in the comparison of the two pictures. Expressed in another way, the normatively determined picture from legal science might not correspond to the empirical answer from sociology. This kind of studies within SoL has mainly been geared to the application of law within public authorities and the result has been labelled the difference between law in books and law in action, i.e. law understood from legal dogmatics says one thing, but does something else in practice. In this way SoL has been related to legal dogmatics and the purpose has mainly been to articulate some kind of societal critique. The ambition with SoL as a norm science is, however, to articulate what Manuel Castells has described in terms of project identities (Castells 1997). This requires that SoL is able to skip the bifurcated research strategy, where deductively generated results are matched against inductive conclusions and move towards integrating and abductive research strategies (Baier 2003, Baier & Svensson 2004).

Abduction as a research perspective can be said to be based on pragmatism in putting the practical solution in the forefront. The American philosopher Charles S Peirce (1839-1914) has shown how pragmatically oriented research can use abductive inferences in order to reach valid conclusions when either deduction nor induction help us (Peirce 1990). Peirce claims that abductive conclusions are based on insights combined with common sense reasoning built on both induction and deduction. Margareta Bertilsson has reflected on the character of Peirce´s abductive conclusions (Bertilsson 2003). She regard the method as revolutionary. Despite the supposed trivial character of the semi-logical operations it can in a scientific context contribute a lot. The premises in an abductive conclusion might be built on empirical observations while within the logic of a syllogism. But the abductive logic has

not the pregnancy of the deductive method, where two true statements take us to an absolute truth. The validity of abductive conclusions is built on them being reasonable. This is of great importance for SoL. We can not observe social norms in the same way as we can identify and study the legal rules. However, we can introduce the understanding of a social norm operating in the field where the legal rule is meant to regulate and in this way explain why the behaviour we have observed with inductive empirical methods is not in congruence with the expected behaviour from an analysis of the legal deduction. Still more important is that the abductive approach gives us the opportunity to consider how changes of the social norms can increase or decrease the compliance of behaviour compared to the legal rule. Abduction can therefore be said to function as a pragmatic link between knowledge based on deduction and induction.

Conclusions

The norm concept is the individual concept that might contribute the most to the research field of SoL and should therefore be held equally important as for example the attitude concept does for Social Psychology; or for that matter, money for Economic Science and politics for Political Science. The reason is that the norm concept is able to bridge the classic gulf between the two dominating perspectives on the legal system that SoL is concerned with. On the one hand there is Kelsen's perspective on the legal system that teaches us that the legal system consists only of 'oughts' arranged into special hierarchies, and on the other hand Durkheim's perspective, claiming that the legal rules, like other social facts, are things and can be related to 'is'. For SoL, which links the legal system to other social structures, the problem becomes intricate in that Hume learns us that 'ought' never can be derived from 'is'. A socio-legal norm concept must thus be able to concurrently handle an internal, legal view on standards *and* an external, social-science based, view on norms. For this to work, the norm concept must be able to link itself to an individual level; otherwise we will lose the – for SoL – essential link to enforcement. It is thus possible to identify a number of specific requirements that can be placed on a Socio-legal norm concept. The method for translating these requirements into an operational definition goes for us via Aristotelian concept pair of essence and accidence. Initially, one must understand that certain attributes that can be linked to norms is not decisive for what constitutes the norm's nature. That a norm is nationally widespread is not, for example, normally in a norm's nature, many norms are less widespread than that. These attributes, which are not in the nature of the norm, must be sorted away through a defining process. Left over will be a number of attributes that apply for all norms. In our case, we have found three properties that are either linked to the 'ought' in that (a) they are behavioural instructions (imperatives), or linked to the 'is' in that (b) they are socially reproduced, or finally to the individual in that (c) they are the individual' s understanding of surrounding expectations regarding their own behaviour.

However, one should note that norms in certain cases may also lack one or more of the essence-linked attributes. This is referred to as an ontological privation. For example, a legal adviser treats a legal rule as a norm, even though it may only correspond against the first attribute as a behavioural instruction (most legal rules, however, correspond to all three). The legal adviser will then be dealing with a norm that is an ontological privation. For a social psychologist it is sufficient that an individual has encountered an expectation on his or her behaviour in order to assert that the social psychologist has to do with a norm. We argue that this is also an ontological privation. Methodologically the norm concept view, we advocate, poses certain special requirements on norms. If one wants to examine norms on the basis that they are behavioural instructions (imperatives), on the basis of the conditions drawn up by the courts, one must make use of a deductive legal method. If one wants, on the other hand to examine norms on the basis that they have a temporal and special spread and that they are socially reproduced, one must use an inductive method. The fact that norms also can be related to individuals' views does not make the matter less complicated. Norms cannot, in other words (given that the socio-legal norm concept is applied), be examined on the basis of themselves through a purely deductive or inductive method. Probably it will be necessary to alternate between deductive and inductive processes and perhaps it will be even more important to incorporate abductive research strategies.

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Håkan Hydén

Putting Law in Context – Some remarks on the implementation of law in China

Short Introduction to Understanding Law and Implementation

Law does not come into being merely by an act of legislation. In itself law is just words on a piece of paper. For law the other systems in society are just noise, as Gunther Teubner puts it (Teubner 1992). Law tells you how to act in certain situations. But what makes law operational? In order to have any influence on people's behaviour, law has to either be followed spontaneously or to be forced upon actors. Sometimes people can be talked into or persuaded to follow the law. This process is said to work by either the-carrot-and-the-stick strategy or as a result of a sermon. The former has to do with actors' own self interests, inasmuch as an individual will follow the law, when it coincides with this actor's self-interest or when the not abiding by the law entails the threat of punishment or sanctions. This way of viewing the implementation of law is mainly related to private and criminal law. In these areas law has the role of setting up borders for acceptable behaviour, providing instruments for co-operation. In other words, law does not tell us what to do, but what not to do, as in criminal cases. It prescribes the limits for what is socially and economically acceptable behaviour in society, or in those contexts where actors require instruments for joint activities in social life or in business. In either case law requires us to act in a

specific way. It also provides certain rules for the regulation of interaction, for example how to conclude a contract, how to do business and how to buy a house, etc.

With regard to administrative law, another angle comes into play. Here the law communicates a political message to the political/administrative system. In organizations that are large enough to have separate units for decision-making and implementation, norms or rules play a role in the communication of messages between units. In organizational theory a distinction is made between authority and executive power. Law is the tool for conveying decisions taken by the authority to the executive within a state. In this case the authority referred to is Parliament or similar decision-making bodies, such as the National People's Congress in China, while the executive refers to public authorities. As a consequence of this division of duties, public authorities have to carry out certain functions. Something that is politically decided is meant to be implemented.

In political and legal science, when one speaks of implementation, one is referring to the carrying out of public policy and law. Public policy mediated by law is a course of action or inaction chosen by public authorities to address a problem. Public policy can be expressed in the body of laws and in the regulations, decisions and actions of government. Legislators pass laws that are then carried out by public servants working in bureaucratic organisations. This process consists of rule-making, rule-administration and rule-adjudication. The factors that impact implementation include the legislative intent, the administrative capacity of the implementing bureaucracy, interest group activity and opposition, and governmental or executive support. When we speak of the law in terms of administrative law, something is expected to be carried out. The outcome is expected to be a practical result. The activities required for putting a political decision into practice are termed the implementation of the law. With regard to administrative law, it is vital to stress that law in itself is nothing. It is, however, the first step in a chain that manifests itself in the decisions and activities of subordinate public authorities.

The aim of this chapter is to put law in context, in order to better understand implementation. My ambition is to create a kind of mindmap for issues dealing with implementation. I will try to set up a general framework for implementation, as a background for understanding the implementation of law in China. This will be done by identifying the three dimensions of implementation, i.e., a vertical, a horizontal and a temporal dimension that will be dealt with below.

In an era characterized by globalisation, the highest level is international law, for instance the text of a convention; the legal design of which automatically becomes the starting point for the process. It is also the determinant for that which follows at the other levels of the implementation chain. The core issue is how to secure the expected legal results when the convention is being transformed into the legal and social cultures of different countries. In China, the effects of globalized regulatory norms are confronted by powerful forces of Chinese local culture (Potter 2004:475). The next level, the national or state level, is where legislation is formed. This means that the convention must gain support from the national legal machinery. Since legal cultures are not the same all over the world, problems of integrating the convention

into the national legal system must be expected (cf Potter 2003). The third step of implementation in a vertical perspective covers the period before the convention reaches society and the population to be affected by it. This is the non-formal, substate world of norms. Legislation never occurs in a social vacuum. On the contrary, there are and always will be existing norms operating already in society, which legal norms have to compete with or complement in one way or another. Lubman and Peerenboom both remind us in a Chinese perspective of the relationships between law and underlying social norms and practices (Lubman 1999, Peerenboom 2002). Since legal regulations are aimed at influencing individuals and society in certain ways, the relation between norms and legal rules in society becomes the final key issue in understanding the destiny of a ratified convention or a law.

The last or the lowest level brings us to the horizontal dimension. It is a common misunderstanding that law can be treated as one uniform entity. However, society is divided into different sectors that follow their own kind of logic and rationality. Therefore, the horizontal dimension of implementation is related to the understanding that the legal system consists of different types of law. These types represent totally different legal cultures, due to the functions they fulfil. Law occurs in different contexts and plays different roles, which in turn affects the problem of implementation. One can speak of distinct legal cultures in relation to separate branches of the legal system, such as the law regulating the civil society, the market, the political/ administrative system and the so-called society of mixed economy[1]. Therefore, I will explain and treat them separately later on.

Since the aim of this chapter is to spread light on the problem of implementation of law in China, we will now turn our attention to society. Law and the implementation of the law are highly dependent on the societal context with which the law is operating. Hence, some kind of understanding of how law differs in relation to society in terms of societal development stages is necessary. The synchronous perspective, from both a vertical and a horizontal point of view, has to be complemented with a diacronic analysis of how law and society develop over time. This is especially important in relation to the study of the implementation of law in China. Both treating the law as one entity and regarding China as one uniform society are equally impossible tasks. Implementation is affected by numerous factors, dependent upon the context to which one is referring, e.g. where in China implementation is to take place and at what stage of development the area and/or region of China finds itself.
The process-- from politics to law and the implementation of law-- is complex. However, from a legal positivistic point of view, this process is often not considered to be particularly complicated. In line with this point of view, new laws are made by Parliament in accordance with existing laws. Politically agreed-upon goals are transformed into a legal norm. Legal norms are supposed to be applied in a legal systemic context with no political or other non-legal influences. This process, however, becomes theoretically more complicated, when viewed from a legal realist perspective. In so doing, we find that a legal norm gets its content first when applied in an indi-

1 The concept of mixed economy covers a socio-economic system where the market economy is complemented by interventions from the state. This is the typical trait of the Welfare state.

vidual case. Taking this one step further, we find it necessary to reformulate the process in a question, i.e., how does the law work as a political tool in a societal context? As the aim of this article is to present a theoretical framework by which to understand empirical studies on the process of lawmaking and implementation of law and public policy, it is appropriate to remind the reader of Jan Michael Otto's remarks: "discussing implementation of the law requires that we consider law-in-action rather than law-in-books" (Otto 2002:23). On this point, I am in agreement with Otto, who further argues that "[we] are not using the term implementation here in the sense of making lower executive regulations…Studying implementation of the law forces us to cross the bridge from the conventional study of law to the study of socio-legal reality". In his chapter within this volume on enforcement of Intellectual Property (IP) protection, Jianfu Chen underlines the same point by emphasizing that translation of rights in law into rights in reality requires much more than the improvement of law in books.

The vertical dimension of implementation

Ideally, the legal text of a Convention will be translated properly into the legal regulation at the national level and these rules will influence behaviour in society according to the content of the Convention. This last step is dependent on the relation between norms and rules in the regulated area[2]. Basically, it is understood that problems of distortion occur at each level, due to the different forms of intervening factors that occur at separate levels. In order to understand transitions between level, we will look a little closer at the three steps of implementation, by exploring an overview of the possible distortions that can occur, using the figure below:

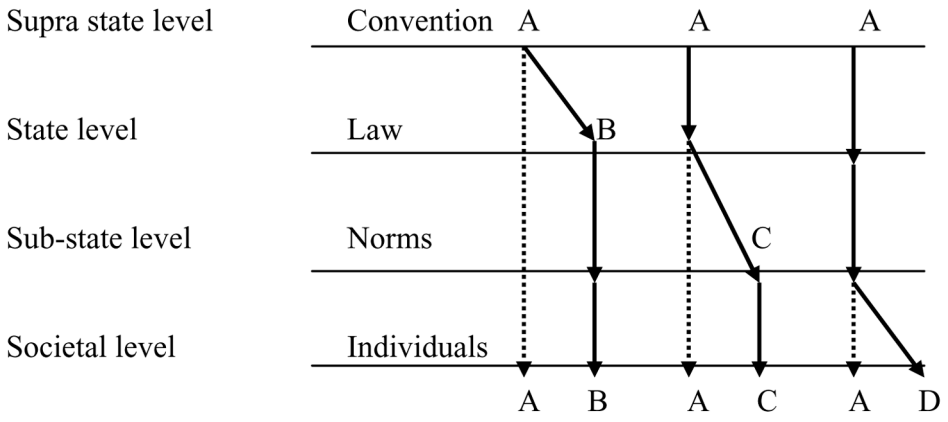


Figure 1

2 See Hydén (2006) for a more comprehensive study of this topic.

Let us assume that the A in the figure above represents a certain provision with a specific content that is expected to be transformed into domestic law, which will, then, harmonize with existing norms in society in order to be finally implemented in the society in question. The first possible distortion that can occur can be seen in the relation between the Convention itself and domestic law. It is feasible that content A may be either misunderstood or implemented in terms of something else, as, for instance, illustrated by B in the figure above. In this case, the end result of the implementation process can be expected to be B, rather than A. The second problem of implementation has to do with the relation between the law and norms in society. The legal design of the law must meet the requirements of necessary measurements in order to influence the norms in society in accordance with the content of the Convention. Content A in law thereby risks being converted into the norm, as illustrated by C in the figure above. The final and third step of the implementation chain is related to the norms, *per se*, in society. Existing norms function as a filter for legal rules, which, otherwise, might make them differ from their stated content. Thus, the specific content of the Convention, A in the figure, may normatively become D in practice. I will continue by commenting on these potential distortions.

In public international law there are two strategies used for implementing an international Convention into domestic law. Where countries follow the so-called monistic tradition, public international law is regarded as part of the national legal system. When a country like China ratifies an international Convention, the convention automatically becomes valid as domestic law. China has signed the United Nations International Covenant on Civil and Political Rights already 1998, but so far not ratified the Covenant with or without limiting reservations or declarations. It is therefore not yet valid in China, which otherwise would have had an impact on the Chinese criminal justice system (Cohen 2007). On the other hand, when countries follow a dualistic legal tradition, a ratified Convention becomes binding only for the State Party but does not become part of the domestic legal system. Sweden belongs to this type of legal tradition. This means that in order to create binding legislation, the Convention has to be transferred into domestic law.

A weak point in international law is the lack of sanctions and enforcement mechanisms. Since legal regulation is geared to influencing behaviour, it is necessary to take legal design into account. How is the law set up in order to have maximum effect? The wording of any law has no impact as such, unless it is backed up by sanctions or if it already corresponds to existing norms in society. In respect to the latter, it cannot be said that it is the law that sways behaviour, as social norms constitute the primary source of influence on human behaviour in society. Mostly, law is simply the codification of existing norms. The question arises, then, as to why the law is at all enacted. The answer is that the function of law is to stabilize and safeguard the norm by relating it to a system of enforcement in order to cope with those who do not freely comply with the norm/legal rule. By upgrading a norm and adopting it as a part of a (legal) system, the argumentative power of the norm also is strengthened.

The way the law is meant to have an impact on people's behaviour is an important aspect that should not be overlooked. It is only in the case of the incorporation of

the Convention that a lack of sanctions will occur. However, if the Convention is first transformed into domestic law, the existing or new legislation could be backed up by sanctions and a system of enforcement. This brings us to the role of law making. The design of the legislation and the legislative process is crucial for understanding the implementation process. The way this works varies in different parts of the world, depending on legal and political culture. Chen and Cai point out that the involvement of the Chinese legislatures in the implementation of law is unprecedented in the West (Chen 2002, Cai 1999). This is something which clearly is shown in the case study of implementation of cultural heritage protection by Marina Svensson, both in the supervision work as well as through motions raised by delegates and active publicity work. Chen, Li and Otto have also pointed out the importance of studying the law-making process for understanding both the law itself and problems of implementation (Chen, Li and Otto, 2002). Sometimes problems of enforceability are built into the law, for example by making the law too sweeping and soft and thereby dependent upon decisions at lower implementation levels. Compare the contribution of Jianfu Chen in his chapter on implementation of IP protection law at local levels in China[3]. If this is combined with a decentralization of decision-making power, a gap between political policy on a central level, on one hand, and the reality of implementation on the local level can arise. Almén in his chapter deals with the way China's legislatures, i.e. the People's congresses at different levels, from national to township level, can influence the implementation of laws. According to Almén, this can be channelled in mainly three different forms, based on the source of influence. First, citizens can forward problems by contacting their People's deputy or they can contact the People's Congress Standing Committé (PCSC) directly, using the letters and visit system. The problem at stake is then usually forwarded to the relevant department. The second source of influence is that of the active engagement of the People's deputies. As seen in Alméns contribution to this volume, they can push local interests as a form of interest articulation. The People's deputy has even the authority to personally make inspections to acquire information. The third form of influence is through the many SC supervision activities of the People's Congress, which exercises supervision from above. By the use of appraisals and law implementation inspections, the SCs of the People's Congress can increase pressure on executive agencies to implement, for instance, environmental protection laws or other laws.

The content of law may be detrimental for its implementation. A general understanding is that the more detailed laws are, the less discretion local bureaucrats use in their implementation (Korn 1995). However, as van Rooij shows in this volume, local interests might be so strong that even a strict and specific law, like the new environmental protection laws in China, will not work because they were too strict, contrasting too strongly with local interest to be enforced (van Rooij 2006:87-88). Another aspect that has to be considered in relation to the implementation of law is, for instance, if the regulation deals with interpersonal relationships or if it has the ambi-

3 See also Winn and Yuping (2007)

tion of affecting physical or other conditions in society. When we speak of implementation, we do so in relation to regulations which are asking for specific actions by the State in order to create the enabling conditions that the legislation requires.

The relevance of this becomes still more important when we look at the relationship between norms and society, that is, the last step in the implementation chain. The norms of a country function as a mirror, when viewed from the perspective of an international Convention. If one does not recognize oneself in the mirror, it is due to the fact that the norms of the society in question do not reflect the normative content of the international convention or, to put it the other way around, the Convention does not correspond to the norms of that society. In either case, the problem of implementation is to understand how norms are constituted and how they can be changed.

The Role of Norms in Society

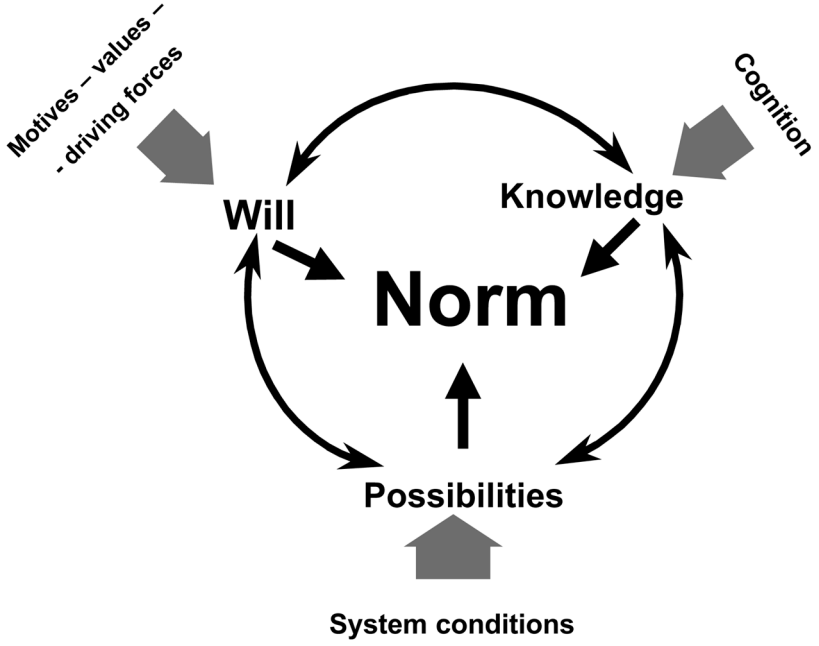
I will now deepen my reasoning concerning the role of norms in the implementation process. As a starting point, we can say that a law cannot be expected to have any sustainable effect, if it does not correspond to the norms already existing in a society. The reason for this is very simple: law comes from above, while norms grow from below.

What is a norm? A simple definition of a norm, which is sufficient for the purpose of this text, is that it guides human actions or behaviour. The norm concept, however, consists of three dimensions or three sets of factors. In the first place, norms are an expression of a will. Someone wants to do something and, thus, could be seen in this situation to be following a norm expressing this will. Will is the first basic component, or dimension, of a norm.

It is not, however, enough that a person wants to do something. He or she has also to have the knowledge and competence to carry out what he or she purposes. Knowledge, together with cognition, are, therefore, the second dimension of the norm-concept. The way one understands and comprehends the context of a situation is, thus, determinant in terms of the way in which one acts and the normative standpoint that one consequently takes up. Differences in opinions, even within legal decision-making, emanate more often from the question of how the situation, a person, or whatever, has been understood in cognitive terms, than from the judgments made based on pure value standpoints.

The third dimension of a norm is related to the system-conditions characterizing the context of the society in which the action and, consequently, the norm occur. It is not enough that an individual wants to do something and that she/he has cognitively adequate knowledge on how to go about it. Rather one has also to have actual possibilities to undertake what one wants to do, in order for a norm to develop. While the first two dimensions are related to subjective factors among actors, this last, the third set of factors, is related to objective factors, i.e., they are not at the ac-

tors' disposal. Hence, the following graph, which elucidates the dimensions of the norm-concept:



Hydén-Wickenberg

Figure 2

I will now apply the basic reasoning behind this graph to the implementation processes. However, in order to exemplify the kind of considerations which have to be taken into account, I will have to present it in general terms. Starting with the will-component, I will show how this norm-model can be used to understand and explain the particular normative circumstances under which legal rules operate.

The first question will be if we can presuppose that a country which has ratified a convention or enacted a law also agrees with the will-component of that specific law. In other words, can we, as a starting point for this analysis, assume that the State Party has the will to really implement the Convention and the law? Of course, this is not necessarily an either/or question, for, a State Party might agree with some parts of the Convention, while disagreeing with others, without having made any reservations when possible. However, we have reason to believe that some State Parties have ratified Human Rights conventions, such as the CRC, just to show "a human face" without any intentions of paying any real attention to the plight of children (Olsson 2003). In his chapter Jianfu Chen mentions the lack of political will from the Chinese governments at all levels as one major problem to overcome in relation to the implementation of IP protection laws in China. The will-component is related to the political system, therefore, laws are often subject to compromise. It is feasible that a

law may lack complete support. There may be many political reasons for making a law, such as to pacify one's opposition or to show awareness in relation to a specific question, which do not necessarily entail commitment to implementation of the law. Aubert, Eckhoff and Sveri showed in a classical study of the controversy in relation to the Norwegian Housemaid Law how a political compromise was set up by giving the law a lot of nice wording without adding necessary enforcement tools (Aubert, Eckhof, Sveri 1952). Randall Peerenboom mentions as an example that "[s]ometimes laws are passed for domestic political reasons, such as when the government rushes out with a law after a major catastrophe". Peerenboom adds: "In the haste to do something, the government may pass laws that miss the target". In relation to this phenomenon Benjamin van Rooij has used the expression "law of event" pointing out that law many times comes into being after something more or less dramatic has happened in society (van Rooij 2006). See as an example of this, Johan Lagerkvist's chapter in this volume, commented upon below.

Typically the development of a law starts with some few requirements and then gradually expands by amendments or the issuance of a new piece of legislation, sometimes as an outcome of international conventions. This has, for example, been shown by Marina Svensson in her study of the Cultural Relics Law. This law was introduced 1982 and amended in 2002, when the number of articles was increased from 30 to 82. An increase in the number of articles in this way does not *per se* imply that the implementation of the new law would be easier, but some of the new articles are more concrete and backed up with sanctions.

It is, however, not only the political system that may constitute an obstacle as far as the implementation of a law is concerned. So too, public officials, whose support is important. This can be a problem for different reasons. As shown by Hatla Thelle in her investigation of the legal aid system in China, the whole system rests on the assumption of the willingness and capability of one professional group – the lawyers – to work for free. As a consequence, the outcome of the law is poor result in terms of implementation, with the quality of legal aid lawyers tending to be low.

Often resistance comes from the surrounding environment in which the law is to be implemented. The normative context in which the law is to be implemented can also enable the legal norm to come into being. A legal norm is merely a social norm or other norm adopted to the legal system and thereby stabilized and formalized. Law is therefore many times introduced when certain norms in society are weakened for one reason or another. Through its coupling to a legal machinery of enforcement, the legal norm can be safeguarded in another way than when it belongs to a self-regulated area. But implementation and enforcement has its own price in terms of economic incitements (carrot), enforcement agencies (carrying the stick) or public authorities (preaching a sermon). In this perspective, a legal norm can be said to be only as strong as the underlying norm or norms already operating in society.

The struggle a legal norm has to go through when implemented is illustrated in the study by Johan Lagerkvist in his chapter on the regulation of internet cafés. As Lagerkvist points out, the regulation of Chinese cyberspace today, such as online news sites, bulletin Board systems (BBS), and blogs, has its forerunner in the regula-

tion of the physical meeting places called Internet Cafés, or *wangba,* in Chinese. These Internet access points became popular in the late 1990s. The Internet cafés were required to have a business license, but, due to the slowness of the public authority in charge, the existence of illegal internet cafés mushroomed. In 1998 the first rule targeting the Internet Café industry was issued. The second important measure that focussed on the Internet cafés was promulgated in 2001. After the Internet café fire in Beijing 2002, which attracted much attention, a third regulation was introduced. This was absolutely crucial for the regulation of the whole net café industry in China. Article 23 of that law entails a lot of requirements as regards the detailed registration, monitoring and accounting for of patrons' surfing habits. It is not difficult to understand that this, referred to Lagerkvist as "the party-state norm", would encounter problems, when it comes to implementation. In addition to the owners and users of the Internet cafés, the voices of liberal academics and lawmakers, who represented youth, formed what can be called a subaltern norm to the law. But, the implementation proved to be fairly easy, since one strong driving force for harsher regulation came from the parents of children spending much time in the net cafés. This parental norm backed up the legal regulation and made it more legitimate in society and thereby easier to implement. Against the norms of the party-state and the parental norm, the subaltern norm was not strong enough to dominate the normative scene, as argued by Lagerkvist in the concluding remarks of his chapter.

The knowledge aspect of the norm is something which mainly relates to professional knowledge. In order to implement a certain kind of legislation, professional knowledge within the field is necessary. Regulation of the health sector requires medical knowledge, while pedagogic skills are crucial within the education system and civil engineers' skills are necessary for the planning and housing sector. In this volume the contribution of Marina Svensson with regard to the implementation of the Cultural Relics Law illustrates this point. In order to safeguard cultural heritages, the implementation agency has to have knowledge within the field. It is not only a question of skill. Norms are formed also by cognitive aspects. The attitude or world-view among those public servants and public authorities in charge of a certain task is fundamental for the understanding of the implementation of that specific law, something which is shown in the way cultural heritage sometimes is treated in practice, according to Marina Svensson's study.

Turning finally to the possibilities of normative changes in relation to the third dimension of norms, system conditions are the most important intervening factors of all, in relation to norm-formation and the implementation of law, especially given the fact that political and economic factors and also social structures could become obstacles or possibilities in the implementation process. Among these both the economic system and political ideologies can be mentioned as predominating system conditions. Matthias Burell's study of the financing of the housing system in China is clearly an example of the influence of structural factors within the economic system in the implementation of the law. Oscar Almén shows the important influence of the political system on implementation processes in general and in relation to environmental legislation in particular. The same goes for the contribution of Benjamin van

Rooij in his study of the implementation of the environmental protection law in Kunming.

Implementation of law in a horizontal perspective

The horizontal perspective is about understanding the legal system as consisting of different parts. Law is related to different sectors of society and it upholds certain functions depending on what role the law plays. One can point out at least four different sectors of society that affect law and give it its special character. These are the civil society, the market, the political/administrative system and the so-called mixed economy or the welfare state.

The regulation of the civil society

The regulation of civil society has to do with identity and citizenship. Here we have rules about immigration, rights of asylum, birth registration, national registration, but also fundamental rules about what is acceptable and what is not acceptable in society. In other words, the regulation of civil society has to do with the question of who belongs to society, complemented by criminal law stipulating what not to do in order to belong to the society. We have also family law and inheritance law as well as rules about legal competence for individuals and organizations. Who is regarded as a competent legal subject in order to conclude contract, represent an organization, etc? Within these regulations on personal matters, we also find rules on the relation between the spouses in marriage and between parents and their children.

The relevant question in relation to the problem of the implementation of law in this situation is the following: What does the regulation look like? The main problem in these cases is not if law is implemented or not, but what the law says about the distribution of personal power in society and if the law is followed or not.

The market regulation

In relation to the market, the law provides instruments for the coordination of business transactions. Peerenboom's conclusion about the potential for the emergence of the rule of law in China draw on his assessment of the interplay between law and economic development (Peerenboom 2002. Cf Potter 2004:467). In general the law provides the framework for the rules of the game. Regulation provides possibilities for action without imposing a certain behaviour. But if someone chooses to act on

the market, the law prescribes how one is to behave. You are not allowed to go outside the limits of the law. If someone does, he will be punished; the rules have the character of prohibition rules. Should someone ---by going outside the accepted limits and by not following the rules of the game--- inflict damage upon another person, a sanction in terms of tort can be raised in order to restore the situation as it was prior to the event.

Among the basic rules of the game in the market economy, we find rules about property and about contract. These two basic instruments, complemented by economical security rights, form the basis for a market economy to operate (Renner 1976). The invisible hand of the market requires the long arm of the law. A pre-condition for market economy is the rules of the game. Another aspect of the role of law in these situations is the standardisation of business organizations. Contract as a legal instrument can be used in order to set up complex organizations. The concept of juridical person, invented in Germany during the 19th century, plays an important role in the possible regulation of the large scale industrial society geared towards mass-production. To stabilise transactions and minimize transaction costs, the legal system has stipulated certain organizational patterns to represent some authorized forms of organizations. A limited liability company follows certain rules and regulations, when it comes to the right to represent the company in a competent way, how dividends should be distributed among the shareholders, how administration of the company should be organized, etc.

Contract is a very flexible legal instrument, which can be used for different purposes and across national borders. In the global economy, contract is the most suitable means for the regulation of transactions between companies from different parts of the world. In this context it is the lawyers, representing large scale law firms or so-called in house lawyers within TNCs, who articulate the international law emerging from practice. Courts and legislation become subordinated, compared to private lawyers and contract as regulators (Dezalay 2002). Thus, contract is a legal instrument whereby private parties, physical and legal persons, can make up their own rules, regulating their dealings, and get these rules sanctioned as being on equal footing with law. See the following figure:

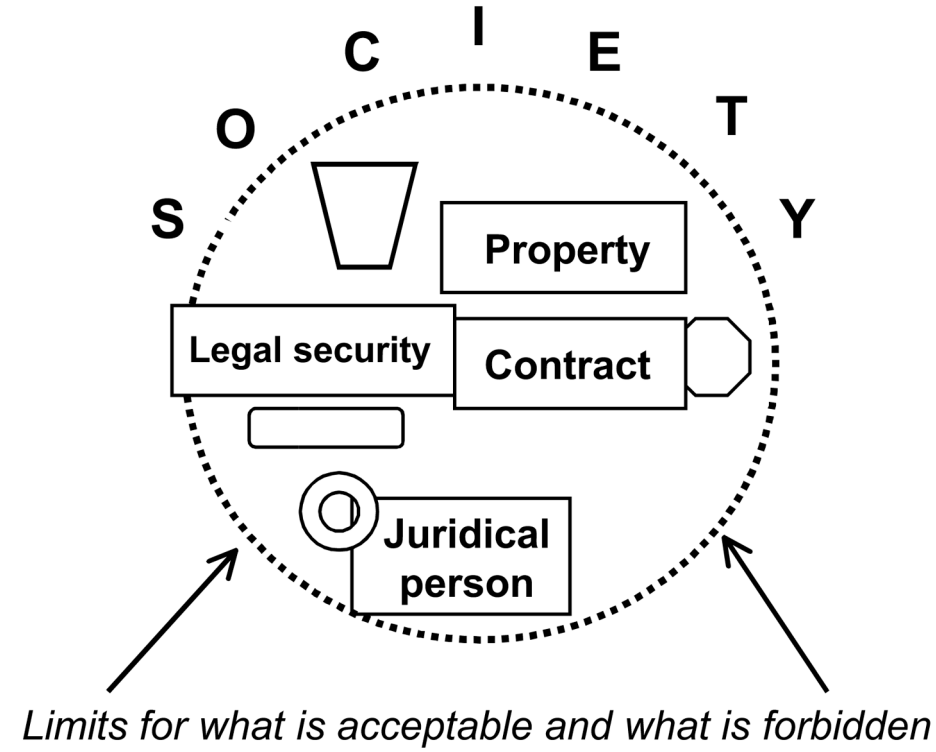


Figure 3

The key question in relation to the regulation of the (market)economy is not about implementation, but rather if the regulation is used, i.e. if it is adequate for the purpose it is introduced (Macauley 1963).

The political/administrative regulation

When it comes to the political/administrative system, law plays another role. Here law and politics are brought together. The law constitutes the political system via the constitution, while at the same time the political system passes and promulgates the law. In that sense there is a dualistic relation between politics and law (Eckhoff-Sundby, 1991: 227). In order to be able to separate law from politics, the legal system must have some degree of independence. When law is created in the political process, it must be possible to distinguish from politics. The legal system, therefore, has its own institutions, courts and public authorities, surrounded by public servants, attorneys, the police force, prosecutors, etc. One of the most important functions of law in this perspective is to set up rules for the division of power in society, between po-

litical decision-making, executive and judicial functions. Here I want to refer to Jianfu Chen's contribution in this volume where he touches upon the separation of powers in China. According to Chen, separation of powers is not a practical reality in China. However, as Chen also points out, from time to time demands for independence or non-interference are made by various authorities in the process of law-making or implementation of law. The autonomy of law and the independence of the court system are important indicators of a vital legal system, which also is stressed by Jonas Grimheden in his contribution to this volume. During the Maoist period, law was an administrative tool, consigned largely to the state's exercise of political power and political authority (Potter 2004:480). Even if much has happened in the post-Mao period, law and politics are often blurred, as shown by Oscar Almén's analysis of the People's Congresses' involvement in law-implementation in the PRC, presented in the volume. Autonomy of the People's Congress and in particular the PCSC is weak in relation to the Communist Party. In effect the PCSC often becomes the executive arm of the Party Committee. Alford and Liebman also refer to the lack of judicial independence as one explanation for the lack of subnational compliance with national laws (Alford and Liebman 2001:748). They also place blame in part on the NPC's "attenuated public mandate" caused by the fact that NPC delegates "are not elected by the public" (Alford and Liebman (2001: 741).

The Chinese political and legal system is hugely complex, given its size as well as the specific problems inherent in a one-party state. As Jonas Grimheden points out in his study of judicial implementation in China, the plurality of actors and the multi-layered hierarchical system of courts and corresponding institutions at each level in China makes the coordination and implementation process a highly difficult task. According to Grimheden, China has a long way to go before it will have what can be called an independent judiciary system. Within a market economy, law plays the role of providing the rules of the game. In such a situation the independence of the court system is vital, in order to create credibility for the economic system. In a further transition of the Chinese economic system into a market economy, a growing independence of the courts, therefore, is likely to occur. Jianfu Chen mentions the need for stronger IP protection, which will force Chinese firms to undertake their own research and development and hence foster China's own technological innovation as one possible, positive cycle based on self-interest.

Access to justice is a related problem. It places requirements on the courts, but also on the regulation of legal aid. If poor people are to have a chance to use the legal system in order to make their voices heard, they must be helped economically in order to cover court costs (Liebman 1999). In China basic legal services are provided via an administrative regulation to poor people, i.e. people without sufficient economic means and to members of the so-called vulnerable groups in society, such as the elderly, minors, women and people with disabilities. Hatla Thelle concludes in her contribution to this volume that the problems of implementation reveal lack of commitment on the part of key actors and lack of sanctions as important elements, complicating the process of realizing the goal expressed in the legislation. This is something which also affects the independence of the courts and, thereby, the credibility of the

market economic system. Hatla Thelle points out a lot of steps that need to be taken in order to improve the situation.

Besides the constitutive function of the political system, law plays an important role by formalising and communicating the tasks the political system has decided should be executed by the administrative system. In the Western model law conveys political messages to the bureaucratic agencies, whose task it is to administer the politics. Through the law the Parliament gives directives to the Government and further along to the Public authorities which are supposed to execute the politics decided upon. In many cases the Parliament delegates to the government the exercise of political power and its executing functions. Then the government issues ordinances, which complement the law decided upon by the Parliament. Even central public authorities might be given competence to issue regulations, which concretise the law. In these situations law has another character than in the earlier mentioned areas of society, the civil society and the market economy. There is a huge difference between the two systems; in the Western model, law becomes the watershed between law and politics. When politics in the Western model has been translated into legal matters via law and other legal sources, the politicians have to hand over the handling of the problems to public authorities, while in the case of China, politicians still have a say, as shown, for example, by Oscar Almén in his study of the People's Congresses' involvement.

The political system fulfils certain functions as a complement to the private sector. These functions can be seen as complementary to the socio-cultural and the economical system which might not be generated by market forces or which for political reasons are set up within the political/administrative system. It is partly a question of rules for protection of the interests of individuals or the collective group. This part of the law is called the general administrative law. The regulation is primarily procedural in character, i.e. it is about handling cases. An important task for the state is to provide infrastructure in different respects. The regulation of the specific public authorities dealing with this belongs to the specific part of administrative law. We can count up to four complexes of infrastructure, which facilitate production. Here you will find the legal infrastructure, whereby the rules of the game of the economical and social life are upheld in the last instance. Secondly, you find the physical infrastructure in the form of transport system, energy and water supply, sewage treatment plant, etc. The role of law in these cases is to distribute tasks. The third complex of rules consists of the social infrastructure, based on rules about care, health and public medical service in combination with rules about protection of income. Finally, we have the cultural infrastructure with the regulation of education on different levels, protection of the cultural heritage and the like. Furthermore, the political/administrative system is involved in the regulation of the protection of outer security, the military force, and inner security, the police force, all with their specific laws. In all these areas law conveys the decisions from the political decision-makers to the executive bodies within the administration. Law lays down the guiding principles for the administrative activities and sets up the fundamental organisational forms for the ad-

ministrative bodies. However, the substantive decisions are taken by different professions, depending on which area is to be regulated.

Legal rules within this societal sector have another character than that of the regulation of the civil society and the market. In administrative law, one does not expect to find prohibition rules. Law defines the administrative agency. Each public authority is set up by an instruction, which roughly tells which duties have been assigned to that authority and how the internal organisation is structured. If a public authority acts outside its area of competence, as defined in the instruction, the consequence will be that the decision is invalid. This is a strong sanction. The decision taken by the authority is regarded as non-existent.

Administrative rules and regulations have the character of a decree, rather than a prohibition. However, since the administrative law tells the actors, the public authorities, what to do in advance, it has to be general. Otherwise the rules would have to resemble a recipe in a cook book and that would not be very suitable. Administrative law is applied ex ante, in contrast to private and criminal law which are applied ex post, i.e., after something has happened. Thus, administrative rules do not stipulate that "You shall", but set up goals towards which public authority should strive. Furthermore the law points out which means are allowed to be used for the actual purpose, i.e., to achieve a specific end. The rules that belong to the political/administrative system can, therefore, be called means-end rules. The application of rules is meant to be forward-looking and precede action. As a consequence, the application of law cannot be said to be rule-oriented, but rather result-oriented. This is why the concept of implementation fits especially well into this legal context. Law is about carrying out certain tasks. These types of rules are, therefore, purpose-oriented and not built as conditional clauses, as is the case within the classical legal tradition related to private and criminal law. Instead of norm-rationality, administrative law is built upon goal-rationality. Hence the implementation of administrative law is in the hands of different professions within certain (expert)authorities. These might constitute medical expertise, as in the system of health care and medical service, or civil engineers, as regards road administration, etc. Only after appeal has been made to an administrative court against a decision taken by a local authority, do legal considerations come into play.

Matthias Burell's study in this volume on Housing Provident Funds indicates that China is in a stage of transition from a planned economy to a market-oriented system. In the development during the 1980s and 1990s from public ownership under a "socialist market economy" into a more decentralised housing system, the Housing Provident Funds were set up as a first step towards a private-based financing system of housing. On local levels the feasibility of rent increases and the subsidized sale of public housing was tested, but only on a small scale and with marginal effects, according to Burell. The first National Conference on Housing Reform was convened in 1988, but a policy was not formulated for the entire country. Each locality was entitled to develop its own housing reform plan, submitting it then to the State Council for approval. The strategy seems to be one of trial and error and learning processes, as often has been the case in the West in similar situations. As Burell points

out, the State council has to await policy changes in other areas, such as the urban wage structure, SOE reforms, the banking system, and the set-up of financial institutions for house construction and individual ownership. The introduction of the Housing Provident Funds within the evolution of China's housing policy also represents an indicator of a step away from a political/administrative kind of legislation and implementation and towards an element of private regulation. In this sense the regulation of the Housing Provident Funds points towards what in the section below is called the law of the mixed economy.

The law of the mixed economy

The regulation of the so-called mixed economy is characterized by goal-conflicts. Or to put it another way, one wants to have one's cake and eat it, too. Randall Peerenboom talks in his contribution within this volume about "competing institutional interests" that affect implementation of law. The mixed economy is also a mixture of the private and public law. The background is related to collisions between the different action systems in society, the socio-cultural, the political/administrative system, technical and economical systems, etc., which place incompatible claims on actors. An imperative from one system will be regarded as alien in relation to an imperative from another system, both of which compete as regards influencing behaviour in a specific situation. In these situations, what we can call an *inter-system* conflict arises, i.e., a conflict between systems[4]. As a consequence, norm-conflicts arise. As long as the different systems co-exist, with each of them determining actors' behaviour, no problem will occur. The only thing we then can expect is *intra-system* conflicts, i.e., conflicts which can be handled within one and the same system.

Inter-system conflicts, however, will be severe, if they give rise to collisions between systems that have such frequency and strength that they constitute threats on, or at least interfere with, the reproduction of the systems. In these instances a call for political interventions occurs. Then the law becomes an attractive political instrument. The law will relieve the pressure on the political system to solve the problem. It will be the administrative system, which has to handle the case. In the Swedish system, politicians are not even allowed to intervene in situations which are regulated by law, according to the separation of power between politicians and public servants, stipulated in the constitution. Thus, by referring to the constitution, politicians can claim that they are prevented from dealing with political issues which are "taken care of" in law.

Even if the law does not solve the true, underlying problem, the symbolic value of law is used in order to stabilize society, when it is exposed to tensions. This kind of rules can be called intervening rules (Hydén 2002). These are the distinguishing-

4 The distinction between inter- and intra-system conflict is made by the Norwegian peace researcher, Johan Galtung, in Galtung (1970)

mark of the Welfare state, related to the mixed economy. Intervening rules have both private actors who belong to the civil society or the market, on the one side, and public authorities, as legal addressees in one and the same piece of legislation, on the other side. Thus, intervening rules are both private and public at the same time. In these cases law recognizes the principles of private production, while at the same time putting restrictions and obligations on private actors, such as employment protection, consumer protection, protection of nature, requirements in relation to sustainable development, etc. It is up to public authorities to control these pieces of legislation. We cannot expect law to be followed spontaneously in these cases, since the law has the character of what the American sociologist James Coleman called "dis-joint norms" (Coleman 1990). This kind of legislation places responsibilities and restrictions on one group in society for the benefit of another group. It might be the employer, as in the case of employment protection, for the benefit of employees, or the seller, as in the case of consumer protection, or the company, as in relation to environmental protection.

This part of the legal system consists of what can be called intervening rules, since they are an expression of intervention from the political system via law and the administrative system in the social, economical and natural systems. The first intervening rules introduced in the industrial part of the world had to do with labour protection in relation to the work environment. It happened in the late 19th century. The background is the so-called labour issue in Europe at that time, how to deal with the uprising labour class and their political claims. The threat from the new political movement prompted Conservative and Liberal politicians alike to take this initiative towards labour protection long before the labour movement had obtained political force and power as a trade union or a political party (Hydén 1992). Gradually similar regulations have emerged in the whole area of labour law, within the social sector, consumer protection of different kinds, environmental issues, promotion of equality between the sexes, to mention some of the most important examples of intervening regulations. An inter-system conflict consists in these cases of the collision between the claim for protection of the individual, derived from the social system, on the one hand, and the demand for efficiency from the economic system, on the other hand, as seen, for instance, within the labour and work environment area. It can also be a conflict between different imperatives, stemming from the ecological system in terms of environmental protection and the demand for rationality within the economic system, or between the claim for good and appropriate products from consumers versus the economic interests of profit-making among producers and salesman. These are all situations in industrialised societies, which have given rise to legitimacy disturbances that have in turn prompted politicians to intervene, using law and public administration.

The typical intervening rule – but not all – has the character of a considering or a balancing rule, where the different interests at stake are mentioned and legitimised without telling how the interests involved should be weighed or judged against each other. The main focus of the intervening rules are instead a question of telling who are authorised to form the decision – competence rules – and how – in procedural

terms – the decision should be taken, what kind of arrangements should be made in order to form as good basis for the decision as possible. Thus, a lack of material or substantive rules related to this kind of regulation exist. The phenomenon has, when it emerged, inspired legal theorists to label this kind of legislation as responsive law (Nonet-Selsnick 1978) and reflexive law (Teubner 1983 and 1987). Randall Peerenboom gives different examples of what corresponds to this in a Chinese context in his chapter within this volume (p 16), i.e. citizen committees which supervise and advise on government work, Expert Consultation System and the Government Decision-making Consultation Committee recently set up by the provincial government in Shanxi. Peerenboom also mentions that Guangdong now holds a symposium every two years where the heads of the top 50 enterprises in the world are invited to advise the Governor on economic development in the province. In Hainan the government has initiated a system of referral for considerations, like the system used in Sweden, where outside legal counsel is consulted before the (intervening) rule is sent to the Governor for signature. Even social organizations within the civil society are exerting a greater influence on the policymaking and implementation process, according to Peerenboom.

Intervening rules differ from the conditional type of precise rules that belong to the regulation of the civil society and the market as well as from the means-end type of regulation, dominating the administrative legal system mentioned above. Intervening rules can be described in terms of relational programming (Willke 1999). The main function of this kind of regulation is to bring a controversial political issue into the political sphere and bring those with interests at stake together there and let them solve the problem, without pointing out ready-made solutions in law in advance. The design of a typical legal body, dealing with intervening rules, is, therefore, a court or public authority, composed of parties representing involved interest under the chairmanship of a judge. This is the case, for example, in the Labour court in Sweden, the Market court, the National Board For Consumer Complaints, the Environmental courts, as well as in many of the decision-making Boards within Central public authorities.

Concurrently with the transition toward a market-oriented economy, we will likely be seeing more and more of this kind of legislation in China. We have already seen it in the field of environmental protection. Even in a small country like Sweden, we might face problems implementing law, due to different interests on the national and the local level. This problem is many times greater in a country as large and complex as China. In politically sensitive areas like environmental protection, this is obvious, according to the study by van Rooij on the implementation of the environmental protection law. Another example which could be mentioned in this context is the earlier mentioned study by Lagerkvist about the implementation of the legislation on Internet cafés. Here the dependency of successful implementation on the normative context, in which the law is expected to operate, clearly is shown. The regulation of the Internet Cafés is also interesting in the sense that private actors are used for public tasks, in this case to keep an eye on Internet users. It is not unusual that one can find examples of self-control in relation to certain activities and areas, like the working

environment where the companies have to take actions and account for them before the relevant authorities. However, the use of private companies to control others is extraordinary. The only similar example I am aware of is the regulation of serving alcohol on the premises. Here the owner of the premises has to have a license to serve alcohol and the duty to – at least – keep certain restrictions in time and amount alcohol, and, if the owner does not follow these regulations, which are set up locally, he can be fined and lose his license.

The content of law in these cases is decided in the process of application and in the actual use of law. The problem of implementation of law will, therefore, be an empirical question, something which can be described but not evaluated in relation to politically set-up values or goals in law. The ultimate purpose is to reach a compromise, built on a model of interest balancing. The rationality of the intervening rules lies in the way it succeeds in solving problems, without creating disturbances in the sector of society in which the problems exist. It is also in these terms implementation or lack thereof has to be judged or assessed (Eckhoff-Sundby 1991:108).

The Time Dimension of Implementation

We have in the previous section discussed implementation from the perspective of different parts of the legal system in a synchronous perspective. In this section I will present a diachronic picture of the problem of implementation. For this purpose I have to put legal implementation in its societal context. In addition we need a theory to tell us something about legal and societal development over time. Such theories are developed within economic history (Schön 2000, Cameron 2003), within history (the so-called Annelles school, see Iggers), within World system theory (Wallerstein 2004) and economy (Kondratieff 1926, Shuman, Rosenau 1972). Due to the scope of this chapter, these theories will not be discussed here. However, their relevance for the cyclical view of societal development with regard to implementation of law in China will be commented upon below.

Societies can be said to develop over time as waves or S-curves. They follow the cycle which any system follows. Society is born, it grows up, becomes mature and after a time it dies and falls into a process of decay. One society emerges as a reaction on the existing. This means that when a society has reached its peak, a new society is already under way, as in the following figure:

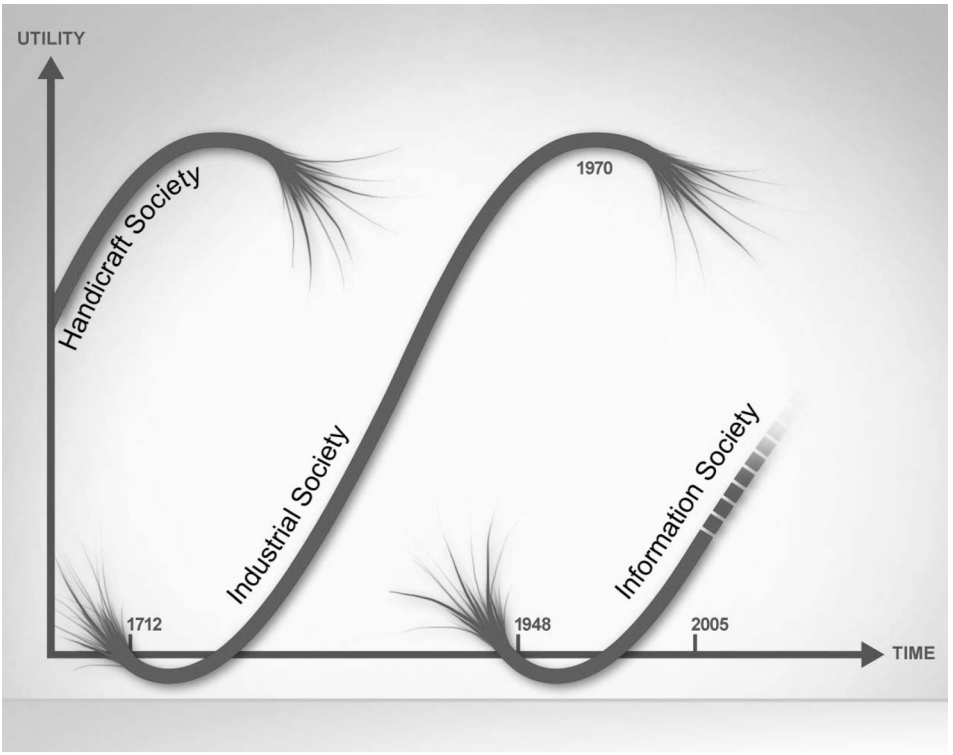


Figure 4

The figure shows the development in the industrialised western world that characterizes Sweden, but also other European countries and USA, partly even Japan. The figure shows the last three centuries. It is possible to follow the pattern historically. These S-curves represent different phases within a larger civilisation, which covers approximately 1000 year. After the Greek civilisation we had the Roman Empire, which was replaced by the Religious period in Europe, before we entered the present stage, the Market epoch (Ewerman 1996). Similar development curves can be and have been set up for Chinese history (Ewerman 2003). Even these longer waves of civilisations overlap in the way shown. According to this logic, in Sweden and the industrialised Western world we find ourselves at present in a period just before transition from one civilisation, the Market epoch where the industrial society is the last phase, into a new civilisation – the cyber epoch or whatever history will eventually call it. It is only when we have lived through a societal curve that we clearly can see what it was all about. Not long ago the present period was labelled the industrial society, due to the fact the we focused for a long time on the differences between socialism and capitalism. Today these two political and economical ways of organizing society can be regarded as two branches on the same tree, the industrial society (Castells 1998). For the same reason it is likely that what we today mainly call the infor-

mation society will be called something else, when it has had its chance to develop its own history.

We have no way of knowing what will constitute society in the future. We can, however, use the cyclical model of understanding societal development and, thereby, predict what form society may have in the future. Societal development shows one common feature over time. Before explaining this, I will say something about the driving forces behind development. In the Market epoch, technological change has been the prime mover. However, not all technological innovation has an effect on a societal level, rather a kind of core technology is necessary, like the steam engine in the beginning of the 18th century. It was used in order to develop new engines, which in turn could lay the foundation for further technological development, etc. The same goes for the computer. It represents a core technological change. After the invention of the transistor in 1948 in Bell's laboratories in the U.S.A., the foundation was laid for the development of the micro chip and the computer. With the development of the personal computer, another step was taken, which furthermore was advanced by the construction of the Internet. We are still waiting for the establishment of the necessary infrastructure and the integration of multi-media solutions. A significant factor in relation to a core technology is also that it is potent enough to stimulate the fantasy and imagination of people, so their application of new technology promotes the development of new modes of fulfilling old human needs.

With reference to the common features of societal development, a certain succession can be observed. The societal curve goes through four phases or rather there are different parts of society, which dominate during certain periods of societal development. The first phase is technique, which relates to what was said about core technology initiating a new societal curve. Each of the phases is about 60 year, give or take 10 years. The second phase is a question of social changes. Society has to adjust to the potential of the new technique, so to say. During the growth of the Industrial society in Europe in the 19th century, a tremendous shift in social life took place. Something similar is going on in many parts of China today. People moved from the countryside into the urban areas in order to get work within growing industries. In Sweden, as well as in other parts of Europe, the rate of the population working in the agricultural sector decreased gradually from about 75 % of the working population down to 2-3 % in a short period of time. The mechanisation of work together with the use of fertilizers and pesticides made it possible to increase productivity with less people working in the sector. This is the same kind of jobless growth we face today, when industrial work is scaled down. In the shift from industrial society to the information society, we can already notice a decrease in employment in the industrial sector from around 55 % down to around 20 % of the working population. This is expected to continue and to end up with the number of people employed in industries landing a bit below 10 % in the coming years. This is a general phenomenon in Sweden today as well as in many other countries in the West, which is also apparent in big cities in China, such as Shanghai and Beijing.

After a new technique has been developed and the societal adjustments have taken place, it is time for the economic boom. This period is characterized by a linear eco-

nomic growth. The new technology makes it possible to produce goods and services in a much more effective manner. When economic growth has accumulated enough of societal surplus value, a need for a distribution system arises. In this situation the political system begins to dominate the scene. Firstly, in order to spread the economic wealth among the population, the welfare state will become the natural result. There is economic pressure for this to occur, which is related to the need to stimulate the demand for mass-consumption, in order to uphold the mass-production upon which the large scale industrial society is built. In order to facilitate this economic development, the political system takes on the burden of providing different kinds of infrastructure. This gives rise to the boom of political/administrative regulation of the means-end character mentioned above[5]. At any rate, the welfare state emerges as a natural consequence of societal development reaching its peak. After the peak, when the S-curve turns downward, the role of the political system becomes more of crisis management. In the legal dimension, this corresponds to the introduction of intervening rules, which I described in the previous section. It is during the 1970s and onwards that the intervening rules to a great extent emerged. Since a characteristic feature of this kind of legislation is the need for control by certain public authorities set up for the purpose, not the least of which are different forms of Ombudsmen, there is a limit for the growth of intervening rules related to public costs. When this became apparent, a quest for self-regulation occurred in late 1980s and onwards.

Different actors dominate and act as initiators during these societal phases. A societal shift is never planned or decided upon by any conscious actor or group in society. It is a question of spontaneous inventions by inventors and artists. There are many who try but few who succeed. This is what characterizes the technological phase, mentioned above. The next step of social development is when the inventions are to be distributed and adopted in society. Then the innovators and entrepreneurs come into play. They are very seldom identical with the inventors and artists, as different skills are required. In the third phase of economical development, administrators enter the scene. Their role is to reproduce and carry on the new way of goods production and services and turn it into large scale application. Mass-production followed by mass-consumption is the aim. This prepares the scene for another category, namely the profiteer, who is a dominating actor, who uses the accumulated societal surplus value for different purposes. When the S-curve has started to turn downward, still another category makes its appearance. This category can be termed the grabber mentality. It is to be found in different sectors of society. Some uses legal, others illegal means. It might manifest itself by going to nightclubs at the expense its members, as is the case of trade union bosses. It might grant itself enormous amounts of money as redundancy payment, profitable pensions, bonus systems, etc., as is the case of business leaders. As a consequence, ordinary people do whatever they can to gain as much as possible. Sickness benefits become in Sweden more or less a means of supplementing one's income for those without a job. Payment in relation to parental leave serves in many cases as extra income, when people are working at the

5 Cf Dowdle 2006, Chapter 13 where he elaborates on different regulatory models of constitutional accountability.

same time. There has been a tremendous change of mentality among ordinary people in Sweden during the last 10-15 years, expressed as dishonesty. The grabber attitude is spread throughout the entire population. This attitude in Sweden has led to a legal proposal about introducing a new crime to punish social benefit fraud.

An indicator of the grabber attitude is the growing tendencies of corruption in Sweden and in the rest of the Western world[6]. In December 2005 an international UN-convention on Corruption came into force. So far (June 2007) 140 State parties have signed and 93 State parties have ratified the convention. If China should follow the same pattern, corruption ought to be located or at least more frequent in those parts of China that have gone through the industrialisation process, such as the coastal provinces in the South of China, Hong Kong and the biggest industrial and service centres and cities in inland areas, like Beijing, Shanghai, Tianjin, Chongqing and Guangzhou. Flora Sapio has in her chapter about anti-corruption law presented a case study of implementation of this law in Beijing. She has shown that the number of corruption cases in the post-industrial, service sector of the industry, such as foreign trade, telecommunications, the high tech sector, real estate and advertising, from 1992 and onwards testifies to a sudden spread of corruption. The service sector in Beijing accelerated further, something which consistently led to a higher degree of prosecution reflecting more closely, according to Sapio, the structure of opportunities but also a changing – robber – mentality. In China, anticorruption campaigns are in essence attempts to promote bureaucratic reform by disciplining and subordinating individual norms of officials to organizational norms of institutions. This has not have any real impact on the problem (Potter 2004:474).

Corruption in China seems to follow the same pattern as has been observed in the developed economies of the Western, industrial world. The diversity of China's provincial economic structures and imbalances in local economic development have resulted in regional patterns of corruption. If we look at economically strong provinces, like Zhejiang, Fujian, Jiangsu and Guangdong, in addition to cities like Beijing and Shanghai, a higher degree of corruption is evident. As a rule, one can say that the more developed, i.e. more post-industrialised, an area is, the more evidence of grabber mentality exists, measured in terms of corruption, according to Flora Sapio in her chapter within this volume. Corruption has reached what she calls a mature stage, which means, for example, that the exchange between payment and service need not be immediate. The methods of corruption have also become so sophisticated that the money/power exchange does not need to take place anymore. Illicit funds are disguised in a variety of ways and in increased number. The amounts of money involved is skyrocketing. The aims of corruption are also diversified[7].

6 Christer van der Kwast, chief procecutor, the Unit against corruption at the National Prosecutor-general's office. According to van der Kwast only 25 % of all reports to the prosecutors go to the court, Dagens industri, 2003-05-14.

7 These trends seem to be fully consistent with some predictions of the functionalist theories of corruption, predicting a sharp rise in corruption in developing countries undergoing a transition. Cf Huntington 1968 and Nye Joseph 1967. See also Tanzi, Vito and Hamid, Davoodi, 1997.

The same development along the presented S-curve above can be displayed for a lot of other variables. One can, for instance, trace developments in moral and ethical issues following a certain pattern. A new societal S-curve starts with a paragon of virtue, since there are no answers as to what is right and what is wrong at the beginning, when new social relations are established. It continues with ethics geared towards actions. What actions as such can be regarded as good and what are bad? After that ethics built on assessments of consequences tend to emerge and finally acts according to rules become the ethical ideal, rule-ethics.

These factors influence also the legal development trends. The development of law "follows" the S-curves. If we look at figure 4, we can notice that the feudal system in the countryside and the guild system in towns and cities with its statutes and regulations of who was entitled to get a certificate as master craftsman and carry on craftsmanship and the mercantile system with its strong regulation of trade, were both deregulated during the 18th century and gradually replaced by a policy of non-restrictive practices and free-trade policy. In the 19th century a new kind of regulatory principles emerged. Through the so called *Code Napoleon* in France and *Burgerliches Gesetsbuch* in Germany, the regulation of the market economy got its features. This applies to the rules regulating property, contract and economic security rights which were commented upon above. During the 20th century the public law system grow. Especially at the time of World War I and World War II, a great amount of public administrative laws were introduced. And when we had reached the peak of the industrial society, a new type of legislation flourished, the intervening regulation. At this time, from 1970 up to the present, society is covered by an enormous legal superstructure just as when the handicraft or agricultural society was found to be at its peak in the beginning of the 18th century[8]. Therefore a process of deregulation, not only is expected, but also to a large extent already has taken place. The first phase of the new information society faces a period of self-regulation and pluralistic efforts to compete for setting the standards for the new development. This is something which could be expected in the economic developed parts of China today.

The characteristics of the shift from the upper S-curve to the lower are always related to a change from large scale to small scale. It is a question of going back to basics, or rather, forward to basics, namely fulfilling old human needs in a new way with support of the new technology. In this shift, we get what we can call a society in transition, which affects all of the societal dimensions mentioned above. Technology makes it possible to produce goods and services in a much more efficient way. Social conditions will change, with growing social tensions in society followed by greater differences in wealth among different sectors of society. Those who have, get more. Those who do not have, get less. This is a nearly inevitable consequence of the clash between the old and the new society that creates winners and losers. For a long period of time, however, hegemonic power continues to be related to those structures and strata belonging to the old society. The existing (reality) has always the preferential power of interpretation as regards what is right and what is wrong. Therefore,

8 The Portuguese Sociologist of Law, Boaventura de Sousa Santos, has made use of the metaphor of an overloaded camel being borne down by the load of laws, Sousa Santos, Boaventura de. (1995)

it is not until the new society has managed to articulate its own societal solutions that one can expect a tendency to shift from the old to the new way of living and fulfilling human needs. During a considerable period of time, the emerging society will be without articulations and therefore will be an unknown phenomenon. This is apparent in contemporary science in the labelling of present day Western society as being post-modern or post-industrial, etc. There is no trace of the new society other than in technological terms.

The economic system will change radically in the aftermath of the introduction of the new information technology. The way of doing business, for instance by using the Internet in so called e-business, will change. The system of production and distribution of goods and services will be totally different. The economy will turn from being based on production (plans) to being oriented towards the demands of consumers. Through new digital technique the possibility to communicate consumers' demands will make it possible to take the interests of consumers as a starting point for the economic process, in a way which was unthinkable in the old production system, based on mechanics. Finally, the political/administrative system and the state will exert pressure for change, like it did during the 19th century when the system of the four estates (in Sweden) was substituted by the parliamentary system based on political parties. These tensions, created within the political system, is strongly indicated in the kind of legislation that Johan Lagerkvist comments upon in his chapter.

Some final remarks on the relevance of the three dimensions in the understanding of implementation of law in China

Above I have given examples from the Chinese context and from the different studies within this volume, in relation to the different dimensions of law brought up in this chapter. Here I will summarize the main features. We have touched upon the different steps of implementation which a Convention and a law have to go through before reaching its final destination. Implementation of a Convention can be called a multi-layered governance problem with a high risk of transformations of the content. As has been pointed out, different aspects have to be dealt with at different and separate levels during the implementation process.

The initial figure, representing possible deviations from the original content of the text of the Convention, is to be regarded as a mere simplification of the implementation process. The idea presented herein, however, is an attempt to sort out the potential problems occurring at each level, i.e., the international, the State, the substate and the local level. This does not preclude the fact that deviances in practice can occur at every level in the same case or that distortion at one level can be reinforced at another level. I have, for pedagogic reasons, chosen to deal with them, one at a time.

The implementation of the political content of the law, at a provincial level, is a delicate legal issue due to the heterogeneity of legal cultures that intervene in the process. There is a close connection between societal and legal development. The different provinces in China belong to different positions on the societal development curve, presented above, which affects the legal culture and the legal needs.

The design of the legal text and the legal machinery that will give support to the implementation process, thus, represents a tricky step to be taken in the implementation chain. This socio-legal enterprise requires insight into the specific kind of problems which the law raises. We have seen examples of this in relation to the study of the Housing Provident Funds by Matthias Burell, as well within the study of corruption by Flora Sapio.

The final battle in the implementation process takes place when the legal ideals of the law meet the normative realities of the particular society, where it is to be implemented. It is when the normative content from above and from outside, in terms of transplants (Dowdle 2006), meets the undercurrent of existing norms in the society that the real challenges begin to occur (Wickenberg 1999). It is here that tensions are at their highest in the implementation process. Johan Lagerkvist has in his study of the Internet cafés given us a case which displays the competition among norms taking place, when a new norm via the law is introduced in society.

By introducing a norm-model, I have tried to indicate the kind of dimensions which have to be taken into account in an actual study. The norm-model serves as a heuristic device that can help screen potential and relevant factors that can come into play on the normative scene, which the Convention is meant to influence. The different examples of law implementation in China have to be analysed with regard to the vertical level where the study takes place. What are the legal regulation about? What superior level of guiding principles including norms of different kinds interfere in the process of implementation?

If we look at the horizontal aspect of implementation, one has to locate the specific study in one or the other of the different societal sectors mentioned. Does the study belongs to the civil society, the market economy, the planned economy, or to other aspects of the political/administrative system? Or does it fall within the sector of the mixed economy and the welfare state? Depending on the answer, different questions have to be raised and different theoretical and methodological considerations have to be taken. The role of law within the political/administrative sector does not only represent a watershed between law and politics. It is also a question of a difference in relation to a shift in decision-making from politicians – in a one-party state system – to professional groups of different kinds, as in the market-oriented socio-economic systems. In the one-party system politicians fill the law with content in the implementation processes, while in the market-oriented system this role is uphold by professions performing different tasks in accordance with what the goal-oriented law tells them to do. China seems to be in a transition from one to the other of these systems, which is shown in many of the examples put forth in this volume.

Finally we have to take into consideration the geographical part of China in focus and, thereby, determine the character of the legal culture in which the problem ex-

ists. Is it a problem in relation to the agricultural mode of production, something where the guild system comes into play? Or is the problem of implementation related to the industrial society and in that case, does it belong to the initial phase of the industrial mode of production? Or are we in the large scale phase of industrialism? Or is the implementation study even related to the phase of a society in transition with its special problem of pluralism and conflicting demands? The answers to these questions will once again guide us in finding the proper way of understanding what is influencing the implementation process. The discussion in relation to Floras Sapios analysis of corruption and anti-corruption legislation shows us the relevance of these distinctions. One can also refer to the uneven development of the legal system in different provinces, which is seen in Zhu Jingwen`s report on law and development in China[9]. Here we can see clear evidence of the relation between economic development and the development of law in terms of number of lawyers, legal education, law firms, the court system and the like. This is also reflected in Hatla Thelle's study of the legal aid system in China in this volume.

Questions that have to be raised might be whether or not implementation processes belong to a communist-organised administrative system or if the administrative system is based on professional decision-making, or if the system is in a phase of transition. How about the role of independence of the court? What are the prospects in these respects in different parts of China? To what extent will we find examples of intervening rules and regulations in China and what characterizes this legislation? These are questions which are dealt with in this volume and where the above-mentioned dimensions of law will help us to orient ourselves for better understanding of implementation processes, while providing us with a theoretical framework[10].

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9 Zhu, Jingwen (2007)

10 For instance law in a perspective of sociology of law can be used as an indicator of societal development in different parts of China.

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Stefan Larsson

Non-Legal Aspects of Legally Controlled Decision-Making

The failure of predictability in governing the 3G infrastructure development in Sweden

Abstract

Predictability is a key function of law. When the application of law goes from being flexible to becoming unpredictable this key function is lost. This article shows how legal application can deviate from formal agreements and law, how legal predictability experiences a setback when other forces or values affect the decision making that is supposed to be strictly legally controlled. Non-legally acknowledged factors can affect the decision-making tacitly. This means that causes like economy and politics can affect the application of law, although not admittedly, and the legislative process in order to change the application.

The example used for this demonstration is taken from the Swedish development of the third generation of mobile phone infrastructure, 3G, and more specifically the responsible authority's, the Post and Telecommunications Agency, supervision of the four licence winning operators during the infrastructure roll-out.

The paper addresses the difference between the intentions of the law and the application of the law, analyses and aims to explain parts of the legal complexities or inconsistencies from a socio-legal perspective. To do so, data permit process data from a regional case collected within a MiSt study (Larsson 2008) is used, along with legal documents, cases, PTA reports and more.

Introduction

Predictability is a key function of law. Predictability is "one of the basic values in democracy and a state governed by law" (Peczenik 1995, p 89f.). Many legal theorists hold the norm of "jurisdiction and the actions of public authorities in a democratic state should be predictable" (ibid, p 90), as the very essence of legal security. When the application of law goes from being flexible to becoming unpredictable this key function is lost: the preconception of knowing the rules of the game, before and when playing the game. A governmental authority is expected to apply law in a predictable, transparent and non-discriminatory way. This article shows how legal application can deviate from formal agreements and law; how legal predictability can experience a setback when other forces or values affect the decision making that is supposed to be strictly legally controlled. The example used for this demonstration is taken from the Swedish development of the third generation of mobile phone infrastructure, 3G, and more specifically the responsible authority's, the Post and Telecommunications Agency (hereinafter the PTA), supervision of the four licence winning operators.

The 3G infrastructure in Sweden has been developed between 2000 and 2007 and the PTA is the authority responsible for supervising the sector, as well as the operator developing the infrastructure. Initially, within the course of three years four operators were to build competing systems to cover 99,98 percent of the population. This was determined as a result of the licence allocation process, the so called beauty contest where operators made promises regarding coverage and how fast to reach this coverage.

These coverage requirements were extreme in relation to other EU countries' licence conditions, and the operators failed to reach the promised coverage in time. In fact, it took twice the time agreed upon. Still the PTA did not order any sanctions, even if the legal provisions clearly state that possibility. Based on a regional sample of permit processes national coverage data and PTA reports, in combination with a legal analysis, this article shows the PTA and the operators' actions in relation to one another.

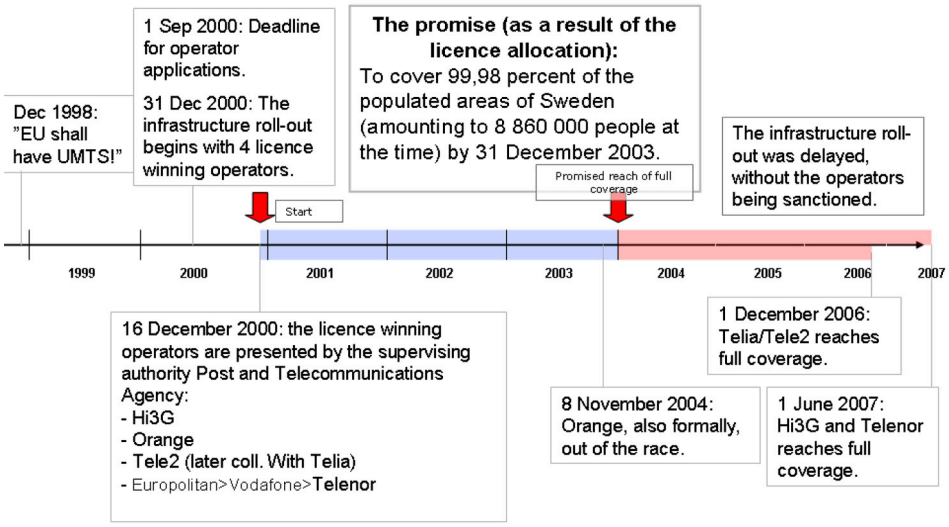


Figure 1 *The 3G development in Sweden*

The article focuses on the relation between the operators and the PTA, a relation regulated by law but also an agreement (upheld by law). It describes how non-legally acknowledged factors are likely to have affected the decision making of the responsible agency for infrastructure development without this being explicit during the development or foreseeable by the time of licence allocation. One could imagine that this difference is an obvious one, but the legal domain can be more complex than first assumed, and the deviations from the law in books has to be empirically investigated in a methodological way far different from the traditional legal method. The legal field to some extent lacks the method to detect flaws of the legal system. This task is therefore often what socio-legal researchers mainly take on, as a main research objective for sociology of law. Much of the data and results are based on a study within the MiSt-programme[1] presented in a licentiate's dissertation published in March 2008 (Larsson 2008).

Background

The PTA, is the "applier" of the legal order describing and setting the stage for the legitimate PTA actions against the operators. The PTA's role is mainly regulated in

1 MiSt is an interdisciplinary research programme on tools for environmental assessment in strategic decision making funded by the Swedish Environmental Protection Agency. The programme is coordinated by the Department of Spatial Planning, Blekinge Institute of Technology. See http://www.bth.se/tks/mist_eng.nsf See also Larsson, Stefan (2006, 2008) .

the Electronic Communications Act, the ECA. As an applier the PTA has to follow the legal order and, if deviating from it in some way, the PTA will most likely still formulate and legitimate this deviation in terms of the legal order.

During 2002, a time when many operators throughout Europe wanted to change the licence conditions they just had agreed to, the European Commission in a communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions in June 2002, stressed the importance of a predictable environment in the 3G development sector. Any modifications in the licence conditions should be "proportional, transparent and non-discriminatory" (Section 3.1 of COM(2002) 0301). The Communication from the Commission is an example of a principle in contract law stating: "Pacta sunt servanda", agreements must be kept.

The Swedish 3G infrastructure development has been analyzed from a planning perspective (Emmelin & Söderblom 2002), from a planning and environmental legal perspective (Emmelin & Lerman 2004), from a sustainability perspective (Larsson 2008, Larsson & Emmelin 2007) and from a spatial planning and sociology of law perspective (Larsson & Åström), and the licence allocation process has been analyzed as such by Hultkrantz and Nilsson (2001) and Andersson et al. (2005).

Research questions of the paper

The article shows the relevant legal framework, including the most important licence conditions binding the operators that received a licence in 2000. This framework is especially interesting in comparison with the actual deviation from the formal licence conditions that occurred in the infrastructure roll out, and how this was handled by the supervising agency, the PTA, especially in relation to the operators that were to develop the infrastructure. The investigation of the legal framework alone, the "law in books", does not explain this deviation or the result of the application of the framework, the "law in action". The objectives of the article is therefore

1. to investigate and present the legal framework relevant to the relation between the operators and the PTA when it comes to the deadline of fulfilling the licence conditions.
2. to show the actions of the PTA and the operators in order to explain the delayed reach of coverage, and hence to focus *the application* of the legal framework.

The first question represents the law in books and the second the law in action. The article suggests a socio-legal approach to explaining the deviation between the formal law in books and its application. The first objective mainly requires legal sources of data. The second requires a socio-legal approach were data in form of PTA reports, operator applications as well as the contribution from other research made on specific parts or angles of the Swedish 3G development. It also requires a more elaborated

view on law and the legal system. This socio-legal approach needs further presentation.

Law in books, Law in action

When researching the empirical side of law, the distinction of law in books – law in action, often comes up.[2] The idea is that there are two sides to law, one dogmatic, often written down, and one empirical, which you only can find outside the dogma, for it is the application of law, the consequence. In other words, it is about the difference between intent and outcome, the difference between what you say, and what you subsequently do. This composition is reflected in the two objectives of the article, presented above. The research design is common in sociology of law research where first the legal design is presented and then the actual deviation from this design is measured or established through empirical data.

Sociology of law offers a set of perspective-giving tools, tools that allow for a different perspective on law and legal institutions. Sociology of law offers a way to question legal matters from a social scientific perspective, with social scientific method and theory. The relation between society, on one hand, and law and legal institutions on the other, is often the area of inquiry in the sociology of law discipline (Mathiesen 2005, se for instance p 18). In the governance and control of the spatial environment the legal frame plays a significant role. How the legal provisions are manifested in the factual sense, showing the empirical side of law, is one of the important fields of study in the sociology of law.

The method of finding *existing law* is legal dogmatic, but when questioning these findings from a socio-legal perspective the perspective of sociology of law is taken, which offers an analytical depth to the spatial planning context. This socio-legal perspective is often described as an external perspective on law (Bernt and Doublet 1998, Hydén 2002a). Whether or not you see it as an external perspective, the norm science approach has generated a number of studies in the sociology of law discipline as a way to focus and explain behaviour controlling entities that are socially reproduced (see Hydén and Svensson 2008 in this anthology) in addition to the legal system. The norm perspective has been used to analyze different topics such as the continuing process of a struggling tunnel construction (Baier 2002), traffic rule compliance (Svensson 2008) and the rise of environmental concern in school curriculums (Wickenberg 1999).

A way to describe sociology of law is the way in which it differs from legal dogmatics and how it complements it (see the introduction to this anthology, Hydén & Wickenberg 2008). Where the legal dogmatic perspective gives a very clear picture of what knowledge and what factors should influence legal decision making (repre-

2 The dichotomy is credited to Roscoe Pound, whose work was a forerunner to the legal realism movement.

sented vertically in the following figure), the sociology of law scholar can examine legal decision making empirically and see if there have been other factors, generally not explicit, that have influenced the legal decision making (represented horizontally in the figure 2 below).

In the case of the PTA supervision over the operators there is a significant usefulness to the sociology of law perspective. The legal order provides the framework for the PTA's actions, but when it comes to the precise decisions, the law has possibly been only one of several factors that have affected these actions. This is returned to below.

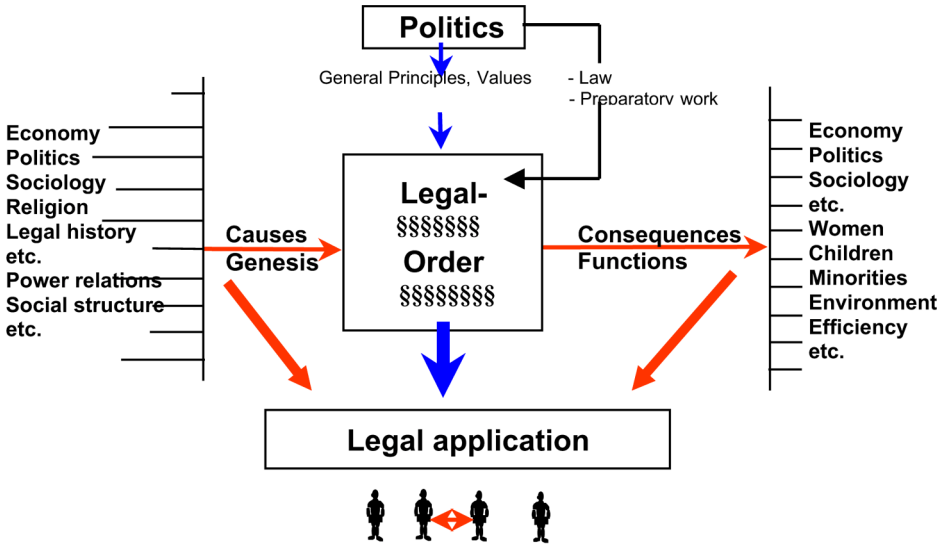


Figure 2 *from Hydén (2002b), p 16, see introduction to this anthology (Hydén & Wickenberg 2008)*

Generally, legal decision making is formulated such that it operates strictly under the principle of legality, that decisions are not affected by legally irrelevant factors such as politics and economy (to the left in the figure), from the horizontal outlook. It is the task of socio-legal science to show when such factors have intervened in the legal decision making. Another task is to show when the application of law leads to unforeseen, distorting effects in society, (to the right in the figure) such as environmental problems or when the legal application results in consequences that are undesirable from a norm perspective, which from a legal dogmatic perspective may be correct. This perspective helps in understanding the actions of the PTA in its relation to the operators in the 3G case. Before turning to the empirical side of the in the Swedish 3G infrastructure development the article now turns to the legal dogmatic perspective that regulates the relation between the PTA and the operators.

The PTA and the operators: The law in books

Before turning to the licence conditions and the specific law that applies to the relation between the PTA and the operators, let us take a brief look at the PTA's role as a whole, from the law in books perspective. What is the task of the PTA?

The duties follow under a governmental authorization, but the more detailed provisions are described in the Ordinance (2007:951) with instructions for the PTA. In addition to supervising the postal services and other sectors the PTA's duty among many is to

> 1 – Promote the access to secure and efficient electronic communications according to the goals of the Electronic Communications Act.
> 3 – Promote a sustainable competition (section 4 of Ordinance 2007:951 with instructions for the PTA, author's translation)

This means a further referral to the Electronic Communications Act and rather vague tasks such as to promote sustainable competition. The Electronic Communications Act (translation made by the PTA):

> **Chapter 1, General provisions**
> **Introductory provisions**
>
> **Section 1** The provisions of this Act aim at ensuring that private individuals, legal entities and public authorities shall have access to secure and efficient electronic communications and the greatest possible benefit regarding the range of electronic communications services and their price and quality.
>
> This objective shall mainly be achieved through the promotion of competition and the international harmonisation of the sector. However, universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices.
>
> When applying the Act, particular regard shall be taken to the importance of electronic communications for the freedom of expression and freedom of information.

The PTA is not likely to be criticized on these grounds, but they show the purpose of the PTA in the electronic communications sector. Of interest is the promotion of competition and that the most important services should be available to everybody under similar conditions. More important here is to show the specific legal framework in the 3G case.

The licence allocation and the conditions following

The reason for discussing the licence allocation process here is because it gives some preconditions for understanding what part of the agreement the operators later breached and why.

On May 12th, 2000, the PTA invited operators to apply for a licence. The number of licenses was decided in April 2000 by the board of the PTA after the Parliament had decided upon the framework of the license process (PTSFS 2000:5). While various other countries had an auction concerning the licenses, the Swedish licenses were offered in a "beauty contest" to those who promised the highest coverage reached within the shortest time-span. The PTA regulations stated that "at the most four licences for a national coverage according to the UMTS/IMT-2000-standard will be available" (PTSFS 2000:5, §6). The intention seemed to be to reach the highest number of licensees, with regard to the services of the 3G that subsequently could be offered to consumers, as a result of a competitive operator market.

Four licences were to be issued, valid until December 31, 2015. The selection was divided into two steps where the contestants were reviewed using certain criteria. The initial evaluation of the contestants was conducted in order to review if they had fulfilled the preconditions for the establishment of a UMTS network. This included financial capacity, technical as well as commercial feasibility, and appropriate expertise and experience (PTA 12 May 2000, p 8-9 and Andersson, Hulthén & Valiente 2005, p 583). Five of the ten contestants failed to prove this (see Larsson 2008, p 23-27).

At the second stage of the beauty contest the operators were awarded points according to the extent and speed at which they offered coverage by the end of 2003, 2006 and 2009. Coverage was defined on the basis of three factors: proportion of population, territorial coverage and distribution throughout Sweden. The population constituting the reference data for the PTA was the statistical data from SCB by December 31, 1999 (PTA May 12, 2000, p 10). This is relevant in relation to the delayed roll out that later became the case, since it was primarily the urban population that grew in the years of the delay, making it slightly easier to reach the coverage demands when postponing the deadline. There had been some criticism of the licence allocation regarding whether or not the last few percentage points could be motivated by a combination of commercial and regional political reasons. The last few steps of percentage points were considered to be extremely expensive (Hultkrantz & Nilsson 2001, p 69, Emmelin & Söderblom 2002, p 47). And as a result of the delay, people moved in under the masts, so to speak, making it possible for the operators to avoid covering the last expensive percentage points in the sparsely populated areas in the north of Sweden.

The importance of good access throughout the country was stated early in Swedish broadband and 3G development (PTA report 27 June 2001, p 9). At the same time the PTA did not want to add a clause requiring too high coverage in the licences, fearing it would discourage operators to take part in the development of the 3G system, which was the case in the earlier application process regarding the GSM licences in the 1800 MHz spectrum (PTA report 27 June 2001, p 9). This is the reason for the application criteria where the applicant had to promise the coverage, and the promise of higher coverage beats the promise of lower.

The results of the so called beauty contest have been a roll out where Sweden differs from the rest of Europe both regarding speed and coverage. This is particularly

interesting regarding the uncertainties of the practical use of the system, the handsets and the applications, at the time of the decision (Emmelin & Söderblom, 2002, p 47-48). The process attracted a large number of applicants, and a large number of new entrants – comparable only to the UK process. Six contestants were not awarded licences.

Ten applicants competed in the beauty contest. Three of the competitors were the leading mobile telephone operators on the Swedish market: Europolitan, Tele2, and Telia. The remaining seven were consortia formed for the 3G beauty contest (Andersson, Hulthén & Valiente, 2005, p 584).[3]

Applicants/first stage	Second stage	Licence holders
Broadwave Communications AB		
Europolitan AB	Europolitan AB	Europolitan AB
HI3G Access AB	HI3G Access AB	HI3G Access AB
Mobility4Sweden AB		
Orange Sweden AB	Orange Sweden AB	Orange Sweden AB
Reach Out Mobile AB		
Tele2 AB	Tele2 AB	Tele2 AB
Telenordia Mobil AB	Telenordia Mobil AB	
Telia AB		
Tenora Networks AB		

Figure 3 *From Larsson 2008, p 25.*

The PTA decided that Europolitan (later Vodafone, now Telenor), HI3G (3), Orange and Tele2 should each get a licence. All four undertook to cover at least 8 860 000 people by the end of 2003. These licences apply up to and including December 31st, 2015, and the licence conditions until March 31st, 2006 (PTA decision of 22 March 2001, p 8).

Telia, Telenordia and Reach Out Mobile, which did not get a 3G licence, appealed the PTA decision to the County Administrative Court (Case nr 499-01). The County Administrative Court confirmed the PTA decision on 27 June 2001, without further appeal. The fact that Telia did not get a licence surprised many. Telia became part of the infrastructure development through collaboration with Tele2, which did get a licence. The three operators Hi3G, Telenor (Europolitan at the time) and Orange signed a deal regarding collaboration on the coverage requirements of the licence conditions.

The licence conditions stated that each operator had to have at least 30 percent of their own infrastructure and up to a maximum of 70 percent shared of the coverage (PTA decision of 22 March 2001, p 3.1). An estimation conducted for the PTA stated that the area coverage likely would be around 170 000 km^2, about 41 percent of the total Swedish surface area (Björkdahl & Bohlin, 2003).

3 Telia Sonera was founded January 1st, 2003, when Swedish Telia and Finnish Sonera joined.

An important licence condition regards the licence holders verifying, by March 1st 2004, that 8.860.000 people in Sweden are covered by December 31st 2003 (PTA 22 March 2001, section 1.1.2 and 1.3.1). Regarding the starting point of a functional network, the licence holders were to make net capacity available by January 1st, 2002 (PTA 22 March 2001, section 2). Another important aspect was that the licence conditions of the first period lasted until March 31st, 2006. After this date they could be reviewed, which they subsequently were.

Parts of the licence conditions, such as the maximum of 70 percent shared infrastructure, follow from set values that were decided before the so called beauty contest, and some conditions emanate from the contest itself, such as the degree of coverage and the speed of the roll out. The licence conditions themselves do not include any sanctions for the operators if they were not to fulfil the requirements. Instead, the sanctions have a more general description in the legal provisions controlling the Post and Telecommunications Agency.

The Electronic Communications Act

The Electronic Communications Act (2003:389), the ECA, came into force on July 25th, 2003 (prop 2002/03:110). The act replaced the Telecommunications Act (1993:597) and the Radio Communications Act (1993:599). The Telecommunications Act was in other words the main legislation controlling the introduction of the 3G development in Sweden. A number of changes had to be made to the law during 1999 and 2000 in order to be able to make demands of coverage in the licence allocation (decided December 8, 1999), to obligate operators to make available net capacity for other service providers, for the sake of competition (decided April 14, 2000) and national roaming (decided June 14, 2000).

The ECA covers all electronic communication networks and electronic communication services, which includes the role of the Post and Telecommunications Agency's relation towards the operators; the legal grounds for the agency actions that affects the operators. Since the ECA replaced the two earlier legislations on July 25th, 2003 it became the most relevant legislation for the relation between and the actions of the PTA and the operators.

The regulation in chapter 7, section 4 of the ECA, giving the operators reasonable time to voluntarily correct errors after notification from the PTA, had no equivalence in the former legislation (prop 2002/03:110, p 398). This possibility, the "reasonable time", was introduced in the Act just six months before the deadline for reaching the coverage requirements.

> If the supervisory authority considers that there is reason to suspect that a party conducting operations under this Act does not comply with the Act or the decisions concerning obligations or conditions or the regulations that have been issued under the Act … the authority shall notify the party conducting the operations about this circumstance and give it an opportunity to state its views. In the notification, the authority shall state that it may issue an order or a prohibition

> in accordance with Section 5, unless rectification takes place within a reasonable time. Reasonable time may not be less than one month, except in the case of repeated cases of violation, unless the party that is notified consents to a shorter time limit.

If the operators till after "reasonable time" fails to "rectify" the failure, of for instance to reach a promised coverage, the following section, 5, explains the rights that the PTA has as a supervisory authority to sanction the operator.

> If a notification in accordance with Section 4 does not result in a rectification, the supervisory authority may issue such orders and prohibitions as are necessary for a rectification to take place.
>
> If the order is not complied with, the supervisory authority may
> 1. revoke a licence, alter licence conditions or decide that the party that neglected the obligation should completely or partially cease the operation, unless the violation is of minor importance, or
> 2. issue such additional orders or prohibitions as are necessary for compliance with the Act or the decisions on obligations or conditions or the regulations that have been made under the Act.

To interpret the words "may issue" we have to look at preparatory work and the preparatory work states that "orders or prohibitions according to this regulation is in force instantly, if nothing else is decided, and can be combined with a fine" (Prop 2002/03:110, chapter 30, and section 22.2, author's translation), with reference to the specific law for fines (Viteslagen 1985:206), which states:

> When a fine is ordered, an amount is to be decided with reference to what is known regarding the addressee's economic circumstances and to other circumstances, that can be assumed to make the addressee to comply with the order that goes with the fine Section 3 of Viteslagen, (author's translation).

The fine is meant to sting, in order to make the addressee rectify the mistake instead of choosing to pay the fine. In the case with lacking coverage, which especially concerned the sparsely populated areas of Sweden, the investments required were large, and the fine could therefore have been expected to be substantial.

A comment in the preparatory work regarding chapter 7, section 4 is particularly interesting in the case of the PTA supervision of the operators' obligations under the licence.

> The circumstance that a party has not responded within the time frame the authority has given, does not hinder that the authority proceeds in its supervision. Neither do repeated or new and changed applications to the authority mean that the authority cannot proceed in its supervision, unless it is clear within the time frame that further supervisory action is unnecessary (Prop 2002/03:110, chapter 30, author's translation)

This will be returned to below, in the case where the PTA seemingly paused in the supervision over the operators whenever the operators appealed a decision or handed in an application for any matter. The preparatory work clearly states that the fact that the operators hand in new or changed petitions does not mean that the PTA should stop the supervision.

So, the law does not force the PTA to take action explicitly, it only states that it may. In most cases this is not a problem, because the PTA is bound to supervise the telecom sector such that it functions at its best (see provisions above) and in most

situations this means that the PTA needs to put pressure on a failing party. But, and this is an important but, when a matter is of such importance that it outgrows the Agency, the supervision and enforcement may not be of top priority to the PTA, even though this is never openly stated. This may be a weakness in the legal construction and can furthermore be said to be a weakness in the actions of the PTA. But without jumping to conclusions, it is time to tell the story of the actual rolling out of infrastructure, the PTA and the operators' interactions within this legal setting.

The PTA and the operators: The law in action

In order to depict the law in action in this case, a somewhat detailed story has to be told of the actions of both the operators and the PTA. But first, let us take a look at an overview of the actions whereby the operators try to postpone the deadline for the reach of coverage, which they only a few years earlier had promised to fulfil in order to receive the licence, and the response from the PTA.

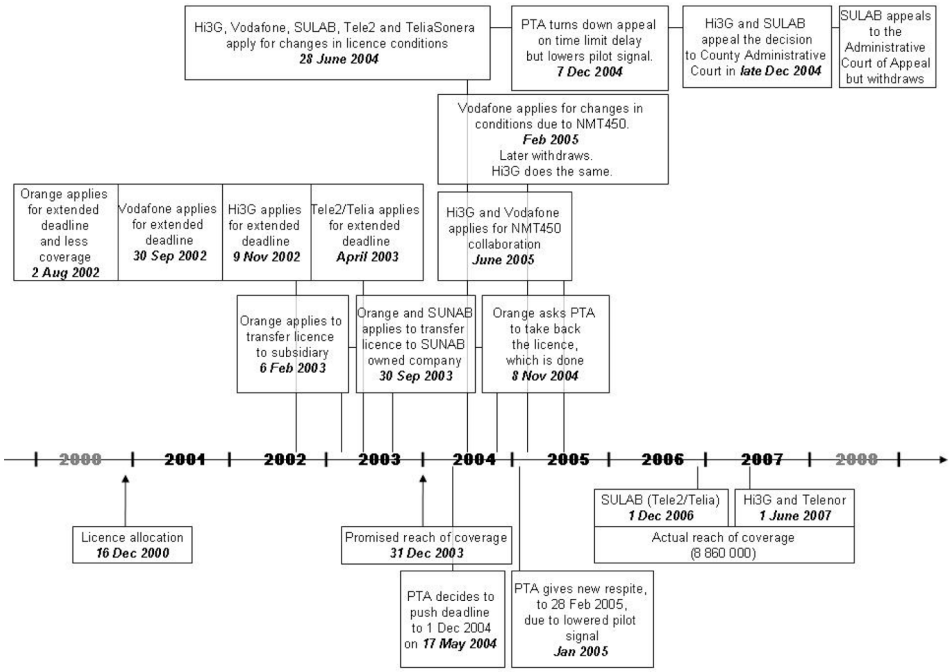


Figure 4 *Shows operator and PTA actions in the 3G infrastructure development in Sweden (Larsson 2008:62)*

The interaction between the operators and the PTA has been extensive. In order to see the reasons behind, the detailed story has to be told. When the operators already

in 2002 started to apply for an extended time limit, the PTA turned down the requests. Orange was first out in August, to apply for an extended deadline and less coverage, followed by Vodafone (which went under the name of Europolitan by now) in September and Hi3G in November, and Svenska UMTS-Licens AB (Tele2/Telia) in April the following year. The operators' requests were all denied (PTA decisions of 30 September, 25 November 2002 and 14 May 2003). The operators all pointed to the municipal permit handling process being slower than expected as the reason for the delay.

When the operators in April 2004 were confronted with the fact that they had failed to reach the coverage of the licence conditions stating December 31, 2003, the reported coverage had at the most been between 65-75 percent, when it was supposed to be 99,98 percent of the populated areas (PTA 10 March 2004). The operators were given "a reasonable time" to "voluntarily" (as expressed in the PTA decisions of 17 May 2004) rectify the lack of coverage, with a referral to the preparatory works of the Electronic Communications Act (prop 2002/03:110, p 398). The time limit for reaching the full coverage according to the licence conditions was postponed until December 1, 2004, meaning 11 months later than the original time limit. The PTA explained this by agreeing with the operators claim that the prerequisites for the construction had been changed after the initial licence agreement by factors outside the control of the operators. These factors where said to be a slow municipal permit process and that the assessment from a flight hindrance and telecommunications conflict perspective performed by the Armed Forces in different respects had delayed the processes (PTA decisions of 17 May 2004). The PTA concluded:

> In some respects the circumstances for the company have been changed in a way that could not have been foreseen at the time of application, and that has been beyond the control of Hi3G (PTA Decision of 17 May 2004, p 3, author's translation).

The same wording has been used in the decisions regarding all four operators. The wording is interesting, especially in reference to the time required for the permit processes. In what way had the conditions changed? And in what way could these "changes" not have been foreseen? Is this a legitimate reason for the coverage delay at all? To be able to answer these questions we have to take a look at the actual roll out empirically, which is done below and in more detail in Larsson (2008).

In the time following the decision, in June 28, 2004, all operators (but Orange), meaning Hi3G, Vodafone, SULAB (Tele2 and TeliaSonera) applied for a change in the licence conditions, which mainly concerned a delay in the coverage conditions to be fulfilled by December 31, 2007, and a lowered pilot signal in the sparsely populated areas. These operators' main arguments regarding the postponed coverage were that the permit processes had been taking considerably longer time than expected due to the public debate regarding the effects on the environment, cultural and nature values and the worry about electromagnetic radiation (PTA decision December 7, 2004, p 4). Parts of the arguments from the recent postponement decision by the PTA were re-used, but now with a bigger jackpot at stake: more than three additional years to reach the full coverage. The PTA found that the reasons to change the

licence conditions regarding the delayed coverage were not strong enough to change the conditions. This was partly based on a Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions from June 2002 – (Towards the Full Roll-Out of Third Generation Mobile Communications) stating the importance of predictability and stability in the regulatory environment.

> When balancing the benefits and drawbacks of a rigid application of the conditions determined by the issued 3G licences, the Commission is of the opinion that in principle the **licensing conditions should not be changed** because the sector is best served by a predictable environment. Predictability allows business cases to be established in a reliable manner and to be credibly defended when accessing investment funds (Underlining and bold letters are as in the text, 3.1 of COM(2002) 0301 and p 8 of the PTA 7 Dec decision).

And the communication continues:

> Changes to licence conditions should be envisaged only when circumstances have changed unpredictably and in these cases any modification should be proportional, transparent and non-discriminatory.

The pilot signal strength was lowered in sparsely populated areas, meaning a change of the licence conditions to some extent. The reasons that resulted in a delay of 6 months from the date of the PTA notice to the operators until December 1, 2004 (11 months from promised reach of full coverage according to licence conditions), were not considered strong enough to change the licence conditions. The operators were just given a respite. The reported coverage on December 1, 2004 was 84 percent for Hi3G, 86 percent for Telia and Tele 2 and 84 percent for Vodafone (PTA report January 27, 2005). The fact that the argument nevertheless ended in a respite means that the PTA gave the argument some credibility. On what empirical grounds the respite was given, is however unclear.

In late December, 2004, Hi3G and SULAB (Telia and Tele2) appealed the decision (in addition to the lowered pilot signal they had appealed the decision of not postponing the deadline) to the County Administrative Court (Länsrätten) on the basis that more areas of Sweden should be included in the lowered pilot signal requirements, in addition to the postponed time limit. The processes made the PTA accept a lowered pilot signal in some additional areas, which is for the benefit of the operators, and the appeal was withdrawn.

By January 2005 the PTA stated that since the licence conditions had been changed (lowered requirement in the way of measuring coverage in the sparsely populated areas) the operators should have a new respite to rectify the lack of coverage. This time however the respite was set to one month and by February 28, 2005 the operators should have reached the coverage of the licence conditions or the PTA "may issue an order" according to chapter 7, section 5 the Electronic Communications Act and the order may be combined with a fine (PTA report of 22 February 2005).

What is interesting here is that the changes of the obligations connected to the pilot signal in the rural areas of Sweden meant a beneficial way of measuring the coverage for the operators. It was this beneficial change (less base stations required for

the same degree of coverage) that gave the operators another respite, due to the "changes of the licence conditions". The logic here is not obvious. It is possible that the radio planning connected to these conditions demand some extra planning time, a reallocation of resources, which would support the need for extra time. This could on the other hand be balanced against the fact that the operators saved up to *one fourth* (according to the PTA press release of October 24, 2005) of the infrastructure costs of the remaining 15 to 20 percents of full coverage by the decision to lower the pilot signal (PTA decision by December 7, 2004, when the coverage was somewhere around 80-85 percent of the coverage requirements). This would be more than enough to outweigh any reallocation costs, and hence make the reasons given by the PTA not legitimate. The pilot signal was allowed to be lowered further in the so called buffer zone in October 2005 (PTA report of February 22, 2006, p 20).[4]

So on one hand, when it comes to the coverage percentage, the PTA stresses the importance of predictability and to not change the coverage requirements of the original licence conditions, and on the other hand, when it comes to the perhaps a bit more complicated pilot signal issue, the PTA changes the licence conditions in favour of the operators. Consequently, instead of changing the coverage conditions, the definition of coverage is changed. What happened when the operators in March 1, 2005 reported that the lack of coverage was not rectified? In fact, SULAB had not raised the level of coverage at all between December 1, 2004 and March 1, 2005, see table below. The story told on this issue in the PTA report from February 22, 2006 stops here. Nothing is said about the order that "may be issued" or the sanctions that could follow (see p 12-13).

	Coverage in percent of 8 860 000 persons		
Report date	**Hi3G**	**SULAB (Tele2 and Telia)**	**Vodafone**
December 31, 2003	68	74	66
June/July 2004	76	80	74
December 1, 2004	84	86	84
March 1, 2005	87	86	86

Table 1 *From PTA report of February 22, 2006, p 10.*

When Hi3G and Vodafone in June 2005 applied for the PTA to allow some of the 3G activity to be performed through an alternative 3G technology, the so called CDMA2000 in the 450 MHz band, the PTA decided to ask all operators if they could ensure the continued infrastructure development with this new technology. At the same time the PTA decided to await these results before issuing an order, com-

4 This buffer zone consists of the area that reaches three kilometres from the boundaries of the population centres for places with more than 1000 inhabitants according to the Statistics Sweden, SCB, as of December 31, 2000.

bined with a sanction, for the operators to rectify the lack of coverage. But why did not the PTA act during the three months following the reported lack of coverage in March 1? The PTA concluded, regarding NMT450 and 3G (UMTS), that there was no way to bridge the technologies without lowered quality for the consumers. For instance, there where no handsets on the market covering both technologies. The PTA turned down the request and through the application the operators again gained some time in the continuing strive for an adequate coverage. The decision came on October 24, 2005.

One of the operators, Orange, chose not to fulfil the commitment at a relatively early stage, resulting in, after a series of events, the Orange frequency spectrum being split between the three remaining operators. Orange applied in August 2002 for more time to develop the infrastructure for a lower coverage, without success. A PTA press release from December 19, 2002, reveals that the PTA found out from an Orange press release that Orange intended to withdraw its participation in the 3G infrastructure development in Sweden. The PTA had not been informed. Orange, on February 6, 2003, applied to the PTA to allow a transfer of the licence to a subsidiary company, GGG Licens AB, which the PTA denied on the ground that Orange was likely to be planning to sell this subsidiary company in order to withdraw the Orange contribution to the Swedish 3G infrastructure construction (PTA Decision April 23, 2003). On September 30, 2003, Orange and the Telia Sonera and Tele 2 owned Svenska UMTS Licens II AB applied to the PTA to allow a transfer of the Orange licence to Svenska UMTS Licens II AB. The PTA denied the request primarily based on competitive aspects; that the competition in the market would decrease resulting from the fact that SUNAB would be in control of two of four licences (see the PTA April 28, 2004 document referred for consultation, and PTA decision of May 26, 2004).

In short, Orange, from late 2002 to 2004 tried different ways to make use of the licence, all denied by the PTA realizing that Orange would not invest in a full infrastructure. During the fall of 2004 the PTA, on application from Orange, retrieved Orange's licence (PTA report of February 22, 2005, p 10) by a decision in November 8, 2004. Chapter 7, section 6 of the Electronic Communications Act states:

> A licence may be revoked and licence conditions amended immediately, if…
> …5. the licence holder requests that the licence should be revoked.

It should be remembered that the PTA has the right to request the operators to present documentation of the roll out with the penalty of a fine if they refuse (section 15, part 1, 4 of the abolished Telecommunications Act 1993:597, chapter 7, section 3, Electronic Communications Act). The PTA did not put much pressure on Orange during the time the company still formally participated in the 3G development, yet obviously showed no intent to fulfil the requirements. This once again shows the scope of action available to the PTA.

Twice the time

When the first licence period ran out by July 1, 2006 the coverage was between 93 and 94 percent of 8 860 000 people. The new licence conditions were favourable to the operators. The pilot signal in the outskirts of the urban areas was lowered, resulting in a higher coverage. With the lowered demands for the pilot signal the area to be covered increased to 98 percent. This is without any new base stations being constructed. On August 9, 2006, the PTA notified the operators when the full coverage should be reached, and the new dates were based on the operators' own estimates of when to be ready.

This means that the operators had managed to reach the end of the first licence period without completing the promised amount of coverage and without receiving expensive fines from the PTA. It also means that on the other side of July 1, 2006, the coverage requirements where lowered and dependent on their own estimates. The PTA had avoided heavy critique, as well as being sued by applicants that did not receive a licence. On December 1, 2006, about three years after the initial deadline for reach of coverage, the first operator (Tele2/TeliaSonera) reported to the Post and Telecommunications Agency, the PTA, that their common network had reached the coverage of 8.860.000 inhabitants of Sweden, followed by the remaining two operators, Hi3G and Telenor, 7 months later (PTA fact sheet of June 1, 2007, PTS-F-2005:5, p 6).

A change of circumstances that could not have been foreseen?

The story above leads to the important question of why the coverage was not reached in accordance with the licence conditions, which is one of the implementation issues of the 3G infrastructure construction in Sweden and, if the reason was not legitimate, why did not the PTA sanction the operators for breaching the licence conditions? The second question is returned to in the analysis below. Regarding the first question, the debated issue, or rather the used explanation, was the municipal handling of mast building permits the unforeseen hindrance of the infrastructure roll out. Or were the permit processes exceptionally slow, as often claimed in the numerous applications for changed licence conditions? What was it in the permit process "that could not have been foreseen at the time for the application"? Orange's application to postpone the deadline expressed (PTA decision September 30, 2002):

> "Orange assumed that there would be a wish to get UMTS-coverage fast, why the permit processes would be handled without delay" (author's translation)

Whose wish the company is talking about is left out in the discussion, but it is surely the municipalities' wish Orange is referring to, which calls for the question of whether the operators expected to get exceptional treatment when it comes to the permits? And on what grounds they expected this.

The PTA can sanction operators not fulfilling licence conditions through a considerable fine. The coverage by the end of the period was between 66 and 74 percent of the promised 8 860 000, with only three operators remaining. The first operator to reach full coverage was the Telia/Tele2 collaboration on December 1, 2006, followed by the two remaining operators (Hi3G and Telenor) that reported on June 1, 2007. The municipal permit handling was blamed for the delay, a reason that "could not have been foreseen", which helped the operators avoid sanctions from the PTA. It has been shown that a slow municipal permit process cannot explain the lack of coverage in some areas of Sweden, and therefore is not a fully legitimate reason for the delay (Larsson 2008). It was especially the coverage in the sparsely populated areas of Sweden that was neglected, which the licence allocation process so generously had promised would not be the case (Larsson 2008, p 124-127).

Analysis and conclusion

A quick conclusion is one that has already been told: The way the legal framework was applied regarding the supervision of the operators in the case of the 3G infrastructure development in Sweden cannot be explained from a legal dogmatic perspective. Something is missing in the explanation of the PTA actions.

One way to approach an explanation on some of the legally controlled decisions in the 3G case is to return to the horizontal perspective of sociology of law in relation to the vertical perspective of legal dogmatics. When having strict and clear conditions attached to the allocated 3G-licences and a governmental authority enforcing these conditions armed with legal tools of making it possible to order substantial fines, one would think that alternatives would be clear. Either the conditions are fulfilled, or they are not fulfilled and sanctions are imposed. Although the picture is not that simple, there are legitimate ways to stall the deadline as well, a certain scope of action. And some PTA actions can be explained in the vertical perspective, for instance giving the operators a chance to correct the lack of coverage within "reasonable time", but not all. Some of the delay of the PTA enforcement seems to lack explanation in the vertical, legal dogmatic, perspective. This is where the horizontal perspective is necessary as an explanatory tool.

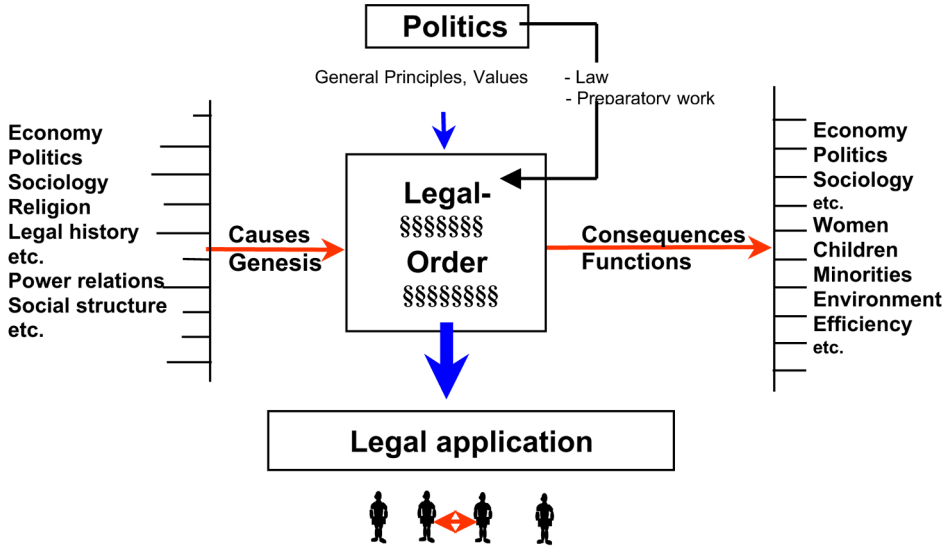


Figure 5 *From Hydén 2002b, p 16, see also the introduction to this anthology, Hydén & Wickenberg 2008.*

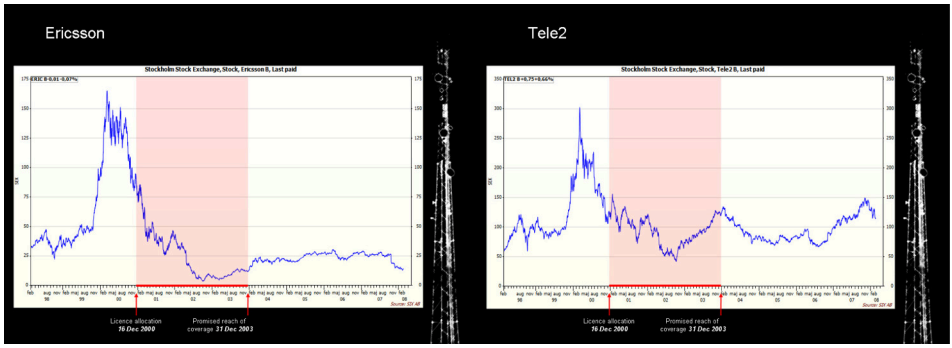
Figure 2, in chapter 3.0 above, has here been complemented with arrows pointing at the legal application, symbolizing the influence from economy, politics etc. The PTA is the "applier" of the legal order describing and setting the stage for the legitimate PTA actions towards the operators. The PTA's role is mainly regulated in the Electronic Communications Act, the ECA. As an applier the PTA has to follow the legal order, and if deviating from this in some sense, the PTA will most likely still formulate and legitimate this deviation in terms of the legal order.

While we should not safely assume that the agency is lawful in all its actions, at the same time the exact legal provisions are not clear in all cases, still to be defined by practice. The ECA sets the framework for the PTA; meaning that the PTA can have different strategies for how hard the PTA will control the operators, within this framework. Regardless if you view it as strategic freedom within a vague legislation or a breach of law and agreements, the outcome is clearly unpredictable and conflicting the intentions expressed in the planning stages of the development. It is acceptable to assume that both political values as well as causes like an IT-sector in a period of decline will affect the PTA application within the legal framework, or beyond the boundaries of the same.

In either case, it has included non-legal aspects to a decision-making that was defended by legal rhetoric. This means that the actions were affected by values that were not outspoken. This can be described as the societal forces in the horizontal dimension becoming so strong in the individual case that they push aside the legal regulation of the vertical dimension. Here there seems to be a bigger game unlocking the legalistic approach. It is in this sense that the PTA can both accept a delay in reaching of coverage, and at the same time claim that the licence conditions have not

changed and blame the operators for stalling the infrastructure development by referring to the legal order. The operators can, at the same time, point their fingers at the municipalities' unexpectedly slow permit process as the reason for the lack of coverage, which at least partly is not a fact.

Such an analysis of the PTA/operator relation suggests a PTA handling of the operators' responsibilities in consensus with the operators, as two participants in a game teaming up in a way that the rules of the game do not intend them to. The period before the licence allocation, when the draft was prepared and the preconditions were decided upon, the times in the IT sector were extraordinarily good, the sector was booming and the optimism connected to information technology was strong (Larsson 2008). The stocks of key players in the 3G development such as Telia, Ericsson and Tele2 were peaking (pictures below). As a result of this, during the autumn of 1999 critical voices were heard regarding the infrastructure development running a risk of being delayed in Sweden, and was an expression for fear that Sweden would lose its world leading position in the telecom sector (PTA report June 2001, p 5). Behind the critique were Swedish telecom operators and producers of telecom equipment. The responsible Ministry called for the PTA to speed up the licence allocation process.[5] Finland had already allocated the licences, a fact that most likely stressed the Swedish critics, especially Ericsson (PTA report June 2001, p 5). It was the necessary changes of the Telecommunications Act that partly delayed the Swedish allocation, which were made in order to secure competition in the telecom market.

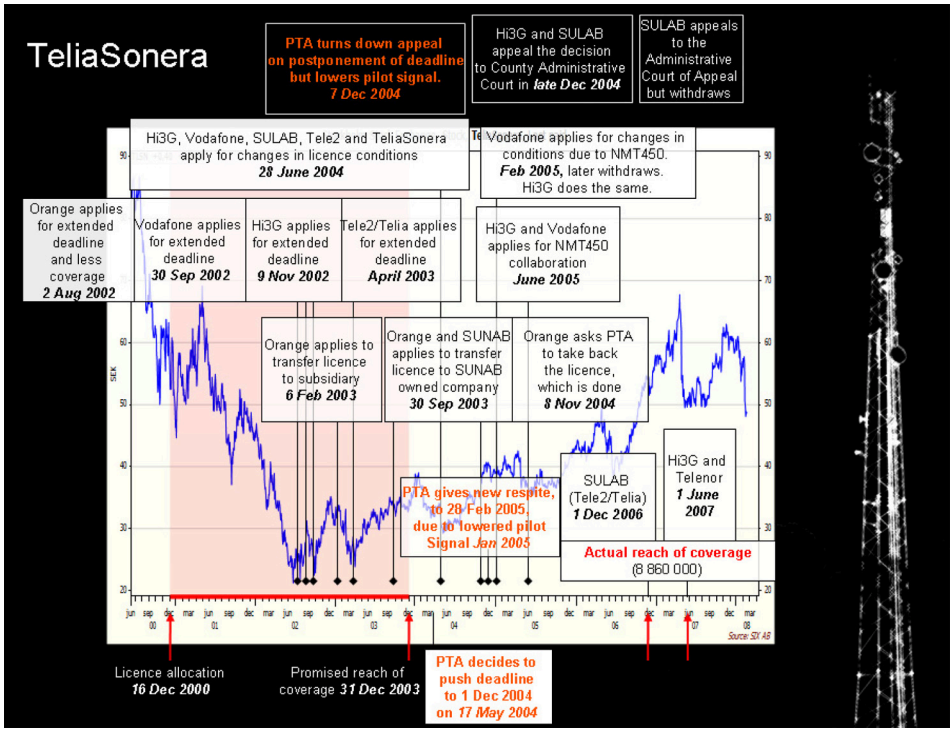


Upper left: The Ericsson stock charts for the times before, during and after the intended 3G infrastructure roll-out. Note the good times of the planning stages of the Swedish 3G development prior to the intended infrastructure roll-out (in pink/red), when Ericsson pushed for a faster licence allocation process.*Source: Six AB*

Upper right: The Tele2 stock charts for the times before, during and after the intended 3G infrastructure roll-out. The pattern is recognized. Tele2 made promises during optimistic times and the attempts to postpone the deadline started sometime in the middle of the "intended" roll-out. *Source: Six AB*

5 "Mångfald, valfrihet och lägre priser på mobiltelefonmarknaden", Press release issued by the Ministry of Enterprise, Energy and Communications (Näringsdepartementet) Dec 15, 1999.

Below: The TeliaSonera stock charts for the times before, during and after the intended 3G infrastructure roll-out compared to the operator actions and the PTA response see figure 4. *Source: The PTA, Six AB and Larsson 2008.*



When the infrastructure roll out, as a result of the promises made to receive licences, were to speed up in 2002, the IT bubble burst and the market went into decline, certainly affecting the investment interest of the operators facing problems. They faced harsher times and decided to try hard to postpone the deadlines for the reach of coverage according to the licence conditions. How the PTA reasoned is hard to tell but the important point here is that the PTA, by its lack of sanctions, participated in the game for the benefit of the operators.

Is it not a good thing that the PTA can be flexible enough to let the operators' roll out depends on reasonable investment strategies and fluctuations in the market? From a licence allocation as well as a legal security perspective it is problematic, to say the least. This is because a "yes" to this question means that the licence allocation would be nothing but a charade, and the promises made by the contestants would not be followed by a duty to fulfil these promises later. Such a system is neither transparent nor predictable and just. If what is stated in the licence conditions is not what will later be fulfilled, the conditions are not transparent. The transparency of the 3G licence allocation in Europe was prior to the allocation especially emphasized in the EU directive of 97/13/EC. Also, predictability is "one of the basic values in democracy and a state governed by law" (Peczenik 1995, p 89f.). Many legal theorists hold

the norm of "jurisdiction and the actions of public authorities in a democratic state should be predictable" (ibid, p 90) as the very essence of legal security. The licence conditions of the 3G development can also be judged in light of the most basic principle of civil law, described by the Latin phrase *pacta sunt servanda*, – agreements must be kept.

When the European Commission in a Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions in June 2002 commented on the matter of the 3G roll out in Europe, it stressed the importance of a predictable environment in the sector and any modifications in the licence conditions should be "proportional, transparent and non-discriminatory" (Section 3.1 of COM(2002) 0301).

From an analytical point of view, there were three basic alternatives open to the PTA when handling the operator breach of fulfilling the licence conditions. One was the "the hard way" – imposing heavy sanctions on the operators in order to make them comply with the licence conditions. Another was "the honest way" – that the PTA would have confessed that the results of the so called beauty contest were not reasonable in light of the changed market conditions of 2001 and 2002, hence allowing changes in the conditions and risking to be sued by other applicants as well as being criticized for not sustaining a predictable environment, transparent and non-discriminatory handling. The PTA chose a third alternative, a middle path, the balancing act of not formally changing the licence conditions (which *formally* sustains the above said) and not sanctioning the operators for their breaches, but from several aspects *informally* leads to an application that is quite the opposite of what the Commission communicated. In fact, the PTA's handling of the operators is not *predictable* – the licence conditions have not been upheld. Not formally (when it comes to the pilot signal), but more importantly not actually, in the application. This means that the handling has not been *transparent*, in the sense that the formal documents did not describe the actual outcome, and *discriminatory* towards the other applicants as regards the lack of demanded realism in the promises made in order to get the licence.

The PTA's role in the governing of the Swedish telecom sector can be returned to here. For instance, it can be questioned that the PTA fulfilled the goal of "promotion of competition" in this case, if the governing was discriminatory. A comment in the preparatory work regarding chapter 7, section 4 is particularly interesting in the case of the PTA supervision of the operators' obligations under the licence.

> The circumstance that a party has not responded within the time frame the authority has given, does not hinder that the authority proceeds in its supervision. Neither do repeated or new and changed applications to the authority mean that the authority cannot proceed in its supervision, unless it within the time frame is clear that further supervisory action is unnecessary (Prop 2002/03:110, chapter 30, author's translation)

The PTA clearly had let the supervision responsibilities rest whenever an operator applied for a change in the conditions or appealed a decision. The preparatory work clearly states that the PTA would not have had to do so. So, again, why the soft treat-

ment, when the design of the development had emphasised the importance of speed and coverage, the reach of a "regional balance" and the importance of ensuring that Sweden remains a "leading IT nation" (Larsson 2008)?

The bigger picture applies and in the long run the results may have been the best in the given circumstances in an IT sector in decline. A bankrupt operator would not have been beneficial to anyone. But the lack of predictability in the actions of an important governmental agency is still a problem. In this case it meant that the applicants in the licence allocation process that could foresee the PTA's lack of sanctions most clearly benefited the most. Note the interesting comment from Europolitan (later Vodafone, now Telenor), one of the 3G licence winners, which, when reviewing the draft before the licence allocation process in 2000, asked for clear and apparent sanctions for the operator that does not reach the promised coverage in time, in order to prevent too high bids (PTA 13 March 2000). This shows that the operator knew that the design of the licence allocation could stimulate too high bids, and perhaps feared that other applicants would bid higher. Bearing in mind that Europolitan actually made the highest possible bid regarding coverage and time limit, just months later. This may have been a tactical manoeuvre or perhaps became a strategy the moment the company realized that no heavy sanctions would be clearly stated in the conditions, even though the company had asked for it. This operator later fulfilled the coverage conditions by June 1, 2007 instead of the promised December 31, 2003 (PTS fact sheet of June 1, 2007, PTS-F-2005:5, p 6).

The differences between how the 3G infrastructure development was designed and how it was rolled out can probably be explained by the radical transformation of the IT and telecom market in late 1999 and into the early years of the new millennium. Still the approach of the article has not been economics or market fluctuations but from a socio-legal and spatial planning point of view. The focus has not been the players of the market as much as it has been the public handling of different key aspects, included the actions of the government, the PTA and the operators.

The unsanctioned operators' lack of coverage according to what had been agreed upon illustrate a lack of transparency in the governmental steering of a billion dollar project, which shows the incrementalist approach where a short-term (daring rather than deliberating) perspective reigns where developments are made step-by-step. The question is to what extent not only the operators but also the PTA were, informally, comfortable to find ways out of the pressured time limits and formal statements of the year 2000. Formally, in any case, the PTA has to refer to legitimate delays. When focusing on the appeals and new operator applications, this can be seen as a method of not putting too much pressure on the operators and to make up for the mistakes made in the licence allocation process that became apparent a little too late, at the cost of predictability in the legal application.

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Johanna Alkan Olsson and Ilhami Alkan Olsson

What Role for Soft Law in Building and Developing the Climate Change Regime?

Abstract

This paper aims to portray the increasingly complex normative structure of international climate change regime (CCR), which consists of the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol as well as other additional elements that playing a role, such as the practices of the Intergovernmental Panel on Climate Change and the Global Environmental Facility and procedures of these institutions.

The paper is composed of four parts. The first part defines three key concepts, extensively used in this paper. Part two discusses factors promoting the increasing use of soft law in international environmental management in general and the climate change regime in particular and overviews the international legal foundations on which the climate change regime is built. Part three briefly analysis of the norm structure of the CCR, including the reporting, review and non-compliance mechanisms as well as the flexibility mechanisms that this regime lays down. Part four reflects on the current interaction between hard and soft law and discusses the future normative development of the CCR.

The paper concludes that both hard and soft law may have differential effects on both rule development and effective implementation of climate change rules depending mainly on three factors: 'political saliency', 'the perceived state of scientific

knowledge' and 'the bargaining power of the states' that favour either hard or respectively soft law.

Introduction

An increasing use of soft law in many areas of international law, in particular in international environmental law can be observed. This development has unsurprisingly attracted the attention of scholars from a wide range of disciplines. The issues related to the functions of soft law, its relation and interaction with hard law, the compliance and effectiveness of soft norms are particularly investigated. This paper aims to examine different types of rules within the climate change regime (CCR), agreed as applicable to states, whether or not states consider them to be legally binding and/or enforceable. Special emphasis will be laying on the factors that promote the employment of soft law in the CCR. Besides, since the climate regime contains norms with different normative qualities, which interact with each other in various forms depending on political circumstances, economic interests and scientific knowledge, this paper, also attempts to demonstrate how soft law is used in the CCR and assess its role in the rule development of this regime by using examples taken from the UN Framework Convention on Climate Change (FCCC) and the subsequent Kyoto Protocol (KP), with the intention of portraying the normative structure of the international climate regime more accurately. In our view, an approach which focus only on the legally binding rules would fail to convey the full picture of what states have agreed to adhere to in the climate context as well as of the factors that have been consequential and likely to remain influential on the future development of this regime. Such a broader approach will also provide a better understanding on the increasing use of soft law as well as its relative position vis-à-vis other flexibility mechanisms that exist in international law.

Three key concepts

This part clarifies the authors' interpretation of three key concepts that the paper employs: "soft law", "hard law" and "international regime". Such clarification will not only provide a basic description of these three concepts for those who are less familiar with them, but also show the theoretical standpoints of the authors with regard to the interrelations between international law, politics and policy making.

Soft law

Gold discouragingly stated that "almost as many definitions of soft law can be found as there are writers about it".[1] Still, it is possible to categorise the diverse definitions of soft law in three broad groups:

(i) Some authors see the *form* of the international instrument as the most important criterion of 'softness'. Francioni, for example, describes international norms and instruments that fall outside Article 38 of the Statute of the International Court of Justice[2] as "soft law".[3] Similarly, Shelton uses the concept of soft law mainly to refer to any international instruments other than treaty, containing principles, norms, standards, or other statements of expected behaviour.[4] In this understanding, soft law instruments are legally non-binding, but they are still capable of creating certain legal effects. When soft law is understood as formally *non-binding*, it is contrasted with "hard law", i.e., 'treaty', which is legally binding.[5] Within this interpretation soft law instruments may take a number of different forms, including recommendations and resolutions of international organisations, declarations and 'final acts' of international conferences, like "the Rio Declaration on Environment and Development"; 'guidelines' that explicitly state that compliance with the norm is voluntary, like "the OECD Guidelines"; resolutions of the UN General Assembly; or codes of conduct, guidelines and recommendations of international organisations, like "the United Nations Environment Programme" and "the Food and Agriculture Organization".

(ii) Some other scholars understand soft law as describing the "soft" provisions/clauses of legally binding instruments made by states and international organisations. Softness" in this description concerns the *content* of the legal obligation and not the form. Baxter for instance defines soft law as follows: "norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between

1 Gold, Joseph, *Interpretation: The IMF and International Law*, Kluwer Law International: The Hague/London/Boston, 1996, p. 301

2 Article 38(1) of the Statute of the "Permanent Court of International Justice", the international court of the "League of Nations" established in 1922 is, as it was, preserved in the 1946 Statute of the "International Court of Justice", which is the principal judicial organ of the United Nations. Article 38 reads as follows: "The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States. 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree there to" (http://www.worldcourts.com/pcij/eng/documents/1920.12.16_statute.htm).

3 Francioni, Francesco, "International 'Soft Law" in Lowe, A. Vaughan and Fitzmaurice, Malgosia (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, Cambridge University Press: NY, 1996, p. 167

4 Shelton, Dinah, *Commitment and Compliance*, Oxford University Press: New York, 2003, p. 3. Nonetheless, Shelton recognises that treaties may have provisions with a hortatory character (*Ibid*. p. 10).

5 According to Article 26 of the Vienna Convention on the Law of Treaties states that treaties, as a legal *form*, are *binding* upon the parties.

states but do not create enforceable rights and duties may be described as soft law".[6] Hence, in this categorisation, soft law refers to treaty provisions/clauses with vague obligations or weak commands, which are formally binding but lack the required normative content to create *enforceable* rights and obligations.[7] The soft characteristics of such instruments may be evident from the employed (imprecise) language, or its flexible context, consequently lacking peremptory character, or the explicit indication that the nature and degree of adherence to the norm(s) is a matter of national discretion.

(iii) In parallel to the increasing role and importance of non-state actors in international policy and norm making, some scholars tend to define soft law as the norms that are created outside the inter-state/governmental realm. Kirton and Trebilcock, for instance, argue that soft law is essentially confined to those norms and regimes that rely on the participation and recourses of non-state actors in the construction, operation, and implementation. Accordingly, governmental authority is either completely absent or does not play a constitutive role in these soft law instruments. Furthermore, the participation in the creation, operation and continuation of these soft instruments are, in principle, voluntary.[8]

In this paper, soft law refers both to soft provisions/clauses of international treaties and legally non-binding instruments. The reason for the preference of a 'broader' definition of soft law is that, as will be discussed below, softness in the climate change regime has two origins: It originates both from the *form* (non-binding instruments) and the *content* (soft provisions/clauses of treaties) of international instruments employed in that regime.

This paper primarily focus on the body of international rules concerning climate change applicable to states and procedures states have created to oversee their implementation, enforcement and further development. Consequently it does not deal with the normative significance of norm-like activities of non-state actors, such as corporate guidelines regarding social responsibility issues. This is not to say that soft instruments created outside the state/governmental realm are not relevant to climate change. A reason for this limitation is that it is obvious that the involvement of non-state entities within the climate change regime does not amount to the law creation in a 'formal' way even though these entities exercise a considerable degree of influence on the policy making process, not least in the activities of the *Conference of the Parties* (COP), the highest decision-making body for the climate change negotiation process.

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6 Baxter, R. R., *International Law in "Her Infinite Variety"*, 29 International and Comparative Law Quarterly (1980), p. 549.

7 However, much controversy remains regarding the precise nature and scope of soft law obligations. See, Alkan, Olsson, Ilhami, *The changing nature and role of soft law in international economic law*, PhD dissertation at Kent Law School, Kent University, UK, 2007

8 Kirton, John, J. and Trebilcock, Michael, John. (eds.), *Hard Choices, Soft Law*, Ashgate: UK, 2004, p. 9

Hard law

As it can be deduced from the above-given description of soft law, "hard law" is in this paper used with reference to legally binding *and* enforceable international agreements of a multilateral nature between state parties.[9]

International regime

Keohane, one of the earliest theorizers of international regimes, defines "international regimes", such as 'international monetary regime' and 'trade regime', as institutions with sets of formal and informal rules created to facilitate cooperation among states.[10] Krasner also holds that international regimes have arisen from the convergence of interests that makes states willing to forego a degree of sovereignty. According to Krasner, regimes are permanent arrangements, which require a firm commitment to norms and rules by the actors involved.[11]

Yet, in parallel to the recent claims about the diminishing role of the nation-state and the growing influence of market forces in the globalisation process, the above given definitions of international regimes have been criticised for focusing on the state as the principal actor on the international arena and thereby neglecting the increasing role and importance of non-state actors within international regimes. According to most critics of the 'state-centric' regime theories, even though states remain the primary responsible for ratifying treaties, passing domestic regulations as well as adopting formal policy, the international arena, on which normative and policy activities occur, is now crowded with non-state actors. Scholars like Cutler, therefore argue that regime studies did not fulfil their initial promise to include non-state

9 Abbot and Snidal hold that norms (or legalised institutions) may have a particular set of characteristics, which are frequently defined along three dimensions: *obligation*, *precision*, and *delegation* (Abbott, Kenneth W. and Snidal, Duncan, *Hard and Soft Law in International Governance*, 54 International Organization [2000]) 3, p. 421). Elsewhere, it is said that hard law refers to legally binding obligations that are precise and delegate authority for interpreting and implementing the law while soft law lacks one or more of these three dimensions to a varied degree (Abbot, Kenneth W.; Keohane, Robert O.; Moravscik, Andrew; Slaughter, Anne-Marie, and Snidal, Duncan, *The Concept of Legalization*, 54 International Organization [2000] 3, p. 401). In this approach, *obligation* refers to a rule or commitment that is legally binding upon states or other actors while *precision* refers to rules that are clearly define the conduct they obligate, authorise, or prescribe. *Delegation* refers to the granted authority of third parties to implement, interpret, apply the rules and to resolve disputes (*Ibid.*). Hence, 'hardness' and 'softness', in this understanding, appears to be a question of degree and gradation rather than absolute categories.

10 Keohane, Robert, O., "Hobbes's dilemma and institutional change in world politics" in Keohane, Robert, O., *Power and Governance in a Partially Globalized World*, Routledge: London and New York, 2002, p. 71. In a similar manner, Krasner defines regimes as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actor's expectations converge in a given area of international relations" (Krasner, Stephen, D., *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 "International Organization", 1982, p. 186).

11 Krasner (1982) p. 186. For a detailed description of the more recent international regime theories, see Hasenclever, Andreas; Mayer, Peter; and Rittberger, Volker (eds.), *Theories of International Regimes*, Cambridge University Press: New York, 1997

actors. Instead regime studies were gradually 'captured' by a neo-realist synthesis of realism, focussing excessively on states, state power and formal rule structuring.[12]

It is true that the participation of non-state entities in the relatively loose system of the international climate change regime is *formally* limited to be observers without voting rights in the COP sessions.[13] However, in view of the significant role of the non-state entities, in particular large multinational enterprises (MNEs) operating as political actors with significant policy influence, this paper understands the climate change 'regime' as including (i) the negotiation process in which non-state entities have formally and informally exercised considerable influence; (ii) the institutional practices, procedures and informal understandings that help define how the international climate process actually works together with more "traditional" elements of international regimes, in this case (iii) the 1992 *UN Framework Convention on Climate Change* (FCCC) and the supplementary 1997 *Kyoto Protocol* (KP) as well as (iv) the institutional framework established by the above-named legal instruments, in particular COP, the FCCC's governing body as well as institutions such as the *Intergovernmental Panel on Climate Change* (IPCC) and the *Global Environment Facility* (GEF).

Presenting such a broad understanding of 'regime' the paper intends to illustrate the blurring distinction between law, politics and policy in the context of climate change. And more importantly, it intends to provide for a more accurate picture of

12 Cutler, Claire, A., "Private international regimes and interfirm cooperation" in Hall, Rodney, Bruce and Biersteker, Thomas, J. (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge University Press: Cambridge, 2002, p. 26. Koskenniemi, on the other hand, sees "regimes" as a step towards deformalisation and fragmentation of international law by redescriptions of the world through novel languages, through which the law of international institutions, focused on formal competence, representation and accountability seems to be outdated. Still, according to Koskenniemi, "regime theory does not replace realism, but embrace it. The basic units remain power, interests and rational actors seeking to maximise both "(Koskenniemi, Martti, *Formalism*, *Fragmentation, Freedom*, paper presented in Frankfurt, 25.11.2005 at a conference titled "Kantian Themes in Today's International Law" available at http://www.valt.Helsinki.fi/blogs/eci/Frankfurt-Formalism-05h[1].pdf). See also Strange's early and prominent critique of regime analysis: Strange, Susan, *Cave! Hic Dragones: A Critique of Regime Analysis* 36 International Organization (1982) 2

13 Along with states and state groupings/political negotiating coalitions, such as "G-77" and the "African Group", as well as intergovernmental organisations such as the OECD and International Energy Agency, UN bodies and specialised agencies, the negotiation within the climate change regime involves a broad range of non-state participants called 'accredited observers' (According to Article 7, paragraph 6 of the FCCC, to be accredited as observers, organisations must be legally constituted entities with 'not for profit' status and competent in the related areas – http://unfccc.int/parties_and_observers/items/2704.php). Since climate change issue intersects with many other policy areas, in particular economy and sustainable development, and affecting many sectors, these non-state participants represent a broad range of competing and conflicting interests. Accredited observers to the negotiations include a spectrum of more than 750 organised interests such as business groups, NGOs, advocacy organisations, think tanks, indigenous populations, faith groups, municipal authorities, and universities (Yet, as Orr notes, barely half of the accredited organisations have actually attended the COP sessions between 1997-2001 -Orr, 2006, p. 149). These accredited organisations participate in the regime both in formal and informal ways. When participating in the formal proceedings, accredited organisations may address (speak to) the COP and its subsidiary bodies in plenary meetings, by special invitation from the chair of these bodies, evidently without the right to vote (On the admission process, see http://unfccc.int/resource/ngo/adm.proc.pdf).

social reality by not focusing exclusively on state authority. Only such a broader understanding of 'regime' explain more adequately for instance why the specific mechanisms, such as "the clean development mechanism" and "joint implementation" are there, why the FCCC contains market-based policies regarding technology transfer from developed to developing countries that may offer ecologically sustainable and socially equitable solutions for developing countries, or what role soft law plays in the formation of the main elements of the KP, which include mandatory but highly modest targets that are substantially weakened by broad and flexible mechanisms for implementation and weak enforcement.

Developing Environment Law and the Climate Change Regime: What Role for Soft Law?

It has become a truism to say that in the aftermath of the Second World War, the "interaction between states has become both more frequent and more penetrating".[14] As a result, the interdependency between states has also increased. In the words of Friedmann, international law has therefore been transformed from being the international law of "coexistence" governing essentially diplomatic inter-state relations, to the international law of "co-operation", expressed in the growing number of international organisations and the pursuit of common human interest.[15] The inclusion of new subject matters, such as the environment, international economy and human rights in international law constitutes one of the most noteworthy developments in the international legal domain. Associated with these developments, a new range of international legal commitments that either, lack the requisite normative content to create enforceable rights and obligations or do not fall into the "traditional" categories of "treaty", "custom" or "general principles of law", has gained unprecedented currency. During the same period, we have also witnessed the proliferation of new international legal rules that originate from entities other than states, particularly from international organisations and to a lesser extent from non-state entities.

The awareness of the interconnectedness between human interference and the deteriorating environment is hardly new. Already in the 1960s, there were international policy statements indicating serious global environmental problems the world faces and proposing the conditions necessary for sustainable development. All these efforts culminated in the UN Conference on the Human Environment held in Stockholm in 1972, which is generally seen as the starting point for the development of international environment law as a separate field of international law. Since then there has

14 Van Hoof, G. J. H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers: Deventer, 1983, p. 66

15 Friedmann, Wolfgang, *The Changing Structure of International Law*, Stevens: London, 1964, "Preface"

been a rapid proliferation of international legal instruments dealing with a broad variety of environmental issues even though this expansion has evolved as a multiple environmental regimes rather than a coherent system.

An overview of the international legal foundation of the climate change regime

The development of the climate change regime into international law started with an international scientific meeting held in 1979 (the First World Climate Conference), which resulted in the creation of the World Climate Programme (WCP), set up under the joint responsibility of the World Meteorological Organization (WMO), the UN Environment Programme (UNEP) and the International Council of Scientific Unions (ICSU).[16] In 1988, the UN General Assembly adopted resolution 43/53 on "Protection of global climate for present and future generations of mankind". In the same year, the WMO and the UNEP established the *Intergovernmental Panel on Climate Change* (IPCC), which consists of government appointed experts, to provide the scientific guidance necessary to take further action.

In 1990, the UN General Assembly formally launched negotiations on a convention on climate change, which resulted in the *UN Framework Convention on Climate Change* (FCCC),[17] the core of the international climate change regime together with the subsequent *Kyoto Protocol* (KP).[18] The FCCC, being a treaty, is legally binding upon its state parties. However, as discussed below, the FCCC sets out the basic framework and the general commitments in respect of climate change issues. Its provisions do generally not specify the precise nature of the legal obligations that state parties are undertaking. On the other hand, the Kyoto Protocol, which is drafted on the FCCC, establishes a fairly distinct regime containing more precise legal obligations as well as non-compliance mechanisms and procedures.

The COP, the governing body of the FCCC, occupies the institutional core of the climate change regime. The COP, which is held approximately once a year and comprises all the countries that are parties to the FCCC, is responsible for reviewing the implementation of the Convention by assessing national communications and emissions inventories submitted by the parties.[19] Notably, "rule development", which mainly takes the forms of adoption of amendments and protocols, creation of com-

16 For more details on the conference, see 5 "Environmental Policy and Law" (1979) and 6 "Environmental Policy and Law" (1980).

17 The Convention was opened for signature at the Rio de Janerio UN Conference on Environment and Development in June 1992 and entered into force on 21 March 1994. As of June 2007, it has been ratified by 191 parties.

18 Negotiations for a protocol commenced in 1995 during the first conference of parties, which determined that the commitments of the Convention were not adequate. The Kyoto Protocol was adopted by the third conference of the parties in 1997 and opened for signature in 1998. The KP entered into force on 16 February 2005. As of 6 June 2007, a total of 174 countries and 1 regional economic integration organisation (the EEC) have deposited instruments of ratifications, accessions, approvals or acceptances, representing over 61.6% of emissions from Annex I countries.

19 Article 7 of the FCCC

pliance mechanisms and interpretation of rules, is one of the most critical tasks that the COP assumes in this regime. However, despite these seemingly broad powers involving 'law' and 'rule' creation, the legal status of the acts and decisions of COP can at best be described as unclear. For instance, it is true that the Kyoto Protocol, which has brought additional legal obligations to the parties to the FCCC, was adopted by the third COP in 1997. Yet, it is hardly possible to consider that the power of the COP to adopt protocols or amendments amounts to a direct law making power for the reason that according to Article 15 and 17 of the FCCC, these protocols or amendments require ratification by state parties to become legally effective. Thus it would be more accurate to define the COP as a forum in which parties elaborate and adopt the protocol or amendment to the treaty, but it does not alter the rights and obligations of the parties.[20] In a similar way, as the COP is authorised to make 'rules', as in the case of the operation of the system for trading with emissions of greenhouse gases embodied in Article 16 bis of the KP. Despite the explicit use of the word of 'rule', which suggests by nature the existence of legally binding measurements, such a rule making, as described in this article, does not entail a substantive obligation, but rather 'guiding principle' even though there could be found a certain normative content within it.[21] The same applies to Articles 6.2, 1.7 and 18 of the KP. In short, it can be argued that neither the FCCC nor the KP contains explicit provisions that entitle the COP to make binding decision upon state parties.[22]

The role and use of soft law in environmental law making

As the 'newer' part of international law, the development of environmental law is essentially based on international treaties, such as the *Convention on Biological Diversity* and "non-binding" international instruments, such as *United Nations Conference on*

20 For a detailed discussion on the 'indirect' law making power of the COP, see Brunee, J., *COPing with Consent: Law Making Under Environmental Agreements*, 15 Leiden Journal of International Law (2002).

21 Article 16 bis of the KP reads as follow: "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3 of this Protocol (…)".

22 There are also some other additional legal instruments and institutions that play important roles in this regime. Two subsidiary bodies carry out preparatory work for the COP: the "Subsidiary Body for Scientific and Technological Advise" (SBSTA) and the "Subsidiary Body for Implementation" (SBI). "National Communications" is another important instrument, designed to provide the means by which the COP monitors the progress made by parties. The *Global Environment Facility* (GEF), established in 1991, which organises the financial mechanism of the FCCC, related to developing countries fund projects and programs, and the "Intergovernmental Panel on Climate Change" are not formally part of the FCCC though provide services to it.

Environment and Development", which took place in Rio de Janeiro in 1992 rather than customary law and general principles of international law.[23]

International environment is one of the areas, where both types of soft law (i.e., "treaty" and "non-binding" soft law) are extensively used. A number of reasons and incentives to employ soft law solution in this domain can be found. Firstly, even when states choose to use the treaty form to regulate an area of environmental pollution that has typically been seen to belong within the jurisdiction of sovereign states, they become often unenthusiastic to let their hands be tied in matters they consider essentially national. However, due to the transboundary nature of the environmental problems states are often obliged to address these issues collectively even though they do not want to be subject to any constrains, which may arise from such 'collective actions'. In order to bridge these apparently conflicting ambitions , states mainly use two techniques to create a legally binding form, i.e., treaty/convention: (i) when signing a treaty, states retain discretion over the definition of the obligations they undertake, or to preserve an emergency exit when needed and to secure flexibility in implementation; (ii) states simply avoid undertaking precise legal obligations. Frequently they use a combination of both methods.[24]

Secondly, soft law provisions/clauses in international treaties may be preferred by states as a way to facilitate bargaining problems. In a world of sovereign states with divergent interests, as often pointed out, it may be difficult to agree on legal rules. The divergence between states in terms of legal/cultural tradition, economic devel-

23 As Malanczuk puts it, customary international law dealing with the environment is rudimentary. Only a few cases , such as the *Trail Smelter* arbitration between Canada and the US –initiated in 196 and concluded in 1941 (Trail-Smelter Arbitration, 2 Encyclopaedia of Public International Law, 1980, commented by Madders, K., J.) that is referred to the principle that no state may knowingly allow its territory to be used in a manner that would cause serious physical injury to the environment of another state, and the International Court of Justice's famous *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, dated 1996, which confirmed that there is a general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment (35 International Legal Material, 1996, p. 821) offer some relatively modest protection for the environment (Malanczuk, Peter, *Akehurst's Modern Introduction To International Law*, Routledge: UK, 1997, p. 245-246). Another case that establishes the limited role of customary law in protecting the environment is the *Corfu Channel* case, which reinforced the principle that every state has a duty not to knowingly allow its territory to be used for acts contrary to the rights of other states (*Corfu Channel* case–UK v. Albania, International Court of Justice 1949, Rep. 4). It is nonetheless important to note that even though the "some agreement better than no agreement" approach might at first sight appear realistic, this understanding, as Klabbers contends, can be deemed rather a simplistic assessment of international relations. The suggestion that 'norms are better than chaos' also reveals the apologetic tendency of the use of soft law, which gives "the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect (Klabbers, Jan, *The Undesirability of Soft Law*, 67 Nordic Journal of International Law, 1998, p. 358).

24 Gruchalla-Wesierski, Tadeusz, *A Framework for Understanding "Soft Law"*, 30 McGill Law Journal (1984) p. 39

opment level, ideology, and readiness for a specific legal commitment make in many cases soft law more attractive than hard commitment.[25]

Thirdly, states may adopt soft treaty provisions to open negotiations or to settle certain problems by subsequent agreement. Especially in the area of environmental law-making, states often use different forms of instruments in a combined manner: They first adopt a framework convention and a subsequent a more detailed protocol, as is the case in the climate change regime (First the FCCC and then the KP). As Chinkin points out, in such cases the framework convention establishes a structure for further co-operation between the state parties while protocols provide for greater specificity in complex regulation also permitting to response to changed scientific knowledge and political circumstances.[26]

Alternatively, states may opt to choose formally "non-binding" instruments in the form of declarations, agendas, programs, and platforms for action emanated from global summit conferences. There are diverse reasons for such choice. For instance, in certain new policy areas, states may be in a "learning" phase, during which they may not yet be prepared to bind themselves legally nonetheless they may be willing to adopt and test certain rules and principles, as in the example of "The Forest Declaration" adopted in at the 1992 Rio Conference on Environment and Development, entitled "A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest".[27] Obviously, such areas require continual adjustment to respond to scientific knowledge and circumstances, a fact which makes it difficult to accommodate such flexibility within traditional forms of law-making. In such cases, "non-binding" instruments may be preferred as they provide flexibility and help to 'road test' complex policy solutions to providing experience for negotiating firmer commitments.

Or, the subject-matter of such instruments, such as social justice, financial support or technology transfer, may be deemed by especially powerful states as inherently 'soft', or "too intrusive for domestic jurisdiction, to be the subject of binding obligation".[28] In these situations, soft law instruments can act as a 'half-way' stage in the environmental law-making processes, bridging law with policy to which states wish to adhere but which they are reluctant to enshrine in binding, highly prescriptive forms.

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25 It is nonetheless important to note that even though the "some agreement better than no agreement" approach might at first sight appear realistic, this understanding, as Klabbers contends, can be deemed rather a simplistic assessment of international relations. The suggestion that 'norms are better than chaos' also reveals the apologetic tendency of the use of soft law, which gives "the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect (Klabbers, Jan, *The Undesirability of Soft Law*, 67 Nordic Journal of International Law, 1998, p. 358).

26 Chinkin, Christine, "Normative Development in the International Legal System" in Shelton, Dinah (ed.), *Commitment and Compliance*, Oxford University Press: New York, 2003, p. 27

27 For the Rio documents in general, see *International Legal Material*, 31 (1992) p. 818 *et seq*.

28 Chinkin (2003) p. 28

Factors promoting the use of soft law in the climate change regime

Two groups of factors that boast the use of soft law in the climate change regime can be identified:

(i) Factors, common to other type of international law instruments in particular state sovereignty and sovereign equality. "State sovereignty" basically means that *sovereign* states are not subject to any higher authority. This concept also includes policy autonomy that refers to the ability of a national government to implement and sustain domestic and international economic policies of its own choosing. "Sovereign equality", on the other hand, refers to the necessity of each state's 'consent' with respect to the formation of customary international law and international treaties (and not the *actual* equality of law creating power of states). The very existence of the concept of soft law can to a certain extent be seen as a side-product of the incompatibility between the legal sovereignty of the nation-states and the minimum needs for an international legal order. The conciliatory role of soft law between sovereignty and order becomes more apparent when states make international treaties, which contain legal obligations and are binding upon state parties. Since treaty obligations involve what Abbot and Snidal call "sovereignty cost", which occurs when states are obliged to accept international authority over important domestic decision areas. In these cases states' ability to govern important domestic policy issues, such as industrial policy, is considerably reduced, as a consequence states attempt to overcome or at least to limit the "sovereignty cost" by using either legally binding nonetheless enforceable or legally non-binding legal arrangements.[29] There is no doubt that both the FCCC and in particular KP have considerable impact on sovereignty which states are reluctant to concede, as evidenced by "protracted debates on the need for legally binding reductions targets, the legal personality of the COP, majority-voting decision-making and procedures for determining non-compliance".[30]

(ii) Factors that are unique to the area of environment and climate change. These include "scientific uncertainties", "far-reaching impacts of defining limits on greenhouse gases (GHS) emissions not only on many aspects of national and international economy, but also the entire modes of living", "geographical discrepancies between those who pollute and those subject to climate impacts", "variations among countries and regions in terms of level of economic development", "the structure of economy as well as demography", and finally "time lags between cause end effects".

Scientific uncertainty has always been a challenge facing international environmental policy and law making, but it has particularly been a major issue when negotiated the FCCC and KP. Considering the multifaceted impacts of the actions from economy to human cost, international law-makers are essentially obliged to rely on scientists

29 Abbot and Snidal (2000) p. 436-441

30 Yamin, Farhana and Depledge, Joanna, *The International Climate Change Regime*, Cambridge University Press: UK, 2004, Introduction

to identify, assess and manage environmental risks and uncertainties.[31] This is why the IPCC stressed in its report that what constitutes dangerous interference must be determined through a socio-political process taking into account issues such as sustainable development, equity, risk and uncertainties.[32] This is also why the COP exists in the first place. On the other hand, scientific uncertainty cannot be used as an excuse not to react especially in cases where the harm may be serious and irreversible. Indeed, although it is still an evolving principle (i.e., it is considered by states not legally binding yet), the "precautionary principle" set out in Article 3.3 of the FCCC, requires that states should not advance scientific uncertainty as a reason not to take action and wait for 'conclusive proof' to prevent environmental damage or disasters.[33] Moreover, climate change is a field, where there will always be some uncertainty and constant advances in our scientific understanding. In other words, international law-makers are obliged to create law under conditions of uncertainty and decide what degree of scientific certainty should be looked for before taking some sort of actions. Hence, one way of limiting the risks is to take a precautionary approach and formulate a law with sufficient flexibility so that parties can adapt to changes in scientific understanding, and it is here soft law comes into the picture.

The wide-ranging and differentiated technological and economical consequences across countries, sectors and enterprises of the climate issue and particularly the design an implementation of the Kyoto mechanisms and its binding emissions requirements is another important and intersecting cause for the use of soft law in the climate change regime. Despite the fact that the KP was adopted unanimously by COP-3 meeting in 1997, the immediate post-Kyoto period, which was marked by economic recession in OECD countries and financial crises across South Asia and Argentina, made it clear that neither the "Rio partnership" of 1992 between developed and developing countries nor the "post-Cold War optimism" among developed countries was enduring and self-assured. Also, related to these developments, it can be argued that contrary to the hegemonic discourse on the globalised world economy within which, it is argued that the globalised footloose capital has become autonomous from national economies, and correspondingly, the notion of international competitiveness has become meaningless, neither the state nor inter-national competitiveness has withered away, but the rules of interstate competitive game has changed from control of territory to a quest for world market shares.[34] To put it differently, in the process of globalization, states are forced to act more and more like a

31 In the negotiations for a climate change convention, the report of Intergovernmental Panel on Climate Change, which consists of government-appointed scientists, was instrumental to the opening of the agreement negotiation. As it is common knowledge, the conclusions of the Panel have been criticized by many of being "negotiated science" rather than pure scientific findings (Weiss, Edith, Brown (ed.), *Environmental change and international law: new challenges and dimensions*, UN University Press: Tokyo, 1992, Introduction).

32 IPCC 2001, *Climate Change Synthesis Report* "Question 1", edited by Watson, R. and the Core Writing Team, Cambridge University Press: Cambridge, 2001

33 Sands, Philippe, *Principles of International Environmental Law*, Cambridge University Press: UK, 2003, p. 266-279

34 McGrew, Anthony, *The globalization debate: Putting the advanced capitalist state in its place*, 12 Global Society (1998) 3

market player that shapes its policies to promote, control, and maximise returns from market forces in an international setting.[35] Otherwise, it would be difficult to explain the rationality behind the US refuse to sign the Kyoto Protocol. Thus, it can be said that the re-problematisation of competitiveness within the context of neo-liberal rationality of government continues to make it difficult to adopt 'harder' norms and commitments and foster the need for soft law as a 'second best' solution.[36]

As mentioned earlier, soft law is often welcomed on the ground of providing flexibility. As may be expected however, soft law is not the only way of creating flexibility or compromise, to respond to scientific uncertainty or conflicting interests. There are other devices that enable states to respond to the demand for flexibility. One way of creating flexibility especially in the context of a changing scientific knowledge is to include appendices or lists attached to the agreement that can be easily updated. The agreement may also provide for regular technical assessments when parties to an agreement meet on a regular basis to respond to new scientific findings, as is the case with COP meetings. In the KP three special flexibility mechanisms; 'joint implementation', 'clean development mechanism' and 'emissions trading' are used.[37] The doctrine of "margin of appreciation", is another device that may provide flexibility. It is based on the idea that each country has the right to decide how to implement international treaties obligations to make them suitable for each State's own circumstance, societal constrains and expectations especially in areas of security, environment, human rights, and allocation and management of national resources.[38]

35 Cerny, Philip, G., *The changing architecture of politics*, Sage: London, 1990, p. 230

36 It is interesting to note that some writers consider *soft* law rules and *flexible* rules as two different phenomena. Carlson, for instance, contends that flexibility and softness are not synonymous or analogous concepts. The writer argues that flexible rules that permit temporary and limited deviations from important norms may contribute to respect for those norms, by permitting gradual compliance with the norms. By doing so, the perceived harmful impact of the norms may be limited. Moreover, within clearly defined boundaries, flexible rules that cause non-uniform obligation can contribute to the application of the terms more fairly. In contrast, according to Carlson, soft law creates national freedom without possessing most of the virtues flexible norms have. The ambiguity and weakness that soft law often displays foster derogation from and disrespect for the goals that soft law norms seek to achieve (Carlson, Jonathan, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimension of a Political Problem*, 70 Iowa Law Review [1984-1985] p. 1270). Yet, even if soft law and flexible rules are accepted as two distinctive categories, such a distinction could be made on a case by case basis and not as a general categorisation.

37 On the various means used in international legislative process to provide flexibility other than soft law, see Szasz, Paul, C., "International norm-making" in Weiss, Edith, Brown (ed.), *Environmental change and international law: new challenges and dimensions*, UN University Press: Tokyo, 1992.

38 Benvenitsi, Eva, *Margin of Appreciation, Consensus And Universal Standards*, 31 International Law and Politics, 1999, p. 845

The climate change regime: an arena for the interaction between hard law and soft law

As mentioned in the beginning of this paper, being an international treaty, the FCCC and the subsequent KP are legally binding upon the parties. Nonetheless, this does not mean that the all provisions that these two legally binding instruments contain are hard in the meaning that they allow third-party adjudication or are enforceable. The section will focus on demonstrating the interactions between hard law and soft law by examining the substantive rules related to the differentiated mitigation commitments and the non-compliance mechanisms and procedures that display interactions between norms with different normative quality. The reason for selecting these examples is that both mitigation commitments and non-compliance mechanisms lay in the hart of the climate change regime and consequently are relevant examples of examining the interaction between hard and soft law in the FCCC.

Objective and principles

Article 2 sets out the objective of the FCCC implicating both an "ultimate GHG concentration level (that "would prevent dangerous anthropogenic interference with the climate system") and the time path of achieving that concentration ("within a time frame sufficient to allow ecosystems to adapt naturally to climate change"). However, Article 2 does not aim to establish concrete commitments for its parties but is a declarative goal involving the basic values and scientific orientation of the regime. In a similar way, Article 3 of the FCCC, which together with the Preamble of the FCCC, sets out principles of the Convention, provides general guidance on implementation of the commitments but provides no concrete commitments.[39] These principles are "common but differentiated responsibilities" (Article 3.1),[40] the "precautionary principle" (Article 3.3),[41] and "sustainable development" (Article 3.4).[42] It can be said that both Articles 2 and 3 should be seen as a general guidance for the parties that consequently display the policy rationale for collective action. Yet, it does not imply that these articles are legally altogether irrelevant. For example, Article 3 limits the scope and legal implications of the FCCC while the Preamble contains some concepts that many consider as the emerging new principles of interna-

39 Article 3 reads as follows: "In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following (…)"

40 This principle refers to the fact that some problems affect and affected by all countries in common. However, the responsibilities following these problems ought to be differentiated because of the different level of economic development. As stated in the Article: "the developed country Parties should take the lead in combating climate change and the adverse effects thereof".

41 Article 3.3 further states that precautionary policies and measures" should be "cost-effective" so as to ensure global benefits at the lowest possible cost and "different socio-economic contexts" should be taken into account. Obviously, such a wording, however might be deemed necessary for the flexibility, gives states parties the possibility to interpret what measures are "cost-effective" in their special socio-economic contexts.

tional environmental law, like "common concern of human kind", which implies that all states have a legal interest in the issue, including legal responsibility to prevent damage to it.[43]

Substantive rules

Article 4.1 of the FCCC defines the mitigation commitments[44] applicable to all parties regardless their stage of development in general terms.[45] Furthermore, Article 4.1 of the FCCC and the corresponding Article 10 of the KP state that there is no common standards that are being laid down, leaving each party to determine its own level of implementation, taking into account its own specific goals and circumstances. Moreover, Article 4.7 states that the level of implementation of the mitigation commitments of the developing countries' depends on "the effective implementation by developed country parties of their commitments under the Convention related to financial resources and transfer of technology". It is therefore possible to interpret the legal implication of this wording in the way that developing countries are not expected to fulfil their mitigation commitments unless developed countries first fulfil their financial and technological transfer commitments to the developing countries. Such a conclusion becomes even more plausible considering that the same paragraph also states that economic and social development and poverty reduction are the first and overriding priorities of the developing countries.[46] It is even a more plausible interpretation when considered the wording of Article 10 of the KP, which states that the

42 Although it is now widely used, it is still uncertain the normative content and use of the concept of "sustainable development". Yet, no matter what, the wording of this paragraph makes sustainable development "a right to *promote*" Besides, Article 3.4 provides again that "Policies and measures to protect the climate system against human-induced change **should be appropriate for the specific conditions of each Party and should be integrated with national development programmes**" (highlighted by the authors).

43 A similar formulation can be found in the Preamble of the Convention on Biological Diversity. Of course, it is open to debate whether such a concept may provide a legal basis for a state, acting as a member of "international community" to enforce obligations to avoid damage to a "common concern" such as climate change (Sands, 2003, p. 287).

44 The word 'mitigation' refers to human intervention to reduce emissions of greenhouse gases from sources or to enhance their removal by sinks (Yamin and Depledge, 2004, p. 76).

45 Article 4.1 of the FCCC reads as follow: "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances (…) And the Article 10 of the Kyoto Protocol reads as follows: "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments in Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention (…)". Thus, as it can easily be deduced from this wording, the KP strengthens the differentiated structure and conditionalities of the FCCC.

46 "(…) economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties".

Kyoto Protocol "does not create any new commitment for Parties not included in Annex 1".[47]

Article 4.1 of the FCCC presents another example of a combined use of hard and soft law. Paragraph (b) of this article requires all parties to formulate national programmes containing measures to mitigate climate change by addressing all GHG emissions and removals by sinks and also to define adequate adaptation measures to climate change. Despite the fact that this article does not contain a requirement regarding the achievement of *specific* levels of emissions limitations/reductions or mandates the pursuit of a *particular* mitigation policy of a country, it nonetheless demands for the establishment of national institutions that are charged with the roles to identify, implement and assess measures to mitigate and adapt to climate change. This also applies to the corresponding Article 10 (b) of the KP, which gives rather a more specific guidance as to how to formulate national programmes addressing mitigation and adaptation. The flexibility contained in this wording reflects the national context of the dependency to determine and implement which policy instruments are to be used to maximise mitigation opportunities. As the high level of detail in the "Guidelines for Second National Communications for non-Annex 1 Parties" adopted by COP-8 demonstrates. Even if these are only 'guidelines' and not phrased in mandatory terms and therefore legally non-binding, the existing commitments are being advanced largely due to the increasingly higher level of details these guidance contain.

A common feature in most environmental treaties is that due to different national circumstances and sovereignty concerns given that states wants to minimise external constraints on policy choices, especially in areas such as energy, industry, agriculture and transport, the choice of policies and institutional arrangements to oversee the implementation and enforcement of such policies are left for each party to decide. Neither the FCCC nor the KP exempts from this 'national prescriptiveness' approach. For instance, Article 4.2 (a) of the FCCC displays a combination of both mandatory and permissive elements regarding policies and measurements issues. It *obliges* all Annex 1 countries to adopt national policies and take corresponding measures on the mitigation of climate change by limiting their anthropogenic emissions of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs. On the other hand, this Article does not say to what degree parties are obliged to constrain their emissions. The wording "limiting" that is used in the Article does not imply an obligation to "reduce" emissions, nor does it lie down a legally binding target. On the other hand, even though Article 2 of the KP states that Annex 1 countries may choose their own policies "in accordance with national circumstances", this Article nonetheless makes it clear that the purpose of such policies are to achieve their quantified targets.

In a similar way, a mixture of the "margin of appreciation", "soft law" and the "choice of policies" techniques are used together in Article 4.1 (f) of the FCCC, which require state parties to employ "appropriate methods", for instance 'impact as-

47 "Annex 1 Parties" consist of developed countries and the so-called EIT countries -countries that are undergoing the process of transition to a market economy.

sessments', (or "given full consideration", as required in Article 10 (g) of the KP) when states adopt their social, economic, and environmental policies that are "formulated and determined nationally". These wordings make it clear that it is up to parties to determine the scope and application of this commitment at the national level "to the extent feasible".

Flexibility mechanisms

To adopt the legally binding collective and differentiated quantified emission limitation and reduction commitments for Annex B countries (i.e., developed countries) is the most important feature of the KP. The KP provides three mechanisms, namely (i) Joint Implementation (Article 6), (ii) the Clean Development Mechanism (Article 12), and (iii) Emission Trading (Article 17), to achieve the Article 3.1 mitigation commitments in view of the discrepancy in compliance costs of the differentiated mitigation measures. The "Joint Implementation" mechanism allows Annex B Parties to trade among themselves emission reduction units; the "Clean Development Mechanism" aims to assist non-Annex 1 Parties (i.e., developing countries) in contributing to the realisation of the objectives of the climate change regime by way of projects in which developed countries that are subject to emission caps under the Kyoto Protocol can invest to reduce emissions in developing countries, and offset some of their own emissions against the savings from these projects; and the "Emission Trading" mechanism allows developed countries to buy and sell emission credits to fulfil their commitments under the KP. In other words, if one country reduces its emissions by more than its Kyoto target requires, it can sell its surplus emissions reductions (carbon abatement) to another country, which in turn, can exceed its emissions target by this amount. This mechanism is based on the idea that the atmosphere is a global common, and it does not matter where the emissions reduction occur. The downside of these mechanisms has been the moral and environmental risks that these mechanisms might exacerbate the existing emissions inequalities by providing a cheap way for Annex B Parties to 'buy' themselves out of their legal obligations.[48]

Non-compliance

The effective implementation is a common concern for all multilateral regimes. The discrepancy between the commitments and compliance has been seen one of the central problems in especially multilateral environmental agreements, which generally lack established 'internal' specialised bodies and procedures to deal with non-com-

48 This concern has been addressed in the Marrakesh Accords, which provide that "use of the mechanisms shall be supplemental to domestic actions and domestic action shall thus constitute a significant element of the effort by each Annex 1 Party in meeting its Article 3.1 commitments". However, the preference of the word 'significance' over more precise wording with quantitative connotation can be interpreted in a way that such concerns have still some grounds.

pliance cases. Of course, it is always possible to use the 'traditional dispute settlement mechanisms, in particular the International Court of Justice and international arbitration to correct non-compliance.[49] However, mainly because of the special nature of environmental commitments, these traditional mechanisms have generally been considered unpractical.[50] In the Kyoto Protocol context, the Marrakesh Accords have established an 'internal' compliance system including a mixture of hard and soft elements.[51] However, the institutions, procedures and consequences designed for the Kyoto compliance system will not be analysed in detail. Instead, the paper confines itself to highlighting the hard and soft elements embodied within the compliance procedure as well as sanctions or enforcement consequences applied in cases of breaches of obligations. There can be found three types of obligation under the climate change regime: (i) procedural obligations, which refer to reporting (in particular those relating to 'national communications' and 'national inventories'), or the obligation to undertake an environmental impact assessment; (ii) institutional obligations, which refer to obligations implemented through the regime's institutions, such as the COP's obligation to review the adequacy of commitments –verification of information provided; and most importantly, (iii) substantive obligations, which basically refer to the mitigation commitments.

The non-compliance procedures under the FCCC display a nature of non-judicial and non-confrontational and therefore have a 'soft' character. For instance, the outcomes of the Multilateral Consultative Committee (MCC) established upon the requirement of Article 13 of the FCCC for the resolution of question regarding the implementation of the FCCC are only 'conclusions' and 'recommendations' for the Parties "to consider". A similar 'soft' preference can be observed regarding the compliance assessment by the COP designed in Article 7.2 (e). This Article requires the COP to 'assess' (the use of a harder wording, such as 'monitor', was not preferred) the 'implementation' (the use of a harder wording, such as 'compliance', was not preferred) of the Convention by the Parties (…). Besides, the compliance of the Parties has to date been insufficiently scrutinised by the COP and limited to only providing 'general consideration'. At any rate, according to Article 7.2, the COP can only make 'recommendation', which is not binding upon the parties.

On the other hand, non-compliance procedures and mechanisms under the Kyoto Protocol display a combination of hard and soft elements. Considering the legally

49 Indeed, Article 14.2 (a) and (b) of the FCCC and Article 18 of the KP contain provisions allowing recourse to both judicial settlement and arbitration.

50 Yamin, and Depledge note that no state party to a multilateral environmental agreement has to date used traditional dispute settlement procedures (2004, p. 378). Considering the fact that breach of multilateral environmental commitments concerns not a single state but the all state parties, for the reason that such agreements address a 'global concern' and therefore should be addressed in a multilateral context rather than through bilateral disputes mechanisms. Also, such traditional mechanisms are designed to award remedies after a breach occurs. However, in case of environmental commitments, such legal remedies may be proven environmentally defective. Lastly, traditional mechanisms are designed to enforce compliance in adversarial/conferential rather than in a cooperative/managerial manner.

51 Decisions 2-24/CP.7, adopted at COP-7 in 2001, which consists of a package of twenty-three decisions.

binding nature of the commitments under the KP, such a harder and quasi-judicial modification does of course not come as a surprise.[52]

The principal institution involved in the identification of non-compliance by Annex-1 parties that the KP sets out is the "Compliance Committee".[53] The "Enforcement Branch" (EB), which functions under the Compliance Committee, has the responsibility to determine whether each Annex 1 party is in compliance with quantified emission limitation or reduction commitments, reporting commitments and eligibility to participate in the flexibility mechanisms under the KP. The EB has the power to apply both soft and hard sanctions. The relatively 'soft' sanctions that the EB may exercise are (i) to issue a declaration regarding the existence of non-compliance aiming to shame non-compliance party, (ii) to require the development of a compliance action plan, and (iii) to require the submission of a progress report. On the other hand, if the EB finds that an Annex 1 party does not meet one or more of the eligibility requirements of the flexibility requirements lied down in Article 6, 12 and 17 of the KP, it *shall* suspend the eligibility of the party. It may mean that all uses of the flexibility mechanisms are prevented. Similarly, if the EB determines that the emissions of a party has exceeded the amount assigned to it in Article 3.1 of the KP, the EB *shall* deduce from the party's assigned amount for the second commitment period. Appeal against an EB decision to the COP/MOB is also envisaged. However, in order to hinder a political interference, even if the COP/MOP decides with a three-fourths majority of parties present and voting to override the decision of the EB, the COP/MOP has only the power to refer the decision back to the EB for reconsideration.

Yet, since the KP states that any procedures and mechanisms regarding non-compliance that entails binding consequences shall be adopted by means of an amendment to the KP (i.e., ratification is a requirement), there is still uncertainty surrounding the legal status of the "Decision 24/CP.7" that set out the KP's enforcement mechanisms.[54]

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52 For the same reason, the Kyoto Protocol includes more elaborated reporting and reviewing provisions. The existence of detailed, accurate and working reporting and reviewing procedures is not only essential for supplying information on the GHS emissions of parties and their sources, the actions being taken to combat climate change and their effectiveness as well as securing the transparency needed to reassure parties that burden of implementation is being shared as agreed, but also is the basis for assessing compliance with the legal obligations (The reporting obligation for the Annex 1 Parties under the KP is embodied in Article 7.1. Detailed guidelines for reporting supplementary information required by Article 7.1 were agreed as a part of the Marrakesh Accords and an additional COP-8 decision "Decision 22/CP.7"). By the same token, the review process embodied in Article 8.1 holds particular significance under the KP given that the review reports provide the basis for the decision-making process under the compliance regime, and that compliance with reporting obligations constitutes an eligibility criterion for participating in the Kyoto mechanisms.

53 It is interesting to note that the voting rule for the Compliance Committee incorporates the concept of a double majority to provide a safeguard for the Annex 1 Parties (i.e., developed countries). Accordingly, any two Annex 1 Party members could block a decision from being taken, a power, which may be critical in the context of eligibility mechanism (See, Yamin, and Depledge, 2004, p. 391).

54 For a more detailed discussion surrounding the uncertainty of the legal status of the "Decision 24/CP.7", see Ulfstein, Geir and Werksman, Jacob, "The Kyoto Compliance System: Towards Hard Enforcement" in Stokke, O., S.; Hovi, J.; and Ulfstein, G., *Implementing the Climate Change Regime: International Compliance*, Earthscan Publ.: UK, 2005

Conclusion

Climate change has many common features with other environmental concerns. It is global in nature (in this case, "atmosphere knows no boundaries") and consequently demand for collective actions of sovereign states and stakeholders. Besides, regulations must be dynamic and responsive to changing environmental conditions and the state of knowledge on the best measures and methods to deal with the matter. However, climate change also indicates a complex new area of international co-operation, mainly for two reasons: First, the actions which are suggested to be necessary when addressing climate change require policy consideration related to the integration of the environment, economic development, energy, transport, consumer behaviour, life style, and environmental and social justice as well as inter-generational equity, hence it is highly politicised. Second, even though the human interference has been pointed out as being one of the major factors influencing the climate, there are still important uncertainties over the timing, rate and impacts of climate change, which require an unprecedented scientific approach, risk assessment and uncertainty analysis, and related to this, the assessment of the cost effectiveness of the actions that the climate change regime puts forward. All these factors identified in this paper urge to the use of a variety of legal norms: some legally non-binding nonetheless detailed and capable of embodying precise standards, some legally binding nonetheless of a general nature, and others, legally binding and specific.

In the climate change regime soft law performs a triple function. First, soft provisions of the FCCC and the KP create the necessary flexibility and (national) discretion to adapt to the diverse and diverging interests of states, MNCs, NGOs and it can hence act as a bridge between state sovereignty and the minimum needs for and international legal order as well as a bridge between law with policy. Second, soft law is considered as a safeguard in a new and complex area such as climate change and is a way to allow 'road test' new provisions or policies. And related to this, third, soft law also makes it possible to handle the specific characteristic of the climate change where the flexibility of soft provisions enables the continuous inclusion of new scientific findings or changed political priorities. Soft law instruments provide the detailed rules and technical standards required for implementation of the FCCC and the KP.

It is sometimes argued that soft law is trivial while hard law is essential. This argument includes the idea that increasing hardness should be the ultimate goal to ensure the implementation and enforcement of the norms in question. There is in many cases a continuum from 'soft' to 'hard' law. In other words, soft law may undergo a hardening process, in which soft law norms may transform into binding (and enforceable) norms. However, hard law and soft law categories do often not indicate two diametrically opposite and frozen polarities instead they are as shown in this paper often used side by side to produce a specific effect. Besides, it should be recalled that the non-binding character may sometimes be the very *reason d'être* of a soft law

instrument. Otherwise, there would, in many cases, be no international agreement at all. Hence, a move towards hard law is neither always possible nor desirable.

Besides, soft law provisions may be substantially more ambitious than hard law. It can be observed that because of the various soft law standards and non-binding decisions taken within the institutional framework, such as those of the COP, the climate change regime has significantly strengthened. As a result of the needed flexibility, built into the institutional system of the regime, where hard law and soft law create an increasingly complex network of rules of climate change mitigation and adaptation, the legal force of the FCCC and KP standards create a more convincing legal framework. The increasingly detailed technical standards and guidelines, which are non-binding in essence, give hard content to the overly-general and open-textured terms of the FCCC. Paradoxically yet, due to the increasing details such soft law instruments contain, the room for discretion left to the parties over the matters is increasingly limited. This potential of soft law to influence the strength of binding norms and institutions by putting pressure on parties is demonstrated in the FCCC reporting guidelines for national communication, which have been revised by the COP three times, each time specifying in more detail the information that parties must include in their reports with the aim of improving the comprehensiveness, accuracy, transparency and comparability of the data provided.[55]

What has been discussed above is also partly about rule development within the climate change regime. It can be argued that despite the fact that the COP has no power to take legally binding decisions over the parties, it has nonetheless become the most dynamic organ of the whole climate change regime as regard to rule development as the regime must be shaped by continuous interaction of member states to provide guidance on, and ensure consistency in the implementation of the FCCC and KP. This has been done through defining the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions as well as approving appropriate and effective procedures and mechanisms to determine and to address of non-compliance with the provisions of the KP. Moreover, COP is also authorised to adopt measures with a certain normative content that relate to the implementation of the parties' substantive obligations unless they are strictly legislative. For example, Article 17 of the KP enables the COP to adopt rules relating the operation of the system for trading in emissions of greenhouse gases. Furthermore, the climate change regime assigns a general supervisory role to the COP entailing the negotiation and elaboration of detailed rules, standards and practices, which intends to give effect to the more general provisions of the FCCC.

This paper explained the factors that have favoured soft law in the climate change regime. However, it should be noted that soft law has also some disadvantages. Thus while the flexibility and fluidness of soft law in overall terms have helped the progressive development of international climate change regime not least by responding to the inherent uncertainty, soft law can also generate uncertainty due to the conceivable weaker engagement to live up to these soft commitments. Moreover, soft law may

55 Yamin, and Depledge (2004) p. 331

simply provide states with an opportunity to be seemingly doing something while avoiding any obligation to comply.

Yet, all things considered, as Chinkin suggests, hard and soft law should be seen as part of a continuum of international legal mechanisms. Both may contribute to the development of international law, to the creation of stability and expectation in international relations and both facilitate international co-operation.[56]

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56 Chinkin (2003) p. 42

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Ellen Almers & Per Wickenberg

Breaking and Making Norms

Young people's stories of consumption actions for sustainable development[1]

Extreme heat waves, droughts, floods and melting glaciers have been observed to an increased extent. According to the assessment of the most comprehensive UN climate report to date, it is highly probable that humans are the primary cause of the recent increase in the average global temperature. Two thousand of the world's foremost climate researchers stand behind this massive fourth report of the Intergovernmental Panel on Climate Change (IPCC).[2] The report states that the release of greenhouse gases at or above the current levels will result in further warming and cause considerable global climate change in the 21st century. These changes will most likely be of a greater magnitude than those observed in the 20th century. A Swedish Government Official Report (2005) indicates that humankind's collective life style, with an ever increasing conversion of material and fossil energy to such things as transportation, food and clothing does not establish the conditions for a sustainable

1 This article has been published in Johan Öhman (Ed, 2008) *Values and Democracy in Education for Sustainable Development – Contributions from Swedish Research*. Malmö: Liber, pp. 165-186. The article is written within the research programme "Action Competence for Sustainable Development – stories of active youths" sponsored by the Swedish Research Council, Formas 2006-09.

2 Recognising the problem of potential global climate change, the World Meteorological Organisation (WMO) and the United Nations Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC) in 1988. The IPCC was to assess scientific, technical and socioeconomic information relevant to the understanding of climate change, its potential impact and options for adaptation and mitigation. The reports by the four Working Groups provide a comprehensive and up-to-date assessment of the current state of knowledge of climate change: http://www.ipcc.ch/index.html

development[3] that takes into consideration coming generations as well as the distribution of global power and resources. The world has already surpassed its ecological carrying capacity by 25% as a result of mankind's total and unevenly distributed production and consumption (Swedish Government Official Report, 2005). A UN Food and Agricultural Organisation report (FAO, 2006) indicates that the global impact of livestock production on climate has surpassed that of the transport sector's.

In the Swedish media, climate and resource issues came to the fore in the autumn of 2006. A discussion accelerated regarding the need for the high-consuming portion of the world's population to change life style and consumption patterns in a sustainable direction. On today's editorial pages and in political arenas, voices are being raised that in addition to investing in new technology, we need to establish new norms that support actions allowing sustainable development. In this explorative study we have searched for stories describing patterns of action and actor contexts with the goal of obtaining in-depth knowledge on how and where learning on sustainable development is taking place. This is significant as the UN again is highlighting Education for Sustainable Development (ESD) in the 2005-14 Decade of ESD (DESD) as one of the most important tools for change. Our information providers are young Swedes who, several years before the autumn 2006 sustainability boom, had already begun searching for patterns of consumption and life styles that could be combined with long-term sustainable global development. What can society in general, university employees[4] and the world of education learn from the experiences of these young people? What can be done differently in today's education?

Starting point

This study is based on the assumption that it is the *distance moral*[5] dimension in actions both spatially, but above all temporally, that is the specific political novelty in

3 This is based primarily on the well-known definition of sustainable development that was introduced in the Brundtland UN World Commission, *Our Common Future*, 1987. The World Summit on Sustainable Development in Johannesburg in 2002 stressed the three dimensions – ecological, economic and social – of sustainable development. The Summit also underscored the need to integrate sustainable development perspectives into educational systems at all levels in order to promote education as a decisive factor for change. The UN Decade (2005-2014) of Education for Sustainable Development (DESD) was proclaimed by the UN General Assembly in December 2002.

4 In Sweden, the research community has recently (2006) been assigned an additional task by a new amendment to the Higher Education Ordinance's opening paragraph: Institutions of higher education, "… shall promote sustainable development in their activities." This means that research and instruction directed towards ESD is one of Swedish society's prioritized knowledge and research fields that will contribute to developing and supporting norms for sustainable consumption patterns.

5 Distance moral here means an intergenerational and global responsibility. Distance moral actions have consequences for someone you have no direct relation to for example, because you do not live at the same time. The consumption of phosphates (nonrenewable resource) by the generation currently living, for instance, will most likely have consequences for generations that we will never meet. The distance from those whom the moral relation affects can involve time as well as place (Almers, Ellen. (2005) Action competence for sustainable development - the stories of active youths. Paper presented at Nordic Educational Research association, NERA/ NFPF. Oslo, Norway).

the fundamental values of sustainable development. This can be compared with the closeness moral dimension that has a longer tradition in the Swedish environmental discourse or the Swedish school system's attitude to environmental issues. In the social norms, which are assumed and can be identified in the sustainable development themes, taking responsibility is intergenerational and global.

The goal of this study is to interpret portions of seven young adults' stories on their distance moral commitment. We have limited the study results to the young people's action patterns and social norms for three specific types of consumption: transport, food and clothing. This is because these action patterns are socially reproducible and can be empirically identified using the methods of the social sciences. The young people have a common moral-ethical-ideological point of departure in a distance moral commitment manifested through their participation in different environmental organisations. For them, acting with distant moral responsibility is not always considered as being identical with what others believe is normal, i.e. acting according to prevailing social norms.

Subjects and selection

The young people who participated in the study were selected strategically.[6] The crucial selection criterion was that they were actively committed to issues that reflected their feelings of responsibility for individuals and/or ecosystems beyond themselves in time and location. What they do to influence such things as climate change or the effects of flooding on Southeast Asian farmers and fishermen resulting from cutting down mangrove forests to raise giant shrimp, hardly has direct consequences for the young people themselves, anyone they know or with whom they have a personal relationship. These are examples of issues that concern distance morals.

The seven young people ranged in age from 17 to 26 years at the beginning of the pre-study in 2004. The upper limit was set at 26, since that is the official age limit for membership in youth organisations in Sweden. Some of the participants passed the 26-year-old limit during the study, but they had been pupils in the Swedish school system in the 1990s when *contributing to sustainable development* was an official and articulated educational goal.

6 One chooses interview subjects that are of interest from the point of view of the study. The aim of such a selection is not to be representative but to discover more qualities, and as in this case, to understanding people, their intentions and actions.

Focus, aim and research questions

In relation to the common themes of this anthology, *Values and Democracy in Education for Sustainable Development,* our main emphasis is on distance moral dimension, social norms and impact. This explorative study is motivated by the goal of seeking knowledge about and an understanding of how it has been and can be possible to break established social norms and incorporate new social norms, consumption patterns and habits. Our focus has been to work with the themes of social norms and norm breakers to find tendencies and indications in the material that can illuminate the following research questions: What are the points on which the young people – reflectively or unreflectively – break with society's social norms and with commonly existing social consumption patterns? What are social norm environments and arenas that over time have supported the norm-breaking and norm-making development of the youths in their consumption patterns? What does this mean for ESD and ESD research?

Method and theory

The empirical basis of this study can be found in the life history tradition (Bertaux, 1981). In this case, it means that the empiri is collected through a combination of life story interviews and thematically open interviews that aim to illuminate the research questions. There are different traditions in story research, each with its own approach to the relationship between life and story. The empirical study that has contributed material to this explorative study (Almers, forthcoming) has its basis in Merleau-Ponty's phenomenology (1945). In the present research we view the story as an articulation of life that both clarifies and provides it with a new, richer meaning.

Thus, we view the stories of the young people neither as constructions independent of lived experience nor as representations of the past from a naively realistic perspective. Instead, we see the stories from the interviews as constituted interpretations of the past, the present and notions of the future. The lived experience, including the interview situation, is the basis of the stories that are constituted.

The empirical material is from an ongoing research project and is not to be considered as general results for the entire group of young people who are distance morally committed. On the other hand, with the assistance of the empirical findings we want to try to understand how distance morally committed youth reason about their norm-breaking actions. With the social norm as an analysis tool, we have studied their stories focusing on their statements about *consumption actions* when it comes to transport, food and clothing. Embedded in the actions there is a social norm that can be identified and formulated by means of the question: What does the person say that one *ought to do in the social context*? In the analysis, we then let the results emerge from the material as answers to the questions we ask.

The *social norms* – here defined as socially reproducible action directives – that govern and influence our lives (i.e. our action and consumption patterns) are often unspoken, invisible and taken for granted. It is not until we actually study the *norm breaker* and his or her patterns of actions that we can catch sight of and identify the norm environments in effect. By focusing on the norm breaker's social consumption patterns we can learn something about these influencing processes and their terms. From a research perspective based on the social norm model developed at the Sociology of Law Department at Lund University, actions carried out in reality are studied in order to understand why things happen as they do. Norm research deals with understanding the driving force of human social actions. The action is seen as subjectively determined and science has to then work with scientific categories and concepts that are able to relate to the normative. The concept of norm can be seen as the connecting link between the actual and the desirable, between what is and what should be, or as expressed in social scientific terms, between system and action.[7]

Will and reason are central driving forces/dimensions/prerequisite for acting with the intention of attaining a desired state or value. Knowledge (situated cognition) is another important prerequisite for being able to carry out actions and solve problems in the way one wishes. An additional prerequisite deals with the possibilities to realise that which one both desires to attain and has the knowledge to implement. It is the terms of the system that both enable and limit the action alternatives that are available. Norms influence everyday practice when people act according to the action directives of the social norm, when one behaves as others do in a given social situation, that is to say, normally.

Here we use the norm's three dimensions – values, knowledge and system conditions – as analytical tools for interpreting and understanding how norms are constructed. Norms are seen as a mixture of cognitive factors, system conditions and values. How they appear in the individual case is an empirical question.

Empirical basis

The results are illustrated with quotations from the interviews to show how the young people interviewed reason *about norms* concerning transport, food and clothing. These three consumption areas spontaneously and frequently appear in the stories about norms in the study. It is in the young people's motivations for their actions that the distance moral norms emerge. Their distance moral commitment is expressed in their life style choices as well as in their efforts to influence living conditions and structures for a sustainable development. The choice of influencing meth-

7 Empirical research on norms has been elaborated in articles, books and doctoral theses from the Sociology of Law Department, Lund University – some of them only with an English summary: Hydén, 2002; Wickenberg, 1999 & 2004; Gillberg, 1999; Baier, 2003; Rejmer, (ed. 2004), Olsson, 2004; Hallerström, 2006; Friberg, 2006; Appelstrand, 2007, and Svensson, 2008. See also Mathiesen, 1973; Aubert, 1976; Elster, 1989; Etzioni, 2000; Hechter & Opp, 2001; Bicchieri, 2006.

ods varies from individual to individual, but also in the course of one individual's life. For example, some of the young people have moved from an action strategy of making as ecologically and socially sustainable choices as possible in their own life styles to trying to affect structural changes. They tell how different events and encounters with other approaches have contributed to them changing action strategies – and starting to act in accordance with other norms. In this study, the statements used are disassociated from the individuals. By assigning them letters (I, J, K, L, M, N and O), however, it makes it clear which quotations come from the same individual. The statements are provided to concisely illustrate how norms related to sustainable development and distance moral can be expressed in different ways in the stories of young activists. Words that are emphasised by the young people in their oral stories have been italicised in print.

Results

The results are initially presented in relation to the norm themes related to transport, food and clothing and the arguments put forward for norm breaking in these areas. Subsequently, norm arenas are presented including school, the family and voluntary organisations where the norms are developed and supported as well as how the young people describe their significance for norm development. On the whole, the interviewed youths are satisfied with their choices of food, clothing and transport. They do not often see their choices as sacrifices even though they deviate from what are considered to be common choices among young people.

Norms related to transportation

For all the people interviewed, living sustainably when it comes to transport primarily means avoiding car and air transport as much as possible. Public transport, primarily railway, is stressed as being positive, as are walking and cycling. One of the interviewees advocates using sources of energy other than fossil fuel. Global fairness is evident with all interviewees, namely the idea that all people on earth have the same right to environmental space, i.e. just as great or limited a right to use the biosphere and atmosphere as a resource and recipient. One of the interviewees relates how he once asked in a public debate if it would be sustainable for all Chinese to have cars. And then if the same would go for all Swedes to have cars.

> O: So I asked, "Is it sustainable that all Chinese have *cars*?" And for the public it was obvious: It was *not* sustainable. And then I asked the question, "Is it sustainable that all *Swedes* have cars?" . . . Even if most of them answered no, there was a totally different *hesitation* in the answer. It wasn't as *obvious*. What is one's view *in that case*?

Interviewee O shows indignation over a view that he thinks means that people make a distinction between Chinese and Swedes when they decide if it is sustainable to have a car, a view that goes against the idea of fair environmental space.

Reasons and arguments for norm breaking in the transport sector

The reasoning behind walking, cycling or taking the bus, train, underground or tram instead of a car or plane is, "to practise what you preach as far as possible" (K). But it also has to do with "wanting to show that it can be done" (O), that it feels good not to support bad systems, that your experience is influenced by your values to the point that you can actually feel bad about doing something that runs contrary to them. Knowledge, morals and feelings are interwoven. One of the interviewees relates how your aesthetic experience is coloured by your knowledge and moral values:

> O: I don't want to support the *system*… You're influenced, you know, by the values you *have*, which means that I think it's really a *pain* to drive a car everyday, entirely for my *own* sake. Just like I think that wind power can be beautiful, I think that driving is a real *plague*.

All those interviewed did not feel the same. Driving a car for another interviewee is an emotionally positive experience. But that is in conflict with his values which are against driving. He resolves this by not buying a car in spite of pressure from others:

> I:…like my brother asked, "When are you going to get a car?" And I just said, "No, *I* don't plan to get a car." For sure, it's *fun* to drive a car and all. And if you *have* a car you are going to *drive* it. And so you don't get a car (laugh) if you don't believe it is *good*. Take public transport as much as possible and . . . cycle. If you have access to a car, you *get* lazy.

Several of the youths relate that they see themselves as parts of a system and a culture that is not very easy to completely break out of. They believe that it may not even be desirable or effective. Living sustainably on a personal level is not an end in itself if it does not result in further changes. Breaking the norms is a matter of balance. They reason about how far one should go and how much one should adapt:

> O: But at the same time you have to live, right? And you live in a given culture and you can't entirely break out of it. Or of course you *can* break out of it, but I don't think that is the smartest way to go.

For some of the interviewees, one adjustment to the norm involves flying when the purpose is perceived as being legitimate. Flying on the job or for a good cause can be allowed, but flying to go on holiday is excluded: "It's out of the question." (K). It is important to be able to defend one's action for oneself. A trip is considered legitimate if it serves a purpose and if it is because a person is going to move away for a long time and do something beneficial:

> O: In that case I could imagine flying there. It would feel more OK for my own sake. [. . .]. Then I can at least defend the carbon dioxide emissions. [Who would you defend yourself against?] Myself (laugh). But that I hopefully *learn* something in the works and do something *worthwhile* when I'm there.

From the perspective of impact, some of the youths, over time, tone down the individual responsibility aspect for emissions and life style in some contexts. You cannot expect that individuals should be so up on the issues and motivated that they "should pay 10 times as much to take the train" (O) instead of flying, for example. In O's opinion, a more accessible approach would be to influence public opinion by lobbying for "political acceptance" among citizens of policy decisions that make flying more expensive and trains cheaper.

> O: In other words, I was probably more judgemental during high school. Now I have greater understanding that some people have other priorities or that they don't *know* any better. It's like impossible to *have* that knowledge. You can't expect that of every individual . . . Well, yeah, maybe *knowledge* about climate change and some awareness that we have to do something about these problems.

Norms related to food

The food related section of the young people's stories are associated with the following norms: not to eat meat or eat less meat, purchase KRAV (organic) labelled/ecologically produced food, purchase locally produced and seasonal products, buy fair trade certified products, boycott products that are considered to be unsustainable "villains" such as giant shrimp and threatened fish species. Here you find boycott[8] as well a buycott[9] among the methods of putting pressuring. Another, and in part alternative approach to advance sustainable food consumption and production by means of one's own life style is to work for collective changes in food and agriculture policies.

Being an aware consumer also means striking a balance. Buying local produce can at times outweigh buying ecologically. It is a matter of *considering* sustainable aspects when you shop, and adjusting accordingly:

> M: There is so very much, to consider . . . that it's not just the *label* but . . . that it is more a matter that you *think* a little when you shop [. . .] Like, for example, I would rather buy Swedish apples that are not ecologically grown. Things like that. I *never* compromise on *certain* products, like . . coffee and cocoa and tea and stuff like that. Because it is so very *important*, and yet, I see it as a bit of a luxury. And bananas, too. You do what is sensible.

Reasons and arguments for norm breaking related to food

Being a vegetarian or vegan is motivated in the stories because by so doing, you place fewer demands on the limited environmental space than a carnivore does, as well as enabling food production that is less resource demanding.

8 Here it means actively refusing to buy something with the intention of having an impact.
9 Here it means actively and positively choosing to buy a product because it is fair trade or environmentally labelled, for example.

> M: In part because it uses less *energy*; it is less resource demanding and takes up less environmental space. It would give more people the opportunity to increase their standard to a fairer level if we didn't use as much agricultural land for cows to graze.

One argument is that the same arable area could feed more people.

> K: Well you know that ten times more land is needed to produce a kilo of meat than to produce a kilo of vegetables and such.

But it also has to do with animal ethics and one of the interviewees feels that it was the animal rights argument that convinced him to become a vegan. Even milk and egg production involves the exploitation of animals.

> K: It was like this classical thought that animals are individuals with their own worth, so to speak. And that it is wrong to use them just to produce . . . yeah, like producing food for people. Especially if it is done on a large scale and in a way that is painful.

The only one of the interviewees who started to eat meat again after several years as a vegan and even more as a vegetarian motivated the decision as follows:

> K: Suddenly I could no longer buy the idea that animals were individuals. Plus that I had a more nuanced picture of the environmental argument for vegetarianism and veganism and that stuff. Maybe I had realised that . . . an *optimal* diet from an environmental point of view was, perhaps, a mixed diet. [. . .] So it was a combination of what is a good environmental choice and how you view animals.

He still tries, though, to keep down his meat consumption because he knows that "there is an upper limit to how much meat you can eat […] if you want to keep yourself within an equitable environmental space and such" (K). He thinks that the optimal diet for a Swede from the point of view of environmental and global fairness is one of locally produced root vegetables and grains with smaller amounts of vegetables, meat, milk, eggs and possibly fish. His reasoning is that there is land that is not suitable for cultivation but better for grazing.

As it was with the positioning in the transport sector, reduced meat consumption is motivated with "practise what you preach" (L), but without going to extremes because it is important that others accept the message and reduce their meat consumption:

> L: I don't think you have to be that careful and that you can eat fish now and again because I am a vegetarian for solidarity reasons and for environmental reasons. So I don't absolutely follow my own rules. I think that is very important too because you want to get people to accept the message, that it's not just about turning on and off a switch, but that you can *reduce*. If people *reduce* their meat consumption, that's good.

Boycotting unsustainable villains is something young people do, among other reasons, for their own sake because it feels good not to participate in unsustainable development. But they also see boycotting as a way of having an impact. It is comforting to know that you do not support the depletion of cod, while at the same time, according to O, you probably would do more good if you put your energy towards

building public opinion against illegal cod fishing and less on your own personal eating habits.

> O: It feels really good not to eat fish when you see all the stuff about illegal cod fishing and giant shrimp and there is a lot that is related to fish consumption. Just so you're not a part of it, right? Not *supporting* it. My *money* doesn't support that awful black market mafia that is depleting the sea . . . But, I mean, I would probably do more good if I ate cod and did one of those documentaries (critical of the cod fishing industry).

The feeling of living a life consistent with one's values is a strong driving force, i.e. to live according to one's convictions. A positive basic outlook can be another driving force. You *can* make a difference.

> N: And then I suppose I have chosen to believe in . . . that you still *can* . . . reverse the trend. So that things turn out *better*. In other words, that everything doesn't *have* to go to hell. It *can* actually . . . It is a fairly *positive basic outlook,* I think, that is the driving force . . . I can be *really* angry and *really tired* and yet, I wouldn't be able to keep on fighting for different causes if it wasn't that I believed that you *can* make a *difference*. That you can reverse the course of things.

The reason for choosing to put time and energy into a boycott of the unsustainable villains can, apart from the gains in factual matters, be because it can be a way of attracting the still uncommitted to a greater awareness and involvement in sustainable issues in general. For one of the interviewees, the giant shrimp issue is an example of a truly "educational" (N) question when it comes to talking to other people who are less interested in sustainability questions about what ecological, social and economic sustainability can be:

> N: I got caught up in it (giant shrimp issue) because it was such a *clear* example of something in which the social, economic and ecological are interrelated. That's when you can really *speak* the different languages when you're talking to other people. To not *just* say, "Yeah, save the mangrove forests because they are so *fine*. A lot of fine animals live there. And the biological diversity, you really have to have more of that." You *can* continue on until you are talking about deep sea fishing. Or anything *conceivable*. And then it immediately becomes more interesting, even for economists.

In that way, N believes, it becomes a question about which you can communicate with *everyone*. It can be a gateway into talking about global contexts of an ecological, social and economic nature. And of what we have the *right* to do towards other people:

> N: It's not just that it's easy to talk about it. If they've understood *that* question, they can also often talk about other things *as well*, when there are clear examples of how everything is *related*. Socially, economically and ecologically, you can say. It's such a good . . . (short laugh) summary of global *environmental problems*. And you can ask yourself . . . "by what *right* do we think that we . . . can eat giant shrimp in Sweden?"

That giant shrimp are such a clear symbol of luxury also makes it interesting as an issue to become committed to. It is so easy to replace:

> N: But *this* is a product that I can't even really . . . that is probably what makes it so interesting, that I can't even see the *point* of it. I think that they can be *replaced*, that there are shrimp in our

oceans too (laughs). They are not giant here, but . . . In that way it becomes *even* more of a kind of luxury symbol.

Becoming very knowledgeable about issues involving the ecological and social consequences of different sorts of production results in one easily *thinking* and *feeling* more and *caring* more, according to one of the interviewees. But one problem is that the information does not get out to the population in general. "I believe that you could talk about banana cultivation with poisons for an hour and quite a lot of people would care. It's just that you can't get the information *out*" (N). But even when the information is spread, it does not always have an impact on everyday action anyway: "But sometimes the *economic* arguments take over so that it doesn't manage to trickle down into everyday life anyhow" (N).

Norms related to clothing

The young adults in this study associate the West's over consumption of clothing with resource depletion, environmental pollution and socially unsustainable working conditions in the producing countries. Their counter strategies are to reduce clothing consumption, make conscious choices of producers, and second-hand purchasing. Clothes are also seen as style indicators with consequences for the possibilities one has to reach out with ideas and messages.

Reasons and arguments for norm breaking related to clothing

The young people's arguments for reduced consumption of clothing and other goods are energy consumption, hazardous emissions, emissions that negatively affect the climate, health problems of workers on cotton plantations and unacceptable working conditions for employees:

M: If you think about, say, clothing production, it is really very terrible when people die from poisoned cotton when they are only 40 years old.

There should be incentives for reduced consumption even for consumers, such as a shortened work week and more leisure time:

M: If you bought *less* . . . then maybe you would also have more time. You would see that everything is related, so to speak. A shortened work week, for example. If we bought less, we wouldn't need to work to get as much money either and then we could maybe *live* a little more and do *other things* that are fun.

Changing clothing norms is related to a bigger life style change, the aim of which is to reduce one's consumption and negative impact on other people's health and environment. It is the result of an awareness that all of one's actions have an impact. Sometimes the life style change is radical:

> O: People don't believe me when I *say* it. That I really could spend all my *days* trying on *clothes* and going to McDonalds's when I was in junior high. I hadn't started to change my *life style* like I did later on in senior high. I tried to consume as little as possible (during senior high). Not to *buy* so much. Not buy so much clothing. Mostly second-hand clothes. Yeah, reduce your consumption and environmental footprint quite simply. Related to the fact that all of your actions have an impact. And try to reduce the impact and reflect on the ways you *want* to make an impact. It is *enormously* related to consumer power. But not *just* consumer power. It's also a matter of reducing your consumption.

It is a dilemma for one of the youths because he thinks it is fun to buy new clothes:

> M: There is so much artificial need. I *have*, like, . . . one and a half closets full of clothes. I can hardly push *in* any more. But I still think it's fun to buy new clothes (short laugh). You wish you could somehow be satisfied, be mentally stronger and not care so much about the *superficial* and *clothes*.

Another of the young people still uses clothes from when he was in middle school and does not feel any need to buy new ones:

> J: In other words, I have worn the same clothes since I was in 6th grade. So it's like no problem for me. And it's really no problem for them (friends who buy lots of clothes) either, but it must be some kind of psychological attitude that they need clothes even if they really don't. And that type of attitude can very well be altered with trends.

Consumption of immaterial services instead of consumption that reduces the earth's resources "could become fashionable" (J). "That people buy those kinds of immaterial services, I mean, like programmed codes . . . It can very well vary with trends" (J). However, J is also of the opinion that it is not entirely impossible to expect that even his "hedonistic friends" (J) could one day realise the unsustainability of continuing with consumption that would deplete "6 earths" (J) if everyone was to live like we do in the West.

> J: It's certainly not the case that they are so hopeless either. They could very well come to the conclusion that it might not be entirely reasonable to expect that we will use up 6 earths …

So far, though, J has not seen any tendency in that direction among his friends.

Low consumption compared with average, particularly when it comes to clothing, can have undesirable consequences in that the low consumer stands out. This is a consideration that some of the interviewees also talk about. Extreme clothing styles can attract some young people, but repel others and thus reduce the ability to involve broader group of youths. It becomes a choice between the goal of reaching more and broader groups by keeping within the accepted clothing norm, and reducing one's resource consumption by distancing oneself from the accepted clothing norm:

I: Even if I also buy a lot of my wardrobe second-hand and maybe don't dress like someone in Vogue magazine . . . I still try not to have a clothing style that is too extreme. Because I *believe* that also make you stand out a little. I have to admit that to a *certain* extent radicalism, just like extremism, can *attract* those who are searching for it. At the same time, *I* think that we have to be more *mainstream* to get more young people to join the movement.

In summary

An overall social norm expressed by the young people in the study is that they want to live in a way that means their consumption is restricted to a fair and just Environmental space[10]. Their justification for their actions is that it feels good to act in a way that agrees with what they think is right, but their motivation is also of a strategic nature: They see action as a means for change and a way to make an impact. Some of the youths have altered their view of individual responsibility for life style being the key to change. They now strongly emphasise action strategies to try to influence structural changes that make living sustainably easier for all. In spite of this shift in perspective, they continue to adapt their consumption to a great extent to what they consider to be sustainable, for several cited reasons.

Norm arenas where norms develop and are supported

Three important norm-building arenas are described by the young people: school, family and voluntary organisations. The roles these arenas play are different for the interviewees especially when it comes to where the balance lies between school and family. The study's strategic selection procedure ensures that voluntary organisations are a significant arena for all the young people involved because it was here the interviewees were found in the first place.

In the young people' stories, the significance of family often has a weak relationship to the interviewees' actions on specific issues, with the possible exception of food. The family has great significance when it comes to basic values, general commitment and confidence in one's ability to make a difference. The importance that the adult world plays emerges in the stories: adults are there to challenge the opinions of the young people and as a confirmation that their commitment is positive. School is also described as influencing values, self-image and knowledge growth. Membership in associations and friends play a big part in knowledge growth when it comes to problem definitions but primarily when it comes to solutions and action alternatives.

Family's significance

One of the youths describes his and many other young people's commitment as though it "builds on a legacy from our parents" (K), a legacy that is expressed in a new way today. It may concern different issues in different families. When it comes

10 *Environmental space* means the consumption of natural resources and pollution of the environment that is acceptable without compromising the ability of future generations to support themselves and maintain biological diversity. *The fairness principle* means that each country has the right to the same amount of environmental space per person. It does not mean that everyone has to necessarily consume exactly the same amount of every individual natural resource. However, it guarantees all people's right to have their reasonable material needs satisfied.

to food, it might be about everyday activities such as buying ecologically produced groceries:

> A: We (in the family) have been a lot into "buying *ecologically* and buying *locally*." My mum bought milk from a place, a farm where she worked. She bought cheese and bread from a local ecological farm. And she was involved in starting up a shop that sold ecological produce.
>
> B: My mother really went in for ecological milk. She was a part of the old vegetarian movement. I think she joined up in the 60s. She always pushed for ecological products.

Parents were a springboard and discussion partners in factual matters but some of the youths describe it as being more the other way around, that their parents were influenced by the discussions. One of them related the impact he had on his father's understanding of transport issues, "I don't know if he had it from *the start* but he *got* it in any case. He is quite receptive" (O).

Several of the interviewees relate that a positive basic outlook of their own abilities to have an impact come from their families:

> N: I think that I got it from *home*, because I have a mother who . . . never gives *up*. She is really a giant . . . she can *convince* most people of what she thinks is appropriate. I mean, she can go into a petrol station and get them to remove the pornographic magazines just by *talking* to them.

School's significance

Some of the interviewees point out positive and committed teachers as being significant in developing confidence in their ability to have an impact. One of them relates that he remembers "that they were positive" (K). They questioned such issues as homelessness, starvation and environmental pollution and showed alternatives, "It could be like this instead" (K). His teachers presented development as something that grew out of the action of humans. "That democracy was something humans had established and won" (K). That it was "someone who arranged it, so to speak" (K). His teachers emphasised "the ability to take action" as being significant for change.

The young people bear witness to varying experiences of how school contributed to their knowledge growth in the norm areas being investigated. There are examples of disappointment with high school environmental instruction on transport. Information material from the car industry was used uncritically in classroom instruction. The catalytic converter was portrayed as having already solved automotive environmental problems, which contradicted the information they had received from the voluntary organisation in which they participated:

> O: In school we had information material from the car industry that told how catalytic converters had fantastically changed the Swedish environment. First there were *dark* pictures and then it was just, "Oh, after the catalytic converter all the water was clean . . ." We *knew*, though, that things *hadn't* changed. We *had those* kinds of facts, of course, from the environmental movement. We may have gone through it in chemistry class as well; I'm not sure, though, maybe. But not with *that* teacher in any case. And he was not at all critical. . . . *Really strange!*

But the young people also have very positive things to say about the school's role in their knowledge growth. The education they received has led to an understanding of scientific relationships that has facilitated their reading of environmental literature outside of the school context:

> O: … but *chemistry* was fun because you could understand more about acidification, ozone . . . Yeah, the teacher got into a lot of that . . . chemical reactions. Or low-altitude ozone, how it is formed. Now I don't remember that stuff anymore, but *then* I knew it well. Exactly how it worked. Thanks to school.

For one interviewee, what he learnt in school has stimulated him to reduce his meat consumption:

> I: I went to a high school that was located in a nature reserve and we were served vegetarian food. I was a vegetarian and I already had some kind of environmental political involvement then . . . and there was, of course, considerable environmental awareness at that school and there was a lot of discussion on questions of fairness and equality at school.

In another case, it was the absence from school that was experienced as enabling:

> J: I usually . . . from a popular science point of view say that I became a vegetarian when I had strep throat and watched educational programmes all day. I stopped eating pork and then beef and then I stopped eating lamb; chicken I had already stopped eating and I stopped eating fish two years later [. . .] Yeah, it had a lot to do with the global waste of resources involved in livestock breeding. It had something to do with 10% . . . On the whole, these bouts of illness were much more productive than my time in school.

But school played an encouraging role when a student had already taken a position. J related how a teacher in a biology lesson on the nutritional pyramid incorporated the position J had taken to eat vegetarian. J thus received attention and an opportunity to develop his arguments:

> J: The nutritional pyramid was a part of it, of course, though it wasn't a part like this "with the 90 percentage loss." In the books it was presented more as a good quality picture with a lot of fish at the bottom and one at the very top, or a person or something like that. But . . . then . . . I don't think that I *wasn't* considered as a resource as a vegetarian. There is still a point there. I mean, the teacher saw me as a subject for debate . . .

One of the interviewees describes the role distribution as follows: it is in the family and school that basic values are formed but, "On the other hand, I would probably say that it is in the voluntary organisations, those contexts that you choose yourself, that the real development or processing takes place" (K). An organisation is a context one has chosen and that is where one starts to talk to peers about it.

Voluntary organisations' significance

As one of the interviewees formulated it, it is in the voluntary organisations (as Nature and Youth Sweden) that one starts to reflect on what fundamental values, such as everyone's equal worth, really mean. Organisations and the courses and spare time activities they offer have been important in supporting the young people's break with

previous norms. The non-formal lectures in voluntary youth organisations are highlighted by some of the interviewees as important clarifiers of concepts and connections. That the non-formal lecturers have been young committed people is also stressed as important. The context plays a significant role in the emotional impression and thus on the impact:

> O: And it was really . . . it was *really awesome* to hear the lecture on . . . *global* . . . issues and hear someone put it in words . . . It became so *obvious* somehow when . . . 20% of the world's population consumes 80% of the world's resources. I don't remember having *that* presented so clearly to me before. I mean, it can't have been the first time I *heard* it in my life. But just in that *context* and with those *people* made it so enormously *powerful*.

Organisations as well as friends have contributed to knowledge about the role of transport in sustainable development. One example is knowledge of structural causes of increased emissions from the transport sector:

> O: …and it was really connected to the insights that freeways increase traffic. [Yes, and how did you gain those insights?] It was *not* at *school*. It was through discussions. It was being at *meetings* . . . then it was also in discussions with others in the Society for Nature Conservation or that you received a brochure, or that you talked about it with someone.

There are also stories that describe the road to conscious vegetarianism by means of adapting to a significant person or group. Vegetarian eating habits came first and then the arguments and awareness were gradually developed: that it had to do with global environmental space and not exceeding one's ecological footprint.

> L: I became a vegetarian in junior high but it probably was mostly because my brother was one and I looked up to him so it wasn't so much taking a stand – or it was that – but it wasn't like I had come up with the idea myself. [. . .] The first vegetarians in 7th grade – it was me and the Muslims who got special meals in the cafeteria. The next year there were more who became vegetarians. In the beginning I couldn't find any arguments for being a vegetarian – I thought sausages were a bit disgusting (laugh) but gradually I learnt that it had to do with global environmental space – how much space a person can occupy without exceeding his or her ecological footprint. That you shouldn't consume more than what the earth can bear . . . and to show solidarity with animals.

Not eating broiler chickens was a prevailing social norm in the Nature and Youth Sweden club that collided with the family norm when one interviewee, as a 12 year old, joined the club. The attitude towards eating broilers among the "old" members appeared to be a bit tough, but it felt like "no offence was intended." Having different norms in different contexts could be a solution when approaches and habits collided. One norm could be the standard at home and another in the club: "You changed *there* (with the Nature and Youth Sweden club) in any case" (N). Even though you continued eating chicken at home. "If you are 12 years old, it's not very often that you can really restructure an entire *family* . . . I don't even think I *tried* to take that battle on at home" (N).

Some became vegetarians more or less on their own, but eventually met other vegetarians in organisations. One of the youths related that he did not know any vegetarians when he became one but, "On the other hand . . . It was at about the same

time I joined the Nature and Youth Sweden club. And then, a little bit later, I met other people who were vegetarians and vegans" (K).

Another of the interviewees related that to start with, it was quite unusual to have vegetarians at school, but that the norms there changed gradually. Some of the friends who at first pestered him and thought it was bizarre were eventually influenced and became vegetarians themselves:

> L: I was the first at school to become a vegetarian. And all of my friends were on my case. They nagged me about it weeks on end. "But why? Oh how strange! Why are you like that? Oh, oh." And then *they* were the ones to become vegetarians themselves later on. They thought I was some kind of Martian when I did it. But it has an effect eventually. Often. Not on everyone. But on some.

All of the interviewees testify to the importance of school knowledge. But all strongly emphasise the knowledge growth that takes place in their time spent in organisations. As one of them expresses it, it was in the organisations that knowledge felt important and fun:

> L: All I have learnt, on the whole, that I have had use for – no, *all* is an exaggeration – but *most*, I have learnt in *organisations*. I learnt a lot in school, too. There is a lot of basic knowledge you have to have and such. But the place where I felt that it was *important* and *fun* was, for sure, in the organisations.

Another young person describes the importance of meeting peers in the organisation setting like this:

> K: …in school we learnt such things as that all people are created equal and that we have a responsibility towards future generations. On the other hand, we never were allowed or encouraged to reflect on what that really *meant*. But I think that is something that is rather natural because . . . in school it's like the meeting of two generation . . . and one has the upper hand because they have the authority. And then when you discuss with peers, that is when you formulate, as it were . . . the *significance* of it all.

It is clear from the stories that the three norm settings – family, school and voluntary organisations – have contributed in varying ways to the young people's formulation of norms. It is also clear from the results that organisational life plays a crucial role in the youths' reflected consumption choices and in their considerations of how they can have an impact on development in a sustainable direction. In the mission from UNESCO (2005) to work for change of consumption norms through EDS, it appears reasonable to focus some of the searchlight on informal and nonformal learning arenas such as the family and voluntary organisations.

Discussion and conclusions

In our empirical material, we have observed a number of tendencies in the stories of young people. From them we can draw the following conclusions:

The young people in our explorative study have broken social norms concerning established and frequently occurring consumption patterns for food, transport and clothing. Their norm breaking corresponds to recommendations for life style change that the IPCC advocates in its fourth report on steps to counter climate change. In other words, they are actions that could be on their way to becoming social norms. The young people in the study can be seen to be at the forefront of this change in norms and thus became norm breakers as a result of their way of transforming knowledge of sustainable development and the taking of a distance moral stance into action in their everyday lives and in their communities.

Different norm settings have had varying significance for the young people's ability to break established norms when it comes to consumption actions – food, transport and clothing. Consequently, it is of scientific value to consider the importance of different social groups, organisations and social movements in ongoing ESD research and education. We can describe these as norm supporting (or norm-breaking facilitation) settings for young people. The organisations and social movements have been significant for knowledge growth and in providing an arena for action, thus enabling and supporting the establishment and reinforcement of new social norms.

The ESD research can learn from the processes in norm-building settings to be found outside of school. We can understand and describe these processes as informal and nonformal education for sustainable development.

It is important for ESD research to not just focus on the system aspects of education (school, teachers, teacher training, textbooks, etc.) but to see other active arenas of influence and norm settings such as the home, family, peer groups and voluntary organisations, media and the press that are significant for young people's norm building and norm breaking. What concrete significance can these have for the ESD research and the educational system? The soon-to-be-completed study of Swedish active youths that this article has borrowed empirical material from examines how commitment and distance moral in action has emerged, from the perspective of young people. It would be valuable to have international studies to compare how the three arenas – informal, nonformal and formal learning – interplay in other conditions than Swedish ones. What role do the differences in legislation and regulations play between countries? What role do the distinct conditions for voluntary organisations and social movements as well as family life play in active young people's stories from different countries? These are questions that are highly topical and urgent in the UN's decade of education for sustainable development.

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