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TRACING CRITICAL REALISM IN THE WORK OF ÅSTRÖM

1 Introduction

The aim of this chapter is to discuss the possibilities of a critical realist sociology of law set against the background of the work of Professor Karsten Åström. Thus, in the next section I give a short description of Åström's "socio-legal stance", and specifically his concept of parallel norm creating processes. I then proceed, in the third section, to describe the basics of Roy Bhaskar's critical realism as a philosophy of science. This is followed in the fourth section by the recapitulation of Bhaskar's own dialectical critical realism (DCR), which is built on the dialectics of Hegel and Marx. In section five, I move on to the legal theory of the critical realist law professor Alan Norrie with a focus on Norrie's critique of "liberal law". Thereafter, in section six, I specifically highlight Norrie's call for a sociology of law in the spirit of DCR, beyond legal positivist and poststructuralist conceptions of law. Then, in section seven, I discuss the potential critical realism of Åström's work by reflecting on the analysis model of legal regulation (AMLR), applied in analyses of legal norms, e.g., in social service agencies. This is followed by how conceiving of AMLR dialectically may enable new ways for understanding social conflicts and social change in the field of social welfare. This is, in the final section, demonstrated by the case of EU migrants residing legally in Sweden but without the right to social welfare. In this case, an external social institution, an NGO, succeeded to influence, open up and ultimately collaborate with the local public administration, resulting in new policy with the potential to improve the living conditions for the migrants.

2 Parallel Norm Creating Processes

At the core of Åström's work lies the concept of *parallel norm creating processes,* which was originally developed in his doctoral dissertation, *Social Welfare Legislation in Politics and Administration – A Study on Parallel Norm Creating Processes* (Åström 1988). The quote below, taken from a report about priorities

made within the Swedish social services, serves in many ways as a good illustration of Åström's approach to sociology of law.

> To prioritize within municipal social welfare organizations is only to a small extent about legal application in the sense that legal sources would offer readymade solutions to this particular kind of assessments. By social welfare law's construction as a goal oriented framework law, it is rather the case that these assessments, grounded in social policy, normative interpretations, knowledge about social and economic conditions and how these conditions affect and are affected by the social welfare system, must be made based on local premises. Prioritizing can hardly be simplified in such a way that its solutions can be read directly from some sort of action list. Law is rather created in its application, that is, in its context or in its locality. (Åström 2004: 44; my translation)

In sum, Åström's concept of parallel norm creating processes is an attempt to describe and explain how and why the practices of public organizations develop into extra-legal but nevertheless normative systems, in parallel to the legal framework that formally controls these practices. In his dissertation, Åström investigated the role of social welfare law in the realization of democratically decided social policies.

To Åström, it is evident that norms created in the practice of social work do not necessarily comply with a hierarchical legal order. Instead, normativity often travels along different paths that do not cross in a predetermined way. The different legal levels of social welfare organizations can indeed be seen as largely autonomous and, at the same time, interdependent. Hence, in practice, social welfare decisions are just as much by social, political and economic system factors as they are influenced by legal factors.

In his dissertation, Åström presents empirical evidence that supports the claim that, in reality, societal structures demarcate the application of the law. For instance, Åström shows that although Swedish welfare law does not say anything specific about the individual's obligation to provide for herself through labour, this obligation is generally taken by the social welfare system as a legal maxim. In fact, there is a much stronger legal support for the right to receive welfare compared to the normalized, although not formally legalized, obligation to work. Åström claims that the reason to why the legal support for receiving welfare is not stronger in reality is because the overarching goals of welfare law have been operationalized into organizational sub targets (in short,

it is ultimately a matter of economic resources). Paradoxically, as the social welfare organizations work towards and in accordance with these sub targets, they do it in conflict with the overarching goals. Thus, the goal-oriented decision-making aimed for by the legislator has transformed into a norm-rational practice.

The argument put forward by Åström is that if legal regulations cannot solve the larger scale social inequalities they were made to solve, there is little chance that decision-makers will achieve this locally when applying welfare law to individual cases. As a consequence, the task of addressing these cases, as well as the larger scale inequalities, will instead be dominated by the *administration*, as opposed to by the *policy*, of welfare organizations. This illustrates what Habermas would perhaps categorize as the colonization of practical social policies by instrumental administrative structures (Habermas 1987; Outhwaite 1994).

Åström's suggested solution to this "systemic antinomy" is as practical as it is critical:

> The difficulty facing the legislator does not consist primarily of finding a successful legal construct but in the fact that the conflicts, that are giving rise to welfare legislation, are central to the entire system of society. The solution to this fundamental value conflict could be some form of basic income (…) The distributional effect (…) would perhaps not be more than marginal, but the legislator's two roles would probably be a bit more clearly delimited. (Åström 1988: 269-70; my translation)

Applying this solution, granted of course that the concept of basic income in fact works the way its advocates promise it should, would allow for the two contradicting values Åström mentions (i.e. the right to welfare versus the obligation to provide for oneself) to be simultaneously respected, without the benefit of the one at the expense of the other.

3 Critical Realism

Åström's socio-legal approach, theoretically informed although firmly rooted in empirical investigations and accompanied with a reformist ambition, bears some resemblance, I argue, to the tradition within philosophy of science labelled *critical realism*. The term, mainly associated with the British philosopher Roy Bhaskar (1944–2014), derives from Bhaskar's insistence in his early works on a philosophy of social science that combines a *critical naturalism* with a *transcendental realism* (Bhaskar 2005).

In sum, critical naturalism, according to Bhaskar, means to acknowledge the natural and the social as categories that are part of the same reality, while realizing that the ways in which we gain knowledge about these categories differ considerably from each other. Bhaskar distinguishes between an *intransitive* ontological dimension, to which natural and social objects both belong and which exists regardless of our knowledge about it, and a *transitive* epistemological dimension, constantly in flux and always depending on social and historical circumstances. (Bhaskar 2005)

The other term, transcendental realism, refers to a philosophical realism that adopts neither an empiricist/positivist nor an interpretivist/relativist view on scientific knowledge. Rather, transcendental realism views the conditions for scientific knowledge as causal, factual and real but, at the same time, always, „subject to historical transformation" (Bhaskar 2005: 8). Contrary to Kant's idealist transcendentalism, which states that we can speculate about, but never fully grasp, the reality that transcends the human mind, transcendental realism states that the human mind is capable of understanding its own limits, but that these limits change as we gain new knowledge of the "world outside" (Bhaskar 2005; Kant 1996).

4   Dialectical Critical Realism (DCR)

In later works, Bhaskar developed *dialectical critical realism* (DCR) and in doing so he both specified and radicalized his previous philosophical positions (Bhaskar 2008). Picking up the thread much where Marx left it, rather than following in the footsteps of subsequent Marxists working in the dialectical tradition, Bhaskar sought to develop his dialectic in a direction leading away and beyond the traditional dichotomies of modernism as well as the theoretical dead-ends of postmodernism.

Like Marx's, Bhaskar's dialectic stems from Hegel:

> In Hegel, the principle of idealism, the speculative understanding of reality as (absolute) spirit, unites two ancient strands of dialectic, the Eleatic idea of dialectic as *reason* and the Ionian idea of dialectic as *process*, in the notion of dialectic as a self-generating, self-differentiating and self-particularizing *process of reason*. (Bhaskar 2011a: 115)

Hegel's dialectic was a reaction against the Kantian antinomies, that is, Kant's inability to explain fundamental contradictions, such as the finite/infinite nature of space and time or whether events are pre-determined or happen

spontaneously (Kant 1996). Hegel attempted to overcome these Kantian rifts by striving for an expressive unity-in-diversity, i.e. a unity in meaning and mind (idealism), resulting from the process of conflict between theory (subjectivity) and practice (objectivity). This process illustrates Hegel's dialectical method and it had a crucial impact on Marx's theory of history. (Bhaskar 2011a; Hegel 2015)

But Marx disagreed with Hegel on one fundamental point; whereas Hegel saw the Idea as the motor of the dialectical process and, hence, the human mind as determinant for the course of history, Marx claimed that Hegel's dialectics was far too idealistic. For Marx, rather than the other way around, materiality is reflected by the human mind and then becomes translated into ideas (Marx 1887).

> It is evident that the true method is turned upside down. What is most simple is made most complex and vice versa. What should be the point of departure becomes the mystical result, and what should be the rational result becomes the mystical point of departure. (Marx 1970: 49)

By describing the major keys to Hegel's ontology, and how Marx disagrees with them, Bhaskar explains how the two could come to so fundamentally different conclusions (Bhaskar 2011a). Firstly, Marx rejects Hegel's realized idealism, i.e. the way Hegel conceived of matter and being as irreducible to spirit and thought (i.e. the primacy of the *idea* of materiality over *actual* materiality); secondly, the importance of differentiation and complexity are far too essential for Marx for him to accept Hegel's spiritual monism (the absolute totality of things) – Marxian totalities "are subject to empirical, not speculative, conformation" (Bhaskar 2011a: 120); and, thirdly, the ontology of Hegel is steeped in an immanent teleology, i.e., the idea that nature, and all that happens in it, happens for a reason. Marx, on his part, emphasized that historical events by necessity are caused by previous events but not according to a pre-determined, teleological purpose. (Bhaskar 2011a)

5 DCR and the Law

During the later period of his career, Bhaskar often collaborated with the British law professor Alan Norrie. Besides being co-author with Bhaskar on a number of publications, Norrie has also been an active proponent of critical realism in his own writing. Often departing from the field of criminal law,

Norrie uses Bhaskar's concept of *praxiology* to describe, explain and criticize positivist traditions of western legal theory, often referred to by Norrie as "liberal law". (Norrie 1998a)

Hence, Norrie suggests that we should think of dominating theories of law as forms of social and historical practice and knowledge which are articulated through law's praxiology. The praxiology of legal positivism thus refers to the theoretical account of law as tied to, and limited by, a finite set of possible practices and outcomes. According to Norrie, a praxiology typically takes the part represented by the practice to be the whole, and in doing so, both obscures the whole and misrepresents the practice. Accordingly, legal theorists, operating in the realm of legal positivism, are incapable of seeing legal decisions in their full social and historical contexts and, therefore, misrepresent law as socio-historical phenomenon and, ultimately, fail in their attempt to formulate an accurate theory of law. (Norrie 1998a)

> [By] ignoring the relationship between the legal practice (…) on the one hand and the social context (…) on the other, [orthodox legal theory] is unable to see the broader picture and to get to the bottom of the conundrums of criminal law itself. (Norrie 1998a: 557)

But Norrie is (almost) as critical of poststructuralist theories of law as he is of legal positivism. He agrees with those poststructuralists who criticize liberal law for purporting to include while it, in fact, excludes. "A theory of what all individuals have in common, liberalism excludes difference: of gender, race, class and community /…/ in favour of a single, only apparently neutral, standard that is in fact gendered (male), classed and aged (middle), and raced (white)" (Norrie 1998b: 705). But in an, according to Norrie, theoretically and methodologically flawed attempt to deconstruct existing forms of reason, poststructuralists either find themselves in a theoretical cul-de-sac, give up and surrender, at least temporarily, to the liberal idea of (legal) rights; or, they point to, what Norrie calls "a necessarily inchoate 'other'" (Norrie 1998b: 706) as the *real* driving force behind *actual* moral and political change. However:

> There is no metaphysical 'other,' but there is real emergent history and developing social structure, and these generate actual difference, conflict, change, sometimes crisis. Difference, 'something new,' emerges in real time, space and history. New perspectives and critical standpoints, new ways of looking at old phenomena of law and justice, are produced in this process of emerging change and difference. (Norrie 1998b: 706)

The quote above expresses the dialectical critical realism of Bhaskar. Norrie regards legal positivism as well as legal informalism and poststructuralist theories as equally incapable of formulating theories that contain and, at the same time, thrive on contradictions like the one stating that law simultaneously promotes *and* obstructs equal opportunities (Norrie 1998c, 1998b; van Krieken 2001). Such a theory, Norrie argues, requires thinking dialectically. An example of this is the suggested thought model in criminal law that Norrie refers to as *relational justice*, i.e. a form of socio-legal engagement that takes into consideration the perpetrator's past and his relationship with a community that includes his victim. Such relational justice would require other social institutions besides law to be involved in the business of justice, a business presently monopolized by the juridical system. (Norrie 1998b)

6 A DCR Approach to Sociology of Law

In this particular context, those of Norrie's contributions in which he makes a case for a dialectical critical realist sociology of law is naturally of special interest.

In Norrie's mind, the fundamental problem with sociology of law, as a social science, lies in the tendency of most socio-legal research, even that of the critical kind, to merely follow in the footsteps of legal positivism. (Norrie 1998c) What Norrie means by this is that by accepting and using the definitions and concepts once "invented" by, and developed within, positivist legal science, sociology of law serves to strengthen the position of legal positivism. Barely supplementing legal theory with sociological analysis is not unproblematic. "[The] challenge is to take positivism seriously as a social phenomenon in itself without endorsing it. That *in nuce* is the mistake of autopoietic theory" (Norrie 1998c: 726). That is, even if the operationally closed legal system may be cognitively responsive to events taking place in its surrounding social environment (which includes the activities of sociology of law), a mere external irritation will never lead to the disclosure of positive law; only function as an update to the next version of law's operating system.[1]

So, ordaining sociological treatment will not cure legal positivism. According to Norrie, positivist legal theory must be analysed in exactly the same way as any other practical manifestation of law. That is, sociology of law must analyse the praxiology of legal positivism as a social and historical phenomenon

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[1] Referring here to Luhmann's theory of law as an autopoietic social system (Luhmann 2004).

(Norrie 1998c). But there is reason for the social scientist to approach these domains with caution. In the same way as the praxiological knowledge of law is adequate in the work of the law practitioner, it is inadequate for the social scientist in a similar manner as "the religious knowledge of the priest would be to a sociologist of religion" (Norrie 1998c: 727).

In other words, traditional sociological methods will not do. Neither will the strategies of broadening and opening up the socio-legal analysis *by necessity* entail the abandonment of the positivist starting point. In a critique of the work of sociologist Boaventura de Sousa Santos, Norrie states that the former basically supports the legal positivism he sets out to destroy by revealing, and indirectly accepting, the historical importance of legal positivism, as long as there are room for other alternatives too. But Norrie argues that, instead of thinking about how to blend different kinds of law, which, according to him, is what de Sousa Santos tries to do, the focus of sociology of law must be directed towards law's dialectical relationship, i.e. law's internal/external conflictual structure. (Norrie 1998c) We can never even begin to understand law's contradictory combination of form and content, claims Norrie, unless it is located dialectically within a social context.

> The conflictual character of social relations are expressed in and through law, even if traditional legal theorists spend all their time denying that this is the case through the explanation of law as a formal rational institution. The starting point for sociology of law must therefore be the connection between what law claims it is, but is not, an internally regulated, self-reflexive, formally rational system, and what law claims that it is not, but is, an engaged and contradictory practice inseparable from the social and historical forces which operate by and through it. The law 'wishes to have a formal existence' (Fish 1993), but in order to do so, it must deny its inability to stand by itself, that is its *syncategorematic* character. (Norrie 1998c: 732-33) [2]

Drawing again on Bhaskar, Norrie argues that we must understand law's ever-changing character as "a complex totality subject to change both in its components and their interrelations" (Norrie 1998c: 736). Seeing law's existence as founded by, and resting on, its relations with other social systems, structures and contexts, "involves a notion of identity that is entirely different from that available to positivist and analytical traditions of jurisprudence" and

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[2] Syncategorematic term = a term of or relating to a word or symbol that has no independent meaning and acquires meaning only in the context of other words or symbols.

"any sociological approach to law which draws on positive-analytical protocols" (Norrie 1998c: 736).

Finally, Norrie argues that the aim of sociology of law must be to work within the scope of a transcendental realism, i.e. to work with the ambition to understand the interrelations between legal practices, social practices and social structures. This, in turn, requires a methodology that "points the way to a critical sociological understanding of law, drawing on dialectics, avoids the 'devil' of substantiating a positivist-analytical conception of legal autonomy and the 'deep blue sea' of a reductionist nihilistic approach" (Norrie 1998c: 737).

7 Åström – A Critical Realist?

I began this chapter with the claim that Åström's work could be argued to fit within the framework of critical realism. But this is not the same as to say that Åström explicitly refers to Bhaskar or that he consciously applies dialectics in his work. Åström's writings, however, reveal some common ground with Bhaskar as well as with Norrie, but some obvious differences too.

For instance, to Åström it is obvious that the welfare system not only requires different kinds of legal regulations but also that well organized social service agencies and sufficient economic resources are required as well (Åström 1988). This indeed is a realist as well as critical point of departure for a socio-legal quest into welfare law. However, Åström has accounted for the possibilities of welfare law analysis like this:

> The issues regarding the construction of welfare law and application can be analysed from two perspectives. One perspective, which can be described as internal in relation to law and which essentially purpose to answer the question of what applicable law is, and one perspective, which is external and with the purpose of answering questions of a causal nature by illuminating law sociologically. A normative concept of applicable law may be posed against a sociological. (Åström 1988: 17; my translation)

The bilateral understanding of law accounted for in the quote above is an example of what Norrie refers to as positivist definitions as being part of the *explanandum* for the sociology of law (Norrie 1998c: 726). Although critical, this understanding is founded on the same legal positivist idea of law, viewed either internally (what positive law is) or externally (what positive law does). In his thesis, Åström also conceives of decision-making within the social

services as following one of two rationalities: norm-rationality or goal-rationality. Åström claims that in practice,"[it] is an empirical matter regarding to what extent decision-making really follows the norm-rational model or if the goal-rational model controls the actual decision-making" (Åström 1988: 36). This is reminiscent of *Theses on Feuerbach* where Marx writes that whether objective truth is possible or not is "a practical question" (Marx 1969). Still, whereas Marx in the legacy of Hegel, saw objectivity and subjectivity as different instances of the same movement, Åström in his doctoral thesis, I argue, seems to have adopted a perspective on norm-oriented (objective) and goal-oriented (subjective) decision-making, as neither a dialectical nor a dichotomous process. Rather, he seems to conceive of decision-making as a process in which two models of norms are created in parallel and where the one model may gain prominence at the expense of the other.

Later on, Åström has explained that his model should not be taken as a claim that legal and social practices develop in strict autonomy from each other. Instead, Åström understands these practices as interwoven in a complicated way. There is no way to predict with certainty that one kind of norms will create one typical kind of decision-making. On the other hand, when legal rules are implemented, the process takes place in a specific social context with its own specific social practices. This process, in turn, is developing in parallel with other social contexts with *their* specific social practices. These contexts and practices are thus operating fairly autonomous from each other. (Åström 2013)

> We do not want to get trapped in the so-called 'gap' problem, the gap between law in books and law in action. The work of Pound has been of great importance to identify the problem (…). However, I agree with Nelken (1984) that the use of the concept 'living law' rather than Pound's concept of 'law in action' opens up for a more sociological understanding of law. (Åström 2013: 71-72)

Ehrlich's concept of living law does possess a recognition of previously unrecognized law, but it is still a dichotomous understanding of law as either formal or "living". Åström sees a problem with this understanding: "we do face a problem researching implementation of legal interventions in social life if we want to separate legal norms from social norms" (Åström 2013: 72). Drawing on Svensson (Svensson 2013), Åström points out that although legal norms have specific characteristics which separate them from social norms, the two

categories constantly influence each other in a way that makes it hard to distinguish what lies closest to the law – an administrative court decision or a social welfare agency decision. It is also, Åström claims, not unusual that legal decisions are motivated with reference to social norms. Åström argues that, in the case of welfare law, it is not possible to study its implementation and effects without also considering social factors. (Åström 2013)

7.1 The Analysis Model of Legal Regulation (AMLR)

In his work, Åström has applied the analysis model of legal regulation (AMLR; my abbreviation), a modification of an original version first elaborated and presented in 1984 (Hydén et al. 2008), to analyses of legal norms regulating the Swedish welfare system (figure 1).

Figure 1: The analysis model of legal regulation (AMLR) (Åström 2013)
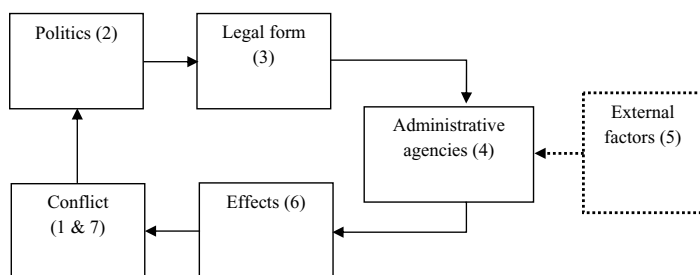
The first step of AMLR involves the identification and understanding of a social conflict and to, empirically and theoretically, gain knowledge about this conflict. The second step consists of describing and explaining how this conflict is handled politically. The policy that is generated in the second step is transformed into legal norms through legislation. This is analysed in the third step of AMLR. In the case of administrative law, not least welfare law, an agency or organization is needed to implement the new legislation in the practice of social work. The implementation of the legal norm is analysed in step four. The effects of the legislation – intended or unintended, manifest or latent – are studied empirically in the sixth step. Finally, in the seventh step, the circle is closed and we may ask ourselves: did the legal regulation contribute to the solving of the social conflict identified in step one? In order to acknowledge the existence of social reality outside of the seemingly closed legal

system depicted in AMLR, the model has been supplemented with a fifth step in which "external factors" and how they influence the process of legal regulation are analysed.

7.2 Thinking Dialectically of AMLR

Now, compare AMLR of legal regulation to the diagram of Bhaskar's dialectic process of absenting absences[3] (figure 2). Bhaskar describes dialectical theory development as the pulse of freedom, a multi-dimensional movement in which absence, or more specifically, the act of absenting, is fundamental (Bhaskar 2008).

> Absenting processes are crucial to dialectic conceived as the logic of *change* – which is absenting. Absenting absences, which act as constraints on wants, needs or (more generally) well-being, is essential to dialectics interpreted as the logic of *freedom*. And the whole point of *argument*, on which dialectic has been most traditionally modelled, is to absent mistakes. (Bhaskar 1998: 592)

Bhaskar's dialectical movement involves four *moments* of theoretical development, as illustrated in figure 2.

Figure 2: Diagram of Bhaskar's dialectical process of absenting (Bhaskar 1998)
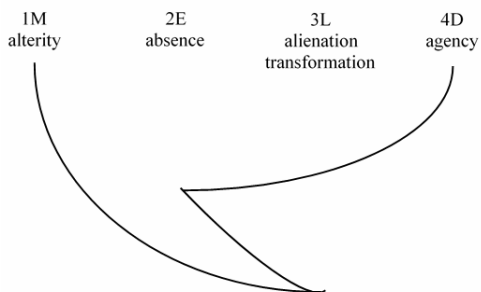
At the first *moment* (1M), we find alterity, i.e. the state of being different (or "otherness"). Theories at 1M possess neither identity nor agency, they are non-concepts, and thus call for the dialectization they receive at the second

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[3] Absence, here, should be understood in the same sense as „non-identity".

moment, the *edge* of absence (2E). In this second moment, non-concepts being absent from, for instance, a scientific theory, are disclosed to the world as concepts (through absenting absence)[4]. As such, the moments 1M and 2E could, at least thematically, be likened to the first step of conflict in AMLR.

The disclosure of the scientifically unknown creates theoretical contradictions at the third moment, the *level* of alienation (3L), "which can only be remedied by a resort to a greater totality, e.g., a fuller, deeper, wider or more complete scientific theory" (Bhaskar and Norrie 1998: 563). At the third moment, absenting absences causes either an "alienating detotalization or split-off resulting in a fragmented impotent self" or a "transformative totalizing praxis absenting the split" (Bhaskar 1998: 593). The point here, as shown in figure 2, is that the dialectic movement does not stop in the event of alienation at 3L, but calls yet again for dialectization. Dialectic is movement, the scientific experience of change in open systems (Bhaskar 1998). Thus, theories conceptualizing about law as a closed system of positive decisions leave no room for dialectically conceived change; it is theoretically impossible. Or, as Luhmann himself puts it, "the concept of positivity is theoretically inadequate. It may be adequate in the context of reflexive theories of the legal system; however, when applied in a scientific context it lacks connection to other theoretical concepts" (Luhmann 2004: 76).

The third moment (3L) in Bhaskar's diagram can be compared to the fourth and sixth steps in AMLR, in which the legal norm is implemented in an administrative social welfare agency, followed by an analysis of how well the legal regulation functions in practice. This is also where we, Åström claims, would discover whether there are other norms (entering as external factors), which affect what comes out of the administrative system in question. It is now that we can make conclusions from what we empirically have found and thence refine our theoretical points of departure. But also Åström's *seventh* step is entailed by Bhaskar's third moment. The "split-off" or, conversely, "new praxis" is represented in Åström by the possibilities of either a social welfare system in harmony, thanks to the new regulation, or a sustained or even deeper conflict as a result of an insufficient or misguided and inefficiently implemented legal regulation.

Back to Bhaskar's diagram; in the event of the transformation of a new praxis at 3L, this is the result of "new philosophical accounts of reason, rationality

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[4] It is important to logically distinguish non-concepts that do exists from concepts that do not exist. In dialectics, the historical dimension is essential. Concepts are ideas, but not absolute ideas in the Hegelian sense. They have been formed by history and social context. Scientific concepts are therefore much better to conceive of as discoveries rather than scientific epiphanies (even *Eureka!* has a history).

and phronesis (practical wisdom), and which then leads to the fourth dimension (4D)" (Bhaskar and Norrie 1998: 563). Here, at the fourth moment of the dialectical movement, the unity of theory and practice *in practice* finally occurs and the initially *alteritist* theoretical concepts receive recognition and agency.

Although the process of AMLR bears some resemblance to Bhaskar's dialectical model for theoretical development, Åström's model lacks the equivalent of Bhaskar's fourth moment, the moment of agency. There simply is no place for agency in AMLR. As Åström himself, straightforwardly, points out, "[the] model of legal regulation (…) does not pretend to explain social reality" (Åström 2013: 73-74). Åström's intention is to provide us with a theoretically grounded practical tool for the understanding of how legal norms can be instrumental in generating social change in policy-driven and norm-rational welfare organizations. Social reality does not deterministically follow the same linear (*and* circular) chronology of the model, which merely maps out the order of the analytical steps for empirical investigation. There is always the risk, however, that this order will also be interpreted as the order of the actual social reality by those who apply AMLR in their research.

Indeed, since the focus lies on *legal* regulation, AMLR remains, overall, legally sealed and restricted for analyses of administrative systems. The fifth box hints to us that there is a world outside of the legal system, and which influences what happens on the inside; Åström's empirical investigations support this as well (Hydén et al. 2008; Pavlovskaia and Åström 2008; K. Svensson and Åström 2013; Åström 1988; Åström and Werner 2002; Åström 2004, 2013). Thus, the model accomplishes what it sets out to do while, at the same time, the major bulk of the model's surrounding social and historical context is reduced to a factor x, *leaking in* to the social welfare system, to paraphrase Dahlstrand (Dahlstrand 2014).

8 Applying AMLR Dialectically: The Case of EU Migrants in Sweden

Unfortunately, when social, spatial and historical factors are placed in the marginal of a circular, closed system, there is a risk that the kind of social conflicts that the social welfare system was originally designed to address slips through the social safety net. Furthermore, as it happens, another theoretical model will be necessary to explain *why* these slips occur.

Consider, for instance, the situation for the so called EU migrants, many of

which are of Roma origin, that currently reside in several Swedish municipalities, living in tents, cars or trailers. Despite the conditions the migrants often live under and their apparent lack of social security, the social welfare authorities are generally at loss when it comes to figuring out what they *can* do to help this vulnerable group while, at the same time, resting comfortably on Swedish laws and policies regulating what they do not *have* to do. Since, from a legal point of view, the social services are doing nothing wrong, positivist legal theories will not help us at this stage. All is well in the kingdom of law. The poststructuralists, on their part, certainly recognize the *otherness* of the migrants and are prepared to grant them agency as fellow citizens. But linguistic deconstruction alone will not dismantle the very *real* structures of the Swedish welfare system. (Bhaskar 2011b; Norrie 1998b)

8.1 Breaking the Spell of Externality

If we, in spite of Åström's caution, would allow ourselves to use AMLR as a map of social reality anyway, it would hypothetically grant EU migrants a kind of backdoor access to the system, i.e. in the shape of "external factor". This possibility is probably a fairly accurate illustration of how the Swedish social services are currently handling the EU migrants' situation. Unfortunately, in Åström's model and assumedly likewise in reality, the case of the EU migrants never proceed from the supplementary fifth step. Neither does AMLR present us with a path in/way out; nor a strategy for system access, communal agency beyond the status of "external factor" and, ultimately, freedom (Bhaskar and Norrie 1998). The EU migrants are not a cause for an effect – they are an external non-factor. They live under the spell of externality as they are not included or granted the same rights as other free citizens of the local community.

This outlook is bleak, to say the least. But with a dialectical approach we would find that there are other supportive social institutions of importance, other than the administrative, policy-driven welfare agencies. Non-profit and non-governmental organizations (NGOs) have been formed around Sweden with the purpose of helping migrants to find shelter, apply for jobs, see a doctor, receive legal assistance, contact and communicate with authorities, send their kids to school, influence politicians, as well as guarding migrant camps and shelters to protect migrants from hate-crime. These NGOs have managed to make a difference, not only for the lives of the migrants, but some NGOs have also been quite successful in influencing authorities on a local level to do things differently (as will be briefly illustrated in the concluding section of this chapter), without violating the rule of law. These NGOs, as part of civil society,

influence the social welfare system, perhaps more than the model of legal regulation detects.

Remember Bhaskar's constellational identity which implicates that the idealist side of an identity embraces the materialist side whereas, at the same time, objective materiality is a prerequisite for the realization of subjective idealism; i.e. the social structure is simultaneously permeated by and serving as the backbone for the surrounding idealist vision of the good society (Bhaskar 1998; Norrie 1998c, 2009). The NGOs are influencing, perhaps in some cases even leading, the ideological progress of the social welfare system when it comes to the welfare of migrants. But practical change, i.e. *real* new praxis, for redistribution and administration of rights and resources, absenting the absence of EU migrants from the social welfare system, can only be accomplished by change within the system structure itself.

8.2 Opening up AMLR

To conceive of AMLR in a way in which more weight is given to the influence of external factors, could lead to a modified model such as the one shown in figure 3. Here, AMLR's fifth step of external factors has not only lost its place in the linear chronology but has also been let loose analytically. In the modified version, the external factors should be understood as *ideological difference*, situated all around the structure of the administrative system. There is no point in placing the external factors specifically between step four and six; ideology affect structure on *all* levels.

Figure 3: Modified analysis model of legal regulation (AMLR)
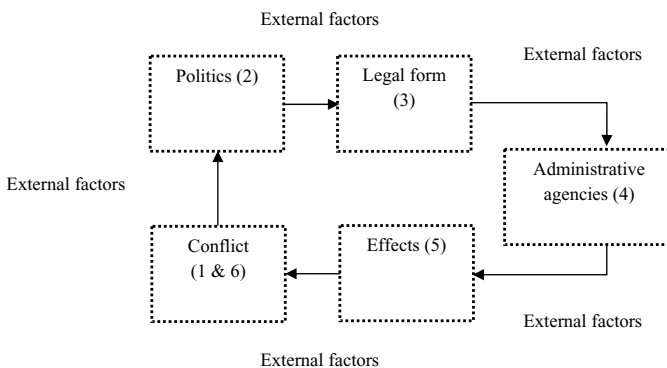
The modified AMLR can be elaborated further. For instance, to abandon the "circular linearity" of the model, in favour of a dialectical movement instead,

could broaden its scope even further. Of course, politics always precedes new legal norms in the legislation process. But viewed as a social institution and as a power structure, situated in a specific historical and spatial context, observed effects (5) does not necessarily have to circle all the way around in the modified model before being acknowledged and corrected on the administrative level (4). It is also important not to retreat to an all in one basket kind of theory where all categories dissolve. Dialectical theory development is not about eradicating concepts but about merging those that work with newly discovered ones (Bhaskar and Norrie 1998).

AMLR focuses exclusively on those social conflicts that attract the attention of the law. All other social conflicts, structural and ideological alike, are left out, though they obviously still exist. By acknowledging, all at once, possibilities and limitations, identity and alterity, difference and structure, not as dichotomies or constraints, but as elements of the same infinitely transformative social, historical and spatial totality (law included, of course), would open up for scientific and social progress even more.

9 Concluding Anecdote

In a Swedish town, the public servants of the local public administration departments were approached by a NGO working with the aim of improving the living conditions of EU migrants. The NGO put the pressure on the public servants by, figuratively speaking, offering to do the "idealist part", if only the local public authorities would provide the "structure" in the project of giving the migrants the basic support that they are legally not entitled to. This forced public servants and politicians, with very different fields of competence and responsibility[5], meet and discuss what to do, how to do it and who should be doing what. Existing legal norms and practices had so far obstructed the public servants from taking real action intended to improve the situation for the EU migrants. Representatives from the police participated in the meeting and within a couple of hours the first steps towards a concrete action plan were taken; not in the form of informal, verbal promises, but as an actual intention of creating new policy. This involved an agreement between the local government and the NGO that approached the public servants in the first place.

Indeed, dialectical critical realism is by nature normative (Bhaskar 2008),

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[5] The mayor's office, the social service department, the school department, the department for roads, parks and other public places, the department for sports and leisure, and so forth.

not in the sense that the final answer is on beforehand given or afterwards absolute, but in the sense that dialectical movement demands a normative direction. However, the intention of closing the chapter with this true story has not been to demonstrate how dialectics can solve the problem of borderless poverty and discrimination in the EU. That is, first and foremost, the responsibility of our elected politicians. Instead, the intention was to illustrate, with the use of an empirical example, how real social conflict and real social change are not taking place in closed systems. Progress always occurs in a socially and historically situated context. And even if normative formal systems serve as the context's backbone, they are also part of and dependent on that context. Karsten knows this. His and others' valuable contributions to the sociology of law, together with approaching society critically, realistically and dialectically may prove very fruitful for the discipline in the future.

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