“A Passage to ‘India’: Toward a Transformative Interdisciplinary Discourse on Law and Society”

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A Passage to "India"

Toward a Transformative Interdisciplinary Discourse on Law and Society

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Today—it cannot be denied—there is no Alexander the Great. There are indeed plenty of those who know how to murder...but no one, no one can lead the way to India. Even in those days the gates of India were beyond reach, but the royal sword pointed to where they stood. Today the gates have been carried off to some quite other, remoter and loftier places; no one shows the direction; many hold swords in their hands, but only to brandish them, and the eye that tries to follow them grows confused.

Franz Kafka, *The New Advocate*

Is the sociology of law "an incoherent or inconclusive jumble of case studies", with "no foundation", "no axioms" and "no core" (Friedman 1986, p. 779)? Is it completely futile to define, if not its boundaries, at least its universe of discourse (cf. Fitzpatrick, 1995)? Is it doomed to remain the highly fragmented field of study, which continues to develop in what appears to be a disorderly and non-cumulative fashion (Nonet and Selznick 1978, p. 2)? Finally, how is it to gain "the fullness and depth of insight and analysis which comes from a specific disciplinary tradition" (Galligan 1995, p. 2)? Such questions formed the basis of a paper on the paradigmatic deficiencies of the sociology of law, which I published in *Retfærd* three years ago (Banakar 1998a) prompting critical replies from some Nordic scholars (see Thomas Mathiesen 1998, Håkan Hydén 1999, Jørgen Dalberg-Larsen 2000, Inger-Johanne Sand 2000, Hanne Petersen 2000 and Anne Hellum 2000).[1]

My original argument was predicated upon the assumption that the sociology of law was a fragmented field of study. This point demands some preliminary clarifications. Mainstream sociology appears to be a rather fragmented field itself as regards its methods, theories, and subject matter. It is then, perhaps, only to be expected that the sociology of law, which is theoretically and methodologically dependent on mainstream sociology, becomes also theoretically fragmented. However, this conclusion ignores the fact that sociology has, despite its theoretical fragmentation, produced a number of 'fundamental paradigms'—such as social-facts, social-definition, and social-behaviour (cf. Ritzer 1975)—which guide its development in a more systematic fashion, and which are as yet not reflected fully in the sociology of law. The soci-

1 I am grateful to Johanna Niemi-Kiesiläinen and the anonymous referee of *Retfærd* for their helpful comments and suggestions on the initial draft of this paper. Thanks are also due Jørgen Dalberg-Larsen, Håkan Hydén and Mikael Pyka for commenting on its earlier drafts.

ology of law borrows and uses the theoretical insights of these sociological paradigms, but has not succeeded in transforming them into socio-legal paradigms of the same sophistication. *Hence, the notion of fragmentation is used here as part of the method of identifying those aspects of the sociology of law which hamper its theoretical, and subsequently interdisciplinary, development.*

In the following pages I intend to reflect on the debate, which followed the publication of my paper and address some of the objections, which were voiced. This paper is not, however, a 'reply to my critics' type of effort, but a modest attempt to employ some of the critical views which emerged out of the debate in a constructive fashion. The ultimate aim of this exercise is to take the debate on the crisis of the sociology of law to a higher level of sociological analysis. I shall, at the same time, avoid sliding into a sectarian debate over the "right way" to define, or conduct, research within the sociology of law. I strongly believe that the sociologists of law should study what they like in the way that they like. Having said this, I also think that the precarious disciplinary standing of the sociology of law and its erratic academic relations with law and sociology already places a number of constraints on the sociological studies of law. To uncover these constraints and highlight their consequences for socio-legal research we need to critically re-examine the scientific standards and the disciplinary standing of the field. We also have to recognise that the freedom to do research as we like is dependent on whether or not the sociology of law has reached a certain degree of disciplinary maturity and can sustain a certain standard of scholarship. Expressed differently, the endorsement of the idea of the freedom of research should not delude us into subscribing to a tacit understanding of the sociology of law as a field of research in which 'anything goes' or in which we may 're-invent the wheel' time and again.

What follows, aims to examine some of the objections raised by Mathiesen, Hydén, Dalberg-Larsen and Sand. I shall abstain from directly responding to Hanne Petersen's and Anne Hallum's papers because, although they claim to be commenting on my original paper, they do not address any of my implicit concerns. These will be attended to in the first part of this essay, paving the way for a new attempt to re-examine the sociology of law. In the second part, the notion of inside/outside dichotomy, which was central to my previous discussions in 1998, will be developed further. At the same time it will be suggested that *one* way of containing the tension, which causes the fragmentation of the field, is to adopt a reflexive 'matrix' for the sociological studies of law. The notion of matrix is used here in the broadest sense of the term, to identify the interdisciplinary parameters of a transformative theoretical discourse, capable of guiding some of the general features of the socio-legal analyses, debates and concerns without dictating their ultimate form or outcome. The matrix also aims to take the concerns of the sociology of law beyond the limits of the inside/outside dichotomy.

It should be emphasised at the outset that the matrix *is not a theoretical perspective and is not intended as an adequate or the ultimate general theory of law and society.* The Matrix is neither "the royal sword" nor does it map the route to "the gates of India". It

only suggests reasons for keeping the vision of "the gates" alive. It is an invitation to a one-way journey, whose destination only can be negotiated once the journey is undertaken.

1. The Critique

Let me begin by briefly commenting on Hydén's contribution to this debate. Reading Hydén's comments, I became aware of the fact that some of my main arguments had missed their intended targets, causing a range of misunderstandings. Lack of space does not allow me to address these one by one, but let me give one example concerning my examination of the epistemological tension within the sociology of law, which lies at the heart of my article. My aim was to demonstrate the significance of epistemology in producing the fragmentation of the socio-legal field, but Hydén understands something very different by it because he writes: "If there is too much sociology the lawyer repels and if there is too much law the sociologists are confused" (Hydén 1999, p. 72). As to how my discussions on epistemology could be reduced to personal views of "confused" lawyers or "confused" sociologists is beyond my comprehension.

Having said that, Hydén makes an important point by arguing that legal science represents only one feature of the judicial system (Hydén 1999, p. 74). Because of my attempt to examine the theoretical state of the sociology of law in the light of its *disciplinary* standing, and above all *vis-à-vis* the discipline of law, legal science did, arguably, loom large in my previous discussion. Moreover, I compared sociology with legal science to illustrate the existing contrast, and subsequently the tension between, the internal views of the law and the external perspectives on the legal system. This rather *ad hoc* approach, when taken out of the context in which it is used, gives the impression that I placed "the entire legal system in the same basket" (Hydén ibid., op. cit.). To avoid any further confusion of this type, I shall distinguish between forms of legal knowledge and legal practice in the second part of this paper and suggest a theoretical approach capable of distinguishing between the different realities of the law as perceived by laymen, policymakers, academic lawyers, clients, practitioners of the law, etc (also see Banakar 2000 and 2001). This will also help us to distinguish between the various institutional features of the law.

The main thrust of Hydén's argument is, however, towards expounding his *normvetenskap*, which is an action theoretical construct based on an understanding of norms in terms of will, knowledge, and opportunity (Hydén 1997, p. 78). In principle, I welcome Hydén's efforts to develop a general theory of norms, but argue that, in its present form, his model (Hydén 1999, p. 74) fails to demonstrate *how* its various elements are causally interrelated. Hydén seems to imply that his model is to be used as a "screening device" to structure research, but ignores that even such a device requires to demonstrate its analytical viability and provide reasonable support for its underlying theoretical assumptions, before it is applied to the study of socio-legal problems. Another related problematic feature of this model is to be found in its non-recursive notion of action, i.e. the action which is produced by the system devised by Hydén does not feed-back into, or affect,

the reproduction of the system. This non-recursive quality of Hydén's model gives a *static* appearance to its central elements. Moreover, even if this model is developed further, it could not embrace the socio-legal field in its entirety as Hydén seems to imply when writing that "sociology of law is a science of norms" (Hydén 1999, p. 76). At its best, it would become one approach or a perspective amongst many.

Quite apart from Hydén's reading of my paper, one of my main objectives was to investigate why, despite the fact that many socio-legal scholars are versed in both sociology and law, the overwhelming majority of the research conducted in the name of the sociology of law is done either extraneously to law, focusing on the interaction between law and other social factors, or internally to law, paying only lip-service to some sociological theories. Furthermore, I was alarmed by how little, many of the discussions, which have preoccupied social theory over the last two decades, have penetrated the socio-legal field. Socio-legal researchers often make references to Habermas, Giddens, Bourdieu and others in their research, but seldom stop to examine the consequences of the macro/micro debate or the structure/agency controversy for how they *de facto* view, perceive, and describe the legal phenomenon, or how the law internally constructs its visions of society.[2] For this reason, following Alan Hunt (1976), I called attention to the fragmented make-up of the socio-legal research, arguing that this fragmentation hampered attempts to build upon the accomplishments, or alternatively learn by the mistakes, of others and, thus, was among the factors impeding the disciplinary advance of the field. Moreover, I suggested a *number* of fundamental paradigms, which could potentially, place socio-legal research on a more secure footing, increasing the cumulative theoretical efforts within it and, subsequently, enhancing its development. In retrospect, this suggestion was badly expressed, which might explain the fact that many of the critics interpreted it as advocating theoretical autocracy.

This brings me to Mathiesen's commentary (1998), which, although focusing on my claim that theory in the sociology of law finds itself in an underdeveloped state, nonetheless ignores my arguments against the dominance of structural functionalism and my painstaking attempts to bring to light the need for enhancing the interpretive modes of analysis within the socio-legal field.[3] As a result, he goes on to interpret my views as a call to establish a unifying paradigm, which would restrict the diversity of views within the socio-legal field.

2 Since the 1960s many sociologists and social theorists have tried to devise a theory which can conflate agency and social structure (or system). Giddens's theory of structuration, Habermas's theory of communicative action and Bourdieu's concepts of "habitus" and "field", all seek to highlight what constitutes the link between social structures and systems on the one hand, and social action and agency on the other. These questions (as Hydén's theoretical scheme demonstrates only too well) have not yet become the focus of our conceptualisation of the law, a fact which to me indicates *inter alia* the theoretical poverty of modern sociology of law.

3 The omission of the fact that I am not proposing one dominant paradigm for the sociology of law is also indicative of the Sand's reading of my paper.

This allows Mathiesen to dismiss the project of the paper as a step towards establishing a theoretical dictatorship. Then he goes further to celebrate what I described in my paper as the paradigmatic deficiency of the socio-legal field, calling it the source of a "freedom" which is denied us by both law and sociology. It is, according to Mathiesen, the freedom from being rooted in one place, which gives a sense of belonging, at the expense of the possibility to move freely (Mathiesen 1998).[4]

In this respect I believe that Mathiesen is in agreement with Dalberg-Larsen (1999), who regards my approach to the sociology of law as a pessimistic one and, despite his positive evaluation of legal pluralism, warns against a situation in which one or a few paradigms rule the field. In contrast to the emphasis I placed on the poverty of sociological theorising on law, Dalberg-Larsen highlights the wealth of theory in the field. Furthermore, and I believe this to be the crux of Dalberg-Larsen's argument, he maintains that it is important that some sociologists of law approach and study the law from what is primarily a legal point of view. I would gladly agree with Dalberg-Larsen's emphasis on the need to study the law from within if by this he means to conduct *sociological* studies of the law in the legal context. This point, I believe, begs closer scrutiny.

Sociology of Law's Three Stages of Development

I think that Dalberg-Larsen would agree with me that a sociology of law, which conducts its discourse in isolation from legal practice and jurisprudence—by, for example, focusing exclusively on the interaction between law and its social environment—fails to register the concerns of the law, thus providing a one-dimensional image of the law. I venture to suggest further that Dalberg-Larsen would also concede that a sociology of law, which exists merely as an auxiliary to legal science, i.e. as a tool for gathering and analysing legally relevant "empirical" data, is a redundant undertaking incapable of making a valuable intellectual contribution to law or to social theory. Finally, I hope that Dalberg-Larsen accepts my argument that the sociology of law, which we should be seeking, is an enterprise capable of capturing the richness and diversity of social theory, while satisfactorily addressing the concerns of the law without necessarily endorsing or falling prey to the assumptions or values intrinsic to legal positivism. In other words, our enterprise should not only be truly interdisciplinary and diverse in its approach to law and society, but it should also be transformative. Taking into account the epistemological tensions in the field, which cause difficulties in matching legal and sociological knowledge, our task may be defined in terms of the paradox of devising a research tradition, which translates the claims of legal discourse into sociological language without loss of meaning.[5]

4 Mathiesen's defence of pluralism against the demands for greater theoretical coherence can also be examined in the light of postmodernism's anti-foundationalist approach, which rejects the possibility of totalising knowledge and absolute truth.

5 For a discussion on the problematic character

Let us now compare the current state of the sociology of law with the vision of things to be. The traditional approaches of sociology to the study of law, which investigate legal phenomena from a point of view extraneous to the law and focuses on the interaction between law and other social factors, is the most developed feature of the field. This traditional type of research stops short of taking "the final and logical step from sociology into law," leaving the black-letter or substantive aspect of the law intact. As a result "most legal academics feel able to dismiss sociological studies as peripheral to the 'real' nature of law as an activity of heightened academic, textual reasoning" (Morison and Leith 1992, p. 155). A classic example of this stage is to be found in the studies of the effects of the social background of judges, juries, and advocates on their legally relevant behaviour. Another is the quantitative analysis of litigation tendencies. These studies, conducted extraneously to law, pledge their allegiance either to law (functioning as an auxiliary to legal science) or to sociology (pursuing the study of the law in an attempt to resolve problems central to social theory). In either case, however, legal practitioners and academics alike view the results as marginal to law, arguing that they merely reflect law's *social* functions and manifestations, rather than its *legal* "essence" or "truth" (cf. Constable 1994, Cotterrell 1998, Nelken 1998).

In contrast to the traditional research described above, there is a less developed sociological approach to the study of law, which I believe to be what Dalberg-Larsen potentially has in mind and which captures the internal operations of the law by describing and analysing the law from within. Studies of this type constitute a dramatic shift of focus from the study of the relationship between law and society to "the way 'society' is produced *within* 'law'" (Nelken 1986, p. 325). Following the example of the judiciary, the second stage shifts the focus from examining the correlation between the background of the judges, juries and advocates, and their self-perceptions and attitudes, to how their actions are formed into legal practice through the constraints of law. To put it differently, it is a shift of focus from studying legal behaviour in the social context (or the interaction between legal and non-legal factors) to sociologically investigating judicial decision-making in a *legal* context (or a sociological examination of legal behaviour in relation to legal rules, principles and doctrines).[6] This type of socio-legal research should not be confused with what generally comes under the studies of "law in social context" (or contextual studies of the law), where only lip-service is paid to sociology or social theory. The internal perspective advocated here must pledge allegiance to both law and sociology if it is to be qualitatively different from externally conducted sociological analyses and legal studies. This double allegiance brings to a head the problem of incommensurability of sociological and legal knowledge, posing new methodological challenges for the sociology of law.

of the incommensurability of legal and sociological knowledge, see Nelken 1993.

6 Examples of such studies are McBarnet 1981, Paterson 1982 and Morison and Leith 1992.

If we view the traditional studies of socio-legal issues as the initial stage in the development of the sociology of law, then the sociological study of law in its legal context marks the second stage. While the larger bulk of the existing socio-legal research belongs to the first (traditional) stage, relatively few sociological investigations have succeeded in the second stage, where the discourse of sociology is confronted with the discourse of the law. We can go even further and speculate on the possibility of a third stage based on a synthesis of the first two stages. In the final part of this paper, I shall try to examine the possibility of developing the second stage and enhancing the integration of the first two stages by proposing a reflexive matrix for the sociological studies of the law.

Returning to the question of the diversity of views, I admit that both Mathiesen and Dalberg-Larsen make valuable points (which, incidentally, is implicit in my using the notion of "fundamental paradigm" in the plural) by demonstrating the need to safeguard the plurality of perspectives within the sociology of law. Having said that, I still fail to see how the diversity of views *per se* could revitalise the field intellectually and help us to prevent socio-legal research from being reduced to what Abel (1980, p. 826) described, some twenty years ago, as "adding minor refinements to accepted truths [and] repeating conventional arguments in unresolvable debates". Moreover, let us not forget that this "freedom" can be illusory and deceptive, concealing the continued prevalence of what Tomasic labelled the "juristic paradigm" (cf. Tomasic 1987, also see Menzo 1998) on socio-legal research and the theoretical restrictions caused by the conscious and unconscious borrowing of concepts from legal science, and the efforts of over-zealous researchers to be accepted by the legal community, or to satisfy the requirements of policymakers and research agencies which are driven by an instrumental interest in macro features of social regulation (cf. Sarat and Silbey 1988).

Why Are We Lagging Behind?

Dalberg-Larsen's and Mathiesen's rejections of a unifying paradigm is pertinent to Sand's approach, which presents autopoiesis as *the* adequate theory of law and society. Sand maintains that law and society constitute autonomous generalised systems of communication and, thus, the duality of law and society should be accepted as a fact of life by the sociology of law (2000, p. 2). The task of sociology of law then becomes the study of the interaction between these generalised systems. Sand's solution, which is influenced by Luhmann's systems theory, does not directly contribute to my concerns. My original discussion was not motivated by a search for *the* adequate theory of law and society. It was instead a poorly executed quest for a transformative disciplinary discourse or meta-theoretical umbrella capable of encompassing many theories (autopoiesis being simply one perspective amongst many such theories).

Modern rationality might well be, as Sand's 'exegeses' of Luhmann suggests, pluralistic and fragmented (Sand ibid., p. 61). It does not, however, follow that the sociology of law should remain a jumble of more or less unrelated case studies, which often unsuccessfully try to simulate what

the founders of the subject have already accomplished. Neither does it explain why the sociology of law is lagging behind other interdisciplinary subjects such as social psychology, criminology or medical sociology. Criminology, for example, not only is an interdisciplinary subject, but also has an interest in the study of social control, law and legal institutions. Neither the "functional and communicative differentiation of society" and the creation of "communicative systems" (cf. Sand ibid., p. 61) nor "the increased production of knowledge" (cf. ibid., p. 63) seem to have hindered criminology from successfully developing its own specific theoretical corpus and establishing itself as an integral part of the curriculum in almost all law faculties and sociology departments. Furthermore, criminology has an established tradition of textbook writing, which is lacking in the sociology of law. Not only does it have its own numerous introductory theory textbooks, but it also has its own *research methods* textbooks (for examples of such textbooks see Jupp 1999 and Hagan 2001). These methodology texts introduce both students and researchers to the relevance of general methods, and methodological debates for the study of criminological topics. No similar systematic attempt has, to date, been made in the sociology of law.

The question for the future of the sociology of law is not whether Luhmann's systems theory, or any other theory for that matter, can provide us with *the* adequate or ultimate general theory of law and society. Such a question would be sociologically flawed and inconsistent with sociology's multi-paradigmatic make-up. Instead, the question is why the sociology of law has failed where other interdisciplinary subjects, such as criminology, have achieved a *relative* academic success?

What is Special with the Sociology of Law?

Let us take a fresh look at the sociology of law by asking if it has something special to offer which cannot be provided by other subjects, such as philosophy, political science or cultural studies, and research traditions such as critical legal studies. If the answer is in the negative, then our enterprise would have no viable scientific function and we should start considering whether it would not be better to dissolve our institutes and centres for the sociology of law. If the answer is in the affirmative, we must identify the distinguishing features of our field and lay the basis of its future development on them.

Let me start by dismissing what has become the standard justification for the existence of the subject, that the sociology of law (and socio-legal studies) helps us to understand the multifaceted make-up of the law in its social context. This justification misleads us into believing that jurisprudence cannot or will not discuss and understand the law in a social context. Constitutional law has, for example, never been strictly separate from political science, and in fact, has demonstrated as much interest in the "letter of the constitution as its practical application, and in addition to this, the nature of the body to which it was applied" i.e. the state (Timasheff 1974, p. 50). So why do we need sociology to understand the interconnection of law and society? One way to answer this question is to go back to the founders of the sociology of law.

The interest shown by jurisprudence in society and social facts, as pertaining to law and legal practice, is in terms of its own juristic categories, and thus limited to its universe of meaning, the parameters of which are dictated by the scope of positive law. It is one thing to *recognise* that social forces have an impact on law and legal behaviour, as jurisprudence does, and an entirely different one to apply sociology as a tool to develop a new concept of law aimed at *transforming* legal thinking and practice as Petrazycki, Ehrlich and Gurvitch have attempted to do. Petrazycki (cf. Podgórecki 1980 and Górecki 1986), Ehrlich (1936), Gurvitch (Banakar 2001) used sociology to develop and improve the science of law, by introducing a new concept of law designed to challenge the dominant understanding of the law in the West.

What is it that gives sociology a privileged position in this respect, a position which cannot be occupied by, for instance, political science, psychology or philosophy? It is a combination of the following factors: 1) being both analytical and empirical at the same time (which enables it to capture what the analytical methods of philosophy and jurisprudence cannot), 2) being able to focus on both macro and micro social developments (which enables it, on the one hand, to transcend the macro limitations of psychology and, on the other, the micro shortcomings of political science), and 3) being, above all, *reflexive* (thus offering not only what research traditions such as law and economy cannot foster, but also providing the law, its practitioners and its institutions with possibilities which lie beyond the cognitive limitations of the ideology of legal positivism). The notion of reflexivity—which should not be confused with Teubner's reflexive law—is understood here in terms of the dialectic of structure and agency, and self-reflection of knowledge on knowledge (cf. Beck *et al* 1994).[7] It is regarded as a tool which can enable agency to reflect upon, and change structures by unveiling the unthought categories which mould our more self-conscious practices. This reflexive quality of sociological thought is as transformative as it is intertwined with sociology's recognition of the diversity of social life and its attempts to integrate macro and micro levels of analysis. From this point of view, the mission of the sociology of law is defined in terms of its potential to transform the monolithically constructed concept of law, making it responsive to socio-cultural diversity and gender differences.

There is a danger here of exaggerating the potential of the reflexivity of sociological thought over the limitations of legal thought. To avoid this danger, we need to recognise the shortcomings of sociological analysis and thus the limitations of the sociology of law. Sociology, too, understands the world in terms of its own concepts and through its own specific lenses. Furthermore, it is extraneous to law and legal practice, a fact which has prompted some schol-

7 Within the sociology of law Roger Cotterrell is among the few scholars who have made use of the notion of sociological reflexivity in his theoretical work. As yet, however, he has not expressed this in the form of a concrete theoretical model, but only as an argument in support of sociology's privileged position to describe and analyse legal phenomena (cf. Cotterrell 1986, 1998). For a critique of Cotterrell see Nelken 1998.

ars of the field, such as David Nelken (1998), to warn us of the limitations of the sociology of law in grasping the law's "truth".[8]

The above discussion on the accessibility of the law's "truth" and the limitations of sociological thought draws our attention back to the inside/outside dichotomy.[9] The law's "truth" is geared to its internal operations and represents an internal perspective on law. Sociological thought tends to view the law from outside and describe it in concepts external to the law. In the second part of this paper I shall re-visit the question of the dichotomy and, in the light of the arguments above, try to reconstruct it in a reflexive manner.

2. Towards a Reflexive Matrix

In my previous paper, I departed from an examination of the epistemological differences between law and sociology. I argued that since law's perspective on society and social relations is epistemologically different from that of sociology, a fundamental polarisation was caused in the sociological approaches to the study of law. This was further sustained within the sociology of law by the auxiliary academic status attributed to socio-legal research. This reduced the scientific value of the socio-legal research to an alternative strategy for gaining the "scientific stakes" of other disciplines.[10] As a result, the sociology of law is often used by academics with roots in subjects such as sociology, social policy or law in an *ad hoc* fashion to promote their research careers in other disciplines. Therefore, sociology of law runs the risk of remaining a research approach with no, or little, scientific stakes of its own. The question, which remains to be addressed, is whether the epistemological tensions can be redirected and employed in such a way as to enhance the status of the field, whilst maintaining the diversity of views and perspectives within it. Any answer to this question will be necessarily both brief and tentative.

According to Malcolm Waters (1994), there is a theoretical tradition within sociology, which is sustained by developing a set of arguments and debates concerning common questions. Despite the disparity of approaches and answers produced, the disagreements and debates all take place within a common universe of discourse, the contours of which are defined by "four concepts which theory must always address: agency, rationality, structure, and system" (ibid., op. cit, p. xi). For Waters, these four concepts are the foci of theoretical debates and are always mobilised to conduct fur-

8 I have already addressed this topic elsewhere (Banakar 2000) and, therefore, shall refrain from expanding it here again.

9 Another important related topic, which is also further developed in (Banakar 2000), is the interconnection of knowledge/truth and power, which brings to light the institutional roots of our problem, i.e. draws attention to the importance of the institutional make-up and academic standing of the sociology of law for its development. This means that the problem we are dealing with here cannot be conjured away through the assumed power of logical argumentation or sociological theorising alone.

10 The notion of "scientific stakes" is borrowed from Bourdieu 1975. For a discussion on the scientific stakes of the sociology of law see Banakar 2000.

ther theoretical analyses of such substantive issues as power or gender. Thus, although there might exist incompatible and rival sociological perspectives on the same issue, sociology does have a common paradigmatic basis. Using Waters' account of the disciplinary mechanisms of sociology, we can establish that the sociology of law also has a "universe of discourse", though its conceptual parameters have not been developed adequately to demarcate this universe sufficiently. Following in Waters' footsteps, we must isolate the central theoretical notions commonly applied within the sociology of law, notions with the potential to create a common socio-legal universe of discourse. Then, we must search for ways to enhance these common notions.

Looking at the vast amount of research carried out within the field we find a number of substantive strands: legitimacy and legality, authority and domination, the relationship between social and legal developments, the rule of law, social justice and community, legal procedure, law and gender, law and ethnicity, discrimination, legal institutions, legal consciousness, the relationship between law, custom and traditional practices, legal culture, legal profession, conflict, dispute resolution, regulation, discretion, policy-making, policy implementation, compliance, juridification, reification, coercion, social order, social organisation and co-operation are just some of the key-concepts or strands of socio-legal research. These strands are not only interwoven, but they also overlap to a greater or lesser degree. If they were completely exclusive they could not create a universe of discourse. Moreover, they do not by themselves signal any ideological/theoretical preferences. They gain their ideological features through the theoretical approaches of individual researchers.

Turning our attention to the more or less influential theoretical discussions within the field, we notice that there are a number of basic concepts which are frequently employed to analyse these strands. These elements are often borrowed from social theory in general and sociology in particular, and closely correspond with Waters' scheme. The notions of structure, system, rationality and agency (or action) are borrowed from Karl Marx, Emile Durkheim, Max Weber, Vilfredo Pareto, George Simmel, Alfred Schutz, Talcott Parsons and George Herbert Mead. In addition we find a number of other concepts within the sociology of law, such as norm, function and communication, which at a first glance appear to operate as the core concept of analysis. For example, Ehrlich (1936) regarded norms as the basic social component of the law, while Habermas (1996), in his sociological and philosophical treatises on law, emphasises the significance of the application of norms by various institutions. These two concepts, which are hardly alien to sociology, have roots both in legal theory and in social theory. Another notion, which is increasingly used in the sociology of law and can be regarded both as a substantive strand and a core concept, is 'communication' which can demarcate an area of research (such as the Internet or advertising) or it can be used as the basic element of social life, as in Niklas Luhmann's description of social systems and Habermas's theory of communicative rationality. The notion of communication has recently been used even to demarcate

an area of socio-legal research (cf. Nelken 1996). All such concepts, such as norm, function and communication are, however, integrated into Water's scheme as the sub-categories of the core concepts of rationality, system, structure and agency.

To guide and contain the tensions within the field so as to support its theoretical development, we need to intensify its discourse, which comprises the unrestricted application of core notions to the substantive strands mentioned above. One way to achieve this is through a reflexive matrix. Thus, our search boils down to the following question. Is there a fundamental notion specific to the sociology of law that can be used systematically to direct the application of core concepts to the substantive strands? This notion should be able to bring into focus the socio-legal discourse by posing a fundamental problem common to all studies of law in the social context, and thus to bring some form of theoretical continuity to the ongoing discussions in the field. Furthermore, it should possess a transformative quality, which enables it to transcend the limited interest of any researcher or research orientation, but it should not be ideologically charged or impose limits on the application of the core concepts to the substantive strands.

Going back to the discussions in the previous pages (see also Banakar 1998a), we find that there is one feature of the sociology of law, which can provide us with the basic element of the matrix. The most basic problem discussed so far concerns the polarisation of the field, the expression of which can be found in the inside/outside dichotomy and furthermore, reflects the epistemological tensions within the sociology of law. This dichotomy which was previously used to describe the epistemologically distinct approaches of sociologists and legal practitioners to the law should, however, be broadened to represents two realities of the law: one based on the law's internal operations, practices, concepts and perceptions, the other focusing on law's interaction with its societal environment. In this way, the dichotomy would capture the tension between the internal organisation and identity of the law and its external functions, manifestations and representations. By making this dichotomy the main focus of all sociological studies of law, we take one step towards building a matrix for the sociology of law. At present, however, the dichotomy is often used to produce one of the following four alternative orientations:

From Inside	From Outside
1. Using sociology to collect legally relevant data.	2. Investigating the effects of law on society or society on law
3. Legal analyses which only pays lip-service to social theory.	4. Using law as one among many factors used to study the society.

Diagram One

The above diagram also reflects the polarisation of the field. The first and the third orientations are based on a juristic paradigm and, thus, are weak on social theory, while the second and the fourth orientations are essentially concerned with social and policy issues and are wanting in legal

insight. As such, none of them takes both the inside and outside views of the law into account. Thus, as the dichotomy is currently used in many studies (but not all), it neither captures nor canalises the epistemological tensions of the field in a constructive fashion. Consequently, it is often ignored in the theoretical discourses, and with such exceptions as the theory of autopoiesis, few theoretical orientations have attempted to incorporate it in their make-up. The theory of autopoiesis achieves this incorporation by maintaining that the law, and any other social sub-system for that matter, constitutes itself through reducing its *internal* complexity in relation to its environment (the *external* conditions), and regulates its own modes of reproduction self-referentially.[11] The normative closeness of the legal system then becomes a condition for its cognitive openness which, in effect (i.e. taking the claims of autopoiesis at face value), integrates the reality defined from within with the perspective of the system from without. Legal pluralism also possesses much (latent) potential to address the dichotomy in a theoretically fruitful fashion. This potential, however, needs to be guided through an examination of the relationship between law and the state. Since legal pluralism is essentially based on the rejection of the monistic model of law, and argues that a variety of legal orders are formed *inside* and *outside* the state through social processes, then it should be especially prone to a constructive application of the dichotomy.

It is important to note that the dichotomy is essentially an "ideal type" construction and, as such, ignores the existing levels of epistemological tension which researchers will be confronted with. To bring these different levels into interplay and also to safeguard the diversity of research interests, the dichotomy should not be regarded as representing absolute and immutable polar opposites, but should be viewed and described in terms of degrees.[12] A sociologist is more of an outsider to law than an academic lawyer, who is in turn more of an outsider than a legal practitioner.[13] In this sense, the dichotomy is not based on some static notions of epistemological difference, but possesses a dynamic and fluid character. This allows various research orientations to choose different forms of this dichotomy, which will represent various epistemological levels of socio-legal reality, to best suit their specific approach and research problem. In one study, the dichotomy might represent the tension between how the law is conceived and employed by the defence

11 The weakness of autopoiesis is to be found in its inability to account for the relationship between agency and structure. By claiming that 'communication', and not 'action', constitutes the basic element of social sub-systems, Luhmann banishes the agency to the environment of the systems (cf. Luhmann 1986 and Teubner 1993). Moreover, as pointed out by Norrie (1997, p. 166), autopoiesis has not freed itself from the constraints of legal positivism, which means that it does not possess transformative qualities.

12 This paradox is hardly new within the study of religion. Cf. McCutcheon 1999.

13 For Geertz (1999, pp. 38-50) the perspectives of the insider (or the subject) is "experience-near" and different from that of the outsider (an analyst) which is "experience-distant". However, the difference between these two perspectives is one of degree, i.e. they are not polar opposites (ibid., p. 51).

councils (insiders) and their clients (outsiders) while, in another study, the dichotomy might capture the tension which might exist between formal regulation, norms, substantive rules or goals set up by policymakers (an outsider's view) and the everyday working reality of the law from the vantage-point of those who implement those rules and regulations (an insider's view). Even the client's view can be regarded as an insider's view when compared to the way those who are not formally engaged in legal disputes might view the law. The list of such combinations, which in one way or another capture the epistemological tension of the field, is simply endless.

Not surprisingly, the dichotomy is part and parcel of many socio-legal debates (cf. Nelken 1997, Cotterrell 1997 and Friedman 1975, Tamanaha 1997) and legal theoretical discussions (cf. Dworkin 1986, pp. 12-14 and Hart 1979). To give an example, Friedman (1975) introduces the notions of "internal" and "external" legal cultures, which closely correspond to the inside/outside perspectives described here. In Friedman's exposition, however, the relationship between these two views remains unclear (Cotterrell 1997, p. 17). The crux of the problem is how to use this dichotomy to contribute to the resolution of the problem it poses.

One possible solution can be found in constructing a matrix capable of transcending the boundaries of the alternatives shown in Diagram One and, if not integrating, at least bringing into inter-play the various realities of law emanating from the inside and outside of the law. This model should allow socio-legal analysis either to depart from one of the substantive issues in order to develop one of the core concepts or, alternatively, to start with one of the conceptual cores in order to examine one of the substantive problems of the field. Whether the investigation is designed inductively or deductively, or whether it departs from the conceptual cores or substantive issues, it will be mediated through the dichotomy when the matrix is applied. Moreover, addressing the dichotomy enhances the reflexive quality of socio-legal analysis by requiring the researchers to confront the insider's assumptions, interpretations and explanations with the outsider's alternative descriptions of any specific problem. This confrontation questions the adequacy of any one perspective (be it based on inside or outside knowledgeability), encourages the self-reflection of socio-legal knowledge, helps to rethink conventional debates and assumptions and, thus, has the potential to reveal the social relations and interests in the field that are currently taken for granted. Thus, the factors constituting the field as presented in Diagram One should be rearranged as demonstrated by the model below:

The Reflexive Matrix

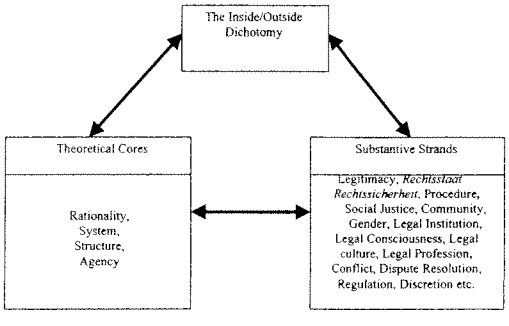

Diagram Two

In short, the above model enables us to address four basic features of the socio-legal field—i.e. substantive strands, theoretical cores, inside and outside realities of the law—simultaneously and in relation to each other. Since it compels us to bring into interplay assumptions belonging to different realities of the law, it also enhances the reflexivity of our research approach making our enterprise potentially transformative.

Examples

Although the matrix has not to date been formally expressed in the general terms shown above, its underlying idea has nonetheless already been applied in various forms within socio-legal research. One recent example of its application can be found in Campbell's (1999) examination of the notion of discretion, in which Giddens's structuration theory is used to bring into focus the tension existing between the legal reality of discretion as it is experienced and conceptualised, on the one hand, in view of the system of legal rules and decisions (cf. Dworkin 1977, p. 31, Galligan 1990, p. 8 and Hawkins 1992, p. 11) and, on the other, against the background of the broader notion of human agency. The internal reality of discretion is often defined in terms of the autonomy of judgement and decision-making in the existing system of legal rules. The notion of agency helps us to transcend this internal view by taking into consideration the extra-legal factors structuring all human action. The internally constructed perspective on discretion as "free choice constrained only by legal limits" is, thus, brought into interplay with an external view of discretion as individual free choice which is perhaps "already collective, ordered, routinised and structured by phenomena other than the law" (Campbell ibid., p. 80). Campbell's analysis may be described by the matrix in the following way:[14]

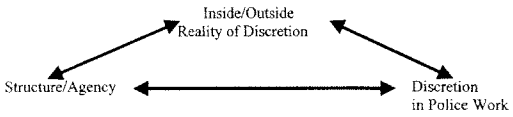

Diagram Three

Starting with the substantive problem of discretion within empirically given structures of routine police work, Campbell goes on to address the theoretical issues of structure/agency by exploring the insider/outsider tension of discretionary powers. All three features of the matrix, i.e. the theoretical core, substantive strands and the dichotomy are in this way described and analysed in relation to each other.

Another example, this time based on my own research experience, is provided by a sociological examination of the Swedish Ombudsman against Ethnic Discrimination (cf. Banakar 1998b). By comparing a number of cases processed by the Swedish Ombudsman against Ethnic Discrimination during 1990 and 1995, I tried to describe how the 1994 Swedish Act against Ethnic Discrimination (AED) functioned in practice. The cases which I used as the basis of my empirical investigation revealed the

14 This is, of course, *my* reconstruction of Campbell's analysis and as such should not imply that Campbell necessarily perceived the process of her investigation in this fashion.

existence of two distinct perspectives on, and the subsequently realities of, the AED: that of the Ombudsman, which was constrained by the terms of reference of its office and the existing body of legal rules and doctrines, which urged him to act primarily as an impartial investigator of complaints, and that of the complainants' view of the Ombudsman as the champion of his or her cause and a legal bulwark against racism, discrimination and social injustice. Although these two perspectives were distinct in their empirical manifestations, they were nonetheless in interaction with one another. The outsider's view of the AED expressed in the complaints which were lodged with the Ombudsman were often based on personal and subjective experience of ethnic discrimination, and neglected the importance of providing evidence of unlawful discriminatory practices, which could stand up in court. This outsider's view constituted the point of departure for the Ombudsman whose actions were constrained by the imperatives of the law and its institutions. This study demonstrated that the social functions and efficacy of the AED had to be based on a model which took into account both these perspectives. Such a model, shown below, was constructed by using Felstiner's theory of conflict resolution and Habermas's theory of communicative action:

Inside/Outside

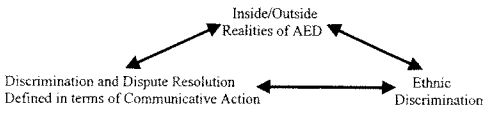

Diagram Four

Another example can be found in Hugh Collins's study of contracts (1999) in which he explores the insight that the way law thinks about contractual relations differs from the framework in which the parties to the contract themselves perceive their relations. Also, R. V. Ericson and K. D. Haggerty's study (1997), which throws light on how the police organises and manages the knowledge of risk, by trying to strike a balance between the external institutional pressures to produce and distribute knowledge in rule-governed frameworks, and the need to elaborate internal communication rule systems in order to be publicly accountable, can be regarded as a study concerned, in its own way, with the application of the dichotomy. Finally, we may venture further and argue that many of the studies of the interaction between formal and informal justice and how, to use Parker's expression (Parker 1999, p. 3), "legalism steals disputes from the control of individuals and communities" are also impregnated with a more or less latent concern with the tension caused by the dichotomy. Such examples of latent concern with the tension between the inside and outside realities of the law can easily be multiplied.

Conclusions

Addressing the dichotomy with the help of the matrix elaborated above provides researchers with a common, but at the same time fundamental theoretical problem, which can be examined irrespective of their substantive concerns or theoretical orientations, bringing about greater continuity to theoretical discussions of the field. Returning to the points made by Mathiesen and

Dalberg-Larsen, the concern with the dichotomy safeguards the diversity of the field without losing sight of the internal operations of the law. Since addressing the dichotomy amounts, in effect, to exploring some aspects of the epistemological conflicts of the field, the matrix will draw attention to the interplay of the opposing interests within the field, and to the need to enhance the scientific stakes of the sociology of law. In this sense, the dichotomy will provide a point of reference with respect to which the universe of socio-legal discourse can be consolidated, integrated and, at the same time, reflexively re-examined.

In order to maximise the reflexivity of this matrix, the type of scholarship which aims at enhancing the scientific stakes of the sociology of law should be promoted. To this end, as I have argued previously (cf. Banakar 1998a), the sociology of law has much to learn from gender studies which have created a discourse which is, in certain respects, more developed than that of the sociology of law, partly by refusing to abide by the restrictions imposed on them by their disciplines of origin. In the same fashion, although the sociology of law should use its parent disciplines as sources of theoretical inspiration, it should limit its dependency on both law and sociology as means of gaining academic identity and autonomy. Such a move towards institutional independence is also intimately related to the struggles to create the specific scientific stakes of the field. At the institutional level, attempts to understand, define and approach socio-legal research as an auxiliary to other disciplines must be discouraged. At the theoretical level, the need to consider and integrate the view of the law from the inside with the view of the law even from the outside must be emphasised. In other words, the legal practitioner's perspective must be integrated with the social scientist's vantage-point on law in a reflexive manner. It also means that a genuine theoretical concern with the dichotomy strives to transcend the duality of law and society.

The reflexive matrix outlined above addresses the need to rethink and transform the field. It should, however, be viewed as only *one* way of answering the questions posed at the outset and does not exclude the possibility of devising other and better means of resolving the problems that these questions identify. Furthermore, the matrix should be placed in the *institutional* context of the socio-legal field. In short, any suggestion to rethink the socio-legal research must also take into consideration the social relations underlying the existing academic interests, scientific authorities and prestige in the field. One should, indeed, expect fierce opposition from those scholars who are either content with the state of the field as it is, or only use the sociology of law in so far as it supports their careers in other disciplines such as law. Notwithstanding this opposition, it is vital to maintain that the sociology of law has an intrinsic value of its own. It can say something about law and society, which neither law nor sociology can articulate by itself. This intrinsic value will not be fully realised as long as the field is sustained as a tool for making careers elsewhere and has not become a discipline in its own right.

References

Abel, Richard L. (1980) "Redirecting Social Studies of Law" 14 *Law and Society Review* 803-29.

Banakar, Reza (1998a) "The Identity Crisis of a 'Stepchild'" 81 *Retfærd* 3-21.

Banakar, Reza (1998b) *The Doorkeepers of the Law*. Aldershot: Dartmouth/Ashgate.

Banakar, Reza (2000) "Reflections on the Methodological Issues of the Sociology of Law," 27 *Journal of Law and Society* 273-95.

Banakar, Reza (2001) "Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jural Experience". Forthcoming in 16 *Canadian Journal of Law and Society*.

Beck, Ulrich *et al* (1994) *Reflexive Modernisation*. Cambridge: Polity Press.

Bourdieu, Pierre (1975) "The specificity of the scientific field and the social conditions of the progress of reason," 14 *Social Science Information* 19-47.

Collins, Hugh (1999) *Regulating Contracts*. Oxford University Press.

Campbell, Elaine (1999) "Towards a Socio-Legal Theory of Discretion," 27 *International Journal of the Sociology of Law* 79-101.

Constable, Marianne (1994) "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of the Law," *Law and Social Inquiry* 551-590.

Cotterrell, Roger (1986) "Law and Society: Notes on the Constitutions and Confrontations of Disciplines," 13 *Journal of Law and Society* 9-34.

Cotterrell, Roger (1997) "The Concept of Legal Culture" in David Nelken 1997.

Cotterrell, Roger (1998) "Why Must Legal Ideas be Interpreted Sociologically?" *25 Journal of Law and Society 171-92*.

Dalberg-Larsen, Jørgen (2000) "Sociology of Law From a Legal Point of View," 89 *Retfærd* 26-39.

Dworkin, Ronald (1977) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.

Dworkin, Ronald (1986) reprint *Law's Empire*. London: Fontana Press.

Ehrlich, Eugen (1936) *The Fundamental Principles of the Sociology of Law*. Cambridge, MA : Harvard University Press. (Orig. publ. 1913).

Ericson, Richard V. and K. D. Haggerty (1997) *Policing the Risk Society*. Oxford: Clarendon Pres.

Fitzpatrick, Peter (1995) "Being Social in Socio-Legal Studies," 22 *Journal of Law and Society* 263-323.

Friedman, Lawrence M (1986) "The Law and Society Movement," 38 *Stanford Law Review* 763-780.

Galligan, Denis J. (1990) *Discretionary Powers: A Legal Study of Official Discretion* (2nd ed.). Oxford: Clarendon Press.

Galligan, Denis J. (1995) "Introduction," 22 *Journal of Law and Society*. 263-323.

Geertz, Clifford (1999) "from the Native's Point of View" in *The Insider/Outsider Problem in the Study of Religion* edited by R. T. McCutcheon. London: Cassell.

Giddens, Anthony (1986) reprint *The Constitution of Society: Outline of the Theory of Structuration*. Cambridge: Polity Press.

Górecki, Jan (1975) ed. *Sociology and Jurisprudence of Leon Petrazycki*. Urbana: University of Illinois Press.

Hagan, Frank E (2001) *Research Methods in Criminal Justice and Criminology* (5th Ed). New York Allyn & Bacon.

Hart, H. L. A. (1979) reprint *The Concept of Law*. Oxford: Clarendon Press.

Hawkins, Keith (1992) *Uses of Discretion*. Oxford: Clarendon Press.

Hellum, Anna (2000) "How to Improve the Doctrinal Analysis of Legal Pluralism" 89 90 *Retfærd* 40-62.

Hunt, Alan (1976) "Perspectives in the Sociology of Law," *The Sociology of Law*. Edited by Pat

Carlen, University of Keele: The Sociology of Law Monograph 23.
Hydén, Håkan (1997) ed. *Rättssociologi: då och nu*. Lund: Department of Sociology.
Hydén, Håkan (1999) "Even a Stepchild Eventually Grows Up," 22 *Retfærd* 71-80.
Jupp, Victor (1999) *Methods of Criminological Research*. London: Routledge.
Luhmann, Niklas (1986) "The Self-Reproduction of Law and its Limits," in *The Dilemma of Law in the Welfare States*. Edited by Günther Teubner.
Mathiesen, Thomas (1998) "Is that Bad to Be a Stepchild?" 83 *Retfærd* 67-76.
McBarnet, Doreen J. (1981) *Conviction: Law, the State and the Construction of Justice*. London: Macmillan.
McCutcheon, R. T. (1999) ed. *The Insider/Outsider Problem in the Study of Religion* London: Cassell.
Menzo, (1997) "Ethnomethodology, Conversation Analysis, and the Sociology of Law" in *Law in Action*. Edited by Max Travers and John F. Menzo. Aldershot: Ashgate.
Morison, John and Philip Leith (1992) *The Barrister's World and the Nature of Law*. Buckingham: Open University Press.
Nelken, David (1986) "Beyond the Study of "Law and Society," *American Bar Foundation Journal* 323-38.
Nelken, David (1993) "The Truth About Law's Truth" in *European Yearbook of the Sociology of Law*. Milano: Giuffre Publisher.
Nelken, David (1996) ed. *Law as Communication*. Aldershot: Dartmouth.
Nelken, David ed. (1997) *Comparing Legal Cultures*. Aldershot: Dartmouth.
Nelken, David (1998) "Blinding Insights? The Limits of a Reflexive Sociology of Law," 25 *Journal of Law and Society* 407-26.
Nonet, Philippe and Selznick, Philip (1978) *Law and Society in Transition: Toward Responsive Law*. New York: Harper Torchbooks.
Norrie, Alan (1997) "Between Structure and Difference: Law's Rationality" in *The Emergence of Law Through Economy, Politics and Culture*. Edited by Roberto Bergalli and Dario Melosi. Oñati IISL: Oñati Papers 1.
Parker, Christine (1999) *Just Lawyers: Regulation and Access to Justice*. Oxford University Pres.
Petersen, Hanne (2000) "Forgoing New Identities in the Global Family?" 90 *Retfærd* 47-54.
Podgórecki, Adam (1980) "Unrecognized Father of Sociology of Law: Leon Petrazycki," 15 *Law and Society Review* 183-202.
Ritzer, George (1975) *Sociology: A Multiple Paradigm Science*. Boston: Allyn and Bacon, Inc.
Sand, Inger-Johanna (2000) "A Future or a Demise for the Theory of the Sociology of Law" 90 *Retfærd* 55-73.
Sarat, Austin and Susan Silbey (1988) "The Pull of the Policy Audience," 10 *Law and Policy* 98-166.
Tamanaha, Brian Z. (1997) *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*. Oxford: Clarendon Press.
Teubner, Günther (1993) *Law as an Autopoietic System*. Oxford: Blackwell.
Timasheff, N. S. (1974) reprint *An Introduction to the Sociology of Law*. Westport: Greenwood Press.
Tomasic, Roman (1987) reprint *The Sociology of Law*. London: SAGE Publications.
Waters, Malcolm (1994) *Modern Sociological Theory*. London: SAGE Publications.

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