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## How to compensate the irreplaceable? A socio-legal research project within victimology about the relation between formal and informal norms

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# How to compensate the irreplaceable?

## A socio-legal research project within victimology about the relation between formal and informal norms

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### Summary

As an ambition to stress the construction of an external and an internal dimension within law I have chosen to study the non-pecuniary damages to victims of crime. The foundation for these damages came from the deep structure of law about the idea that the right to integrity of the human body and soul are one of the cornerstones in the state governed by law. But when it comes to estimating the amount, such that it gives the violated victim satisfaction and eventuality a preventive role, the application of the law becomes dependent on the knowledge about the external and the social norms that the law operates within. Compared with pecuniary or physical damages there are no formal norms from which we can appreciate that kind of damages we called non-pecuniary. This problem would maybe not become a big deal if the matter was not that the loss here is of a normative art and about “ought” related to human rights and the fact that individuals are carriers of these values. If the legal field stresses the closeness of the legal system that gives to a limited space for the possibility of discretion and reason and that undermines both the legitimacy of the law and the right to integrity. But if the external view and the possibility to interpret and create the content of the general sense of justice becomes to wide within the application of the law that will undermine and stress the professionalism of the legal profession but also central goals like predictable decisions. So the challenge is to find the balance that corresponds to the social norms within society and to generate

knowledge about how people react upon the practise when it comes to the amount of damages. Therefore the topic is an example of how empirical facts about the social and political contexts become an important variable within the internal application of the law and how this creates an arena for socio-legal research and in a wider sense a debate about the role of legal decisions within a landscape of existential words like violations, satisfaction or human dignity. My method is both quantitative and qualitative and the aim is to provide both empirical knowledge about the general sense of the compensation to victims of crimes and an understanding of the impression in everyday life especially for victims of crimes through focusgroups.

## Introduction to the field

One of the most characteristic tendencies in Swedish tort law today is the increasing importance of compensation for “non-pecuniary” harms. The traditional restrictive attitude towards a claim for compensation for non-pecuniary damage in both case law and legislation become weaker even if the theoretical and practical reason behind the old exception-construction remains. This reason can best be explained by the thesis of incommensurability when it comes to the compensation for some losses that money cannot compensate. To explain why the exception-construction is problemized in recent days I think two circumstances has played an important role (1) the materialisation of human rights as a consequence of the incorporation of the European Convention on Human Rights in Sweden since 1995 and (2) the right to compensation to victims of crimes and the establishing of victimology in the legal and academic field. In practice there is of course a co-operation between these two factors and there is also some kind of hybrids like the legal interest of for example discrimination. The possibility to obtain redress with this compensation function as a means to support the judicial systems official goal that is to satisfy the citizens’ needs and at the same time secure the confidence and the legitimacy of the judicial system through the factors (1) legal security and (2) the legal rights of the individual. At the same time this compensation brings on inherent risks because of its unclear function and the incommensurability between injury and compensation that risks falling upon both the victims and the lawyer’s profession.

So when human rights has become both a goal and a means for democracy and violations of the citizens bring about a right to compensation this illustrates a paradox. The judicial system cannot handle this type of injury that has its ground in public law without challenging traditional principles and legal professionalism. This tendency is also interesting in a comparative perspective given the premise that the jurisprudence movement known as Scandinavian Legal Realism has had an influence on the Swedish judicial culture. This follows from two circumstances: (1) Given the Scandinavian Legal Realism it is impossible to set up a legal claim from a violation

of justice or somebody's rights and (2) even if it would be possible, it is impossible to imagine the basis of calculation of this compensation because there is no way for informal norms from society to influence the formal legal norms and the application of the law (only the opposite) given the Scandinavian Legal Realism. The last circumstance is relevant because the compensation for non-pecuniary damage consist of incommensurability and the only way to calculate the compensation, such that it serves as rectification or redress for the victim, is through reflection and influence of the informal norms or the "common sense of justice". My topic presupposes that the legal field is influenced by the theory in jurisprudence and can we therefore talk about an idealistic tendency or "critical legal realist" movement that maybe is highlighted in these compensations. In a more concrete perspective this compensation bring to the fore a methodological question in social science of how we can get empirical knowledge about norms in our society.

In Swedish law of torts one would most often distinguish between ordinary financial or pecuniary damages and non-pecuniary damages.<sup>1</sup> Non-pecuniary or non-material damages can also be called compensation for non-financial damage because they do not have any objectively economic value and the loss is not material. These damages cannot be evaluated in terms of money. Instead the loss is some value of normative art like a public concept (*cf.* *ordre public*), such as human rights and therefore interesting to sociology of law with a focus on norms.<sup>2</sup> The law of torts is about personal injury and this article emphasizes the absolutely non-pecuniary damages for violation or injury of personal integrity. When somebody's rights or interests are violated that are protected by law, the question arises as to how to compensate the injury. How the court of law estimates the value of the non-pecuniary damages in tort shall reflect the common or general sense and feelings of justice. These non-pecuniary damages often come up after a violation of personal integrity or human dignity and are therefore in practice an important part of the compensation to a victim of a crime or another grave violation. The damages must reflect the social norms to repair the injury and therefore highlight the need for empirical research as part of norm science in sociology of law.<sup>3</sup> According to the tort liability provision in the Swedish Action on Damages (*skadeståndslagen*), Chapter 2, Section 3, a person who seriously violates another person through a crime involving an assault on his person, liberty, peace or honor, shall compensate the damage the violation involves.

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

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

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

## About this special compensation

Since Aristotle we usually see questions about compensation as one type of concretizing fairness in a corrective way. The aim is to give the injured what is fair or between loss and gain. One of the most characteristic tendencies in Swedish law of torts today is the increasing importance of compensation for these non-pecuniary harms. Typical for “pure” non-pecuniary harms without any physical elements is the so-called infringement damages, which often rest on punishable offences incompatible with the European Convention on Human Rights (ECHR) or the criminal law. The characteristic is therefore the mediate and defence of a fundamental value from the deep structure of the law. But the judicial system has difficulties handling this type of emotive injury, which has its ground in public law without challenging traditional principles in civil law and the legal professionalism as such. The traditional restrictive attitude towards claims for compensation about non-pecuniary harms in both the application of the law and legislation seem to become weaker even if the theoretical and practical reasons behind the old exception-construct remain.

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

In Sweden the term idealistic damages (*ideellt skadestånd*) about non-pecuniary damages has been used since the 19<sup>th</sup> century and the term comes from German idealistic philosophers like Fredrich von Schelling who was interested in the contents of the subject’s consciousness and the “public property” or common knowledge in relation to reality.<sup>5</sup> Non-pecuniary or idealistic damages stem from both the harm to the “soul” as mental suffering and actions that are contrary to our basic values or norms within the context of a complex and reflexive relation. In the Swedish Act on Damages (*Skadeståndslagen*) (1972:207) 2 ch. 3 § it appears that an infringement of one’s person, freedom, peace or honour should be compensated for by the harm the infringement gives. Swedish law of torts has a tradition of restrictiveness about these claims for damages because they do not fit with the ideology of full mending within the law of damages because they are irreparable and they also challenge aspects of both ontology and epistemology in law. Liability for damages is thus linked to certain criminal acts and therefore bridge the traditional distinction between civil law and public law. Can we evaluate a violation of a person or that person’s right to integrity in fiscal terms? If the answer is yes: some tricky questions in epistemology

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4 Hydén, 2008.

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

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

## The relevance of non-pecuniary damages to sociology of law

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

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

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

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

social norms in society, in my opinion. I will also point out that compensation to the victims of crimes also challenges the Aristotelian distinction between distributive and corrective justice because the corrective justice deals with the victim in relation to the offender and distributive justice deals with the rights a person has towards the state.<sup>8</sup> In practice the offender often lacks money and the Swedish Criminal Victim Compensation and Support Authority funds the compensation. The compensation is primarily based on the circumstances surrounding the offender and the perpetrator (the abuse) and as we can see in the figure below, there is a complex mixture of different demands of justice. I have made a figure to give a simplified and lucid picture of these aspects regarding the compensation:

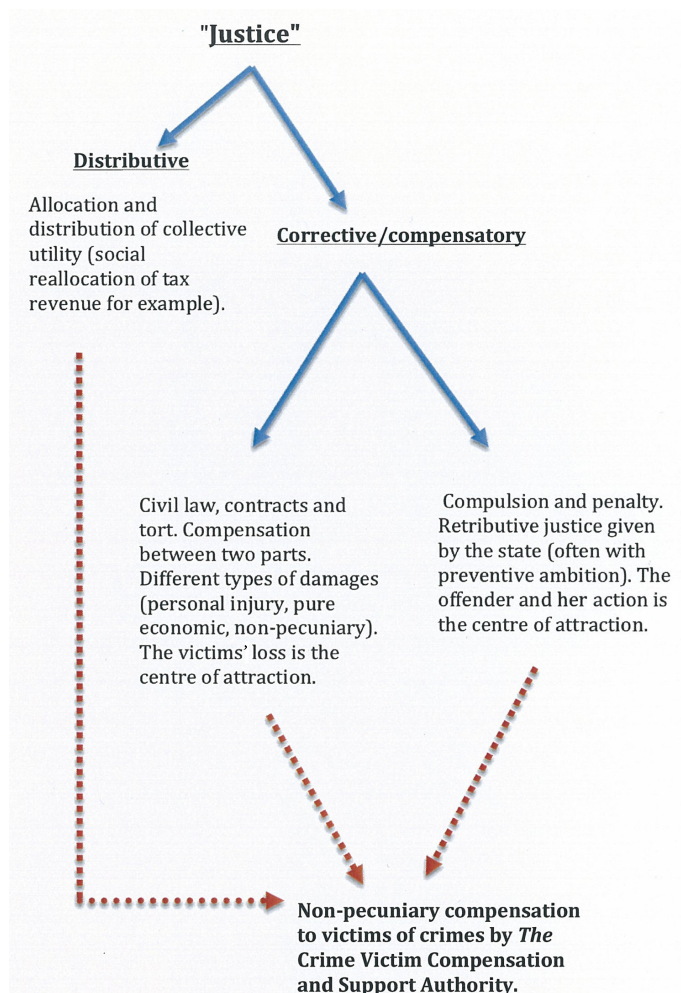


Figure 1

8 Schultz, 2007, p. 155.

The point is that if there are too many different, and sometimes contradictory, elements that create the compensation the ambition to compensate will be weakened. From the victim's perspective, there is an interest of clear reaction and the possibility to survey the situation.

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

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

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

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

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

13 Cotterrell, 2006, p. 83.



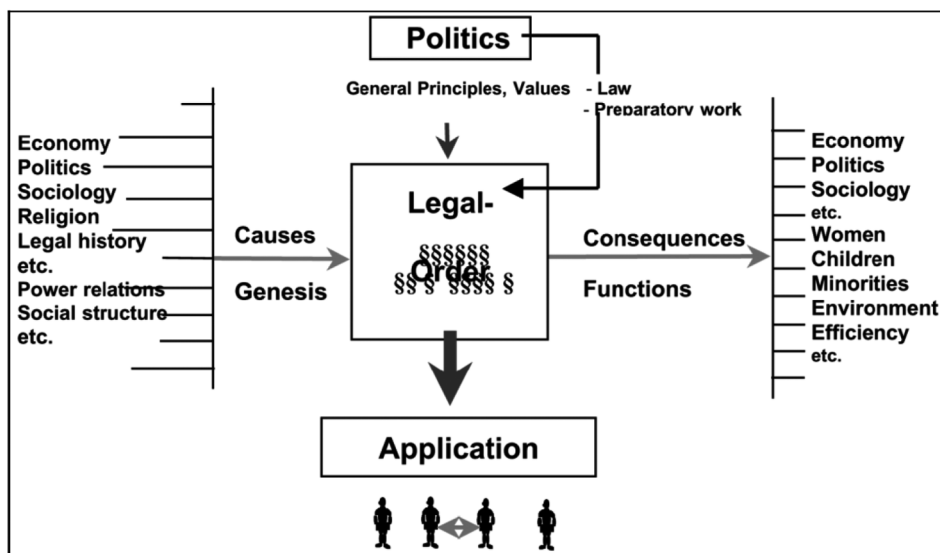


Figure 2 Two perspectives on law – the internal and the external perspectives. Hydén & Wickenberg 2008.

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

14 Prop. 2000/01:68 p. 51.

15 Prop. 1972:5 p. 121. Norms can in this connection be understood as expected acting.

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

## From exception to something else? About the “Swedish model”

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

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16 Prop. 2000/01:68, p. 17.

17 Prop. 1972:2, p. 121. Therefore these damages bring to the fore some aspects of the relation between distributive and corrective justice which goes back to Aristotle.

18 NJA 2005 p. 462.

19 Dahlstrand, 2007.

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

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

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

21 Zamboni, 2004. Banakar, "The Policy of Law: A Legal Theoretical Framework", *Retfaerd*, 2005, No. 4, p. 83. Here a few words about Critical Legal Studies would fit in the context since the movement's theories are of interest to my topic, as ideas that the legal material does not determine the outcome of legal disputes and that, at the end of the day, all "law is politics". In a classical article by Roberto Mangabeira Unger he criticizes traditional legal thought with its self image of objectivism

My thesis presupposes that the legal field is influenced by the contemporary theory in jurisprudence. We can perhaps talk about an idealistic awareness or “critical legal realist” movement that possibly illustrates the increasing importance of these compensations. They show how the process about how the application of law is a product of the consciousness and the intellect of the subject and in that sense dependent on the subject and the context even if the ground for the claim for damages is found in the deep structure of the law and therefore is less dependent on time and place.<sup>22</sup> In a more concrete perspective these compensations bring to the fore methodological questions in social science of how we can get empirical knowledge about norms in our society. Some questions from theory of science can consequently in a sense throw light upon some questions in legal thinking and definitions by legal means.

This presupposes that you get a reflexive approach between legal thinking as a part of jurisprudence and theory of science in general. In that sense you can talk about some kind of discourse analysis of the legal field where the language and communication through legislations and judgements is regarded as social interaction and struggles between different important concepts. I intend to return to this question later. For the moment we can note that the **non-pecuniary damages illustrate the importance of the professional values and bureaucratic principles that the lawyers get from education and doctrine.** It is not hard to consider that these damages are provocative to that institutional context and its practices if law has been described as standardized politics. These circumstances can also describe why professors of law go outside the professional role when they make notes on different claims for compensation and then compare them to love or Santa Claus (!). Accordingly, not only the horizontal perspective is of interest here but also the vertical in the model below. The two descriptions unite how the **non-pecuniary damages makes projections about people’s identity or worth, which is a consequence or function of the application of law that makes sense in a society where media plays an important role as an intermediary between concepts of reality.** To estimate these **non-pecuniary damages in terms of money is an uncertain factor when it comes to the application of the law and therefore the following model is much more open than the traditional one and it represents in a sense the possibility to integrate the two dimensions, the internal and the external perspectives on law:**

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and formalism, Unger, “The Critical Legal Studies Movement”, Harvard Law Review, 1983, No. 3, p. 567ff. According to CLS, legal argumentation neither could nor should be clearly separated from its surroundings, like ideology, philosophy or politics. The application of the law should be changed into a more open debate about basic values within society. SOU 1999:58, p. 40.

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

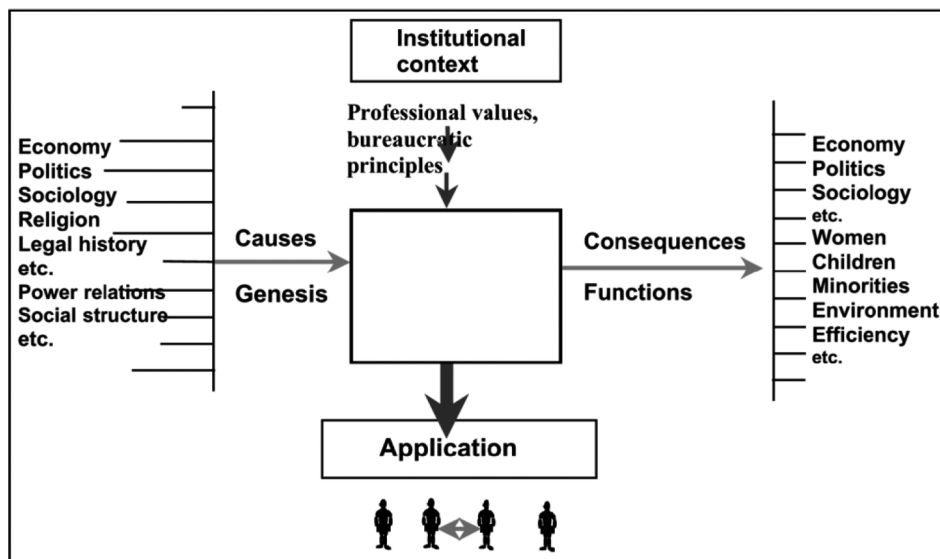


Figure 3 An empirical approach has to start with an empty box, consisting only of institutional actors. Hydén & Wickenberg 2008.

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

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

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

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

Accordingly, we have seen how the **non-pecuniary damages challenge the traditional** division between external and internal perspectives of law because legal dogmatics runs into problems when the law lacks guidance, or norms in the meaning of expectation in relation to the valuation of the damage, when it comes to the application of this law.<sup>27</sup> This situation would not have generated so much interest if it at the same time had not been the central values and norms within the legal system that rose these claims for damages in a form of protecting the human dignity and the rule of law. It is important to understand that this resolving power within the fundamental values in the law is a consequence of connecting a financial amount of damages to somebody's violation, but since this is the order in our legal system and the legal and the political importance and interest of offended victims or members of some minority group increase this condition is relevant. On the other side these vague and context-wrapped damages involve a potential for integration between legal practice and

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

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

26 SOU 1992:84.

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

legal science in a broader meaning including sociology of law and at the same time a break with the normative and discursive closeness and inward looking character of legal dogmatics.<sup>28</sup> And the most sensational is that this potential only presumes that the legal claim is assumed from a protection of the goal of the juridical system, manifested as the individual's needs for protection against violations of the individual's rights and dignity. The sociology of law does not need to convince anyone of the demand for the external perspective here, provided that damages is the remedy after an injury of somebody's rights, because the norms and facts meet in the calculation of the non-pecuniary damage. The internal-external distinction evaporates so to say and I think this is something that makes the application of the law more serviceable. The distinction between internal-external is maybe mostly a law of thought among the theorists that have a restraining influence on the function of the laws (the ratio or validity) but its complexity is reduced when the legal system shall be described theoretically.<sup>29</sup>

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

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

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

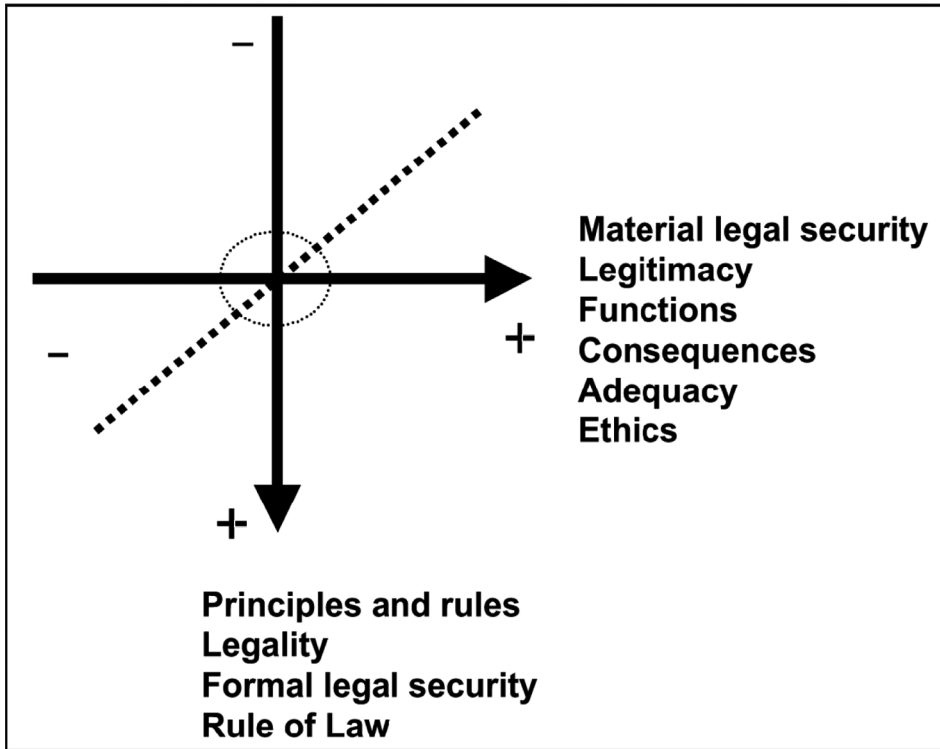


Figure 4 Law is a compromise between the two dimensions, between legality and legitimacy. Hydén & Wickenberg 2008.

The starting point for every right to non-pecuniary damages is some normative statement by the legal system that is worth protection, and obviously, the breaking of the norm. The old catch-rule for non-pecuniary damages demands a grave crime and legal support (legality) and when it comes to the assessment of the amount of the damages the preparatory work talks about a quest for adequacy and consideration of the sense of justice in society (legitimacy). When the exception-construction got a heavy emphasis the focus is on the legality and formal legal security, but since the normative engine for these damages is the defending of the individual's rights and freedoms within the rule of law the legal system somehow becomes valueless (the anomic law). According to Habermas, legitimacy can be compared to what he writes about validity – the law's normative character, its nature as a coherent system of meaning, as prescriptive ideas and values. Validity ultimately lies in law's capacity to make claims supported by reason, in a discourse that aims at and depends on agreement between citizens in relation to law's facticity that is its character as a functioning system, ultimately coercively guaranteed.<sup>30</sup> So, non-pecuniary damages can be seen as a conduce to inter-system conflicts within the legal system since they

30 Habermas, 1997, Cotterrell, 2006, p. 83.



challenge a rigid internal and dogmatic view upon a law without any normative ambition to defend the individual's interest governed by the rule of law. But as we have seen the legal system loses in homogeneity and there is no single point from which a uniform exception-construction can be successfully built, whether it is political, scientific or legal. In this pluralistic environment the "ought" also increases within the legal system as a consequence of for example the Europeanizing, in the form of rights and duties according to the European Convention on Human Rights, of the national law. Axel Hägerström turns in his grave!

Without such normative "ought" from law as to how people should behave, no right to non-pecuniary damages exists and there exists no thirst for knowledge about "is" in the form of empirical knowledge about the horizontal perspective and the social norms within that context in which these damages communicate. This also includes an interest about how different legal institutions without their different professional values and so on make their decisions and calculations about non-pecuniary damages. There is an uncertainty about what norms and which principles shall regulate the valuation of non-pecuniary damages, for example the office of the chancellor of justice (JK) about the long waiting time for court proceedings, discrimination lawsuit by the Supreme Court of Judicature, or compensation to victims of crimes by the Crime Victim Compensation and Support Authority. And since people make comparatives within their interpretation of reality, this situation is somehow infelicitous and makes sense of professor Håkan Hydén's hypothesis that the more stable and homogeneous the society is, the less the problem in relation to combining legality and legitimacy is.<sup>31</sup> Even in this case I think research with an external perspective like sociology of law can help obtain knowledge, not in the set of rules and regulations, but what the normative context looks like where the damages are interpreted and at the end perform the function of mending or redress to the individual and are preventive against future actions.

## The relevance of a norm perspective for my topic

### The first example

To begin with, there is a clear relation between normscience and different claims for damages within society. See for example see the chapter about sanctions in Baier and Svensson's book about norms or Torstein Eckhoff's presentation of restitution and punishment in his book "Justice. Its determinants in social interaction".<sup>32</sup> One reason for this situation is the fact that the tort law is from a Swedish horizon relatively

31 Hydén, 2008, p. 8.

32 Baier & Svensson, 2009, s. 145ff. Eckhoff, 1974 s. 133ff. For a more deeper description about tort law and its theoretical ground from a Swedish perspective see Hellner & Radetzki, 2006, s. 50ff.

formed by the supreme courts' decisions and also by the legal science. The legal field is more "living" and dynamic so to say.

For me there is a need to deeper understand the importance of the norm concept in relation to two different areas within my topic. I begin with the first one that is more concrete and deals with the question about what I really investigate when I bring together my empirical material from my survey that victims of crimes get the possibility to answer questions about their compensation. The survey contains questions that are connected to different fields like how they feel about their own compensation, how did they think the compensation mirrored the general values in society and so on. The survey also contains one part of vignette-questions where the respondent gets the opportunity to write what amount of money could give satisfaction in relation to a short description about some type of crime against someone's integrity.

So the question is what kind of knowledge I get when I now make my statistical adaptation. Given the definition of the norms that Håkan Hydén och Måns Svensson has introduced with three essential attributes that is "Imperative", "Socially reproduced", and "Surrounding expectations".<sup>33</sup> From my point of view it has always been problematic to see how this definition of norm is suitable for the outcome of my empirical work. The background of the definition above is the theory of planned behaviour and the aim is to make a prognosis for human behaviour. But my purpose is not to calculate or understand people's actions as respondents in a psychological way. Instead my interest of knowledge is about the victims of crimes' ideas about fairness, satisfaction, what is proportional and of course the victims' experience and within that, their needs given the compensation. So I can maybe find some kind of imperative norm after my statistical analysis from my material for example "increase the compensation" and if there is a strong support for that ought/imperative and especially if I also can find support for it in my survey from the public I can maybe talk about some kind of norm that is socially reproduced in general. But I think it will be hard without some kind of far-fetched psychological analyse to talk about a norm that also is society's expectation. If we instead look at the accidental attributes about the norms within my empirical material I think it is clear that the strongest attributes in the norm deals with values oriented/internal functions. One of the big points of using the model or "Norm classification system" is also that you can use it for different norm types. So if we instead use it for a analysis of the legal norm that underlies the regulation of the compensation I make my research about we will maybe come up with the answer that there is no imperative as essential attribute as is formulated in the preparatory work of the law. In fact there will be no essential attributes at all only some accidental ones like system oriented for example. We can notice that it is obviously an uncertainty about the regulative norms here in relation to Göran Therborns definition.<sup>34</sup> In the same context the need for norms to reduce the complexity appears when handling this type of compensation. But it is too late

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33 Hydén & Svensson, 2008, s. 25.

34 Therborn, 2002.

to have the last word on this question until I make my analysis a part of the dissertation.

Another aspect that I have contemplated upon and makes the topic more complex is the fact that we cannot for sure say that I study the corrective part of fairness that I assert above. When the respondents answered the survey they also wanted to take into consideration the accidental attributes like economic interests because this type of compensation often in the end falls back to the state and in the end the tax-collective. In that sense we can talk about distributed norms about how to allocate risks and cost within the system. This perspective opens the perspective for an analysis that the essential attributes deals with moral norms and corrective fairness in relation to the accidental attributes that deal with social norms and distributive fairness.<sup>35</sup> This perspective also opens for an analysis about allocation, distribution and reciprocity that also can be analysed from a perspective of norms and justice that goes further than restitution.<sup>36</sup> But even in this perspective there is a good point to stress the consensus-building mechanism of the system norms that enable the system's actions to be synchronized and harmonized in a so to say idealistic view. It is near to even relate to the field of law and economics and make an analogy to game theory or actuarial mathematics.<sup>37</sup>

## The second example

I have earlier described the problem with the typical compensation that is the object of my study. The application of the law often came in conflict with the needs of the victims, the general sense of fairness when too much consideration is taken to the inner logic of the legal system for example the need for coherency. But on the other hand, when the application of the law tries to be more in touch with the legal politics of the moment or the sense of justice the lawyers get upset. We can see a classical polarisation between *Nomos* and *Thesis* in the light of Fredrich A. Hayek.<sup>38</sup> In my application of the theory *Thesis* stands for the professional norms that are related to power of the lawyers and *Nomos* for the need among the civil in a social and political way. So if we assume that the law has a reproductive role this becomes more clear and reasonable. From a social point of view the restoration of the individual and the autonomy as well as the social and political life is important but for the legal point of view is it important to safeguard the legal autonomy and the legal profession like rule of law et cetera. The attentive reader may find out the difficult and frustrating thing within this field or compensation if we were more concrete. The driving force for the compensation emanates from the respect for the legal right to integrity and the rule of law but gets automatically in conflict with the ground values and norms

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35 Compare Hydén, 2004, s. 38.

36 Eckhoff, 1974, s. 205.

37 Hechter & Opp, 2001, s. 36.

38 Hydén, 2004, s. 45.

that support the law because of its lack of norms when we shall calculate the amount in money when the loss is purely idealistic (see above for a deeper description). The result will be that the law becomes norm-less (anomic) and the confusion becomes a negative influence on legitimacy for the law.<sup>39</sup> Well, in general, this is the classic conflict between legality and legitimacy as it has been described many times before (Plato, Hegel and Weber).

So if we want to elucidate the normative ground for the law and make it possible for individuals to use these rules as grounds for compensation we also threaten the definition of the legal system as Eckhoff-Sundby described it.<sup>40</sup> The legal system and the legal profession rather deals with things that can be objectively described and valued on a market than with fluffy things like norms even if life and bodily integrity are among the values that the law is trying to protect. Even if there is a clear norm rationality within the classic criminal and civil law that can say when something is legally regulated it is much more difficult to say what this means in practice. This statement brings up the question about the corrective fairness or justice and what is the right reaction to something that has created an injury.<sup>41</sup> It falls back to the old device *suum cuique* and I think that sociology of law as a field gets a greater need to with empirical studies find out what things mean in our complex society. If not I think one of the most central functions of the legal system will get lost and here I think about the important but difficult mechanisms of conflict-resolution. The problem is then that I feel that most writers have a too grounded or naïve understanding about this difficult field and how both practical and theoretical and variable it is by nature. For example we can look at how Torstein Eckhoff writes about it: "If restitution is to be made, it may be an advantage for both parties that the relationship is regulated by norms. By indicating when, what and how much compensation should be afforded, the norms save the parties the trouble of bargaining and manoeuvring. They also help to reduce any uncertainty as to whether or not full restitution has been made."<sup>42</sup>

As a consequence of the character of this type of compensation we can also discuss how suitable the picture of the law as standardized politics is. I think Håkan Hydén points out something important when he writes: "The norms that shape decision – making are determined by the rationality that belongs to the knowledge system that determines the intended fulfilment of the target."<sup>43</sup> We face a so called "inter system conflict" which Hydén has described like this: "The main cause of this situation is the various action systems in people's practices colliding with each other or imposing incompatible demands on each other, whereby a system's requirements are

39 In Sweden, one feminist theorist in legal science introduced the term "the separation logic" to illustrate how some aspects in legal science fall outside and are therefore non-legal. Svensson, 1997.

40 Ibid, s. 51. Many writers has talk about the important to both make the rights and freedoms within our RF for example more legal and possible to take as a ground for a legal process and make the fundamental principles of the deep structure of the law more clear in a Scandinavian perspectives Hydén, Touiri, Wilhelmsson or Töllborg for example, Ibid, s. 112.

41 Hydén, 2004, s. 69.

42 Eckhoff, 1974, s. 139.

43 Hydén, 2004, s. 88.

perceived as alien to another. It then occurs what we may call an intersystem conflict, i.e. a conflict between systems.”<sup>44</sup> This can be seen as the classic conflict between system and life world as Habermas and others have described it but here Hydén goes one step further and talk about a new scientific paradigm that is able to conduct normative reasoning without having the completed norm as a starting point.<sup>45</sup> But I think it is hard to maintain this new paradigm because of the conservative tradition within the legal academy and legal profession. There can also be problems from a political perspective about how free the application of the law can be and what kind of legal source the jurisprudence is. There are possibilities to draw some parallels with what Robert C. Ellickson writes about how hard it is to change norms within a field for example because custom may lag.<sup>46</sup> I will say that the incentives already exist and I think that the more the problem with the too strict and narrow legal profession that has difficulties to understand the surroundings understanding and expectations or needs (the context so to say) about the legal application in a norm perspective the more will the need for some kind of reformation of the legal field increase.<sup>47</sup>

### “Norms about norms”?

One of the most typical dimensions of norms is its function of reducing uncertainty as Göran Therborn writes or reducing complexity as Matthias Baier and Måns Svensson write.<sup>48</sup> After my presentation above the need for norms within that type of compensation that victims of crimes have their right to. As I have writes above, already in the preparatory work to the tort law, there is a statement about the lack of norms for the calculation of the amount of the damages to be awarded. The answer from the legal field was on the one hand the restrictive attitude I described above and on the other hand a far-reaching standardisation within the application with the help of a stereotyped technique. This technique was effective and rational not least from an economic point of view and worked as a type of norm in the legal field because it reduced the complexity, coordinated the application, distributed power to an authority and at the same time integrated the application and the legal field.<sup>49</sup>

As I pointed out above, there is an anomic tendency within this compensation that results in uncertainty within both the victims of crimes and the juridical system. It is not even clear if these non-pecuniary damages to victims of crime are some kind of sanction for the action or if it is a compensation for damage.<sup>50</sup> If the rule as damage is stressed, the problem is the intertwining between the distributive and corrective

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44 Ibid, s. 95.

45 Ibid, s. 106.

46 Hechter & Opp, 2001, s. 56.

47 Ibid, s. 410.

48 Therborn, 2002, s. 863. Baier & Svensson, 2009, s. 176.

49 Ibid, s. 176ff.

50 Friberg, 2010, Schultz, 2008.

dimensions of justice, because in practice there is The Crime Victim Compensation and Support Authority that compensates the victims and not the offender.<sup>51</sup>

So one solution to this “problem” can be as I have mentioned to do as a dissertation, an empirical sociology of law study about what kind of norm you are likely to find that can be used as guidelines for the understanding about the compensation and how it can function as satisfaction for victims of crime. But is it right to replace one standard with some other? I do not think so. Instead I will hopefully see that my result can reduce the traditional understanding of how relativistic the common sense of justice is. It can function as help for the application of the law and a help to be freer in the interpretation of the aim of the law. The consequence will probably be a more spreading among the amount of damages with the consequence that the compensation loses its function and the victims of crimes stop expecting full satisfaction. The consequence will also be that the risks of some kind of negative inter system aspect or function will decrease. In the end the distinction between an internal and an external view of the law will be difficult to reach and that is something I think is positive from a lot of perspectives but I have to return to that topic in another time. But, I think what I have described here in this article, touched upon the importance of metanorms (or norms about norms) as H. L. A. Hart has elaborated in his sophisticated theory about what officials accept, the recognition of a rule and how the vague nature of law brings forward it’s empirical and sociological dimension.

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51 There is for example some principle and practical difference between the Criminal Injuries Compensation Act and the Swedish Act on Damages.

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