The Identity Cricis of a "Stepchild"

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pulverisering fører lett til likegyldighet.

Siste skudd på stammen i den økonomiske globalisering er Den multilaterale avtalen om investeringer. Denne avtalen er under forhandling i OECD, og skulle etter planen ha vært ferdigstilt for ett år siden. Avtalen vil i hovedsak ta sikte på å beskytte investorer mot inngrep fra det offentlige. Avtalen vil, dersom den blir ferdigforhandlet, få store konsekvenser for staters muligheter til å regulere internasjonale investeringer.

Investeringsavtaler har tradisjonelt vært inngått bilateralt mellom industrialiserte land og utviklingsland for å sikre interessene til de førstnevntes investorer. I OECD har man forestilt seg at man kan bygge på de prinsipper som har vært utviklet i slike bilaterale avtaler ved utviklingen av en multilateral avtale mellom OECD-land. Etter at OECD-landene har forhandlet seg ferdig, vil det være åpent for andre land å søke om å få slutte seg til avtalen.

Et viktig problem i forbindelse med denne avtalen, og forsåvidt også i forbindelse med det globale handelsregelverket, er at disse avtalene i stor grad får utvikle seg uten at man tar særlig hensyn til avtalenes effekter for andre politikkområder. Handelsekspertene forhandler handelsavtaler, og finanseksperter forhandler investeringsavtaler. Dersom andre kommer med innvendinger som kan forstyrre forhandlingsprosessen, blir de fort betraktet som hår i suppa og behandlet deretter. Men tiden synes å være i ferd med å løpe fra dem som argumenterer med at «dette er en handelsavtale som skal regulere handelsproblemer, andre problemer får man ta seg av i andre avtaler».

Mye tyder på at man har gapt for høyt i forbindelse med Den multilaterale avtalen om investeringer. Avalen, som inntil nylig fikk utvikle seg utenfor offentlighetens søkelys, har nå pådratt seg betydelig oppmerksomhet. Det er ikke bare positive ting som kommer frem i media. Selv en avis som Financial Times ser i en lederartikkel ut til å ha sansen for dem som karakteriserer avtaleforhandlingene som «an excercise in neo-imperialism».

Avtalen har også begynt å miste støtten fra betydningsfulle arbeidsgiverorganisasjoner. En avtale forhandlet mellom industrialiserte land, og som følgelig må ta hensyn til en del andre interesser enn investorenes interesser, vil neppe være særlig attraktiv som erstatning for bilaterale avtaler mellom industrialiserte land og utviklingsland; avtaler som i stor grad er diktert av industrilandenes interesser.

Det som er i ferd med å skje med Den multilaterale avtalen om investeringer aktualiserer spørsmålet om man er i ferd med å nå grensen for akseptabel økonomisk globalisering, eller tar man seg bare en liten pust i bakken? Har man kommet til et punkt der det kan være på sin plass å snakke om «subsidiaritet» (et mye omtalt, men raskt glemt prinsipp)? Mye tyder på at viktige grupper i opinionen synes å ha fått nok av ensidig økonomiske globalisering. Mobiliseringen mot Den multilaterale avtalen om investeringer har vært langt større enn ventet, og WTO har etterhvert blitt tvunget til å diskutere arbeidsstandarder og miljøspørsmål.

Et interessant tema for fremtiden er hvordan det vil virke når juristene gis økt makt innenfor regimene som fremmer økonomisk globalisering. Vil juristene ha mot til å finne fornuftige løsninger på interessekonflikter som så langt har blitt skjøvet under teppet, eller vil de innta rollen som tekniske eksperter uten ansvar for de bredere økonomiske, sosiale og miljømessige konsekvenser av egen virksomhet?

Den norske redaksjonen håper med dette å ha sådd spiren til en rettspolitisk debatt omkring ulike sider ved økonomisk globalisering.

The Identity Crisis of a "Stepchild"

Reflections on the Paradigmatic Deficiencies of Sociology of Law

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This paper explores the causes of the lack of common basic assumptions between different orientations constituting the field of sociology of law. It argues that sociology of law lacks theoretical coherence and therefore is unable to produce fundamental paradigms. The solution to the paradigmatic problems of sociology of law is then sought outside the traditional frameworks of law and sociology.

Introduction

Most sociologists of law are conscious of the fact that the inter-disciplinary exchanges between their field of study and its two parent disciplines leave much to be desired.[1] Sociologists – if they read socio-legal work – complain because it does not live up to their theoretical and methodological sophistication and epistemological purity. Those few academic lawyers who might read sociological analysis of law raise their eyebrows in amazement (if not in disapproval and disdain) and wonder what it has to do with the law they know. Thus, it is not surprising if some socio-legal scholars view their undertaking with "self-doubt" and "anguish" and describe their academic functions in terms of "role confusion".[2]

There are few themes with the potential to unify the mosaic of sociologically inspired studies of law and legal order. Besides a few vaguely formulated general assumptions such as 'the law cannot be adequately studied in a societal vacuum', or 'the law is a form of social control', we find few ideas which are shared by those who conduct sociological studies of law. The studies of law in its social context are therefore characterised by a myriad of 'sectarian' alternative approaches, each motivated by its own specific scientific goal and political interest. This diversity of perspectives on law and legal order is a source of inspiration and confusion. On the one hand, sociology of law is a dynamic field of inquiry offering almost unlimited research opportunities. On the other, it is a highly fragmented field of study developing in a disorderly and what appears to be a non-cumulative fashion.[3] This lack of

1 The title of this paper must be placed in the context of Talcott Parsons' remark that sociology of law is something of "an intellectual stepchild for social scientists" (quoted in Tomasic 1987, pp. 8-9).

2 Cf. Tamanaha 1997.

3 I refrain here from defining sociology of law as a discipline and use it as a synonym for the 'sociological movement in law', 'sociological jurisprudence', 'legal sociology' and 'socio-legal studies' and so on to indicate the general approach to the study of law in its social context. The epistemological differences between these approaches will however be successively investigated. This *methodological* strategy is motivated by the underlying aspiration of this paper, which is *not* to contribute to further fragmentation of the field, but to investigate the possibility of creating a common ground upon which a general →

"intellectual coherence" which seems to constitute the salient feature of the field of sociology of law diminishes its ability to provide the students of law and society with "a rational agenda for social inquiry".[4]

The field of sociology of law is permeated by disagreements on the social nature of the law, a fact which is reflected in the existing conflicting views on the relation between law and its societal milieu, the place of law in society, the social consequences of law, the role of law as a means of social control and an instrument for bringing about social change. This lack of consensus can be to some extent explained in terms of the multi-paradigmatic basis upon which sociological studies of law rest. Unlike mainstream sociology, sociology of law has, however, been unable to produce a number of 'fundamental paradigms', which can guide further research and theorising within the field in a systematic fashion. In 1975 George Ritzer could argue, for example, that there were three sociological paradigms: Social Facts, Social Definition, and Social Behaviour Paradigms, which explained the sources of many differences in sociology. The followers of each of the paradigms usually claimed that their perspectives could explain, most, if not all, social phenomena. Contrary to their belief, Ritzer sustained that none of these paradigms could adequately explain all the diversity of social life.[5] This tripartite differentiation, nonetheless, provided general frameworks for a large number of sociological theories and thus integrated large parts of sociology. Sociological studies of law have not produced similar 'fundamental paradigms' and different theoretical/methodological approaches to the study of law in its social context have not transcended the status of sub-paradigm. The above mentioned common denominators concerning the importance of understanding and describing the law in its social context have proved to be far from sufficient to lay a firm and balanced foundation upon which a number of diverse perspectives on the sociological studies of law can be based and developed.

Since the multi-paradigm nature of mainstream sociology cannot by itself explain the paradigmatic deficiencies of sociology of law, it is argued here that the causes of the problem should be searched elsewhere. In the following pages, special attention is therefore devoted to the relationship between the disciplines of law and sociology in order to investigate the compatibility of sociological and legal theory. Hence, the question has been raised concerning the very possibility of a scientific mode of inquiry that endeavours to integrate sociology and law. In short, the *general* aim of this paper is to explore the main causes of the lack of common basic assumptions between different orientations constituting the field of sociology of law and to initiate debate on the future of sociology of law as a discipline existing, not in the shadow of jurisprudence or sociology, but in its own right. Thus, this paper departs from the following three overlapping and interrelated assumptions:

theoretical framework, capable of uniting different orientations within sociology of law, can be constructed. It should also be mentioned that in the following pages "law" or "the law" refers to the modern Western state law.

4 Cf. Nonet and Selznick 1978, p. 2.

5 Ritzer 1975.

1) Sociology of law lacks theoretical coherence and therefore is unable to produce fundamental paradigms.
2) This lack of theoretical coherence brings about and sustains the theoretically underdeveloped state of the field of law and society.
3) This theoretically underdeveloped state is enhanced by the dominance of a type of structural functional thinking, which is at least in parts a product of law's pragmatic properties.

The core of these assumptions, which will be presented in detail in order to develop them further, are hardly new.[6] However, no satisfactory solutions to the problems posed by them have, up to date, been produced. This brings us to the main theses of this paper, which can be formulated as follows:

1) It is misleading to regard sociology of law simply as another branch of general sociology (or jurisprudence for that matter). Other branches of sociology, for example sociology of family, youth, ethnicity, religion or education, are not to the same *extent* exposed to interdisciplinary epistemological tensions and confrontations. These differences cause the fragmentation of the field and impede its theoretical development.
2) In order to facilitate the theoretical advance of sociology of law, we need a number of fundamental paradigms capable of uniting and systematically moulding the knowledge that it produces.
3) The construction of such paradigms will not be possible as long as the scientific goals of the researchers in the field of law and society is to reproduce the basic assumptions and academic identities of their disciplines of origin.

Therefore the more *specific* goal of this paper is to investigate the possibility of uniting the fragmented field of sociology of law.

The study presented in the following pages consists of four parts. In the first part the fundamental division within sociology of law is discussed in order to demonstrate and analyse the fragmentation of the field. The examination departs from a critique of 'juristic sociology', which views sociology as the *aide-de-camp* of the legal profession and proceeds to criticise the traditional alternative to a 'juristic sociology', which is a sociological approach informed and structured solely by the fundamental paradigm of mainstream sociology. It is argued that neither the juristic approach, nor the sociological approach, is alone capable of creating a fundamental basis for sociology of law. In part two attention is drawn to the theoretically underdeveloped state of sociology of law. The general argument is that sociology of law is to its detriment dominated by a form of structural functionalism, which mainly reflects the societal role of law as a pragmatic instrument of social order. In the third part the focus of the study is drawn to more or less marginalised, but dynamic, alternative schools within jurisprudence and sociology of law. It is argued that despite the general dominance of structural functionalism in sociology of law a number of alternative research orientations–such as those formed through the feminist critique of law–are being put forward which can contribute to resolv-

6 Cf. Hunt 1978, p.2.

ing the problem at hand. In the final part of this paper the need for a unifying paradigm is discussed and the development of legal pluralism and autopoiesis is used to exemplify how this unification might be facilitated.

1 The Fundamental Division within Sociology of Law

Within sociology of law it is generally agreed that there are many valid, but not necessarily epistemologically compatible, definitions of the law. Law is regarded as an intangible concept or a socio-cultural process, which may be viewed from many angles and be understood from many standpoints.[7] Common to all these diverse points of view on law is the emphasis on the social nature of the law. This approach to the study of law in society creates a basic disciplinary framework of sociology of law; a framework which should–but rarely does–enable different researchers to pursue their diverse theoretical and methodological goals within a single fundamental paradigm of sociology of law.

The study of law and society approached in this fashion has given birth to a number of perspectives (or sub-paradigms) on the relationship between law and society. William M. Evan has distinguished at least five different perspectives.[8] The first of these is based on a so-called "role analysis," and focuses on the behaviour of legal functionaries. The second perspective is that of "organisational analysis," which emphasises the behaviour of the courts, the administrative and the enforcement agencies. The third perspective is called "normative analysis" and concerns the examination of legal norms as they are related to the social and moral values' of diverse groups in society. The fourth perspective is based on a systems theoretical approach, and has received its original inspiration from Talcott Parsons. That is why Evan names it "institutional analysis". This perspective illuminates the tasks (such as conflict resolution) that the law must perform in order to harmonise social relations. Finally, the fifth perspective is called "methodological analysis," and refers to the occasional attempts by certain lawyers to apply sociological techniques for collecting data in support of legal analysis.

Looking at the five approaches to the study of law mentioned above, we soon discern a deep division within our original fundamental paradigm (or "the basic disciplinary framework" of sociology of law) and, in fact, two general paradigms based on different assumptions can be distinguished. One is firmly rooted within social sciences, where it receives its intellectual impulses from mainstream sociology; the other is committed to a juristic paradigm which reaches its extreme form in Evan's fifth approach, which he called "methodological analysis," where sociology is used not for substantive analysis but as a tool for collecting data.

The 'juristic' approach (which has at times been labelled "sociological jurisprudence", "legal sociology" or "socio-legal studies" in order to distinguish it from mainstream sociological studies of law) is based on the lawyer's 'internal' view of law and legal institutions. This paradigm is not committed to developing social theory or to conducting systematic examinations of social life. Its aim

7 Cf. Friedman 1977, p.3.

8 Evan 1962.

is instead limited to providing *ad hoc* and instrumental knowledge, which contributes to the resolution of legal problems.[9] Sociology of law developed under the influence of this juristic paradigm runs the risk of remaining a theoretically eclectical instrument of research that is an *auxiliary* to legal sciences and polity.[10] Furthermore, when the legal sciences are used as a paradigmatic framework for sociology of law, there emerges the risk that: 1) the legal community ultimately determines which questions are to be addressed; and 2) the legal community defines which answers are interesting, desirable and acceptable. Adopting the legal sciences as a disciplinary point of reference can in effect amount to the internal colonisation of sociology of law by legal sciences and thus impede its development as an independent academic discipline.

The alternative to a "juristic sociology" is an approach to law that is methodologically and theoretically informed and structured by various schools within mainstream sociology. This sociological approach to law often attempts to promote social awareness through criticism and reflection, and therefore seems to be particularly concerned with unmasking the hidden interests and latent functions of law and its practitioners.[11] However, also this approach, when examined closely, reveals a number of flaws.

Pure sociological studies of law can be criticised, for example, for confining themselves to the social consequences of legal action and regulation, ignoring the internal mechanism of the legal system.[12] When a sociologist studies law, he/she, in a sense, has to stand beside the legal system and 'observe' legal processes and structures from the outside. The perspective of sociologist on law is, therefore, the view of the outsider on the legal system and hence limited to the law's interaction with its societal milieu. It also implies that the view from within, i.e., the lawyer's perspective of the law, is hidden from the sociologist and therefore becomes automatically excluded from his/her scope of observation and analysis. Thus, it is understood that the sociologist is expected to avoid making comments on matters defined by lawyers as technical legal issues which are only visible to initiated 'insiders'. Since the sociologist willingly–and perhaps in an attempt to avoid criticism– declares himself/herself as incompetent to critically review, analyse or comment on the legal *mode* of decision making and argumentation, then he/she is forced to treat a large part of the activities constituting the legal field as politically neutral. By treating the process of legal thinking, which constitutes the core of legal decision making, as a politically neutral exercise of legal power, the sociologist indirectly legitimises the essence of what he/she set out to question, criticise and when necessary 'expose'.[13]

9 Cf. Travers 1993, p. 443 and Stone 1966, p. 5.

10 For examples of definitions of sociology of law as an auxiliary to legal sciences see Persson Blegvad 1966, p. 2; and Dalberg-Larsen 1996, p. 27.

11 It must be added at this juncture, that not all sociological studies are necessarily driven by the ambition to enlighten. Some sociologists are driven by their pure curiosity for social phenomenon and their endeavours to study society are aimed to grasp the meaning of social events and describe them in sociological terms. This type of sociologist is undoubtedly a threatened species within socio-legal studies.

12 Cf. Bancaud 1987.

13 This criticism is developed in a rather elegant way by A. Bancaud 1987.

Through his/her incomplete critical studies, the sociologist legitimises the hidden structures forming legal action and hidden processes that are used to consolidate political interests which might be manifested in legal practice.

The Insider/Outsider Dichotomy

Sociological thinking is based on a constant questioning of what is hidden, taken for granted or regarded as common sense in everyday life. The sociologist seems at times to be solely interested in revealing the 'true' (but often morally shocking) layers of meaning hidden under the facades of respectability and normality. The motive behind this subversive approach is the sociologist's desire to understand the fundamental mechanisms of society and perhaps to contribute in an intellectual fashion to the creation of a more humane society, free from repression, illusion, deception and hypocrisy. This type of questioning is unpleasant to uncritical minds, but particularly aggravating to those who become the object of sociological criticism. This is perhaps why Peter Berger advises those who like to avoid "shocking discoveries, who prefer to believe that society is just what they were taught at Sunday School, who like the safety of the rules and the maxims of what Alfred Schutz has called the 'world-taken-for-granted'" to stay away from sociology.[14] Furthermore, he describes the sociologist as a "spy", whose job, within an ethically defensible framework of research, is "to report as accurately as he can about a certain social terrain".[15]

The legal profession seems to be hypersensitive to being scrutinised by outsiders and seems in particular to resent the subversive glances of the sociologist. From the sociologist's point of view, this resentment is just too understandable: the social status of the functionaries of the law is very much a function of the symbolic/ideological force of the law, the mystification of legal thinking and the glorification of the legal profession. The jurists are, according to the sociologist, disturbed by the fact that one might succeed in transcending the artificial legal barriers created with the help of language and other symbolic means and reveal the political and economic constituent elements of the law for what they really are. The jurists, on the other hand, describe their resentment and dislike of sociological intrusions, not so much because they are afraid of disclosures but because the sociologist is an outsider who does not grasp the intricate legal meaning of what they do. The fact that a sociologist can probably understand every word used in an Act or a legal opinion does not necessarily mean that he/she can interpret it in a legally correct fashion or even realise its legal significance or implications. The sociologist who cannot, according to the jurists, understand what is actually happening from a legal point of view, tries to make general critical statements regarding the effects of law on society. For lawyers such statements are usually devoid of legal meaning and thus uninteresting.

The apparent intelligibility of legal texts to the layman are, for example, described by some lawyers as "illusory". Ordinary words of a language can be used as a point of departure for an understanding of the legal concepts, but for a full understanding of the latter a greater knowledge of law than that possessed by the layman is required.[16] Furthermore, the insider's understanding of the law is not simply a question of legal knowledge which might be acquired through formal legal education or the mastery of legal rules and doctrines, but also a function of legal practice. In other words, one must also know how laws are used in practice, a tacit form of socio-legal knowledge which can be acquired only through working within the legal system and gaining experience from legal practice. Here we are in effect talking about the law as a socio-legal *process* internal to the legal system. This 'processual' aspect of the law that tends to be hidden from the outsiders' view is *paradoxically* of micro sociological and psychological character. As such it is neither captured by the *modi operandi* of legal sciences, which focus on norms and legal rules, nor by structural macro sociology which ignores the agency.[17]

In short, the objections raised by lawyers illustrate that not even an approach based on sociological thinking can create a scientific matrix for unifying diverse orientations characterising the studies of law in its social context. Such discussions regarding the relationship between sociology and law merely outline the difficulties that must be overcome by sociology of law in its attempts to study the law, an object of investigation which is both a discipline in its own right, a field of practice and one of the centres of power and social control in modern society.

Sociology of Law as a Field of Tension

While law is above all a *field of practice* closely related to and identified with a well established *profession*, sociology is an *academic* discipline, interested in *describing* and *understanding* society. Now it goes without saying that social workers, lawyers, civil servants and other groups working publicly ought to possess a degree of sociological understanding. One especially expects that legal practitioners, legislators and policy-makers have a need for a sociological understanding of the relationship between law and society. However, the 'problem' is that the law, particularly as it is related to the application of legal rules, can survive without any major systematic sociological input. A sociologically painful truth is

14 Berger, reprint 1991, p. 35.
15 Ibid., p. 16.
16 Wennström, 1996, pp. 22-23.
17 Let me give two examples of studies in English Criminal Justice to illustrate the point that legal practice is not simply a function of knowing and applying legal rules. Mungham and Thomas (1970) point out, for example, that working in the courts involves knowing little law. What is essential for a solicitor is to possess a particular set of practical social skills", which would enable her to "act successfully the role of what might be termed 'broker' or 'facilitator' between divergent interests" (Ibid., p.173). Max Travers (1997, pp.10-11) goes even further and suggests that describing what solicitors do in court as a game fails to illustrate how the lawyers understand the tasks at hand. Travers then argues that "an important part of legal work involves what might be termed the practical calculation of ends-means relationships: the practical adequacy of any particular lawyer's work does not lie in obtaining an acquittal in every case, but in securing the best outcome that is possible in any particular case, given the particular set of circumstances the lawyer has to work with". These types of practical calculations are not a product of or even related to legal thinking or legal rules, but a part of the (micro) social and psychological strategies used by social actors to organise their daily lives.

that although it is *desirable* for a jurist to have sociological insights he/she can easily function as a competent lawyer, prosecutor, judge and so on without ever studying sociology. The reason for this is to be found in the legal system's instrumental approach towards its social environment, an approach that is determined by the legal system's concepts, modes of reasoning and forms of communication. With such exception as the 'open ended' welfare laws that aim to realise policy goals, the correct and effective application of legal rules do not necessarily presuppose or require sociological analysis. This does not of course mean that legal reasoning is free from all extra-legal factors, such as value judgement. It only means that one does not need sociological theories to make legally valid decisions.

The legal system's conceptual apparatus is relatively limited in scope in the sense that it does not reflect the diversity inherent in social life. The legal system has, therefore, a rather narrow perspective on social relations. This limitation constitutes both a strength and a weakness. It makes it possible for the legal system to function effectively and uniformly, but it also seems to ignore the diversity of social action and has a reifying effect on social life. At the risk of oversimplification and exaggeration, one can say that within the legal system there is only one way of doing things and one fundamental image of its subject matter, which is shaped through the application of valid legal rules. Within legal positivism, as in jurisprudence in general, there are many orientations and schools, but there is only one paradigm of modern law, as related to legal practices, that is generally accepted by lawyers. I am, of course, using the notion of paradigm here as an "ideal type", which can not be found in pure form in real life. This paradigm, which comes close to legal monism is often taught extensively at law schools and presented as "the law". Its best quality is that it distinguishes sharply between law and other phenomenon and insists that legal decisions gain legitimacy by grounding on 'valid law' and by following the correct legal procedures. This paradigm determines in general terms what is to be examined, "what questions should be asked, how they should be asked and what rules are to be used in interpreting the answers".[18] Conduct which deviates from the single framework of this paradigm becomes an "extra-legal action". Furthermore, there is formal and strict control of the production and reproduction of the new and old legal concepts, and a tendency towards conceptual conservatism, both in a quantitative and a qualitative sense.

Within sociology, on the other hand, there is a freedom as it regards to the production of concepts and the invention of new paradigms that is only restricted by the general criteria of the science (criteria which help us to distinguish scientific reasoning from pure speculation or metaphysics). In contrast to the legal system's mono-paradigmatic field of activity, sociology is a multi-paradigm science. Within general sociology, the old concepts are redefined and new concepts are introduced all the time by sociologists in an attempt to depict a more generalised model of society. While sociology is constantly striving to broaden its many perspectives on society, the law struggles to limit its single vantage point on social life and thereby, now to use Niklas Luhmann's sociological description of the law as a system, reduce its "complexity" in relation to its environment.[19]

18 Ritzer 1975, p. 7.

Finally jurists tend to think in terms of individual (abnormal or exceptional) cases, while sociologists try to generalise taking into account the routine and the typical conditions.[20] The lawyer's pragmatically formed approach to law is closely rooted in the legal sciences and is related to the functional character of the law. This approach is, however, sustained and reproduced through legal education that fosters the reductionistic tendencies of legal system.[21]

In brief, the law as a field of practise, and sociology as an academic discipline, relate themselves to society in fundamentally different ways and seek different ends. Laws are made to change society, regulate social institutions and control the behaviour of groups and individual actors in an effective and rational manner. Lawyers are socialised to think in a pragmatic and eclectic manner, focusing on individual cases.[22] The legal system is, in turn, expected to contribute to shaping social behaviour and bringing about the changes desired by legislatures.

Sociology, on the other hand, is ultimately driven by sociologists curiosity about social life as reflected in their attempts to explain and understand social reality. In contrast to the lawyer, the sociologist is interested in the general characteristics of social phenomena and his/her scientific activities are directed towards producing a general knowledge of society, i.e. social theories. Individual cases *in themselves* and *for themselves* are of no significance for the sociologist. Thus, sociology and the law are founded on two diverse epistemological premises, which means that they organise themselves in accordance with two separate sets of theories of knowledge and the justifications of belief.

What does all this mean for the discipline of sociology of law? It means that sociology of law is given the difficult (if not impossible) task of uniting two fundamentally different images of society: a legal image shaped by formal practice and a sociological image formed through intellectual scientific curiosity. The result is the creation of a socio-legal field of research characterised by a constant tension caused by the two different images of society.

2 The Underdeveloped State of Sociology of Law

Taking into account the epistemologically different roots of the factors constituting the field of sociology of law and its theoretically fragmented make up, it should then come as no surprise if, from the standpoint of mainstream discipline of sociology, it is criticised for being theoretically and methodologically underdeveloped. Max Travers argues, for example, that the field is dominated by various forms of structuralist approaches. Furthermore it illustrates a lack of interest in non-structuralist schools and in agency/structure and macro/micro debate which is going on within sociology.[23] Travers's remedy is sim-

19 Luhmann 1986.
20 Podgórecki and Whelan, 1981, p. 11.
21 Ziegert 1988, p. 184.
22 Ibid.
23 Travers 1993, pp. 443-444.

ple: sociologists of law are to improve their knowledge of sociology in order to pursue even issues central to mainstream.

I can only agree with Travers's critique of sociology of law. However, in the light of the discussions above, it is doubtful if the remedy lies *only* in improving the knowledge of sociological theories and methods in the field or promoting interpretive sociological studies of law. Instead, I postulate here, that the theoretical one-sidedness of sociology of law is also a result of its attempts to study the legal order, which is *often* defined within legal theory, legal philosophy and social sciences in terms of its *functions* in society. The law is also described in terms of the State, a sovereign or 'specially authorised staff' all of which are *macro* entities. Such functionalistic definition, which are intrinsic to legal sciences, easily lead to the examination of the relationship between law and society 'from above' with an emphasis on structural features of the law. This theoretical, and subsequently even methodological, one-dimensionality is, to judge from research reports published in international journals, an international trend.[24] The preference for macro theories is therefore not an occasional personal preference, which can be abandoned overnight, but a result of some of the intrinsic 'qualities' of the field of law and society. It will also remain so as long as legal practice moulds the concept of law, which is used in socio-legal studies. The marginalisation of interpretive and interactionist theories is at least in parts brought about by the 'limitations' of, for example, phenomenology and symbolic interactionism, in investigating socio-legal issues as they are perceived by legal sciences and policy-makers. These limitations are, in turn, enhanced and sustained by the absence of a fundamental paradigm, an absence which compels the sociologists of law (even those who are inspired by the general paradigm of sociology) to fall back on juristic definitions of the law in terms of the nation state. Departing from such definitions the researcher can hardly escape structuralist-functional mode of analysis.

From the vantage point of jurisprudence, law is a functionally constructed device, in a sense that, both in its totality and in parts, i.e. both seen as a system and as a number of rules each existing for themselves, always serves a *purpose* or a *function*.[25] This inherently functional character of the law, which is manifested in the legal system's attempts in normatively regulating certain interrelationships between norms, roles and institutions, in practice takes different forms, one of them being the investigation of causal relationships between events. For example, a considerable portion of the activities of the courts of law are dedicated to determining if there is a causal

24 I am not claiming here that the field of sociology of law is totally dominated by structural functionalism in a sense that all studies conducted are of structural functional character. An increasing number studies which have recently been published are inspired by post modernism, action theory, phenomenology and symbolic interactioninsm. However, these studies are still underrepresented and their influence on the over all development of sociology of law is rather minimal.

25 For example, in an introductory textbook to legal theory, Jan Hellner, one of Sweden's foremost legal scholars, describes the modern legal order as a functionally constructed control system (cf. Hellner 1988, p. 10). The legal order consists, according to Hellner, of legal norms, each created to fulfil a particular social function.

relation between two events, a fact which is particularly striking in criminal law and the law of torts. This preoccupation with cause and effects has, according to Vilhelm Aubert, "saturated" the reasoning of the judges and legislators and resulted in their making references to the future consequences of the law and its enforcement.[26] This has not however resulted in the construction of a uniform and immutable method of legal reasoning for determining causal relations. Aubert argues that various methods of reasoning, varying from normative to natural scientific, can be used in certain cases.[27] This means that the mode of thought known as legal reasoning, is not necessarily purely legal in constitution, a fact that reveals one of the most important characteristics of the legal system: The law readily, but on its own terms, imports into the domain of legal reasoning various extra legal ideas, which are then transformed into legal codes and applied to reproduce the law's reality. What is in essence unchangeable regarding the legal reasoning is the law's overriding concern with confining and defining various issues, such as cause and effect, in normative terms.

Modern law claims, furthermore, to be a *rationally* constructed system. In the same way, legal thinking, particularly as it manifests itself in the relationship between legal dogmatic and legal practice, where decisions *have to* be made, illustrates a structural functional character. Law creates its own reality and produces its own truth, by strictly determining the questions which are to be regarded as legally *bona fide* matter and the manner in which these questions are to be answered. Questions that law cannot answer are defined as legally irrelevant. Within this legally constructed domain of reality, each legal rule or decision becomes, or is presented as, a function of another rule or decision. Furthermore, legal rules are applied and legal decisions are made to 'resolve' concrete problems or conflicts. Within civil law traditions, such as that in Sweden, the relation between legal rules and statutes are formed into, what some lawyers and legal scholars regard as, a 'coherent system'. Thus, the structural functional character of legal reasoning is concealed behind, for example, the emphasis on *rational* thinking and the priority conferred *legal doctrine* as a source of law. According to this mode of legal reasoning, doctrine becomes a tool for interpreting the (valid) law as a highly coherent system, i.e. the process of legal reasoning becomes bestowed with a rational purpose.

Now to give another example of structural functional qualities of legal reasoning, one can mention the tendency of lawyers and courts to argue in certain cases in a teleological fashion. Teleological construction of statutes is, of course, done as the last resort in an attempt to interpret a statute, but nonetheless is a good example of the inherent structural functionalism of the legal thinking.[28] These properties of the law and legal thinking guide the sociologists of law toward structural functionalism.

26 Aubert 1994, p. 118.

27 Ibid., p. 119.

28 Teleological construction of a statue, which in Sweden is associated above all to Per Olof Ekelöf, is an interpretation of the statue in view of its *purpose*. For a detailed discussion on this mode of reasoning see Ekelöf 1958 and Peczenik 1989, pp. 404-425.

Thus, it is hardly surprising if the sociologists of law illustrate a tendency to discuss the *latent* functions of, for example, a legislation rather than to study the way its enactment affects the interaction between certain actors in a specific social field.

This tendency to think in structural functional terms can of course be regarded as a basis for the construction of a fundamental paradigm and a matrix of sociology of law of law. It has, however, clearly not succeeded in doing so because in many cases it is not a result of consciously planned theorising, it is highly eclectical, and often seeks no more than providing *ad hoc* solutions to legal problems. Partly therefore, we find that this tendency is considerably stronger within the juristic approach to law and society. Since this structural functionalistic mode of reasoning is in many instances taken for granted and reproduced as if it were the most normal mode of thought, it becomes part of the problem (and not part of the solution) discussed in this paper.

My purpose here is not to defend the sociologically underdeveloped state of sociology of law, but to point out the following: Firstly, the obstacles facing sociology of law do not to the same extent face, for example, sociology of family, youth, ethnicity, religion, politics or education. Socio-legal scholars try to study relations, which in one way or another involve law. Law is not only a social institution in itself with many centuries of well-documented history behind it, it is also a centre of power and socialisation in modern society, and above all (that is in the context of the problem at hand) it is an academic discipline of much greater 'authority' than sociology.[29] Not only law is an academic field with the same concern in social control as sociology, it is also a profession, which at the same time claims to constitute a logically constructed and coherent system of rules. Finally, it is a "myth" because only through its mythical force it can be sustain its image as a unified system, a fact that hardly makes its sociological analysis any easier.[30] Religion, politics, medicine and education are also centres of power and academic disciplines but they do not to the same extent constitute normatively closed, and therefore *integrated*, spheres of discourse as the law. None of them are to the same extent *exclusive* in their mode of reproduction, or as in case of medicine or education claim to be an authority in social control. Furthermore, they either lack the hegemony of the law or they do not have the same academic status (and therefore scientific legitimacy and the right to establish the 'truth') as the law.[31]

Secondly, these obstacles–which are in essence caused by epistemological tensions between law and sociology–are also symptoms of the paradigmatic rupture within sociology of law, which obstruct the construction of a fundamental framework/matrix. Furthermore, the roots of the inside/outside dichotomy must also be traced back to this epistemological tension, which also implies that in order to reduce this tension within the field, the dichotomy must be systematically addressed by all research conducted within the field.

Thirdly, the notions of law, legal order, legal system and so on, as they are *usually* used within socio-legal discourse, have not been produced free from the ideological dominance of positive law and jurisprudence in general. To reduce the dominance of structural functionalism new approaches to the relation between law and society are needed. Such approaches can be found in a few *marginalised* schools of jurisprudence, which will be presented in the next section.

3 The Non-Traditional Trends within Sociology of Law

There are at least two non-traditional trends within jurisprudence and sociology of law, which demonstrate a potential to bring about a paradigm shift from the traditional concept of law.[32] Furthermore they seem to possess the capability to pave the way for breaking the 'macro-spell' criticised above. These are challenges presented by feminist scholarship and legal pluralism.

The feminist scholarship on law has, from a woman-centred vantage point, brought into focus the significance of gender, i.e. the socially constructed male and female roles and relations, for shaping our perception of the world and reality in general and the construction of the legal system and of legal thought in particular. It highlights the subjective and collective meanings attributed to 'men' and 'women' as categories that produce and reproduce identities. These categories have penetrated the legal system and legal reasoning, subsequently, influencing, if not determining, the social function of the law in modern societies, systematically disadvantaging women. What the law conceives and presents as the "universal" is but a reflection of male experiences. It must, however, be pointed out that the social scientific and political fruits of what some feminist scholars have revealed transcends the critique of the role of law as the instrument of male domination which mediates and perpetuates unequal gender relations in society. The challenges of feminist theory is not limited to illustrating the disadvantaged position of women in the legal system, which in fact is still a rather neglected topic within sociology of law. The most significant contribution of feminism to the study of law in society is to be found in its mode of critique, which questions the very foundation of the modern legal systems by illustrating that they are constructed to signify masculinity.

Thus, it would be a mistake to regard feminist studies as merely an extra insight which we *all* need in order to bring our traditional views on law and society 'up to date'. According to feminists, not only legal sciences but also sociology remains after thirty years of critique for their malestream orientations still male-dominated.[33] Feminist knowledge is to

29 The notion of 'authority' is used here in a political and ideological and not in a scientific sense. We must, however bear in mind that in everyday life the political, practical and scientific aspects of various disciplines and fields of activities are so interwoven that one can hardly separate them from each other.

30 Cf. Fitzpatrick 1992.

31 Sociology of law has had little impact on the theoretical development of mainstream sociology. This is partly explained by the underdeveloped state of sociology of law but also by the fact that sociology of law has never been sufficiently integrated into mainstream sociology.

32 They are 'non-traditional' in a sense that they are not as well established and as frequently applied in research within sociology of law or jurisprudence as, for example, systems theory.

33 Abbott and Wallace 1997.

be viewed as a fundamental challenge to the basic theoretical assumptions of the malestream sociology and legal sciences. Subsequently, what law and sociology need is not a cosmetic touch of feminism for the sake of political correctness. Nor is it sufficient to attempt to incorporate feminism into the malestream legal and sociological thinking. What is needed is a paradigm shift.

Under the façade of objectivity and value-neutrality of positive law, the feminist scholarship discloses the maleness of the law and by doing so it casts doubts on the validity of the central assumptions of positive law. In other words it questions the most basic principles of legal positivism which through objectivity and impersonality aims to guarantee justice. Positive law does, of course in a sense, produce justice, but a justice which is the product of a "masculine mode that has been transposed in an idealised form into the legal systems of the developed world".[34] This masculine mode which constitutes the essence of the modern legal systems of the West, then makes "claims to truth". The law achieves this claim by *disqualifying* alternative "discourses", such as those reflecting women's accounts and experiences.[35]

Feminist theory is the product of an interdisciplinary community, with no interest to extend the goals of their parent disciplines. It is not anchored in any of the traditional fundamental paradigms of sociology (or any other discipline for that matter), which have influenced the development of sociological theory. Furthermore, in contrast to sociology of law, "feminist theory has gone a long way toward effectively integrating, and thus transcending, the micro-social vs. macro-social debate".[36] Feminist theory can be said to be 'radical' in at least two senses: it does not organise itself according to the traditional disciplinary divisions and it fosters an intense desire to bring about social change. Partly due to the radical status of feminist scholarship, even mainstream sociology seems to fear efforts to integrate feminist theory with the general body of sociology.

Feminists are themselves divided into various camps, but many of them equate the structural functional thinking (of the type dominating the sociological studies of the law and which is often directly borrowed from jurisprudence) with gender bias. The elementary critical observation that the law is constituted as a masculine profession (the law is developed and shaped mainly by men and the majority of lawyers and judges have traditionally been men) and that legal argumentation is a reflection of the masculine mode of thought, enshrines the kernel of a fundamental paradigm shift from a sociology of law dominated by structural functionalist thinking to new interactionist or interpretive modes of research on law and society. Only a (non-structural functionalist) critical interpretive mode of analysis can avoid the masculine bias which exists in most of the sociological and jurisprudential descriptions of the relation between law and society.[37]

The feminist movements have been criticised, among other things, for being dominated by female academics of white middle class of European origins, who confuse their own (privileged) situation with the condition of women everywhere. Feminism is also criticised–mainly internally by feminists themselves–for departing from the assumption that there can exist "a monolithic 'women's experience' that can be described independently of other facets of experience like race class and sexual orientation".[38] Notwithstanding these criticisms, feminist scholarship carries with it, as pointed out above, the kernel of social change in our societies and the possibility of a revival in social theory and jurisprudence which breaks the dominance of structural functional thinking.

Feminism is, however, not the only critical school trying to brake the dominance of the traditional concepts of law within jurisprudence and socio-legal studies. The resurgence of legal pluralism and the development of such schools as "legal polycentricity" are also reactions directed towards the existing one-dimensional, instrumental thinking about the role of law in society. While feminism was a reaction against the role of law in the production and maintenance of gender relations, legal pluralism and legal polycentricity are reactions against the ideology of "legal centralism", which claims that there is one, and only one, source of law. Furthermore, legal centralism argues that this law exists separately from and is instrumentally superior to the societal bases that has produced it and upon which it is dependent for its existence.

The more recent critical reaction against legal centralism emanates from within the legal system and is motivated by the aspirations of some lawyers to bring about a paradigm shift within the legal sciences. The proposed paradigm, called "legal polycentricity", is said to correspond more realistically with the social and legal reality of the law. Legal polycentrists, in contrast to the dominant ideology of legal positivism, argue that the law has many sources besides the will of the sovereign or the state, is generated at many legally but also *socially* conceived centres.[39] The followers of legal polycentricity question the monolithic conception of the law, which understands and describes the legal order in terms of a single-value-system and maintains that within the modern Western legal system various normative orders co-exist. Despite the fact that there exists one formal legal system we can find various centres of interpretation, application and enforcement of the law in a modern society. By departing from the assumption concerning the pluralistic nature of modern law, a fact that is denied by the presently dominant paradigm of legal positivism, legal polycentricity also brings under question the validity of the basic principles of legal positivism.

What makes the two schools of thought briefly presented above of special interest to the problem at hand is their attempt to bring about new conceptions and understandings of the law, which are free from the dominance of traditional legal theory. Therefore it plausible to postulate that they carry with them at least part of the solution to the question of how the field of sociology of law may be unified.

34 Smart 1995, p. 73.
35 Ibid.
36 Lengermann and Niebrugge-Brantley 1992, p. 447.
37 Cf. Smart, ibid., p.88.
38 Harris 1995, p. 225.
39 Cf. Petersen and Zahle 1995.

4 Theoretical Integration of Sociology of Law

In this paper I have tried to illustrate that there is a fundamental polarisation in sociological approaches to the study of law. This polarisation, I have argued, is caused above all by the fact that the law's perspective on society and social relations is epistemologically different from that of sociology. Moreover, the polarisation is sustained and enhanced due to a lack of a fundamental theoretical framework, which can embrace all sociological approaches to the study of law. The question, which remains to be investigated, is whether the polarisation of the field can be diminished and if a few alternative fundamental theoretical matrices can be produced that will contribute to a systematic methodological and theoretical development of sociology of law.

In order to answer this question we must go back to our discussion concerning feminist scholarship. Although feminist scholars have different academic backgrounds, and disagree on some issues central to the feminist theory–such as the causes of women's subordination–they have nonetheless been able to create a body of theoretical work which is considerably more coherent than that we find within sociology of law. What unites the feminist scholars despite their internal differences is twofold. Firstly they demonstrate a general interest in investigating the mode of production and reproduction of gender relations in modern society. The sociological approaches to law are in a similar fashion interested in studying the law in its social context. Feminist scholars share, however, a common ideological objective that does not exist to the same extent and with the same intensity in sociology of law. All feminists strive for social change understood in terms of women liberation, but not all sociologists of law necessarily seek social change or are driven by a burning belief in the necessity of bringing about some form of emancipation. Furthermore, in their struggle feminists have learned that they cannot afford the restrictions imposed on them by their disciplines of origin. They have therefore, to different extents, freed themselves from the limitations of the traditional and academically established disciplines.

Sociology of law must also in the same fashion limit its dependency on both law and sociology. It must not only avoid reproducing the pragmatic approach of the legal sciences to social issues, it must also refrain from the ambition to create a field of knowledge moulded by sociological theories only. While emphasising the need to consider and integrate the view of the law from 'inside', the sociologist of law must underline the significance of viewing the law even from 'outside'. In other words the legal practitioner's perspective must be integrated with the social scientist's vantage point on law. This integration cannot happen as long as the concept of law is borrowed from the legal sciences. Furthermore, not only mainstream sociology but also the legal sciences must become auxiliary to sociology of law. A project with such aspirations will, however, always run the risk of producing eclectical constructions, which might be epistemological problematic.

Only a fundamental paradigmatic framework enabling us to analyse different societal manifestations of the law can provide us with the theoretical perspective for embracing all possible orientations and sub-paradigms on the relationship between law and society. Although there are no such ready made fundamental frameworks of law and society at the moment, there are *at least* two examples of theoretical constructs with the potential to be developed into fundamental paradigms for sociology of law. These are the theory of autopoiesis and legal pluralism. Both these theories are at present in one way or another underdeveloped and therefore inadequate for this purpose. They have, however, the potential to be developed into fundamental paradigms capable of furthering the development of a large number of different theories on law and society.

As far as the integration of the view from outside with view from inside of the legal system is concerned the theory of autopoiesis can provide us with an interesting basis for developing a fundamental paradigm. According to autopoiesis the law, and any other social subsystem for that matter, constitutes itself through reducing its internal complexity in relation to its environment and regulates its own mode of reproduction self referentially. The weakness of the theory of autopoiesis is to be found in its inability to account for the relation between agency and structure in a sociologically convincing manner. Furthermore it is essentially a systems theoretical construction resting ultimately on assumptions regarding the functional differentiation of modern societies into normatively closed but cognitively open sub-systems. Such assumptions neither promote the cause of non-structural functionalist thinking within sociology of law nor necessarily favour the feminist critique of the law. In short, the merit of the autopoiesis lies in its ability to integrate the internal and external views on the legal system; its demerit is related to its emphasis on understanding the world in terms of normatively closed systems, which entails the exclusion of other alternative modes of analysis.

As it regards legal pluralism, it is approached here as a theory with the potential to lay the ground for an alternative fundamental paradigm to autopoiesis. The definition of legal pluralism I would like to depart from is that offered by Boaventura de Sousa Santos. According to Santos' post-modern understanding of law, legal pluralism is "not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crisis in our life trajectories as well as in the dull routine of eventless everyday life".[40] The strength of this type of legal pluralism is to be found in its openness to non-structural functional approaches to the study of law and society. This openness enables it to capture the socio-cultural diversity characterising social life in modern societies, a diversity which is of utmost importance to the reproduction of law, by highlighting the informal sources of the state law. It conceptualises the plural features of legal orders and allows the examination of the perception of social actors against the background of specific legal spheres. Thus, action theoretical and phenomenological approaches are easily accommodated within the boundaries of legal pluralism, while the different feminist critiques of the legal system are easily embraced. The weakness of legal pluralism lies in its ambiguous concept of law. The boundaries of law, spe-

40 Santos 1995, pp. 472-473.

cially the borderline between formal and informal rules of conduct, are not clearly defined and, subsequently, the internal mechanisms of the legal system are neglected.[41]

My purpose here is not to develop two fundamental paradigms of sociology of law, but only by giving examples briefly demonstrate that the necessary theoretical instruments for constructing more stable basis for the development of sociology of law is already available. Both legal pluralism as it is defined by Santos and the theory of autopoiesis, specially as it is developed by Günther Teubner, present us with theoretical grounds for developing two fundamental paradigms which can comprise the overwhelming majority of studies of law in its social context. Such paradigms become a reality first when most researchers in the field of law and society make an attempt to follow some general features of these theories–the qualities I underlined above as their theoretical merits–while trying to avoid some, if not all, of the problems discussed in the previous pages such as emphasising the internal or the external views of law, reproducing a structural functional definition of law which is borrowed from jurisprudence or viewing sociology of law as an auxiliary instrument for legal sciences. Such proposal can be interpreted as an attempt to advocate theoretical conformity within sociology of law and the above-proposed fundamental paradigms will clearly have some constraining effects on the studies of the relationship between law and society. Their goal is not however to limit the diversity of theoretical perspectives, but to further the development of sociology of law in a more systematic and cumulative manner, where various theories can more effectively enrich one another.

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41 For other contribution to the theory of legal pluralism see Pettersen and Zalhe 1995, Dalberg-Larsen 1994, Chiba 1989 and Griffiths 1986.

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