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Non-Pecuniary (Idealistic) Damages in Tort

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

Introduction

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

One of the most characteristic tendencies in Swedish law of damages in tort today is the increasing importance of compensation for these non-pecuniary harms. Typical for "pure" non-pecuniary harms without any physical elements is the so-called infringement damages, which often rest on punishable offence incompatible with the European Convention on

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

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

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

Human Rights (ECHR) or the criminal law. The characteristic is therefore the mediate and defence of a fundamental value from the deep structure of the law. But the judicial system has difficulties handling this type of emotive injury, which has its ground in public law without challenging traditional principles in civil law and the legal professionalism as such. The traditional restrictive attitude towards claims for compensation about non-pecuniary harms in both the application of the law and legislation seem to become weaker even if the theoretical and practical reasons behind the old exception-construct remain.

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

The term idealistic damages about non-pecuniary damages in tort has been used since the 19th century and the term comes from German idealistic philosophers like Fredrich von Schelling who was interested in the contents of the subject’s consciousness and the “public property” or common knowledge in relation to reality.⁵ Non-pecuniary or idealistic damages stem from both the harm to the “soul” as mental suffering and actions that are contrary to our basic values or norms within the context of a complex and reflexive relation. In the Swedish Tort Act (Skadeståndslagen) (1972:207) 2 ch. 3 § it appears that an infringement of one’s person, freedom, peace or honour should be compensated for by the harm the infringement gives. Swedish law of damages has a tradition of restrictiveness about these claims for damages because they do not fit with the ideology of full mending within the law of damages because they are irreparable and they also challenge aspects of both ontology and epistemology in law. Can we evaluate a violation of a person or that person’s right to integrity in fiscal terms? If the answer is yes: some tricky questions in epistemology arise.⁶ If the answer is no: our attention turns to the difficulties surrounding the possibilities of acquiring empirical knowledge about the “common sense of justice” in our society. Additionally, we can talk about the importance and relevance of discussions about the role of traditions, methodologies,

⁴ Hydén, 2008.

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

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.

research designs, paradigms and different disciplines when we examine or inspect these idealistic damages and how professionals like lawyers and bureaucrats have treated them historically. This perspective reflects some Foucauldian perspective in social science today like other perspectives, including Donna Haraway's critique of science from a feministic viewpoint.⁷

1. The relevance of idealistic damages to sociology of law

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

Restorative justice (mediation) and the retributive justice co-operate in my opinion because the general goal is satisfaction. The difference exists in the fact that the retributive or commutative justice has explicit social-minded and principle-shaping essences in relation to the more practical and private restorative justice. I think it is correct to compare the compensation for victims of crime with retributive justice even if Swedish law of damages does not accept punitive damages in these cases in relation to idealistic damages for discrimination which shall have a preventive role. It is a central question to commutative justice how to judge a reasonable and proportional compensation in consideration of values and norms in both the legal system and the sense of justice. But mediation can also result in an agreement about economic compensation. The law only acknowledges a reasonable compensation, but how can the mediator decide upon this when there 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 in the effects of the law and the social norms in the society, in my opinion. I will also point out that

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

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.⁸ In practice the offender often lacks money and the Swedish Criminal Victim Compensation and Support Authority funds to finance the compensation.

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

⁸ Schultz, 2007, p. 155.

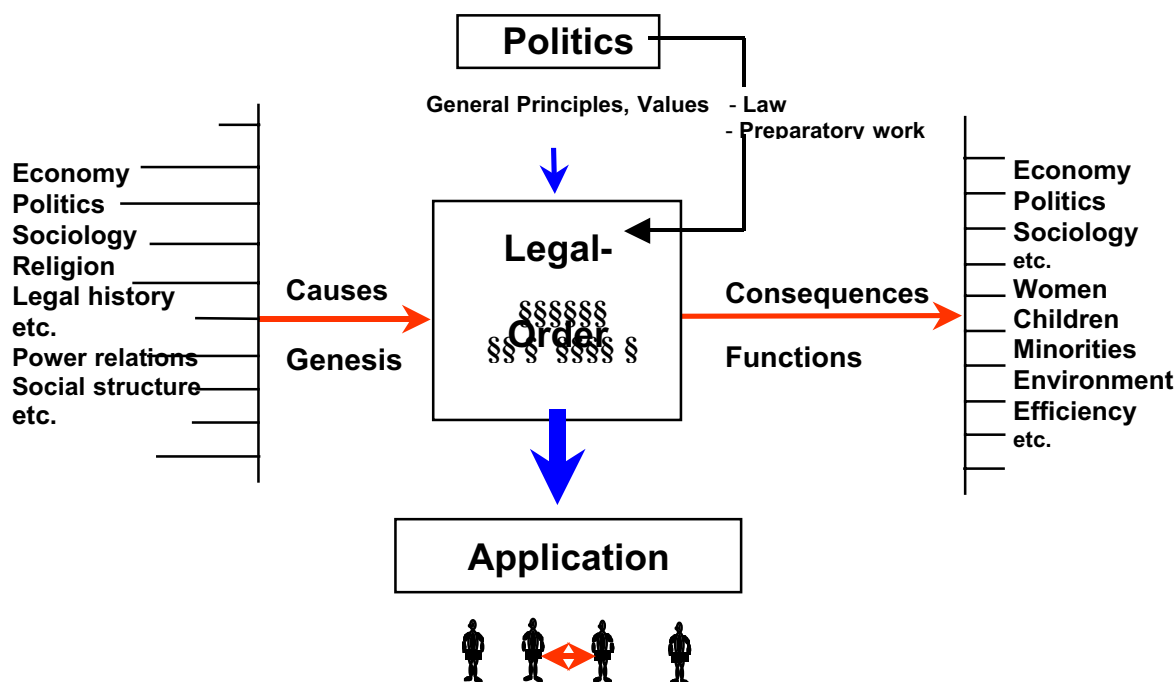
⁹ The question “how can sociology and jurisprudence learn from each other?” has recently been the subject of a discussion between Reza Banakar and Mauro Zamboni in *Retfaed*; No. 2, p. 75ff, 2006.

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

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

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

¹³ Cotterrell, 2006, p. 83.



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

¹⁴ Prop. 2000/01:68 p. 51.

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

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.

What have more modern theory like social constructivism, postmodernism or phenomenology to say about these damages and the epistemological and ontological questions they raise?

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

2. From exception to something else? About idealism and the “Swedish model”

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

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.

grounds (because of the idea that there exist no norms to calculate the compensation) when it comes to violations of somebody's rights or interests and therefore coin the critical conception "the anomic law".¹⁹

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

The exception-construction can also be an illustrative example of how Swedish law of damages can be influenced by another dominating legal theory under the modernity, namely Hans Kelsen's pure theory of law. Given his theory it is decisive to maintain the borderline between "sein und sollen" with devastating consequences for consequence considerations within legal decision-making. There are no possibilities to fill the law with the is-side of norms from the social world around the legal system when there is no ought within the norms in the legal system when it comes to idealistic damages. As professor Håkan Hydén goes into particulars about in his introductory chapter, the separation between the external and the

¹⁹ Dahlstrand, 2007.

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

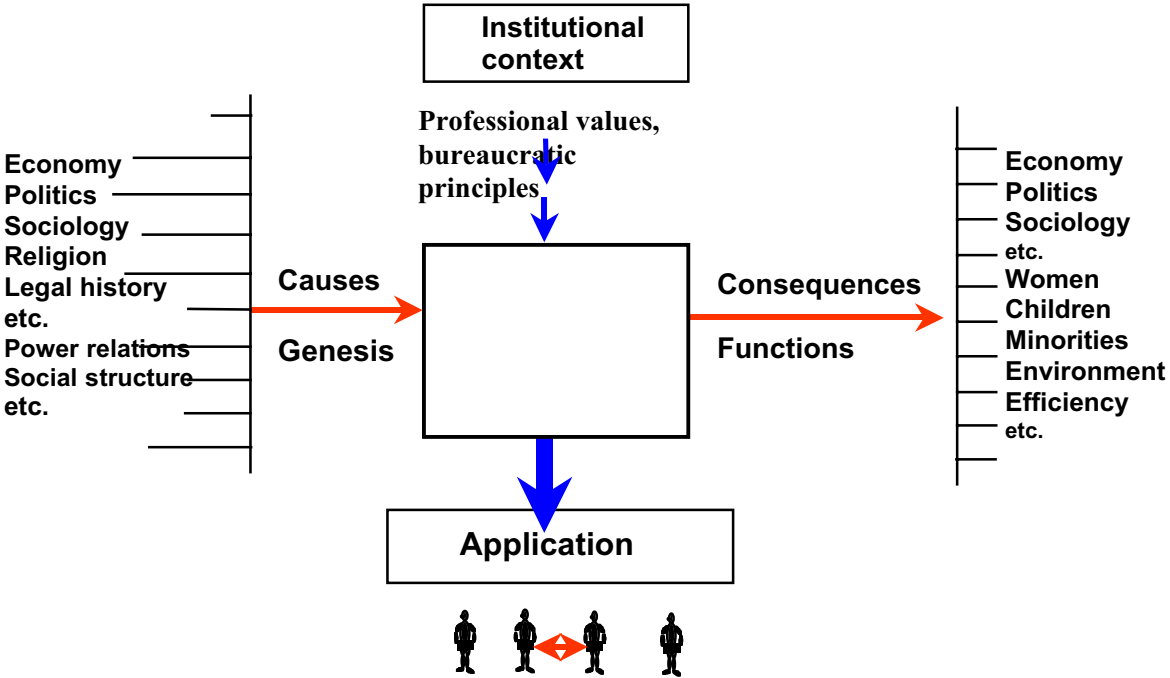
internal description of law has been very dominating. Legal dogmatics has dominated the inward looking internal field. The legal system has even been described as a closed system. Mauro Zamboni has described how different schools of jurisprudence describe and theorise the relationship between law and politics as the autonomous, the embedded and the intersection model. It is pretty clear that the idealistic damages fit and even bring out the embedded model (Critical Legal Studies, law and economics and natural law theories) where politics influence the process of lawmaking both at the stage of legislation, interpretation and enforcement.²¹

My thesis presupposes that the legal field is influenced by the contemporary theory in jurisprudence. We can perhaps talk about an idealistic awareness or “critical legal realist” movement that possibly illustrates the increasing importance of these compensations. They show the process about how the application of the law is a product of the consciousness and the intellect of the subject and in that meaning dependent on the subject and the context even if the ground for the claim of damages is the deep structure of the law and in that meaning less dependent of time and place²² In a more concrete perspective these compensations bring to the fore methodological questions in social science of how we can get empirical knowledge about norms in our society. Some questions from theory of science can consequently in a sense throw light upon some questions in legal thinking and definitions by legal means. This presupposes that you get a reflexive approach between legal thinking as a part of jurisprudence and theory of science in general. In that sense you can talk about some kind of discourse analysis of the legal field where the language and communication through legislations and judgements is regarded as social interaction and struggles about different important concepts. I intend to return to this question later. For the moment we can note that the idealistic damages illustrate the importance of the professional values and bureaucratic principles that the lawyers get from education and doctrine. It is not hard to consider that

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

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.

these damages are provocative to that institutional context and its practices if law has been described as standardized politics. These circumstances can also describe why professors of law go outside the professional role when they make notes on different claims for compensation and then compare them to love or Santa Claus (!). Accordingly, not only the horizontal perspective is of interest here but also the vertical in the model below. The two descriptions unite how the idealistic damages makes projections about people’s identity or worth, which is a consequence or function of the application of law that make sense in a society where media plays an important role as an intermediary between concepts of reality.



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

jurisprudence has also been influenced by these German thinkers and jurisprudence from Germany (the so called historical school), which makes a connection between these two.²³

If Swedish jurisprudence historically has carried the stamp of idealism, this tendency takes a dramatical new turn within Scandinavian realism and legal positivism in the 20th century. Axel Hägerström, as we note above, protest every form of subjectivism and metaphysical ideas as rights or values according to his value-nihilism. Instead he perseveres objectivity and statements without contradiction as criteria about truth and science. Only what is founded on facts and can be categorized in time and space make excuses to be the real in his form of materialism. The idealistic metaphysics was rejected radically as unscientific and values as simply emotions because for Hägerström legal science was a part of natural science. Even traditional legal conceptions like fairness and blame were concepts of appearance only with an emotive meaning since the Scandinavian Legal Realism got the dominating position in Swedish tort law.²⁴ The Swedish tort law came to be dominated or bear the stamp of a far-reaching collectivism and insurance policy where the economic compensation was far more important than the preventive or normative aspects. In some aspects you can talk about something like anti-idealism and rigidity in the modern Swedish legal culture. In the optimistic and radical 1950's the political and jurisprudential critique against the traditional self-regulating systems in law – consisting of penal law and a claim for damages – culminated, represented by professor of Ivar Strahl.²⁵ The “Swedish model” as it comes to the law of damages in the welfare state distinguishes itself with the wide insurances and consequently in the form of mending before prevention, collectivism and the public welfare, as well as different panels of lay assessors instead of self-governed law courts. The system was rational and effective but the individual and his or her needs negligible and in combination with a small amount of compensation, in particular for idealistic damages in a comparative perspective, the model of legitimacy was lost and the government has to appoint a committee in the late 1980's to evaluate the situation.²⁶

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

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.

3. Idealism related to critical realism as an example

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

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

3.1 About dualisms and deconstruction

²⁷ Sayer, 2000, s. 6ff.

²⁸ Ibid, p. 32f.

²⁹ Ibid, p. 33.

³⁰ Ibid.

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

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

³¹ Ibid, p. 39.

³² Ibid, p. 55.

³³ Haraway, 1991, p. 580. In Sweden, one feministic theorist in legal science introduced the term "the separation logic" to illustrate how some aspects in legal science fall outside and are therefore non-legal. Svensson, 1997.

³⁴ Haraway, 1991, p. 581.

³⁵ He writes that the relations between the three distinctions are contingent. Sayer, 2000, p. 61.

³⁶ Haraway, 1991, p. 584.

³⁷ Ibid, p. 585.

³⁸ Sayer, 2000, p. 67.

making knowledge relative to the holder or to particular social group is controversial, but a certain anti-realism is much in evidence in sociology and cultural studies.”³⁹

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

3.2 A critique of idealism

Some associate idealism to the religious current which was dominating when idealism was influential in science. Others will probably associate idealism with romanticism and a consensus perspective in sociological research that for a long time has been in the shadow of some kind of paradigm where the conflict perspective and a materialistic (from Karl Marx) understanding have dominated under the modernity.⁴³

As we have seen above, Andrew Sayer is negative of idealism. For example he writes that “(i)dealism makes discourse both inconsequential and all-powerful: inconsequential because it refuses to acknowledge that it can be causal and that its causal efficacy depends on how it

³⁹ Ibid, p. 68.

⁴⁰ Ibid, p. 69.

⁴¹ In Lund has Kjell-Å Modéer, professor in legal history, has argued for this perspective.

⁴² Compare with Sayer, *ibid*, p. 79.

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

relates to extra-discursive processes; all-powerful because it also makes it seem that we can re-make the world merely by re-describing it.”⁴⁴ The question is if this cannot be said about discourse in general and not only about idealism?

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

What Sayer writes about is the (in legal theory) well known ontological problem of natural law and how it limits the human freedom of action and the ground on which these are politically plausible. Some kind of essentialist ground therefore seems important for the critical social science.⁴⁶ So in the same extension as a social constructivism with its pluralistic view opens up the possibility for the idealistic damages or compensation, this theory undermines the theoretical foundation of the ”right” to these damages. Since there is the legal claim from a legal entity that should be based on some right or freedom given the state governed by law which establishes the damages of violation or the non-economic claim for damages, it is interesting to note that the idealistic theory was a reaction to the French revolution and that French materialism was dominating in that time. The French revolution is often described as a foundation of the state governed by law and an individualization of rights and freedom (the non-socialist revolution). The point of departure of the scenario above is partially based on Jean-Francois Lyotard’s description of the collapse of meta-narratives – sometimes ‘grand narratives’ in the late modernity. Roger Cotterrell writes about what comes

⁴⁴ Sayer, 2000, p. 97.

⁴⁵ Ibid, p. 98

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

instead; “The result of postmodernity is a privileging of the local and the specific ‘local knowledge’ as Clifford Geertz calls it.”⁴⁷

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

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

⁴⁷ Cotterrell, 2006, p. 19

⁴⁸ Wilhelmsson, 2001.

⁴⁹ Bauman, 1993. Wilhelmsson, JFT 5-6/2007, p. 366f.

⁵⁰ Ibid, p. 369ff. Wilhelmsson emphasize so to say the space for common sense-judgement and the character of framework law that characterize the law of damages in general and which is specially relevant for the non-economic damages we talk about here.

⁵¹ The history of hermeneutics (the philosophy of understanding and interpretation) goes back to controversies on how to best interpret texts, for example legal texts.

⁵² See above concerning idealism and linguistic. Sayer, 2000, p. 143.

indispensable, it is not sufficient to explain material change: causal explanation is still required.”⁵³ And therefore the conclusion in this chapter becomes somewhat pessimistic, but at the same time points to the complexity when it comes to theoretical questions and choices. At the same time it is clear that the exception-construction witch surrounds the non-economic or idealistic damages reflects well founded theoretically premises that say something fundamental about ontological and epistemological matters in modernity. One other question is what postmodernity makes of these aspects on the ground where the exception-construction rests.

3.3 The relevance of Social constructionism

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

⁵³ Ibid.

⁵⁴ Ibid, p. 92.

Social constructivism can accordingly be described in relation to idealism. Particularly this has been done as universal social constructivism in relation to linguistic idealism (which descends from the theologian and philosopher George Berkeley).⁵⁵ According to linguistic idealism, nothing is real until it is written down or has been an utterance and therefore everything, which exists, is mental. Besides idealism phenomenology has also contributed to and inspired social constructivism. This applies particularly to Alfred Shütz who was influenced by Edmund Husserl and Max Weber. This becomes clearer when you think about phenomenological research as a “systematic investigation of subjectivity” and the ambition “to study the world as it *appears* to us in and through consciousness.”⁵⁶ The vague character of the idealistic damages and the legislator’s positive orders to the courts in terms of their own discretion within the context of their application of the law, gives topical interest to the theory of social constructionism. But also the traditional dichotomy between idealistic and economic damages can be seen as a social constructionism and judgement of a later date has reversed this division in creating ecological-damages with obvious influence from the external discourse about the indignation of environmental crimes.⁵⁷

4. Freedom of action?

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

⁵⁵ See Hacking, 2000, p. 41.

⁵⁶ Bullington & Karlsson, Scandinavian journal of psychology, 1984, Vol. 25, p. 51.

⁵⁷ NJA 1995 p. 249 “the wolveine-case”.

The new dimension in this field, and for my topic, is however the traditional exception-construction of idealistic damages in relation to economic damages, within legal science this can be problemized in light of later theoretical movements. Does the old and traditional restrictive attitude against idealistic damages depend on their difficulty to be estimated on objective grounds? My description here assumes a reflexive relation between jurisprudence and the application of law and a contemporary concept of reality as an example of causes to the legal system within a horizontal perspective on law. Sayer writes for example "(t)he charge of empiricism might derive from an unacknowledged supposition that theory-neutral research is even possible. As I have argued elsewhere (1992), taking this impossibility seriously requires us to adopt a less exclusive concept of theory as 'examined conceptualizations' which make claims about the nature of objects, particularly their structures and powers."⁵⁸ The traditionally monistic conceptions of justice dominating under the modernity have now become weaker and several write about legal pluralism.⁵⁹ In recent years the right to the mention compensation for damages has increased and at the same time a shift in the social sciences has come about which makes this more humble. What I refer to is the phenomenon whereby researchers talk about their informant having the preferential right of interpretation in epistemology. It is also popular in sociology to talk about participation within the exploration of knowledge and theory of knowledge.⁶⁰ This means that qualitative aspects have gotten some acknowledgement that can influence victimology. The system-perspective has to decrease in relation to the lifeworld and the "actors", which can weaken the economic damages in their role as the privileged in relation to the non-economic (idealistic) as an exception to the rule.⁶¹

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

⁵⁸ Sayer, 2000, p. 147.

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

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

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

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

The ambition of this paper was to discuss some interesting and immediate theories in social science today and to try to put these in relation to a concrete legal field. For example post-structuralism because of its ontology (antiessentialism and discursively constructed reality) and its epistemology, with contextually based knowledge and localised knowledge, can constitute an example. This perspective will also be taken on using discourse analysis, deconstruction and breakdown of representations and so on. Another alternative should be critical realism.⁶⁴ One of my points of departure is the ontology that non-observable phenomena exist and can be used in explanation. Like post-structuralism and critical/relational relativism the ontology will be distinguished by anti-essentialism and the focus on relations. The problem, as I mentioned above, is if you as a researcher have an ambition to go from a critique to a more normative argumentation. Sayer argues in favour of a normative turn in social theory and in my opinion this is an important aspect in sociology of law and especially in victimology, as a project to promote the victims of crimes and their rights, interests and needs.⁶⁵ A more or less relativistic and non-essentialist approach can make it hard to create a foundation on which ethics, normative argumentation or even critiques, can be built upon. It is not possible to solve this problem here, but an awareness of these problems and aspects, which also can have a political dimension, are good things to carry into the future.

The importance of compensation for damages to individuals who have been offended has increased as a consequence of political, social and legal changes. The thesis in this paper has been that even theoretical changes can be connected with these idealistic damages and the weakening of the early restrictive attitude towards the possibility to get compensation for non-

⁶² Hollis, 2004.

⁶³ Lloyd, 1993.

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

⁶⁵ Sayer, 2000, p. 172ff.

economic injury. These issues are important as aspects of victimology and a concrete question of the relation between formal and informal norms in sociology of law today.

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

We have so to say two paradoxes. The first is the problem the legal system gets in order to guarantee its normative ground when somebody’s rights or interests are violated. We can see how the will to keep the legal system coherent and loyal to its internal rationality comes to stand in conflict with the political will and also with defending the human rights when Sweden shall implement directives from the EU that demand damages to be effective, proportionate and dissuasive. As an explanation can we therefore emphasize the theoretical climate that was dominating under modernity when law and science became an isomorphism.⁶⁶ The other paradox is that the theoretical climate is more permitting now (given that theoretical movements have dominated the last decades) while at the same time undermining the normative ground for these damages.⁶⁷

5. Idealistic damages between legality and legitimacy - exemplification and summary.

⁶⁶ Peczenik, 1995, p. 397. Santos, 1995, p. 57.

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

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

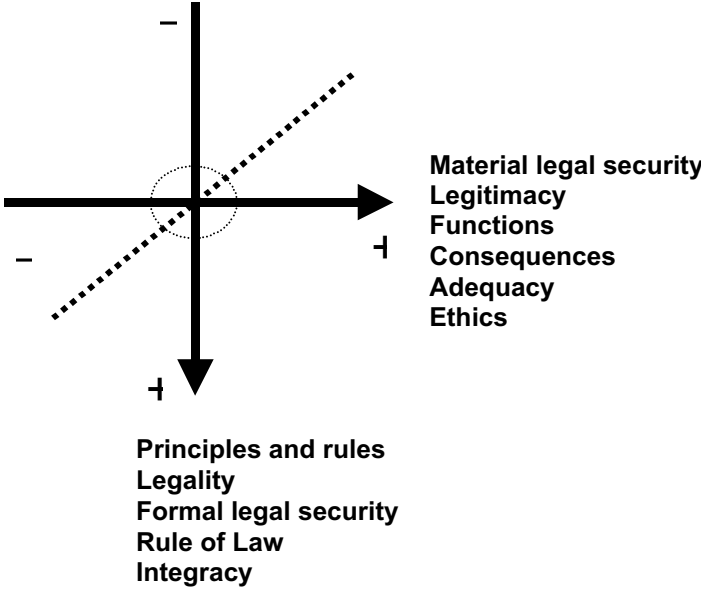
In practice we can for example look at the activity that the different ombudsmen or corresponding private activists are running and how the claim for damages plays an important role. In these legal processes the law's deep-structure on the surface of the law concretize but also facts and rules or is and ought because without considerations about the horizontal perspective of causes and consequences the process gets rather meaningless and the normative

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

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

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

background about principles and values becomes unarticulated. The legislator’s awareness of this possibility (damages as a normative medium) can maybe explain why the right to idealistic damages has increase in resent years. The political will can therefore defy the professional identity of lawyers. Previously, the idealistic damages challenged both the division of power between the legislator and the lawcourt and the professional identity amongst lawyers, which can explain their limited role. Still they threaten ideas like legal certainty and predictability but the difference is that these damages go from a situation as something negative to an advantage, in particular when it comes to the legitimacy of the legislator. But as we have seen this picture is not complete because the right to idealistic damages emanate from and put force behind the rule of law, human rights and so on. In that meaning the application of the right to idealistic damages ties legality and legitimacy together in a very concrete way. We can compare with the following model:



The starting point for every right to idealistic damages is some normative statement from the legal system that is worth protection. The old catch-rule for idealistic damages demands a grave crime and legal support (legality) and when it comes to the assessment of the amount of the damages the preparatory work talks about a quest for adequacy and consideration of the sense of justice within the society (legitimacy). When the exception-construction got a heavy emphasis the focus is on the legality and formal legal security, but since the normative engine for these damages is the defending of the individual’s rights and freedoms within the rule of law the legal system somehow become valueless (the anomic law). According to Habermas,

legitimacy can 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.⁷¹ So, idealistic damages can be seen as a conduce to inter-system conflicts within the legal system since they challenge a rigid internal and dogmatic view upon a law without any normative ambition to defend the individual’s interest governed by the rule of law. But as we have seen the legal system loses in homogeneity and there is no single point from which a uniform exception-construction can be successfully built, whether it is political, scientific or legal. In this pluralistic environment the “ought” also increases within the legal system as a consequence of for example the Europeanizing, in the form of rights and duties according to the European Convention on Human Rights, of the national law. Axel Hägerström turns in his grave!

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

⁷¹ Habermas, 1997, Cotterrell, 2006, p. 83.

⁷² Hydén, 2008, p. 8.

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