

Authors Version

How to Study Worlds: Or why one should (not) care about methodology

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Abstract:

This chapter advances a twofold analytical strategy. Firstly, an extrapolation of the legal method, *i.e.* the application of general rules to particular cases, into a general tool for both description and problem solving. Secondly, through the integration of the legal method with a phenomenological approach for the study of social worlds. This provides the basis for an integrated approach potentially deployable in relation to all social phenomena at the micro, meso and macro levels. This makes it an alternative to the methodology of the social sciences, *i.e.* economics, political economy, political science and sociology. The social sciences have become characterized by hyper formalistic and opaque modelling and simplistic assumptions resulting in a structural incapacity of scholarly innovation with the consequence that they are incapable of answering ‘big questions’ and lacks the ability to reflect critically upon the basic structure of society and core assumptions about the composition of the social world.

Keywords: Methodology, Phenomenology, Legal Method, World Studies, Holism, Post-ontology

1. Introduction

Methodology have traditionally not been a major concern or point of interest within legal scholarship. In the social sciences, most notably in economics, political science, psychology,

empirical sociology and international relations this is very different. In these disciplines methodology and methodological questions have over the course of the last four decades become the central theme around which scholarly developments circulate. The social sciences have become 'method driven' to a degree making theory and theory driven research increasingly illegitimate and marginal. The legal discipline feels the heat of this development and consequently 'empirical legal studies' adopting methods and approaches from the social sciences have experienced considerable traction in recent years.

This contribution aims to assess this development by advancing the argument that the 'methodological backwardness' of legal scholarship has been its core strength in recent decades. The 'methodology obsession' within the social sciences has led them into a dead end, characterized by hyper formalistic and opaque modelling, simplistic assumptions and a structural incapacity of scholarly innovation making them incapable of answering 'big questions' and the ability to reflect critically upon the basic structure of society and core assumptions about the composition of the social world. The poor state of the social sciences is not only reflected in lack of scholarly innovation in the strict scientific sense but also in their incapability to address concrete societal challenges and problems such as those currently fashionable in public discourse; digitalization, diversity, inequality and sustainability. As an alternative, a case is made for a return to generalized theorizing on societal structures and a reestablishment of the link between theorizing and concrete societal problems through a twofold analytical strategy. Firstly, through the outline of the general features of a phenomenological approach for the study of social worlds, understood as the unity of an 'inner world' and a horizon, *i.e.* the external context of the inner world in question. An undertaking that can and should be unfolded at the micro, meso and macro level hence providing the basis for an integrated approach potentially deployable in relation to all social phenomena.

Secondly, through rendering the world study approach compatible with the traditional legal method. The application of general rules to particular cases is the DNA of legal scholarship and is as such also a general approach potentially deployable in all cases. This indicates a potential for extrapolation of the legal method to the social sciences rather than integrating social science methods in legal scholarship.

2. “Why we should not care”¹

When legal scholarship is in the need of a methodological backup the place to go is usually the social sciences, i.e. economics, political science, political economy and sociology among others. A brief look at the dominating approaches and methods in the social sciences however reveals that the methodological inferiority complex of legal scholarship is unwarranted.² The methodology obsession in the social sciences over the past four decades has not resulted in any major scientific advances. The turn to regression analysis, aimed at mapping causal relations, which is the standard and most applied methodological tool within positivist social sciences and the tool serving as the ideal model most other tools seeks to imitate, means “testing” a literally infinite number of causal constellations. The information value of such exercises however remains limited. Causal relations are ‘constructions’ made through a linking of a ‘cause’ and an ‘effect’. In the social world, operating in time and under condition of complexity any social phenomenon can however be ‘caused’ by multiple effects. As a relation in time, different causes can produce similar effects at different times. Since the social world is always “in process” the establishment of ‘causality’ is

¹ This section partially draws upon Poul F. Kjaer: ‘The Law of Political Economy: An Introduction’, 1 - 30 in Poul F. Kjaer (ed.): *The Law of Political Economy: Transformation in the Function of Law* (Cambridge: Cambridge University Press, 2020).

² The intrusion of social sciences into law is, as pointed out by Gareth Davies in his contribution to this volume also pushed by funding agencies and the desire to make legal scholarship “a science”.

always a selective operation performed in a specific moment where a ‘cause’ and an ‘effect’ is selected and constituting each other relationally in a moment and only in that moment while other constellations of ‘causes’ and ‘effects’ (or problems and solutions) would appear in other moments. A causal scheme is, in the neo-Kantian words of Ernst Cassirer and with direct reference to Kant’s *The Critique of Judgment (Kritik der Urteilskraft)*, therefore not a scheme of determination but on the contrary a scheme of freedom. Causal schemes are based on *pre-conceived* ideas of their objects and a never-ending range of possible re-combinations of causal relations.³ One of many consequence of this is that social identities are not being constituted substantially but rather in the continued articulation of a horizon of possible actions in the sense of Husserl. Hence, identities are not substantially fixed but fluid as they are constituted in time.⁴ As such one might dismiss the turn to regression analysis as a regression providing an under-complex and fundamentally distorted view of the social world. Accordingly, the “knowledge” produced by mainstream political science and related disciplines darkens rather than enlightens our view of the world.

This is also being exemplified by the extraordinary lack of conceptual progress. The core concepts of contemporary political science, *i.e.* concepts such as ‘interest’, ‘Sovereignty’, ‘the state’, and ‘class’ (in the way they are used in mainstream political science) are essentially Weberian concepts. As such they have not experienced any notably increase in depth or refinement since the posthumous publication of Weber’s opus magnum ‘*Economy and Society: An Outline*

³ Ernst Cassirer, ‘Form und Technik’ (1930). In: Ernst Cassirer, *Gesammelte Werke. Hamburger Ausgabe*. Hg. von Birgit Recki. Band 17: Aufsätze und kleine Schriften (1927-1931), Hamburg [Felix Meiner Verlag] 2004, S. 139-183 and Niklas Luhmann: *Zweckbegriff und Systemrationalität. Über die Funktion von Zwecken in Sozialen Systeme*, 250ff.

⁴ Niklas Luhmann: *Zweckbegriff und Systemrationalität. Über die Funktion von Zwecken in Sozialen Systeme*, 29ff.

of Interpretive Sociology' (*Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*) 100 years ago. The only major change was when the core foundations of the discipline were laid down in the "invention of the American Weber" in the 1950s, some 50 years after his scholarly breakthrough in Germany.⁵ It was through the translation of Weberian concepts and their transposition into the US-American context that they were transformed into positivist and behaviourist notions.⁶

The desertification of social sciences can however be traced back to the method dispute (*Methodenstreit*) between the methodologically individualist Austrian School emphasising formal logic and the methodologically collectivist German Historical School focusing on historical experiences with political economy and economics. With initial skirmishes unfolding from Smith and Ricardo to Hegel and Marx, the defining battle emerged with the constitution of economics as a largely self-contained academic discipline from the 1880s onwards. The consequence was a switch from the dominance of the German historical school, associated in various ways with Gustav von Schmoller, Max Weber, Joseph Schumpeter and others, to the analytical, model based, largely US-based economic discipline of today. While an Austrian/German scuffle, US-American economics picked the winner by its adoption of the core assumptions of the Austrian School with von Hayek as the go-between.⁷

⁵ For a good example of the poverty of mainstream political science see Bartelson's deconstruction of the concept of disciplines use of the concept of Sovereignty. Jens Bartelson: *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), p. 12ff.

⁶ Not surprisingly, the foundation of the now dominant form of political science and the social sciences in general was founded in the US-American context of the 1950s by German scholars in exile from 1933 onwards. See also; Jürgen Habermas, *On the German-Jewish Heritage*, *Télos* 1980 (44):127-131 (1980)

⁷ Carl Menger. Introduction by Friedrich A. Hayek, printed in the English translation of Carl Menger's *Principles of Economics*, New York University Press, 1981. page 24.

The switch from the “real world”, *i.e.* history and evolution, to analytical models is normally considered a switch from holism to differentiation and hence as representing an advancement of science because the German historical school ultimately subscribed to a particular holistic inspired philosophy of history.⁸ Rather than representing an advancement of modernity, analytical economics remain stuck in the past, as the axis around which mainstream economic theories circulates is a notion of “equilibrium” and the idea that markets tend towards it. The notion of equilibrium, or balance, as originally developed in the 16th century however, pre-supposes a whole which can be “in balance”. Contemporary economics is yin and yang science, where the whole, *i.e.*, “the market”, is a body which is greater than its parts, *i.e.*, supply and demand. This is also expressed by the common day stylisation of the market as a *persona* with autonomous agency, as expressed in statements such as “the market expands”, “the market rebounds” or “the market expects”.⁹

Whereas advanced social theories have shed any notion of equilibrium or balance a long time ago, and substituted them with notions of process and evolution, mainstream economics remains entrenched in holistic thinking of an early modern origin. This is also apparent from its built in bias, which tends to see “society”, rather than the state or any other repository of public power, as the central driving force of social development, while, at the same time, “society” is factually equalled to the market. Hence, “private” is preferred to “public”, and public intervention is only deemed desirable in the unfortunate case of “market imperfections”.

⁸ Yuichi Shionoya, *The Soul of the German Historical School: Methodological Essays on Schmoller, Weber and Schumpeter*, (New York: Springer Verlag, 2005).

⁹ For a de-construction of the notion of the market, see Geoffrey M. Hodgson, “How Mythical Markets Mislead Analysis: An Institutionalist Critique of Market Universalism”, *Socio-Economic Review*, *Socio-Economic Review*, Volume 18, Issue 4, October 2020, Pages 1153–1174.

The above characterisation of the dominant traits of contemporary economics has, of course, been heavily criticised by the political economy discipline, which went its own way in the wake of the differentiation of economics from its neighbouring disciplines.¹⁰ But, even in contemporary political economy, the critique of “market fundamentalism” and the crude world view concerning the nature of economic relations which dominates the economic discipline has, however, not implied an abandoning of the holistic premise, but merely a substitution of market holism with cultural holism. *The Varieties of Capitalism* literature relying on a method derived from statistical aggregation tends to simply speak of “France”, “Germany” or the “United States”, assuming that they are unified and singular entities, *i.e.* that a state, a nation and society is one and the same thing. From this perspective, the state/society distinction does not exist or is at least disregarded in so far as the objects of study are ontological pre-supposed and “culturally given” holistic national units, made up of all social communications unfolding within their respective borders and seen as tending to move towards some sort of institutional equilibrium.¹¹ The ontological assumption concerning the prior existence of chessboard style national universes within which institutions of political economy tilts towards equilibrium originates from 17th century mechanic philosophy and have, not surprisingly, resulted in the often repeated criticism that the *Varieties of Capitalism* approach is incapable of explaining emergence and change.¹²

In the German context, Scharpf and Streeck have, as representatives of the Cologne School on rational institutionalism, moreover, advanced an implicit culturalistic version of

¹⁰ Karl Marx: *Zur Kritik der Politischen Ökonomie* (Berlin: De Gruyter, (1859) 1980).

¹¹ Peter A. Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, (Oxford: Oxford University Press, 2001).

¹² E.g. Chris Howell, ‘Varieties of Capitalism: And then there was one’?, *Comparative Politics*, 36, 102 – 124.

political economy. An approach in which the German political economy, *i.e.*, the German capitalist state, is seen as a unitary and holistic system encapsulating all activities unfolding within the borders of Germany. In Streeck's reconstruction, the evolution of political economy institutions is presented as a purely national story.¹³ The German system of political economy has apparently gone through a substantial degree of transformation without being substantially impacted by non-German factors. The institutional setup of the German political economy is however the paradigm case of the exact opposite: The emergence and continued transformation of a conglomerate of overlapping, complementary and contradictory institutional formations of political economy through an interplay between local, national and transnational dynamics.¹⁴ The reconstruction of German political economy as a purely German story is therefore not only false but also fuels nationalist myths of the most dangerous kind. In contrast to the Varieties of Capitalism approach, Streeck acknowledges the transformational perspective as crucial but at the same maintain the post-WWII German Federal Republic as an already given frame where his plaidoyer for a democratic socialist approach to political economy of the kind typically observed at the left-wing fringes of social democratic parties can be unfolded. As such, his approach, while containing many insightful observations on the rise and fall of institutions, ends up consisting of a dangerous cocktail of national and socialist ingredients.

While considerable less radical than Streeck's approach, Scharpf takes a peculiar approach to European political economy, inspired by Agamben's idea of a 'Latin Empire' which should strike back against 'German hegemony'.¹⁵ In the context of the Euro-crisis, Scharpf

¹³ Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, 2nd edition, (Oxford: Oxford University Press, 2010).

¹⁴ Poul F. Kjaer, 'The Transnational Constitution of National Social Market Economies: A Question of Constitutional Imbalances?', *Journal of Common Market Studies*, 57, 1, 143 – 58, 2019.

¹⁵ Giorgio Agamben : *The "Latin Empire" Should Strike Back*. March 26, 2013. Available at www.voxeurop.eu/en/content/article/3593961-latin-empire-should-strike-back

followed Agamben and argued that “the present euro regime must indeed be seen as an effort to impose a “Germanic” socioeconomic model on “Latin” societies”.¹⁶ Scharpf hereby advances an implicit understanding of the Eurozone as characterised by not only unbridgeable cultural divides, but also by static cultures essentially resistant to change.¹⁷ While cultural diversity and differences is an observable fact throughout the world, notions of static cultures based on a sort of immutable essence or nature is a figure and assumption developed in the late 18th century by scholars such as Herder and Fichte. Consequently, notions of national spirit (*Volksgeist*), national soul (*Volksseele*) and national character (*Nationalcharakter*) became widespread throughout the 19th century acting as the foundation for mainstream anthropology, law, philosophy and the social sciences. Static and essence based culturalism was however discredited by the events unfolding between 1914 and 1945. In addition, essentialist and foundationalist thinking is far away from the state of the art characterising modern social and legal theory where notions of evolution, indeterminacy, process and time have replaced essentialist, holistic and static notions at least since the mid-20th century. Presumably unwillingly and unintended, Scharpf therefore ends up advancing a peculiar form of regression leading back to some of the most simplistic and most dangerous categories produced in the history of modern social and humanistic scholarship.

That scholarship central to mainstream contemporary political economy feels the need to rely on or at least flirt with cultural essentialist categories seems at best strange and are at worst deeply problematic. There are however theory-constructing reasons forcing their hand. Due to the deficient conceptual toolboxes at their disposition both economics and political economy

¹⁶ Fritz W. Scharpf, ‘Forced Structural Convergence in the Eurozone – Or a Differentiated European Monetary Community’, MPIfG Discussion Paper 16/15, p. 20.

¹⁷ Fritz W. Scharpf, “The Costs of Non-disintegration: The Case of the European Monetary Union”, in: Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity*, (Cambridge: Cambridge University Press, 2016), pp. 29-49.

are forced to ontologically assume the prior existence of some sort of given holistic unity that tends towards equilibrium upon the basis of mysterious forces. Mainstream economics, as mentioned, is forced to ontologically assume the existence of a market, *i.e.* a holistic whole, tilting towards equilibrium. The political economy discipline is, on the other hand, constituted through its differentiation from mainstream economics. A differentiation that is reproduced through its rejection of the basic point of departure of mainstream economics, *i.e.* the idea that the market is the basic category framing economic (re-)production and exchanges. But if not the market what is then the basic category? The answer to that question from provided by the Varieties of Capitalism approach and Cologne style rational institutionalism as well as most other variants of political economy has been national societies constituted within the frame of nation states. Political economy, in other words, merely replaces one holistic, ontologically assumed, frame with another. In relation to a phenomenon such as but not only the continued process of European integration, this however poses an explanatory problem as this phenomenon clearly falls outside nation state categories. One strategy has therefor been simply ignoring its existence, as done in the Varieties of Capitalism approach and in Streeck's reconstruction of processes of institutional change in German political economy. Another strategy as advanced by Scharpf is to refer the notions (a)symmetry and (in)balance in the relation between the EU and its Member States, from his introduction of the concept of the 'joint-decision trap' in the early 1980s and in his manifold and continuously evolving scholarship since then.¹⁸ In 2002 he, for example, criticised the "constitutional asymmetry between policies promoting market efficiencies and policies promoting

¹⁸ E.g. Fritz W. Scharpf, *The Joint-Decision Trap. Lessons From German Federalism and European Integration*. Public Administration, Vol. 66, No. 2., 1988, pp. 239–78; Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, 40, 4, 2002, pp. 645–70.

social protection and equality”.¹⁹ Notions of (a)symmetry and (in)balance reach as far back as Thucydides and has been deployed in classical international relations in the sense of a balance of power between states, as well as in relation to federally organised political systems with the latter being the core expertise of Scharpf. In both cases the condition is however the assumption of the existence of a larger whole within which (a)symmetry and balance can appear. The power balance between early modern European states was assumed to unfold within the *Ius Publicum Europaeum* just as later international relation scholars tend to talk of a world system of states. Scharpf is however systematically unclear in the question concerning the character of the whole within which he sees (a)symmetries and (in)balances unfold. Already in the initial “joint-decision trap” piece he twisted Stanley Hoffmann’s argument that it would be impossible for what is now the EU to be the “stable middle ground between the cooperation of existing nations and the breaking in of a new one”²⁰ by arguing that the EU is in fact exactly just that. When revising the “joint-decision trap” in 2006 he simply dismissed “the ontological battle that ‘intergovernmentalists’ and ‘supranationalists’ were waging over the true nature of the European polity.”²¹ While intergovernmentalist and supranationalist scholarship indeed is characterized by extreme degrees of simplicity relying on outdated conceptualities and assumptions which have been surpassed decades ago in other scholarly fields,²² simply dismissing the question what exactly the entity is within which he assumes (a)symmetries and (in)balances to occur is hardly satisfactory. Indeed it

¹⁹Ibid. p. 645.

²⁰ Hoffmann cited after Fritz W. Scharpf, *The Joint-Decision Trap. Lessons From German Federalism and European Integration*. Public Administration, Vol. 66, No. 2., 1988, pp. 239–78, p. 242.

²¹ Fritz W. Scharpf, ‘The Joint-Decision Trap Revisited’, *Journal of Common Market Studies*, 44, 4, 2006, pp. 845–64, P. 847.

²² For a deconstruction of the intergovernmentalist and supranationalist as other mainstream approaches to European integration and the development of an alternative approach relying on insights from contemporary sociological theory see Poul F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Oxford: Hart Publishing, 2010).

is exactly the lack of clarification of this fundamental question that explains the problematic turn to cultural essentialist categories. When wanting to apply the vocabulary of (a)symmetries and (in)balances to the Euro-zone the shaky foundations of theoretical constructs necessitating an assumption concerning the existence of a holistic whole becomes clear. The euro-zone is a phenomenon that cannot be subsumed under nation state conceptuality or considered a mere inter-state arrangement. When seeking to depict the Euro-zone's core feature as (a)symmetries and (in)balances and when you cannot frame it as a relation between the supranational EU and nation states or as domestic politics within a 'Euro-state' the only category left becomes the cultural one. Approaches relying on concepts of (a)symmetries and (in)balances or (dis-)equilibrium requires two or more constituent units making up the whole and in this case the culturalist 'Germanic' and 'Latin' categories are the only ones on offer.²³

3. "Why we should care"

The above dismissal of mainstream social science begs the question what the alternative might be? A question which is even more pertinent when observing the effects of the social sciences, most notably law and economics, on legal scholarship.²⁴ An easy solution would of course be to say "anything goes" in the sense of Feyerabend.²⁵ Going beyond that, one might search for specificities of scientific communication which does not apply to other types of communication and which enjoys a high level of institutionalization.²⁶ Among the many requirements one might add to such

²³ For a popular scientific version of the same culturalist argument see: Ewoud van Laer: *The Desperate Union: What is going wrong in the European Union* (London: Anthem Press, 2020)

²⁴ For more on this see the contribution of Irina Domurath in this volume.

²⁵ Paul Feyerabend: *Against Method: Outline of an Anarchistic Theory of Knowledge*, 4th ed. (New York, NY: Verso Books [1975] 2010).

²⁶ For the specificities of scientific communication and how it potentially can serve as an ideal model for other forms communication, see Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp Verlag, 1992), 24ff.

a framework at least ten stands out in particular. Requirements serving as a toolbox which, when taken together, provide the basic features of an approach for the studying of ‘worlds’, *i.e.* social phenomena consisting of an ‘inner world’ and a horizon in the sense of Husserl,²⁷ or a social system and its context.²⁸

- First, any framework of scientific enquiry will have to be post-ontological, *i.e.* not be based on given assumptions and foundationalism. Examples of given assumptions, is the assumption of interest maximization within economics and political science, or the assumption within classical versions of public international law and international relations scholarship concerning the ‘unity of the state’, or the assumption of preexisting and transcendental cultural units. The latter is for example found in Dieter Grimm’s foundationalist idea of a pre-existing nation (*Volk*) as a requisite for a state²⁹ and, as we have seen, in culturalist political economy. The post-metaphysical demand can, however, be difficult to achieve. The insight that all social phenomena’s are ‘processes-based’, *i.e.* constituted in time, is also an ontological assumption, albeit a non-substantialist one, in the need of justification. In short: The quest is to move beyond metaphysical foundationalism and given assumptions to the highest extent possible.

²⁷ The world is here understood as an ‘aggregate of things’ which is not located within consciousness. See Mikhail A. Belousov, ‘On the Problem of the World in Husserl’s Phenomenology’, *Russian Studies in Philosophy*, 54, 1, 2016, pp. 20-34. See also Edmund Husserl, *Lebenswelt. Auslegungen der vorgegebenen Welt und ihrer Konstitution. Texte aus dem Nachlass (1916–1937)* (Dordrecht: Springer, 2008), pp. 246–56 and Ludwig Landgrebe, ‘The World as a Phenomenological Problem’, *Philosophy and Phenomenological Research*, 1, 1 (Sep. 1940), pp. 38-58. For very preliminary reflections see also Poul F. Kjaer, ‘Law of the Worlds - Towards an Inter-Systemic Theory’, 159 – 75 in Stefan Keller, Stefan Wipraechtger (Hrsg.): *Recht zwischen Dogmatik und Theorie. Marc Amstutz zum 50. Geburtstag* (Zürich: Dike Verlag, 2012).

²⁸ Poul Kjaer, ‘Systems in Context: On the Outcome of the Habermas/Luhmann-debate’, 66-77, *Ancilla Iuris*, Sep., 2006.

²⁹ E.g. Dieter Grimm, ‘Braucht Europa eine Verfassung?’, *JuristenZeitung* 50, 12 (16. Juni 1995), pp. 581-591.

• Second, any framework needs to be “epistemologically versatile”. The starting point would have to be the acknowledgement that no framework can be “epistemologically complete”, *i.e.* no framework can shed light on a social phenomenon in its entirety. There is always a blind spot. The only possibility is to look at a social phenomenon from as many angles as possible, developing a framework enabling a constant switch of perspective. Epistemological versatility through constant switching means that the framework itself, like any other social phenomena, needs to be conceived of as an operation unfolded in time.³⁰ To take an example, Comitology committees, the implementation committees, located ‘in-between’ the EU legal order and Member State legal orders can be observed from the ‘EU legal order and out’ or from different ‘Member States legal orders and out’. Apart from a legal, angle, they can also be observed from, for example, a moral, an organizational or a political angle and depending the angle different views and comprehensions will appear.³¹ In a similar manner: Do you observe the public in the private or rather the private in the public or both? Can you maybe switch between the two back and forth?³² Hence, while acknowledging that no Archimedean point exists, the aim should be to increase epistemological versatility as much as possible in order to obtain a ‘complete picture’ as possible rather than to reduce, as aimed for by positivism, the spectrum of perspectives to the one “true” perspective. Multi-disciplinarity, the systematic switching from one scientific discipline to another is therefore an indispensable requirement for social scientific and legal scholarship.

³⁰ Jean Clam, ‘System’s Sole Constituent, the Operation: Clarifying a Central Concept of Luhmannian Theory’, *Acta sociologica*, 43, 1, 2000, pp. 63-79.

³¹ Poul F. Kjaer: *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Oxford: Hart Publishing, 2010).

³² Poul F. Kjaer: ‘From the Private to the Public to the Private? Historicizing the Evolution of Public and Private Authority’, *Indiana Journal of Global Legal Studies*, Vol. 25, 1, 13 - 36 (Spring), 2018

• Three, dissolution capacity is the criteria of ‘scientific progress’. In physics particles forms atoms which in turn forms molecules and the advancement of the discipline is based on ‘discovering’ this by dissolving the objects of study into ever smaller units.³³ The same goes for the social sciences. Kant separated culture and nature, Arendt power and violence and Luhmann psychic and social systems and so forth. Hence, a theory or more precisely a theoretical concept is to be understood as an instrument of observation and its ‘value’ should be judged on its magnifying capacity and hence its capacity to dissolve objects through the introduction of ever more distinctions. The central question when evaluating the usefulness of a theoretical concept is therefore: Does one see “more” with it or not? Just like in the legal method, dissolution capacity is intrinsically linked to generalisation. It is the formulation of increasingly abstract and generalised insights, as in the case of the theory of relativity, which enables increases in dissolution capacity.

• Fourth, the theoretical architecture (*Theoriearkitektur*) is essential. When building a house, different dimensions (the fundament, the walls, the roof etc.) needs to be compatible in order to provide a coherent construction. In addition, they need to be aligned with different functions (cooking, eating, playing, sleeping, working etc.) which themselves need to be organised in a mutually supportive way. Only if that is the case an edifice capable of enduring in time will emerge. The same goes for theories, understood as an ensemble of concepts. The concepts need to “fit together” and support each other. That goes for basic concepts (*Grundbegriffe*) as well as secondary concepts derived from them, as, for example, is the case with primary norms derived

³³ Niklas Luhmann, ‘Die Soziologie und der Mensch’, 265 – 74, in Niklas Luhmann, *Soziologische Aufklärung 6. Die Soziologie und der Mensch* (Opladen: Westdeutscher Verlag, 1995).

from secondary norms,³⁴ or primary rules derived from secondary rules.³⁵ The more coherent they are the more they will encompass. This is however only possible if there is a single basic concept, for example a basic norm (*Grundnorm*), acting as the centrepiece binding the rest together. But in order to do so in a non-foundationalist way and with the lowest possible level of ontological assumptions built into it the single basic concept needs to be an essentially empty concept encompassing everything and therefore nothing. This is, for example, the purpose of the concept of spirit (*Geist*) by Hegel, or the concept of Meaning (*Sinn*) by Luhmann both serving as basic concepts with no essential content.³⁶ The same might be said about the concept of ‘integration’ in relation to the study of EU and EU law.³⁷

- Fifth, the ultimate object of study is ‘society’. Society is the all-encompassing unit of study and social phenomena such as the EU, states, law or the economy can only be studied in a contextualized manner within society as such. Legal or social theory is therefore *only* possible as societal theory (*Gesellschaftstheorie*) understood as a general theory of society.³⁸ A concept of society is the necessary point of departure for *any* social science study including a legal study. For a theory to qualify as a societal theory at least two requirements however have to be fulfilled: The theory should be able to give a qualified answer to the question “how is society possible?”, *i.e.*

³⁴ Hans Kelsen, ‘Primary and Secondary Norms—The Difference between Law and Morality’, 142 – 43 in Hans Kelsen, *General Theory of Norms* (Oxford: Oxford University Press, [1979] 1991).

³⁵ Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press; New York : Oxford University Press, 1994) p. 94ff.

³⁶ Niklas Luhmann, ‘Sinn als Grundbegriff der Soziologie’. In J. Habermas and N. Luhmann (Eds.): *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet die Systemforschung?*, (pp. 25-100). (Frankfurt am Main: Suhrkamp Verlag, 1971).

³⁷ Poul F. Kjaer: *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Oxford: Hart Publishing, 2010), 31ff.

³⁸ Bob Jessop, ‘Corporatism and Beyond? On Governance and Its Limits’, pp. 29 – 46 in Eva Hartmann and Poul F. Kjaer (eds.): *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Basingstoke: Palgrave Macmillan, 2015).

how does it all “hang together”?³⁹ A question which under the understanding of the social as constituted in time also can be rephrased as ‘how is society synchronized?’ Second, the theory should, in principle, be able to observe *all* social phenomena irrespective of time and place, *i.e.* from lodging construction in archaic societies and table manners in the Byzantine Empire to contemporary financial markets and the tedium of EU law technicalities. Under pre-modern conditions such all-encompassing theories can be found by Augustin and Spinoza. Under modern, *i.e.* non-totalizing and non-static and non-metaphysical conditions, the only two existing attempts (which might be considered successful or not) to develop all-encompassing theories of society are those associated with Hegel and Luhmann. Many other social theories have developed partial insights of great importance, such as the conditions for rational communication by Habermas, the logics of class struggle by Marx or genealogies of subjectivity by Foucault. None of these theories however develop a conceptual system capable of encompassing society as such.

- Sixth, *all* social phenomena are, as mentioned, constituted in time. Observing social phenomena can thus only be done in a processual, *i.e.* non-static, perspective highlighting evolution over time. Evolution is however blind and nothing is given or can be ontologically assumed (such as objective interests, logics of history or states). In short: *All* social phenomena are contingent emergencies and all theories are therefore confronted with and need to address the issue of evolution (defined as the unity of variation, selection and stabilization) by answering the question: How does change take place? Purely analytical theories, for example in mainstream economics or the Rawlsian theory of Justice, as well as static Behaviorist observations are not capable of ‘explaining’ change. When understanding the social and therefore society as consisted in time change however become

³⁹ Georg Simmel, ‘Wie ist Gesellschaft möglich’, 29 – 40 in Georg Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (Berlin: Duncker & Humblot, [1908] 1983).

the only thing that is certain. Explaining why a given social phenomena looks different at different moments of time therefore become the central focus point of social scientific enquiry.

- Seventh, the structural condition of contingency means there is always a ‘surplus of choice’. The slave, as Hegel argued, is also free as he/she can always choose to commit suicide, just as the choice not to make a decision on this or that is also a decision. At any moment in any given context, there is always an alternative even if extremely limited or unattractive. This is the structural condition of counter-factual articulations, *i.e.* of normativity. The articulation of a possible future alternative to the factual in the present constitutes a tension and a central driver of evolution as counter-factual norms are derived from the past but serve as criteria of evolutionary selection for the future. Issues of justice, legal and/or moral evaluation of a given communication and its effects, are always done with reference to the past. No matter if concerned with shop lifting or a genocide the act committed is in the past. The purpose of sanctioning is therefore not primarily to redeem the past but to confirm the validity of the norm transgressed for the future. When systematized, normative projects, e.g. constitutional texts, treaties, charters of fundamental rights, therefore all serve as codified schemes for the selection of futures on the basis of past experiences.

- Eight, the only empirical object there is are language games (*Sprachspiele*) or articulations in the sense of Wittgenstein, *i.e.* the interpretation of communication in their context. As the only thing “there is” in the social world is process, *i.e.* time, *all* social enquiries are by definition historical enquires (even if at times the history is very short). The combination of time, contingency (*i.e.* blind evolution) and dialectics between the factual and the counter-factual and the impossibility to “go beyond language” means that any historical analysis and hence any social enquiry only can be

conducted as a conceptual history in the sense of Koselleck⁴⁰ or a genealogy in the sense of Foucault.⁴¹

• Nine, all social phenomena need to be observed in their context. Requirement five above, implied an understanding of ‘society’ as the ultimate context of a social phenomena. Society is the all-encompassing unit and as such co-extensive with the world understood as the ultimate horizon. Everything within the horizon belongs to the world. The problem with that is that the world, paradoxically, consists of many worlds, micro-, meso- and macro-worlds. From the dynamics in a classroom and the interaction of a criminal gang, national labour market institutions to world events like the Olympics, multinational companies or empires. These are all worlds, understood as the unity of an ‘inner world’ and a horizon, *i.e.* the external context of the inner world. Hence, worlds only exist relationally in a given moment and that moment and those relations need – as far as possible – to be included in the observation in order to provide a comprehensive as possible description of a social phenomena.

• Ten, worlds not only exists as the distinction between the ‘inner world’ and the horizon. They also exists as ‘double worlds’, *i.e.* as factual and as contra-factual worlds as already hinted at under point seventh. The central driving force of social evolution is the dialectical tension between the factual and the counter-factual world. The constant re-articulation of alternative futures thereby become the fuel of change.⁴² The counter-factual world’s are therefore equally ‘real’ as the factual worlds. It is for this reason and in this specific sense that law becomes ‘constitutive’ of worlds.⁴³

⁴⁰ Reinhart Koselleck, *Begriffsgeschichten* (Frankfurt am Main: Suhrkamp Verlag, 2006)

⁴¹ Michel Foucault, *Let Mots et les chose* (Paris: Galimard, 1966).

⁴² Most clearly outlined in Hauke Brunkhorst: ‘Critical Theory of Legal Revolutions: Evolutionary Perspectives (London: Bloomsbury, 2014).

⁴³ Poul F. Kjaer, ‘The Law of Political Economy as Transformative Law: A New Approach to the Concept and Function of Law’, *Global Perspectives*, 2, 1, 1 – 17, 2021, 12f.

Law is the ultimate system aimed at upholding existing norms and, simultaneously, of articulating counter-factual propositions for the future. As expressed in the distinction between cognitive and normative expectations, the factual world however tends to change faster than the counter-factual worlds. Bridging this time gap is the core function of constitutions.⁴⁴

4. Perspectives: From the Legal Method to General Theory of Society and Back

A central element of the traditional legal method is the application of general rules to specific cases. Rather than a one-way street, it represent a constant oscillation from the general to the particular and back. Hence, the legal method is an operative act where the general and the particular is simultaneously constituted. The legal method, as a practice, can in this sense be considered a heuristic problem-solving tool aimed at established concordance between the general and the particular. The central way of doing is the form giving function of law, due to the constraining effect of the legal form on processes and their outcome. Formalism in this sense does not imply any claim to determinacy but provides a particular form to the law itself which makes law distinguishable from non-legal parts of the social world.⁴⁵ At the same time, law gives form to non-legal social phenomena, *i.e* through the institutions such contract, rights and property. The traditional legal method can thus be understood as oscillating between form giving and problem solving.

A general theory of society does for science. A general theory also oscillates between the general and the particular and its explanatory capacity is also momentarily constituted in the oscillation. Both are furthermore frameworks aimed at using the past to move into the future. The legal method

⁴⁴ See Poul F. Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Abingdon: Routledge, 2014).

⁴⁵ See the contribution of Christiane Eckes in this volume.

serve as the vehicle for the establishment of precedence through case selection and interpretation. Similarly, evolutionary based theory of society allows us to understand the future as emerging immanently from the past within the scheme variation, selection and stabilization. The general approach to the study of worlds outlined above and the traditional legal method might thus be seen as not only compatible but also as intrinsically interlinked as explaining the world and the other with concrete problem solving.