1. Legal theory and sociology of law

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INTRODUCTION – SOCIOLOGICALLY INFORMED JURISPRUDENCE

Sociology of law and jurisprudence (the general theory and the philosophy of law) are in uneasy tension. Sociological accounts of law as an institution provide legal practice and legal theory with insight into law's social processes, and the social sciences help jurisprudence examine if its assumptions are grounded in the reality of law (Galligan 2006, 18). Yet despite socio-legal scholars' endeavours to integrate legal and sociological ideas, *law* and *sociology* remain apart. Sometimes these disciplines ignore each other, somewhat minding their own business. Banakar (2009, 71) wonders why prominent philosophers of law, such as Dworkin, regard sociological and historical studies of law, which view the law externally as 'perverse', while failing to recognize that internal studies of the law which ignore questions about the social properties of the law and the external manifestations of the law are also 'impoverished and defective'. Sometimes, however, sociology of law and jurisprudence communicate and rely on each other. This chapter explains the tension, finding a different approach to the *is/ought* distinction in each discipline. To even out that tension, law is understood, following MacCormick (2007), to be a process of institutionalised normative communication, and institutional theory of law is proposed as the conceptual starting point for the sociology of law.

Kornhauser (2017) identified five components that any comprehensive theory of law should provide: first, *the nature of law*, distinguishing law both from other normative systems such as morality and religion, and social conventions such as etiquette, but also from other domains of practical reason, utility, coercion, interests, power and politics; second, *the grounds of law*, the conditions for a proposition of law to be true or valid; third, the nature of *the reasons for action* that law provides; fourth, the value of *legality*; and fifth, a normative theory of *adjudication*, a theory of how judges ought to decide cases. This chapter deals with these five components. Sociology of law will complement the first and third and provide empirical counterpoints to the fourth and fifth components, while neglecting the second item as idealistic¹ or not realistic. Indeed, 'a realistic theory of law is built on observations about the past and present reality of law rather than on intuitions, thought experiments, musings about all possible worlds, claims about self-evident truisms, and other non-empirical modes of analysis frequently utilized by analytical jurists' (Tamanaha 2017, 2).

¹ This neglect of legal idealism frees sociologists from making assumptions about the sources of law and the nature of legal reasoning, enabling them to identify the sources of law in social formations and associations which have come about and exist independently of the state and to adopt a bottom-up and critical perspective on law, regarding social interactions and relations and perceptions of the law as the primary focus of their study (Banakar 2009, 66).

Tamanaha claims ‘law involves multiple social-historical phenomena that have taken on different forms and functions in different times and places and, therefore, cannot be captured by a singular definition of law’ (2017, 38). While accepting the diversity of legal phenomena and even embracing (a mild form of) legal pluralism, this chapter takes up his challenge in order to defend a ‘singular definition of law’ as an *institutional normative order* and as a suitable conceptual approach to law, valid for both jurisprudence (general theory and philosophy of law) and sociology of law across cultures and history, and thus universally applicable although, admittedly, my sources are mostly European. This approach to the theory and sociology of law, sketched by the late Neil MacCormick in 2007, takes the norm-user’s perspective and is ‘realistic’, without outright rejecting law’s dual nature (Alexy 2010).

Exploring the conceptual foundations for sociologically sound jurisprudence, and inspired by neighbouring sub-disciplines like the sociological theory of law or sociological jurisprudence,² this chapter puts forward an *institutional theory of law* that accounts for the wealth of legal phenomena and provides a working concept of law for sociology. It discusses key issues in the tension between sociology of law and jurisprudence and revisits the *is/ought* distinction as it applies to sociology and jurisprudence, considering legal norms and processes as the institutional elements to test the two disciplines (Ferrari 2006, 72). Norms operate in communicative spaces, sometimes monolingual sometimes multilingual, as patterns for action that influence peoples’ expectations, social actions and the settlement of social conflicts. Sociology of law thus contributes to jurisprudence, distinguishing law from other normative systems and legal norms from other types of norm.

NORMATIVITY IN SOCIOLOGY OF LAW AND IN JURISPRUDENCE

This section discusses the tension between sociology of law and jurisprudence; the *is/ought* divide as it applies to sociology and theory of law and a minimal working concept of law and legal norms as distinct from other normative systems or other types of norm. Normativity is expressed through norms, institutions and processes and, while semiotic understandings of normativity see norms operating in communicative spaces, sociological understandings see them as patterns for action that influence peoples’ expectations, social actions (behaviour) and the settlement of social conflicts. These descriptive-interpretative approaches contrast with internal legal discourses; at best analytical or hermeneutic, at worst dogmatic or doctrinal.

² *Sociological jurisprudence*, linked with the sociology of law, is from an earlier date than the *Law and Society* movement. It is interested in legal theory and legal education and views the law as experienced by legal practitioners and actors. Ehrlich, Gurvitch, Petrazyski and Pound called on legal research, legal education and judicial decision-making to adopt the methods and insights of social sciences to amend the conceptual formalism of analytical jurisprudence and its neglect of empirical facts, and of the role of social forces in creating the legal order and shaping legal behaviour (Banakar 2009, 67–8).

Is and Ought in the Sociology and Theory of Law

The separation of sociology of law and jurisprudence as disciplines is largely based on the *is/ought* distinction; facts and values (norms) being separate dimensions. Enlightenment philosophers David Hume and Immanuel Kant warned of the categorical mistake in deriving an *is* from an *ought* or an *ought* from an *is*; a naturalistic fallacy (Moore 1903, 13). Along this radical separation of experience domains, the sociology of law would be concerned with *is* and jurisprudence with *ought*. The analytical jurisprudence of legal positivists has become increasingly abstract, specialized and narrow, disregarding social theory or history (Tamanaha 2017, 2) – disregarding the *is*. Legal positivism, like natural law, avoids discussing the constitution of the ‘social’ (Banakar 2009, 60). For positivist jurisprudence, *is* and *ought* are radically and rigidly apart (Zagrebelsky 1995, 118). Thus, Hans Kelsen (1911) adopted a transcendental theory of legal norms on the basis of a chain of validity that ultimately relied on a hypothetical *ought*, the *Grundnorm*. But in order to study the *ought* scientifically, as an *is*, norms were treated as normative propositions. Sociology was a disturbing noise in his *pure* theory of norms; as elements belonging to the factual sphere, the human activities generating law are the concern of sociology and have no part to play within a ‘pure’ theory of law (Delacroix 2006). Equally aware of the fallacy, Vincenzo Ferrari, a prominent professor of sociology of law, recently warned that the danger of functionalism lies in confusing *is* and *ought* (Rivaya 2019).

By contrast, sociology of law tends to bridge and blur the *is/ought* distinction. Niklas Luhmann (1972) developed a sociological theory of the legal system on the basis of the binary category *recht/unrecht* (lawful/unlawful) as they operate in society, seen as a network of systems and acts of communication having social meaning. Norm-based thinking is a method through which law distinguishes itself from non-law, deciding cases on an all or nothing basis, which in principle leaves little or no space for general moral or sociological considerations. But norm-based thinking is also a communicative process through which the norms are interpreted and applied in various social contexts (Luhmann 1985). Here, *is* and *ought* are in permanent dialogue.

This method or approach reflects law’s attempt to integrate, rationalize and confine complex social processes to the conceptual boundaries of legal norms. Law is a highly rationalized rule-based activity; a system of rules, norms, decisions, doctrines and principles designed to guide action, enable legal analysis, and justify decisions in an ‘objective’ manner. This image of law pervades juristic discourses and creates the cornerstone of a legal education devoted to the reading of cases and law reports, and searching for, interpreting and applying legal rules (Banakar 2009, 60). Jurisprudence and sociology of law could very well take each other’s teachings and perspectives into account and use ‘sociology’s looking glass to see beyond the self descriptions of law and the legal profession’ (Banakar 2009, 64). But this is rare. This separation of sociology of law and jurisprudence as disciplines has as much to do with academic competition and fields of research, the construction and distribution of ‘scientific stakes’ in academia (Bourdieu 1975); as with epistemic conflicts, their respective theoretical make-up is the way they approach the *is/ought* divide.

Legal positivism tries to provide an adequate, internal account of law *as it is*, in contrast to how law *ought to be*; this being the interest of natural law. But positivism aims at grasping the *is* analytically, by clarifying the basic concepts and frameworks through which we

observe, describe and understand law, rather than through an empirical investigation of the practices and experiences of those who produce and reproduce the law and its institutions. It deliberately ignores the life of the law and treats normativity as its data: Kelsen's pyramid-shaped legal system based on the chain of validity of legal norms (Kelsen 1960) is the climax of a positivist legal science that avoids the naturalist fallacy all the way to the Grundnorm, and pretends to be scientific, a genuine *Rechtswissenschaft* (Jung 2020).

In natural law as well, at least in the most systematic and coherent versions of iusnaturalism, 'no value can be deduced or otherwise inferred from a fact or set of facts' (Finnis 1980, 66). Finnis' system of values and rights generates an order or system in the face of value-pluralism and social co-ordination problems by the 'induction' of indemonstrable first principles of practical reason (that is, of natural law), like the principle that truth is worth pursuing (Finnis 1981, 268). The 'natural law method' of working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law' also aims to respect the *islought* divide and reinforces the claim to the autonomy of the law (Finnis 1980, 102–3).

By contrast, legal realism, critical legal studies or alternative use of law have shown some interest in the ways normative structures are created and recreated, enacted and reconstructed and, in their relation to conflict and power, they have bridged the *islought* divide.³ Sociology of law, by title, by birth and by definition, dissolves this divide, and thus potentially clashes with the modern Kelsenian philosophy of law, but the concept of norms helps them to conflate.

The Sociolegal Concept of Norms

The concept of norms is accepted within both the prescriptive legal field and the descriptive social sciences (Hyden and Svensson 2008, 137). Norms can be seen as objects, data containing messages – speech acts – about what ought to be. Norms are individuals' understanding of surrounding expectations regarding their own behaviour, so that when an individual's attitude deliberately conforms to the norm we can infer that the norm has been internalised by the individual. Action in conformity (or not) with the norm has cognitive, volitional and behavioural components.

Sociology of law explains normative structures from their factual (empirical) context. Durkheim avoided breaking Hume's law by claiming that social facts such as legal norms are things or data, a realm of the *is*. For Durkheim, norms are facts that can be studied as they interact with other facts in society. They are data that can be viewed through their signs. In that sense they are objective and *external*: they exist in a social context and are socially reproduced, whereas the *ought* is linked to an individual, internal level of the person and falls outside any sociological or social analysis. Thus, as norms bear features of both the *ought* and the *is*, Hyden and Svensson claim that, through norm analysis, we can derive the *ought* of the legal system from the *is* of society (2008) – a Durkheimian claim.

For Durkheim the model or representation that society (the group) imposes on an individual about due and expected behaviour (what ought to be done) is a social fact.

³ American legal realists are 'acknowledged as forerunners of the Law and Society Movement, Socio-Legal Studies and other empirical approaches' (Twining 2019, 165).

Guiding human conduct is what norms do as a form of communication, and this is a social phenomenon that works as a norm for norm-givers and norm-users, and for those engaged in the *language game* of normativity (Wittgenstein 1953, 23), but appears as a fact for the external observer as a given, as *données* or data: the conducts of the users, in conformity with the norms they recognise, are facts to the observer (Perrin 1990). This transpersonal recognition of the norms is linked to the development of the feeling of justice, Piaget's development psychology, to be found in all domains of practical reason. The social norm is that which is recognised as just or fair in a social group. For Weber too, the norm is an instrument of communication that becomes a mental representation as a consequence of a process of socialisation. The norm addressee receives the normative message and recognises the norm in the message: the expectation of due behaviour it contains becomes the object of the norm.

'One cannot play bridge without knowing and accepting the rules of bridge' (Perrin 1990, 134). The game of bridge has an institutional reality by reference to the norms that regulate the game. Existence is not brute or physical, as in paper cards with figures, numbers, colour or ink markings, but rather institutional. Legal and social institutions are also institutional facts. Searle's idea of institutional fact (1969) revisits the ontology of norms, a domain of reality, a language game that only makes sense by reference to norms that constitute that reality. Physical facts and relationships are then understood as humanly meaningful, imputable to shared human norms of conduct (MacCormick 2007, 31). Unlike natural entities, social entities such as institutions are mind-dependent. For example, the fact that a five euro bill is money and not merely paper depends on the collective belief that it can be used as a medium of exchange and on rules that constitute their value and regulate their operation. By contrast, a molecule of water is water irrespective of anyone's belief (Searle 2010).

In this sense, all norms recognised by a given group in a given domain constitute a system and the norm's belonging to that system, structured in institutions fulfilling some social or legal function, is one of the explanations of the reinforced feeling of the duty to obey, which is consequential to the fact that the rule is accepted as being part of that order or system (Perrin 1990, 136). In other words, 'the system, once accepted by participants, commits them to acceptance of facts within the system', maybe not of all the norms belonging to that system, but of the system as a whole (Searle 2010, 102–3). It will be precisely this fact, obedience or acceptance that will integrate one of the most influential positivist definitions of law, one that focuses on the law giver and the sovereign rather than that of law users. The view of law as the commands of the sovereign backed by sanctions is one of the dominant versions of legal positivism. Austin's 'main idea, that law is a matter of historical decisions by people in positions of political power, has never wholly lost its grip on jurisprudence' (Dworkin 1986, 4). Its simplicity attracts practitioners and academics alike. In a nutshell, the command is the expressed wish that something be done, laid down by a sovereign who receives habitual obedience from the bulk of the population, and who has the ability to impose an evil or a sanction if that wish is not complied with. The 'sovereign' is a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but does not habitually obey any other (earthly) person or institution (Austin 1832; Bix 2018). Here, jurisprudence draws from sociologically observable facts, and sociology depends on internalised norms or expectations. The is/ought divide fades away in Austin.

The Sociological Dimension: The External and Internal Point of View

The sociological dimension of legal theory is taken for granted in three elements of Austin's definition: (i) the sovereign – one who receives habitual obedience from the bulk of the population and does not habitually obey any other earthly person or institution; (ii) the sovereign's ability to impose an evil; and (iii) the possibility of ascertaining whether the wish or the command is complied with or not. The three are external factors that call for an empirical enquiry: does a given person or an institution, as a matter of fact, receive habitual obedience? How and where is this obedience identified or observed? How much of the population makes the bulk of the population? What is the nature of non-compliance with the commands of the sovereign, considering possible conflicting sources of popular consciousness?⁴ Who certifies non-compliance and how? How is the *system of evil* operated by the sovereign? These questions deal with external regularities and should call for an empirical enquiry, but they also have an *internal* dimension and exploring it calls for a qualitative methodology.

As Hart observed (1961, 55), the habit of obedience, the regular uniform behaviour, which an observer could record, is the external aspect of a rule. But Austin's definition makes several theoretical and conceptual assumptions about the internal aspect as well; the reason to obey is the fear of the sanction – the imposition of sanctions is sufficiently credible to the bulk of the population to ensure compliance. These assumptions involve the *internal point of view* of the population: people avoid evil; people will comply in order to avoid evil; people believe that the infliction of evil is a credible scenario in case of non-compliance; and people believe that non-compliance will not go unnoticed, so they had better comply. The identification of these internal factors also calls for an empirical enquiry, but not of the type that looks into regularities and correlations. The meaning and opinions about the law, people's reasons to follow or break the law and *legal consciousness* need to be explored. Max Weber built on the idea of coercion (the sanction) and on the meaning of following a rule, upon which HLA Hart developed the internal point of view. Lacey (2004) recalls that Hart was indebted to Weber for his internal account of legal rules and had read *Economy and Society*, but never acknowledged his debt.

Weber's sophisticated definition of the state echoes Austin's view of the sovereign's ability to impose an evil. For Weber (1978, 904), the state (successfully) 'claims the monopoly of the legitimate use of physical force within a given territory'. For Searle too, the feature distinguishing government (state) law from other social institutions is the constant threat of physical force (Searle 2010, 171). Under the coercive views, law is to be found in the commands of the sovereign (Austin) or in the conditions under which physical force can be used legitimately in a territory, in a logically clear and internally consistent, gapless system of rules governing all conceivable fact situations (Weber 1978, 656), or in the rights and guarantees that citizens have as protection from such use of

⁴ For Eugen Ehrlich (1936), living law emerges from different social groups, and in each of these groups psychological pressure is exerted on individuals to comply with the norms of the group (Hertogh 2009).

force. Indeed, for Dworkin, ‘law insists that force not be used or withheld, no matter how useful, beneficial or noble the ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified’ (1986, 93).

Taking a distance from coercive views, Hart explored *The Concept of Law* (1961) and found the grounds of law in the acceptance by the community as a whole of a fundamental master rule of recognition that assigns to particular institutions the authority to make law, which relates to social conventions. The identification of such conventions is a matter of sociological research, but Hart’s theory also takes sociological enquiry for granted and postulates that actors’ critical reflective attitude toward the rules is not ultimately a matter of internal feelings, but of how the group regards its own behaviour (1961, 88), and this establishes a connection with normative language: ought, must, should, right and wrong (1961, 56). This allows him to distinguish between ‘feeling obliged’ and having an obligation, according to this critical reflective attitude shared by the group (1961, 86). For many, *The Concept of Law* is the most important work of twentieth century analytical jurisprudence (Douglas-Scott 2013, 40), but in spite of pretending to deliver ‘a descriptive sociology’ Hart only *describes* the use of language: social situations or relationships are related to the standard uses of relevant linguistic expressions in a social context. Such “language turn” points to the relevance of semiotics.

The semiotic dimension: ‘It takes two to make a truth’ (Austin 1950, 124)

The commands of the sovereign are expressed in a language: take the language out and the whole system collapses. This necessarily implies a situation of linguistic communication where the wish of the sovereign needs to be understood by the bulk of the population. Words and commands are used to get things done, but Austin overlooked this point. The presence of language in the background was largely ignored in successive jurisprudential discussions. It took another writer, John Austin, 100 years later, to develop this dimension of linguistic communication. The ‘language turn’ brought about by Oxford analytical philosophy was incorporated into the law largely by H.L.A. Hart, who built *The Concept of Law* on the criticism of Austin’s command theory. John Langshaw Austin (1911–1960), a colleague of Hart’s in Oxford, developed this dimension of linguistic communication. He could have analysed Austin’s commands as a situation of communication, as performative, perlocutionary acts (1962). The messages emitted by the sovereign are not only pieces of information, they are ‘commands’ and threats addressed to the population for it to do, or not do, something. J. L. Austin was sensitive to: (i) the specific features of situations upon which we base one or another more fine-grained appraisal of uses of sentences, and (ii) the details of the participants in that and other forms of transaction between *word* and *world* (Longworth 2017). Norms are messages, illocutionary speech acts emitted by a source and directed to addressees in a shared speech situation – semiotic circle or discursive space sharing codes of meaning, word and world, and extracting from them similar information (Ferrari 2006, 69).

From the sociolinguistic speech act perspective, law is a process of communication generating order in an institutional environment: a norm-giver emits or directs norms to the addressees, the norm-takers, in a given jurisdiction, who are the bulk of the population.

But why not understand law as the self-government of the citizens rather than the command of a sovereign to subjects? Norm-givers and norm-addressees (norm-users) would then merge as the same self-governing or autonomous agents. If it takes two to make a truth, *it takes two to make a norm* as well. This alternative focus adopts the norm-user perspective rather than that of the norm-giver. The institutional approach to law and normativity (MacCormick 2007) accepts law is about normative communication, generating order in an institutional environment. The 'sovereign', the norm-giver, also has to follow the norms about making new norms, and thus becomes a norm-user bound by the law (secondary rules). When applying and stating the law, judges also follow previously set norms. Herein lies the essence of the rule of law. The community of users then becomes the focal point, in law as in language, and this enhances individuals' access to law making and autonomy; that is personal empowerment (Bengoetxea 2015). Law, normativity in general, is very much like language games in that the community of users determines the linguistic practice and the understanding of the norms. An authority may very well prescribe correct ways of speaking but if the users do not follow, the stipulated language will become merely academic.

Law is not only about norm and regulation, it is also about dispute resolution and conflict, and conflict emerges where normative expectations are not met and where behaviour does not conform to the norms. Here too, *it takes two to make a conflict*. This can happen when norms are being discussed, because their existence, validity or meaning are contested. A failure of linguistic communication can account for the contested meaning. A disagreement with the norm can also take place, and this may bring about a new form of communication or discourse – debating the norms. The resulting situation may be a frustration of normative expectations which may change with the new norms and, sometimes, result in a loss of trust in normativity within the social group. But if conflict and norm change are successfully managed, a new form of order may emerge and trust in institutions may be reinforced.

The institutional settings or contexts differ greatly, but the essence of normative communication remains the same: generating and fulfilling normative expectations on behaviour in a community of users is socially meaningful. It is also socially valuable; to the extent that the users share and satisfy such expectations, trust will follow, and the rule of law principles will reinforce mutual trust in the social group, and this trust is enhanced when norm-users engage in normative communication in a language that they share (Bengoetxea 2011). For the more like others you are, the more inclined you will be to trust them (Fukuyama 1995). Norm-givers (message issuers) and norm-addressees (message recipients) normally find themselves in different spatial and temporal coordinates; communication is not immediate, but they share an institutional setting, a social space, a context, a language and a (legal) culture where norm-making and norm-following are socially valuable institutional practices: in short, the social capital of civil society (Putnam 1993). Herein, we meet the essence of self-government, home rule, or self-determination. In a democratic polity, law is then better understood as the re-enactment of the citizens governing themselves directly or indirectly through representation. In multilingual, highly pluralistic and polycentric polities like the EU, this process of representation, taking place in over 23 different languages, where the citizens elaborate, receive and follow the norms, is extremely complex. It is supported by a wealth of institutions.

A CONCEPT OF LAW AS AN INSTITUTIONAL NORMATIVE ORDER

We need to be very careful about making universal claims when putting forward a concept of law: its defining features – sense or intension – have to capture the many different manifestations of the legal phenomena historically and geographically, reference or extension. An over-inclusive reference extends to phenomena like morality or religion, whereas an under-inclusive reference excludes phenomena like custom or self-regulation (Tamanaha 2017, Ch. 2). Following this advice, we should approach the theory and concept of law cautiously, progressively and cumulatively. Cautiously, by not making sweeping generalisations; progressively, analysing each of the necessary features step by step; and cumulatively, where each feature adds something necessary. MacCormick (2007) defined law as an ‘institutional normative order’, a short but rich concept of law. Its three components or *explanans* – norms, order and institutions – need to be conceptualised without reference to the *explanandum*, law, in order to avoid redundancy and circularity.

The fundamental presupposition of this concept is that law belongs in the domain of practical reason; the general human capacity for resolving, through reflection, the question of what is to be done and how one contributes to what collectively ought to be done when faced with a set of alternatives for action. Practical reason is concerned with matters of value, of what it would be desirable to do, assessing and weighing reasons for action (Wallace 2018). Norms, rules or standards of behaviour recognised in a social group are powerful reasons for action.

From a sociological point of view, an institution is any type of normative set structuring a field of social action in a lasting manner (Ferrari 2006, 139). The field of social action is the subject matter of the institution: family, religious practices, games, economic value, goods, power, education, health and so on. The lasting existence in society is the consequence of the normative set providing stability and order: ‘Institutions by definition are the more enduring features of social life.’ (Giddens 1984, 24). Institutions thus help conciliate social stability and individual free will, recalling Aristotle’s view of man as a political animal.

The structuring and the normative set go together and relate back to the concept of norms, which constitute social reality. There are formal features – a status with deontic relations giving rise to rights, duties, obligations, requirements, permissions, authorizations, entitlements, prohibitions and powers – that the diverse human institutions – churches, universities, money, hospitals, schools, banks, ski clubs, marching bands, nation states or governments – have in common, enabling them to function in human life (Searle 2010, 123). These formal features, bearing the form ‘*X counts as Y in context C*’, rely precisely on norms: they provide structure to the institutions and they involve social and collective recognition of the broader system or order where they belong to create deontic relations.

Institutions bring together categories of norms; for example, contract, property, marriage, personality, trusts and so on, but they are themselves the creation of norms, namely constitutive rules. Social institutions like family, authority, money and the market acquire a higher level of complexity, an enhanced double institutionalisation (Bohannon 1965), when they turn into legal institutions where the norms that constitute, regulate and change them are themselves the object of further institutions. Norms in highly institutionalised settings are structurally (systemically) more complex and sophisticated than norms

in less institutionalised settings such as custom or moral standards. Legal norms are highly institutionalised forms: ‘legal conceptualisations function as action guides for an idealised norm-subject’, a *zoon politikon* or *homo juridicus* using ‘institutional information about legal arrangements both to set up and to stabilise relevant normative information’ (MacCormick 1992, 12). This stabilisation function of institutions can also be seen in Schelsky (1980), Luhman (1985) and Weinberger (1991).⁵ Indeed, the institutional theory of law advocated in this chapter, as facilitating the cross fertilization between jurisprudence and sociology of law, which was sketched by MacCormick and Weinberger (1986), ‘was profoundly influenced by a general sociological theory of institutions and legal realist ideas of law as a means of social integration and change and as a normative reflection and institutionalisation of human political and social imagination’ (Příbáň 2015, 98). But, from the point of view of practical reason too, law involves enhanced institutionalisation: ‘the law exists to improve people’s conformity with reasons that already apply to them’ (Gardner 2018, 77), and this raises the issue of justice, upon which we conclude.

THE DIMENSION OF JUSTICE

‘Justice is the first virtue of social institutions’ (Rawls 1971, 3). The institutional analysis of law carried out so far, like socio-legal studies generally, has paid less attention to a crucial dimension of practical reason. The claim to correctness of the legal order, a claim revived whenever controversies, disputes or conflicts emerge concerning the legitimacy of legal norms and institutions, or their correct interpretation in hard cases, are given their best possible meaning (Dworkin 1986). Law, as part of practical reason, makes a claim to correctness that goes beyond its claim to formal validity, legality and authority (Raz 1994, 199), and even beyond the inner morality of law (Fuller 1964). Not only is the legal system and its norms valid, they are also morally correct because the legal system, the legal order and the institutions of law, aspire to reflect justice (Alexy 2010).

This is not an external claim to be checked empirically. The claim of law as integrity, the dual nature of law is internal and conceptual: it would be self-defeating and conceptually contradictory for the law to content itself with legality and not claim correctness at all, or not interested in justice. If law discarded this claim to integrity, it would not be an institutional normative order. The very concept of the norms as justificatory reasons implies an internal claim to correctness. It is the very idea of *norm* in practical reason, of *order* and of *institution* that implies such claims to moral correctness, justifying actions and decisions. We go back to Gardner’s *delphic* observation that ‘the law exists to improve people’s conformity with reasons that already apply to them’ (2018, 77), and we could add, following from the previous section, that legal institutions exist to stabilise such reasons. Practical reason may guide action and decision-making in complex and critical situations where the rule of law – the virtue of legality – clash with other important values and

⁵ Like many sociologically inclined German and Central European jurists, Luhmann and Weinberger were influenced by Schelsky’s notion of social institution as ‘objektiv, festgelegtes System sozialer Handlungen’ (1980, 215). Discourse and systems theories soon took over, however, and the general sociological theory of institutions gradually lost ground. I am indebted to Jiří Příbáň for pointing out Schelsky to me.

claims to justice put forward by norm-users and litigants. 'The paradigm of law is law that exhibits all of the moral virtues that can be exhibited by institutions, not just the virtue of legality. When law can exhibit legality only at the expense of other moral virtues, it is by no means a foregone conclusion that legality must triumph' (Gardner 2010, 426). This principle of orientation that sees law as an argumentative practice, and legal reasoning as part of practical reason, can be taken into account by a judge when judging human and social action, but it can also contribute to the sociology of law when analysing and even researching into the claims of law and the question of authority and legitimacy, and the internal legal culture of a law as part of practical reason. This conceptual framework should also be of use to the sociology of litigation.

CONCLUSION

The dialogue between jurisprudence and sociology of law will bring about an enhanced understanding of the phenomenology of law. This dialogue has all too often been eschewed by both disciplines, obsessed as they were with achieving full scientific credentials on their own. Law's domain is not an empire nor a closed system of norms, not even a collection of raw data (social facts) but, rather, argumentative practice and practical reason in a highly institutionalised setting, concerning personal lives in private and public spheres. The language games of the law operate with rules (norms), processes (procedures) and institutions; they stabilise and reflect social practices, social action involving people's rule-guided behaviour, disputes and conflicts concerning the rules, their meaning, scope and application, even their change, and the making and enforcement of authoritative decisions on the basis of such norms to concrete and real disputes. The internal (re) construction of that system of norms, procedures, institutions and argumentative practice seeking fairness is the law in the books and the law in the minds, of particular interest to jurisprudence. The external social action reflecting and generating such practice is the *law in action* that makes socio-legal scholars tick. I cannot begin to see how understanding 'the legal' could neglect either discipline.

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