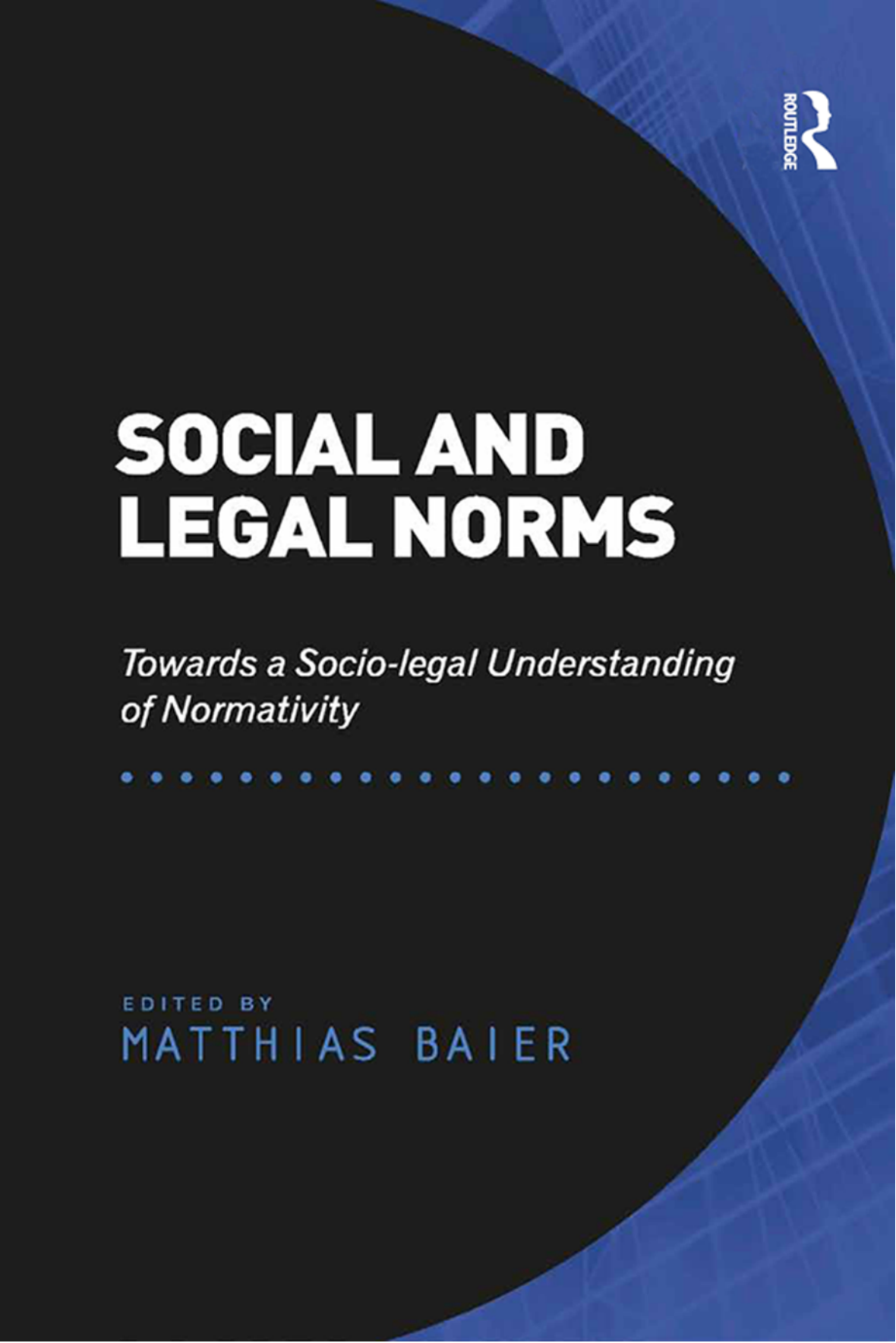
ROUTLEDGE
SOCIAL AND LEGAL NORMS
Towards a Socio-legal Understanding of Normativity
EDITED BY
MATTHIAS BAIER

SOCIAL AND LEGAL NORMS

This page intentionally left blank

Social and Legal Norms

Towards a Socio-legal Understanding of Normativity

Edited by
MATTHIAS BAIER
Lund University, Sweden

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2013 by Ashgate Publishing

Published 2016 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

The Library of Congress has cataloged the printed edition as follows:
Social and legal norms : towards a socio-legal understanding of normativity / by Matthias Baier.
pages cm
Includes bibliographical references and index.
ISBN 978-1-4094-5343-7 (hardback)
1. Sociological jurisprudence. 2. Social norms--Philosophy.
3. Law--Philosophy. 4. Normativity (Ethics) I. Baier, Matthias, 1962- editor of compilation.

K376.S577 2013
340'.115--dc23

2013011510

ISBN 9781409453437 (hbk)

Contents

This page intentionally left blank

List of Figures and Tables

Figures

Tables

This page intentionally left blank

Notes on Contributors

Johanna Alkan Olsson holds a PhD from Linköping University, Sweden. Her research interests lie within the area of law and policy making and implementation, focusing on the use of information and communication technologies (ICT) as a facilitating tool. She is a member of the Cybernorms research group, which specializes in the interaction between people, technology and regulations, mainly in the areas of environment, agriculture and development. Recent publications focus on the Swedish implementation of the European Water Framework Directive.

Karsten Åström, LLD, MA, is professor in sociology of law and is also member of the board of the Renato Treves international PhD programme in law and society. His main areas of research are theories and methods in sociology of law, social welfare politics and implementation of welfare legislation, legal means for social and ecological sustainability, law enforcement professionals, expert knowledge in legal processes, and decision-making in courts.

Matthias Baier, LLM, PhD, is senior lecturer in sociology of law at the department of Sociology of Law, Lund University. He is currently head of department. His main interests concerns general sociology of law, citizens' participation in legal decision-making, law in the public sphere and environmental regulation.

Reza Banakar, PhD, is the Professor of Sociology of Law, Lund University. Previously he was Professor of Socio-Legal Studies at the University of Westminster, London and the senior Research Fellow at the Centre for Socio-Legal Studies in Oxford. He has also taught at the International Institute for the Sociology of Law in Oñati, Spain. Among his publications are *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research* (Berlin/Wisconsin: Gald + Wilch, 2003), *Theory and Method in Socio-Legal Research* co-edited with Max Travers (Oxford: Hart, 2005) and *Rights Discourse: Law and Justice in Late Modern Society* (Aldershot: Ashgate, 2010). His research interests and teaching are in comparative law and jurisprudence.

Karl Dahlstrand, LLM, PhD, is working as acting lecturer at the department of Sociology of Law, Lund University and as visiting lecturer at law schools in Gothenburg and Stockholm. His doctoral thesis (2012) deals with the conditions for compensation and estimations for non-pecuniary loss among victims of crime. The title of the thesis is *Violation and Satisfaction. A Sociology of Law Study of Non-Pecuniary Damages to Victim of Crime*.

Eva Friis, LLM, PhD. Senior lecturer in Sociology of Law. Friis' research focuses on social welfare, particularly in the field of social work with vulnerable children and families, in which she, among others, has made a study of social investigations into criminally abused children within the family. Friis is also studying questions related to immigration and labour, and has recently completed an evaluation study of a labour market project for long-term unemployed immigrant women in Rosengård, Malmö.

Susanna Johansson, PhD in Sociology of Law, Lund University and currently holds a post-doctoral position in social work. Her main research interest is in general sociology of law, tensions between criminal and welfare law, organizational institutional theory and theories of power, as well as comparative and critical methods in social science. Her PhD thesis from 2011, *Law, power and institutional change. A critical analysis of public agencies' collaboration in Barnahus*, analyses inter-organizational collaboration processes and institutional change from a critical perspective.

Marcin de Kaminski is a PhD candidate in Sociology of Law, Lund University. He has a clear focus on Internet-related research and is a part of the Cybernorms research group. The focus of de Kaminski's research is mainly on the relation of legal rules and social norms in an online context, more specifically the formation of inter-group norms in net-based communities and the norm-creating processes that appear in the wake of the changing information technology.

Stefan Larsson, LLM, SM, Licentiate in Technology in Spatial Planning, and PhD in Sociology of Law from Lund University, with his 2011 thesis, *Metaphors and Norms – Understanding Copyright Law in a Digital Society*. He currently holds a post-doctoral position and has written a number of publications on metaphor theory in relation to law and norms, but also what the Internet means in terms of social and legal change (for example, in relation to copyright, file sharing and online anonymity). He is a member and co-founder of the Cybernorms research group, participates in and contributes to projects on open data as well as on cyber security, an education program on Social Innovation in a Digital Context, and a project on Swedish wind power regulation. In 2012, he received the Podgógecki Prize for 'emerging socio-legal scholars' awarded by the Research Committee of Sociology of Law (RCSL) of the International Sociological Association.

Ulf Leo, PhD, is a senior lecturer at the department of Sociology of Law, Lund University. His research and teaching are related to leadership, democracy, children's rights and sustainable development. He has been a teacher and a school principal in the basic school system for 25 years. He is currently working in an international training programme, 'Child Rights, Classroom and School Management', and in the Swedish national principal training programme.

Lars Persson, PhD in Sociology of Law, is currently working as a municipal development leader in education. His main interests are school development, leadership and governing, and education for sustainable development, especially democracy issues. The engagement in educational practice, together with connections to social and educational sciences, makes questions like learning organizations, theory-practice applications and action research a natural part of his work.

Lucas P. Konzen, from Brazil, is a PhD in Sociology of Law of the Renato Treves International PhD in Law and Society, at the University of Milan, Italy, and Lund University, Sweden. Between 2011 and 2012, he was a Swedish Institute scholarship holder at the department of Sociology of Law, Lund University. He is particularly interested in the socio-legal field of Critical Legal Geography, and is focusing his doctoral dissertation on studying public space regulation in tourist cities. He is a member of the Research Committee on Sociology of Law (RCSL/ISA) and Law & Society Association (LSA).

Kari Rönkkö is Associate Professor in Software Engineering, with an emphasis on cooperative and human aspects, at Blekinge Institute of Technology in Sweden, and is currently also a guest researcher at Lund University. He has eight years of action research experience together with industrial actors concerning usability framework that lead to a *de facto* standard. He is Product Development Officer in an IT company. Dr Rönkkö's research has centred on communication and human aspects of software development, flexible research approaches, usability evaluation and user experience. Current research topics are code as law, how norms influence software design, social media, social innovation, and value-based design.

Eva Schömer is a senior lecturer in Sociology of Law. She has an LLM at the Faculty of Law, Lund University, and a PhD in business law, specializing in sociology of law, labour law and gender. She served as a recorder at a district court and worked at as investigation secretary at the Swedish government at some commissions of inquiries. Schömer's research has focused on equality and gender equality from an intersectional perspective during the last 10 years. One main point in this research is that, while equality is a value-laden term, which stresses similarities between people, it masks differences between people, and that fear (conscious choice) when it comes to not seeing 'the others' leads to a kind of covert racism, which flourishes because nobody makes an effort to reject it.

Måns Svensson is PhD in Sociology of Law at Lund University, head of the Research Team Cybernorms (www.cybernormer.se), and head of the department of Work Environment and Leadership (WEAL) at Lund University. He is member of the board of the Swedish National Association for Work Life Research. In his thesis (2008), Svensson develops a theory and method tied to the concept of norms in sociology of law. Since then, he has written a number of articles where he continues to investigate the relationship between social norms and legal rules in society.

Rustamjon Urinboyev (from Uzbekistan) is a PhD in Sociology of Law at the department of Sociology of Law, Lund University. His main research interests focus on law and social norms, welfare structures, rule of law and corruption, public administration, and social rights. Rustamjon obtained his LLB degree in 2007 at the University of World Economy and Diplomacy in Tashkent, Uzbekistan. In 2007, Rustamjon received a full scholarship from the Maastricht Graduate School of Governance, Maastricht University (Netherlands) to study MS in Public Policy and Human Development.

Ana Maria Vargas Falla is a PhD candidate in the Renato Treves international PhD programme in Law and Society, and is writing her dissertation in the area of legal empowerment of the poor for informal workers. This program is organized by a consortium of universities, including the University of Milan as the central base and Lund University, which hosts Ana Maria as visiting researcher. Ana Maria is from Colombia, where she studied her bachelor in Law, and she has a Master in Development Studies from Lund University. Ana Maria's research is focused in the fields of good governance, legal empowerment, and development.

Per Wickenberg, Professor in Sociology of Law, Visiting Professor at Inner Mongolia Normal University, and Chifeng University, China. He studies education as an arena of norms and has a focus on implementation of Environmental Education, Education for Sustainable Development and Child Rights in Education. He has recently published *Accessing water through rights-based approach: problems and prospects regarding children* (2012, with Nandita Singh); *The unknown but well-known wells in Holma. Public participation and norms in the City Tunnel Project in Malmö* (2011); *Progressive Development of Environmental Education in Sweden and Denmark* (2010, with Sören Breiting); and *Taking Child Rights Seriously* (2009, ed.).

Preface

In the early 1990s, Håkan Hydén, Professor in Sociology of Law at Lund University since 1988, began to take an interest in the concept of norms as a key perspective on understanding socio-legal problems. The main motive at the time was the emergence of sustainable development as a scientific field. A field of research founded in a normative claim about change must focus on the question of how change comes about, Hydén argued. Equipped with a focus on norms, sociology of law would be well-suited to this kind of science. Can law, as we know it, manage this kind of change? Or is change dependent on other normative structures? These were questions that Hydén posed. In the years thereafter, more scholars at the department of Sociology of Law in Lund have engaged in the development of the concept of norms in different ways, realizing its potential for other areas and for other scientific problems. More than 10 doctoral theses in Sociology of Law, since the end of the 1990s, have found inspiration in Hydén's elaboration of the norm perspective and have also contributed further in developing this theory.

This book serves several purposes: it offers a collection of studies of the relations between social and legal norms that are held together by a common perspective on norms; it is also a contribution to the debate about how normativity comes about, and thus fills a space between Philosophy or Legal Theory and Sociology; and it aims to provide a link between earlier and ongoing research, while posing theoretical challenges for future study.

We would like to thank Håkan Hydén not only for his inspiration, but also for the research environment that has emerged during his time as a professor of Sociology of Law in Lund.

Matthias Baier
21 August, 2013

This page intentionally left blank

Chapter 1
Introduction

Matthias Baier

Back to norms[1]

Norms are an essential part of the social structure and thus always of interest for the social sciences. Few aspects of social life are conceivable without relating to norms in one way or another. Norms are an essential part of the lifeworld, and so they integrate society in a very basic sense. Since norms also proscribe behaviour, norms are ordering social life and in this way norms can also be understood as coercive. By reducing complexity, norms also coordinate actions and contribute to an effective organisation of society. Norms of the legal system have similar functions but are also strongly connected to the political structure; law communicates politics (Hydén, 1978). Societal norms permeate almost all parts of society and are essential for what we call 'society'.[2]

Since societal norms are pivotal for society, relations between social and legal norms ought to be fundamental to the scientific study of law in society, be it in the study of law and society, sociology of law, socio-legal studies, criminology, anthropology of law, or any other scientific study of the normative aspect of society. As will be elaborated by Karl Dahlstrand (in Chapter 6), this argument could also be valid for the more internal and theoretical studies of law. Accordingly, it is easy to see that the study of law in society actually has taken norms as one point of departure. Several of the sociological classics have explicitly devoted their studies to a normative understanding of society. Émile Durkheim is a prominent example. He used law to understand changes in society and developed theories understanding normative integration. His

1 This formulation is directly borrowed from Göran Therborn's article 'Back to Norms! on the Scope and Dynamics of Norms and Normative Action', *Current Sociology* 2002 50:863. This book can, in a sense, be considered to be a response to this invitation.

2 In this book, 'norms' are used as the overall category, sometimes with the prefix 'societal' as an additional clarification. The terms 'legal norms' and 'legal rules' are used to distinguish the category of institutionalized norms that are intended to regulate society. The term 'social norms' is used as a comprehensive category for other kinds of norms. Following Måns Svensson's theoretical definition of norms in this book, also elaborated on in Chapter 4, it should become clear that the basic structure of all norms is the same (referred to as the essence of norms); at the same time, particular norms can have distinctive features (referred to as the accidence of norms). The differentiation between social and legal norms is thus made for analytical reasons.

theories concerning norms, morals and collective conscience are still of great importance in understanding the social world. Several other classics discussed norms from a more or less explicit socio-legal perspective. This intense interest probably has historical explanations. At the time, it seemed natural for many social scientists to devote at least some effort to the nature of different normative systems and the relations between them. William Graham Sumner's *Folkways* is one example, but also sociologists like Georg Simmel and Ferdinand Tönnies took an interest in these issues. Mathieu Deflem has read Tönnies from a socio-legal perspective and points out that Tönnies differentiated societal norms into three subcategories: order, law and morality. In Tönnies' Gemeinschaft und Gesellschaft law, order and morality express themselves differently (Deflem, 2008), and these two concepts can therefore be viewed as two normative structures. Last but not least, Eugen Ehrlich and his work on the forms and relations between different norm systems must be mentioned (Ehrlich, 2002; Hertogh, 2009).

The interest among early sociologists must, however, be understood in the light of the status of the legal system in the nineteenth century. By and large, it was different from the modern legal system we know today. Even though nineteenth-century law was, to a high degree, professionally organized, the development of the law and other subsystems has thereafter been characterized as a further functional differentiation. Today we can describe this situation as a technocratic rationalization of the law. The functional differentiation of modern legal systems, along with increased legal autonomy, has in some sense diminished the interest in relations between different normative systems. Instead, the relations between the legal system and the political system have become of great importance. Still, several other scholars have taken an interest in a norms perspective during the twentieth century. Roger Cotterrell has written about the social basis of law, more generally in his text books (1992), but also displayed in his interest in Durkheim (Cotterrell, 1999 and 2010).

A modernisation of society with further differentiation of the legal system during the twentieth century does not make it less interesting to study the relations between legal and social norms. On the contrary, there are several reasons to revitalize the study of relations between the formal legal system and other normative systems. Beginning with the assumption that legislation today is the dominant producer of legal norms, where does this leave social norms as a basis for the production of legal norms? Are folkways, mores, conventions, morals and so on of no relevance, either for the production of law or for the application of law? For instance, we find lay judges or jurors in many criminal matters, but other areas of law are often administered by professional judges or other technocrats. Kaarlo Tuori (2002) argues that law is more than the mere application of legislation. Law is also a legal culture expressing important principles and a deep paradigmatic structure, and both have relations with the surface (that is, legislation). This broader understanding of law, of course, raises questions of the relations between these parts of law and social structures in society.

From this perspective, the question for contemporary law is whether the political system itself can constitute the sole social basis for law, even for highly politicized areas of law like welfare legislation? Many studies point to the fact that there are problems in the application of the law resulting from a poor connection to, or incomplete understanding of, the social norms relevant to the field. This book offers such examples. We see these problems following the materialization of law, like in welfare law, but there are other examples. Today we see examples of de-regulation and re-regulation, with the purpose of better connecting the law and its application to the social sphere. Alternative dispute resolution is one such example. But also aspects of so-called reflexive law and other self-regulatory mechanisms can be viewed as attempts to reconnect to the social structures.

A similar problem is the fact that modern law and other subsystems of society, according to Jürgen Habermas, have tendencies to colonize the lifeworld. This means that communication in the lifeworld takes place by means of money and power, for instance. In the case of law, this means that social conflicts are increasingly referred to and thematized in terms of law. For example, in Sweden, conflicts among children at school tend to be resolved by means of law. Here we do not see juridification in terms of legal norms replacing social norms, but rather as a new way of communicating about certain problems. Insofar as the legal-administrative system responds to such problems, we can expect different kinds of perturbations in the social system. Again, we now see attempts to solve this problem by efforts to set limits for the law or by devising new quasi-social mechanisms for solving these kinds of conflict.

In his theory of communicative action, Jürgen Habermas (1987) has argued that law can be seen either as an institution or as a medium. As an institution, law is part of the lifeworld; as a medium, law operates instrumentally. This is one way of understanding the problem of law's decoupling from the social world. Habermas has later argued (1996) that law is always part of the lifeworld. The mere instrumental aspects of law must be complemented with a more moral dimension, he says. From this follows that law can always be normatively grounded, even for those areas of law that are merely technical. This means that normative structures of the lifeworld are always relevant in the application of law. In Sweden, recent trends in public trust in the law and the courts clearly indicate this. The last decades have shown a decrease in public trust, and the courts are now trying to improve public trust by means of procedural techniques, perhaps aiming at more moral legitimation. One political response to this problem has been to set up the Commission on trust in the courts (SOU, 2008: 106).

Consequently, there are complex relations between law, politics and the lifeworld constituting several kinds of problems. These problems are even more complicated, given the increased diversity of values and complexity of cultures in present-day society. Whatever label we prefer, globalization and increased migration are two developments that point to what is often labelled a multi-cultural society. Given this development, law faces enormous challenges in integrating society. A parallel development can also be described in terms of an erosion of

(legal) norms (Frommel, 1996). Motivating this trend are the many observations of a law failing to achieve its goals, a decrease in obedience to law, and even mobilization against law. Even agents of the state follow the law to a lesser degree, and at the logical conclusion of this trend lies the death of *homo legalicus*.

Michel Foucault offers quite another perspective. If the discussion so far has taken law and its functions in the modern society for granted, Foucault puts much more emphasis on other normative structures than law. Biopolitics, discipline and governmentality are concepts that, at first glance, seem to give another view of the relations between social and legal norms. What is of interest to Foucault are the new mechanisms that attempt to discipline the human body and regulate the population. Foucault described strategies to replace criminalization with positive regulation of, for instance, hygiene, sexuality or health, by techniques such as ordering and normalization. This has even led to claims that Foucault's view can be described as an 'expulsion of law from modernity' (Hunt, 1992: 2). This categorical interpretation of Foucault's view on law, however, needs an explanation. According to Foucault, biopower as a new mode of governance replaces the juridical mode of governance. The juridical mode is connected to sovereignty and characterized by force, seizure, repression and other methods where law exerts negative power.

The strong focus on governance through normalisation procedures, of course, puts an emphasis on norms. This notion of norms differs somewhat from classical conceptions. Discipline operates through norms, that is 'standards that the subject of a discipline comes to internalize or manifest in behaviour, for example standards of tidiness, punctuality, respectfulness etc' (Hunt and Wickham, 1994: 49). Foucault's 'norm' can then be understood rather as the principle of generalisation, a way for a group to measure conduct and make it normal in the sense of statistics. See also Francois Ewald's (1990) discussion of how insurance can be subsumed under the concept of norms. The fact that Foucault focused on the structural aspects of normativity, however, does not make him less interesting when understanding the relations between legal and social norms. Nikolas Rose and Mariana Valverde argue rather more convincingly that there is a 'co-existence, hybridization and mutual inter-dependence of law and norm' (1998: 542).

The purpose of making these sketchy references to Habermas and Foucault is merely to provide examples showing that social norms are part of many contemporary important theories of society; and it thus becomes clear that the relations between legal and social norms are as relevant as ever to the study of law in society. It has also been argued that a basic societal concept like norms might actually serve as an integrating concept, especially when studying law in society (Hydén, 2011). There are also other arguments for developing the norm perspective. One argument concerns the contemporary problems of society, referring to, for example, the body, integrity and internet technologies that need to be viewed in a perspective including social norms. What is significant for these new areas of life is a strong focus on the social aspect, often in combination with technological advancements. What actually is a body? What actually are a 'man'

and a 'woman', given the technical possibilities of today? What is called the technological imperative can itself be viewed as a norm in Foucault's sense, but it also produces a vast set of norms on a more concrete, action-oriented level. It is, for example, clear that social life on the internet produces or changes many social norms that are far ahead of legal development. Here we also see a strong connection between the social and the personal; and, in many areas today, norms seem to be important for shaping our identity. Law is also challenged in the area of, for example, copyright law when social norms about file sharing contradict legal norms of copyright. The problem is highly relevant, at least in Sweden, where a large portion of the population is file sharing (see Chapter 18).

Another argument for studying law and social norms is the fact that globalization, increased mobility, migration and similar trends further undermine the idea of a shared consensus about values in society. We might easily arrive at a consensus on values such as life, health, well-being, security or social recognition. But other values are less evident for a majority, and modern society is increasingly described as a society where people hold different sets of values. Freedom, autonomy, self-realisation, democracy, authority, duty, self-control, material welfare or sexual equality are examples of values held differently, according to political and cultural settings (Baurman et al., 2010). And, if norms are seen as instruments for the realization of certain values, changes in the value structure result in changes in the norm structure. What these changes will look like is not clear. Does an increased value plurality lead to a corresponding norm plurality – and, if so, what effects will this have on law? Can law continue to exist as a coherent system of legal norms, or are other normative systems better suited to respond to these challenges? We certainly need to understand law as one of several parts of societal norms. Perhaps we need to address societal norms in a post-modern sense and ask the question, What constitutes a post-modern normativity?

The field of law and social norms

There are a growing number of studies into the field of what might be labelled as 'law and social norms', and some examples will be provided here. As mentioned earlier, the definition of the concept of norms has direct relevance for how the research field should be described. Assuming that there is something like law and that social norms do exist, there are several concepts with an underlying claim to normativity outside the legal system that are still not labelled as norms. There are also concepts with an ambition to transgress, or even challenge, the division of societal norms into law and social norms, on the one hand, and other kinds of non-legal norms on the other. One early example is Eugene Ehrlich's concept of living law (Ehrlich, 2002).

Hanne Petersen uses the term 'informal law' to describe normative practices in a workplace that are not law, but still normative (Petersen, 1996). She also uses the concept of 'home knitted law' (ibid.). A fourth example is 'indigenous

law' (Galanter, 1981). All discussions of law and social norms pre-suppose that these two concepts can be defined – something that some research contests. As mentioned earlier, for analytical reasons we believe that law and social norms can be separated, but that they are both part of the overall concept of societal norms. Our ambition is – as in many sociology of law studies – to understand not just the relations between the two as separate normative systems, but also their similarities, their interdependence, and how they might merge into one normative practice.

Having made this remark, there are several contributions in what we label the field of law and social norms.[3] This is not surprising, since one key question in sociology of law is how social order is upheld in the absence of law or despite the law. This is an even more central question in anthropology of law. For this reason, one might expect more contributions devoted to law and social norms. Nevertheless, this field has of late been largely occupied by scholars of law and economics. Robert Ellickson's study of disputes among farmers in Shasta County (1991) is perhaps the first of this kind. Later, this perspective has grown rapidly and now includes several entries.[4] Common among most of these scholars is a rational choice model of human behaviour entailing a methodological individualism, assuming that each individual is rational and is motivated by its self-interest (Ellickson, 2001). For a critique of what has been labelled the new behavioural law and economics, see Rostain (2000) and Scott (2000). In criminology, Meares and Kahan (2000) offer an example of the law and social norms perspective.

Mathieu Deflem (2008) explicitly takes a norm perspective in accounting for the field of Sociology of Law. Deflem devotes the chapter called 'Law and culture: the balance of values through norms' to this issue, but in fact the norm perspective permeates most of the book. Many aspects of social life can easily be connected to, or reduced to, norms and normative issues. This is even more true of socio-legal concepts, such as general prevention, compliance with the law, sanctions or legal cultures. Early work worth mentioning is Stewart Macaulay (1963), showing that social norms complement or even replace legal norms in contract relations. Another important contribution is Sally Falk Moore's notion of semi-autonomous fields, which is an example of the in-betweens of law and social norms (Moore, 1973). More recent examples are Joseph Sander's work on law, norms and lay tribunals (2006) or Dorothy Thornton's study of compliance with environmental regulation (2009).

---

3 There are, of course, contributions within other fields like Sociology, Political Science and Social History: Bicchieri et al. (1997); Hechter and Opp (2001); Bicchieri (2006); Ernst (2006); Wiener (2008).

4 For a good overview, see McAdams (1997); Posner (2000); Hetcher (2004); Drobak (2006). There have also been several symposiums: 'The legal construction on norms' (2000) 86 *Virginia Law Review* 1577; 'Social norms, social meaning and the economic analysis of law' (1998) 27 *Journal of Legal Studies* 537; 'Law, economics and norms' (1996) 144 *University of Pennsylvania Law Review* 1643.

For some time, the department of Sociology of Law at Lund University has taken an interest in the concept of norms. Several dissertations have more or less used the concept of norms as a tool to understand society. In the field of environmental regulation, there is Appelstrand (2007), Baier (2003), Bergman (2009) and Gillberg (1999). In the field of schools and education, there is Hallerström (2006), Leo (2010), Persson (2010) and Wickenberg (1999). There is also Larsson (2011) concerning language, Olsson (2003) concerning rights, and Svensson (2008) dealing with compliance. Last but not least, Håkan Hydén's seminal work, translated as *Normscience* (2002), must be mentioned.

Outline of the book

The overall purpose of this book is to revitalize a genuine normative understanding of society. This ambitious endeavour is realized through mapping and analysing normative focal points resulting from concrete normative instances in which law and social norms are active. Much simplified, we can say that many of the contributions intend to unfold the normative set-up pertaining to each case. Many of the contributions are adaptations of dissertations, and so they can be treated as case studies working with different empirical methods, in different empirical fields, dealing with different legal forms of regulation and applying different theoretical points of departure. As a result, they do not make up a planned series of studies, nor are they part of a coherent research program. On the other hand, they make up a rich blend of different areas, problems and legal operations. Most of the examples are from Sweden, but there are also international cases provided by Rustam Urinboyev and Måns Svensson when studying corruption in Uzbekistan (see Chapter 16), by Ana Maria Vargas Falla's example of legal empowerment in Colombia (see Chapter 14) and Lucas P. Konzen's example of street vending in Mexico (see Chapter 9).

The book starts with some more theoretical, reflective chapters. The purpose of Part I is to narrow down the scope of the book and to provide the reader with the necessary questions, terminology and definitions. In Chapter 2, Reza Banakar discusses law's normativity. By asking if legal sociology can account for the normativity of law, we hereby set the direction of the book: what is the normativity of law? The answer to this question lies in the many cases provided for in the book, all of which have taken as a point of departure the two normative lenses of law and social norms. In this way, we might also contribute to the discussion of which questions it is possible to address within law and sociology respectively.[5] The argument is that, when departing in an abductive manner from concrete cases, it is clear that social and legal norms are, in many cases, jointly normative.

Måns Svensson elaborates (in Chapter 3) on a definition of norms in general, that accordingly extends over social and legal norms. In this book, the ambition

5 See preferably Cotterrell (1998) and Nelken (1998).

of this definition is again to overcome the demarcation between social and legal norms. Svensson's definition is, at the same time, succinct as well as flexible. In Chapter 4, Matthias Baier builds on this point of departure, and elaborates on a strategy for how to study the field of social and legal norms. The strategy considers four aspects of normativity: social norms, legal norms, social practice and legal practice. These four aspects, in turn, open up several normative relations that can work as a common language for understanding, sorting and conducting empirical studies in the field of social and legal studies. The first Part finishes with Karsten Åström's discussion (in Chapter 5) of parallel norm creating processes, which can be seen as an elaboration of the previous chapter. By this chapter, we have an idea of how certain cases and certain areas of law will be looked upon.

The second Part gives room for perspectives on norms by connecting them to legal theory, language, institutions and space. Chapters 6, 7 and 8 all argue in different ways for a broad understanding of norms and even a dismantling of the barriers that often separate social and legal norms. Karl Dahlstrand also argues for a break-up of the internal and the external view on law, but does so by starting in legal theory. He analyses H.L.A. Hart's concept of the meta-norm, by applying it, in relation to compensation for non-financial damages, to victims of crime. Susanna Johansson elaborates on the concept of norms by comparing it to the concept of institution. It is argued that there are similarities and differences between the two, and that this knowledge is of importance when understanding the normative character of norms. Stefan Larsson's contribution can be seen as an addition to, or comment on, this strategy when introducing metaphors as a possible bearer of normativity. Metaphors can thus be seen as (unintended) strategies to exert normative influence by simply describing something. Larsson's point is that metaphors are used both within law and in social norms. Finally in that Part, Lucas Konzen (in Chapter 9) connects norms with space, using legal geography as a theoretical tool. Social and legal norms are connected to space in certain ways, he concludes.

The two following parts contain contributions that are based on empirical studies. They offer results based on either a direct application of the norm perspective or an interpretation of previous results based on this perspective. Part III takes an actor perspective. In Chapter 10, Eva Friis describes how social workers are mandated to mediate between social and legal norms in order to solve social problems. In doing so, social workers have to simultaneously adopt two quite different models for how to address social problems. Other professions can be found within the school. Lars Persson shows (in Chapter 11) that many professionals today work in very complex normative environments. For teachers, the situation is so complex and the obligations so diffuse that meta-norms have emerged as a reaction to the situation. The meta-norms can be viewed as a result of negotiation between social and legal norms. Ulf Leo continues the investigation of the school in Chapter 12, and offers an insight into the problems that principals have when transforming the law that regulates the schools into professional norms. Of importance is the complex context, but also the fact that the profession itself is not very integrated.

In Chapter 13, Per Wickenberg deals with education in different settings. The main focus lies in the role that 'souls of fire' have as catalysts of change. This capacity as change agent goes beyond profession, status and similar qualifications, but is very important to achieve real change in organisations. Both social and legal norms depend on these 'souls of fire' in order to be effective, Wickenberg shows.

The last Part addresses structural aspects, and Chapter 14 begins with Ana Maria Vargas Falla's investigation of legal reform aimed at development for displaced persons in Colombia. Her conclusion is that, paradoxically, social norms supersede legal reform that is intended to improve the situation for displaced persons. The reason why legal reform fails is not just about certain thresholds in the labour market. Eva Schömer comes to a similar conclusion in Chapter 15 when studying the Swedish labour market. A new legal strategy, with the ambition to change the social structure of the labour market, has been introduced; but, analysing the situation with the concept of intersectionality, it is clear that the social norms still stand strong. In Chapter 16, Rustam Urinboyev and Måns Svensson carry out an empirical analysis of the underlying normative structure that actually makes corruption possible. Different social norms (including authority and cronyism) tend to reinforce each other in ways that actually leave the formal legal system behind. Chapter 17 deals with the uncertainty and unpredictability of law. Investigating planning procedures, Stefan Larsson points to the fact that, as well as having to struggle with contradicting factors like social norms, law has to struggle with itself. Finally in that Part, Marcin de Kaminski, Måns Svensson, Stefan Larsson, Johanna Alkan Olsson and Kari Rönkkö provide (in Chapter 18) a summary and overview of studies dealing with the differences between legal norms coming from an industrial age and social norms emerging in a digital age.

The book ends with a chapter that aims to answer the question of how normativity comes about. This is not done by providing a clear-cut answer, but rather by taking the previous contributions as an empirical and theoretical foundation from which a future direction can be discerned. It is proposed that socio-legal normativity is expressed through four aspects of normativity: social norms, legal norms, social practice and legal practice. It is also proposed that normativity might be the result of norms, but also that norms are the result of normativity.

References

Appelstrand, M. 2007. *Miljömålet i skogsbruket: styrning och frivillighet*. Diss. Lund: Lunds universitet.

Baier, M. 2003. *Norm och rättsregel: en undersökning av tunnelbygget genom Hallandsåsen*. Diss. Lund: Lunds universitet.

Baurman M. et al. 2010. 'Introduction', in *Norms and values. The role of social norms as instruments of values realisation*. Edited by Baurman M. et al. Nomos: Baden-Baden.

Bergman, A.-K. 2009. *Law in progress?: a contextual study of norm-generating processes: the example of GMES*. Diss. Lund: Lunds universitet.
Bicchieri, C. (ed.) 1997. *The dynamics of norms*. Cambridge: Cambridge University Press.
Bicchieri, C. 2006. *The grammar of society: the nature and dynamics of social norms*. New York: Cambridge University Press.
Blegvad, B.-M. 1982. 'Interaction between indigenous and official norms: examples of norm generation in the consume field in Denmark', *Zeitschrift für Rechtssoziologie* 3, 43–58.
Cotterrell, R. 1989. 'Why must legal ideas be interpreted sociologically?', *Journal of law and society*, 25(2), 171–92.
Cotterrell, Roger 1992. *The Sociology of Law: An Introduction*. 2. rev. ed. London: Butterworth.
Cotterrell, R. 1999. *Émile Durkheim: law in a moral domain*. Edinburgh: Edinburgh University Press.
Cotterrell, R. (ed.) 2010. *Émile Durkheim: Justice, Morality and Politics*. Farnham: Ashgate.
Deflem, M. 2008. *Sociology of Law: Visions of a Scholarly Tradition*. Cambridge: Cambridge University Press.
Drobak, J.N. (ed.) 2006. *Norms and the Law*. Cambridge: Cambridge University Press.
Ehrlich, E. 2002[1936]. *Fundamental principles of the sociology of law*. [New ed.] New Brunswick: Transaction Publishers.
Ellickson, R. 2001. 'The Evolution of social norms: a perspective from the legal academy', in *Social norms*, edited by Michael Hechter and Karl-Dieter Opp. New York: Russell Sage Foundation.
Ellickson, R.C. 1991. *Order without law: how neighbours settle disputes*. Cambridge, Mass.: Harvard University Press.
Ernst, W. (ed.) 2006. *Histories of the normal and the abnormal: social and cultural histories of norms and normativity*. New York: Routledge.
Ewald, F. 1990. Norms, discipline and the law. *Representations* 30(138–61).
Frommel, M. (ed.) 1996. *Normenerosion*. Baden-Baden: Nomos-Verl.-Ges.
Galanter, M. 1981. 'Justice in many rooms: courts, private ordering, and indigenous law', *Journal of legal pluralism* 19, 1–47.
Gillberg, M. 1999. *From green image to green practice: normative action and self-regulation*. Diss. Lund: Lunds universitet.
Habermas, J. 1987. *The theory of communicative action. Vol. 2, Lifeworld and system: a critique of functionalist reason*. Cambridge: Polity.
Habermas, J. 1996. *Between facts and norms: contributions to a discourse theory of law and democracy*. Cambridge, Mass.: MIT Press.
Hallerström, H. 2006. *Rektorers normer i ledarskapet för skolutveckling*. Diss. Lund: Lunds universitet.
Hechter, M. and Opp, K.-D. (ed.) 2001. *Social norms*. New York: Russell Sage Foundation.

Hertogh, M.L.M. (ed.) 2009. *Living law: reconsidering Eugen Ehrlich*. Oxford: Hart.
Hetcher, S.A. 2004. *Norms in a wired world*. Cambridge: Cambridge University Press.
Hunt, A. and Wickham, G. 1994. *Foucault and law: towards a sociology of law as governance*. London: Pluto Press.
Hunt, A. 1992. 'Foucault's expulsion of law: Toward a retrieval', *Law and social inquiry* 17(1), 1–38.
Hydén, H. 1978. *Rättens samhälleliga funktioner*. Diss. Lund: Lunds universitet.
Hydén, H. 2011. 'Nine reasons for norms', in *Understanding Law in Society. Developments in Socio-legal Studies*, edited by Knut Papendorf, Stefan Machura and Kristian Andenaes. Hamburg: LIT Verlag.
Larsson, S. 2011. *Metaphors and norms: understanding copyright law in a digital society*. Diss. Lund: Lunds universitet.
Leo, U. 2010. *Rektorer bör och rektorer gör: en rättssociologisk studie om att identifiera, analysera och förstå professionella normer*. Diss. Lund: Lunds universitet.
Macaulay, S. 1963. 'Non-contractual relations in business: a preliminary study', *American Sociological Review*, 28(1), 55–67.
McAdams, R. 1997. 'The origin, development, and regulation of norms', *Michigan Law Review*, 96(2), 338–433.
Meares, T. and Kahan, D. 1998. 'Law and order in the inner city', *Law and Society Review*, 32(4) 805–38.
Moore, S.F. 1973. 'Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review*, 7(4) 719–46.
Nelken, D. 1998. 'Blinding insights? The limits of a reflexive sociology of law', *Journal of Law and Society*, 25(2), 407–26.
Olsson, P. 2003. *Legal ideals and normative realities: a case study of children's rights and child labor activity in Paraguay*. Diss. Lund: Lunds universitet.
Persson, L. 2010. *Pedagogerna och demokratin: en rättssociologisk studie av pedagogers arbete med demokratiutveckling i förskola och skola*. Diss. Lund: Lunds universitet.
Petersen, H. 1996. *Home knitted law: norms and values in gendered rule-making*. Aldershot: Dartmouth.
Posner, E.A. 2000. *Law and social norms*. Cambridge, Mass.: Harvard University Press.
Rose, N. and Valverde, M. (1998). 'Governed by law?', *Social and Legal Studies*, 7(4), 541–51.
Rostain, T. 2000. 'Educating *homo economicus*: cautionary notes on the new behavioural law and economics movement', *Law and Society Review* 34(4), 973–1006.
Sanders, J. 2006. 'Law, norms and lay tribunals', in *Law and Sociology*, edited by Freeman, M.D.A. Oxford University Press.
Scott, R.E. 2000. 'The limits of behavioural theories of law and social norms', *Virginia Law Review* 86(8), 1603–47.

SOU 2008. *Ökat förtroende för domstolarna : strategier och förslag.* Statens offentliga utredningar 2008: 106. Stockholm: Fritzes.

Svensson, M. 2008. *Sociala normer och regelefterlevnad: trafiksäkerhetsfrågor ur ett rättssociologiskt perspektiv*. Diss. Lund: Lunds universitet.

Svensson, M. and Larsson, S. 2009. *Social Norms and Intellectual Property. Online Norms and the European Legal Development.* Research Report in Sociology of Law, Lund University.

Thornton, D. 2009. 'When Social Norms and Pressures are not Enough: Environmental Performance in the Trucking Industry', *Law and Society Review* 43(2), 405–36.

Tuori, Kaarlo 2002. *Critical Legal Positivism*. Aldershot: Ashgate.

Wickenberg, P. 1999. *Normstödjande strukturer: miljötematiken börjar slå rot i skolan*. Diss. Lund: Lunds universitet.

Wiener, A. 2008. *The invisible constitution of politics: contested norms and international encounters*. Cambridge: Cambridge University Press.

PART I
Norms and Normativity

This page intentionally left blank

Chapter 2
Can Legal Sociology Account for the Normativity of Law?

Reza Banakar

This chapter challenges the assumption that legal sociology should apply itself to the external or factual properties of the law and leave the internal and normative aspects of legal phenomena to doctrinal scholars and moral philosophers. It argues that legal sociology explores the normative contexts of the law and other social systems but, being restricted by its 'scientific' mode of expression, it describes and analyses them in sociological rather than moral terms. Legal sociology is, and should be seen as, a different language game from moral and legal philosophy, and its treatment of normativity should be understood on its own terms. The assertion that legal sociology should limit its scope of analysis to the study of the empirical aspects of law, and leave the study of law's normative dimensions to other branches of legal studies, is itself a normative supposition and part of the competing discourses which constitute the field of legal research. These discourses aim at demarcating the disciplinary boundaries between various epistemic approaches to the study of law and creating disciplinary identities rather than exploring the methodological scope of socio-legal research.

Introduction[1]

Professor Håkan Hydén maintains that norms should be the subject matter of legal sociology, but he also explains that the study of norms should proceed in a non-normative and scientific manner, because 'the science of norms is not … the same as normative science … [It is] empirical and normatively unprejudiced in its ambition' (Hydén, 2011: 131). The idea that legal sociology should treat norms as the platform from which to explore the relationship between law and society is motivated by the assumption that norms are the fundamental constitutive parts of action systems (Hydén, 2002: 114) and, as such, they 'govern human

1 This paper was delivered at the conference on *The Normative Anatomy of Society* arranged by the Institute for the Sociology of Law at Lund University in April 2012 and is dedicated to Professor Mauro Zamboni, whose normative arguments on the disciplinary limits of legal sociology prompted this paper in the first place. See Zamboni, 2006 and 2007.

behaviour' (Hydén, 2011: 140) while bridging the paradigmatic gap between law and society (Baier and Svensson, 2009: 15). Norms provide standards of conduct, which guide expectations and coordinate action and interactions, thus engendering normativity, behavioural regularities and social order (Durlauf and Blume, 2008). Since social order constitutes the central concern of socio-legal research, legal sociology should therefore investigate the sources of norms, their relationship with rules, and how they govern human behaviour (Hydén, 2011: 140). But what if norms do not govern social behaviour and are not the source of normativity? What if norms, as Judge Posner (2002: 34) insists, are 'endogenous', labels that we attach to regularities and patterns of behaviour which were initially caused by various social processes? What if normativity can emerge independently of norms and provide a basis for articulating norms? Where does that leave legal sociology? These questions set the backdrop against which this chapter will explore the ability of legal sociology to account for the normativity of law.

Although Hydén focuses on norms because they exert normativity which translates into social order, he nonetheless keeps his empirical distance from them. Norms, he emphasises, must be studied empirically and not normatively (Hydén, 2011: 131). This mirrors what is regarded by some legal sociologists (see Black, 1972) and many legal theorists (see Kelsen, 2002; Tuori, 2006; Zamboni, 2006) as the methodological limit of legal sociology – that is, legal sociology as an empirical science should engage with the external aspect of norms, which generate observable regularities, and leave the internal aspects of norms, which deal with the 'ought' dimension of the norms and the sense of obligation, to legal and moral philosophers. The central aim of this chapter is to examine this assumption by exploring the disciplinary discourses emerging from studies of the law. Therefore, what follows is as much an investigation into the methodological scope of legal sociology as it is an inquiry into how academic discourses (belonging to various fields of social and legal studies) position themselves in respect to each other in an attempt to reproduce specific epistemes and disciplinary identities.

Part One starts by briefly considering the relationship between norms and normativity, arguing that normativity is generated by the system as well as lifeworld and is not necessarily reducible to the effects or functions of individual norms. Part Two develops this point by making a case for justice as law's source of normativity *par excellence*. It maintains that, although the relationship between law and justice is often discussed in terms of norms, the normativity that justice exercises on law depends on the broader context of the legal system, which is defined differently by different theories. Part Three draws attention to the methodological constraints of socio-legal research, according to which social scientific studies of law should apply themselves to the external empirical or factual properties of the relationship between law and society, and leave the internal and normative matters to doctrinal scholars and moral philosophers respectively. The chapter concludes by arguing that the sphere of socio-legal research is not, and cannot be, limited to an examination of the factual characteristics of law. Moreover, the assertion that legal sociology should apply itself to the study of the empirical aspects of law, and

leave the normative dimensions to other legal scholars, is a normative stance and part of on-going attempts at demarcating the disciplinary boundaries of various branches of legal studies.

Part one

What if norms are not the source of normativity?

Looking at the works of the founders of legal sociology, such as Eugen Ehrlich and Emile Durkheim, we note that norms have played an important role in socio-legal theorising and research,[2] partly because they allow us to address the materiality of the law (institutional facts and practices) as well as its ideal dimensions (values, autonomy, legitimacy and authority).[3] Norms also loom large within legal theory (see, for example, Kelsen, 1967 and 2002), even though the discourse which bestows weight upon the concept of norm in legal theory is more concerned with 'ought' statements and is thus different from sociology's interest in behavioural regularities.[4] These two understandings of norms are interrelated and are discussed by Hebert Hart (1994) as the internal and external perspectives on social rules. I shall use Hart's internal/external distinction liberally to discuss 'social norms', which may be regarded as a category broader than 'social rules'. The discussion which follows is therefore more in line with the distinction made between descriptive and injunctive norms by Carl Kallgren et al. (2000: 2002, see also Elek et al., 2006).

The external or descriptive aspect of a norm is revealed through tangible and observable behaviour, and can be studied by employing empirical methods.

---

2 I should hasten to add that neither Durkheim nor Ehrlich advocated a norm-based methodological approach to the study of law.

3 A note of caution is in place: A norm-based approach to the study of law is *likely* to promote consensus-oriented research. Its explicit or implicit focus on conformity and social integration, which treat the *normalisation* of certain practices and discourses as desirable or necessary, emphasise the stabilising role of law in society, rather than highlighting social conflicts or exploring forms of political domination through law. It suffices here to point out that the studies of law conducted from a conflict perspective often depart from the experience of injustice or structural inequalities and not from norms. The extent to which one can depart from norms and explore forms of domination from a conflict perspective is a topic for another paper.

4 Both sociology and legal theory consist of diverse theoretical perspectives, each propagating its own brand of epistemology. At the risk of making a sweeping generalisation, we could say that various methodological approaches within legal theory are either normative or analytically tuned. These can be contrasted with various socio-legal perspectives, which, despite their differences, are 'brought together by a common epistemology that views law as a social construct and argues that law and all its manifestations should be studied empirically and contextually'. See Banakar, 2011.

Some people follow norms, or the standard patterns of behaviour, more or less unreflectively, doing what is commonly done. By contrast, the internal or evaluative aspect of norms involves the agency's reflective commitment to them (that is, a commitment to what should be done and to what is commonly approved). This aspect of norms is intangible and, as such, does not have a factual expression that can be studied using empirical methods of investigation. The intangible dimension of norms nevertheless does possess a cognitive element, in that it involves thought processes and also requires confrontation with 'facts', which are external to the agency's cognition. One can form a general idea about the evaluative aspect of norms by studying the perceptions (attitudes, opinions and beliefs) of various groups, but social scientists are aware of the limitations of this method, as attitudes and perceptions do not necessarily translate into action.[5] Whether the agency's perception of the validity of a norm (that is, the subject's belief that the norm should be obeyed) translates into an actual behavioural response in accordance with that norm is determined ultimately by a host of social factors belonging to the context of the action. We shall return to the methodological limitations of social sciences in respect of the study of norms (and law and justice in particular) in Part Three; but, for our immediate purposes here, we need to take a closer look at law's normativity and consider the extent to which the normative force of law is linked, or can be traced back, to norms or a collection of norms which constitute the context of social action.

Normativity beyond social norms?

'Normativity' is used when exploring why, under certain circumstances, we feel obliged to act in specific ways (for a recent contribution to the debate on normativity, see Raz, 2011; Turner, 2010; Wedgewood, 2007; Delacroix, 2006). The notion of an 'obligation to act in a particular way' requires conscious commitment to a norm, and is thus linked to the internal (non-empirical) aspect of norms discussed above. The normative efficacy of a norm can, in turn, be explained by reference to the authority of the source of the norm (who said that we should act in a particular way?) and/or the social functions thereof (we might follow a rule because it fulfils certain social functions or upholds certain values such as justice, equality or fairness). In other words, norms in general, but the internal aspects of norms in particular, provide reasons to act in particular ways.[6] The reason itself (that I, for example, pay council tax because I would like to make a contribution to the community where I live, or I follow certain traffic

5 As I have argued elsewhere, it 'is now a social psychological commonplace that a discrepancy between attitudes and behaviour can exist. The fact that a person expresses a belief does not necessarily mean that that person will act in accordance with that belief'. See Banakar, 2003: 201.

6 As Raz (1999: 113) points out, reason (or rationality) in itself can have a normative dimension, therefore suggesting that normativity is not restricted to social norms.

rules because I care about other people's safety) is articulated consciously, while its underpinning values (why I should care about my community or the safety of other people) can be intersubjective, taken for granted, and rooted in the culture or customs of a group of people.

Limiting our discussion to the normativity of law and its implications for legal sociology, we are led to ask one of legal philosophy's classical questions: Why does law provide the majority of people with a reason for action? Moreover, why do some people comply with the letter of the law, even when there is no threat of sanctions against their non-compliance, and even though they know that following the law is not in their self-interest and will cost them in material and other terms?[7] The answer to this question takes us to the heart of law's normativity. For natural lawyers, such as Cicero, the normative force of law resided in some form of 'higher law'; while, for legal positivists, such as Austin (1967), it was to be found in the intimate relationship between legal norms and coercion. Subsequent legal positivists, such as H.L.A. Hart,[8] Hans Kelsen (2002) and Joseph Raz (1979), questioned the centrality of coercion in upholding the normative force of law, and maintained that coercion was neither an essential part of what constituted all the aspects of the law nor an indispensable requirement for what it did. Some laws are brought about to empower and facilitate social action, rather than coercing people into acting in particular ways.

From a sociological standpoint, people comply with the law for a number of empirically ascertainable reasons, which are not necessarily related to the threat of violence or whether the law is morally justifiable. Following Max Weber's forms of action (1978), we can say that one might follow a legal norm as a force of habit or custom (that is, Weber's 'traditional action', which we described above as descriptive norms). Alternatively, one might abide by the law for emotive reasons (that is, Weber's 'affective action'). Then again, one might believe that the law represents foundational values, such as rights and justice (this would correspond with Weber's value rational action), or one might follow the law because of the way it was enacted (that is, because of the authoritative source of the law). Finally, one's fidelity to the law might be motivated by purposive rationality, the belief that it accomplishes certain tasks which are required for an efficient governance of society. These ideal types of reason for action suggest that normativity can emerge out of system imperatives (purposive or instrumental rationality) as well as lifeworld (value and rationality), and that normativity can be the source, rather than the effect, of norms. To develop this point, we need to return to Hydén's

---

7 This is not to suggest that law (or the threat of violence) necessarily deters people from committing crime. Although the legal system does deter crime generally, the relationship between individual criminal action and the law (or the threat of sanctions) remains contingent on a host of factors. See Robinson, 2004.

8 Hart (1994: 82) criticises Austin's predictive model (namely, that the subject follows rules because he or she predicts sanction) and instead argues that the normativity of legal rules resides in their ability to provide reasons or justifications for action.

'science of norms', according to which a norm can emerge out of economic and political systems as well as the community:

> [B]oth moral and social norms are challenged by norms following from the construction or the structure of systems built up for the purpose of organising the production and distribution of material goods and services … Rationalities are thus bound to systems, and the more unambiguously the system is constructed, the stronger the normativity that follows from analysis of the systems relationship to a given empirical reality. The normativity is even more pronounced in systems that are associated with the laws of nature. (Hydén, 2011: 134–5)

Thus, system imperatives exert a normative force by urging and guiding action at societal (macro) and institutional levels. Norms then become labels that we use to refer to the normativity generated by system imperatives which can provide reasons for action, but not a sense of obligation. The sense of obligation (that is, the feeling that one is morally obliged to act in particular ways) emerges instead out of lifeworld (that is, the sphere of spontaneously generated values and worldviews) which are taken for granted by social actors and out of which 'system' is born (cf. Habermas, 1984). In that sense, lifeworld (and not system) provides the values which underpin the internal aspect of norms. This means not only that normativity can have other sources beyond social norms, but also that normativity *per se* can be a source of norms. In other words, system imperatives on the one hand, and lifeworld on the other, guide conduct, giving rise to repeated patterns of behaviour which are identified as social norms. These norms are not the cause of normativity, but equally they are not mere labels either, for they feed back into the system and lifeworld, thus strengthening systematic imperatives and community values respectively. We should bear in mind that normativity generated by social systems and the community (lifeworld) are based on different types of rationality and, following Habermas (1975 and 1984), coincide with system and socio-cultural integration respectively (see also Banakar, 2003: 291–2). One of the functions of modern law may be described in terms of its ability to mediate between the two types of normativity generated by system and lifeworld. However, the fact that law is a social system – defined variously by diverse philosophical and sociological approaches in terms ranging from a body of legal rules, norms and principles, to communications, practices and processes – exerts its own normativity. The uniqueness of the legal system's purported normativity is not captured by Weber's ideal types of action sketched above. Moreover, legal theory and legal sociology deal with law's normativity using epistemically incompatible terms. What mainstream legal scholarship regards as the principal values of the legal system, such as law's autonomy, objectivity and commitment to the rule of law, become the primary focus of critical inquiry within legal sociology.