On Empirical Legal Science

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1 Why Empiricism?

In law – legal science included – we use the legal method[1]. This method requires a mastery of the sources of law, the ability to make legal arguments and a comprehensive knowledge of legal forms and systems etc. There is also a considerable amount of craftsmanship involved which in some ways can be said to be a part of the law itself but which is also in part outside of it. It is in this "crafted" part of the law, which lies at the edge of legal argumentation, where it is appropriate to use common sense based reasoning. It can be seen as a kind of "silent understanding" residing in the margins between legal argumentation and policy analysis. Common sense based reasoning is an unavoidable part of legal argumentation. One reason is that the great number of empirical questions posed by the lawmaker and the adjudicator makes it impossible to do an empirical investigation of every question. Another reason is that the questions are so convoluted and effected by so many variables that an attempt to develop a well founded understanding in a scientific way becomes almost unmanageable. The legal method is practical in that only certain circumstances are deemed relevant and therefore need to be taken up by the legal argument. And it is practical not least for the legal decision makers in that they may to a large degree ignore the consequences of their decisions.[2]

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1 It is certainly common in legal theoretical presentations to point out that it isn't completely clear what the method has for content. But in practice we may agree that the "legal method" is a meaningful concept that may be used without risk of misunderstanding. I refer to Peczenik 1994 and Strömholm 1993. The latter points out that one can talk about the legal method in general as compared to the methods which are used in other disciplines and still talk about law's own particular methods, i.e., teleological etc.; see Strömholm p 362 and following. Here is a reference to the former.

2 Strömholm 1975: Legal decision making has developed in contrast to consequence oriented forms of decision making, e.g., business, military and political. (s 602) The assertion is valid for traditional legal decision making, the so called normative rational decision making. With

The legal method nonetheless has its own limitations in that it is not a result oriented instrument for those who have a problem which is not taken up by positive law. Lawyers in this situation have a tendency to try to define the problem so that it conforms to the tool that they have, that is the previously described legal method. This, of course, is not unique to the legal profession, for one and the same problem can be described by the medical doctor as a medical problem, by the engineer as a technical problem and by the social scientist as a societal problem. The tools may in other words shape the kind of problem that is presented.

There is a category of jurists who need not be reduced to using the legal method within the traditional meaning: the legal scholar. It is not necessary to place an equals mark between the legal method and the jurisprudential method. A legal science which does this – which understands itself in this way – limits its own ability to take on problems which lie outside the reach of the legal method, reduces the possibility for legal science to achieve social relevance and increases therewith the risk of its marginalization. One way to broaden the scholarly analysis is to go outside of the legal method through the use of empirical material. Accordingly then the question of the use of empiricism within legal science is to a large degree a question of this discipline's own self understanding and relevance.

Studies in legal positivism are naturally central for jurisprudence in that traditional legal analysis is irreplaceable for a high level of quality in law, the preservation of legal certainty and a good legal culture in general.[3] However, as this paper will attempt to show, by complementing such studies with empirical material, the importance of legal science can be increased.

2 The Traditional View

Traditionally, legal studies have had little empirical input, and yet not as little as one might think. Many studies which claim to be pure legal positivism, for example, are influenced by lesser empirical elements which have not managed to stamp their mark on the work. But on the whole, it must be admitted, the present use of empirical material is limited and hardly on the rise. It ought, perhaps, be said here that the lack of empirical material in a juridical work does not necessarily turn it into a study in "pure legal positivism". Numerous studies with a purely theoretical problem orientation nonetheless build upon a developmental perspective and employ a historical approach or other alignment which is not completely legal positivistic. Although a great deal of work consists to a large degree of legal political argumentation which goes beyond an analysis of

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the application of open formulated legal rules, which aim at the future development of trade, we receive naturally, a consequence oriented type of legal decision making (see below paragraph 7).

3 The term "studies in legal positivism" or the like for traditional legal analysis ("the legal doctrine") is used frequently below. Although the German concept "legal dogma," which was common a long time ago appears to be coming back, it is nonetheless not regarded as particularly revealing because it contains unclear and divergent understandings as to where the "dogma" lies.

positive law, these works reveal, on closer examination, an array of legal political reasoning, suggestions for changes in the law, discussions, presumptions as to the effects of legislation, etc., that are weakly supported and only occasionally built on an empirical foundation. In many cases, in fact, the arguments are almost entirely speculative.[4] An empirical study of a cross section of legal studies works would be quite illuminating from the standpoint of the theory of legal science.

What can be the cause of the strong dominance of traditional legal analysis without empirical content? It will be helpful to separate a few of the reasons.

a) The first reason arises from the widely-held conception that jurisprudence is practically oriented. Many academically involved jurists share such an idea – even if they don't say it in plain language – and see legal positivistic research as a counterpart to this thought.

b) The next reason is associated with the general belief about the scientific preconception of jurisprudence, i.e. that the sources of law are its material and the legal method its method. Studies done from this perspective normally take legal rules as their starting point and by steering the choices of subject in the same direction automatically separate them from empirical relationships. The prevailing belief in scientific thought also says that for the sake of one's professional standing it is best to place oneself in the legal positivistic camp.

c) A third reason is that the field of jurisprudence is often equated with a condition of high value and unappealable precedent in that it has as its object "the high culture of the law". Such a concept is closely tied to the belief in the legal system's homogeneity and coherence and in a uniform source of legal principles that are interpreted in a homogenous way within a well unified legal system. Although theories on legal pluralism have during the last 10 to 15 years cast doubt on the authority of this vision of the rule of law,[5] the view is tenacious and presumably still dominant at a central level, among lawmakers for example and within formative instances of lawmaking. It will therefore take a powerful shift of mentality in traditional jurisprudence to erode its position of dominance, specifically, a change in priorities directed towards systematizing jurisprudence to counteract inconsistencies and pointing out the legal principles and context upon which the legal system's homogeneity depends.

d) The insignificant use of empirical material may also be explained by the fact that the positivistic legal culture automatically gives a strong position to technical, doctrinal and other forms of legal positivistic analysis. An example of

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4 A standard example is the study which validates certain legal rules – for example a chapter on corporate law – but yet fails to lead to a conclusion as to how the rules work. The conclusion is founded upon purely "internal material", usually the legislative history and legal precedent, but above all judicial opinion. From this material an analysis in abstract is done without the use of empirical material. The question is raised as to whether it is possible to form a well grounded opinion on whether the rules in question work well or are poorly based solely on current sources of law.

5 Griffith, the leading name, has written a number of notable works on legal pluralism. A much cited work is Griffith's 1986 work, a later Nordic development of this branch of learning on "law's polycentrism" which in particular takes up the pluralistic sources of law (about the theory of legal pluralism see Dahlberg-Larsen 1994).

this is the dominance that the judicial perspective has and continues to have in jurisprudence.[6]

e) In addition, lawyers' one sided training in the legal method makes them poorly equipped to use other methods and creates a mental block against the use of such methods.

f) Part of this picture is also the tendency of lawyers to imagine that the alternatives to the customary legal method are full-fledged legal sociological or legal economic studies of considerable format, an intimidating conception which undoubtedly arises from their great respect for the demands of method required by the use of empirical material.

g) A final reason is that the law labors with average, abstract actors in the legal analysis, for example "the salesman", "the testator", the tenant" etc.[7] Since these are not actors of flesh and blood, their own individual characteristics are not taken into account in the analysis, and jurists can therefore pursue their abstract argumentation without making any use of empirical material. It is, of course, entirely acceptable to use hypothetical cases as the foundation for an analysis without grounding it in empirical fact. However, as has already been mentioned, the law – including its scientific branch – weights its evaluations with common sense, relying on the trove of wisdom which has, over time, sprouted up in the pasture of legal usage.[8]

A reference to the neoclassical theory in economics lies close to hand. In that theory there is a goal of "equilibrium" which arises when in a perfect market there exits a balance between supply and demand. The neoclassical theory is emptied of social categories. Abstract actors act in an abstract market, i.e. actors without flesh and blood, whose abilities and social residence is not considered in the neoclassicist's discussion.

The following account builds on the idea that while the heretofore stated reasons may explain the dominant position of legal positivistic analysis in jurisprudential practice, they are not convincing as objections to the further strengthening of an empirical orientation in jurisprudence. We will have occasion to come back to the aforementioned reasons below (section 10).

3 What is the Empiricism of Legal Science?

Legal source material is by definition the empiricism of legal positivistic jurisprudence. In that systematization and interpretation of positive law material is the doctrine's task.

We do, of course usually not express it in that way, for when we talk about empirical material in connection with jurisprudence we often mean material other than just legal source material. The fact that legal source material must be treated in a certain ("dogmatic") fashion is presumably the reason that it is not

6 The reasons that the jurisprudential perspective is to such a high degree in concurrence with the courts is analyzed by Hellner 1969 s 207–213.

7 Wilhelmsson analyzes this in *Social Civilrätt*.

8 Compare Christensen's description of the legal mentality, especially the laws knowledge structure (1986 s 80).

seen as empirical. Its material and method are woven together and function in that way. so. To see this, one has to consider he "integration problem" which often presents itself when the customary legal method and the empirical method are combined (see 8.5 below). Such a problem does not exist in pure legal positivistic studies.

But there isn't any real logic in this way of viewing it. Most sciences are "dogmatic" in the sense that they treat material of a particular type in a certain way. Historians, for example, who make use of diaries as source material must use a source critical method, having no discretion in respect to method. It is also apparent that sources of law and precedent are not as concrete as many conceive them to be.[9] A consequence is that the border between legal source material in its own meaning and other empirical material (in the named meaning) is not clear. This appears for instance in the area of labor law where the collective agreement as well as the employment agreement play a central role in the creation of law. They have in reality the character of both legal source material and other material and are sometimes called "normative sources".

The concept "positive law" is itself a source for confusion in that it is often used in two different contexts. The first, refers to the positive law in the customary meaning, that is to say the law that corresponds to the content in legislation and precedential decisions. The other refers to "positive law in a factual meaning", in other words the law which is applied in the first instance by entities like governmental agencies, city governments and inferior courts. The content of positive law in the latter meaning can only be determined by going through a great deal of material from the first instance sources. The insight that positive law in the factual meaning is often different than positive law in the customary meaning and that the content in the former can be more important for citizens is a meaningful, theoretical and legal political achievement. Nor is it any hindrance that the two concepts should be kept carefully apart, for in a corresponding way legal source material should be kept separate from other material as soon as what positive law is in the customary meaning can be established. At the same time it should be noted that there is not always any reason to draw a dividing line between legal source material and other *empirical* material. The determination should depend on the use to be made of the material.

If the primary purpose of using legal source material is not to analyze the content of positive law, then it is natural (in a scientific context) to regard this material also as empirical. In other words, legal source material may very well function as empirical material. And as we soon shall see it is in fact quite common.

9 Eckhoff (1987) speaks of "source of law factors" and about "the arguments which add relevance". As one category of legal source he designates among others "actual respect (evaluation of the results goodness)".

4 On the Need to use Empirical Material in General

The heading's question has been the object of a great deal of discussion the main work being Dahlberg-Larsen's thesis from 1977. He puts forward the thesis that we ought to seek to develop an independent, non- dogmatic form of jurisprudence, which studies the changing law from a social scientific standpoint. Speaking for a social scientific jurisprudence that is separated from the legalistic dogma,[10] Dahlberg-Larsen recently has come back to the subject (1989 and 1992) and has now a somewhat modified view. In a short but illuminating addition from 1992, which deals in particular with the demand for quality when using social scientific methods, he distinguishes between three types of jurisprudence: a) legal dogmatism; b) an empirical-theoretical science, that is to say a "social scientific jurisprudence" (see above); and c) a practically oriented jurisprudence which combines traditional viewpoints with new social scientific considerations.[11]

Dahlberg-Larsen (1992) notes that it is the third type (see c) above) of jurisprudence that is the most attractive for legally trained researchers and he adds that it is difficult to say anything more general about how such a kind of jurisprudence should be created (p. 65) even though he gives some views. Dahlberg-Larsen is presumably quite right thus far. The advantages of an *integrative* jurisprudence that is to say a jurisprudence, which integrates customary legal analysis and empirical analysis, is given considerable attention below.

The need to use empirical material can be discussed on two levels which share the researcher's interest in knowledge as a central factor. On a general level it is the inquiry's direction which establishes the need for and conditions of the use of empirical material within jurisprudence. This manner of approaching the question is dealt with in this section. A more concrete and action-oriented way of dealing with this problem is to focus on the researcher's purpose in using empirical material. This is taken up in the next section (5).

Where is one to start, or, alternatively what provides jurisprudential study with its direction? For most researchers legal rules are the given starting point. But there are in my thinking, two additional alternatives, real and imaginative, of different kinds. Therefore, according to this way of thinking jurisprudential inquiries can have three different starting points (directions), each of which has a great effect even on the inquiry's problem formulation and on the need for prerequisites when empirical material is used.

a) The most usual starting point for jurisprudential inquiry is, as has already been mentioned, legal rules or "legal stuff" of other types. It is therefore an act

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10 Dahlberg-Larsen 1977 among others p 540.

11 Dahlberg-Larsen 1992 p. 65. Here also is a reference to Mikkola's thesis on jurisprudential research (1981), which is also a contribution to, among others, the foundations of jurisprudence's theoretical knowledge and limitations. Empirical research is seen by Mikkola as one of jurisprudence's four tasks: "Research 's empirical task is to in a general way acquire knowledge of legal and administrative practice, the values and procedures which steer their decision making together with the object and results of the decision making" (p. 281).

of law, a legal rule, a chapter in a law, a law, a legal principle, a legal institution, a type of contract, a certain kind of juridical material (for example case law), which determines in these cases the focus of the inquiry. The starting point is moreover such that the use of empirical material is in practice insignificant even when completely possible (the use, for example, of a large amount of material from courts of first instance). In the greatest number of cases, the choice of an uncontemplated starting point accordingly allows the legal rules to steer the choice of the problem and, its direction in the inquiry.

b) Another starting point is "factualness". The inquiry is oriented then towards "reality", a factual state of things, a social phenomenon, a social problem, an aspect of social development, a social institution etc.[12] It is normally desirable – and often necessary – to draw upon empirical material in an inquiry of this kind. The use of empirical material and the analysis of the legal rules go then, with advantage, hand in hand.

c) A third starting point may be a "conception" of some kind, such as a political or economic theory, a referential frame, a perspective, a value (legal), or a goal (rationality) etc. Here are a few examples: A basic ecological outlook could guide an analysis of civil law so that when we examined sales law (for example fit for use); consumer law (for example duty to inform); patent law (for example first to invent) etc., we would be able to determine how much leeway there was in weighing environmental considerations when applying positive law. Another possibility would be to allow society's goals in a political area to steer an examination of an area of law.[13] To this category can also be referred work which is stamped with a singular ideological outlook[14] or a comprehensive valuation.

Also, in examinations of the aforementioned kind the use of empirical material lies close to hand, even if it isn't as expressed as it is under b).

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12 Some well chosen examples can illuminate the stream of thought: risks in society (for example aids); computerization and other forms of information technology's development; immigration; market theory's breakthrough in the public sector; the knowledge society's growth; and tendencies in employment (such as working from a distance) are such conditions which can be fruitful starting points for an inquiry. At the University of Umeå's Institution for Legal Science a new project dealing with working from a distance has begun. The project's problem orientation is in this case determined by a social phenomenon, namely the large increase in working from a distance.

13 As an example of a study with such direction, Källströms inquiry into alcohol politics and labor law can be named, which deals with alcohol abusers' employment protection. The society's political goal for alcohol is the main thread in the work, of which the result is anchored in an empirical pilot study. Compare, Fallback's critique which observes among others the questions on method (p. 713).

14 Here we can refer to the work which is inspired by a definite social ideology. A number of labor law dissertations which all build upon Marxist theory, can be given as examples: Per Eklund (1974), Håkan Hydén (1978), T. Sandström (1979), Ann Henning (1984) and Håkan Göransson (1989). For a contribution to the discussion of method we can refer to Henning who mentions that she examined her dissertation subject "from a certain social theory and from a historical, legal dogmatic and quantitative statistical viewpoint".

The choice of a starting point has accordingly a great effect on the need of and prerequisites for the use of empirical material.[15] But we should keep in mind that such use is just a tool and not a goal in itself. The choice of a starting point should be decided by its relevance and fruitfulness in furthering the researcher's interest in knowledge. An increased orientation towards b) and c) and therefore a reduction in the strong stress on a) can direct attention towards new problem formulation and reinforce jurisprudence's relevance. On the track of such a change follows the increased use of empirical material. The choice of problems is very important for a science which doesn't work with precise hypotheses for the researchers who identify fruitful and relevant problems increase their possibilities of producing an abundance of knowledge.

It also should be kept in mind that a legal rule as a starting point is a fragile foundation for an investigation. If the rule is buried in a paragraph of a law the lawmaker can readily change the investigation into an obliteration (v Kirschman). In a corresponding way one of the lawmaker's construed concepts can be an easily destroyed starting point, for example if the concept is no longer needed for technical reasons. On the other hand a reality based problem or an assessment doesn't lose its actuality in the same way and thus it retains its relevance to foundational legal principles and traditions.

5 The Purpose in Using Empirical Material

In the following an attempt is made to identify and analyze the purposes for using empirical material in the context of jurisprudence but it ought to be pointed out that the purposes are at least in part interactive. It is perhaps of lesser importance that the boundaries be completely strict so long as they are able to illustrate the possible use of empiricism to enrich jurisprudence.[16]

5.1 Background Information

The role of background information in treating a certain institution of law is to shed light on how often it is used, who uses it, its particular content, the eventual requirements for its use, etc. In a similar way the nature of a legal document, a testament, for example, can be made clear with the help of empirical data showing which type of legal documents exist and which formulations and situations can create difficulties or problems of another kind. Background

15 Compare Hellner 1975, who points to the difference between a material orientation and a problem orientation and draws the following conclusion: "The more a jurisprudent tries to employ the methods for the use of legal sources recommended by the proponents of the history of law, the greater the risk that the jurisprudential research becomes a tedious exercise in the art of using legal interpretative technique and case analysis on trivial material" (p. 395). Hellner places in question jurisprudence's emphasis on "the special material which is seen as legal sources" (p. 396). He points out in particular that the law of formulas within parts of the law on wealth can be just as important as a source of law.

16 The reasoning is illustrated by a number of examples taken from civil law and also from other areas. The examples may seem to be chosen arbitrarily. I hope therefor for the readers understanding because it is difficult to find any other presentation technique to give substance to the discussion.

information can also be of a more general nature. An account on transportation law, for example, may with benefit be prefaced with an overview of the transportation system's organization and way of operating. Such an overview provides a frame for the account on transportation law and contributes to an increased understanding of its elements.

In these cases the purpose is so limited that the normal way of acting doesn't encounter any methodological problems in using empiricism for no claim is being made as to their generality. The material, therefore doesn't need to be representative.

5.2 Relevance

If empirical material is intended to secure the relevance of the problem being dealt with its role is a trifle more demanding, for the purpose of the material is to show that such a problem is real. For example, if a certain type of contract in practice exists only marginally, there is good reason to question its use as an object of juridical study. Hence, in study of the validity of certain clauses, the purpose could be to find out the frequency of use of such clauses and number of typical examples of certain formulations. Such a going over of contract practice shouldn't have the purpose of establishing the occurrence of any customary practice. Rather the purpose should be to ensure that the problems touching the clauses' validity that are being dealt with exist in reality and are therefore relevant.

As long as the purpose is to ensure relevance and procure new ideas, the demands on method are still modest.

5.3 Theory

An important use of empiricism is to analyze legal rules in the light of a certain theory or, alternatively by using the theory as an important part of the analysis, for a legal.

A legal inquiry may be related to a theory usually a theory about society in such a way as to form a frame for the analysis. For example the relationship between employer and employee in questions of joint decision may be analyzed in terms of an overlapping theory on impediments and opportunities that, through legal means, push the balance of power in one direction or the other. In such cases legal source material is, not only to establish the content of positive law but also to establish the empirical basis that may shed light on the named theory and eventually develop it.

Jurisprudential inquiry often takes its starting point in social theory (when, for example the theory is allowed to determine the formulation of the problem) and empirically study the theory's durability. Consider, for example the new theory of institutional economy involving the significance of a legal framework for economic advancement. Against this background, a jurisprudential study could examine the particular structure of some central legal institution in a country as well as a company's, or another actor's, effects on the rule's content and the applying organ's effectiveness.

Jurisprudence might also adopt another discipline's formative theory touching conditions which direct the control of a legal rule or touching on general conceptions foundational for a particular legislation or rule making. An example of the latter might be perceptual psychology's research on what it is that effects our conception of reality.

Jurisprudence can further profit by the use of other discipline's theoretical research through the use of means that deepen the jurisprudential analysis without researchers having to tie themselves to the content of a particular rule. The efficiency concept developed within parts of sociology is, for example, used in this way. When we analyze the "efficiency" of legal rules in jurisprudential accounts we use in general a mildly vague concept of efficiency, talking about "the rule's efficiency" influence or the like without offering further information about what is referred to. Similarly in research on economics, we usually differentiate among meanings, goal fulfillment (effectiveness) inner efficiency (efficiency) and relevance (efficacy). Through the use of such conceptual tools – mutatis mutandis – jurisprudential analysis gains precision. Should we also inch towards other social scientific disciplines "the concept of efficiency" would give the analysis even sharper focus.

One may also begin by analyzing legal rules, contract practice or other material, with the guidance of a particular theory, to judge whether the rule's respective contract practices are effective. One might for example question whether or not contract law's rules on the formation of contract or contract nullity, increase or decrease the transactional cost. Taking as the starting hypothesis, that it is desirable for the rules to be formed so that the costs are minimized. In a similar way one could investigate to what extent particular rules of tort law are in harmony with for instance, the generally accepted principles of "least expensive cost avoider", "most efficient accident preventer", "least expensive insurance" and more. The rules in this case would be analyzed with the primary purpose of determining positive law without determining if it is in conformity with the formative theory on transactional costs.

A variant of this would be to investigate to what extent there is room to bring in legal-economic argumentation in the analysis of positive law. In this case the starting point would be certain arguments which build on legal-economic theory. Although legal rules may have been formed without any consideration for such economic viewpoints, they may very well be reconcilable with conceptions of this kind. In such cases a legal- economic argument, with solid theoretical foundation, may be irrelevant when applied to a section of a law, despite, the fact that it touches the question the section regulates, but may be useful nonetheless in the legal political analysis of the legal rule. Such an analysis may show that the contents of the rule are good reasons in themselves, that for example there are considerations other than those which are a foundation for the legal economic argument, that with good reason have had a determining significance. But it can also show that there is reason to put in question the legal rule's formulation.

Incorporating the theories of neighboring disciplines is – or ought to be – as natural to jurisprudence as is the use of economist's theories on the family and education to demographers and pedagogues.

For the sake of clarity it ought to be pointed out that the jurist's use of other discipline's formative theories doesn't mean that the jurists themselves are in command of the empirical methods that underlie the formation of the theory. It is enough that the jurist is well acquainted with the theory's content.

Great care must be taken in the choice of the theory that will guide the examination. If one wants to analyze the conceptual pair legal predictability-efficiency one can do it from economic welfare theory but one can also do it from political logic on the decision processes' legitimacy. The choice of the theory has a great effect on the inquiry's structure and often also on its eventual result. The interest in knowledge which underlies the inquiry as well as the researcher's view of science is very important in the choice of a theory. If the theory lacks relevance in both of these regards, the connection to the theory in the worst case can make the research meaningless for the researcher's interest in knowledge.

5.4 Perspective

Analyzing the legal rules from particular perspectives provides the legal material with a primary purpose beyond that of establishing positive law (even if it should later be an essential part of the analysis). As conceptually possible perspectives we can name a consumer's perspective, a woman's perspective or an immigrant's perspective etc. For example, if one chooses ethnicity as a perspective, one might examine the legal rules in a particular area in order to determine whether they serve their purpose as regards persons with a foreign background, analyzing how the rules of consumer law work for groups in society that don't understand the Swedish language. Or one might examine the rules in the law of inheritance to determine to what extent they go against the values of immigrant groups. One could also try, of course, to analyze in a more general way the legal system's appropriateness in light of the large contribution by groups with foreign backgrounds and therewith the growth of a multicultural society.

Empirical material is also useful for revising perspectives such as the researcher's views of reality or other conceptual views because the law tends, in general, to overestimate the extent to which people are norm steered entities, and it is difficult for researchers of law to free themselves from this perception. As a consequence jurisprudential analysis prefers to build on uncertain premises and preconceived thoughts about the effects of legal rules on human behavior. In a corresponding way lawyers' – as well as researchers of law – view reality as formed by rules of law,[17] and they would rather believe that the legal rules

[17] Eckhoff has touched upon this in a short but thought provoking contribution (1985 pp. 32–35), which leads to the following conclusion: "The weaknesses of jurisprudence that are named, can only be remedied if we obtain greater knowledge on the relationships of life that are the substance of legal regulation, and better insight into the legal rule's manner of operation. In addition is a need for an increased understanding of what it is that motivates human behavior, and an overall view of society that isn't too strongly influenced by the prejudices of law. In order to open this it is, according to my opinion, important to come closer to other social disciplines. We ought to make use of some of the insight that has been

decide which relationships are of practical importance, and that the legal rules are good and therefore have beneficial consequences.[18] This bias effects the lawyers conviction as to the legal rule's content. They are, in other words, steered by it and do not see that the factual conditions are not reflected in the legal rule. This limits the field of view.[19]

That the lawyer's perspective is, in fact, affected by the legal rules and his belief in their effects is difficult to show empirically,[20] but there is no reason to doubt that members of the legal profession would be affected in this way by their training in legal method and professional practice.

Yet another form of perspectival distortion occurs when statements about reality in the legal source material are taken as given just because they are found in that material. Not the least dubious is to proceed, for example, from the executive government's wish-colored opinion of a law's effects, using this opinion as a foundation for analysis.

In the aforementioned case, or in any case in which lawyers are made aware of the perspective that is steering their concept of reality and belief in the effects of the legal rules, empirical material can contribute to the correction of that perspective. And this can in its turn have a beneficial influence on the legal positivistic analysis of positive law.

Empirical material can also contribute to "a shift of perspective within the law". An illuminating example can be taken from the law of wealth. Earlier, it appeared self evident that the law of torts was the law of compensation's core. But over time social insurance law and private insurance law have become more important, and the consequence has been that the area is now often called compensation law with the interaction between rules from different areas standing in the center. Clearly, in this case it was not a change of rules in the law of torts which led to the classical rollback of tort law, but, more accurately, an empirical stage in which different forms of compensation became important that resulted to the shift in perspective.

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developed in areas like sociology, social psychology, political science and economy" (p. 39). – Eckhoff's thought is also that jurists ought to make use of insights form other disciplines. For an example from psychology see the next footnote.

18 Ekhoff also states that lawyers have a belief that there are beneficial consequences if their standpoints and suggestions are accepted (p. 35). Eckhoff refers to psychological research that shows that concepts of reality are affected by what one believes beforehand, what one needs to believe and what one wants to believe.

19 The thesis of Eckhoff's and others that lawyers think that legal rules reflect "reality" is a thesis that is certainly difficult to test empirically. Even more difficult is it to determine if the lawyers are right, that is to say that the rules are not only norms which have the purpose of directing behavior but also descriptions of reality. Ekhoff seems to think that lawyers are wrong in perceiving legal rules as a description of reality. Christensen seems to have the opposite view. She "is rightly convinced that the law has gathered as much knowledge about society and humanity as the modern social and human sciences." (1986 p. 81). This particular knowledge formulates the law in a normative form.

20 Ekhoff's thoughts are extended by Graver, who tries to go a step further when he proposes that lawyers have a warped sense of reality which in all of life's contexts distorts their view of reality and makes it more or less impossible for them to develop new and different views of society. (Graver 1986 p. 118 and following). Graver doesn't present any empirical evidence for his opinion. It isn't always so easy to accomplish this.

5.5 Value

Under this heading we may appropriately place work with a specific value as its starting point (and conceptions of a similar kind).[21] This might be a value related to the protection of human rights or one tied to the concept of "state governed by law". Or perhaps the need to protect minorities might provide a value for guiding an examination of legal areas where such a viewpoint is of importance. Similarly, "state governed by law" values, such as predictability or uniformity, might provide the starting points for an inquiry. In these cases, while the legal material functions as a kind of empirical material, the inquiries also involve a legal positivistic analysis of it. If, on the other hand, the purpose is to point out the general public's or a certain group's values or conceptions in legal areas, the rules according to legal sociological examination may be called for.[22] And the importance of equality is a value that may provide a fruitful starting point for the choice of a problem and a structure.[23]

A variant of this would be an attempt to isolate the values and other kinds of conceptions underlying a particular law. The result of such an examination could increase the understanding of the law and thereby affect its interpretation and application.

However, in order for a value (or concept of a similar kind) to have operative worth, it needs definition. A utilitarian view, for example, does not in general provide much guidance. Nor does the somewhat pretentious "of benefit to society" standard with which many Scandinavian jurisprudential scholars have labored. This type of measuring stick has shown itself to lack substance as a starting point for discussion and has opened the field to an excess of subjectivity.

5.6 Function

Certain purposes may be grouped together under the designation of function. Description of the workings of legal cultures belong in this category, the informal business system of dispute resolution, for example, and the athletic movement's own "legal system." Another correspondingly partial legal culture is the scientific community's own rules and a third example can be taken from the religious world which has constructed its own legal order on the churches' beliefs and values. One might also include the Mafia's legal order in which agreed upon rules steer the families' behavior and yet occasionally allow an uncontrolled outbreak of violence (The Mafia's legal order is similar in this respect to the international legal order). In each of these examples, there exists

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21 Compare Weber's "the rationality of value", that is to say, the orientation towards a value which is superior in the sense that it is a "value in itself" and that the goal is to reach that value and it is therefor it not weighed against other goals.

22 "Legal awareness studies" have an old tradition in the north (Segerstedt, Kutchinsky, Mäkelä, Saldeen). BRÅ has again taken up this tradition, see Axberger 1995.

23 Dahl stipulates expressly that women's law has as its purpose "to improve women's place in the law and society" (1985 p. 21).

legal material of an empirical character which can shed light on the function of "legal rules."

Another type of examination of the function of law might take aim at the frequency of a law's use, which categories of persons are benefited by the law, the costs involved in enforcing it, etc. The purpose then would not primarily be to determine the content of positive law. In certain areas where the rules are imbued with the character of the framing of the law, it can be difficult to determine the content of positive law in customary ways (the legal text is meaningless, there isn't any binding precedent, etc.). In such cases a "massive study" of the practice of government institutions or courts of first instance could provide information about the actual enforcement and function of legislation. As has already been touched upon (section 3), the goal is not always to determine the content of "positive law in the traditional sense" but by an "analysis of its function" (as discussed in the previous paragraph) to gain a good picture of "positive law in the factual sense".

A further interesting research project would be to analyze how the development of society can change a law's function. In labor law, for example, although the demand for "suitable qualifications " has up until now had limited meaning, the increased demand for knowledge in the work force may well lead to the use of this rule by companies desiring to secure qualified labor at the expense of certain employee's employment protection. Although the application of the rule at the level of the work place is an empirical fact, it yet sheds light on the changed function of the relationship between employee and employer.

A core area for functional analysis is the interplay between different rules (complex rules) in a particular area, such as the previously discussed interplay between compensation law, tort law, private insurance law and social insurance law.[24] But the interaction between legal rules and a non-legal discipline can also be a valid candidate for such analysis, e.g., the interplay between family law and research in child psychology.[25]

The researcher's view of the law's function may also influence the perceived need for empirical material. Putting the law's function in the foreground of conflict resolution directs attention to the application of the law, i.e., the work of the courts which is accomplished through the use of accepted legal method. If on the other hand researchers focus their attention on the law's function to create a basis for the division of public services, then the administrative application of the law comes into view, i.e., the bureaucratic mass-application of the law which is often done by non-lawyers.[26] In the latter case researchers will have a great deal of empirical material to go through.

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24 Roos 1984 (p 508) points to the interplay between rules for compensation as an appropriate area for research of the type mentioned.

25 Compare Saldeen 1995 p. 72 on.

26 Graver 1987, which deals with law simplification and points to different types of legal application in a clear way.

5.7 Effects

Analyzing the effects of a particular law or legal rule is a central task for both legal economics and legal sociology where it is usual to study the effects of law and its applications on society. Those who undertake this task must be careful to use the accepted methods demanded (validity, reliability, representativeness, etc.). But there are types of "effects studies" having a somewhat different purpose which are primarily a task for jurisprudence, the question, for example, of the degree to which the legal interpretation of a particular law has influenced the court's or governmental institution's application of that law. Other studies analyzing effects may show that the courts have interpreted a decision in a certain way, perhaps in an unpredictable way, in order to avoid certain consequences. The practice is analyzed in this case, not primarily to establish positive law, but to ascertain whether or not the court's interpretations are consequence oriented.

Perhaps the most important form of "legal effects analysis" is examining the effect (or impact) a law or legal rule has in legal application, above all in the first instance (court or administrative institution) to see if that application is in agreement with the legislation and precedent- building instances. The importance of such an analysis is derived above all from the fact that the practice in the first instance is determinative for the real rights and duties of law abiding citizens. This type of investigation can be especially rewarding in areas where legal frameworks are dominant. An area rich in such frameworks is welfare law.

Closely related to the above is the sort of effects analysis which examines the application of a particular legal rule with respect to certain categories of person. For example, an effects' analysis of the rules in labor law for the protection of weakly positioned groups of employees, such as elderly, handicapped, part time, etc., might be able to clarify the way in which the "last hired, first fired" rule is applied, what exceptions the unions accept, which employee groups are effected by the exceptions, etc.

5.8 Legal Political Argumentation

Legal political argumentation related to legal work can have strongly changing character, as, for example, when legal-technical viewpoints modify the order in a section of a law in an effort to conform the wording of that section and a particular goal or social theory. Although the discussion in question may be furthered without the use of empirical, non- legal material as a foundation for the argument, the argumentation may have a much broader purpose, to raise questions about unforeseen or negative consequences of particular legislation, perhaps, or questions about a specific determining precedent. In such cases it is often desirable to support the argument with empirical material. This need not always be an extensive investigation by the author. In some cases, simple statistical information will give sufficient weight to the argument. In other cases, of course, it may be of greater importance to bring in empirical material which has resulted from extensive investigation such as a survey.

Although argumentation *de lege ferenda* may be benefited by support from empirical material, it should be pointed out that such argumentation in the work of jurisprudence is closely associated with positive law. Recommendations *de lege ferenda* are built to a large degree on an analysis *de lege lata* and are systematically given considerations of great weight, often at the cost of material viewpoints. This may occur for two reasons, the first being simply that empirical material has not been used. The other reason is less obvious, reflecting the systematic tug inherent in the analysis *de lege lata* which colors the analysis *de lege ferenda* and causes it to become almost an extension of the former. As a result, the analysis *de lege ferenda* rarely contains any independent thought formation but is constructed on premises of positive law.

In any case, because of the close link between jurisprudential analysis *de lege ferenda* and positive law, the call for empirical material in this type of argumentation is often limited. There is, however, an alternative form in which argumentation *de lege ferenda* becomes relatively freer as its legal character is diluted. In this form, the researcher gives less weight to systematic considerations and is, as a consequence, freed to broaden the arena of argument with empirical material. It is, of course, important to acknowledge the good foundation for legal political argumentation provided lawyers by their legal education, a foundation which demands that they develop insight in a systematic way into which relationships are suited for legal regulation in an institutional context, etc. But it is a giant leap from an analysis *de lege lata* to taking a purely political position. And in the interlude between, jurisprudence can make its contribution.

Because the attempt to improve the application of law relates to legal political purpose, jurisprudential analysis of the above type may validly be used in the examination of courts and at the level of government institutions. It could, for example, be used to determine whether or not the decisions of the governmental institutions applying the law are in agreement with positive law by examining the material upon which the decisions are based to see if it has a reasonable quality. A jurisprudential study of this kind could be of special importance as applied to those institution's whose decisions have far reaching consequences for individuals, in, for example, the area of welfare law. And in studies of the social services which are the basis for court decisions on incarceration, the inclusion of empirical material would appear to be essential .

5.9 Development of the Legal Method

Jurisprudential analysis focused on the development of method in legal technique seeks to clarify our understanding by examining the varied forms in which legal technique occurs, as legislative technique, contract based rights and duties, legally imbued institutions and figures; perhaps even as certain constitutional premises (equality, non-discrimination, protection of minorities). The purpose of such analysis is to lay a foundation for a more varied and goal oriented use of legal technique; to create, for example, more flexible arrangements within the public sector and to introduce principle considerations into the discussion on means of control. As compared to the development of

means of control in administrative and economic method, the development of method in legal technique has not, to date, been pursued in any systematic way.[27] This may well be due to the fact that such an analysis requires support from empirical material and that jurisprudence, with its limited tradition in using that kind of material, has not been equipped to pursue it. It is often said that the courts have been marginalized in modern times and therewith the judges as sources of law. But if jurisprudence is to intervene in the institutional aspects of legal technique, it must first understand the development of its method and thereby the kinds of conflict resolution that have taken over its role in contemporary society.

There is a form of legal means of control analysis that may be used to examine the law's "effectiveness" from an instrumental perspective. This form is used, for example, in Snyder's study of the different means to secure the European Community Law's "effectiveness" where he examines the means available, looks at the tools and techniques which the commission and the court have and brings in a normative discussion on how the Community's goals, rules, procedures and institutional structure can be brought into better agreement with each other.[28]

6 Some Concrete Views on When we Should use Empiricism

It will be helpful at this point to take a closer look at the question of when empirical material should be used within jurisprudence. There is perhaps no general response to this question, except to emphasize what has already been said (above chapter 1), that the answer is closely related to the discipline's own self understanding and concern for relevance. For jurisprudence finds itself in an unusually divided situation: On one side is the territory where its rule is unlimited, i.e., the territory dominated by legal positivistic treatment of legal material in service to the legal community. Within this region method and material are on the whole taken for granted, canon is uncontested and products have their market secured,[29] products which have manifested their own relevance outside of academia, namely in the practical life of the law.[30] And yet this territory is clearly limited for on the other side, outside of the reach of legal positivistic method, lies a type of jurisprudence which is free to raise questions

27 Hellner 1990 is still a pioneer in legislation education. Another example is Sandgren 1981 and Eckhoff 1983.

28 See Snyder 1993 (with many references).

29 This is an explanation for the fact that the greatest part of jurisprudential work (like the work of the natural sciences) doesn't contain any.

30 The legal literature, in Sweden, is thought to have a relatively good position within the practice of law. This is a consequence of our legal tradition which among other things means that the courts are careful in developing new principles through the creation of precedent. Many questions which the legislator hands over to be applied in the law, not least within the central civil law, remain unanswered by the courts because the questions are not subordinated to the court's power to judge.

about method and material, and by so doing to expose the reality of jurisprudence's self understanding and identity.[31]

On one hand, therefore, it appears most profitable for the sake of jurisprudence to assist the development of legal positivistic analysis in its ongoing effort to describe, interpret, and systematize the law. Towards this end it is practicable to give increased weight to the working out of general principles (general theories) and thereby subject the administration of justice and legislation to continuous scrutiny.[32] It is difficult to imagine that any other legal means could better assure the quality of the administration of justice[33] than the sort of examination that can have in mind both the quality of the argument in a narrow sense and the development of law in agreement with legal principles in a broader sense. Hence, no other academic discipline can, nor wants to, intrude into this area.

At the same time if jurisprudence is to strengthen its relevance and position, it must broaden its sphere outside of the area of legal positivism. Otherwise, more expansive disciplines will continue to move in and monopolize the problems best suited for jurisprudence to address. Towards that end jurisprudence must therefore develop to a greater degree points of departure other than those named earlier, i.e., "factualness" "and representativeness" (see section 4.2). Such starting points make the identification of profitable and relevant problems easier and thereby increase the possibility of producing additions to knowledge. Such a change in direction necessarily brings with it a more empirically oriented way of working within jurisprudence.

It is difficult to delineate in any general way the kinds of concrete cases which would offer jurisprudence particular grounds for using of empirical material. As has been suggested, such a determination is above all based on the researcher's purpose for the study and the problems which are to be dealt with (compare with section 5 above). However, although it is, generally speaking, what the researcher wants to achieve that determines whether or not it will be fruitful to employ empirical material, which material is to be used and the method for its use, it is yet possible to identify some guidelines.

A close examination of legislation in terms of the types of rules that are employed, suggests that it is fruitful to use empirical material for the analysis of legislative frameworks, standards, and rules similar to these whose formulations are open and whose material content is insignificant. Rules of this type have

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31 There is a certain parallel in this to literary criticism which found itself on the defensive during the 1970's and 1980's and sought different models and methods in other disciplines to win respectability. But literature has revived itself. The sickness is now located in the opposite direction: literary models are now found within law, philosophy, and business economics.

32 The need for such a direction in analysis is found especially in the Nordic countries as a consequence of the unwillingness of their legislators and highest courts to establish general principles of law. In contrast to their German counterparts' love for the creation of law in this form. Such legal principles are almost completely lacking in the Swedish law on wealth. Maybe the situation would be different if we had a general civil law book. (On the Swedish legislative technique in the area of the law on wealth see Hellner 1990 particularly p. 64 and following).

33 Compare Saldeen 1974 p. 58.

become more common. It might even be said that the development of legislation is moving towards an increased use of result norms (in contrast to method norms). Moreover, the wording of these norms is such that traditional legal analysis of them is often unsuccessful, for their content has come from non-legal principles, such as scientific examinations, negotiations between two parties, etc. Environmental law, welfare law, social insurance law, health and health care law, planning law, parts of labor law, labor protection law, and important parts of administration law are other typical examples of areas where it would be especially fruitful to use empirical materials in the analysis, and it appears that these too are expanding legal areas which will be of increasing importance.[34] On a similar basis, even constitutional law can be named. But large areas of civil law – not least its central areas – by contrast, are only slightly touched by this development. And that perhaps explains why customary, legal positivistic work with scanty empirical input has dominated the area of civil law.

Another criterion for the use of empirical material might be the amount and nature of the legal source material which exists in a particular area of law. Where a guiding legal practice is lacking it can be difficult to achieve satisfactory results with the prevalent legal method. And in instances where other customary legal material is also scanty, the motivation to use empirical material is further strengthened, in the practice of government institutions, for example and in that of contract negotiations. In other instances, by contrast, it is the large quantity of material to be analyzed that renders a jurisprudential treatment using customary legal analysis inadequate. At the level of government institutions, for example, there has for some time been a substantial expansion of rule making. In Sweden, there are legislative frameworks producing over 200 secondary norms just on the central governmental plane, and to this are added local and municipal regulations. In addition there has also been a substantial increase in the number of changes to the law.[35] In all these instances, analysis will be far more fruitful if empirical materials are used.[36]

This expansion can be described as a "legalization" in the sense that as more and more areas of society are regulated and professionalized, the tasks previously done by family members, etc., are being turned over to "experts." This, in turn, is putting new types of "legal decision making" in the hands of non-lawyers (technicians, psychologists, economists, social workers, bureaucrats, politicians and other laypersons, etc.). "The welfare state's law" has this character to a

34 On the changing of the substance of the rules in the 20th century see Hyden & Anderberg 1995.

35 See Bruun in JT 1994-95 p. 1082.

36 How does the accelerating rate of law making affect the traditional areas of jurisprudence? Viewpoints are divided. Stjernquist and Agell – to name two researchers that have founded this area – have opposite opinions. Stjernquist says that the need for such jurisprudential research is diminished (1952 p. 201). Agell thinks that among else the accelerating speed of legislation often brings with it problems of application and that soon enough there exists a need to analyze the legal practice (1974 p. 28 and following) Possibly they operate in such a way that a detailed positivistic legal analysis loses relevance for example in the right interpretation of an element in a law. At the same time it is conceivable that a positivistic legal analysis which has as its purpose the exposure of principles and connections becomes more necessary.

pronounced degree. For all the reasons discussed in the previous paragraph, an adequate analysis of the entire area of what might be termed "pseudo-law" will require the use of both legal and empirical methodologies. As a concrete example, consider the problem of conflict solving in the area of family law where courts, law firms and non-lawyers "compete" with each other. Custody disputes, it appears, tend now to a lesser degree to be decided by the courts. This raises an interesting empirical question, namely whether or not the results of custody battles are different when they are dealt with by non-lawyers. Other questions might be whether or not children have a greater opportunity to express themselves in these conflicts and to what extent that possibility is increased by the use of non-lawyers in this kind of dispute resolution.

Similar criteria for the use of an empirical methodology might be sought in areas having quite another character than contemporary courts of law. There currently exists a varied group of government institutions, committees of composite structure, advisory organs, ethical commissions, disciplinary bodies and "ombudsman like" institutions with great influence over the creation of law within parts of administrative law and other areas. Again, this kind of law making is not well suited to traditional legal analysis because the decisions made are to a large degree steered by factors other than established sources of law. And this is especially true for organs of mediation in the private sector.

7 Types of Empirical Material

Empirical material was defined above as material not used primarily, or in any case not used only, to analyze the content of positive law. Customary legal source material also lends itself to such use. As the foregoing should have made apparent, the work itself may well suggest good reasons to use legal source material in this way, but often the material may be used in two ways, both to establish the content of positive law and for some other distinct purpose. In the former instance, validity is established by the usual application of legal sources and in the latter by proper application of empirical methodology (see section 8 below). It is at times unclear, however, as to which way the legal source material is being used, an unclearness emanating from the fact that scholarship in legal source material tends to be ambiguous. It is thus a reflection of the differences between normative sources of law and descriptive sources.[37] It is because of this difference that may be difficult to ascertain the particular point at which the analysis leaves the legal positivistic domain and crosses over to the empirical domain.

When legal material other than legal source material is used as empirical material, it cannot, by definition, be used to establish the content of positive law in the customary sense. This kind of empirical material may be of various different kinds, such as the following:

a) The practice of inferior courts and governmental institutions. Analysis directed at practice other than cited court opinions can reveal problems and legal questions of practical importance, but studies of the practice of first instance

37 On this point see Blume 1990 pp. 877-879 (with references).

decision making may also shed light on the content of "positive law in the factual sense" (see above section 3) as well as on the expression that legislation and precedent in certain areas of law has.

b) Contracts, forms, bylaws, deeds and legal documents of similar kinds. These are the kind of empirical material which can be used in the different contexts touched upon above. In the area of administrative law, for example, where contract conditions in general have great importance for the creation of law and where legal practice is lacking to use standard agreements as the starting point for analysis.

c) Areas, including many of those mentioned above, which have their own legal order, the rules of the stock exchange, for example, or the ethical rules found within many sectors of society such as those regulating the practice of athletics. That kind of private law generates its own legal material.[38]

e) The internal hand books, memos, forms and similar non-binding texts circulated within government institutions. This type of material often has great importance for the content of "positive law in the factual sense," for pressures of time often motivate the use of such material in the creation of law in the first instance.[39] It is disputable whether or not the effect of these texts is less when they are in agreement with positive law in an actual sense.

f) File records of different kinds both in public hands and other places including private companies. Among such potential sources for information should be included patient records, insurance registers and the like.

g) Material from foreign law. Although this sort of material is normally used to show the content of a particular country's legal order, foreign law may also be used as empirical material, when the purpose, for example, is to illustrate a discussion or show that a certain kind of conflict exists in another legal system. Argument from foreign law may also be used as support for a particular argument. And in that case the foreign court decision may be used without regard to its outcome or precedential value.

h) Statistics. It is, of course, self-evident that statistics may be useful as empirical material. These are derived from a wide variety of sources. They may be official statistics, purchased statistics, collected statistics, or statistics which researchers produce themselves.

i) Interviews and surveys. Initially, most of us are likely to think of interviews and surveys when empirical material is mentioned. As has already been indicated, this type of material can be used for a wide variety of different purposes. In many cases interviews and surveys are the only means of showing how legal rules are actually used and what effects they have. However, it is generally only the affected actors' view of the legal rules which can be discovered in this way.

j) Observation. A variation of interviews and surveys is observation, through participation in the entity in question, perhaps. Long term participative

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38 Compare with section 3 above.

39 This is illustrated in a interesting way by Åström p. 202. Internal (municipal) directions are used most frequently as a foundation for decisions in social assistance cases (p. 202). In child removal cases such directions are the next best thing to legal texts (p. 203).

observation is the foremost tool used by legal anthropologists in obtaining information for their studies. Similar to this is documentary material, e.g., courtroom video and audio tapes, yet other forms of empirical material.

k) Mass media. Often the mass media can cast light on a particular legal question. Although such reports must be handled with care since their reliability may be questionable, both news articles and editorial comments may contain valuable arguments and be good sources of problems worth investigation.

l) Literature. Even literature may be useful as a source of empirical material, for law is not as dissimilar to literature as one might at first glance assume. Both, for example, are sources of knowledge which give expression to underlying human experience. Rules of law, in other words, may be seen not only to fill the function of controlling behavior but to reflect, as does the tale of a great story-teller, an accumulation of wisdom inaccessible to science, expressing this in ways as varied and deep as those of literature. We can observe such a use of literature in the work of Robin West, a specialist in law and literature, who uses this perspective to criticize Richard A. Posner's perception that a person's conception of a legal action is based on a desire to maximize well-being.[40] Not necessarily, West counters. Such conceptions of legal action may arise from one's submission to the force of authority. In support of his argument, West uses the example of the so called starving artist in Kafka's novels along with Graver's use of Hamsun's literary figure Isaac in *The Growth of the Soil* to illuminate the parallel between the "common sense" of legal argumentation and a corresponding way of thinking in literature.[41]

m) Experiments. Lastly, as a kind of odd form of empirical material we can name the results of experiments. Usually such material isn't used in jurisprudence. This is in the first place a normative science whose statements neither can nor need to be proved empirically.[42] But one could think of doing experiments. EU law is in a certain way a jurisprudential experiment. Norms with one and the same content are instituted in the completely different legal environments of the EU's member states. Through a comparative systematic analysis we may thereby study how effectiveness and legitimacy as norms may be different in dissimilar legal environments. The grand study done by Cappelletti and others "Integration through Law" can be said to treat EU-Law as a kind of jurisprudential laboratory.[43] Even more daring would be to treat the previously socialistic countries' change over to democracy and market economy as some sort of gigantic experiment that many different disciplines could make use of, jurisprudence among them. Many accepted propositions and suppositions would thereby be put at the forefront. And through observation of this mega-

40 Here it can be added that law and literature can be combined in the USA. One of America's leading literary scholars, Stanley Fish, is also a professor of law. He applies half of his time to literary criticism and the other half of his time to contract law and legal theory. He is currently working on a project on Posner. See Holmberg p. 29.

41 Graver 1986 p. 61 and following.

42 Compare therefore to Ross' theory of prediction according to which jurisprudential predictions are defined as predictions of the court of last resort's application of the law (developed by among others Ross 1953).

43 Integration through law , see especially book 1 p. 3 and following.

experiment jurisprudence might accordingly put many of its suppositions through empirical testing.

8 Questions of Methodology

8.1 Social Scientific Methods

The methods of social sciences all fall along a spectrum of diversity. Some social disciplines, social anthropology for example, work with qualitative methods with modest claims for generalization. According to many social anthropologists their discipline is characterized of its method, long term field observations. At the other end of the scale are quantitative disciplines like statistics and in the middle, business economics which has developed from a practical subject to an eclectically imbued discipline incorporating methodological elements from sociology, cultural theory, psychoanalysis and critical theory etc. Empirical jurisprudence as well may look to the social sciences for methods to use as tools. But what those methods should be depends, among other things, on the type of empirical material that will be used and on the purpose of the intended analysis. And as has already been suggested, there are some purposes for the use of empirical material which do not require a more advanced methodology.

Generally speaking it is desirable to gather and treat empirical material as correctly as possible from a methodological point of view and, if it is quantified material, for it to be as representative as possible. Nonetheless, it may well be that the purposes for the use of empirical material on the part of an integrative jurisprudence may be achieved even when the claims demanded by the method are not fulfilled. This is to say that it can be enough for the researcher to have a general understanding of the relationships that have relevance for a legal rule.[44] The ambition ought to be well fitted to the examination's purpose. "Perfectionism" makes for poor research economy and if the ambition is too great there is an impending risk that the researcher's plans will not be realized.

This does not mean, of course, that the jurisprudent is not free to take on tasks that lie at the heart of the social sciences, a legal sociological study, for example, analyzing the effects on society from individual legislation or perhaps a socioeconomic examination of the effects of particular rules. But when jurisprudence takes on such tasks it has bound itself to the social sciences and must carefully follow the demands of the methods that are used within legal sociology, legal economics or whatever specific discipline is involved.

The handicap accorded the jurist because of his limited training in the use of the social scientific methods is unavoidable. But at the same time it ought to be observed that the jurist's training may be an advantage when it comes to the formulation of problems and the use of certain empirical material. The jurist can see which problems may be relevant from a legal perspective and may more

44 Roos thinks that absolute exactness is seldom sought after in a legal context. "An approximate assessment is often enough in order to determine if the underlying system of rules is functioning well." (1984 p. 509).

readily discover what is to be derived from the material. To state this another way, it may be easier for jurists to ask the "right questions" of the material. It should also be observed that jurists need not necessarily seek expert help when they reach the limits of their capabilities in utilizing different methods. They are using method as a means of assistance and nothing more.

8.2 Empiricism-theory

Material which is not solely used to established the content of positive law has been defined as empirical material above. But inherent in the very concept of "empirical material" is the implication that certain material stands in opposition to theory. Under normal circumstances, of course, empiricism and theory are not opposed in this way but are qualitatively different things. And even in this context such a distinction appears to be somewhat artificial. Theory might more accurately be described as accumulated empiricism, and in many cases social scientific theories have a stimulating effect upon jurisprudence(Some examples were given in section 5).

Traditional jurisprudence (that is to say legal positivistic) regards the formulation of hypotheses and the formation of theory in a rather vague way. It is in this similar to other text-based disciplines like some of the social sciences. Jurisprudence might be said to be in a position similar to that in which the historical sciences found themselves two decades ago. The jurisprudential formation of theory consists primarily in the elaboration of certain legal principles, lines of development and the like. Nonetheless, the attempt to build a so called comprehensive legal scholarship may be seen as a move in the direction of a formative theory of jurisprudence.[45]

The relationship of comprehensive legal scholarship to reality is not, however, completely clear. Of course the question of how reality is constructed as such is not the concern of comprehensive legal scholarship. Legal scholarship is directed towards abstractions of the content of systems of rules in certain areas like contract law or in more general areas such as those that encompass the civil law. Its theories are therefore to be distinguished from legal theories built on material law. And yet it seems possible that as an "integrative jurisprudence" is developed and assumes a position of greater strength within the discipline, jurisprudence will be forced to take a long look at itself and its formation of theory and that this will further its ability to develop a more formative theory.

Yet another way to encourage the jurisprudential formation of theory is to develop a "goal oriented" jurisprudence. A jurisprudence grounded in teleology would reasonably demand that empirical material be given greater attention in that such a jurisprudence would put the behavior- controlling effects of legal rules in the foreground.

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45 See for example Wilhelmsson 1987 p. 19 and following.

8.3 Quantitative or Qualitative Methodology

The law is qualitative to its core, for it is not numbers of instances that determine its values. It is not, in fact, uncommon for a single case to overturn a whole line of previous decisions. Determinations of formative legal instances should therefore be handled with a method that is qualitative in its character (general principles of law). At the same time this method should respect the general legal principle's particular and very specific demands for "representativeness and validity". The interpretation of case law is a way to fulfill this, for the law's suppositions are in fact qualitative in their form and can only to a limited extent be quantified. Legal positivistic empiricism (see section 3 above) must likewise be treated with the legal, i.e., qualitative method. And for that reason the jurist should not be a stranger to the use of the qualitative method on empirical material. This may necessitate that the collection of the material and the choice of selection be done in a different way and, for this reason, the interpretation of the material may lead to particular difficulties. But foundationally the jurist ought to feel at home with a qualitative interpretative way of working.

The application of a quantitative method to legal material, on the other hand, is quite another matter.[46] It would be quite understandable, for example, for a researcher to treat of a great volume of legal case material with statistical analysis or to be motivated by the purpose of an examination to conduct a large survey where forms could be sent to practicing lawyers.[47] In cases like these it is usually necessary to employ conventional statistical and quantitative methods that insure the material is representative.

As can be seen from the above discussion, a number of interlayers exist where at one and the same time the material is treated by both legal and quantitative methods. This is the case when the extensive practice of a governmental institution is quantified for the purpose of illuminating some "aspect of society" in legislation, the types of cases presented in inferior courts, perhaps, or a study of the motivations behind decisions of administrative agencies from the standpoint of legal predictability aimed at determining how usual it is for the motivations of administrative agencies or inferior courts to fail to meet the demands placed upon them. Such investigations are based on the assumption that both a "legal determination" and a quantitative treatment of the motivations needs to be done.

The "analysis of legal effects" discussed above (see section 5.7) is also one wherein there is room for both qualitative and quantitative methods. A qualitative analysis might try to show which arguments are given weight in the first instance, how precedential decisions are used and the like, perhaps examine

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46 For commentary on quantitative methods within jurisprudence see Seipel 1974.

47 A pioneer in Nordic jurisprudence as it pertains to working with quantitative material is Saldeen. In his dissertation mentioned above from 1971 on damages from divorce he worked with a great deal of material from inferior courts with a statistical method. Saldeen could therewith fall back on "jurimetrics" which was coined already in 1949 by Lee Loevinger (see p. 115). Saldeen came back to the field of jurimetrics with his work on the establishment of paternity. Saldeen has presented the jurimetrical method in among other things in his essays from 1974 and 1978.

the degree to which classical, legal values as well as predictability are given consideration in general legislation. A quantitative analysis, on the other hand, would form the foundation for general observations, such as categories of persons who are disadvantaged by the application of the legislation.

Summing up what has been said in the previous paragraphs, it is often fruitful to combine qualitative and quantitative methods. The former sheds light on motivation and inducements and enables us to pick out problems which are appropriate for closer analysis. This facilitates our ability to create a theoretical framework for a quantitative part directed at answering questions on frequency, number, etc. And there can also be reasons to go in the opposite direction. As the result of the quantitative analysis of a large amount of material, problems can may be identified which would be appropriate to tackle in greater depth, with interviews, perhaps or other qualitative methods.

8.4 Sources of Empirical Material

Many key problems of method connected to the use of empirical material involve the collection of that material. In order for an analysis to be valid the method of collection must assure a desired level of representativeness. In the case of interview questions the tendency to slant the information must be avoided. While problems of this kind are always present, they are of particular concern in jurisprudential studies where the subject matter raises special considerations. It is not difficult, for example, to think of instances where even the collection of the empirical material would demand competence in jurisprudence of a particular kind or instances in which the material might be especially hard to obtain. This is by no means always the case, however, and the jurisprudent may very well make use of material that has been collected by someone else, perhaps for a completely different purpose, when such material can be found. Moreover within jurisprudence itself there can be found a great number of investigations containing material which can direct attention to problems appropriate for further study of an empirical nature. Here we ought to mention the possibility for several persons interested in the same legal area to construct a common database. From such sources, if it is well designed, researchers would be able to retrieve empirical information over a long period of time for use in different contexts.

8.5 Integration of Empirical Material

Empirical studies done within the social sciences are ordinarily related to a theory, hypothesis or frame of reference of a more general nature. But in jurisprudence, apart from certain legal sociological studies, the collection of empirical material and choice of method is rarely guided by a particular law or legal rule. This is an impediment to its effective use. Research on the work place, for example, has had very little effect on the legislation of labor law.

For jurisprudence it is both natural and compelling to select empirical material compatible with positive law interests, for this will allow it to be

integrated advantageously into legal analysis and thus maximize its use. Although such studies are grounded in positivistic legal analysis of a traditional type, they may subsequently assume a more varied character. Legal analysis may also, of course, have the character of legal political argument and in that case an attempt should be made to weave the legal analysis and the empirical material together. The following citation by Dahl may help to illustrate this:

Women's law – at least as it has been pursued in Norway – can accordingly be said to have the empirical investigation of reality as its original legal activity, where legal dogmatic activity in the traditional sense naturally stands in the center. In this work we seek at the same time to build on the methodical acquisition of empiricism in the descriptions and evaluations of positive law. This is not to play down the importance of being able to reason dogmatically in every possible situation, but rather to complement part of traditional dogmatism's hypothetical suppositions about their factual relationship to the empirical researcher's descriptions.[48]

The importance of integrating the legal analysis and the empirical material need not in any way mean that there is a certain law or a particular rule which will "set the agenda" for the investigation. The result is often more interesting when a conception of "factualness" is used to determine the formulation of the problem, for the investigation is then anchored in a conception or reality. One should however guard against allowing the legal part to become superficial or the jurist's competence to be disregarded. If the legal rules are used only for illustrative purposes then the legal analysis will not have been enriched and the benefits of an "integrative jurisprudence" will not have been obtained. Much sociological research of a legal nature has such characteristics, the previously mentioned research on the work place, for example. And similarly, it is not uncommon for legal philosophers to use legal rules only for purposes of illustration. But again, if the analysis of the rules is pushed out into the margins then the desired degree of integration has not been fulfilled.

As Aubert has pointed out, sociology and the law have different functions and their proponents dedicate themselves to different ways of thinking and looking at the questions on various social problems.[49] As a consequence they structure their thoughts differently, and since their concepts are not in agreement, their concept of law is divided . Aubert sees this as a great problem for the subject legal sociology but an "integrative jurisprudence" seeks to eliminate it by employing legal and empirical analysis side by side.

It is not entirely clear, however, just how the "integrated material" should be used and presented. Some cases seem to call for a rule oriented structure, but in many cases, societal problems for example, "factualness" is needed to guide the choice of subject and direction. In general, a better result will be achieved if the starting point is allowed to guide the arrangement and presentation. This often leads to a result quite different that envisioned by the legislator who originally treated the material.

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48 Dahl 1985 p. 60.

49 Aubert 1979.

9 A Closer Look at the Reasons for and Against an Empirically Oriented Jurisprudence

This paper has up till now considered primarily the needs and requirements for an increased use of empirical material within jurisprudence. It is now time to take a close look at the objections which are likely to be raised against such an orientation for jurisprudence, objections which are closely related to the reasons empirical material has not up until now been employed extensively in jurisprudence.

9.1 On the Tasks of Jurisprudence

There is a conception, especially prevalent among certain practitioners of law, that the task of jurisprudence is to support legislation and the application of law. Nor is this perception of our discipline's task unusual among proponents of jurisprudence. Such a point of view is unobjectionable as long as that task is understood to be one among the many tasks for jurisprudence, but it should be noted that there is no connection between such a practical view of jurisprudence and the traditional legal method. And for that reason, jurisprudence's success in the task of supporting legislators and the application of law is likely to be greater if its arguments can be supported by empirical material. As has already been said (section 5 above) empirical material may be used for a number of purposes, many of which are relevant for the sort of jurisprudence needed to serve legislation and the application of law.

It ought also to be added that although the tasks of jurisprudence are decided by jurisprudence itself, there is nonetheless a corrective in that if jurisprudence focuses on problems with little relevance outside of its own science, it will find itself being gradually marginalized.[50]

9.2 On the Limits of Jurisprudence

We now come to the question of where the limits to jurisprudence lie. The risk is that an empirically directed jurisprudence will lose its "jurisprudentialness" and begin to wonder where the law has gone.

To begin with there is reason to remind the reader that there does not exist any hallmark definition of what jurisprudence or any other discipline is. As history shows subjects may completely change their character and direction over time. New objects of study and new methods are used; others are seen as having been used up and are therefore discarded (or ought in any case to be discarded). What jurisprudence is in the first place, as well as what good jurisprudence is, is decided primarily by professors as they evaluate dissertations and other

50 Compare the following comments by Ekelöf. "In regards to recommendations in the work of jurisprudence Rodhe asks who has given the doctrine its task to propound such and he reasons that this question can't be adequately answered. This should be readily admitted. But I would want to meet this argumentum ad hominem with a counter question. Who has given our professors in medicine the task of giving some recommendations on how we should cure intestinal ulcers?" (1951 (1991 p. 121)).

scientific work, fill academic positions and approve of applications for research grants, etc.

Jurisprudence in Sweden and the other Nordic countries still regards positivistic legal analysis as the core of jurisprudence. And although the corps is cautiously open for other types of jurisprudence, the considerable uncertainty within the discipline about both the object and method of jurisprudence has resulted in widely spread skepticism about forms of jurisprudence lying clearly outside of the legal positivistic field. Here opinion is split on the question of the freedom and boldness displayed by the discipline in, for example, the United States. In that country academic legal scholars are working in a very unbiased way to distinguish forms of policy analysis as well as to utilize interdisciplinary research for testing new combinations.[51] That frankness may possibly be connected to the open and vital legal political debate which is part of the framework for the interpretation of the US Constitution, for the subject of constitutional law has a leading position there and creates opportunities for policy analysis in jurisprudence as well as in other legal areas. By contrast, the remote corner accorded "regeringsform" (the Swedish constitutional law) here (and therewith constitutional law as a discipline) contributes to the concentration of legal positivism within Swedish jurisprudence. The incorporation of the European Convention on Human Rights may lead to some change in this direction.

In any case, as has already been noted, the contribution of empirical material within Jurisprudence here is still scanty and it seems likely that an increased use of such material would serve to counteract the erosion of the discipline's position. For such a change would allow jurisprudence to undertake a number of the potentially fruitful tasks that have been previously described (section 5, on the purpose and the use of empirical material). A jurisprudence working in the border land has unobstructed views that can enable it to win increased relevance outside of its own science by taking on the pressing problems which lie beyond the reach of traditional jurisprudence. No other discipline labors in this border land. The analysis of legal sociology tends to be superficial because it limits itself to the law's social consequences. Legal questions which touch, for example, on the methods of argument of government institutions and their application of legal rules are thus left to jurisprudence.[52] Jurisprudence has, in fact, the potential for taking a much broader approach than the more specialized social sciences. Such a direction may be pursued, moreover, without in any way denying the value of legal positivistic analysis on its own merits. It will merely serve to broaden the existing field of jurisprudence.

Jurisprudence, along with all other scientific disciplines, must retain its vitality by encouraging the development of its subject and opening new fields for exploration. A reorientation of this kind (as sketched in section 4 above) involving the increased use of empirical material, is then, the path to follow.

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51 Examples are psychology and procedural law, the economy of law and environmental law, political science and administrative law, organization theory and administrative law, literature and law etc.

52 Boe 1989 p. 219.

How far can the "broadening" go without the work ceasing to be jurisprudence? As has already been stressed it is not possible to establish in any clear-cut way what jurisprudence is. The question itself is beyond science, i.e., in the metaphysical realm. It revolves, to a large degree, around jurisprudence's controversial problem of method, i.e., the interface joining positive law and reality.[53] Stated another way, the question is the degree to which jurisprudence should attempt to pull reality into the analysis and how reality should in that case be handled.

It is not meaningful to approach the question in abstraction outside of the definition of jurisprudence. Instead we should inquire about the ways in which jurisprudence may insure its relevance outside of its own science by determining the sorts of cases it needs to work with and the methods it needs to develop. As this paper has suggested, it is by building on its own traditions and self understanding that jurisprudence can revitalize itself. This is not the first time that such a move has become necessary. The discipline underwent a similar renewal at the turn of the century.[54] But it seems safe to maintain that on this occasion, the renewal of jurisprudence, while maintaining a core of traditional legal positivistic analysis, will involve the incorporation of an interdisciplinary method and an increased use of empirical material.

For the sake of openness, it should be pointed out that this is not the only way to proceed in the effort to revitalize jurisprudence. One might also, for example, seek to activate the humanistic side of jurisprudence, i.e., highlight the areas of intersection of literature, legal logic, semantics, moral philosophy and history, to name a few. In the Nordic countries jurisprudence has come to be seen more and more as one of the disciplines of the social sciences and has been described, as such, naively by some writers[55] and with awareness by others (Dahlberg-Larsen, for example, who normally speaks of "jurisprudence and other social sciences").[56] Here, it might be important to highlight the humanistic side of jurisprudence to counteract the risk of its becoming a pure instrumentalism (compare this, for example, with the struggle between the humanistically oriented school of "Critical Legal Studies" and the economy of law in the US).

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53 Graver 1994 proposes quite rightly that the question of what jurisprudence is foundationaly is uninteresting; it has interest exclusively in context of the politics and administration of research. Graver's article which was brought about by the evaluation of Andenaes' dissertation (Andenaes 1992), contains an interest awakening analysis of the evaluation of a number of Norwegian works that have social scientific content. Graver's own conclusion is that there is "much speaks for one not setting up barriers between the different sciences. The setting up of barriers is nothing that is necessary for research. Barriers between the sciences have a more practical, administrative object, tied to the division labor, teaching and the work of evaluation" (p 576). Another interesting contribution to this discussion is Boe 1987.

54 See Dahlberg-Larsen 1977 p. 100.

55 Not seldom is the critique of "legal dogmatism" (which is said to be narrow, inbound etc.) misguided because it is based on the conception that "legal dogmatism" is a form of the social sciences.

56 See for example Dahlberg-Larsen 1992.

9.3 The Territory of Jurisprudence

To again reiterate the theme of this paper, jurisprudence can alter its character by taking on new tasks, using new material and developing new methods. But above all, it must redefine its object "the law".[57] Such a redefinition has occurred during the last 10-15 years under the collective concept "legal pluralism".[58] Although the theories on this subject are disparate, common among them is the understanding that the law of the state is not the only form of law, that informal norms have great importance, that the law's borders are unclear, that the law is a social phenomenon closely connected to society's other norms, that the law at the central level and at the local level can be very different and that the law can be viewed from many perspectives. By the last provision is meant that the law, among other things, has several functions (a means of guidance, a "meaning creating" cultural phenomenon, a means for self regulation etc.).

One may, of course, have objections with regard to the details of the formative theory of legal pluralism and legal pluralists themselves are not in complete agreement on many points. But this has not prevented them from forcing jurisprudence to seriously weigh its view of the law as a nationally limited, hierarchical and well-connected unit, i.e., "a systematic totality."[59] A jurisprudence that looks at "the law" as its object cannot be satisfied with studying the decisions of the state's formative legal instances and other parts of law's lofty culture. And a reappraisal of the concept of law leads without exception to the conclusion that empirical material must be employed to a greater extent than has yet been the case.

9.4 A Positivistic Legal Culture

Researchers' views of the definition of the law not only have considerable impact on the materials and methods of jurisprudence but also affect their view of science and interest in knowledge. Those socialized to a positivistically imbued legal culture feel at home in that tradition and thus tend to regard the reinterpretation and systematization of positive law as the proper task of jurisprudence. But the step from a legal positivistic posture to an instrumental one is a small one and those who want to look at the law from an instrumental perspective finds it easy to distance themselves from purely legal positivistic

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57 Compare Seipel 1974 who speaks of "the constantly changing interest areas of jurisprudence". According to Seipel "there exists at the present time reason to notice tendencies towards increased attention to details and processes rather than to the statistical relationships connected with the concept of positive law." (p. 102).

58 See in this context Dahlberg-Larsen 1994 pp. 136 and following.

59 The pluralism that is prevalent is moreover not an argument against the attempt to create a coherent system as well as means to insure the law's legitimacy compare Gunnarsson 1995 (with references). One can say that the fiction of a possible coherence is one of the law's useful fictions. In fact the jurisprudential ambition to form general theories reflects the conception that it is possible to uphold a somewhat consistent and unified legal system.

analysis. Questions which then come forth are: the function of law as a means of guidance; the effectiveness of different means of guidance; the legal technique's different forms etc. (compare 5.9 above). Questions of this kind suggest that they would be difficult to analyze without the support of empirical material. And, in fact those who lean towards an instrumental perspective have a particular need of such material in their effort to understand how the law functions. For working with the actual empirical material will serve to show them that it does not happen in the aerodynamic and commando-like way that instrumentalism implies. From this we can see that regardless of how we position ourselves with respect to the dominating legal positivistic perspective there are good reasons to use empirical material.

9.5 The Training of Lawyers

It may be objected that the training of lawyers in the legal method is an impediment to the increased use of empirical material in jurisprudence.

To begin with it ought to be noted that competence in law is inescapable for an "integrative" form of jurisprudence. But as was pointed out, (8.1) training in law develops the talent of asking the "right questions" of the legal material and the ability to formulate fruitful problems, a measure of quality in all disciplines, and not least in jurisprudence (section 4 above). Lawyers, it would seem, are off to a good start.

An empirically oriented jurisprudence, however, also demands that the user be competent in dealing with empirical material. Such competence needs to be cultivated by research education which includes training in quantitative and qualitative methods, in, for example, survey and interview techniques. Here a parallel can be drawn to the renewal of method which national economics went through after the war when the national economists' resistance towards mathematics gave way. Thanks to their improved tools of method the economists have been able to achieve more robust results and strengthen their discipline's position. The increased use of computers will in almost every scientific discipline offers another parallel. The training demanded by this new tool has led to new techniques which have, in turn, made possible new ways of working and opened new fields of research. In an analogous way, training lawyers to be competent in dealing with empirical materials can improve the ability of jurisprudence to take on new tasks in a relevant way.

In broad perspective, even the basic education of lawyers ought to include a real dose of training in such proficiency in that most practicing lawyers are necessarily as dedicated to "the use of facts" as they are "the use of rules".[60] The collection of facts, sorting and structuring of facts, going through large amounts of factual material, the evaluation of expert statements, negotiations, interviews, questioning and evaluating person's truthfulness are important and time demanding elements in the practice of many lawyers. Moreover, lawyers' tasks in reconstructing sets of events are often many times more demanding than the

60 For some time the Institution for Jurisprudence at Umeå has pursued a project which has the purpose of investigating "what lawyers do and how they do it".

rule application sides of their assignments. And yet very little attention is currently given to such tasks in legal education. The recommended training in "the use of fact" would be of great benefit, therefore to the practitioners' professional enterprise as well as to an empirically oriented jurisprudence.

9.6 The Ambitions of Method

While an empirically oriented jurisprudence will create a demand for a reinforced competence in method on the part of researchers, jurisprudence can also make increased use of empirical material without doing full-scale legal sociological or legal economic studies. As was earlier suggested, ambitions that are too expansive may risk hindering the development of a discipline because they are incapable of being realized (compare 8.1 above). This tendency can be avoided if the empirical material is allowed to temper the demands placed on the method and the ambition. Again it should be emphasized (see Section 5) that many different purposes can be realized without resorting to an overly ambitious methodology and that we need not need be deterred from using empirical material because of the assumption that this always requires a correct examination and the application of a qualified social scientific method.

To this may be added that jurisprudence can be helped by other disciplines or may work in cooperation with other disciplines and in this way clear the hurdles of method which may stand in the way. Such cooperation is, of course, not completely uncomplicated. The lawyer needs a certain measure of competence even to ask the "right questions" and to communicate with colleagues in the other discipline.[61] But obtaining this competence ought not to be too demanding. Of course, those who choose to be more ambitious may involve themselves in the creation of integrated projects in which the proponents of affected disciplines participate.[62]

9.7 The Law's Level of Abstraction

As was pointed out earlier (section 2) legal regulation and legal argumentation lie on an abstract plane. One may therefore object that the law works with abstract categories and works well without empirical data. To a certain extent, this is probably necessary in order for the law to deal with a multifaceted reality and for the judges not to give undue weight to the consequences of their decisions. It is also true that lawyers are little used to the notion that it is appropriate to use social scientific empirical data to support or refute an accepted understanding. Nonetheless, this should not be regarded as a reason for jurisprudents never to use empirical material in their analyses. Certainly they must normally abstain from the use of empirical material within the scope of their usual legal positivistic studies. Many legal questions do not lend themselves to illumination by the use of such material and jurisprudents must be able to fall back on the use of common-sense-based viewpoints. But it should

61 Saldeen 1974 p. 64.

62 Seipel 1974 p. 103.

not be regarded as inappropriate where there is a reason to use empirical material, when, for example, the examination's purpose makes it important. Abstraction, in brief, distinguishes legal argumentation but should not be used to exclude the use of empirical material, per se.[63]

10 Some Concluding Remarks

Both the law and jurisprudence find themselves in positions that are exposed to competition but this fact is seldom noticed by either the law's practitioners or its theoreticians. The law has been challenged for a long time by other types of collective decision making. Jurisprudence is at risk for maginalization in the wake of advances in other disciplines. But this is also a consequence of its own failure to renew itself and its method from within the discipline. But we have now entered a phase in which the times are changing and in which the law may be moving towards a renaissance, for in the path of the European integration has come an upswing for the law. It is law which is being relied upon to hold together the newly constructed European community in a way that is reminiscent of the law's function during the time of the Roman Empire. Sweden's closer relations to Europe also open up risks of "legal viruses" from the continental legal tradition with its stress on the law's connections to foundational values and evaluations. The incorporation of the European Convention on Human Rights in Swedish national law may have similar effects.

But the law's power to integrate advances on the international plane at the same pace that the forces which have held societies together are losing their strength, forces such as religion, culture, values, the national state etc. It is consequently not only in large federative countries that the law is an amalgamating putty. Throughout the world the transformation of countries to a market economy and the rule of law is strengthening the law's role in society. This is true both in the east and in the south where the law's role in society has been strengthened considerably during the 1990's.

Similarly, in the realm of ideas, the law is being more and more stressed as important for the creation of society. This has resulted from breakthroughs in the area of institutional economy whereby the structure of legal rules as well as the conditions for economic development have been put in the foreground.

Such a renaissance in the law forms the foundation for a vitalization of jurisprudence while at the same time undergirding the law's position in the creation of society. And it is not only the powers in society that are affecting the prerequisites for jurisprudence. There are, in addition, shifts within the legal system that are calling for our discipline's renewal. To this belongs that body of rules which must change its character and the new legal areas demanding their rightful place. The concept of law has attained new dimensions. The view of legal culture has been altered and new techniques have been developed (see

63 Here can be mentioned the difference between the practitioners and the researchers work. For the former it is often the individual case and its specific characteristics which are central. A main task can be therefore to discover legal facts and eventually facts of evidence in the case (compare section 9.5 above). The concrete circumstances in a particular case do not normally in comparison draw in the attention of the researcher.

section 9). The demand is that jurisprudence take on this development in a relevant way, that it give increased weight to hypotheses guided by reality – rather than legal rules – in determining the problems jurisprudence entertains (see 4 above), a reorientation which will of necessity lead to an increased use of empirical material.

This reorientation as viewed by its proponents, should be a complement to traditional jurisprudence. The legal positivistic tradition is very strong in the Nordic countries and in others which have given jurisprudence a central role to play. But this need not be an impediment to the renewal of jurisprudence. By opening new methods and new areas of research, the needed renewal of jurisprudence may be accomplished. In this paper a number of ways have been suggested that lead in this direction.

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