

# Law and Reality

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## 1 Introduction

The relationship between law and legal science, on the one hand, and reality, on the other, is an immense and practically illimitable topic. Indeed, virtually all aspects of the character of law and legal science can be included in an inquiry of this subject. We will however limit ourselves to illuminating two closely related aspects of this theme. The first aspect concerns whether legal science is a strictly normative science, unlike empirical sciences. The second aspect concerns “the perspective of legal science”, which refers here to the choice of angle for legal scientific studies.

## 2 Is Legal Science Purely Normative?

Legal science is usually characterized as a normative, i.e., non-empirical, science, which has norms as its object of inquiry and where the truth of its results cannot be verified empirically. One consequence of this is that law and reality are viewed as two vast but separate entities.<sup>1</sup> It is that perspective which dominates social science studies of law, e.g., when law & economics inquires into the economic effects of legislation within a particular area. Against that perspective, however, one might argue that norms and (physical) reality are more or less intertwined. This applies to the adoption and application of norms as well as their future effects.

(a) The principles that can be gleaned from the legal mass are typically the result of an experience that has developed over a long period of legal practice. That mass reflects a tested experience. The legal practice is thus the genesis of the legal rules. Such a perspective conforms well with the historical school’s leading thoughts.<sup>2</sup> The foundation for the cited works has of course thinned out through the years as legislation has acquired an increasingly law-creating function at the expense of its codifying function. But also when legislation creates new law – and thus breaks with the prevailing tradition in a particular area – legislation falls back on the lessons learned, e.g., knowledge that the prevailing legislation has not achieved the intended results.

(b) The rules are also interpreted and applied with the prevailing societal context in view, e.g., with an understanding of how “ideal types” such as buyers, consumers, witnesses, etc., think and act. The rules cannot be applied in an abstract fashion, without due regard for how they will impact reality. The rules would in actual fact be incomprehensible for a law-applier who does not “see through” the rules when they are applied. The effects of the rules – actual as well as contemplated – are ever present when they are applied. Not only do the legal rules acquire their meaning from the context in which they are interpreted and applied (roughly as historical

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<sup>1</sup> We will not here deal with the question of where law is “situated if it is not deemed to be part of reality; cf. Jareborg, N., in SvJT 2004 p. 1

<sup>2</sup> A modern proponent of such a view was Christensen, A. See her essay *Den juridiska mentaliteten*, in *Mentaliteter*, ed., P. Sällström, Åbo 1986 p. 79 ff. and Zaremba, M., *Minken i folkhemmet*, Timbro, 1992 p. 94 f.

facts acquire meaning from the context in which they are placed),<sup>3</sup> but their (assumed) effects often determine the meaning they acquire upon application. Without a conception of the rules' effects, the law-applier's interpretation would produce rather odd results. The foregoing can also be expressed in such a way that the doctrine of legal sources in Eckhoff's spirit is given a broad meaning which leaves the door open for societal aspects, e.g., regarding the effects of a particular decision. It seems likely that the law-applier's decision often rests on intuition and with certain desirable results in mind, after which she consults the legal sources to see if they allow the decision in question.

(c) A third aspect that is often the focus of attention is the legal application's effect on citizens' future conduct. The material does after all produce well-founded rules of conduct for the future.

The foregoing makes it problematic – as is established – to depict the object of legal science as a completely normative system, or to put it differently, an ideological system. A goal-oriented legal dogmatics itself reveals the legal system's link with reality. The view of rule application as an abstract process – separated from the effects of such an application – seems divorced from reality.<sup>4</sup>

The perspective presented above links legal science with reality: to say something about the norms is also to say something about reality in the past, present and future. When one develops and/or constructs doctrines and principles, one does it on the basis of a notion about the nature of reality and about how it can be altered. So, for example, when one constructs principles for the delimitation of compensation liability, one does it on the basis of notions of this type, e.g., notions of how people usually act, what can reasonably be expected of various categories of persons, what is deemed acceptable conduct, etc. Such principles are thus tacitly linked with reality. Legal knowledge has not however been formulated in distinct and well-founded principles and doctrines that have been tested through hypotheses and systematic empirical work as is the case in the empirical sciences.<sup>5</sup>

The legal rules are thus bound up with reality “in both directions”: retrospectively, with legal practice and prospectively, with the effects of the rules' application.

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<sup>3</sup> Cf. e.g., Arvidsson, H., *Dåtiden – tur och retur*, Historisk Tidskrift 2002 no. 3, p. 410.

<sup>4</sup> Cf. Graver, *Den juristskapte virkelighet*, Otta 1986 p. 144 ff. On the formation of knowledge in law and on the legitimisation of the norms, See Nilsson, G.B., *Den källkritiska processen*, Scandia 2002 no. p. 180. Klami, H.T., *Om rättsdogmatisk forskning*, Åbo 1984 p. 18 f.

<sup>5</sup> Cf. Jareborg: “The reality of legal dogmatics is the legal system itself as a normative system, not that which the system results in with regard to human conduct when its rules are applied by public authorities and individuals...legal dogmatics becomes rather meaningless if it fails to view what takes place in the world around it. But it is not *that* reality which is reconstructed in legal dogmatics, but rather the normative system.” (p. 9).

### 3 Law's Insights

Legal science thus operates in a twilight zone between norms and reality. Legal science is normative but to say that it is *only* normative appears therefore much too categorical. Legal science should mantle the task of uncovering and specifying the principles and doctrines that form the core of the legal system, perhaps developing them and giving them a general design. In other words, the theory-constructing function of legal science ought to be strengthened. In doing so, legal science can unearth the knowledge hidden in the legal system.

The theories elaborated on the basis of the legal material can disclose important insights and throw light on non-legal theories. When the social sciences discovered “*trust*” in the 1990s as a decisive factor for a favourable societal development, this was no news to lawyers. Indeed, law has long attached significant weight to trust. Trust is at the very core of the process resulting in contract law obligation and decisive for the good faith that is to characterize contractual performance. Another example is provided by analysis of the *culpa assessment* and the possibility to consider economic costs for risk avoidance within the framework of that assessment. That insight, which has been gained in modern law & economics research, actually has a long history in Nordic law.<sup>6</sup> The difference is that the formation of legal knowledge ordinarily lacks the robust character that social science empirical research can display in its finest moments. Untold examples can be cited of the legal formation of knowledge at a high level but with a somewhat imprecise content. The principles on which the trial system rests – the adversary principle, the accusatory process, etc., is one such example. The “legal method” is an example of a decision-making technique that has been refined over the centuries; it is applied by today’s lawyers without much reflection about that technique’s development or alternatives.

### 4 The Legal Science Perspective

A legal science inquiry can have at least three different perspectives (orientations): a) The most common is legal rules or “legal material” of some other type. This can be called a “material-oriented” orientation. An example is where the inquiry has certain legislation as its point of departure. b) A second point of departure is a problem, an actual fact and the like. This can be called a “reality-oriented” orientation. An example is that a societal problem is the point of departure. c) A third point of departure is a theory, frame of reference or other “view”. Perhaps we can call it a theory-oriented orientation.<sup>7</sup> The three orientations can be combined and ought often be combined. They correspond in essence to three questions: a) How has the problem been resolved? b) What is the problem? c) Why is there a problem?<sup>8</sup> Westberg distinguishes between a

<sup>6</sup> See Agell, A., in *Festskrift till Strömholm*, Uppsala 1997 p. 37.

<sup>7</sup> Cf. Sandgren, C., *Om empiri i rättsvetenskapen*, JT 1995-96 p. 734 f.

<sup>8</sup> Cf. Westberg, P., *Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet*, *Festskrift till Bolding*, Lund 1992 p. 421 ff.

rule-oriented approach and a problem-oriented approach. He asserts (already in the title) that his thoughts only apply to dissertations; it does not appear why dissertations apparently differ from other legal scientific works in this respect.

The choice of topic determines the potential for the inquiry's relevance and novelty; at the same time, it is important that the topic can be fruitfully addressed with the methods of legal science. One sign that a topic (problem) is not well-chosen is that the inquiry can be rendered irrelevant by a single stroke of the lawmaker's pen. Points of departure b) and c) have in that respect a head-start before a).

Considering that the choice of topic – along side the capacity for methodical renewal – is decisive for the ability of legal science to produce new and interesting results, that choice should be given much more attention than is usually the case. Moreover, the choice and formulation of the problems which fall within the topic deserve great care.<sup>9</sup> In this respect as well, points of departure b) and c) have a head-start in relation to a), since reality-based problems and theories can provide ideas for entirely new topics as well as new angles on “old topics”.

The freedom enjoyed by legal science creates room for the researcher to decide the general orientation of her inquiries. Her choice is influenced by prevailing perceptions within academia, previous works that mark out that which can be deemed relevant, the possibility to secure financing, etc. It is thus the prevailing scientific culture that determines what is possible but, within that framework, there is considerable freedom of choice.

The scientific culture of legal science makes point (a) above predominant. Legal science inquiries are rule-oriented and characterized by legal dogmatics, even though such an approach offers only limited room for novelty and originality, especially in cases where the analysis painstakingly interprets a host of individual problems but without generalising the results.<sup>10</sup>

A rule-oriented approach readily imposes a handbook-like character on the presentation, with the focus being on problems of application. Such an orientation limits the possibilities for generalising results. The reasons for such an approach can be habit and the traditional ambition to produce “user-value”. One sign that this approach is viewed as unsatisfactory is that many inquiries are characterized by a rather open-ended argumentation with only a limited support in legal sources. One suspects that the researcher desires in that way to rid himself of the “lock-in effects” that accompany this orientation.

The “problem-oriented” point of departure (b) is oriented towards reality. Westberg states an “actual phenomenon” as an object for the inquiry in a case like this.<sup>11</sup> One of the advantages of a problem-orientation is that it does not bind

<sup>9</sup> Cf. Rienecker, L., *Problemformulering*, Malmö 2003 p. 49 ff.

<sup>10</sup> Olivecrona's terse comment that too often there is a lack of information about what is new applies even to this day (*Docentbetyg eller icke?* SvJT 1963 p. 528 (532)). Many researchers of traditional legal scientific works have difficulty presenting what is new about their contributions. They *See* their work as a long series of analyses of difficult legal problems which they have approached as a judge would have. If the researcher were to view generality as a primary objective, it would make his task easier to achieve and it would be easier for him to explain what he had achieved, not least to describe what was new.

<sup>11</sup> *Op. cit.* p. 436.

one to specific rules and their contents. Agell is sympathetic to such an orientation when he writes that: “If the goal is to practice constructive legal science, I think one should already when choosing a topic for inquiry look for interesting problems, which can be in need of analysis.”<sup>12</sup> The point of departure for such an inquiry can be both within the legal system and outside it. It may be a study of how the courts act, to what extent and how standard contracts are used, how penal sanctions differ in different parts of the country, etc. But the point of departure could also be a societal problem and how it is to be regulated, e.g., increased risks in society, tendencies in working life, the influence of market-oriented thinking on the public sector, etc. The inquiry will grow in a natural fashion and be quite relevant, if the problem is well-chosen and well-formulated.

The “theory-oriented” point of departure (c) has a great potential to produce interesting results and may be well-suited for a researcher with a legal background. Already existing empirical materials and theories can often be used, among other things, empirical knowledge from other disciplines; such knowledge can be used by the researcher to illuminate the contents of the legal rules. The view that serves as the point of departure for the work might be of a non-legal character.<sup>13</sup> The point of departure can also be some aspect of societal development.<sup>14</sup> A legal science theory too, e.g., a doctrine or a construction, can offer a theoretical framework that provides a suitable point of departure for the inquiry. Such a framework can determine the topic’s orientation but also influence the choice of method. Incorporation or other use of *other sciences’* theories and methods is also a way to achieve a greater measure of generality. This can be achieved, e.g., by choosing theories that are then made the foundation of a legal science inquiry.<sup>15</sup> Thus, for example, natural science theories can form the basis of an environmental law study, or theories about corporate development can provide the point of departure for an insolvency law inquiry, but also fundamental economic concepts can provide inspiration for an inquiry’s framework.<sup>16</sup> A general difficulty is to master the integration of legal and other analysis.

The reasons for making use of other points of departure than a) above is the need to broaden and renew legal science and to expand its societal relevance. Only in that way will it be able to justify its place in the research community in competition with disciplines with an “imperialistic agenda” such as certain of the

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<sup>12</sup> Agell A., in *Festskrift till Strömholm*, Uppsala 1997, p. 48. Westberg too expresses a “predilection” for such an orientation; (op. cit. p. 424).

<sup>13</sup> An example is Källström’s study *Alkoholpolitik och arbetsrätt*, for which society’s alcohol policy is the connecting thought.

<sup>14</sup> An example from recent years is Wilhelmsson’s study, *Modern ansvarsrätt*, Helsingfors 2001, where he writes that “Very loosely the work’s point of departure can be described as an attempt to localize the implications for private law of the present changes in the societal context and especially of the development of the Welfare State in the direction towards that which has been characterised above as a “post-Welfare State” (p. 13).

<sup>15</sup> See Sandgren *op. cit.* p. 737 ff.

<sup>16</sup> See e.g., Cooter & Ulen, *Law and Economics* 1988 p. 12 f. and 22 on concepts such as maximisation, efficiency. Generally speaking, law and economics theories regarding, e.g., transaction costs, can provide a fruitful angle.

social sciences. It is important for legal science to initiate new fields of research. This is oftentimes more important than ploughing existing fields and it is easier to achieve interesting results in a new area.

Greater reflection on the potential of theory formation can itself produce good consequences. Such a reflection can prompt legal science to “begin in theories” rather than in sources, i.e., work more deductively. The pre-occupation of legal science with sources and the doctrine of legal sources limits the field of vision, which in turn inhibits its impulses for renewal. Reflection on the interplay between theory-empiricism can also be useful. The theory can provide a fixed point in an apparently heterogeneous and contradictory material and supply a guiding principle for choosing materials and structuring the inquiry.

## 5 Final Word

The relationship between law and reality is not all that easy to grasp. The foregoing has sought to illuminate that complicated relationship in two ways. Firstly, the norm-reality relationship was addressed. It has been asserted that the norms describe reality; one can say that the norms embrace a profound knowledge of reality. What is more, law-applying bodies apply the norms with the application’s effects in view. Secondly, it has been posited that legal scientific inquiries need not have the norms as their point of departure; indeed, reality too can be a point of departure, as can views (e.g., theories) about reality.

Legal science operates in the region between law and reality. This is evident from, *inter alia*, the open-ended argumentation that occurs and that many arguments are based on loose – often arbitrary – assumptions about the nature of reality. Greater awareness of the potential to use empirical material and to form theories within legal science would create better conditions for legal science to generate new and original knowledge.