Law in a Global Knowledge Economy – Following the Path of Scandinavian Sociolegal Theory

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1 Introduction

This article is about the importance of developing a sociolegal theory of law.[1] The focus of the article is on law in a business context wherein the economy is becoming increasingly international and knowledge-oriented. It focuses on the need for developing a legal theory with greater sociological influence that will enable the legal profession to take on a more constructionist approach to law when creating business on an international business arena. The article builds on the development of legal theory in the Nordic countries and elaborates on a social constructionist approach to law. It does not simply point out that legal phenomena are socially constructed phenomena. That this is the case is obvious. Instead, it takes on the challenge of analysing the theoretical prerequisites for reaching a comprehensive legal theory, which will enable the legal profession to take on greater responsibility for social constructions in general, and for legal constructions in particular.

The starting point of this article is the standpoint that there is an increasing need for legal methodology that enables us to take on the challenges related to law as business structures, e.g. law in the form of property, rights, associations, contractual relations, transactions and platforms. These challenge become much more explicit when one is confronted with internationalization and the increasingly knowledge oriented nature of modern business. For example, when designing new business models in relation to knowledge based business transactions on the internet, it is not obvious what ought to be governed as legal constructions, e.g. as property, property transactions, contractual relationships, financial capital etc. In the knowledge based business setting we are confronted with legal pluralism as well as uncertainty. A conclusion often close at hand is thus that legal methods internalized through traditional legal training will not necessarily be sufficient. Even from a legal science point of view it is questionable whether we have the means to provide an appropriate toolbox.

As we see it, there is a need of a sociolegal theory that will not only unveil the construction process, but also enable a participatory role in the construction of legal structures, i.e. a theory that can be used "externally" to understand the construction process as well as "internally" in the practice of legal construction. We need this in legal practice as well as in legal science. The practical/pragmatic responsibility is thus important for us. We do not share the attitude of realist social constructionism and *Ideologiekritik*, which seeks to dismiss rights and other legal constructions.

On the contrary, we consider these constructions fundamental elements for the building of society. An insight that is crucial for us is that neither in theory nor in practice should one treat the existence of legal constructions as something given, but instead always aspire to see their communicative, behaviorist and complex reality. This dualistic attitude[2] to law can and should also be applied to

1 We would like to thank Caroline Pamp and Henrik Rosen for valuable help with improving the text.

2 *Cf* Doublet, David Roland: *Rett, vitenskap og fornuft* Bergen (1995).

structural/institutional phenomena in general. We will therefore argue that practitioners of legal argumentation should switch between a substantial and a deconstructive/realism-aspiring attitude. In the context of legal science, we believe that this attitude does not only create a bridge between legal science and other social sciences, but also paves the way for a "design-based" attitude within the social sciences generally. When deconstructing structural phenomena, one is also taking part in the reconstruction of the same.

As already stated, the article will build on an analysis of the Nordic development of legal theory. A general conclusion of the study is that there is a Nordic path to a more comprehensive sociolegal theory. In the presentation of our study we will show how the theoretical discussion, described as Scandinavian legal realism, paved the way for a sociolegal development (section 3)[3]. We will describe how the realist discussions on rights and property rights have generated a number of sociolegal insights to be used in the societal construction of legal structures (section 4). Further, we will describe how the Nordic development in the field of sociology of law has generated a potential foundation for a sociolegal theory (section 5). Finally we will elaborate on what we consider to be the fundamental building blocks to a more comprehensive legal theory to be used internally in legal science as well as in legal practice (section 6).

2 Law in a Global Knowledge Economy – Framing the Legal Challenges

For at least a couple of the preceding decades, we have discussed the impact of globalization and of the ongoing transformation of the economy. We have discussed the transformation in terms of such concepts as "the global network society", "the knowledge society", "the declining welfare state", "the intellectualized economy", "the new economy" etc. More specifically we have discussed how industry is becoming multinational, and will locate production where the incentives are highest, and how firms are increasingly becoming knowledge based and network driven. Further, we have discussed how the process of establishing a start up venture in the modern high tech sector necessitates an international approach from the very start. In addition, the importance of the internet as a market platform for business transactions has become an unquestioned fact of the modern business arena.

In a Swedish setting it has for a long time been recognized that business, in big industry as well as in small and medium sized firms, has to be conducted in English. Even in high tech start-ups we have seen how these prefer to have their legal documents in English, and early stage entrepreneurs have come to see the importance of having due diligences carried out in a way that that will allow investors to directly analyze and understand the assets of the firm. In addition, we are already used to how new business models such as franchising, merchandis-

3 The sections focusing on Scandinavian legal realism are based on an article by us published in Swedish, *Illusionen om rätten – juristprofessionen och ansvaret för rättskonstruktionerna* (2002).

ing, co-branding, open innovation, open source, etc. are developed and applied in an Anglo-American business framework.[4]

In summary, it is thus well acknowledged that business is becoming increasingly international. But how far have we come in our discussion on how globalization and the transformation of the economy have affected and will affect the concept of law, the legal methods, the role of the lawyer and the responsibilities of the legal profession? Of course in legal practice we have started to discuss the impact of business managers increasingly tending to claim that legal services should be performed by international law firms, and there are some discussions on how legal precedents in other countries tend to be recognized as legal sources. Within academic settings we have also heard voices that more generally raise the question whether or not globalization has resulted in a crisis in law.

There are obviously many dimensions to analyze when it comes to the challenges associated with globalization and law. In this article we are going to limit our focus to law in the development of legal business constructions on an international arena. As we see it, one of the major challenges in a knowledge- and information-oriented economy is to collectively understand and govern those processes that generate the conceptualization of legal persons, legal objects, legal relations and legal transactions on an international market. In this regard innovations in ICT (information and communication technologies) oriented industries are especially interesting, as ICT has become one of the most important mediums to transform human resources into structures. Together with concepts of copyrights, patents and other legal constructions, information technology makes it possible to directly relate to virtual products, features, internet services, knowledge markets and other new structural objects. New legal tools are developed in close interaction with the structural transformation of the economy. Of course we are aware that this development to a large extent is driven by various commercial interests. The understanding that legal structures are based on claims, beliefs, communicative actions, trust and even manipulation is not controversial per se.[5] However, this understanding is not necessarily something we acknowledge in our legal methodology, not even within legal science. Lawyers often have no problem with seeing these kinds of analysis as part of psychology, sociology, business etc., but not as legal practice, and for some not even as legal science.

In the context of the emerging global knowledge economy it is close at hand to question whether the prevailing legal paradigm blinds us. Does our lack of sociolegal theory and methodology unnecessarily put us in a situation where societal transformation acts as a runaway train and where legal skills are the techniques of nailing down rails into nowhere? A dogmatic theory to law as an existing reality which we can interpret by using a hierarchy of legal sources has perhaps outplayed its role, at least in the context of the global knowledge economy. The traditional view of describing internal versus external approaches to law does not necessarily help us either. It is obvious that contractual content is law in

4 *See* further Petrusson, Ulf: *Intellectual Property and Entrepreneurship* (2004). Petrusson, Ulf: *Universitetet i Kunskapsekonomin* (2007).

5 Compare Searle, John, *The Construction of Social Reality* p. 113 (1995).

some kind of internal sense, but it is not internal in the way the distinction normally is made. In addition, it is not obvious what contractual content on an international business arena is. Possibly we need to distinguish between different kinds of law? The finish legal theorist Juha Karhu questions whether we might need to separate three legal paradigms that exist in parallel: "state's law: the paradigm of national legislation; market's law: the paradigm of the usages and practices of the merchants, and society's law: the paradigm of tradition and local customs."[6] Using Karhu's classification, the challenge in this article is to elaborate on a sociolegal theory that can enable us to govern "market's law".

For us, a natural starting point is the "real" character of legal constructions created in an international knowledge economy. Whether we discuss a theory for legal science or for legal practice, we need a theory that unveils the construction process. This conclusion brings us back to the theories of the early Scandinavian realists.[7]

3 The Questioning of "Law as Ideology"– the Sociolegal Door is Opened

Axel Hägerström paved the way for a social constructionist discussion by stating: "the legal order is on the whole nothing but social machinery, in which humans are the cogs"[8]. What was held in common by the Scandinavian realists was their attack on law as a metaphysical world of ideas. The deconstructive element is manifested in the questioning of the legal construction as "legal ideology" – as a current existing world of ideas consisting of legal areas, rights, legal principles, legal rules etc. – which can be interpreted with the help of an ideology of legal sources.

It was above all Vilhelm Lundstedt who came to radically question the ideology of law as a scientific object of study as well as a foundation for the identity of the legal profession. The idea of law as an existing object creates according to Lundstedt "veils of legal ideology" (our translation). These veils are exploited by, among others, practitioners of legal science. Under the guise of describing and interpreting law, legal scientists devote their time to realizing their own values and the values of others– they conceal how they generate new and adjusted conceptions of law. From this, it is not possible to conclude that the legal realists opposed the valuing elements of legal science. Lundstedt explains: "However, one can certainly not appropriately characterize it as unscientific in and of itself to make value judgments. In actuality, all scientific activity presupposes value judgments from the point of view of the practitioner, to a greater or lesser de-

6 From a presentation made by Juha Karhu in a seminar on legal theory in Göteborg the 29th of March 2008.

7 For a more thorough analysis of the Scandinavian realists and their impact on the Nordic development in legal theory, *see* Glavå, Mats: *Arbetsbrist och kravet på saklig grund* (1999). Petrusson, Ulf: *Patent och industriell omvandling* (1999). Glavå, Mats & Petrusson, Ulf: *Illusionen om rätten – Juristprofessionen och ansvaret för rättskonstruktionerna* (2002).

8 Hägerström, Axel: *En straffrättslig principundersökning* SvJT 1939 p. 214. Our translation.

gree. What does, however, have to be considered unscientific, for the simple reason that it is directly untrue, false – is to treat value judgments as judgments in the real sense. It is for this reason that legal ideology must be dismissed as unscientific."[9]

Olivecrona, who realized that legal scientists tended to misunderstand what the attack on metaphysics meant, stated the following: "The confusion between the freedom to make value judgments and the liberation from metaphysics is dangerous. It easily leads to the worst possible result: that one maintains the metaphysics and thus the possibility to make concealed value judgments under false pretences, while one at the same time puts on that straitjacket, which is the result of distancing oneself from conscious and open value judgments."[10]

In the works of Ross and Ekelöf too we find criticism against the legal scientist who exploits his authority in order to enforce subjective values, at the same time as they consistently maintain that this does not mean that legal scientists should refrain from making value judgments.[11]

The fundamental challenge for legal science in the view of the legal realists was the ambition to describe real circumstances instead of trying to create an idea-world that was as perfect as possible. Their foremost contribution is the insight of law as ideology, the questioning of the belief in a normatively objective law and the ensuing focus on structural legal mechanisms.[12] Law was often likened to machinery. "However – if we then view the law, or society, as a kind of machinery – it is important to always keep in mind that the material in this machinery is primarily not made up of material things in the normal sense but of people as psycho-physical existences, i.e. of their actions as decided by factors, whose influence are mediated by a co-operation between reason and feelings. It is obviously this circumstance that has constituted the condition for the entire legal ideology."[13]

Hägerström and Lundstedt regarded law as a construction, which they related to a large number of factors such as "consciousness of law, class interests, the general inclination to accommodate to circumstances, the fear of anarchy, lack of organization by the dissatisfied part of the population and not least the inherited habit to take what is called the concept of law etc. into consideration."[14] The Uppsala school of legal science can be characterized as being social constructionist and was based on a view of ideology criticism. For Hägerström as well as Lundstedt, the social consequences were always in the foreground. They also argued that the analysis of social consequences always had to be present in legal

9 Lundstedt, Vilhelm: *Grundlinjer i skadeståndsrätten*, the latter part *see* p. 533-534 (1944). Our translation.

10 Olivecrona, Karl: *Om lagen och staten see* p. 60-61 (1940). Our translation.

11 Ross, Alf: *Om ret og retfærdighet see* p. 406-407 (3rd ed. 1971), Ekelöf Är den juridiska doktrinen en teknik eller en vetenskap? p. 6 (1951).

12 *Cf.* Tolonen, Hannu: *Några synpunkter på den skandinaviska realismen see* p. 26-27 (1991).

13 Lundstedt, Vilhelm: *Grundlinjer i skadeståndsrätten*, the latter part p. 587 (1944). Our translation.

14 Hägerström, Axel: *Är gällande rätt uttryck av vilja?* p. 80 (1916). Our translation. *Cf.* also Lundstedt *Obligationsbegreppet*, the latter part, first instalment *see* p. 91-92 (1930).

practice. Concerning the role of the judge, Hägerström stated among other things that a judge may be obliged to deviate from explicit law. "Yes, at times it can be required of him that he act against the explicit wording of the law, namely at those times when it can be said that the legislator could not have foreseen the social consequences under the present conditions of the application of the law in the case at hand, or it has on the whole become obsolete."[15]

Another significant figure was Ross, who above all in his earlier works focused on analyzing the magical/illusory character of law.[16] Ross regarded in his early works law as causal relations of influence in different social contexts.[17] "First and foremost, legal science must seek a philosophical-historical understanding of the immediately given legal norms with consideration to the actual-social power conditions, from which the legal order originates.[18]

Ross' attitude is clarified even further when he tries to create a bridge between Scandinavian and American realism. "In both these cultural circles a decisive tendency towards a realistic conception of the legal phenomena is traceable; by this I mean a conception which principally and consistently considers the law as a set of social facts – a certain human behavior and ideas and attitudes connected with it – and the study of the law as a ramification of social psychology."[19] Ross was the person who most clearly strived for reconstructing legal ideology into a law that was actually valid. The concept of law was the law that was actually applied.

Today we can establish that in several regards, the Scandinavian legal realism has not had the impact that its advocates strived for. The idea of the concept of law as a uniform and predictable legal ideology is still alive within practice as well as within legal science. To the extent that analyses of the real psycho-social character of law are made, these are regarded as something other than legal science – well, at least something other than legal dogmatics.

This development is not only the result of a counter-reaction against realism or a consequence of the fact that its meaning was never sufficiently clarified. We can also find the explanation within the legal realistic theories in themselves. One of the main reasons for the limited impact of the Scandinavian realism was that no uniform view on the character of law was developed. Another main reason was the unwillingness of its advocates to draw methodological consequences from their theoretical insights. If one is striving to describe real conceptions and/or behaviors, it is not sufficient to relate to traditional sources of law, but one must also allow oneself to draw upon impressions from other empiricism.

In order to be able to understand the development in this regard, it is important to emphasize the dilemma that Tolonen describes as "Hägerström's basic

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15 Hägerström, Axel: *Till frågan om begreppet gällande rätt* p. 87 (1931). Our translation.

16 "In this work, I especially want to take the opportunity to show that the traditional concept of law, according to its immanent prerequisites is of *magical* nature." (Our translation.) Ross, Alf: *Virkelighed og Gyldighed i Retslæren* p.19 (1934).

17 *Cf.* Tolonen, Hannu: *Några synpunkter på den skandinaviska realismen* see p. 25-26 (1991).

18 Ross, Alf: *Virkelighed og Gyldighed i Retslæren* p. 113 (1934). Our translation.

19 Ross, Alf: *Towards a Realistic Jurisprudence – A Criticism of the Dualism in Law* p. 9 (1946).

autonomy" (our translation). In short, the dilemma consists of what remains of law as a phenomenon once one within legal science explains that it is a psychological fiction, based on individual conceptions.[20] If the nature of law as a societal phenomenon is highlighted, the result will be an ominous picture that a science which exclusively criticizes law as subjective conceptions and misconceptions may end up diminishing the importance of legal concepts, and ultimately of the law itself. Hedenius, who had in fact also himself been greatly influenced by Hägerström's works, approached this problem by terming it "the Hägerström-Lundstedt mistake" (our translation). He believed that there was a risk that the actual idea of the concept of law, as well as the binding force of law would dissolve into nothing.[21]

This exact dilemma is often pointed out to those who adopt a social constructionist attitude. The insight that structural phenomena only exist in the sense of our relation to them appears to be difficult and results in anxiety. It is therefore not so sensational that a questioning of the autonomy and uniformity of law as an existing world of ideas is perceived as a threat. If we accept the statement that law does not exist other than as individual conceptions and actions – i.e. the law constitutes an illusion – will then also the societal order collapse? The anxiety in this context is without a doubt one of the most important reasons why enlightened thinkers choose to maintain the idea of the uniformity of the concept of law. The view of the Swedish legal theorist Peczenik is illuminating here: "When somebody takes his starting point somewhere other than in the unity of the legal system, he may be a skilled legal sociologist, political debater, social critic etc., but he is not a legal scientist in the classic sense. The societal role of the latter is namely to interpret the legal roles so that they comprise a single legal system."[22]

The Scandinavian legal realists who were explicitly opposed to legal ideology gradually came to use more energy to try to create a new basis for the legality of law.[23] In our opinion, it was their normative ambition to reconstruct the "concept of law" that came to limit the possibilities for the sociolegal dimensions of legal realism to reach a breakthrough. Together with factors such as the lack of common views concerning the real character of law, the retention of legal sources as the most important foundation of legal knowledge, the unwillingness to use sociological and other scientific methodology etc., "legal ideology" came to remain a describable and interpretable object.

Ross states that the common denominator of different directions of realism is that they agree "to interpret the value of legal norms as expressions for a certain

20 *Cf.* Tolonen, Hannu: *Några synpunkter på den skandinaviska realismen* p. 21 (1991).

21 Hedenius, Ingmar: *Om rätt och moral* see p. 59-62, 66 and 67 (1941).

22 Peczenik, Aleksander: *Vad är rätt* p. 278 (1995). Peczenik goes so far as to say that he believes that to the degree one does not accept the assumption of the unity of law, the conclusion would be that "traditional legal science must be abolished" (p. 279, our translation). *See* also Peczenik, Aleksander: *Rätt, rationalitet och ideologikritik* p. 83 (1996), where he among other things discusses that "the task of legal science is not only to describe the legislation and legal cases but also to make this material as coherent as possible." Our translations.

23 Lundstedt, Vilhelm: *Grundlinjer i skadeståndsrätten*, the latter part, p.550 (1944).

social effectiveness" (our translation). In view of the fact that legal phenomena encompass legal conceptions as well as "legal actions", there are two ways of defining "the real correlate of norms" (our translation) and in accordance with this, realism diverges according to Ross into two branches that he chooses to call the ideological and the behaviorist branch, respectively. Ross describes the ideological realism as searching for "the reality of law in the conceptions of actions or impulses that actually motivate human beings. The norm is valid as long as it is part of the ideology that is actually experienced, and that can be called a sense of justice. These experiences are psychological facts, and it is these that constitute the actual real content of statements about the concept of law made by legal scientists. The verification task therefore consists of proving that a rule is encompassed by the general sense of justice. That such rules are also handled by courts is from this point of view something derivative and secondary, a normal consequence of the general sense of justice that is decisive also for the reactions of the judge. The actual criterion is not the handling as such but the reason for it."[24]

The ideological attitude was most clearly expressed by Olivecrona. He explained that law does not exist other than as *fantasy conceptions*, but that the "content of conceptions is a reality and it would be unreasonable to deny that it plays a paramount role in all civilized societies as a model for the modes of action of human beings."[25] When Olivecrona states that legal rules consist of conceptions of ideas about modes of actions, he does not mean that we shall analyze the conceptions of different individuals and actors, but instead he limits himself to the legislator as the actor whose conceptions we should analyze. "What legal science has to do in the examination of the content of the given rules is to explain which conceptions of actions have been expressed in the law, and in other rules belonging to the legal system, to compile them and systematize them. This is what it is to concern oneself with reality. The conceptions are natural facts. The issue is only to investigate their content."[26] Olivecrona hereby creates a world of conceptions that is tied to a specific constructed structural actor. The step to a positivistic analysis of the concept of law is then thus not very far.

Ross himself adopted a more "behaviorist" attitude. Even the young Ross was critical towards what he terms the "psychological-sociological, realist legal science" (our translation) in relation to the possibility of analyzing the validity of law.[27] That Ross early on attempts to find a new "validity" is made clear when he explains that "the legal validity is not independent, but inseparable from and interwoven with an empirical-real system of restrictions (the real interaction), so this duality of the essence of law cannot be interpreted in any other way than that the validity is given in reality itself, which with consideration to the categorical difference again must mean that law is an appearance of a metaphysical idea (power) in the physical world of reality."[28]

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24 Ross, Alf: *Om ret og retfærdighed* p. 85-8 (1953). Our translation.

25 Olivecrona, Karl: *Om lagen och staten* p. 49 (1940). Our translation.

26 Olivecrona, Karl: *Om lagen och staten* p. 50 (1940). Our translation.

27 Ross, Alf: *Virkelighed og gyldighed i retslæren* p. 73 (1934).

28 Ross, Alf: *Virkelighed og gyldighed i retslæren* p. 101 (1934). Our translation.

Ross believed that within the judiciary, we can perceive the existence such regularities of behaviors and conceptions that we can deduce the validity of law from this perception.[29] From a legal scientific point of view this means, according to Ross, that we can use legal sources as interpretation schema – "the interpretation schema make it possible for us to understand the (verbal) actions of the judge, his verdict, that is connected in meaning and motivation contexts to other social actions that after the content of normative ideology determine the reaction of the judge (acts of legislation, other public or private legal acts, actual acts)."[30] Ross thus believes that the theory he has developed is a synthesis of a behaviorist and of an ideological attitude. "The approach is behaviorist, in as far as it tries to find connections and foreseeability in exterior and observable verbal behavior. It is ideological in as far as it tries to find connections that can provide a shared context of meaning and motivation, which is only possible under the hypothesis that the judge in his own mind is controlled and motivated by a normative ideology with a certain content."[31]

Ross' aspiration to reconstruct the concept of law undeniably resulted in a regression towards an attitude of legal ideology. When Ross explains that the validity of law is expressed through the actions of judges and that the legal scientific method to predict these to a large extent can be complemented by studies of legal sources, he has drastically reduced the risks for what he himself certainly experienced as the "destructive" functions of realism. "Our hypothetical starting-point is that validity in terms of normative systems means the ability to function as an interpretation scheme for a corresponding set of social actions, the real substrate of normative ideas, and thus it becomes possible for us to understand this set of actions as a meaning and motivation context, and within certain limits to be able to predict them."[32] Despite his awareness of the complexity of the interplay between the individual actors' conceptions of actions and behaviors, he thus chose to restrict himself methodologically to a traditional doctrine of legal sources and to, at least in theory, consider law as something valid.[33] Therefore, it is no coincidence that Olivecrona states that Ross, after his excursions on philosophical grounds, returns to the ordinary attitude of law to legal constructions and that his works ultimately constitute a defense of this.[34]

To be aware of and be able to control legal phenomena as social constructions, based on real individual and collective conceptions, within the framework of legal methodology, it is nevertheless important to try to see to the potential in the theories of legal realism. The most challenging of the Scandinavian realists was Lundstedt. He was also the person who devoted the most strength to

29 *Cf.* Tolonen, Hannu: *Några synpunkter på den skandinaviska realismen* see p. 26-27 (1991).

30 Ross, Alf: *Virkelighed og gyldighed i retslæren* p. 101 (1934). Our translation.

31 Ross, Alf: *Om ret og retfærdighed* p. 89 (1953). Our translation.

32 Ross, Alf: *Om ret og retfærdighet* p. 47 (3rd ed. 1971). Our translation.

33 Doublet calls attention to the fact that Ross has a functionalist analysis of the concept of property which is not, however, applied when he analyzes law more generally and adopts a more substantial view. Doublet, David: *Rett, vitenskap og fornuft* p. 365 (1995). *Cf.* also Lauridsen, Preben Stauer: *Studier i retspolitisk argumentation* p. 136-137 (1974).

34 Olivecrona, Karl: *Rätt och dom* p. 142 (2nd ed. 1966).

fighting the dominating "paradigm of legal ideology". The image of Lundstedt's ambitions is clarified by Olivecrona: "The main theme of the work of Lundstedt in question is partly to point out the real meaning of legal conceptions, partly their function in society, and based on the investigations of these, to dethrone the legal consciousness from its place as the foundation of law to be a part among others in the context of reality that legal science shall explore."[35]

If one wants to form a picture of the potential of the ideas of legal realism, one shall thus study Lundstedt, and the polemic between Ross and Lundstedt is particularly interesting. It is obvious that Ross has been strongly influenced by Hägerström. At the same time, it is quite possible to view Ross' prognosis theory as a reaction against Lundstedt's ideas – a reaction against an according to him "psychological-sociological, realist legal science" (our translation).

Lundstedt emphasizes in his works that legal activity is indispensable for the continued existence of society, but claims at the same time that as long as the legal profession restricts itself to legal ideology as a world of ideas where there exists a material and formal law, legal activity will not work constructively.[36] "If one made the intellectual experiment of asking oneself what societies would look like, if the legal ideological conceptions within science, let us say half a century ago, had generally and consistently had to give way to reality-emphasized points of view, a definite answer naturally could not have been given. But it is in the nature of the matter, that the tensions between considerable conflicts of interest within a country would not have become as severe as they have been. Above all, class struggle would have taken less severe and provocative forms. The functioning of the machinery of society would inevitably have had less friction, than has been the case."[37]

Lundstedt accordingly considered it his mission to contribute not only to legal science, but also to the reconstruction of the legal profession. A main task for Lundstedt was to question the concepts of rights, legal principles etc., with the aim that these should be replaced with adjustments between different interests and values – an analysis of "public utility". "Constructive law must in its systematization of laws, and the concomitant handling of the institute of law, surely take the historically given and current meaning of legal ideology into consideration, but must always be aware that an outlook which is liberated from legal ideology cannot found its reasoning on anything but social science, i.e. on human beings as they are physically and mentally constituted, on the facts that dictate their mutual conditions, on the facts that stipulate their mutual conditions, on these conditions in themselves, and on the actual ambitions of human beings."[38]

If we see the potential of Lundstedt's ideas, we ought to first and foremost emphasize the fact that he considers the ideological-critical mission a necessary

35 Olivecrona, Karl: *Till frågan om rättsvetenskapens problemställning* p. 344 (1927). Our translation.

36 Lundstedt, Vilhelm: *Det Hägerström-Lundstedtska misstaget* p. 32 (1942). *See* also Olivecrona *Grundtankar hos Hägerström* p. 39 (1972).

37 Lundstedt, Vilhelm: *Det Hägerström-Lundstedtska misstaget* p. 84 (1942).

38 Lundstedt, Vilhelm: *Grundlinjer i skadeståndsrätten*, the latter part, p. 552 (1944). Our translation.

step towards a practical law as well as a science where one relates to real interest and value adjustments. Using the terminology of today, we can say that the legal profession must constantly work on unmasking and deconstructing legal constructions. When one understands how legal constructions *de facto* consist of power processes within and outside the legal machinery where different values and interests are provided for, one's prerequisites for arguing how different conflicts, problems etc. should be handled are all the more improved. Legal science has, according to Lundstedt, a particular responsibility in this context. "We have on the one hand the methods of legal science, according to which the social realities, which is what the whole must concern, are veiled in legal ideology and may not or cannot be observed otherwise than through these veils, at times so thick that one's scrutiny never actually reaches the underlying realities. We have on the other hand a method that does not purport anything other than to let these realities come into favor again, to let the scientist investigate these realities and their mutual connections to the best of his ability and place these as clearly as possible directly in front of him, and with the help of these argue for those principles, that, in one area or another and in one regard or another, should in his opinion constitute the foundation of the judicial procedures. To me, it seems that each and everyone should be able to understand the importance for the survival and development of a society, that the former method should be forced to be abandoned in favor of the latter. The recognition of the latter is what I fight for in every case. It is also in accordance with this method that I try to carry out my own work. But as things are, it must be and for the time being remain an important assignment to remove the veils of legal ideology."[39]

When we have understood that legal ideology works as a veil for the real processes, it also becomes apparent that those of us within the legal profession who claim to describe law, actually devote ourselves to a number of different tasks. For Lundstedt, it is important to draw the normative conclusions of these insights. Accordingly, he argues in favor of a constructive legal science and a constructive "judges' law".[40] Since legal ideology is a veil, judges, though always influenced by real circumstances, do not admit it in their legal argumentation. According to Lundstedt, judges who accept responsibility shall always descriptively strive to support the interests of public utility. When normatively removing the veil of legal ideology, it is also desirable that the judiciary normatively strives to support the interests of public utility. For Lundstedt, it is exactly a constructive aspiration that shall replace the almost instrumental aspiration of describing the law. This constructive aspiration is no simple task. In their constructive work, judges shall be loyal to the legislator and those values that are ex-

39 Lundstedt, Vilhelm: *Det Hägerström-Lundstedtska misstaget* see p. 128-129 (1942). Our translation.

40 Jacob Sundberg, the perhaps most notable Swedish opponent to realism, has in his book *fr. Eddan t. Ekelöf* stressed the analysis of Lundstedt's role as a socialist and follower of Hägerström. There he argues that the principle of public utility is incompatible with these two roles; see p. 212-215. Later in that work, he states that "[t]here was something unhealthy about the doctrine of public utility… The day that Lundstedt's book about public utility would be published, he would have been finished as a socialist member of parliament" (our translation) see p. 265-266 (1990).

pressed in the legislation process. At the same time, judges shall strive to be loyal to the values of the citizens. "This means that we in every case where the meaning of public utility is not clear and obvious for the legislator shall undertake a closer examination of relevant values in society, and take the following into account: 1. that values, except on the emotional level, are decided by conceptions, in their turn depending on the knowledge position of the person in question, as well as his intellectual qualifications; 2. that it is the values of the legislator that are decisive and 3. that these in their turn as I have stated above have to be influenced by the values of the citizens."[41]

An important constructive assignment for science is to assist the judiciary in their complex task to determine what public utility consists of. It is above all this constructive legal science, developed by Lundstedt, which Ross opposes.[42] Ross criticizes Lundstedt for contradicting his own view of science in his ambition towards public utility, and creating a new ideology. "Public utility is discussed by the author as "the decisive factor in deciding the content of law" or as the "motive that really determines the legislator"[43] The meaning of this is according to Ross that Lundstedt's principle of public utility is a "metaphysical postulate that works as a constitution for a practical dogmatics" (our translation), whereby it can be dismissed as a chimera according to Lundstedt's own terminology.[44] In polemics with Ross, Lundstedt explains that public utility in his theories is not a form of "open sesame!", but is instead an issue of the "values of the so called legislator, i.e. the law committee, the Law Council, the government and the parliament".[45] Lundstedt thus wants to point out that public utility is not an ideology of its own. It is completely clear, though, that Lundstedt found it hard to rid himself of Ross' criticism that the analysis of public utility was based on Lundstedt's own, normative values.[46] Lundstedt naturally realized that a legal scientist who is to analyze "public utility" will find it hard to liberate him or herself from his or her own values. In another context, Lundstedt further explains: "Although what we call objective values do not exist, it is certainly obvious, that our actions, both those of the individuals and those of the legislator, are constantly dependent on our values, both moral as well as other in nature. Therefore, it seems particularly inappropriate to, as Mr. Hedenius and many others do,

41 Lundstedt, Vilhelm: *Grundlinjer i skadeståndsrätten*, the latter part p. 581 (1944). Our translation.

42 Ross, Alf: *Realismen i retsvidenskaben og samfundnyttekimæren* SvJT 1932 p. 348. Lundstedt, Vilhelm: *Är det metafysik att beakta samhällets intressen i rättsvetenskapen - svar till doktor Alf Ross* SvJT 1932 p. 537. *See* also Ross, Alf: *Samfundsnytteprincippet - gensvar til professor Lundstedt* SvJT 1933 p. 115 and Lundstedt *Beaktandet av samhällsnyttan inom juridiken*. Ett genmäle, SvJT 1933 p. 121.

43 Ross, Alf: *Realismen i retsvidenskaben og samfundnyttekimæren* SvJT 1932 p. 337. Our translations.

44 Ross, Alf: *Realismen i retsvidenskaben og samfundnyttekimæren* SvJT 1932 p. 342, p. 348.

45 Lundstedt, Vilhelm: *Är det metafysik att beakta samhällets intressen i rättsvetenskapen?* p. 543 (1932). Our translation.

46 Lundstedt, Vilhem: *Är det metafysik att beakta samhällets intressen i rättsvetenskapen?* (1932).

characterize this doctrine of values, as I have tried to illustrate, through the expression »value nihilism».”[47]

Ross’ criticism appears on first reading to be a defense of a legal realist view, against Lundstedt’s more ideologically characterized constructive view of law. After considering it further, however, it becomes obvious that it is Ross who is defending “the ideology of law” as a world of ideas – a legal ideology. Ross’ fundamental working hypothesis during his entire career was to consider law as a superindividual social phenomenon that influences a collective of individuals in the sense that “an interpersonal meaning and motivation connection” is created.[48] He argues that law can, at the same time, be considered both as a legal norm/legal ideology and as a legal phenomenon. Legal norms are, according to Ross, valid to the extent that they are applied by the courts.[49] “Describing Danish law can hereafter be characterized as using the normative ideology that is actually at work or is considered to be at work, in the mind of the judge, since it is perceived by the judge as socially binding and is therefore effectively observed. ”[50]

Ross’ conclusion, certainly similar to Olivecrona’s, tends towards naiveté in its social constructionist approach. He acknowledges law as a social construction, but legitimizes law as a world of ideas, which it is possible to interpret, since it is applied by judges or can potentially be applied by judges. We can, however, discern a certain self-criticism and hesitation in Ross. “In reality, it is said, the judge makes his judgment partly from emotional inspiration, partly from practical purposes and considerations. When the conclusion is made, he thereafter finds a suitable argumentation of legal ideology to legitimize his judgment.”[51] Ross does not let this suspicion about the dynamics between “process of discovery” and “process of justification” influence the prognosis theory, but states that if this assumption would be true, “insight into legal ideology [is] hereafter only of slight use, since in reality is it not that which motivates judges. If it is at all possible to reach a real understanding of what happens, and to predict the outcome of legal disputes, studies of a quite different kind than those of legal science are required.”[52] In principle, Ross hereby fails his own legal realist theory. It is not possible to discuss a concept of law with existing and substantial validity.

This was exactly what Lundstedt had realized. The ambition of a common constructionist ambition to obtain “public utility” was for him the way to reconstruct the legal profession and its common practice.[53] The decisive ambition is however that legal science as well as the remaining legal profession abolishes

47 Lundstedt, Vilhelm: *Det Hägerström-Lundstedtska misstaget* p. 24 (1942). Our translation.

48 Ross, Alf: *Om ret og retfærdighet* p. 42 (3 rd ed. 1971). Our translation.

49 Ross, Alf: *Om ret og retfærdighet* s. 41 (3 rd ed. 1971).

50 Ross, Alf: *Om ret og retfærdighet* p. 48 (3 rd ed. 1971). Our translation.

51 Ross, Alf: *Om ret og retfærdighet* p. 57 (3 rd ed. 1971). Our translation.

52 Ross, Alf: *Om ret og retfærdighet* see p. 57-58 (3 rd ed. 1971). Our translation.

53 Today, possibly concepts such as “sustainable development” would appear more appropriate.

the legal ideological attitude. For Lundstedt, this also meant that legal ideological phenomena such as rights etc. should be abolished. Here, however, is Lundstedt's "Achilles' heel"; Hedenius' criticism is accurate in this regard.

The most important conclusion from the work of the early realists is that if we are to understand law, we have to deconstruct it as social and psychological processes. When it comes to the realist ambition to reconstruct law, Lundstedt, for example should have limited himself to stating that the legal profession has a collective mission to design, construct, reconstruct and care for legal constructions which further public utility. Our entire society is built on social constructions – ideological phenomena. In order to increase public utility, create better order, and improve our ability to handle problems etc appropriately, and so on, we require the ability to construct, reconstruct and above all tend to legal constructions and other social constructions as the social processes they actually are. In order to be able to do this, we must switch between an ideological/structural/substantial perspective, and an open, more reality-aspiring attitude wherein which it is possible for the analysis of public utility to be a central element. We cannot abolish legal constructions just because we realize that they are nothing but "illusions" in character. On the contrary, we are dependent on even more sophisticated and complex structural constructions. It is, however, important that we question and abolish constructions that are not appropriate/furthering public utility. It is especially important to dismiss such constructions/conceptions that blind us to reality.

4 The Discussion on Property Rights – the Concretization of a Sociological Approach

A standpoint that is important for us is that the social constructionist awareness ought to be developed on a more detailed legal construction level – i.e. in the legal analysis and argumentation about what constitutes rights, associations, property, legal principles, legal rules etc. The insight that legal constructions as well as other structural phenomena (social constructions) do not have independent existence must be operationalized in order to be possible to control. When we no longer consider legal constructions as real phenomena, which can be described and interpreted on the basis of a doctrine of legal sources, we begin to acquire the necessary prerequisites for being able to master the actual construction processes.

A suitable starting-point for developing our understanding of legal constructions is the analysis of property rights made by legal realism. In our opinion, it was precisely in the analysis of these rights that Scandinavian realism came furthest in its deconstructive, reality-aspiring ambitions. Axel Hägerström and his disciples explained that rights are metaphysical and thus do not exist. They were opposed to the classical doctrine wherein it was assumed that civil law consisted of rights and obligations.[54] Lundstedt was, in accordance with what has been es-

54 Hägerström, Axel: *Begreppet viljeförklaring på privaträttens område* see p. 102-103 (1961, the original is from 1935).

tablished above, the disciple of Hägerström who adopted the most drastic attitude to the concept of rights. He actually seemed to mean that one shall avoid giving this concept any content and thus also in the extension cease to use the same.[55] Olivecrona, who in principle agreed with Lundstedt, is less drastic in his criticism and believes that since the concept of rights actually is used as an idea in a legal world of ideas and there serves some important purposes, we have to relate to it.[56] "Concerning the concept of rights or rather the idea of rights, there are two issues that need to be kept thoroughly separated. The lack of clarity in this area is probably to a large extent a result of the fact that this important distinction has not been observed. The first question is the one of the meaning of the idea of rights. This is the issue that deals with what is thought about »the right». The second issue is the issue of how the idea of rights is used, the role it plays in law and in everyday life. This issue can be labeled the function of the idea of rights."[57]

The analyses of Olivecrona and Lundstedt thus pave the way for a substantial and functional attitude to the construction of rights. As a starting-point, they shared a functional attitude, wherein the concept of rights in itself is empty, but where the concept of rights creates function depending on how it is understood and used. The difference between them is, however, the constructive impact that Olivecrona assigns to the idea of rights. Olivecrona believed that the conception of the meaning of the legislator *de facto* is a meaning one shall control. Lundstedt described "the functions" of rights as advantageous positions.[58] The conception of rights gives the perceived holder of those rights a position that renders it possible for the action of the legal machinery to be invoked, and for public power to be exercised on behalf of that holder.[59] Olivecrona, who to a larger extent focuses on the ideological aspect, believes that rights create a feeling of power, which appears at its strongest in situations of conflict, since that is where rights are most evidently connected to presumptions of winning a legal procedure.[60] "The power feeling of the rights-holder at all times collects nourishment from a number of circumstances given from experience: he knows that he has the support of the law in the sense that consequences provided for by the law can affect those who violate his right."[61] Furthermore, he believes that the feeling of power shall be seen in relation to the functions of rights as directing action. It is namely a characteristic of the idea of rights that it creates a number of subsequent ideas - consequential beliefs.[62] The conception that somebody has a right to property creates conceptions that the power of the state will intervene

55 *See* among others Lundstedt, Vilhelm: *Obligationsbegreppet*, first part p. 107 (1929).

56 Olivecrona, Karl: *Rätt och dom* p. 90 (2nd ed. 1966).

57 Olivecrona, Karl: *Rätt och dom*. p. 91 (2nd ed. 1966). Our translation.

58 Lundstedt, Vilhelm: *Obligationsbegreppet*, first part p. 107 (1929).

59 Lundstedt, Vilhelm: *Obligationsbegreppet*, first part p. 107 (1929).

60 Olivecrona, Karl: *Rätt och dom* p. 99 (2nd ed. 1966).

61 Olivecrona, Karl: *Rätt och dom* p. 99 (2nd ed. 1966). Our translation.

62 Olivecrona, Karl: *Rätt och dom* p. 104 (2nd ed. 1966).

if somebody steals that property. Transactions that are made concerning the property are also presumed to be upheld by the power of the state. In this way, rights also possess informative functions.[63]

Olivecrona also differentiated between the functions of the idea of right in societal communications and its function in the judiciary and legislation. When Olivecrona makes the claims that the right creates a feeling of power, he relates to its function in society. The same applies when he describes the functions of rights in directing action and in information. Concerning the functions within judicial action, the starting-point for Olivecrona is that the term rights is not here, on the whole, used to express a conception of anything. Instead, it is the conception of the individual right that has "an imperative, action directing function" (our translation), since a number of consequential conceptions follow from that conception.[64] "The rights of possession of the public get their practical importance through the feelings and ideas of action that are connected to the idea, that a person is the owner of a certain object. Correspondingly, the rules of origin of the rights of possession get their importance for the courts through the ideas that exist about what a court in the concrete case shall do in the event that a person is shown to have acquired an object legally."[65]

Ross, too, developed a "functional" attitude to the concept of rights in his early works. "As a postulate for a realistic view of law, we can begin with the fundamental condition that any regulation of, as is the case in the typical situation, what we call a right, must refer back to a determination of one or more legal functions. The right only exists in what it really leads to in legal activities, and nothing else. The typical situation of rights is an expression of a complicated set of behaviorist attitudes of the individuals of an association, which leads to a certain possibility of action for the entitled and in different ways give a number of reactions that are functionally dependent on his circumstances."[66] In accordance with Hägerström, he considered rights to be "magical-metaphysical conceptions" (our translation), which must be understood on the basis of ruling ideologies.[67] Much like Lundstedt, he emphasized the functions of the concept of rights as providing an advantageous position.[68] His theories of the self-assertion of individuals are especially interesting. "The concept of rights marks the autonomous self-assertion of the individual ... since one from the concept of right ought to deduce such freedom and power, that precisely is given not to autonomously look after one's own interests, but as a social function to look after the social interests."[69] In this analysis, Ross clarifies that the experienced meaning of the concept of right is the result of, among other things, the self-asserted interests of economic actors.

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63 Olivecrona, Karl: *Rätt och dom* p. 110 (2nd ed. 1966).

64 Olivecrona, Karl: *Rätt och dom* p. 125 (2nd ed. 1966).

65 Olivecrona, Karl: *Rätt och dom* p. 121 (2nd ed. 1966). Our translation.

66 Ross, Alf: *Ejendomsret og ejendomsovergang* p. 13 (1935). Our translation.

67 Ross, Alf: *Ejendomsret og ejendomsovergang* p. 536 and p. 540 (1935).

68 Ross, Alf: *Om ret og retfærdighet* p. 213 (3rd ed. 1971).

69 Ross, Alf: *Om ret og retfærdighet* p. 214 (3rd ed. 1971). Our translation.

Under the influence of modern linguistic philosophy, Ross increasingly began to analyze the function of the concept of rights in legal argumentation. When Ross in the beginning of the 1950s described the status of the rights discussion, he explained that the realist discussion in principle has gone through three phases in the legally functional attitude:[70] First, Hägerström developed his metaphysical theory where rights as elements in legal ideology were criticized and questioned. Thereafter the discussion, because of among other things Lundstedt's contribution, became more sociologically characterized and rights were explained as functions in societal relations. During the end of the 1940s, and in the beginning of the 1950s, Ross, together with primarily Ekelöf, developed a "functional attitude" to the concept of rights in the legal argumentation in itself.[71] Ross believed that the task consisted of "trying to interpret the concept of rights in legal-functional approach, i.e. as an instrument for describing the law and legal relations"[72] Ross himself, just as Olivecrona, belonged to those who aspired to include the two earlier lines of development in their later analyses which were more influenced by linguistic philosophy. Concerning the function within the legal machinery, he describes rights as a concept without semantic reference.[73] "The fact which a proposition refers to is called its semantic reference and can more precisely be defined as the fact that thus relates to the statement expressed in the proposition, so that since the fact is assumed to exist, it is also assumed to be true."[74]

Ross believes, like Olivecrona, that even if for example property rights do not have a semantic reference and do not signify anything, they still work as a meaningful technical aid for making and interpreting statements.[75] The discussion with primarily Ekelöf focused on the issue of whether it is possible to argue that the concept of right has semantic references or not. Ekelöf shared Ross' legal realistic starting points, but believed that the concept of rights has semantic references in the legal argumentation.[76] He believed that on the basis of semantic analysis, one could conclude that the concept was used to signify legal facts as well as legal consequences.[77] When one as Ekelöf states that a right consists of a

70 Ross, Alf: *Status i rettighedsdiskussionen* p. 530 (1953).

71 *See* Ekelöf, Per Olof: *Juridisk Slutledning och Terminologi* (1945), Strahl, Ivar: *Till frågan om rättighetsbegreppet* see p. 204-210 (1946), Ekelöf, Per Olof: *Till frågan om rättighetsbegreppet* see p. 309-313 (1946), Strahl, Ivar: *Till frågan om rättighetsbegreppet* see p. 481-514 (1947), Ekelöf, Per Olof: *Om begagnandet av termen rättighet inom juridiken* see p. 151-177 (1950), Ross, Alf: *Tü-Tü* see p. 468-484 (1951), Ekelöf *Är termen rättighet ett syntaktiskt hjälpmedel utan mening?* see p. 546-559 (1952), Ross, Alf: *Status i rettighedsdiskussionen* see p. 529-540 (1953).

72 Ross, Alf: *Status i rettighedsdiskussionen* p. 532 (1953). Our translation.

73 Ross, Alf: *Status i rettighedsdiskussionen* p. 539 (1953).

74 Ross, Alf: *Tü-Tü* p. 469 (1951). Our translation.

75 Ross, Alf: *Tü-Tü* p. 478 (1951).

76 Ekelöf, Per Olof: *Är termen rättighet ett syntaktiskt hjälpmedel utan mening?* (1952).

77 *See* Ekelöf, Per Olof: *Juridisk Slutledning och Terminologi* (1945) and *Om begagnandet av termen rättighet inom juridiken* see p. 151-177 (1950).

number of legal facts with their own references, this is, however, the way to a substantial attitude.

What makes the discussion so interesting is thus their ambition to deconstruct the concept of rights on the basis of its functions partly in society and partly within the legal machinery. A uniform theory was however never elaborated, and instead the discussion was inhibited precisely by the inability to reach a uniform view. The main explanation is again their incapability to liberate themselves from "the ideology of law" and to draw the methodological consequences of such a liberation. Again, the ambivalence is most apparent in Ross, who on the one hand emphasized some of the most interesting functional insights, at the same time as he on the other hand aspired to reconstruct the concept of law and the doctrine of legal sources as interpretation schema. In his analysis of the rights debate in the beginning of the 1950s, he establishes that Lundstedt's analysis of how the functions of the legal machinery created different situations of rights, and, conversely, how the conception of these situations of rights triggered legal decisions, executive interventions etc., in and of itself was correct. "But at the same time it is clear that this creation of concepts is of sociological, not legal nature, and thus, it is not the concept that is implied in legal scientific statements or practical-legal argumentation. The economic advantage, the real possibility to act or the 'protected position' that these authors discuss, seems to be the practical consequence of a certain legal situation, not this situation in itself. But as a legal concept, the concept of rights has to be analyzed as an instrument to describe legal content, a legal situation, not the legal economic consequences of it."[78]

An explanation for Ross' theoretical standpoint is thus that he, partly as a result of the discussion of legal facts and legal consequences, has been captured by a more traditional substantial approach to property rights where one relates to their subject, object and content. Olivecrona discovers this contradiction in Ross' theories when the latter in certain contexts proceeds to discuss precisely legal facts as subject, content, object and protection. "The description could belong to any handbook. I cannot see other then that Ross after certain excursions on philosophical grounds has returned to the usual legal way of using the concept of right. In reality, his description surely ultimately aspires to be a defense for this."[79]

A general conclusion concerning the legal realist discussion of rights was that in the later discussion about the functions of rights within the legal machinery, the realists did not accept the consequences of the insights that they had reached earlier. They came to totter between a functional and substantial attitude, and were inhibited by their unwillingness to use any other method than the traditional doctrine of legal sources. All functional initiated theorists were, however, explicitly aware of the significance of relating to an empirical method. "When investigating the term of rights and the function of the idea of rights, one naturally has to use empiricism. Thus, one has to try to observe how the term and its con-

78 Ross, Alf: *Status i rettighedsdiskussionen* p. 532 (1953). Our translation.

79 Olivecrona, Karl: *Rätt och dom* p. 142 (1966). Our translation.

nected ideas are actually used in different contexts and which actual consequences the use has."[80]

They did thus not succeed in developing a sociolegal theory. They did however succeed in showing how rights are based on a communicative power game where among other things self-asserted self-interests result in a favored position. They also succeeded in showing that this favored position is based on an image and language game where the assumption of a right creates consequential beliefs, for instance that one can make commercial dispositions regarding certain property and that one can intervene against certain actions, which all in all result in a feeling of power. Furthermore, they showed how conceptions of rights at the same time have addressees within as well as outside the legal order. They described how the conception of rights on the one hand fills functions in industry/society where it among other things creates a favored position, and on the other hand also has functions within the legal machinery where it functions to direct the actions of judges. They did not, however, succeed in replacing the substantial attitude with a functional attitude. Between the lines, one can also discern an intuitive insight in the necessity of switching between a substantial and functional attitude. The attitude of the legal realists paves the way for a sociolegal attitude to legal constructions by these insights, where we once and for all realize that legal phenomena do not have independent existence.

5 Sociology of Law – Reconsidering the Distinction between Internal and External Approaches to Law

When elaborating on a sociolegal theory of law, an obvious field to look into is of course the sociology of law. As a discipline, the sociology of law is quite diverse, with many sources of influence.[81] Theorists such as Durkheim, Parson, Merton, Luhmann, Renner, Weber and Habermas have of course had great impact. It is quite close at hand to describe the discipline as an in-between or supporting discipline.[82] Many of those considering themselves active in the discipline tend to focus on the societal functions of law, which often means that they have a relatively narrow and more regulative approach to law.[83] In the field many have what can be described as an external approach to law, and see it as their role to empirically analyze the consequences of law. Tuori elaborates on the distinction between the internal and the external: "Legal-scientific and social-scientific research on law understands the law as the object of study in different ways. The law shows to legal scholars its symbolic normative side, whereas social scientists primarily focus on social practices related to the law…The legal scholar approaches the law from a participant's internal point of

80 Olivecrona, Karl: *Rätt och dom* p. 103 (1966). Our translation.

81 For overviews of the development of the discipline see Dalberg-Larsen, Jörgen. *Lovene og Livet – En rättssociologisk grundbog* (5th ed 2005) and Hydén, Håkan: *Rättssociologi som rättsvetenskap* (2002).

82 Dalberg-Larsen, Jörgen: *Lovene og Livet – En rättssociologisk grundbog* pp. 17-18 (2005).

83 Compare Aubert, Vilhelm: *Retssociologi* pp. 12-30 (1967).

view, whereas the social scientist adopts an observer's external point of view."[84] From a legal science point of view it is in this context therefore quite easy to argue that the sociology of law is, if not something different from legal science, then at least something that only is of complementary interest. It is close at hand with this point of view to argue that sociological understandings are something that should not be incorporated in legal methodology.

However, of special interest for this study are those theorists who apply their understanding of sociology in internal analyses of law. Influential from this perspective on the Nordic scene are among others Aubert, Eckhoff, Eriksson, Dalberg-Larsen, Doublet, Graver, Hydén, Karhu, Petersen, Sand, Tuori, Wilhelmsson and Zahle. Not all of them would necessarily describe themselves as theorists in the field of law and sociology. Several of them have explored external as well as internal approaches to law, and some of them combine a realistic foundation with sociological theories. Aubert and Eckhoff, for example, can at least in their early years be labeled realists.[85] Dalberg-Larsen has over the years analyzed and also built some of his reasoning on developments in legal realism and pragmatism.[86]

When focusing on the "internal" dimension of the sociology of law an overall challenge is how the external understanding of law can be used internally when describing and analyzing law. Thus, an internal sociolegal theory will of course build on external insights. Dalberg-Larsen argues that by examining the sociological character of law and the roles of lawyers one can formulate new sociolegal theories to use in legal practice. "Formulating general legal theories – theories on the character of law and the roles of the lawyer in society – has as I see it a very important practical function, as the law and lawyers hold several decisive functions of different kinds in modern society. The role of the legal theories can then be to call attention to the responsibilities, functions and roles that lawyers are normally not aware of practicing… The theories can also show developments within both law and society which mean that new responsibilities intrude, or that new problems arise when it comes to realizing decisive legal and societal values through the law."[87] Thus, external insights on the character of law help us to reconstruct the internal approaches. When the border between the internal and the external is rewritten, the law in itself is reconstructed.

One external discussion of great importance is that of how legal systems interact with other systems, such as political systems, technical systems, social systems etc. This discourse, inspired by Luhmann and others, opens up for external reasoning on what law is. Discussed is to what extent law is a normatively open or closed system. A conclusion discussed in the Nordic setting is how "[t]he unity of the system is produced by the system itself."[88] Doublet, who ex-

84 Tuori, Kaarlo: *Critical legal positivism* p. 285 (2002).

85 Eckhoff; *Rettslige vurderinger* p. 88 (1970).

86 *See* for example Dahlberg-Larsen. *Pragmatisk retsteori* (2001).

87 Dahlberg-Larsen. *Pragmatisk retsteori* p. 133 (2001). Our translation.

88 Luhmann, Niclas: *Operational Closure and Structural Coupling: The Differentiation of The Legal System* p. 1420 (1992).

plores a system approach to law, argues that it is the praxis of argumentation within the legal profession that defines the normative conditions for what will be accepted as law.[89] Legal methodology defines, accordingly, the criteria of what is legally relevant.[90] Graver analyses legal reasoning as a social activity and shows how the reality created by the legal profession – "den juristskapte virkelighet" – can be understood as a number of different systems.[91]

A fundamental external insight on which a sociolegal theory can build is the discussion on legal pluralism and the polycentricity of law.[92] Within the Nordic discussion on pluralism it is nowadays quite well acknowledged that it is possible to view the law as composed of or existing in several different systems. From an external point of view, this perspective is not even controversial anymore. For example, Dalberg-Larsen concludes in one of his analyses that in the process of globalization, in which nation states lose the exclusive capacity to govern, it becomes increasingly clear that we need a pluralistic approach to law.[93] Hydén suggests that it is possible to talk about the law of the market society as well as the law of the cyber society.[94] At the same time, in the internal discussion the possibility of arguing legal pluralism is also increasingly gaining acceptance. As has already been mentioned, Karhu suggests that we can distinguish between three different dimensions of law: state's law, market's law and society's law.[95] An important step in grasping the foundation of a sociolegal approach is consequently recognizing that it is possible to distinguish between different sociolegal theories depending on which legal paradigm/dimension the theory supports. The discussion opens up for an internal legal theory and a methodology adapted to the system of market's law – a sociolegal approach to law within business, originating in contracts, collective agreements, normative instruments used within associations, etc.

Another fundamental external insight for this article is that law will always be a reflection of the forces of production, i.e. the base.[96] A significant number of theorists are influenced by the Marxist approach to the political economy, according to which law should be analyzed as an integrated element in the superstructure.[97] Eriksson for example argues that even "jurisprudence as a praxeolog-

89 Doublet, David Roland: *Rett, vitenskap og fornuft* p. 26 (1995).

90 Doublet, David Roland: *Rett, vitenskap og fornuft* p. 44 (1995).

91 Graver, Hans Petter: *Den juristskapte virkelighet* (1986). Graver, Hans Petter: *Normative systemer – skisse til en oppløsning av retsbegrepet* p. 53 och p.p 60-63 (1989).

92 Zahle, Henrik & Petersen, Hanne: *Legal Polycentricity*, Köbenhavn (1995). Dalberg-Larsen *Rettens enhed – en illusion* (1994). *See* also Gustavsson, Håkan: *Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet* (2002).

93 Dalberg-Larsen, Jörgen*: Lovene og Livet – En rättssociologisk grundbog* pp. 312-314 (2005).

94 Hydén, Håkan: *Rättssociologi som emancipatorisk vetenskap* p. 208 (1999).

95 From a presentation made by Juha Karhu in a seminar on legal theory in Göteborg the 29th of March 2008.

96 Stjernquist, Per & Widerberg, Karin. *Rätten i samhällsbyggandet* p. 20 (1980). Compare Hydén, Håkan. *Rättens samhälleliga funktioner* pp. 35-52 (1978).

97 Compare Aubert, Vilhelm. *Continuity and Development* p. 161 (1989).

ical process always reflects the existing power relations."[98] According to this view, law is not necessarily the driver of change, but rather a result of industrial transformation. Law is one of several ideological elements which act in a dialectical process in relation to industrial transformation.[99] Tuori, who has developed a multilayered approach to law, explains that "[i]n Marxist analysis, categories like "legal subjectivity" and "subjective right" represent fetish forms of consciousness which both express and distort bourgeois social relations. In fetish forms, the parties to these relations appear as formally free and equal subjects. This reflects surface legal economic relations of exchange- contract relations- but at the same time such fetish forms cover up the inequality and lack of freedom on which the relation of production between capital and labor is based. Again the Marxist reconstruction can offer inspiration even to those who do not accept its skewed economist view. Knowledge about the law's deep structure is part of the most fundamental practical knowledge which the members of modern society employ in their everyday life and without which they could not act out, for instance, their roles as employees, consumers or spouses. The fundamental categories of modern law are intimately linked to the basic structures of modern society and modern culture: the permanence of the former is dependent on the permanence of the latter."[100]

Elaborating on an external understanding of the impact of globalization, and on the technical change of the transformation of the economy it becomes obvious that the legal processes are quite complex. To illustrate the complexity Dalberg-Larsen asks whether it might not be that the unintended consequences of law have a more significant impact than the intended consequences. He argues that the situation of today is the result of "the unintended consequences of law and State in previous phases of evolution and with the unintended consequences of previous ideologies".[101] In the analysis of the role of regulation in relation to science, Sand asks whether we are not now witnessing a spiraling effect resulting in ever more uncertainties, contingencies and unintended consequences. Naturally then, an important question becomes to what extent an internal legal theory can encompass this complexity. Both Dalberg-Larsen and Sand emphasize the importance of developing a socio-legal approach in order to be able to deal with this situation.[102]

Wilhelmsson is among those who have elaborated on an internal legal approach which could potentially be capable of dealing with the challenges he has encountered in his external analysis. He focuses very much on the challenges in private law that follow from globalization and the transformation of society, and raises the question of whether or not we need an internal approach to law based

98 Eriksson, Lars D. *Marxistisk teori och rättsvetenskap* p. 110 (1980). Our translation.

99 Stjernquist, Per & Widerberg, Karin. *Rätten i samhällsbygandet* p. 30 (1980).

100 Tuori, Kaarlo: *Critical legal positivism* p. 188 (2002).

101 Dalberg-Larsen, Jørgen. *On the evolution of law and the importance of unintended consequences*, 55 (1989).

102 Sand, Inger-Johanne. *The legal regulation of the environment and new technologies – in the view of changing relations between law, politics and science. The case of applied genetic technology* (2001).

on engagement and involvement in an increasingly shared world.[103] "The shortcomings of national legislation lead on the international market to an increasing need for private regulation through the contractual mechanism. This too reinforces the strong position of private law, at the same time as it draws new actors into the norm formation processes. It favors the development of various systems based on self regulation… One can envision certain elements of a fairly commercial transnational norm system which is developed side by side with national law, but outside the codifying structures of international law. However, when private law on the internationalized market is decoupled from the control of the nation state in this way, it is most often formed or supported instead by the strong actors on this market."[104]

Further, Wilhelmsson argues the need for the reconstruction of the role of the lawyer as a response to globalization, the rapid transformation of technology, individualization in society etc.[105] He asks for a development where legal argumentation in private law is based on moral responsibility and an element in micro politics.[106] "Neither the System of Law, the System of Ethics, or the System of Rational Science can credibly shoulder the full burden of legal decision making. As there is no system-authority that relieves the legal scholar or practitioner from making moral decisions, his or her personal choices become meaningful and he or she must bear the moral responsibility for these decisions."[107] Fundamental for Wilhelmsson is the challenge to overcome the prevailing notion of self interest, and his internal approach can also be described as a constructive response to a development which risks becoming destructive. It is also possible to here trace the outlines of a belief in the importance of reinforcing welfare based on solidarity on the micro-political level.[108]

Another theorist who elaborates on what can be characterized as an internal sociolegal approach is Tuori. He suggests that we need a "critical legal positivism". Much like Wilhelmsson he bases his theory on a relatively advanced external analysis, though in Tuori's case the emphasis is on public law. Tuori argues that we ought to analyze law on three different levels: the surface level, the legal culture level and the deep structure level.[109] "Modern law does not consist

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103 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 18 (2001).

104 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 169 (2001). Our translation.

105 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 120 (2001).

106 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 19 (2001).

107 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 122 (2001). Our translation.

108 Wilhelmsson, Thomas: *Senmodern ansvarsrätt – Privaträtt som redskap för mikropolitik* p. 19 & p. 44 (2001).

109 Tuori, Kaarlo: *Kant och rättsvetenskapens tidlöshet* p. 5 (1997). Compare also Tuori, Kaarlo: *Två tolkningar av rättens evolution* p. 50 (1987). Tuori, Kaarlo: *Alternativ eller kritik, snäv eller utvidgad doktrin* p. 186 (1988).

merely of regulations that can be read in statute collections or court decisions found in law reports. It also includes deeper layers, which both create preconditions for and impose limitations on the material at the surface level. I call these sub-surface levels the legal culture and the deep structure of law."[110] The conscious discourse takes place, in Tuori's theories, primarily on the surface level of the law. "In modern society, the surface level of the law can in fact be viewed as a forum for debate, in which legislators, judges, and legal scientists carry on a discussion, the results of which are always temporary."[111] The real communication that takes place on all levels represents, therefore, the hidden order. A significant statement of position which follows from Tuori's theories is that as long as the discourse on the surface level adheres to the predominant general teachings and the fundamental principles that exist on the 'deep structure level,' efforts to adjust to a transformed industrial reality will not be questioned. Conversely, problems of legitimacy will inevitably arise when the administrative knowledge processes create legal perceptions which are in conflict with fundamental principles on the deep structure level. "The delimitation function is expressed when, for example, one is assessing the legitimacy of individual laws: a law that is in conflict with any of the principles on the deep structure level is illegitimate."[112] It is of significance in this context to note that it is not only principles relating to for example ideologies on the sources of law, that we discover on the deep level, but also fundamental values and principles on which all of society rests. When Tuori describes the selection process on the deep structure level he relates to, *inter alia*, a concept-related dimension where basic concepts form the foundation for legal thought on both the surface level as well as on the level of legal culture.[113]

A possible conclusion following from Tuori's multilayered analysis is that the transformation of the economy will result in a legal paradigm shift which will affect law on all layers. The constructions of rights, property, associations and contractual business models all have their deep structure rooted in the industrial economy. The adjustment of interests which follows as a result of market-technical paradigm shifts, exemplified in the transformation of society by for example advances in information and genetic engineering technologies, means that the values on which the concepts of, for example, property and ownership rest will also change.

The internal implications of Tuori's theory on critical legal positivism is that the lawyer, in practice as well as in legal science, should develop an immanent criticism – a criticism within the framework of positivism. The criticism should contribute to the reconstruction of the law, both as a normative order and as specific legal practices. Furthermore, according to Tuori, law has in this context two faces. "On the one hand, it can be approached as a set of norms, as a legal order; this is the aspect that conventional lawyers in the spontaneous positivism equate with the law. However, there is also another aspect to the law: it can also be ex-

110 Tuori, Kaarlo: *Critical legal positivism* p. 148 (2002).

111 Tuori, Kaarlo: *Kant och rättsvetenskapens tidlöshet* p. 5 (1997). Our translation.

112 Tuori, Kaarlo: *Kant och rättsvetenskapens tidlöshet* pp. 6-7 (1997). Our translation.

113 Tuori, Kaarlo: *Critical legal positivism* pp. 162-163 (2002).

amined as a set of specific social practices, as legal practices. These two aspects of the law are in constant interaction."[114] The immanent criticism should take both faces into account. Thus, Tuori's theory can be described as an internal sociolegal theory, which accepts both of these faces as well as the need for immanent criticism based on how the law as norms is developed on the three layers.

When elaborating on sociolegal approach to law as norms it is quite close at hand to begin this by categorizing different norms. Hydén has undertaken the elaboration of a general theory on norms,[115] in which he elaborates on norms both from an external as well as an internal point of view. In his external analysis he focuses, for example, on how norms are created as the result of practical actions and vice versa. Especially interesting for this article is his theory on how legal systems provide norms for self regulation in other systems, and how legal norms act as intervening norms and solve inter-system conflicts. Closely related to this, and thus also of considerable interest, are his theories on how legal norms constitute and govern the rules of market interactions and power games.[116] When confronted with globalization and the IT revolution, Hydén concludes that with the increase of self regulation we need, *inter alia*, to deepen our understanding of how the social constructions of contracts are used and can be used as normative instruments. "The instruments used to create collaboration between people can be traced back to two fundamental instruments: the organization, which operates through leadership, but which builds on agreements and implies a role structure, and the contract which also takes its starting point in the agreement and implies jointly formulated norms for the intended collaboration. Collaboration in its different forms is of course studied within the social sciences, yet this is done without the normative structure of the contract as frame of reference. Within legal science, instead, the focus is on the contract as a formal phenomenon, concerning itself with questions of what legally constitutes a valid contract in terms of rules regarding the entry into a contract and its grounds for invalidity. Its content, and the usage of the contract, are of limited interest. Specific aspects of contracts are left outside of the scientific treatment, and float between two dominating science traditions, social and legal science."[117] He further concludes that it is not the parliaments of the nation states or the courts that will drive the development of new legal solutions in the internationalized market; it is instead attorneys and in-house lawyers representing transnational firms who define the rules of the game. To their aid they have contracts as regulation models.[118] Additionally, Hydén questions why we, in legal education as well as in legal science, do not focus on the skills of on how to use contracts as regulative

114 Tuori, Kaarlo: *Critical legal positivism* pp 121-122 (2002).

115 Hydén, Håkan: *Normvetenskap* p. 109 (2002).

116 Jfr Hydén: Håkan: *Retssociologiens relevans vid behandlingen af formueretlige spørgsmål* p. 126 (1989).

117 Hydén, Håkan: *Avtalets samhälleliga funktioner – mot en teori om avtalet som rättsligt instrument* p. 147 (2007).

118 Hydén, Håkan: *Avtalets samhälleliga funktioner – mot en teori om avtalet som rättsligt instrument* p. 161 (2007).

instruments.[119] An implication of Hydén's general norm theory is thus very much that we as lawyers need to develop skills and methods on how to govern the processes where legal rules are transformed into societal norms and vice versa. The contract is in this context both an instrument to create legal rules as well as a mechanism to promote an internalization process where legal rules are transformed into behavioral norms. When the contracts are written they become sources of law that we need to govern.

6 Towards a Sociolegal Theory for Market's Law

Building a generally applicable internal sociolegal theory which is operational in all aspects of law is not necessarily doable. We have learned from the realist endeavor that it is very difficult to build a normative framework which can enable the law profession to deal with the "reality of law". A more limited ambition is to try to build a sociolegal theory which would be possible to use in the legal construction of business. Building on the Nordic theoretical development it is, as we see it, possible to extract a number of foundations for a sociolegal theory, to be used in the context of what Karhu has labeled market's law.

When focusing on the construction of market's law, it seems natural for us to use precisely the construction metaphor in the development of a sociolegal legal theory. We can then relate to the design, construction, reconstruction, and the creative destruction and deconstruction of structures (the word structure has its origin in the Latin *structura*, deriving from *struere* – build up, arrange). The concept of the structure clarifies how human relations lead to the experience of ideological/imaginary phenomena and constructions, which can even be the phenomena we experience as the most important in society. This can apply to various perceived persons/subjects, including companies, organizations, universities, authorities, and yes, even states. It can also apply to perceived objects. Within the financial sphere, money, promissory notes, shares, options, insurances and other bonds are clear examples of such structural objects.

Drawing on the analysis above, we assert that it is possible to extract a number of sociolegal foundations which can be used as a basis on which to generate a theoretical framework for the market law. A first foundation is the role of the lawyer. In the market law context, where we have to break out of the framework of national law, the role of the lawyer is, as we see it, one of the most important social constructions. There is a need for a role which undertakes the obligation to constantly deconstruct and design market's law. A second sociolegal foundation is the realistic insight that law has no existence in itself, and tends to operate as a façade in relation to the real processes that take place. As we see it, the aim must be to build a sociolegal theory that recognizes both of the faces of law. A third sociolegal foundation is the approach to market's law as structural tools and structural building blocks. The ambition is to generate a substantial framework for the face of law as norms and norm systems in an international market's

119 Hydén, Håkan: *Avtalets samhälleliga funktioner – mot en teori om avtalet som rättsligt instrument* p. 165 (2007).

law. The final sociolegal foundation identified here focuses on the face of law as a practice by which business is constructed. These four foundations will be further elaborated on and discussed below

6.1 A Role-based Responsibility to Deconstruct and Design

A general sociolegal standpoint is that we as lawyers have a duty to recognize our responsibility to *deconstruct and to design legal constructs*. To be a lawyer in the setting of an international market is definitely associated with challenges, and it is quite easy to be captured in self interest. When elaborating on a sociolegal theory for the context of market law and the knowledge economy it is thus important to start with a clear focus on the role of the lawyer.[120] Our opinion is that we need to build on the theoretical development in Finland. By combining the contributions of Tuori and Wilhelmson we can elaborate on a role which builds on a responsibility to deconstruct and design legal constructs. This responsibility should be a typified obligation connected to the role as lawyer.

The notion of deconstruction implies an ambition to translate the legal constructions and construction processes into their underlying realities. Using the more radical approach of Lundstedt the challenge is to unveil the façade legitimization of law. Applying critical positivism according to Tuori this critical ambition could be to alternate between the two faces of law, which is certainly something that lawyers already do to a certain extent, which Lundstedt among others notes in his discussion. Even the conventional lawyer realizes, at least intuitively, the difference in her actions when she describes the meaning of for instance copyright for her client, compared to describing the meaning of copyright for the Supreme Court. In the former case, she makes a prognosis of the judicial practices and consequences that are expected to occur, particularly in the first instance of judgment, whereas she in the latter situation aspires to communicatively claim an as favorable position as possible for her client.

An internal approach will always include a normative pressure of loyalty towards some kind of legal framework/systems. The ambition of deconstruction and criticism must, as Tuori states, be immanent and cannot go so far as to question the process of law as such. Instead, the issue of unity becomes a subject for analysis, and will no longer constitute an axiomatic assumption. In relation to the client, the lawyer can explain whether there communicatively exists a uniform substantial construction, or if there are several practiced constructions with different communicative origins. If there is no unity and only a limited amount of trust exists, the lawyer will consider it natural to make this clear. In relation to the court, on the other hand the actual claiming process on the part of the lawyer will be obvious. In this obvious process we can be explicit and openly criticize different legal claims from a unity point of view. The judge as well as other lawyers will consciously discuss to what extent the application of the legal construction will result in communicatively reconstructing the copyright construction, etc. It will also be possible to discuss the problem inherent in a lack of unity and trust in a substantial legal construction.

120 Regarding the construct of the role see Lundqvist, Mats and Petrusson, Ulf: *Designing the role of the entrepreneur - using a norm constructionist approach at the interface of research, learning and innovation* (2002).

The notion of design implies that people within different legal professions admit that they take a normative role and are always participating in the construction and reconstruction of legal constructions. The notion of design underlines for the lawyer that she has a normative responsibility, partly as an active participant in the construction of the actual substantial legal thought constructions, partly as an active participant in the design of structural phenomena within industry/society when legal constructions are applied as building bricks. The lawyer realizes that regardless of which role she has, she will to a larger or lesser degree participate in the communicative acting, power and learning games, language and image games etc. that generate the experience of structural phenomena.

It follows then in the development of market law that it is fundamental for the lawyer, just as Wilhelmsson argues, to take on an approach that includes an individual responsibility. The notion of design requires that the legal profession in general, as well as the individual lawyer in particular, shoulders the responsibility for legal constructions. The notion of deconstruction means that the lawyer always has to question her role and what her tasks consist of. In the long run, it will be inevitable that the legal profession as a collective reconstructs its identity as well as the role allocation on the basis of the moral obligation to design and tend to legal constructions that are as appropriate as possible, while at the same time furthering public utility and sustainable development for industry/society as far as possible. The ubiquitous awareness of design will also make a democratic attitude possible, in which issues of participation and responsibility will be essential. Participation will be an issue of who it is that governs the communicative power processes that generate structural phenomena, and whose role it will be to simply accept and internalize the generated structural phenomena. This responsibility, which has to be based on a democratic attitude, will also mean that one consciously refrains from concealed reconstruction activities. For instance, as a professor of law one should not lightly write handbooks in IT law, biotechnology law, or license agreement law; at any rate not unless the notion of deconstruction is present and clearly evident. When authors of handbooks make it clear that they are designing possibilities and not describing the law, the situation is naturally considerably less problematic, and this type of clarification certainly does not have to mean that the designed constructions would necessarily be used less frequently.

An important question is of course to which degree the notion of deconstruction shall be typified in relation to the role of the lawyer. For some actors, for instance legal scientists, it is reasonable to claim that the notion of deconstruction should be highly present, as it cannot be sufficient from a scientific perspective to only describe legal constructions. Still, from our perspective it remains fundamental that the responsibility of deconstruction is associated with the role of the lawyer per se. This is especially challenging in the role of the lawyer within the context of market law.

6.2 A Sociolegal Recognition that Legal Constructs have no Existence in Themselves

In an increasingly structure-based world, it is thus decisive that we are able to increasingly control those processes where structural subjects, objects and rela-

tions are generated, as well as the underlying processes of which these in reality consist. Taking on our role and responsibility to both deconstruct and design, a foundation, in line with the insights of the Scandinavian realists, is to realize that rights and structural phenomena do not have independent existence. Using the realist thinking, we need to understand how for example rights, property, and other created structural objects in the practice generate *favored positions*,[121] and to understand which *consequential beliefs* are brought about.[122] . Fundamental in all of this is the challenge of unveiling the *self-assertion of the individual*.[123]

However, if we consider it to be one of our main obligations to design and construct structural phenomena in a business setting, is it not then risky to deny the actual existence of structures? Is it really possible to build an internal legal theory on this approach? Is not the risk imminent that this questioning, in accordance with what has been said above about the Hägerström-Lundstedt mistake, will result in the removal of structural phenomena, i.e. that the prerequisites for trust and permanence will be undermined? Many are those who have come to this conclusion. Peczenik, for instance, belongs to those who, by referring to the three worlds of Popper, regard it as impractical not to consider legal constructions and other institutional facts[124] as realities.[125] We believe that this reaction is understandable, but at the same time we also believe that it is a normative mistake - one which is not acceptable given the runaway structural transformation we are experiencing today. Instead of normatively taking the existence of legal constructions for given, we ought to aspire to establish uniformly accepted structural phenomena, which are experienced to be permanent and are thus capable of generating trust. We need to realize that we constantly, using Tuori's concepts, have to have both of the faces of law present. In the context of market law it is quite natural to accept that if we are to govern law as rules and norms, we need to be able to govern law as practices, and vice versa.

Thus the theoretical key concerning the notion of deconstruction as well as the omnipresent notion of design is the ability to alternate between the two faces of law in a market's law setting, which we will describe as a *norm substantial* and a *reality/practice aspiring approach*.[126] When alternating between on the one hand a practice/reality aspiring and on the other hand a more legally substantial attitude, one will rather soon realize that the substantial attitude is multifaceted in itself, and as a consequence one will be compelled to accept a pluralistic substantial attitude. When we take the aspiration to reality/practice as a starting-point, and accept that legal constructions do not have independent existence, we can in principle go so far as to claim that each individual who has in-

121 Lundstedt, Vilhelm. *Obligationsbegreppet* p. 107. Senare delen. Första häftet. A.-B. L Norblads bokhandel (1930).

122 Ibidem p. 104.

123 Ross *Om ret og retfærdighet* p. 214 (3rd ed. 1971).

124 Concerning the concept "institutional facts", see Searle *The Construction of Social Reality* (1995).

125 Peczenik *Vad är rätt* p. 180f (1995).

126 Compare David: Doublet, David Roland: *Rett, vitenskap og fornuft* (1995).

ternalized a conception of law has a substantial attitude of his or her own. The simultaneous occurrence of communication makes it possible for us to discuss more or less predominant substantial legal constructions. In situations where there are no divergent opinions about what the substantial conception of law consists of, i.e. there are no different legal conceptions, we can relate to predominant and generally accepted legal constructions. We can also relate to changing substantial legal constructions. The aspiration to reality establishes how "self-assertion interests" etc. place communicative pressure on change. As more and more individuals change their legal conceptions, we can state that a predominant substantial legal construction is gradually replaced by another. In this context, it is important that we create an explicit awareness of the real communicative transformation, and thereby openly demonstrate the existence of different substantial legal constructions.

The ability to alternate between the two attitudes makes it possible for legal scientists as well as legal practitioners to create an awareness of the interplay between the cognitive openness and the relative normative closure within the framework of the substantial construction. The degree of closure/openness concerning value/interest discussions, and the acquisition of conceptions of societal consequences, etc., is especially interesting. When the discrepancy between the "search-process" (the process that is cognitively open) and the "justification-process" (the relatively normative closed process) is large, this may be an impetus towards making the substantial construction more open, i.e. to allow a larger degree of empiricism etc. within the framework of the construction. In this context, it is of decisive importance that the legal profession collectively acknowledges the cognitive openness and allows for a practice and reality aspiration. At the same time, it is necessary that we acknowledge the importance of the substantial legal construction. The importance of substantial legal constructions such as institutional facts/structural phenomena in society will always mean that we have to handle the problem of the cognitive processes and the superficially legitimizing effect that they can lead to.

6.3 A Sociolegal Theory to Govern Structural Tools and Building Blocks

The third foundation in the market law context is the distinction between legal constructs as a structural tool – *a constitutive legal construction experienced in the society process* – and a structural building block – *a constitutive legal construction applied in the society process*. We here build on the realist insight that all legal constructions work, in some respect, with a normative/regulative effect on their addressees, within as well as outside of the legal machinery. They create normative experiences determining which actions are allowed/prohibited and what one may, may not, has to, can, ought to and ought not to do, respectively. In the setting of markets law, however, legal constructions that also work constitutively are especially interesting.[127]

127 An important source of inspiration outside of the Nordic discussion is Searle, who describes how the concept of constitutive norms can be used to explain the creation of institutional facts. Searle, John (1988). *Speech Acts*. Cambridge: Cambridge University Press. Within the field of legal theory there are of course also important contributions outside of the Nordic countries which have elaborated on the concepts of constitutive norms. *See* for example

Thus, elaborating on a substantial approach market's law we could see how legal tools emerge on an international arena. The legal constructions referred to in for example legal texts, such as patents, limited companies, employment agreements etc., constitute structural tools, which, when used, result in the creation of structural building blocks – building blocks used in the establishing of companies, the creation of different commercial relations, the construction of markets etc. When for instance an owner of a business considers establishing a trade relation, she considers such tools such as the employment construction, the representative construction, the agent construction, the retail construction etc. Concerning patents the role of the structural building block is provided by a central authority, i.e. in this case the patent office. Concerning other structural tools, such as for instance the copyright construction and the majority of agreement constructions, these are experienced as realized when a specific context is assumed to be at hand. If a conflict arises, it is the court that ultimately is to decide what constitutes the structural building block/the applied constitutive legal construction. The legal construction applied by the court has consequently, after the judicial process, a direct normative effect on what constitutes the experienced applied legal construction in the specific context. Indirectly, the legal construction applied by the court works normatively on what it is that constitutes the structural tool. A judgment about what in a specific experienced agreement relation constitutes a licensed object, can very well influence the experienced license agreement construction and the extent of what can be imagined to constitute an object of a license agreement.

When we start to deconstruct/unveil the structured complexity of market's law and the construction of business, we will come to appreciate the importance of norms. We therefore share Hydén's aspiration towards a more comprehensive theory on how norms in the international market setting will be experienced as legal, while others will be experienced as organizational or social.[128] Legal rules that can be transformed into building blocks are those that can be characterized as constitutive, i.e. they will, when applied, confer a specific legal status qualifier on intellectual phenomena. Constitutive legal norms are used as tools to create and qualify intellectual persons, intellectual properties, roles, relations and transactions. Some constitutive norms are legal definitions, while others mandate specific actions. For example, a definition of a patentable invention can be used in claiming patentable inventions. To qualify for a patent, the business actor has to follow the prescribed activities in the administrative application procedure. Constitutive legal norms tend to be addressed to a variety of different actors. For example, a legal norm defining what it is that is considered patentable is a tool addressed to business actors, patent examiners and judges. The business actor will use the norm as a tool when claiming what a patentable invention is, whereas the patent examiner will use it to grant/reject patent applications, and the

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MacCormick, Neil & Weinberger, Ota (1986), *An Institutional Theory of Law.* Dordrecht: Kluwer.

128 Compare Nelson and Sampat who conclude that institutionalized social technologies take on the character of norms. Nelson, Richard and Sampat, Bhaven (2001), *Making sense of institutions as a factor shaping economic performance*, Journal of Economic Behavior & Organization vol. 44, issue 1, p. 45.

judge will use it to validate/invalidate patents. A legal norm determining who can apply for patents can be used as a tool to confer/qualify proprietorship. The quality of 'proprietor', and of the property, constitutes the basis for market transactions.

Also, the qualification of a legal actor, such as a company, is based on constitutive legal norms defining what a company is and what for example the registration requirements are for the company. Other legal norms are used to qualify the competences of the company – norms that can be characterized as competence norms. Through the application of various constitutive and competence norms, different institutional functions, (including that of the board of directors and the CEO), are qualified and assigned different competences. Altogether, these tools are fundamental in the construction of the firm as a hierarchical organization. The usage of legal constitutive norms enables the usage of other constructive tools, such as models on how to organize and govern business activities. Shareholder agreements, visions, business plans, policies and strategies are, when implemented, important building blocks in the construction of firms.

Examples of tools	***Tool Elements***	***Sources of knowledge***
• Asset & capital concepts • Property concepts • Property right concepts • Company concepts & models • Contractual relations contracts & models • Role/competence concepts & models • Financial instrument concepts & models • Value/valuation concepts & models • Concepts & models for organization • Concepts & models for standardization & market creation • Concepts & models for open source & other intellectual commons	• Stipulative definitions & descriptions • Prescribed criteria • Prescribed attributes • Symbols • Illustrations • Prohibitions • Competences • Obligations & duties • Permits • Sanctions/Prescribed consequences • Visions • Values • Interests • Principles	• Regulation • Court case precedence • Contracts • Policies & decisions • Strategies • Research reports • Published checklists, handbooks, etc.

Figure 1. Elaborating on an structural toolbox.

Thus, a fundamental challenge in market's law is to build a structural toolbox. Some of the tools will be international, while others are national. If I am to establish a contractual relation I need to have tools that will make it internationally sustainable. It is not acceptable if it will not be recognized in the system of a particular state law. If I for example wish to build a patent portfolio I have to use nation-specific tools to build national patents. Thus, market's law will always, at least in some respects, be based on state law.

6.4 A Sociolegal Theory where we Question the Level of Permanence and Collective Trust in Legal Constructions

A fourth foundation, when working with the development of the legal system in the market's law context, an internal approach to how norms, as tools and building blocks, interact. An important sociolegal foundation is consequently the development of a theory for the practice dimension of market's law, i.e. the second face of law. We need an internal approach to the design and construction process.

A fundamental understanding which is quite well established within sociology is that trust, permanence and uniformity are fundamental values in a society based on structures. In a market law context this is expressed in the fact that one of the major obligations will be the participation in the process of reification. A general reflection concerning all forms of structural (institutional) phenomena is that communication makes collective learning and internalization possible – the phenomenon becomes a part of what is taken as given, whereupon externalization occurs.[129] That the creation of legal structures is associated with a communicative process is obvious, and the more people who internalize the imagined legal construction, the more that construction becomes externalized. Concerning legislation aiming to change or influence behavior, the fundamental condition for its success is that the content of the rules is communicated to the parties concerned. If this is done successfully, the desired behavior will eventually become an unconscious element in the everyday life of individuals or companies; the legal construction is externalized and taken as a given. In order for designed structural/institutional facts – for instance companies, patents, contractual relations – to be possible to apply, it is necessary that they are placed in an immediate vicinity to our everyday life by internalization in our everyday language and image games. In the same way that the ability of people to internalize the imagined construction as a structural tool grows, by for instance having knowledge about and operatively being able to relate to thought models as invention concepts or the model of license agreements, the greater the need becomes for companies regarding their technology as patentable inventions and regarding their commercial relations as license agreements. Here, we can see how on the one hand the actual model of license agreements (the tools) is externalized and on the other hand how the license agreement entered into (the building block) is externalized.

The tool of the legal person is in this regard a revolutionary creation, which allows us to discuss a company that owns objects, has the ability to act, exists in a certain place, can be an employer etc. The conceptions of the agreement are

129 A major contribution important to relate to in this context is Berger and Luckmann: *The Social Construction of Reality* (1966).

upheld by the act of us talking about ourselves in our capacity of parties to an agreement; we are employees, buyers, tenants, leaseholders etc. The permanence of the conception of marriage is upheld by the fact that we discuss couples as married, as husband and wife, etc.[130] The structural tools create images, which we contextually can transform into a society constructing and a structurally transformative power game.

Another general element which enables structural phenomena to be experienced as permanent is documentation.[131] Much like communication, documentation is a means to make knowledge available; the possibility for internalization creates the prerequisites for externalization. The more important a new construction is, the more important it is that it is expressed in written contracts and other written sources that can uphold the appearance of permanence.

In this context, we must not disregard the fact that it is the communicative conduct that primarily generates the experience of permanence. If a well-designed legal construction is not internalized either within the legal machinery or within society, it will not be experienced as permanent. Constructions that constitute a communicative result of the conduct of industry have, from this perspective, undoubtedly an advantage over others when it comes to achieving an experienced permanence.

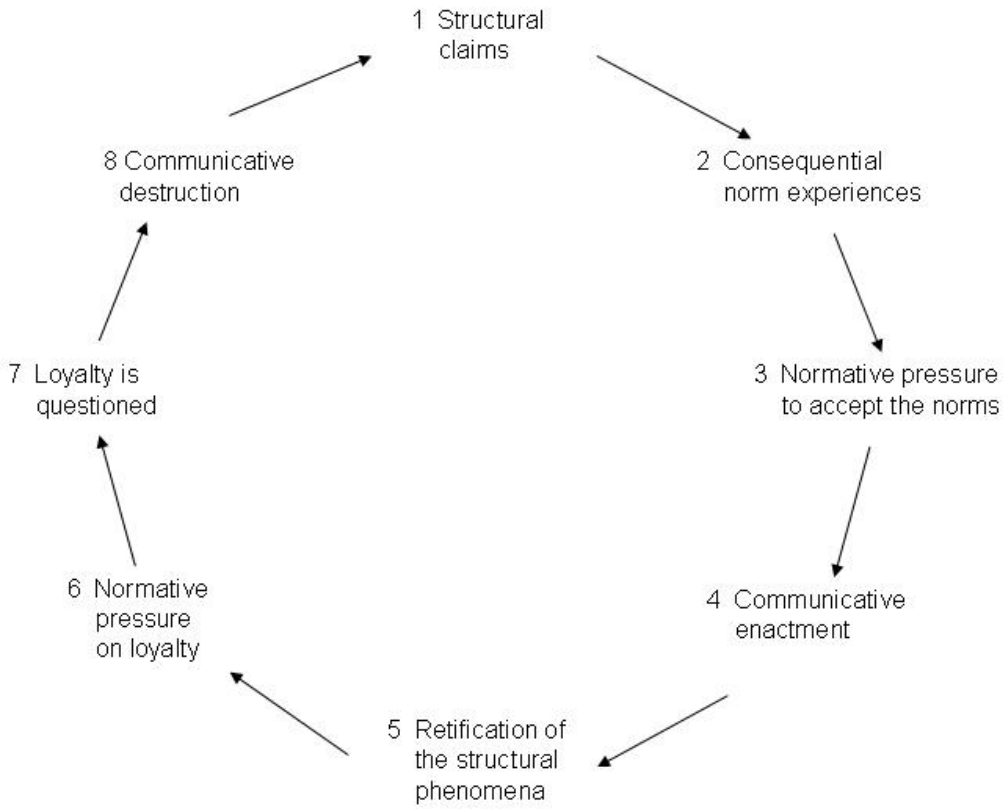

Figure 2. Reification and structural transformation.

130 *Cf.* Searle *The Construction of Social Reality* p. 113ff (1995).

131 *Cf.* Olivecrona *Om lagen och staten* p. 48 (1940).

When a court judges in accordance with a certain legal construction, this is naturally a very strong signal of permanence. Even the circumstance that there is a risk/possibility that a court will intervene is important from the point of view of establishing the experience of permanence. A general element in this context in order for structural phenomena to be experienced as permanent is also the existence of different roles of professions and expert professions. Stock exchanges, finance analysts etc. are structural participants of large importance in order for financial instruments to be experienced as permanent. The general knowledge that there are experts who can handle specific structural phenomena acts as support for the permanence of those phenomena, and the result is that for the masses, it is sufficient to internalize phenomena only on a superficial level in order to feel trust. The different roles of the legal profession cannot be underestimated in this context. Collectively, not only the structural tools, i.e. the imagined legal constructions, are tended to, but also the extant structural subjects, objects and relations in society. The judiciary, which possesses the power to determine whether or not the applied legal constructions, (e.g. the inventions and license agreement) shall be upheld etc., are naturally especially important. Thus, it is in the practice we will learn how markets law is based on state law.

6.5 A Sociolegal Approach to Contracts

In many ways the contract is one of the most important elements in market's law. International business is to a large extent a question of developing contractual networks of norm systems generating the reification of assets, property, transactions of property, alliances, joint ventures, etc. We consequently agree with Hydén when he elaborates on the need for a deeper sociolegal understanding of contracts. This is also a good context in which to apply the sociolegal foundations discussed above.

The contract is, of course, one of the most interesting phenomena, both as a tool and a building block. National legal rules, such as the prerequisites which must be met for a contract to be binding upon its parties, qualify the contract as a constitutive tool to use when designing and constructing different business phenomena. For example, conceptual models on methods for licensing, franchising and merchandizing trademarks, become important tools when constructing commercial relationships regarding trademarks. Agreed-upon norms will qualify commercial relationships. Clearly then, when focusing on contracts, the extent to which business structures are based on regulative norms becomes obvious. Agreed-upon norms regarding appropriate behavior – the rules of the game – are, in many respects, the most important intellectual elements in the construction of firms and markets. Agreed-upon norms for when and how to pay for something form the basis for qualifying a debt as financial capital.

In long-term relationships it is of course not necessary to write a contract for each activity or transaction. Each contractual relation can have a written contract including tools (constitutive norms) which can in turn be used as the basis for claims concerning which role a specific actor has, what a relevant intellectual property is, or who has the right to do something. These tools can possibly result in conflicting claims, especially since typified obligations connected to a specific role can be claimed through the use of other legal sources as well. At the same time, it is important to see that communicative actions continue as contractual

relations. From a reification point of view, network based business, and even hierarchic business, are both based on layers of contractual relations between different constructed roles that have been internalized and are represented by individuals. The firm, as a structural order and construction, contains innumerable roles, such as employer, contractor, consultant, debtor, creditor, seller, etc. All of these roles are represented by individuals because of the experienced norms of loyalty and other contractually typified obligations, which they experience as a result of their identification of their own roles.

As demonstrated, when analyzing the interaction between legal tools and legal building blocks, contracts can be extremely sophisticated intellectual constructions. It is possible to write contracts as a means to create business structures, as well as to in turn create other tools. When apply our understanding of the reification process in the practice of market's law, we will learn to view contracts as norm experiences which can be 1) only to some extent agreed upon, 2) accepted and 3) internalized. A relationship between two firms may not be recognized and internalized by any other group than the lawyers that have drafted the contract. If that is the case, then the contract may primarily include tools that can be used in a business arena, but perhaps not in a court. Often lawyers draft contracts as a communicative document between lawyers. The clauses are addressed to the actors in the judicial arena, i.e. the judge and the lawyers representing the parties of the contract. Of course, because of the importance of validating business phenomena, written contracts always have to be addressed to the actors in the judicial arena, but at the same time the written clauses also have to be addressed to business actors. If the written clauses are not accepted and agreed upon as norms among the actors in the business arena, they will not result in an intellectual construction process. The greater the number of people that internalize the written clauses as jointly understood and accepted norms, the stronger the reification process of the business phenomena.

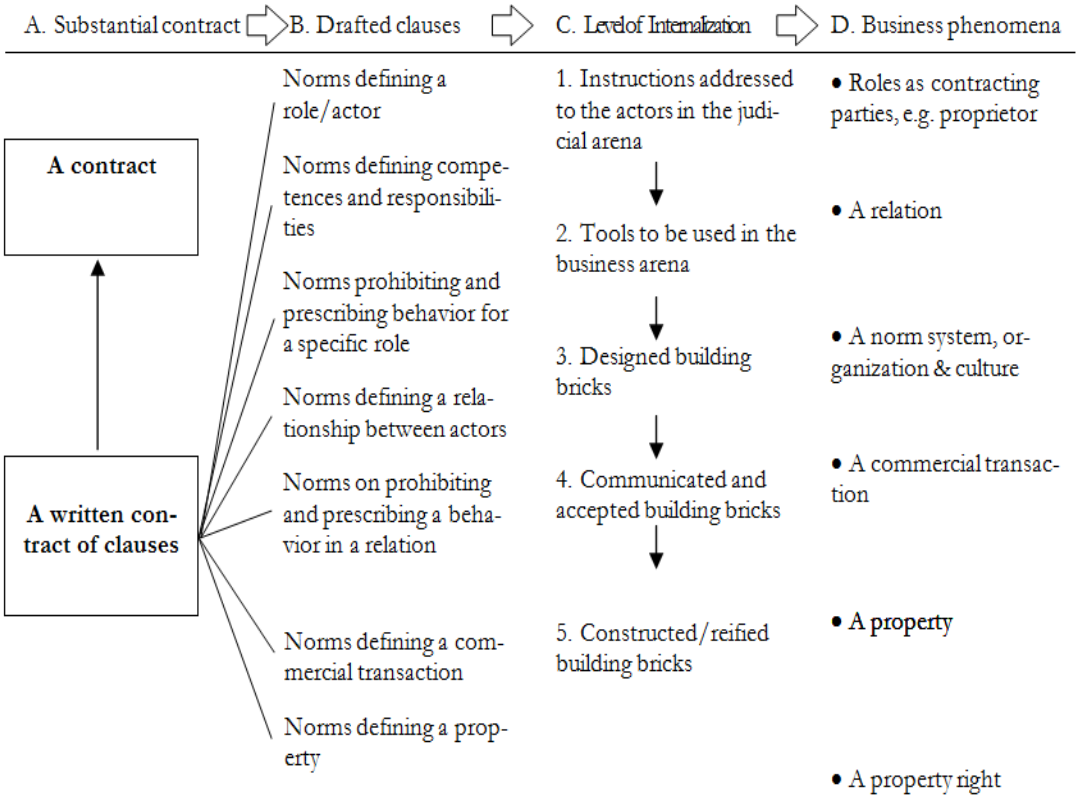

Figure 3. Governing written contracts as means of reifying business.

Thus, applying a sociolegal approach to market's law, we will learn to govern contracts as internalization as well as externalization processes. In some cases, already internalized norms are explicitly codified into written agreements. In other cases the actual internalized norms do not correspond with the written clauses. Hence, the written clauses can be seen as tools that can be used to reconstruct the norm culture, organization, relationship, etc. If, instead, managers have internalized and agreed upon the norms, the clauses can be understood as designed building blocks that must be implemented in order to result in a construction process.

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