

Towards a Theory of Law and Societal Development

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Abstract

To have an idea and understanding of law and its development, a theory of law and its character is needed. When legal theory is discussed, this generally has a legal philosophical character. This means that such theoretical reasoning encounters difficulties in reaching beyond a taxonomic stage characterized by divisions of different types of law. Neither has sociology of law devoted any specific interest to the question of the relationship between legal regulations and their corresponding societal entities. The apparent question of which social conditions correspond to different types of legal rules has not been addressed or, at any rate, treated in a systematic manner.

There are approaches to research in sociology of law, however, which aim to describe the legal development in terms of different stages. Already, the first sociological studies of relevance to sociology of law by Emile Durkheim used the law as an indicator to describe the development of society. I am inclined to emphasize that different legal types are present parallel with each other but with different functions and, in particular, with varying strength over time. This leads the thought to patterns that legal development assumes over time, where one legal form is displaced – without disappearing – in favor of another. The British sociologist of law Roger Cotterrell has highlighted different social characteristics in the form of polarities which he believes characterize contemporary legislation.

My own position is to look at social development in terms of S-curves or waves. When we look at different societal systems and the transactions between them from a historical angle, we can see that societal development appears to be cyclical. Societal development can be regarded as waves breaking forth. These times of dramatic change which we are presently experiencing between an old, overly mature industrial society and the current information society can, for the sake of simplicity, be described as a society in transition. In this situation, contradictions appear between the old and the new. Tensions arise between people who live with different conceptions of the world depending on where they have mentally localized themselves.

The logic behind legal development tends to differ from societal development. The development of normative and legal history is distinguished by its movements within the frame of bipolar opposing pairs. I therefore call this the locomotive of legal change. It combines two separate and incompatible expressions. The metaphor of the locomotive reflects this conflict between static and dynamic, between position and movement. The locomotive unites the synchronic and the diachronic perspective. Whilst the locomotive moves forward, carriages are attached as the society undergoes various developments. The direction of movement is the same in the entire industrialized world. The differences in speed and development depend on, amongst other things, the relationship between the different, bipolar, normative positions that determine the normative fundamental pattern. This is then related to a number of circumstances from societal economic development levels, through institutional traditions to technological conditions.

1 Law as an Indicator of Societal Change

To have an idea and understanding of the developmental processes, a theory of law and its character is needed. When legal theory is discussed, this generally has a legal philosophical character. This means that such theoretical reasoning encounters difficulties in reaching beyond a taxonomic stage that is characterized by divisions of different types of law. The starting point for understanding different laws, then, becomes their mutual relations and characteristics. This can be regarded as a reflection of the circular nature of law in its present stage. The law is nothing more than what is defined as the law, which in turn can be divided into different sub-categories. "Relatively little time is spent on the study of law as a system, its differentiation from other social systems, or the interaction of its parts," writes Terence Daintith.¹ The equivalent within jurisprudence that takes its starting point in the social sciences could be Niklas Luhmann's and others' description of law as a normatively closed system, where the emphasis lies in the explanation of how different societal subsystems are able to communicate and interact with each other in terms of autopoietic systems.²

Neither has sociology of law devoted any specific interest to the question of the relationship between legal rules and their social background and their corresponding societal entities. The apparent question of which social conditions correspond to different types of legal rules has not been addressed or, at any rate, treated in a systematic way. Jørgen Dalberg Larsen states that the legal system has a genetic side that corresponds to the question of what lies behind a certain law, and an operational side that deals with the effects in various respects.³ However, I distinguish between a vertical, deductive perspective of the legal system and a horizontal, cause-oriented approach to law, in which the latter corresponds to Dalberg Larsen's perspective.⁴ But in both cases, it is either a question of highlighting the one perspective, i.e. the background to why we have rules of law, or the other, i.e., the consequences and functions of law. The two perspectives are not integrated into one cohesive theory of the relationship between law and society.

Another tradition within sociology of law concerns the implementation of laws and the problems it faces.⁵ These studies provide us with knowledge of the conditions under which law can be expected to operate according to its intentions. Some types of legislation require specific institutional arrangements to be maintained. This applies primarily to the laws inserted into social life from the outside and intended to be implemented in a top-down perspective. These studies tend to consider law as a black box, i.e., as if the legal design is

1 Daintith 1989:361.

2 Luhmann 1993.

3 Dalberg Larsen 1999.

4 Hydén 2008.

5 *See*, for instance, the classical study by Per Stjernquist, 1973.

meaningless for the implementation. There is therefore no accumulation of knowledge of the relationship between law and society within this research field.

Within sociology of law, there are also research approaches which aim to describe the legal development in terms of different stages. Already, the first sociological studies of relevance to sociology of law used the law as an indicator to describe the development of society. As the main representative of this scientific approach, Emile Durkheim's study, *De La Division du travail social*, can be mentioned in which the author uses change over time, from an emphasis on criminal to civil law, as an indicator of a society in transition from mechanical to organic solidarity. Another such classic example is historian Henry Maine's study of the development from status to contract.⁶ Even Max Weber's analysis of different types of authorities can be mentioned in this context, where legal authority represents the modern society.⁷

The American sociologists of law Phillippe Nonet and Philip Selznick have divided legal development in modern time into three phases: Repressive law, autonomous law and responsive law. The form of the legal system may, in their view, be seen as an indication of societal development. Repressive law responded to the need to legitimize an emerging political order.⁸ With the initiation of a new social organization principle followed, according to Nonet-Selznick, a need for change in the legal structure. In response to the repressive phase, autonomous law evolved. This law, which was initiated during the last century, was perceived as standing above social, economic and political problems. This became an ideal to maintain which created a dividing line between law and politics, and between legal and social sciences.⁹ The autonomous law corresponds to what Max Weber called a formal legal rationality, characterized by strict rules and norm-driven decision making, universal and precise rules and supervision of a legal profession. The autonomous law also gives rise to a very specific system rationality that is legitimized through procedural regularity

Nonet-Selznick claim that we crossed over into a third phase during the postwar era, namely, responsive law. Law became a more flexible social institution in a position to learn from experience and react flexibly to social needs and human expectations of the surrounding community. In this new legal form, legal decision-making is governed by considerations of purposes which are based on social scientific knowledge and different mechanisms of participation, whereby citizens are drawn into the use and development of law. This means in turn that the former, strongly maintained distinction between law, society and politics is weakened.

6 Maine 1959.

7 Weber, Max, *Economy and Society*.

8 Nonet-Selznick 1978:29.

9 Cf. Dalberg Larsen 1984:194.

This turns formal and autonomous law into an orientation towards a material content. The purpose-oriented law requires goal-oriented funding rules. The previous norm-oriented decision-making method is replaced to a greater extent by policy analysis for finding the purposes of law. The new responsive law also requires new institutional and organizational structures. An integration of legal and moral judgments and the legal and political participation is needed.¹⁰ The function of the legal system is, according to Nonet-Selznick, to create harmonization of the institutional and social context, rather than to influence the social contexts as such. Instead of directly entering into a specific social outcome, law is referred to structural arrangements such as negotiations, decentralization, planning and channeling of conflict.¹¹

Jørgen Dalberg Larsen has touched upon similar ideas in his description of the transition from law to the welfare state.¹² Another sociologist of law to have dealt with legal development in stages is Gunther Teubner. In an article published in the *Law and Society Review* in 1983, he puts forward a theory that law moves from formal to substantive law and onwards to what he calls reflexive law. Teubner agrees with Nonet-Selznick that we have passed a stage of formal law, which is consistent with the concept of autonomous law, and have since entered a stage of material law. Teubner believes the transition from formal to material law should be divided into two types: A "genuine" material law which is used to realize specific, concrete values, what Teubner calls substantive law, and another type of material law which Teubner has labeled reflexive law. This latter, legal form is characterized by constitutive and procedural rules that put limits on legal developments without specifying concrete material values to be realized. Teubner summarizes the characteristics of reflexive law by placing it against a relief of formal and substantive law as follows:

“Reflexive law affects the quality of outcomes without determining that the agreements will be reached. Unlike formal law, it does not take prior distributions as given. Unlike substantive law it does not hold that certain contractual outcomes are desirable.”

These legal forms discussed above can also be traced in Swedish legal traditions. For my part, however, I tend not to view development as an evolutionary process in which a legal form replaces another. Rather, I see it as society gradually expressing demands for changes in legal forms, without the former legal forms completely disappearing. I am, therefore, more inclined to emphasize the simultaneous involvement of the various types mentioned. The different legal types are present in parallel with each other but with different functions, and in particular of varying strength over time. This rather leads the thought to patterns that legal development takes over time, where one legal form is displaced – without disappearing - in favor of another. I will, therefore,

10 Nonet-Selznick 1978: 104, 108 and 110.

11 Nonet-Selznick 1978:111.

12 Dalberg Larsen 1984.

make use of Anna Christensen's theory on normative basic patterns consisting of different poles that attract or repel the law during the development of society.

2 The Development of the Legal System via Bipolar Values

The categories which Anna Christensen examines, the pattern of market functions and protection of established positions, can presumptively be associated to a tense relationship which occurs in larger or smaller scales within all society systems between an interest in exploitation and a protection of the implementation of human needs. Cases in which exploitation coincides with or leads to the implementation of human needs cause a decrease in the significance of the protection of established positions. In vice versa, one can assume that if such exploitation actually threatens the implementation of human needs, the importance of safety precautions would increase. We can claim that economic values oppose human values, economic rationality against human rationality. There may be several reasons for why this opposition occurs. The fundamental organisation principles of society are determinant during certain circumstances. Another consistent feature is that a social system that has reached a certain, large degree of scale tends to retreat from the "people it serves." To use Jürgen Habermas' terminology¹³, opposition occurs between system and life-world. It also concerns the external effects that follow in a large scale society, thus causing it to become counterproductive with regards to the implementation of human needs which once drove forth ambition and the structure of society.

These factors vary over time. During the market epoch, technology advancement led to the separation of production and consumption and laid the foundation for the market as a distribution mechanism. This in turn gave rise to a distinction between a product's utility value as a consumer good and its transaction value in the market as a sales item. The distinction, which was a central aspect in Marx' analysis regarding the capitalistic economy, was accentuated through the invention and application of the concept legal person. This concept made it possible to refer to a company or some other sort of organisation as an individual person. However, the fact that there is a difference between a large company and an individual person (with regards to resources) has opened the market to disturbances in the shape of overexploitation of consumers. Consumers have demanded mechanisms that compensate in the form of consumer protection legislation.

13 Habermas, Jürgen (1995).

Hence, there is a connection between the invention of the concept of the legal person and consumer protection legislation. The background to the establishment of the concept of the legal person in the mid-1800s is related to the fact that industrial production underwent a phase during which it was expanding and required the ability to assemble large numbers of capitalists within the frame of a legal subject. This situation generated the division of what used to be regarded as natural persons into two types of legal subjects, physical persons and legal persons. By this separation, one could transfer the entire Roman legal system built on civil rights upon which the market economy leans in our current phase of society; the societal phase which is based on large scale industrial production. The invention of the legal concept, the legal person, also made it possible to transcend national borders as a first step towards the need for a global, legal order. The price society had to pay was the wave of intervening consumer protection legislation which was introduced during the 1970s and onwards. This was done to express the need for the protection of an established position, i.e., social protections against a dominating interest for exploitation. Since the individual person neither has equal strength nor equal access to resources as a large company, a Consumer Ombudsman and a Consumer Agency were set up in Sweden. Here we find a parallel to the introduction of the Environmental Protection Agency and the Environmental Courts which took place during the same period. Their task is to ensure that the individuals'/consumers' wishes are fulfilled in the market by the support of intervening legislations such as the Consumer Sales Act, the Marketing Act, legislation of unreasonable terms in contracts, home sales legislation, etc.

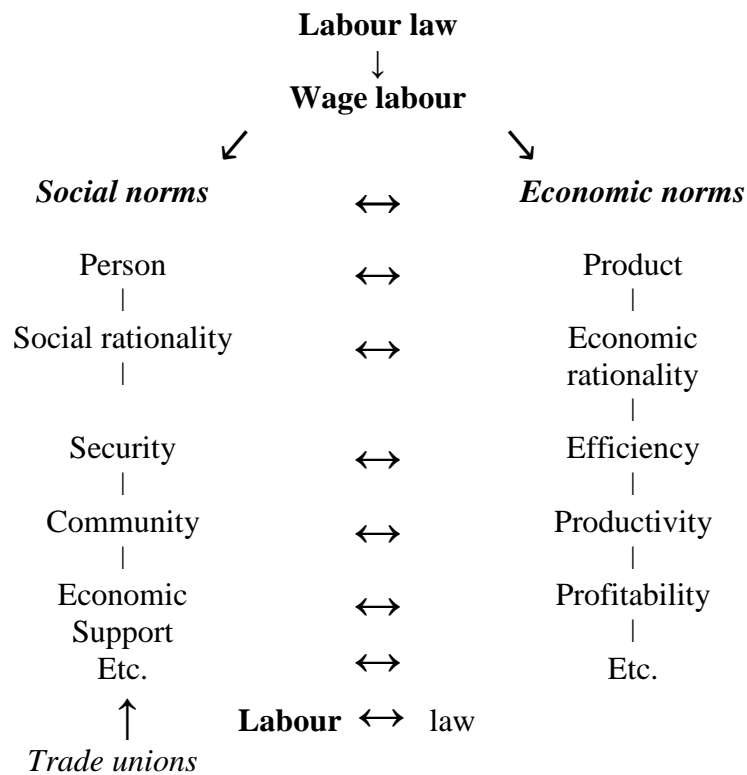
The tense relationships in the industrial society, which require compromises between exploitation and protection/preservation, can usually be deduced from the opposition between work and capital that occurs from the organisation of work in the form of wage labour. This inherent contradiction requires intervention to support protection of the wage labourer, first in the area closest to human needs such as health and work environment, thereafter in respecting livelihoods via income opportunities, followed by the growth of the collective labour law¹⁴ and finally the employment protection law.¹⁵ After a while, the systems come to dominate and force people into specific patterns in order to satisfy their needs.¹⁶ Since this leads either to overexploitation or to neglect of the human aspect, compensating mechanisms are generated. The development of consumer and environmental legislation as well as labour law constitutes such examples.¹⁷ For an illustration of the inherent contradictions related to wage labour, the following figure can be set up:

14 See Schmidt, Folke (1962) and Adlercreutz, Axel (1954).

15 See Numhauser-Henning, Ann (1984).

16 Cf. Habermas distinction between and discussion of the terms lifeworld and system, in Habermas (1981).

17 It was this juridical area that I mainly used in my treatise, Hydén (1978), to portray the growth of intervening rules. See also Hydén, Håkan (1999).



With the construction of wage labour it becomes legitimate to regard the worker and the workforce as consisting of individuals, the left hand side of the figure. For them, social norms are of primary interest. For the company owners and those representing management, economic norms are guides. These economic norms promote other values, as can be seen in the examples to the right in the figure. The figure also tells us something interesting about the role of law. The economic norms and the values attached to it do not need any legal support. They are initiated and upheld spontaneously and related to self-interest. They are in line with economic success and public benefit and are thereby supported by politicians. The social norms, however, are not of primary interest to the companies. Historically, they have been forced upon management by legal means. Today, we can see a huge superstructure of labour laws, at least in the industrialised world, compensating to a certain extent the lack of spontaneous interest in introducing these values into the operation of private (and public) business. Trade unions have played an important role in introducing and upholding these laws.

The same kind of figure could be set up for the environmental problems. They are constituted by a contradiction between ecological norms based on values about preservation and economic norms focused on exploitation. Here, the situation is similar to labour law. The economic norms are spontaneously cherished. They do not need legal support in other respects besides protecting the most efficient exploitation, such as through laws about oil and mineral extraction. The ecological norms and the preservation value need legal support to be taken into consideration during the exploitation processes. In this field, there is no given, organized interest. It is up to NGOs and political parties to put these forward as a social and political interest.

The distance between the social and economic norms and the ecological and economic norms respectively is an empirical question. Over time, both social and ecological norms seem to have come closer to dominating economic norms. One indication of this is the increasing interest in CSR, Corporate Social Responsibility, we have witnessed during the last decades.¹⁸ Another parallel movement is connected to the concept of sustainable development, SD. The key to success for every political initiative in the promotion of social or ecological values seems to be related to the ability to bring social and ecological values in line with spontaneous self-interests connected to economic interests; i.e., to integrate social and ecological norms respectively as much as possible with economic norms. This is what both CSR and SD are concerned with. Whether there are any limits to this integration process or whether it requires a re-definition and re-organization of work as the emerging network society indicates, is still an open question to which only the future can provide us with answers.

Anna Christensen's theory deals with changes within the normative foundation of market economy. She regards the market economy as an economic system built upon certain fundamental normative preconditions: Ownership, the freedom to conclude contracts and freedom of trade. In this way, the protection of established position may be seen as an expression of the need for social protection which emerges when these three legal institutions do not generate legitimate consequences in response to human needs.

This leads me to emphasize yet another condition which is important for the understanding of changing processes within the legal system: The relation and correlation between different normative patterns. The normativity which determines the compromise between the normative patterns based on market functions and the protection of established positions is not necessarily the same as that normativity which creates the needs and driving forces for regulation. There are several normative poles or dimensions which operate simultaneously and which either support or counteract each other over time. As examples of other such polarities, we can mention equal distribution versus distribution which is governed by needs and substantive justice versus formal justice.

18 See John Ruggie's various reports on Business and Human Rights, especially his final report as special rapporteur (2011). Cf. also McBarnet, Doreen, Voiculescu, Aurora, Campbell, Tom (2007) (eds.) *The new Corporate Accountability*.

The British sociologist of law Roger Cotterrell has in his book, “*Law’s Community: Legal Theory in Sociological Perspective*”,¹⁹ highlighted different social characteristics in the form of polarities which he believes characterize contemporary legislation. He underlines the polarities between order and justice as legitimating attributes, between *voluntas* and *ratio* as bipolarities of the juridical doctrine and also between empire and *community* as reflections of society which are implied and active in the juridical doctrine and rhetoric. Cotterrell suggests that order and justice are related to one another. However, order is a more basal attribute of society. The logic in this, then, is that there is no reason to strive for justice if one does not have the guarantee that it can be carried out. Within the concept of *Rule of law*, justice and order are joined through the accentuation of predictability, according to Cotterrell.

The opposing couple of *voluntas* and *ratio* stand between the will of the supreme, the unquestionable political authority and enforcement power on the one hand. On the other hand, it also includes the elements of considerations and principles, where the uniting force and convincement make sense through the logical pattern of the idea, normative consistency and rational coherence.²⁰ *Voluntas* represents the legal system’s need for hierarchy and political control. It is utmost the legal system’s political authority which gives the characteristic of a coherent legal system. Potential inconsistencies and indistinctness in court are concealed through the manipulation and practice of political power.²¹ As *voluntas* reflects the legal system’s political authority, *ratio* expresses the moral authority’s entity and integrity. *Voluntas* is associated with legal positivism in that if the element of *voluntas* increases, the institutionalization of the juridical doctrine tends to increase. This benefits the growth of a certain legal profession which grants law the characteristic of standardized politics, where preparations constitute the main source of law.²² Law is transformed into (legal) technique instead of art.²³ The legal system of today’s industrialized world is, according to Cotterrell, characterized by the fact that the substantial rationality – the juridical principles and the moral arguments supporting the contents in law – tend to be “piecemeal and localized.”²⁴

Similarly to the way in which order has priority over justice, *voluntas* dominates over *ratio*. Cotterrell suggests that this is shown, amongst other things, by the fact that when executive, legislative and judiciary powers are policy driven, they continuously interfere with the legal rationality which necessitates a jurisprudential “purification process.” The function it comprises is that of repairing the loopholes and gaps in the juridical logic. Cotterrell points out that *voluntas* and *ratio* both are independent of each other within the

19 Cotterrell, Roger (1995).

20 Cotterrell, Roger (1995) p. 165 f. and 278 ff.

21 For individual examples of this phenomenon, I refer to those case descriptions in Hydén, Håkan & Thoor, Alf. (red.). (1997a).

22 Cf. Hydén, Håkan (1999) Ch. 2.

23 Cf. Strömholm, Stig (1974). Also Højlund, Peter (1992).

24 Cotterrell, Roger (1995) p. 318 and Cotterrell, Roger (1989) p. 223 ff.

legal doctrine.²⁵ *Voluntas* can contribute to law and order whilst *ratio* similarly can contribute to chiselling out morally founded and systematized principles of justice. However, at the same time, Cotterrell sees these two values as related to and dependant on one another. There are certain limits to how much power the centralized government can possess in a legal sense before either being considered illegitimate or imploding like the Soviet system. In addition, there are limits to how far moral rationality can spread in the legal system. Morality is closer at hand within various sections of the legal system, whilst other sections depend more on political power struggle.

When studying the polarity between *imperium* and *community*, the same reasoning becomes significant. The legal system's imperial characteristic relates to the hierarchical relationship conveyed by the legal system when it enters into communication with individual people. The legal system is somewhat superior, since it can be physically enforced. To oppose this description, one can take the legal system and portray it as community; something which is held together by and evolved from a common morality between people who share the same values. This characteristic is linked to the distinction between the legal systems which are, so to speak, built from above and developed from below, respectively.²⁶ Cotterrell argues that in the legal system of the industrialized, western world, there is a clear linkage between the depiction of the legal system as an *imperium* and *voluntas*, as well as between *community* and *ratio*. He writes:

The image of community presupposes a moral grounding of principle which is considered to unite society and which finds its expression in legal doctrine as *ratio*. If *ratio* is the element of unifying moral authority in law it implies social arrangements in which principles of justice are derived by elaborating a substantive rationality justified as grounded in shared moral experience.

Both Christensen and Cotterrell highlight the simultaneity in the opposing pairs which the legal system displays. Christensen, however, discusses movements, how the normative poles attract over time and are drawn towards different regulations. Cotterrell perceives the opposing pairs as paradoxes,²⁷ partly opposing values which struggle to influence legal doctrine and regulation. I can agree with both, but claim for my own part that the development of norms portrays a pattern which implies movement from one polarity to another and vice versa. The opposing pairs can be perceived as bipolar values that the normative development alternately opposes. When the development reaches its extreme end, it turns in the opposite direction towards the other polarity, only to return once the development again reaches the second polarity's extreme. In my opinion, one can regard this as a swinging pendulum. Using this as our starting point, we have reason to discuss shifts of focus, where both polarities are constantly present, but where a displacement of dominance occurs

25 Cotterrell, Roger (1995) pg. 319.

26 Aubert, 1990.

27 Cotterrell, Roger (1995) pg. 324.

simultaneously with the movement of norm development towards one of the polarities. This development is not continuous. Its course of events can be jerky and uneven, but the point is that it follows a trend. The movement is towards a certain direction, during a certain time.

The observation of legal development within various legal systems, which was discussed in relation to the issue concerning Anna Christensen's normative basic patterns, supports the idea of an existing movement between one polarity and another. Given that normative basic patterns are reflections of "moral customs and fundamental positions which evolve in society", the discovery of a social development corresponding to changes in the normative movement patterns is possible. Thus, there is no reason to believe in the existence of a simple causality between legal development and normative and legal changes

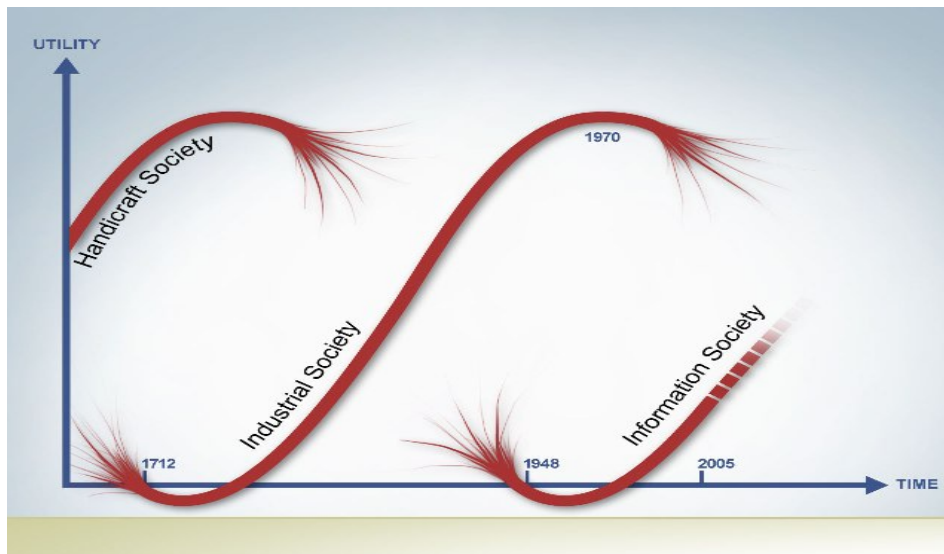
3 Societal Development in Terms of Cycles

When we look at different societal systems and the transactions between them from a historical angle, we can see that societal development appears to be cyclical.²⁸ Now and then throughout history, the world appears to become flat.²⁹ It occurs when a new society is on the verge of development. Societal development is actually cyclical, as waves breaking forth. Such cycles, portrayed in the figure below, can be described as waves. In this diagram, they signify different societal systems' developments over time – along the horizontal axis – and the systems utility for individuals – along the vertical axis. The higher up on the crest of the wave, the higher the utility that specific society provided for the individuals at that time.

See the following image portraying the past three centuries:

28 This is a way of looking at societal development that occurs in many disciplines. Some of the most influential work is related to Immanuel Wallerstein and his theory about World Systems. A strong proponent of this perspective within economic theory is Nikolai Kondratiev (1892-1938). He talked about cycles of about 60 years between boom and depression. These business cycles are called Kondratiev waves, see Barnett, Vincent (1998). Within history, the so called Annales School has used similar ideas of recurrent events. Among other things they use is the concept of "the history of mentalities." By mentality, they meant ideas which were not necessarily conscious ones. They are shared within a collective and they change slowly. Perhaps the most prominent member of the Annales school, Fernand Braudel, divided historical time into different rhythms (*la longue durée*). The expression refers to the analysis of trends as a study of continuities and discontinuities where society was regarded as a totality of economic, social and mental patterns. My own understanding of societal development in terms of waves is inspired by the expert on future studies, Anders Ewerman (1996).

29 Cf. Friedman, Thomas (2005).



It seems as if the world opens up for each, new leap in development, i.e., in the transition from one society system to another, from one wave to the next. In the transition from the handicraft society to the industrial society, the differences between city and countryside were evened out. During the handicraft society, the city's walls determined the frame within which production and purchasing were allowed to take place. After a while, the space became too constricted and via a technological leap, the transformation of primary energy into secondary energy sources, the gulf between city and countryside widened, the city walls were torn down and the flow of trade was freed. In return, the nation state emerged and, thereby, a larger arena for production and trade.

We are presently witnessing the latest leap; the nation state weakens through the new information technology, by which boundaries between nation states cease being barriers for the peoples' and companies' domiciles. The digital technique gives rise to new economic ways which open up the world. Today, this technological leap has made it possible for us to tear down the remaining few walls which hinder humans from interaction across national state borders.

A society's change can simplest be described through being divided into different areas or sections: the technical, the social, the economical and the political. In the following text, we will study these various areas, partly from the starting point in industrial society, and partly from the thesis that industrial society is challenged by a new society system which we can label the information society. These respective areas change the most at different points in time and can during these periods be said to dominate society. It is during these phases that the pressure towards change is at its greatest. However, when the technological phase dominates throughout an introductory stage, it does not mean that the technological development ceases simply because of this.

The introductory figure clarifies that I have portrayed the industrial society as having been born in 1712. This relates to the fact that the steam engine was

invented in that year.³⁰ Through this, mankind took the first step in the transformation of primary energy for different purposes. The steam engine lay the ground for a technological leap by making itself superior. Steam engines were needed to create steam power in order to construct more steam engines, then more steam power, and so on. It was not until the Scottish physicist and inventor James Watt that the steam engine developed into a power machine of economic significance. With the development of electricity and the petrochemical industry, not to mention nuclear power, mankind developed even more powerful forms of energy. This has, in turn, contributed to the mass production and large scale which has come to distinguish the latest phase of industrial production.

The equivalent variable in the birth of the information society is the computer and digital technology. A birth date is symbolically set to the year 1948 which is labeled as the year the transistor was created in Bell's laboratories in USA, after WWII. The transistor was the predecessor to the micro-chip which lay the foundation for computer technology. Similarly to the steam engine, the computer's development needs new computers which lead to further development of information technology, etc. Therefore, the computer means a leap in the development of humans. Electricity is not used primarily as an energy source anymore, but as a regulative force. The new technology enables the storage of information in a way which makes it possible for humans to raise their intelligence. If the industrial society's development of energy as an energy source meant that humans increased their muscle capacity, then the information society's use of electricity as a regulative force is the human's way of increasing our brain capacity. In this manner, we can create and implement things in a much more energy efficient way. The transition from industry to information society is distinguished by a transition from more or less clumsy mechanics to slightly more convenient electronics.

When the technology breaks through, a period takes place in societal development which is distinguished by social adjustment to the new technology. When the industrial society removed and replaced the handicraft- and agricultural society, it led to dramatic changes in social life through people moving from the countryside into the cities. Initially, the men moved away from their families in the countryside in order to work in the cities' factories. Due to this, the working class was blamed for living a sinful life, best described as promiscuous, i.e., living an unregulated sexual life. This is what distinguishes England during the 1800s, which was aptly described by Charles Dickens in books such as *Oliver Twist*.³¹

30 Thomas Newcomen invented the first steam-engine. Newcomen's atmospheric steam engine, however, was a transitional phase, where the latter machines were based on James Watt's design.

31 The story is about an orphan, Oliver Twist, who endures a miserable existence in a workhouse and is then placed with an undertaker. He escapes and travels to London where he meets the Artful Dodger, leader of a gang of juvenile pickpockets. Oliver is led to the lair of their elderly criminal trainer Fagin, naively unaware of their unlawful activities.

We have reason to expect some form of change in the social relations in the prolonging of the information society's emergence in the postmodern society. The question is what they will consist of. Will people move back to the countryside, away from the cities? Perhaps in part, and by choice instead of force, considering the fact that nowadays one can work from home and therefore choose a place where one really feels comfortable.

The third important process in the development of society arises once the new technology has been established and people have begun to socially adapt to the new conditions of production, distribution and consumption of goods and services which the new technology offers. In this phase, the new technology offers a full economical exchange. The new technology which has been driven forth by peoples inherent will to constantly better their living conditions now becomes applied on a large scale. Productivity constantly increases and is greatly superior to the technology of the past phase of society. The industrial society was about mankind learning to transform the primary energy sources to secondary and transferring energy to machines which had already been invented but which could now make use of far more energy than humans and animals can ever produce. Access to energy was the key to success in the industrial society. This condition made industrial society dependent and vulnerable.

Through this, the foundation had been laid for a new and final step in the market epoch's 1,000 - year - old history: the period of mass production and mass consumption. The golden age of industrialism occurred, in the Western world, between 1860 and 1940. This was when material prosperity was created. Once the economic development has reached success, it gives rise to such a large surplus that the society demands a system for a collective distribution of wealth. This is, of course, not a law of nature, but it seems as if it is the pattern which, in varied forms, arises in all industrialized countries that have reached a certain level of development. This is when the foundation for the welfare state is created. We obtain a political culture which has the task of distributing the common surplus. The more the country's political leadership pulls towards the left on the classic left-right scale between work and capital, the more welfare state we get, simply expressed. This has also been an economical recipe for success. Mass production presupposes mass consumption which, in turn, requires a spread of economic resources (read purchasing power) amongst as many people as possible. Accordingly, unemployment, occupational injuries and illnesses are not only of social interest but are also connected to economic and, therefore, political interests.

Every system of society describes a type of wave, where the society is born, grows up, matures, only to reach a culmination, die out and finally decompose, leaving only a trace in peoples' memories. The industrial society reached its culmination in the developed world's industrial countries, the OECD countries, in the beginning of the 1970s. Since then, productivity has continued to increase up until recent time in which the financial crisis forebodes a recession, but the benefit of the societal system has subsided long ago. The industrial society can no longer grant us more benefits. It is this circumstance which leads to financial crises and unstable situations in the stock market. There are no sane alternatives. Admittedly, the benefits are unevenly distributed, but the

injustice is structurally built and can only be solved if we abandon our present system and find a new way to live, produce and distribute. This development follows a logic which applies to all systems. They reach a certain potential at which point they even become counterproductive. Monopolies - state and private - which have grown strong during the large scale phase of industrial society produce negative consumer value today instead of providing us with constantly better products for lower prices. The development for the better which takes place during these circumstances is an effect of the giants, although everything is beginning to be challenged by small and medium sized companies which are driven by the aspiration to find new solutions, whilst the established companies struggle to keep old solutions which give them advantages.

4 Society in Transition

When the industrial society's utility curve begins to descend, the prerequisites for politics radically change. From having been concerned with distribution, the focus will gradually come to rest with crisis management. The politics will acquire the task of trying to conciliate criticisms emerging from people's negative expectations. Politics will shift from having been distinguished as the art of possibilities to becoming the art of the insufficient. In order to solve an impossible equation, politicians use law to smoothen out social inequalities and calm tensions so that cracks in the market economy - built on the idea of the invisible hand - do not become visible. What happens in this transition?

The time of dramatic change between an old and overly mature industrial society and the current information society which we are presently experiencing can, for the sake of simplicity, be described as a transition society. Within this society, contradictions appear between the old and the new. Tensions arise between people who live with different conceptions of the world depending on where they have mentally localized themselves. If one believes that the industrial society is merely going through a short-term downturn and only sees the linear society development which we have experienced during the past 150 years, one probably has the opinion that it all will continue as previously, which leads to the strategy of *business as usual*. There are those who have discovered that the industrial society's curve has turned down. They realize that one cannot rely on earning money on growth anymore. It is through cutting expenses in the production process that the economy can be maintained. For these people, strategies related to terms such as recycling become popular. Another conception of the world is expressed by those who have discovered and become fascinated by the new technology in itself. This group consists of teenagers who experiment with and force the development onwards. However, there has so far not been any usefulness produced from their work, as it is used mainly for personal entertainment. It is not a great loss, but it does result in a predominantly technological advancement rather than the advancement of services for the benefit of society. They belong to the group of people who have the knowledge and understanding of technology and its potentials, people

of little life experience who can apply the new technology in order to meet human needs. They live with another conception of the world. On a larger scale, one can say that people working in biotechnology belong to this group. Other examples are those who build databases filled with information which people seek in different circumstances, or those who construct search engines on the internet, connect phones, computers, etc. This gives us at least four different potential worldviews to manage simultaneously.

What arises in the transition society, in this perspective, is that communication between people becomes more complicated. People who live with these different worldviews have difficulty understanding and therefore communicating with each other. Within the social sciences, postmodernism is used as the term for this transition. A distinguishing feature of the postmodern society, according to one of its prominent analysts, Zygmunt Bauman, is that there are no truths anymore. “Everything solid melts into air”, is one of Bauman’s expressions. It has not yet reached the stage where we can speak of a society in *ànomos*, to exercise the language used by one of the founders of sociology of law, Emile Durkheim, when describing the transition from the agricultural- and handicraft society to the industrial society. This gave rise to a norm confusion that then led to a norm deficit which Durkheim named *anomi* (from the Greek *à*= denying and *nomos*=law).

What we know from equivalent shifts in history is that the change consists of a transition from a large scale to a small scale. It starts over again from the beginning, where old human needs – which do not change over time – are met through new ways, since the new technology opens up for new possibilities. One can use the expression *forward to basics*, one move forward, although on a superficial level it might look as if one is starting over again. It is in this process that communication becomes important. There are no given answers to what the best solution is. There is no key to the correct answers. It can only be created by us through communication between people.

Another consequence of the transition from one societal organization to another is that we go from governmental regulation and control to supporting systems and self-regulation. The new which is emerging does so, not due to centrally made decisions, but through testing various types of social experiments, different ways to live and support oneself. As the old society loses its ability to satisfy human needs, people look for new livelihoods and ways to live their lives. To gradually develop new patterns to satisfy human needs.

An additional effect of a society in transition is the pluralism; different worlds living parallel to one another. This in turn gives rise to discussions concerning legal pluralism and how one is to handle it. One can say – to use Thomas Kuhn’s theory of paradigm – that we are in a stage with several competing sciences. The old society’s dominant scientific perspective and dominant societal perspective are not able to meet the needs of the people. In this situation, there is no reason to attempt to change society and the order of things through “manipulating the old.” The established systems can only partly change in the direction towards new coordinates. A process of change requires, instead, that the old lives on and dies out as its need diminishes. At the same time, the new gains space by becoming popular and eventually replaces the old.

What, then, can we expect of the future? If we apply the theory of societal development described above, we would be on the edge of a phase which is dominated by societal changes. The new informational society has so far not left traces on the collective consciousness. It exists only as technology and not as a societal change, although it is on its way to becoming one. The reason for this has previously been discussed in terms of the remaining mental structures of the old society. All the new which grows forth is conceptualized and understood in the old society's terms and frames of understanding. This is the way it is and always has been. It is in the old society – in the upper curve - that we all have our references. That is the reality we know of. Even more important is that it is within the old society that political and economic power is located. However, after some time, a shift occurs which opens up for new solutions. When the old society gives rise to too much anomaly, individuals start looking for new solutions from which develop new ways of regarding society and thereby new coordinates for the legal system.

5 The Locomotive of Legal Development

The moment has come to introduce a theory on legal development which makes use of the ideas about societal development, the comprehension of norms in society and their movements over time. It concerns tying the legal system and society together over time, common neither to legal history or sociology of law. Keeping in mind the evolvement of our own legal culture, we have reason to consider the work of one man, Harold J Berman, who has attempted to combine the two aspects, when he, in the conclusions of his great work *Law and Revolution: The Formation of the Western Legal Tradition*, writes the following:³²

Thus the Western legal tradition grew – in part – out of the structure of social and economic interrelationships within and among groups on the ground. Behavioural patterns of interrelationships acquired a normative dimension: usages were transformed into custom. Eventually custom was transformed into law. The last of these transformations – custom into law – is accounted for partly by the emergence of centralized political authorities, when a conscious restructuring at the top was needed to control and direct the slowly changing structure in the middle and at the bottom. Law, then, is custom transformed, and not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top.

Social theory must therefore accept a broader concept of law than that which Marx and Weber adopted. Law is, as they believed, an instrument of domination, a means of effectuating the will of the lawmaker. But this theory of law, usually identified with the positivist school of jurisprudence, tells only part of the story. Law is also an expression of moral standards as understood by human reason. This view of law, which is associated with natural-law theory, is also partly true. Finally, law is an outgrowth of custom, a product of the

32 Berman, Harold J., (1983) p. 556.

historically rooted values and norms of the community. This third view, identified with the historical school of legal philosophy, can also claim – like each of the other two schools – one third of the truth.

By combining all three perspectives it may be possible to give better answers

...

Our theoretical foundation depends on the comprehension of societal development in terms of the motion of waves.³³ A second point emanates from the comprehension of norms as imperatives belonging to different systems. This is facilitated by the stability which distinguishes legal development in our country over time.³⁴ Another ingredient in the theory of legal development is related to the comprehension of the reasoning around the gradual change of dominance and focus within the legal system.³⁵ Furthermore, we can employ the actual legal development as the basis for the analysis.

We know that the legal system collects its main contents from the constitutive norms of the social, economic and political/administrative systems of action in society, but we also know that the legal system completes these systems by creating its own norms/rules. Moreover, we have been able to establish that the reason for why certain norms within the mentioned system of action are given the status of legal rules is due to the need for securing the reproduction of the respective system of action and the measures it brings forth. Those norms which are of vital significance for the systems' reproduction tend to become legal rules. This, however, does not mean that these rules are, by the system of action, considered the most important norms. The reason for this is that the norms of the system of action lie practically outside the legal system. Those norms which constitute the system of action have been proven to demand empowerment by the legal system. This relationship contributes to granting stability to the respective system. It leads to slow changes over time, just as is the legal system's successive way of changing.

The structure and task of the legal system are also explained by the reproductive function, which requires mechanisms for consensus and conflict solving. It deals greatly with what ought to be considered as right and wrong. This type of legal rules is distinguished to a large extent by stability which is related to the stability of constituting norms, whilst action-norms vary and transform. Today's rules, which are embedded in civil and penal law and which enclose the social and economic systems, are those of old traditions. The same conclusion can be made when discussing the procedural laws which lay the

33 Here, a historical dimension to the discussion concerning different legal systems is illustrated, which my previous analyses of the legal system's development have lacked. Cf. the criticism which Carsten Henrichsen brings forth in this respect, Henrichsen, Carsten (2001) pp. 78, an aspect which also concerns Teubner's and Nonet & Selznick's works.

34 "There barely dared exist a country which had been spared, to a greater extent than our country, from the hasty changes from one legal system to another", writes the juridical historian Henrik Munktell in the book about the Swedish juridical heredity, Munktell, Henrik (1944) p. 175.

35 This makes my previous introduction of different legal systems more concrete and historically specific.

foundation for legal conflict resolution. Within the administrative legal system or the public authority's jurisdiction, the principles are dependent on the political systems' historical specification, which allows them a shorter lifespan. They follow the development of the societal cycle, which currently makes it equivalent to the development of the early 1900s, although the amount and extent of the body of rules has increased.

In this situation, there is also reason to remind of the delay which legal development illustrates in comparison to society's development in general. It presumes that an epoch's or era's legal principles are expressed in relation to the fact that the epoch or era have reached their maximum and are on the verge of dissolving. It presumes that the legal development illustrates a certain delay in relation to those waves which societal development describes. However, with this reservation in mind, we can establish the fact that legal development follows the waves.³⁶ We therefore rediscover a de-regulating period which is connected to the diminishing agricultural and handicraft era. At the same time, we can identify a re-regulation in the framework of the industrial society's escalation during the mid-1800s and onwards. It sometimes seems as if there is a gap between de-regulation and re-regulation. The legal re-regulation does not directly succeed de-regulation; instead, the amount of rules decreases during the period of de-regulation only to gradually be compensated by new legal regulations, thus increasing again. One can question what ought to be applied during a time where the legal perspective appears to be a vacuum. The most probable answer to this is that we find ourselves in a stage of self-regulation without legal interference. It is likely that it is this self-regulation that lays the foundation for the codification which takes place afterwards. During this period, the legal system undergoes a reconstruction where the already existing building blocks are combined with new constellations at the same time as original legal institutions might come into existence, as a reaction to the new technology and to society's new demands.

If we return to describing society's development in terms of S-curves, this means that the legal system's development changes are visible on the upper half of the figure; i.e., it appears historically after a period in which the societal era has undergone its birth phase and begun its growth phase. Throughout this period, the previous society's political and legal institutions continue to dominate. It is not until the old society, through de-regulation, has let go of its hold on society and the new society has consolidated its positions in which there is reason to expect a legal codification, that we get what we call a legal system. In the figure demonstrating society development above, legal regulation is initiated at a point where the two curves intersect. Legal development then crosses through the various stages which follow the curve's rise to a maximum, only to be followed by de-regulation, as previously described. The hypothesis which the all-inclusive analysis generates states that legal development is always preceded by a self-generating phase, which is succeeded by legal codification when the society development curve

36 Hydén, 2002, chapter 5.

approaches the middle. Thereafter, legal regulation dominates until it has lost force and been replaced by a new legal culture.

During the late 1900s, we similarly find a de-regulation in the industrialized western world which took place in the 1980s and onwards. This deregulation was introduced after the industrial society had reached its peak in the early 1970s. We were taking the first steps towards a re-regulation of the information society's needs. So far, self-regulation dominates within the IT-field where concerned participants find their own way. The legal development is distinguished by the contraction in the introductory stage of a new era, as well as the extraction during the development towards the cycle's peak. This is symbolized by the movement from a state limited to upholding basic security needs and rule of law as ideals during an introductory stage, to the growth of the welfare state in the peak of the industrial society's development.

The logic behind legal development tends to differ from societal development. Society develops during the market epoch through different steps related to the growth of new core-technologies, thus undergoing different system or paradigm changes over time. On the contrary, the development of normative and legal history is distinguished by its movements within the frame of bipolar opposites that existed previously. This is where the expression, societal development's locomotive, is employed. Locomotive is a word created by the combination of the two Latin words *locus*, which means place, and *motivus*, which in more modern Latin means movement. What is interesting about this combination of words is that it combines two separate and incompatible expressions. It concerns partly something stationary, such as place, while simultaneously depicting something as dynamic as movement. The word locomotive can, for this reason, easily be used to express the principles of the parallel legal and societal development. The legal system moves in a vertical dimension, within a place, up and down between bipolarities, whilst society moves forward in a consistently changing movement.

With the support of our knowledge of normative basic patterns, there is reason to assume that the legal system describes a movement from a market-functional, basic pattern in the introductory phase of a cycle. It then receives the elements of protection of an established position at the same time as the movement increases, as described by the cycle. When the S-curve reaches its peak and for the duration following shortly afterwards, the protection of established position is at its greatest. This was manifested in the legal dimension through the growth of the market-functional approach during the late 1800s, which broke through into the legal system at the turn of the century. This is also shown in the consolidated protection of its established position which developed during the time following WWII and broke through into the legal system by the end of the 1960s and onward. During this time span, different compromises were retrieved in the form of a step by step movement from one polarity to the other.

The legal system consists of many of these bipolar continuums. The poles are constituted by different opposing values, such as the previously mentioned distinction between substantive justice at the top of the vertical continuum and formal, procedural justice at the bottom that occur in the initial stage of an

emerging society. Another example of poles mentioned by Roger Cotterrell is the movement from *voluntas* on the top and *ratio* in the lower part of the continuum. *Voluntas*, as mentioned above, represents the legal system's need for hierarchy and political control. It is utmost the legal system's political authority which provides the characteristic of a coherent legal system. *Ratio* expresses the moral authority's entity and integrity. Cotterrell also points out the distinction between *imperium* and *community*. *Imperium* corresponds to the stage at the top of the continuum, and dominates when society has reached a large scale societal phase characterized by hierarchical relations where law is imposed from above, while *community* can be regarded as something which is held together by and evolved from a common morality between people who share the same values. This is what occurs in the beginning of a societal development. *Community* can, therefore, be placed on the lower part of the continuum.

I have described this development in other situations in terms of a tendency for legal institutions to emerge and disappear over time.³⁷ They can disappear for some time, becoming what is described as obsolete in legal terms, but they tend, sooner or later, to return. In the same manner, a shift arises from the protection of established position back to the market functions, or at least to the freedom of contract which distinguishes the free disposal of the property (ownership, proprietorship). This occurs at a time which coincides with the information society just as it is about to break ground. This indicates that the movement reverses. The protection of established position returns, whilst a new era of patterns of market functions is established.

Sociologist of law and Austrian statesman Karl Renner made the same observation, although from another perspective. He claimed that the concept of property has been able to retain the same juridical significance over time, even though its social/economic/political contents have shifted from the Roman legal system's simple production of goods, where everyone owned what was produced, to the industrial society's more composite concept of property to means of production in terms of wage labour. This also implies reconciling the concept of property with influence over other people. The last step is welfare state's mixed concept of property with a free right of disposition for the owner within those boundaries and restrictions set up by the government through intervening legislations. Renner explains this phenomenon by describing that the concept of property was related to different, connected legal institutions over time. The relation of the concept of property to the contract, security rights and other occurrences, all played a part, as did the construction of the concept of the legal person.

The development from one societal system to another shows itself in a movement from collective to individual orientation, which is legally equivalent to a shift in focus from law to self-regulation, which in its turn increases the significance of contract as a legal instrument. Every new cycle leads to the process starting all over again. The description of wave movements is perhaps

³⁷ See Ewerman, Anders & Hydén, Håkan (1997), p. 98, where I speak of shifts in focus in the legal system's development over time, and Hydén, Håkan (1996a).

a more appropriate choice.³⁸ A wave crashes and is replaced by a new wave. The reason why the metaphor of wave movements might be more effective is that the wave describes an ascending curve with a relatively short descent after having reached its peak. The new wave movement's apostles always engage, over a transitional period, in a struggle against the old society's well-established institutional stakeholders. When the new pattern has had time to establish itself on a larger scale, it will in turn actualize conflicts between the exploitation interest and the social protection demand. This will then drive the new juridical pattern for the protection of established position and so on. In this way, the juridical system portrays a varied, ascending and descending movement within the frame of one place belonging to different bipolar structures of values. Simultaneously, the locomotive drives development, i.e., the societal development continues to move on.

To add to the metaphor of a locomotive, during an epoch one may envision that whilst the locomotive moves forward, carriages are attached as the epoch travels through various eras. During the market epoch, the legal system is gradually filled as it goes through merchant, trade house, agricultural and handicraft and industrial eras. The legal system is successively built up from different components. During the merchant era of the 11th and 12th century, the Canon Law still dominated. However, at the same time, the actual exchange between merchant and buyer³⁹ became established mainly through self-regulation of the basic rules for the market economy. This then established *lex mercatoria*, built upon a revived modified Roman legal system, the demands specific to the times and gradual, legal expressions in the form of fundamental game rules. In Sweden, there are elements of this in the sales acts of the medieval landscape laws. These rules were primarily about creating security of transactions with regards to the seller becoming the lawful possessor of the sold property, etc. During the trade house era, a large part of the legal system was established around payment liability and security/creditor acts in connection to the need for financing the long travels overseas for oriental goods. Every trip was a huge project which demanded collective financing, thus making these rules necessary. The opportunity to register lawful possession and other guarantees in (ship) registers played a large part in this. The driving force was the market epoch's demand for new goods. It was the same forces that drove the handicrafts during the mechanical era. As the markets widened, "a greater uniform market, the nation state"⁴⁰ became inevitable. This then led to the now regulated market receiving, through mercantilist principles, an infusion of security customs and such. More goods could now be allocated, which meant that private craft shops began to be replaced by specified occupations and work divisions. After some time, machines became independent goods. It was during this time that production came to dominate the juridical, regulating through the growth of the city and its

38 Cf. Ervin Tofflers, Alvin (1981), which describes technical advancement in these terms.

39 On the importance of the merchant and trade, see Beard, Miriam (1939).

40 Ewerman, Anders (1996) pg. 247.

system of privileges built upon the guilds. During the industrial era, mercantilism and the guilds finally released their grip on production and “set it free.” In return, we obtained a legal regulation of consumption, most of all in the form of public production, parallel to state upheld consumer security for the consumers and individuals in various respects, from the legislation of consumer protection to that of the environmental protection.⁴¹

If we connect this to previous research on this subject, it does not reach far enough back in time to be able to verify societal and legal development in terms of cycles or waves during the entire market epoch. However, in the following text I shall attempt to bring forth that which is available. This concerns foremost the development over the past century, the transition from an agricultural and handicraft society to an industrial society. In this context, Durkheim’s observations concerning the movement from repressive to restitutive law can be mentioned. This development corresponds to what Durkheim has labelled mechanical and organic solidarity, respectively. The repressive stage is related to the introductory stage of the S-curve which simultaneously represents a separation between two different societal systems. During this period of societal development, there is reason to expect normative disorder in the sense that the normative poles that previously held a force of attraction in the old society lose their force and meet competition from the other normative poles of a new societal era. It is not until a societal system has been established, as well as having reached a stage of maturity, we can expect the repressive features to be forced to step back under pressure from the social elements in the penal system in the same way as experienced in Sweden between 1960 and 1990. In a mature society, such as Sweden after WWII, homogeneity occurs, which changes criminality into a marginal phenomenon and organic solidarity becomes possible since “everyone is sitting in the same boat.”⁴² In this perspective, it becomes more logical to emphasize individual prevention, to concentrate on bringing the criminal back to society, than, through harsh punishment, to bring forth general crime prevention and the terror it is meant to conduct.⁴³

If we apply the reasoning on legal changes in the form of movements between binary poles within the normative field, we would find ourselves in an era moving towards a new stage of increased, repressive elements.⁴⁴ This does not emerge from the same societal reasons as those which Durkheim refers to in terms of mechanical solidarity. This comes out of the previous thesis that society changes while the legal phenomenon remains constant, they come and

41 It is only the last era of an epoch which is distinguished by consumption. The previous eras are specialized in investments. Similarly, it is the last phase within an era which is dominated by consumption, whilst investment takes place during the earlier.

42 Cf. the Swedish welfare state ideology. It concerns political distribution for maximum consumption, what we call the supply economy, which ideology is based in what Ewerman calls “the Keynesian parenthesis” in history.

43 See Strahl, Ivar (1967) pp. 14.

44 In this situation the interest of the victim increases.

go over time. The societal context which today gives rise to repression differs completely from the context which was valid in the times Durkheim discusses.

Max Weber makes a distinction between formal and substantial justice which can also be seen as a dichotomy between bipolar points, where the former answers to a mature phase of legal development and the substantial to an over-mature phase. Reza Banakar highlights Timasheff's distinction between different legal paradigms which are built around ethics and power. This, in turn, is related to Malinowski's description of social orders that are independent of enforcement and political institutions, as well as the social order which is dependent on them. In this situation, Banakar points to Carol Gilligan's differentiation between caring rationality and legal rationality.⁴⁵ He personally brings forth the difference between juridical facts and values. Banakar argues that these dichotomies can be boiled down to a more basic differentiation between an external and an internal perspective of the legal system.⁴⁶ The external perspective makes itself valuable in a historical aspect which is distinguished by the initiation of a new legal form. This fact, which occurs during the establishment phase of a cycle in which the internal perspective stands out in the latter part of a cycle when the actual era has "sunk in" and become internalized on a larger scale in society, is the time when the structural norms dominate.

According to Banakar's reasoning, the dichotomies between attributive characteristics and prescriptive norms respectively, as well as between the concept pair legality and rights, can in a similar manner be attributed to the same development phases. The fact that these dichotomies, highlighted by Alan Hunt,⁴⁷ can be said to be inherent in all legal phenomena does not exclude, as described previously, that we are dealing with shifts of focus in which one aspect dominates over the other and vice versa, in various development phases of societal and legal development.⁴⁸

Today, the societal development deals with - in addition to this change of societal systems which involves a shift of social codes and therefore a shift of opinions of what is right or wrong between those who have a starting point in the old society's normative pattern and those who have a starting point in the new emerging society's norms - globalization and all that it contains concerning influences from various places, as well as the migration flow which has brought great changes and therefore tensions in society.⁴⁹

One can also relate those initiations of legal development which Nonet, Selznick and Gunther Teubner have brought forth, as described introductorily,

45 Gilligan, Carol (1982).

46 *See* Banakar, Reza (2000).

47 Hunt, Alan (1993).

48 Banakar means, for example, that Gurvitch's view on justice coincided with the struggle to reach a balance between legal facts and values. My reasoning does not oppose this interpretation; however, it would mean that during certain times - in the introductory stage of a societal era - values would dominate, whilst legal facts and legal techniques dominate in the latter half of the societal era's development curve.

49 *See* Fitzpatrick, Peter (2001), Ch. 6.

to societal development in terms of S-curves and legal development in the form of movement changes within the normative field. Nonet and Selznick's transition from repressive to autonomous, or formal according to Teubner's categories, is represented by a movement along the cycle from an introductory, repressive phase, in agreement with Durkheim, to a more stable normative phase which corresponds to Durkheim's organic solidarity where the legal system's ideal consists of process oriented correctness following on the ideal of the rule of law governed state. The launch of the term responsive law corresponds to the point on the cycle in which the societal system in question comes close to its peak and the distributive politics come to dominate. It then becomes a case of seeing the individual's demand from a collective perspective. Teubner's argumentation concerning reflexive law can, in this situation, be interpreted as an attempt to solve the problems of the transitional society with regards to normative dissolution at a collective level, which means that norm creation occurs best in those whom it concerns in each specific case. The legal system's role, in this perspective, is to produce an arena for this norm creation. Through this, the interests that are related to the external, and often unintentional, indirect effects of these large scale activities often get the chance to influence the norm results.

The advantage of this model of reflexive law is that it compensates the lacking, legal contents with democratic contents, in comparison to the responsive legal system's more expert oriented solution proposals. The experiences of attempts which have been implemented in order to compensate the lacking democratic content of the responsive model with various participative elements have not been successful. The distance between the system and the individuals' life-world (in Habermas' meaning) is too extreme to make arguments possible from a life-world perspective.⁵⁰

Yet another circumstance which is important to highlight is that the "locomotive" maintains several positions within which values change during this movement. Parallel changes in normative patterns cooperate or counteract each other in legal changing processes over time. One can, in this situation, pinpoint the transition from a formal concept of justice (fairness) in relation to the new society's integration phase during which everyone must be afforded equal opportunity to succeed, i.e., a formal or procedural kind of justice. This demands that the old society's walls are demolished for a substantive concept of justice, which is built upon the idea that everyone must have an equal, preferably double, amount of everything, and relies on making the satisfaction of human demands into a part of the political project for which the legal system becomes an instrument. It is when these movements pull in the same direction that we see a change in the normative basic patterns which, in turn, cooperate in order to create societal changes.

50 The environmental area can be referred to two treatises in sociology of law, Eriksson, Lars (1985) and Svenning, Margaretha (1996), both of which highlight "mechanisms of rejection" which apply themselves when it concerns the public trying to affect matters of environmental protection.

The direction of movement is the same in the entire industrialized world.⁵¹ The differences in speed and development depends on, amongst other things, the relationship between the different bipolar normative positions that determine the normative basic pattern. This is then related to a number of circumstances, from societal economic development level, institutional traditions to technological conditions.

6 Concluding Remarks

Society's direction of movement is at the same time the development of the legal system within the frame of its place, the same value dimension, even if there are several such parallel places. The term locomotive reflects this conflict between static and dynamics, between position and movement. The locomotive unites the synchronic and the diachronic perspective. As society develops along the wave, the position on the vertical axis, the normative dimension changes and moves up and down depending on the development phase. The legal system does not control the development. It is even less the driving force for legal development. But the movement forward demands that the development in the normative dimension keeps up. Otherwise, problems may arise. Incongruities and anomalies will occur. The development can cease etc. The locomotive stops.

During a cycle – simultaneously to the forward movement – the focus shifts from phase 1 self-regulation, phase 2 game rules, phase 3 planned system rules to phase 4 intervening rules. If we regard different legal systems, the focus will be moved in the legal system's development during the societal development's movement from phase 1 non legal regulation, to phase 2 duty rules, phase 3 end means rules and phase 4 consideration rules. There are different models of legal argumentation to these various rules. If we express the development in legal terms, we can describe the following which dominate during these stages: Phase 1 penal law and private law in relation to the social system, and constitutional law in relation to the political/administrative system; phase 2 civil law with a focus on the economic system; phase 3 administrative law with a focus on public authorities and phase 4 intervening rules managed by decision-making bodies representing the involved parties.

I speak, here, of a specific type of norm formation (spontaneous, game rules, formalizing and intervening) dominating at indicated points of time. However, it does not exclude the simultaneous existence of all legal forms. Certain legal forms characterize their respective periods of time. During the first phase one can, from a legal point of view, claim that phase 4 dominates mentally. Phase 1 has not yet had time to provide strong enough imprints to have a mental impact. Even during phase 2, there remains a delaying priority for the upper curves of mentalities and legal customs. There is a tendency, in historical situations of transition from one era to another, to perceive what occurs in the new society (the new cyclical perspective), in the old society's terms.

51 The railway is, in the terms of metaphors, single railed.

Now, as the information technology drives forth new ways to fulfil human needs, this delaying mentality becomes present in the following manners. Firstly, the old society's rules create hindrances for the establishment of the new, whether it concerns new forms for working, living or selling. Secondly, the new phenomenon becomes perceived through the eyes of the old society, the problems which the old society gave rise to being reflected in the new phenomenon.

This seems to be the way. A new legal development is forthcoming where old legal institutions receive a partly new meaning and where remaining legal development awaits the self-regulation which takes place within the framework of the new technology. New legal areas, built around new functionalities such as e-business, can be constituted by the changed relations between existing institutions which therefore receive a changed significance, in the way that Karl Renner described. It therefore seems as if the new information technology does not demand changing constructions of rules and legal innovations. The trust and supporting structures which every new phenomenon that is to be regulated require continue, to a large extent, to rely on spontaneous solutions within the area of IT-law. These solutions are related to the market's own ways of functioning and logic instead of political and legal decision-making in some national or international form.⁵² The jurisprudential competence which is vital in order to meet this new legal culture demands a return to those times of less dogmatic legal constructions, which have distinguished corresponding phases in earlier history.

From these theoretical points of departure, we face an era of transformations in society which will also give rise to legal changes. Society, here, is not the same as the nation state. The logic of societal development has not during earlier stages in history, nor in the coming stages, been related to the nation state. It is only during the industrial era that the nation state plays a significant role. The development of the legal system is already dominated by the pendulum's extremes of freedom and self-regulation in the information society's phase 1 in order to move, during phase 2, towards legal regulation in the form of game rules, and now towards a global level. Later on, we have reason to believe that law takes the shape of planned and intervening rules.

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