

Law, Materiality & Justice

Peter Bergwall & Karl Dahlstrand

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1 Introduction

Can law still play a central role in governing human behaviour even if the state law may have become less important? Whether law without the state is possible depends, of course, on how we define “law” and “state”. But it also depends on the perspective from which one approaches the legal material. From a sociology of law perspective, as will be presented in this chapter, the topic has a slightly different signification and consequence than within traditional legal dogmatics. After all, going back to the pioneers of sociological jurisprudence and sociology of law as, for example, Roscoe Pound (1870-1964) and Eugene Ehrlich (1862-1922), we hear the echoes of a time when the state had not yet grown so strong (Berman 1983). Surely, the times of Pound and Ehrlich were characterized less by “state-law” compared to present times. Still, would we describe the early 20th Century as governed by “non-state law”?

“Let us not be legal monks”, as Roscoe Pound writes, when he also makes his famous distinction between law in books and law in action (Pound 1910). And Ehrlich too recognized that legal dogmatics and the formal sources of law give a somehow incomplete picture of what law is really like. Ehrlich questions the hierarchical notions of law, propounded by such theorists as Hans Kelsen (1881-1973). Instead Ehrlich presented his ethnographic approach and the concept of “living law” (Ehrlich 2002). Ehrlich warns us against law’s “blind spot”, which results from the fact that law is a trade, and lawyers refer primarily to previous cases and conventional legal practice. Therefore, they do not really perceive reality in its entirety (Ehrlich 2002; Hertogh 2009). So, as early as a full century ago, scholars with an interest in the social sides of law realized that the “non-state law” condition should not be seen as the end of state law but, in fact, as the opposite; it is the social condition in which new state law is waiting to emerge out of social normativity.

However – as David Nelken points out – if we follow Ehrlich in his interest in “living law” and “norms for decision”, we will end up in something similar to a sociology of norms rather than law and which “have the implication of swallowing up the sociology of law in general sociology” (Nelken 1984:173) So, is the discipline of sociology of law in danger now when positive law (i.e., law produced, or at least authorized, by the state) is perceived to be weakened or threatened, and when Swedish sociology of law has been dominated by norms science for some time now? Or, is sociology of law, in fact, more relevant than ever? In this chapter we argue that, although one objective of sociology of law has always been the tracing and examination of law’s effects, consequences and social functions, the importance of exploring and explaining the social normativity *preceding* law cannot be enough emphasized.

Before asking: what precedes law, we must ask: what is law? There are several reasons for asking this question. How can we define law as a phenomenon? What are the consequences and limitations of legality? Who or what decides these definitions and at what point in time? These questions are of fundamental importance within analytical jurisprudence, such as legal theory drawing on modern analytical philosophy, in order to understand the nature of law. H.L.A. Hart (1907-1992) calls the question regarding law’s character a “persistent question” and present the question as follows:

Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’ Even if we confine our attention to the legal theory of the last 50 years and neglect classical and medieval speculation about the ‘nature’ of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the questions ‘What is chemistry?’ or ‘What is medicine?’ as it is to the question ‘What is law?’ (Hart 1961: 1)

As, for example, Galligan, Winch, Aarnio and others have pointed out, there is a link between analytical jurisprudence and analytical philosophy to social science and socio-legal studies (Aarnio 1987; Galligan 2007; Winch 2008). It has been important for fields such as political science and sociology to define “law” as a social scientific concept, distinct from prior jurisprudential definitions. But this social scientific conceptualization of law has also been essential in understanding the relations between concepts that are common in both social science and jurisprudence, e.g., “rules”, “reasons”, “regulations”, “norms” or “normativity” (Baier 2013; Banakar 2015; Cotterrell 1992; Pettit 2002).

Nevertheless, although this relation between law and the social sciences has no doubt been fruitful, it has also contributed to the maintaining of an unfortunate analytical dichotomy, positioning legal positivist understandings of law at one extreme of the scale and poststructuralist understandings at the other. In this chapter, we will argue for a materialist approach to the study of law and society in which law, including aforementioned conceptions of law, is understood as one of several aspects of emergent social normativity. We will present some ideas (or suggestions, if you will) for ways to apply a materialist conception of law. Our ideas draw both on traditional materialist philosophy and sociology as well as on more recent theoretical excursions, which in the literature are sometimes referred to as “new materialism”. Having said that, we do not intend to position ourselves as “new materialists” nor “post-humanists”, neither do we have the ambition to present a comprehensive overview of any one of these theoretical tendencies. Instead, we view this as an opportunity for us to try our wings, flying over territories hitherto only spotwise familiar to us.

1.1 Chapter Overview

In the first section, *Materialism Revisited*, we briefly show how materialism with roots in Marxian and Althusserian thought is making its way back into social theory. The implication is a challenge of importunate dichotomies, such as the social subject/object and the legal ought/is. In the next section, we proceed with the theoretical developments, labelled new materialism, emphasizing the flows generated by social and legal structures, rather than the structures per se. We then proceed to one of the main objectives of this chapter, the discussion building on the argument that materialist conceptions are essential in empirically grounded justice theories. Hence, the *Justice* section includes a brief overview of classical justice theories, followed by the critique of them, and a proposition that materialistic, evidence-based procedural justice theories are better equipped

for socio-legal research compared to more idealistically grounded justice theories. We then present a research project which is about how distributive and procedural justice affects the intention to disclose personal health information in online contexts. We conclude by stating that, what we label *emergent social order*, i.e., the interplay between law, materiality and social normativity, is important for understanding the current condition, which is characterized by some as governed by “non-state law”.

2 Materialism Revisited

Sociologist Scott Lash has described how sociology has moved from Kant’s *epistemological a priori* to the *social a priori* (Lash 2009). That is, it has moved from the question of how *knowledge* is possible to the question of how *society* is possible. The backside of this development, Lash argues, is a too strict focus on sociology as a rational means for social control (e.g. sociological functionalism). Lash instead argues for an “aposteriorist” and empiricist sociology that “would instead investigate social processes in their very factuality, their open-endedness, complexity, and path dependency” (Lash 2009:175). Regarding law, this means to think of law, not as an ideal conceived *a priori* but rather in terms of something unfolding with the development of society as a whole. This implies a necessity for the removal of the clear distinction between fact and value, i.e. in the case of law, between the “is” and the “ought”.

In existentialist philosophy, “values are fully integrated into the ‘fact’ of man’s ontological condition. /.../ Mankind is thus always already constructing itself factually through values” (Martin 2009). Furthermore, it is important to stress that, if subscribing to a materialist ontology, fact and value are only *analytically* distinct. In reality, they both emerge through human action. The emphasis on “action” here, the existentialists brought with them from the thought of Heidegger, Hegel and, not least, from Marx for whom fact and value are dialectically related and come together primarily through human activity. Marxian materialism also influenced a young Nicos Poulantzas (1936-1979), who claimed that the social values produced through labour eventually become embodied in law. “Conceived that way, rights are ontologically grounded in so far as they emerge as norms from the factual experience of human labour and class struggle rather than as abstract, transcendental principles” (Martin 2009).

Poulantzas’ thought later developed into a distinctly structuralist direction, under the influence of Louis Althusser (1918-1990). The latter’s concept of history is that of a process without subject and/or end(s) (Tzanakopoulos 2012). Furthermore, Althusser introduced the notion of “aleatory materialism” or “materialism of the Encounter”.¹ According to Tzanakopoulos, by that Althusser meant that it is the unpredictability of reality that creates a situation that demands humanity to act. “[The] *Ought* of the past resistances and pleas of the movements

1 “Aleatory” in the same sense as in “aleatory contract”, i.e. a contract whose fulfilment is dependent on chance, accident or coincident (the most obvious example being an insurance).

have been transformed into a radical political imperative, to a simple and straightforward *Must*. The situation can no longer continue as it is: it must change” (Tzanakopoulos 2012:273).

Mcgee wants us to readdress the parts of Althusser’s thought that he calls “Althusser’s jurisprudential problematic”.² The problem with jurisprudence, according to Althusser, is that its philosophical perspective on law is that of the *fait accompli*. “[There] is no explanation in this analysis; the analyst has arrived too late” (Mcgee 2012:149). Althusser viewed jurisprudence as preoccupied with debating where law’s ultimate source is to be found – in nature, in previous law or among the gods. This, Althusser claims, is *the ideology of genesis* at play.³ “The Encounter” itself is empty of law, “but the new conjuncture that [the encounter] enables cannot last without creating for itself a normative formation” (Mcgee 2012:149). In other words, since law is an ideological delusion, reality will create its own order.

The jurisprudential problematic represents a line of thought, Mcgee argues, that leads away from Althusser’s anti-humanism to a (softer) post-humanism. Post-humanism does not reject human agency. Rather, materiality or structure is given *primacy* over agency. Agency certainly plays a role in normative formations, but it alone does not “make” law. It is the encounter between materiality and humanity that creates the order of reality, i.e. “real law”.

3 New Materialism

Drawing from the philosophy of Deleuze and Guattari, Manuel De Landa argues for a “neo-materialist” interpretation of their idea of the “abstract machine of stratification” (De Landa 1995). Abstract machines refer to the same kind of structure-generating process, shared by very different assemblages, but for similar function or purpose. De Landa differs between strata and meshwork, two types of structures in and through which the abstract machines are operating. Strata are hierarchical organizations emerging from homogenous elements while meshwork is defined as “self-consistent aggregates that emerge from the articulation of heterogeneous elements” (Linstead and Thanem 2007:1488). Strata and meshworks are to be understood in a purely theoretical and relative way. In reality, each type of structure will, to a varying degree, display features of the other type. (De Landa 1995) Neither should a social meshwork be understood as a type of social network. A network usually refers to a connected set of centres or organizations.⁴ A meshwork, on the other hand:

2 Compare to Althusser and Balibar’s “empiristic problematic”, a critique of pre-Marxist philosophy of science for arriving at “the real” based on metaphysical concepts, and for using another metaphysical concept (“essence”) to refer to the result of the scientific process. A “jurisprudential problematic”, then, would be when the *is* of law is arrived at based on ideas of what law *ought* to do, and for using equally metaphysical concepts (e.g., “rule of recognition”, “Grundnorm”, “the categorical imperative”, “Hercules”, and so forth) to refer to results from jurisprudential studies.

3 Ideology, for Althusser, is the opposite of science.

4 “A network is a set of interconnected nodes. /.../ A network has no center, just nodes. Nodes may be of varying relevance for the network. /.../ However, all nodes of a network are

have no centres: their ‘points’ are merely sites of overcrossing, of images of information. /.../ The growth of these meshworks is by *drift*, an unplanned result of the cumulation of adjacent interactions. /.../ [Drift] happens when new nodes insert themselves into loops (Linstead and Thanem 2007: 1489).

According to De Landa, the conception of abstract machines “points towards a new form of materialist philosophy in which raw matter-energy through /.../ self-organizing processes /.../ generates all the structures that surround us. /.../ [The] structures generated cease to be the primary reality, and matter-energy flows now acquire this special status” (De Landa 1995:10).

Indeed, this kind of new materialism reminds us of Luhmann’s systems theory (Luhmann 1989). Just as Luhmann’s social systems are built around communication, rather than around communicators, De Landa describes social meshworks as built around energy flows, not around the entities generating the energy. And both Luhmann and Deleuze view society as, more or less, self-organizing. But while Luhmann’s autopoietic systems are operationally closed, Deleuze’s social organizations are “defined not by what they control or attempt to control /.../ but by what escapes their attempts to control” (Linstead and Thanem 2007: 1491). Social organizations are “not fixed, but in motion, never resting, but constantly trembling” (Linstead and Thanem 2007:1486). Furthermore, “[whereas] Luhmann’s neglect of autosubversion leads to a one-sided focus on stability, Deleuze’s focus on autosubversion highlights the changing nature of organization” (Linstead and Thanem 2007:1498).⁵

To understand the openness preceding, inhabiting and exceeding social organization, and the “responsive conversation between organization and non-organization” (Linstead and Thanem 2007:1491), Deleuze introduces *virtuality*, a concept that bears some resemblance to Althusser’s aleatory materialism. For instance, when thinking of *the virtual* in Deleuzian terms, three concepts are of central importance: the *real*, the *possible* and the *actual*. The real is what exists here and now and the possible is what *can* exist. Therefore, possibilities to be realized in the future depend on what is realized in the present. The virtual, on the other hand, is always present in the actual. However, the virtual is not necessarily engaged in a relationship with the real as the virtual, as opposed to the real, can exist as pure vision. The *actualization* of the virtual always occurs as an *event*.

An event is [not] something that simply happens, /.../ Rather, an event is inessential, unexpected, anomalous, seemingly impossible from the current state of affairs, and therefore capable of opening up the future, making a difference, and changing the world /.../ 9/11 was an event; the 2004 tsunami was an event. As the event is different from what already exists, and as it sticks out from the mundane and the regular, it is a discontinuity in history. (Linstead and Thanem 2007:1493)

necessary for the network’s performance” (Castells 2004: 3).

5 If an autopoietic system is to be understood as self-creating or self-referring, an autosubversive organization should be understood as self-changing or even self-destructing. As we interpret Linstead and Thanem, this autosubversive quality should be seen as immanent in all organizations.

Although the (virtual) event is always connected to history as well as to the present, it is always unexpected and unprepared for. Still, it is inevitable. Hence, as in Althusser's aleatory materialism, the prerequisites for political change are situated in materiality. The difference, however, is that Deleuze's organizations open up for multiple possibilities, beyond the dualism of Althusser (although the latter did attempt to eliminate the distinction between agency and structure). For instance, while Althusser wanted to put "already existing representations of reality into an order by establishing their connections" (Gallas 2010:37), Deleuze advocates for a creative pluralism of organization and *against* a controlling pluralism of order (Linstead and Thanem 2007).

4 Justice

In a sense, Deleuze's theory puts power out of order. If there is a latent uncertainty in an organization regarding who is commander and who is commanded, in time even the command might change direction or even become normatively irrelevant. This is empirically manifested when the normativity of materiality "strikes back", i.e. when objects designed for social control begin to operate as subversive tools. This is aleatory materialism – the normative potential is contingent in materiality but it was not purposely planted there. At the same time, in order to realize the radical normative turn, for certain enabled by a materialist conjunction, human agency is absolutely essential.

Still, in practice, it may be difficult to see how the concept of materialism can be related to law and legal science. Merima Bruncevic has studied access to art as knowledge, and law's role in facilitating this access (Bruncevic 2014). But she also discusses how art can be communicated and shared through the legal concept of *cultural commons* (Bruncevic 2014). Bruncevic's study presents a critique of dogmatic jurisprudence (and its constant referencing to concepts such as the "unity of law", "foundations of law", "coherence", etc.) through the application of the Deleuzian concepts *rhizome* and *re-/deterritorialization*⁶ (Deleuze and Guattari 2004, 2013). From this Deleuzian perspective, Bruncevic views the perceived crisis of law as "a creative force that creates previously unthought-of alliances" (Bruncevic 2014:362). Instead of a body of law, we should rather speak about a law without organs, where the *de lege ferenda* ("future law") and *de lege lata* ("existing law") approaches are constantly intertwined (Bruncevic 2014). With respect to the topic of this volume, then, what makes a "body of law" and "law without organs", and what does this mean in relation to "non-state law"? Is this something more than just another analytical concept, aiming beyond traditional legal theory on a purely abstract level?

This brings us to another notoriously abstract concept: justice. We intend to show why a materialist conception of justice is necessary when using it as a theoretical construct within empirical research. Obviously, here is not the place to account for all the different theoretical conceptions of justice – indeed, the meaning and definition of justice have occupied the minds of philosophers for

6 Rhizome: an "image of thought", apprehending multiplicities. Re-/deterritorialization: a distinctive structuring of a place or territory.

thousands of years. However, we would like to grasp this opportunity to point out that, in a broad sense, most classical theories of justice should be conceived of as idealist (as opposed to materialist), including those theories that are advocating social equality through the allocation of material resources, i.e., through *distributive justice*.

4.1 Classical Justice Theories

Strict egalitarianism, for instance, is based on the moral principle stating that every person should have the same level of material goods and services (Lamont and Favor 2014:7). The *difference principle*, on the other hand, states that some degree of inequality is acceptable as those who are more productive should be allowed to earn more than other, less productive individuals. According to this principle, inequalities are justified as long as they are to the greatest benefit of the least advantaged in society (Rawls 1993:5-6).⁷ The difference principle, in turn, has been accused by its critics of failing to account for those who, due to sheer bad luck, receive a disproportional share of the common resources. Thus, *luck egalitarianism* puts a greater emphasis on (bad) luck and personal responsibility in attempting to define equality of opportunity. (Lamont and Favor 2014:19)

Welfare-based principles of justice play down the importance of the goods to be distributed. These things are only valuable to the extent as to which they can positively affect the common welfare as much as possible. The main concern for “welfarists” is what function of welfare that should be maximized in order to optimize the totality of all welfare available. *Utilitarianism*, the idea that the pursuit of happiness and preference satisfaction are the only things in life with intrinsic value, is probably the most well-known type of welfare-based justice. Accordingly, the most just arrangement of a society is the one that grants as much satisfaction (or welfare) as possible for as many citizens as possible. “Welfarism” has been criticized for treating people as “mere containers for well-being, rather than purposeful beings, responsible for their own actions and creative in their environments” (Lamont and Favor 2014:25). As a response, *desert theorists* argue that people should be rewarded in light of their actions. That is, the individual desert should correspond to the *contribution* to the social product, the *effort* put into the work activity, and *compensate* for the costs caused by the work activity. (Lamont and Favor 2014:26)

According to Lamont and Favor, there is no distinct *feminist principle* of distributive justice, although the authors stress that feminist approaches are at work within all the distributive justice theories. However, distributive justice theories fall almost exclusively under the ideological umbrella of liberalism.

7 Rawls formulated two principles of justice: “1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. 2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b) [*Difference Principle*], they are to be to the greatest benefit of the least advantaged members of society” (Lamont and Favor 2014: 10).

Hence, the liberal feminist position is viewed by many other feminists as a conservative one. (Lamont and Favor 2014:36) For instance, the liberal philosopher Susan Moller Okin (1946-2004) criticized the difference principle for being blind to the fact that “the modern liberal society to which the principles of justice are to be applied is deeply and pervasively gender- structured” (Okin 1989:89). When discussing Rawls’ view of the family in relation to the difference principle as a just social institution, Okin notes that:

If families are just, as Rawls later assumes, then they must become just in some different way (unspecified by him) from other institutions, for it is impossible to see how the viewpoint of their less advantaged members ever gets to be heard (Okin 1989: 94)

Furthermore, Okin points out that there are very few occasions, although they do occur, where those occupying the original position are anything else than “(male) heads of (fairly traditional) families, and are therefore not concerned with issues of just distribution within the family or between the sexes” (Okin 1989:95). From a gender perspective, Okin takes this as proof of that Rawls’ theory is far from value neutral. In fact, it shows that Rawls effectively excludes a large sphere of women’s lives from the theory. Once the *veil of ignorance* is removed, the theory expects to find that all the parties of the *original position* are participants in the paid labour market while the value of unpaid domestic labour is not taken into account.⁸ Nevertheless, being a liberal herself, Okin believes that Rawls’ original position can work as a fruitful tool in a feminist critique if one accepts that inequalities from the private sphere, like domestic gender inequalities, seep into the public sphere, thus making them relevant for deliberation at the original position (Baehr 1996).

4.2 Criticisms of Classical Justice Theories

Among all the justice theorists in modern times, John Rawls (1921-2002) has arguably been the most influential. It is therefore quite natural, if admittedly a bit unfair to Rawls, to let him be the portal figure against whom we project a handful of the more substantial criticisms against liberal justice theories. Considering that we ended the previous section with a feminist critique, we find it convenient to begin this section on the same theme.

Not an outspoken liberal like Okin, law professor Mari J. Matsuda claims that “Rawls’ ‘theory of justice’ fails because of its central choice of abstraction as a method of inquiry” (Matsuda 1986:613). The “method of abstraction” that Matsuda refers to is Rawls’ original position. Matsuda sees this as a “key move” by Rawls to avoid having to anchor his theory in the concrete realities of social life and to effectively ignore alternative theoretical constructions. (Matsuda 1986) “The push to abstraction is understandable. Like the push to objectivity

⁸ Rawls developed the idea of the *original position*, a hypothetical point of departure from which principles of justice are decided on behind a *veil of ignorance*, blinding all involved parties to each other’s actual status and position in society (Rawls 2005; Dahlstrand 2014).

and formalism in law, it avoids the war of the wills” (Matsuda 1986:616). From a feminist perspective, Matsuda disregards abstraction as methodology since she believes it is working towards “androcentric ignorance”. Like other critics of Rawls (e.g., Wolff 1977; Habermas 1995; Mouffe 2005), Matsuda points out that the foundation of American liberalism and the theory of justice is an illusion. There is no foundation that Rawls’ theory rests upon; there is only ideology. The fundamental political discussion that Rawls wants to dismantle, Matsuda views as essential for feminists.

What we really need to do is to move forward through Rawls’ veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be. By ignoring alternative visions of human nature, and by limiting the sphere of the possible, Rawls creates a gridlock in which escape from liberalism is impossible (Matsuda 1986:624)

The main problem Matsuda sees with Rawls’ theory is that he treats value laden concepts as facts when they are not. If Rawls would agree with Matsuda on this point, then he would suddenly end up in trouble trying to explain why some values, formerly disguised as facts, were let into the original position, behind the veil of ignorance, while others are left out. According to Matsuda, this exclusion is the strategy behind the choice of abstraction as methodology. (Matsuda 1986)

From a critical race theory perspective, Matsuda sympathizes with the critical legal studies (CLS) movement’s “scepticism toward the liberal vision of the rule of law” and “its central descriptive message – that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power” (Matsuda 1987:327). At the same time, Matsuda criticizes CLS for lacking a bottom-up perspective, which exposes CLS to accusations of being, among other things, elitist, overly academic, over-idealized, inaccessible, cynical, and anti-rational. To remedy these flaws, Matsuda urges critical legal scholars to “read and cite the work of minority scholars within and without the law, to consider the intellectual history of non-white America, and to learn about the life experiences of people of color” (Matsuda 1987:331).

Later on, Rawls replied to some of the feminist critique by claiming that some traditional gendered division of labour within families must be accepted by a liberal conception of justice, “provided it is fully voluntary and does not result from or lead to injustice” (Rawls 1997:792). Rawls connects the roots of gender roles to religion. Therefore, since religious practice is voluntary, it is not a concern for political liberalism to adjust inequalities within the domestic sphere – that would be to infringe on the liberty of free religious practice. (Rawls 1997)

Before Okin and Matsuda, and from an entirely different perspective, legal positivist H.L.A. Hart acknowledged the importance of Rawls’ work but, nevertheless, formulated harsh criticism against it. (Hart 1973) Besides the first and second principles of justice, Rawls also formulated two priority rules. The first one, *the priority of liberty*, states that “liberty can be restricted only for the sake of liberty” (Rawls 2005:302). Hart argues that Rawls fails to explain how this statement is compatible with the *difference principle*. How can the liberty of private property (wealth) be restricted by the difference principle (redistribution

of wealth) when the priority of liberty clearly states that liberty can only be restricted for the sake of liberty? “What, then, is it to limit liberty for the sake of liberty?” (Hart 1973:542). According to Hart, “it seems /.../ misleading to describe the resolution of the conflicting liberties /.../ as yielding a ‘greater’ or ‘stronger’ total system of liberty, for these phrases suggest that no values other than liberty /.../ are involved” (Hart 1973:543). What such a resolution accomplishes, says Hart, is not a stronger system of liberties but rather the higher valuing of one conflicting liberty over others. “[Yet] Rawls speaks as if the system ‘of basic liberties’ were self-contained, and conflicts within it were adjusted without appeal to any other value besides liberty and its extent” (Hart 1973:543). Rawls denies the involvement of other ideals in the process of ranking liberties while Hart thinks it is evident that Rawls’ own value-laden conviction (political liberalism) is at the very core of his theory (Hart 1973).

Hart admits that Rawls’ theory of justice might work in simple hypothetical cases. However, in reality, people will need something less vague than references to “liberty for the sake of liberty” or “the common good” when facing real complex conflicts of principle. Furthermore, Hart criticizes Rawls for ruling out the possibility of more than one resolution to conflicts between basic liberties, when different resolutions probably appeal to different people with different interests. Hart uses private land property as an example. For some, private land ownership and the freedom to work it is more important than the liberty to move freely wherever one pleases. Others prioritize the liberty to migrate unhindered and are willing to accept a lesser potential for economic growth and redistribution of wealth that, for instance, corporate agriculture can entail. What Rawlsian solution to this problem would lead to a stronger common system of liberties, asks Hart. (Hart 1973)

Rawls’ Harvard colleague, philosophy professor Robert Nozick (1938- 2002), delivered his critique from a libertarian position (Nozick 2001). Nozick, who was influenced by Locke, claims that Rawls’ equalization of justice with redistribution of wealth had an inhibitory effect on individual liberties (Norberg 2008). Nozick cannot accept the idea of the veil of ignorance and argues that in real life it is impossible for individuals to “forget” their talents and social background or how much work they have put into the production of what Rawls believed should be redistributed equally. According to Nozick, it is not a question of justice whether someone wants what someone else has produced. For Nozick, one does not have to earn something to have the moral right to that something. As long as it came into the owner’s possession in a lawful way, without the violation of anyone else’s individual rights, the possession is morally just. Moreover, it is morally just irrespective of whether it is at the same time unequal. Hence, Nozick rejects Rawls’ difference principle. (Nozick 2001)

From a Marxist perspective, political philosopher Robert Paul Wolff believes that Rawls relies too much on philosophy and theories that Wolff simply disqualifies, such as rational choice theory, and that “his use of the concepts and models of utility theory, welfare economics, and game theory, which is at the very heart of his enterprise, is the wrong way to deal with the normative and explanatory problems of social theory” (Wolff 1977:10). Wolff finds little in Rawls’ theory rooted in the concrete facts of social, economic and political aspects of reality. Instead, Wolff characterizes *A Theory of Justice* as a classic

example of utopian political liberalism. To Wolff, the veil of ignorance is preserving the political status quo rather than redressing socio-economic inequalities, which are, in Wolff's mind, the consequences of liberal welfare-state capitalism. According to Wolff, the theory of justice operates on a level of abstraction that is so high that any effort to empirically test it will be virtually pointless. "What remains, it seems to me, is ideology, which is to say prescription masquerading as value-neutral analysis" (Wolff 1977:195). Like the libertarian Nozick (Nozick 2001), Wolff also refutes the difference principle on the grounds that Rawls fails to explain how it will help to organize the redistribution of wealth and the "just inequalities" in a manner that serves the interests of the least advantaged in a best possible way. "In a word, he has no theory of the state" (Wolff 1977:202).

Post-Marxist political philosopher Chantal Mouffe understands Rawls' idea of public reason as an ambition to depoliticize the basic framework for political discussions within the public sphere (Mouffe 2005), an idea that is not dissimilar from previous critique delivered by Jürgen Habermas (Habermas 1995). Mouffe regards Rawls' taken-for-granted values of the public reason doctrine as an insidious attempt by him to package political liberalism as a value-neutral universal tool for democratic practices. Mouffe argues that Rawls tries to avoid the primacy of the political by creating the concept *overlapping consensus* (Rawls 1993), under which representatives of differing political positions can agree based on reasonably common principles. Mouffe writes:

In *Political Liberalism*, [Rawls] declares that when the society is well ordered, the overlapping consensus is established on the principles of his theory of justice as fairness. Since they are chosen thanks to the device of the original position with its 'veil of ignorance', those principles of the fair terms of cooperation satisfy the liberal principle of legitimacy that requires that they are endorsed by all citizens who are free and equal (as well as reasonable and rational) and addressed to their public reason. (Mouffe 2005: 224)

Mouffe questions Rawls' "apolitical ideal" and wonders why Rawls rules out the possibility for moral, religious and philosophical doctrines being able to reach rational agreements while at the same time arguing for the possibility of consensus between values of the political kind. (Mouffe 2005) "This is a consensus that it would be illegitimate to call into question. /.../ Clearly, the Rawlsian well-ordered society does not leave much room for dissent" (Mouffe 2005:225).

4.3 *Materialist Justice*

Does the lack of materialist foundation mean that everything that liberal justice theories have brought to the table should be thrown overboard? If we were to ask the legal scholar Alan Norrie, the answer would likely be "no".

Norrie, on the one hand, supports the poststructuralist criticism of "how a theory of liberal law, which purports to include, excludes" (Norrie 2005:78).

Unlike liberalism, which emphasizes universality, poststructuralism emphasizes difference.

A theory of what all individuals have in common, liberalism excludes difference: of gender, race, class and community. It does so in favour of a single, apparently neutral, standard that is in fact gendered (male), classed and aged (middle) and raced (white) (Norrie 2005: 78-79)

On the other hand, Norrie argues that a system “based on individual rights, on reason and universality surely has some advantages. Poststructuralists who want to argue for legal or human rights surely accepts this, but /.../ on what basis?” (Norrie 2005:79). Norrie’s ambition is to formulate a theory that acknowledges the “Janus-like character of law, both its significance and its problematic character, for justice” (Norrie 2005:79). Although poststructuralists, in the eyes of Norrie, have accurately identified some serious shortcomings of liberal law and justice theories, they have at the same time failed to deliver a proper alternative. The reason for this is anti-foundationalism; as poststructuralists basically dismiss all material structures as illusionary and oppressive power constructs, they consequently dismiss any possibility of an ontological and conceptual ground on which they can base an alternative justice theory.

Sociologists of law, in Norrie’s view, often fail in establishing an autonomous definition of law as its study object. They often accept definitions of law, deduced within positivist legal science from traditional legal practice, and then try to build a sociological approach on this positivist foundation. In doing so, sociology of law certainly benefits from advancements of positivist legal science, but at the same time it serves to supplement legal positivism. Norrie refers to this as the Weberian approach. (Norrie 1998)

According to Norrie, law can never be understood conceptually unless it is located dialectically within a socio-historical context.⁹

The conflictual character of social relations are expressed in and through law, even if traditional legal theorists spend all their time denying that this is the case through the explanation of law as a formal rational institution. The starting point for sociology of law must therefore be the connection between what law claims it is, but is not, an internally regulated, self- reflexive, formally rational system, and what law claims that it is not, but is, an engaged and contradictory practice inseparable from the social and historical forces which operate by and through it. (Norrie 1998:732-33)

Norrie’s approach is inspired by the dialectical critical realism of Roy Bhaskar (1944-2014), who, in turn, was influenced by Althusser’s conception of knowledge as “materialistically not real” (Bhaskar 2011b). Put briefly, Althusser made a clear distinction between the *real object* (the knowledge production) and the *object of knowledge* (the outcome of the knowledge production). But, unlike Althusser, Bhaskar viewed knowledge as real. “Althusser’s failure to give any

9 Compare to Luhmann, for whom the greatest weakness of the concept of “positivity” is that, *in a scientific context*, it is disconnected from other theoretical concepts (Luhmann 2004).

apodeictic¹⁰ status to the real object rendered it as theoretically dispensable as a Kantian thing-in-itself and helped to lay the ground for the worst idealist excesses of post-structuralism” (Bhaskar 2011b:188). However, although knowledge facts to Bhaskar indeed are real, they are also what he calls “historically specific social realities” (Bhaskar 2011a:61).

Fetishism by *naturalizing* facts, *de-historicizes* them. Its social function is thus to conceal the historically specific structures and relations constituting sense-experience in science. As we could say of positivism, as Marx said of ‘vulgar economy’, that it is content to ‘stick to appearances in opposition to the law which regulates and explains them’. (Bhaskar 2011b: 61)

In other words, facts are not permanent truths but subjects to socio-historical progress. Naturally, this must apply to facts about justice as well. There is no denying that liberal ideas of law and justice are real. Although they are clearly based on idealist and not materialist principles, they are central fundamentals in liberal democracies and their legal systems. Liberal justice is a fact, it is real, but it is a historically specific social reality, not a naturally given *fait accompli*. Liberal justice is engaged in an interplay with the here and now as well as with the past. In this socio-historical interplay lies the materialism of the encounter; i.e., the future of justice.

4.4 Procedural Justice

Although justice theories around the time of Rawls’ *A Theory of Justice* (1971) were mostly preoccupied with discussions of distributive justice, Rawls did pay some attention to issues regarding how the procedure of distribution could be thought of as well. He distinguished between three kinds of *procedural justice*: (1) *perfect procedural justice*, i.e., an independent criterion of what is a fair distribution combined with a procedure that guarantees this outcome, (2) *imperfect procedural justice*, i.e., the first characteristic of perfect procedural justice is present but combined with a procedure that aims for, but cannot guarantee, that desired outcome (as in, for instance, a criminal trial), and (3) *pure procedural justice*, i.e., there is no “right” result, however, a correct and fair procedure guarantees a likewise correct and fair outcome, whatever it may be, based on the procedure’s own merits. (Solum 2004)

Influenced by continental European law tradition, in the mid 1970’s, Thibaut and Walker divided the dispute-resolution process into two stages: the process stage and the decision stage (Thibaut and Walker 1975, 1978). Greenberg later elaborated on this division: “The ability to control the selection and development of the evidence used to resolve the dispute is referred to as *process control*; the ability to determine the outcome of the dispute itself is referred to as *decision control*” (Greenberg 1987:14). Thibaut and Walker hypothesized that verdicts resulting from procedures offering process control are perceived as fairer than those resulting from procedures denying process control (Greenberg 1987: 14).

¹⁰ Apodeictic (or apodictic) = incontestable, necessarily true, logically certain.

But it was in the 1980's that new approaches to the study of procedural justice, with a special focus on perceptions of justice within organizations, began to emerge and make an impact (Greenberg 1987). Greenberg categorizes various conceptualizations of organizational justice around a taxonomic scheme with two independent dimensions: a reactive-proactive dimension and a process-content dimension (Greenberg 1987:9). Greenberg emphasizes that although several of the theories within these dimensions have been applied in organizational research, none of them were formulated specifically with organizations in mind – they should be understood as general theories of social behavior. (Greenberg 1987)

In 1986, Bies and Moag introduced a new justice type, *interactional justice*, which has sometimes been regarded as a “social form of procedural justice”, and sometimes as a third category, separated from distributive justice and procedural justice (Bies and Moag 1986). Interactional justice focuses “on the importance of the quality of interpersonal treatment people receive when procedures are implemented” (Colquitt et al. 2001:426). Later, theories of interactional justice began to develop in two different directions of interpersonal treatment: *interpersonal justice*, which reflects the treatment's degree of politeness, dignity, and respect by those executing the procedures, and *informational justice*, which focuses on the explanations provided to people that convey information about why procedures were used in a certain way or why outcomes were distributed in a certain fashion (Colquitt et al. 2001: 426-27; Greenberg 1990, 1993).

In Colquitt et al.'s review of 25 years of organizational justice research, the authors argue that the literature support the idea of justice as socially constructed (Colquitt et al. 2001). What can be considered “fair” thus becomes a consequence of decisions made based on basically two types of subjective perceptions of fairness: distributive justice and procedural justice (Colquitt et al. 2001:425). Colquitt et al. argue that interpersonal and informational justice are distinct enough for not being lumped together under the same “interactional justice” label. Also, the authors found that when considered separately, interpersonal and informational justice were powerful predictors of procedural fairness perceptions while being not as powerful when considered in conjunction with other procedural justice facets. “The construct discrimination results suggest that procedural, interpersonal, and informational justice are distinct constructs that can be empirically distinguished from one another” (Colquitt et al. 2001:437-38).

Unlike liberal justice theories, the theories surrounding the procedural justice category are, for the largest part, evidence-based. Departing from a conception of justice as a social construction, these theories derive from empirical studies where human agency has been decisive for the outcome. However, in order to measure perceptions of justice, there must be some matter of fact to actually perceive. In this context, this fact consists of some justice principle, specific for the particular social context. But justice principles are set against, or communicated through, an actual, real, and material structure. These structures, or material circumstances, within which “objective justice” is subjectively perceived, plays a major part in how the justice principles will be understood and, ultimately, accepted or rejected. As such, the normativity contained in materiality interacts with social structures and human agency in a potentially

autosubversive process. In this process, justice and its content are constantly defined and redefined. Under some circumstances, the process might enter into a self-destructive mode, which could result in experiences of a condition governed by lawlessness, or “non-state law”. Under other circumstances, however, formal state-law might emerge anew, stronger than ever.

5 Materialist Research: Information Society and eHealth

The materialist perspective on theories of procedural justice are relevant for socio-legal studies, focusing on the regulation of different areas of information society. Not only social media, but also fields like E-government,¹¹ eHealth,¹² digital journalism, geographic information systems (GIS), global positioning systems (GPS), and so forth, are basically built upon two-way or multi-way information exchange. Even IT-based mass surveillance systems or information warfare (IW) presupposes information exchange of some sort. Point is, all these areas operate by way of information flows, i.e. streams of materiality that can be intercepted but hardly completely contained at all times. New materialism perspectives, as well as “traditional” materialism, thus becomes useful theoretical frameworks, especially for sociology of law. The advantages of these theories, compared to, e.g. Luhmann’s closed systems theory or Castells’ binary social networks theory, are the openness of information that especially new materialism takes into consideration. Furthermore, the aleatory aspect of the materialist conception of reality offers an explanation of how structures of justice and power are immanently unstable and constantly changing. The definition of existing power structures and positions must therefore constantly be rearticulated.¹³

5.1 Applying Materialist Justice Theories to eHealth Studies

Currently, we are preparing an empirical study on how perceptions of distributive and procedural justice influence the intention to disclose personal information using eHealth services. We have the ambition to integrate organizational justice theories¹⁴ with two theoretical perspectives: *the group engagement model* (GEM) and the *privacy calculus* model in the upcoming study.

Previous research support the claim that justice provisions are significantly related to perceived risks and benefits associated with online activities and behaviors (Chiu et al. 2010; Chiu et al. 2013; Culnan and Bies 2003; Fang and

11 E-government: digital interactions between citizens and the public authorities.

12 eHealth: electronic health services, including healthcare practices using the internet as well as the use of mobile phone applications or smartwatches, for the purpose of, e.g., monitoring personal health status or providing the eHealth provider with personal health data.

13 Drawing here on the political strategy of articulation as explained by Laclau and Mouffe (Laclau and Mouffe 2008).

14 Including distributive justice, procedural justice, and interactional justice provisions.

Chiu 2010; Gefen and Reychav 2014; Martínez-Tur et al. 2006; McNall and Roch 2007; Turel et al. 2008; Zhu and Chen 2012). Of particular interest in this context is Tyler and Blader's *group engagement model* (GEM), which has been developed to understand and explain how and why procedural justice shapes cooperation in groups, organizations, and societies (Tyler and Blader 2003). Tyler and Blader distinguishes between two classes of cooperative behavior: mandatory cooperation that is stipulated by the group the individual is part of, and discretionary cooperation that originates from the group member individually. Referring to previous research that has compared perceptions of distributive justice and procedural justice, Tyler and Blader argue that "procedural justice play the major role in shaping people's reactions to their personal experiences" and that "people who were asked to talk about personal experiences of injustice were found to talk primarily about procedural issues, in particular about being treated with lack of respect when dealing with others", i.e., "judgments about the fairness of procedures" (Tyler and Blader 2003:350).

A number of empirical investigations have been conducted with GEM serving partly or entirely as theoretical framework. Some studies have applied GEM in research on perceptions of procedural fairness in general (Blader 2007; De Cremer and Blader 2006; Simon et al. 2015) while some use the model in research on special topics, such as tax compliance (Hartner et al. 2008), perceived ethnic discrimination (Jasinskaja-Lahti et al. 2009), the effects of status and power on perceptions of justice (Blader and Chen 2012), and peer review and scientific misconduct (Clair 2015). Some criminological or socio-legal studies have adopted the GEM to various extents (Dorfman 2016; Killean 2016; McLean and Wolfe 2016; Myhill and Bradford 2013). However, the field where the GEM has been the most frequently applied seems to be in studies on work organization and employer-employee relations (Blader and Tyler 2009; Den Hartog and Belschak 2012; Fuller et al. 2006; Fuller et al. 2009; Harris et al. 2014; He et al. 2014; Jiang et al. 2015; Koivisto and Lipponen 2015; Kulkarni and Sommer 2015; Olkkonen and Lipponen 2006; Shin et al. 2015; Sparrowe et al. 2006; Wang et al. 2016).

Furthermore, within the behavioral sciences, Laufer and Wolfe first explained a *calculus of behavior* as a decision-making process preceding information disclosure in general (Laufer and Wolfe 1977). Laufer and Wolfe argue that a calculus of behavior, "accounting for situational constraints such as institutional norms of appropriate behavior, anticipated benefits, and unpredictable consequences /.../ is an important predictor of when and whether individuals would disclose personal information" (Dinev and Hart 2006:62). Following Laufer and Wolfe, Culnan and Armstrong argue that, in a more specific context of purchasing products and services, individual decision processes involve a *privacy calculus* (Culnan and Armstrong 1999). Dinev and Hart describe their *privacy calculus* model as an extension of Culnan and Armstrong's concept, "in that we account for an individual's willingness to provide personal information with the respect to Internet transactions specifically" (Dinev and Hart 2006:62). Furthermore, Dinev and Hart argue that Internet users should behave in accordance with expectancy theory, "which holds that individuals will behave in ways that maximize positive outcomes and minimize negative outcomes" (Dinev and Hart 2006:62). Also, "individuals will disclose personal information if they

perceive that the overall benefits of disclosure are at least balanced by, if not greater than, the assessed risk of disclosure” (Dinev and Hart 2006:62).

5.2 *Theoretical Advantages of Applied Materialism*

Information and communication technology (ICT), as well as the flows of information generated by it, are part of materiality and should be understood as such. As more and more human communication depends on “material smartness”, materiality may be conceived as an autonomous power entity in today’s society. Although the medium is perhaps not always the message, it is certainly normative and social.¹⁵ The anti-dual character of new materialism is on par with its time. Hardly anything comes in dichotomies anymore (has it ever?). The diversity, mutability and fluidity of Deleuzian social meshworks, including law, do not fit Luhmann’s closed systems, Castells’ social networks, or the debate between legal naturalists and legal positivists. Furthermore, “materialism of the Encounter” tells us that materiality might have a political potential and that it has its own immanent normativity. This is important for socio-legal studies of law, normativity, and justice within online environments. The “autosubversiveness” of social organizations, as described by new materialists, also tells us something about the difficulty for traditional power structures (including law) to remain stable. This directs attention, perhaps away from the sociology of *law*, but towards a sociology of *power and resistance* instead. Related to this, when normativity moves away from formal law, something happens with the concept of “order” in relation to the concept of “law”. When we talk about “privacy by design” or “code as law” (Lessig 1999), we refer to a type of order created in a “social materiality” and not to a metaphysical type of order created by lawyers. And lastly, the conditions of globalization and a rapidly changing reality fits nicely with new materialism’s virtual promise of something situated in the present *and* in the past but that we yet do not know. What does this ontological understanding of reality do with the epistemology of sociology of law?

6 **Concluding Remarks**

The perceived legal vacuum that characterizes times of great technological leaps forward may be explained through a materialist analysis. In this vacuum, it may appear as if normativity and social order are, if not absent, then at least unanchored to traditional state-law. We propose that what some describe as “non-state law” is in fact social order in the making – and law is one form of social order (Tamanaha 1999). The legal vacuum is a precursor of aleatory materialism, i.e., normativity of the present and the past, out of which immanent normativity of tomorrow will emerge. We have all the reason to believe that this future normativity will contain new state-law as well – all historical evidence

15 Referring to Marshall McLuhan’s statement: “The medium is the message” (McLuhan 2003).

point in that direction. But it will also contain the possibility of discontinuity, either in the form of grand time-changing events, or perhaps even in the shape of a radically different social order. In any case, whatever will emerge will emerge out of a social materiality, perhaps as flows of energy or information that existing state-law order could not constrain. But this condition is nothing new. On the contrary, what we choose to label *emergent social order* has been a feature of modernity since the beginning of Industrialization. It is normativity, flowing unconstrained until it is formalized as state-law, or as something else.

As been pointed out above, conceptualizing materialism can be valuable in studies of digitalization and “big data”.¹⁶ As early as in 1999, Lawrence Lessig elaborated the concept “Code is law”, and since then Lessig has been one of the most well-known legal thinkers with an interest in the limitations of law in our age (Lessig 1999). Lessig argues that law struggles and competes with other normativities, such as the legal and technical norms and rules of the internet. From a sociology of law perspective, Lessig’s theories are relevant due to his understanding of law in relation to copyright law, digitalized culture, and free and open-source software (Larsson 2011, 2015). However, the discussion about how law and digitalization integrate and influence each other, has been going on for quite some time now (Ewerman and Hydén 1997; Wahlgren 2014). Banakar describes the technological (and legal) shift as “the changing horizons of law and regulation” (Banakar 2015: 241) during which industrial society gradually transform into a post-industrial, digital one (Banakar 2015). More than before, law and regulation in late modernity is characterized by reflexivity, networks, risk management, contextualisation, and globalisation (Banakar 2015; Castells 1998; Giddens and Griffiths 2007).

One important question remains, namely the one regarding the relevance of legal positivism and legal dogmatics during times when the state and/or traditional legal sources become weaker. As Lessig and others have stated, there is always a competition between different normative orders, between different kinds of norms and rules. Zamboni asks if the “legal pluralist world” will function as the “black hole for modern legal positivism” (Zamboni 2013). Others have pointed to late- or postmodern legal jurisprudence as possibilities for criticism of legal positivism and new, creative theoretical perspectives on topics such as “what is legal knowledge”, “legal language”, and “legal activism”, with reference to, for instance, Deleuze and Wittgenstein (Gustafsson 2011). From a Swedish perspective, the “weaker state” condition may be understood as something new or dramatic, but as aforementioned, that reaction is perhaps saying more about the history of Sweden and Swedish jurisprudence than it does about the current state of law or jurisprudence in general. Modernity was exceptional, so to say. Or, as Modéer describes it; late modernity, from a legal-historical perspective, means *synthesizing*, and the ruins of law live again (Modéer 2008). Consequently, we now notice how the number of references to Ehrlich and concept as “living law” and “legal legalities” are increasing; Ehrlich’s plea for a decoupling of law from the state seems more relevant than

16 Data sets that are so large or complex that traditional data processing applications are inadequate.

ever (Hertogh 2009; Papendorf et al. 2014).¹⁷

But what is the difference between “non-state law” and “nonsense law” (Hertogh 2007)? And still looming is Zamboni’s question concerning “legal pluralist black holes”, which remains unanswered and troubling for those of us who agree upon the relevance of legal positivism. And furthermore, sociology of law is dependent on some kind of “practical difference thesis”, i.e., the distinct ability to understand law as having the possibility to make authoritative normative claims, which are separable from other informal norms (Coleman 2001). Otherwise, as we pointed out in our introduction, the sociology of law runs the risk of becoming general sociology. At the same time, sociology of law has traditionally often viewed law as a stable, independent variable, and stressed its discrepancy with a surrounding, ever changing society. Hydén has criticized this standpoint within sociology of law – the tendency to handle the law as a “black box” (Hydén 2002). Hydén argues for the need of a more nuanced understanding of law and the importance of legal dogmatics for sociology of law. Therefore, one unsurprising conclusion is that acknowledging non-state law, normativity within materiality, and a multitude of social orders (not excluding state law), is vital in order to illuminate the relations and distinctions between internal and external views on law.

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¹⁷ See for example Rustamjon Urinboyev’s thesis “Living law and political stability in post-Soviet central Asia: a case study of the Ferghana Valley in Uzbekistan” (Urinboyev 2013).

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