Some Useful Concepts in the Study of the Diversity and Change of Law in North and South

Agnete Weis Bentzon
International Development Studies, Roskilde University
Institute of Legal Science, University of Copenhagen

Abstract

It is the aim of this article to present and discuss some useful theoretical tools/concepts in the contemporary legal traditions for the study of the diversity and change of law in the Nordic countries and in the Southern African countries.

The dominating tradition of jurisprudence at our law faculties in the North and the South, the legal positivism, may be termed a theory of congruence because it assumes a congruence between the content of the law in books and the activities of the courts in action. The positivist legal doctrine sees the task of jurisprudence to give a logical coherent account of the system of law. And for this study of valid law it coins a number of theoretical tools and assumptions of which the three most important are discussed.

This tradition has encountered dificulties when confronted with legal praxis. Two other contemporary traditions seek to address the problem of lack of correspondance between norm and fact of the behaviour of legal practicians: the legal realism of US and the North and the legal pluralism/ legal polycentricity originally inspired by experiences from the South. Some useful concepts from these two traditions are discussed in relation to the study of the diversity and change of law and illustrated by a few examples from the North and South.

Legal Rules and Changing Life

Diversity of law between regions or countries and change of law within a region or country are relevant fields of study for lawyers, anthropologists/ sociologists and politicians in North and South. The handling of the subjects is very much depending on the researchers' presuppositions about the relationship between on one side the existing or developing rules and norms and on the other side the activities of the target groups of actors in question. The presuppositions are guiding the researcher in what to look for. I will here first comment on some dominating ideas at the law faculties in North and South and at the anthropologist departments studying the conditions of human relations in the South.

Legal Positivism

The legal positivism focus on "positive law" as it is presented in the legislation and the court usage. Law is the normative order of the state. The legislator generates new rules and the courts are the main means to induce compliance with the given rules. It is the task of jurisprudence to give an account of *a logical, coherent system of law* as advice to practitioners about what is considered valid law. The main means to obtain coherence in the mass of rules generated at different times and by different agents is the doctrine which sets up *a hierachy of the sources of law*. The rules laid down in legislation are the primary sources. Next comes the administrative regulations derived from the legislation. The third source is court usage (precedents) and last comes customary law. This doctrine gives - it is assumed - the judges a guide to, how to choose among seemingly incompatible sources of law. Further the legal positivism has ideas about *methods of interpretation of the law text* and the other sources. How to understand the phrasing of the paragraphs, how to take into account the intensions of the legislators when the law was enacted, and eventually later on the politicians' discussions of aims and actual use of the legislation.

Legal positivism (in its original version, Austin, 1863) asserts three principal theses:

1) About definition of law. A legal system is a collection of laws emanating from the sovereign. A law is a command backed up by a sanction. Thus customary law is not law unless it is recognized by state law.

2) About the relationship between law and morals: There is no necessary connection between law and moral although coincidence may be shown to some extend, and

3) About general jurisprudence: A value free analytic study , also named analytical jurisprudence should be aimed at. The study of law is an autonomous science, an abstraction of law from its social setting and function. To this could be added, that

4) The positivists focus on the reading and interpretation of the relevant texts: the sources of law ordered in a hierarchy.

From Scandinavian jurisprudence the following citation about the validity of rules and norms may be illustrating:

"A system of norms is valid if it is able to serve as a scheme of interpretation for a corresponding set of social actions in such a way that it becomes possible for us to comprehend this set of actions as a coherent whole of meaning and motivation and within certain limits to predict them... Legal phenomena as the counterpart of the norms must be the decisions of the courts. Here we must see the effectiveness that is the validity of the law" (Ross, 1974).

This quotation from the Danish legal philosopher Alf Ross represents a widespread conception among jurists about the relation between legislation and other central sources of law and the behaviour of judges in their decision making. We may call it a theory of congruence. The citation postulates a close relationship between the expressed purpose of the legislator and the behavior of the judges in the courts. Thus only a limited part of the social life is covered or included in the theory.

Congruence Theory in the Anthropology of Law

A similar conception may be found among the classics of the legal anthropology about congruence between norms as prescripts for conduct and norms as habitual behaviour of people in general, habits, customs. "In the past a great deal of work in

anthropology and sociology has focused on congruities between ideology and the organisation of social life". Furthermore: "Seeking or postulating congruence between ideology and social structure has been as attractive to utopian idealists and to social planners as it was to social scientists. Cultural and ideological materials have been as frequently treated as a blueprint for a new society or a part of it as they have been considered a reflection of an existing structure. - Discrepancies have been explained away as a consequence of transition, of lag -" (Moore, 1994).

Critique of Congruence Theories

The common problem for the congruence theories within the disciplines of law and anthropology is the lack of complete correspondance between ideology and the facts of social life."-obviously there are degrees and kinds of congruence and contradiction" (Moore, 1994). The formal national system of law and norms is not a covering description of an observable behaviour of judges and other legal authorities and neither of the beliefs and attitudes in the population towards what is right or wrong.

The changes in the contemporary societies in North and South are extensive and uneven for many reasons, among other things the effect of wars, development in science and technology and the ecological challenge. Several different systems of norms may be in action at the same time (Aubert, 1989).

Legislation has been used to provide a unification of law, in our countries centuries ago and in postcolonial states in this century but the implementation has only resulted in succes in some areas not in other areas. A diversity of norm systems prevails.

As long as the training of lawyers is primarily concerned with the study of valid law within a positivist frame of reference the understanding of legal diversity and legal change will be defective. Attention towards change will concentrate on new legislation and changes in existing legislation. The judge - we are told - applies the law. And cases where a court decision apparently is representing or pointing to a legal innovation are seen as depending on application of other sources of law than the legislation and precedents and it is explained that the judge finds the law.

The idea of judges being persons that logically solves a problem by subsuming the facts under an existing rule (that

might be difficult to find) is no longer undisputed in the jurisprudence. And the belief of the politicians and utopians that legislation can effect changes in the attitudes and activity patterns of the population or among the trained people employed by the different sections of the hierarchy of the executive power is often exposed to disappointment (Dahl, 1987).

Contributions to Jurisprudence from Legal Realism

The above mentioned school of Legal Positivism also called analytical jurisprudence may still have a hegemonic position at universities throughout the world wherever a European legal system has been introduced. However a teaching with a main stress on the law making role of the legislator is not pervasive.

Two alternative schools of thought assign considerable importance to the role of the judges in the development of law: The legal realism which exists in an American and a Scandinavian edition, and the legal pluralism especially cultivated by legal anthropologists based on studies of societies of the South. Of late the comparable concept of legal polycentricity has been discussed in Nordic legal fora as a contribution to a critical revision of the doctrine of the sources of law. The polycentric character of law presents itself by the fact that different authorities in different fields of regulation use different sources of law and in different order (Petersen & Zahle, 1995; Bentzon , 1991).

American legal realism

In this school a main distinction is made between *law in books and law in action*. The actions to be studied are the decisions of the courts as results of the behaviour of the judges. This behaviour is influenced by other factors besides the content of what jurists present as valid law on the basis of legislation and earlier court decisions. In their decision-making the judges are influenced by law in books but at the same time other influences are active, even where a piece of legislation or a precedent deals with the issue at hand. The text of the relevant acts is interpreted and more than one outcome may be acceptable. The appropriateness of possible precedents is assessed and

considerations of equity included. Many of the authors within this tradition have been judges themselves and thus have an inside knowledge of the life in the courts. So they turn the focus from the texts of legislation to the law making activity and behaviour of the judge.

But it is varying how much discretion the legislation leaves to the judge. There is a trend in modern legislation to assign a wider discretionary power to the judge within the bounds of objectives and conflicting interests, that have to be taken into account.

Legal standards

An international legal discussion has evolved around a pattern of law called legal standards (in German: Generalklausul). The American legal realist Roscoe Pound (1945:118) mentions three characteristics of rules in this form:

1. They all involve a certain moral (broadly interpreted) judgement upon (people's) conduct. It should be fair, reasonable, conscientious, prudent, diligent.

2. They do not call for exact legal knowledge exactly applied but for common sense about common things or trained intuition about things outside of every ones experience.

3. They are not formulated absolutely and given an exact content either by legislation or by judicial decision, but are relative to times and places and circumstances, and are to be applied with reference to the facts of the case ind hand. They recognize that within the bounds fixed each case is to a certan extent unique.

Scandinavian legal realism

This legal school is founded on the philosophy of the logical empiricists of the Vienna school who maintain that normative sentences lack logical meaning and have no factual content. In order to attribute a non-metaphysical empirical meaning to sentences about valid law in jurisprudence these are to be understood as statements about rules of behaviour that are actually being applied by judges in their decision making and by other state agencies authorized to apply force to achieve com-

pliance with official decisions. The task of jurisprudence is thus to predict the behaviour of judges and the empirical test must be based on the study of courts decisions. As a consequence the doctrine of the sources of law must develop a description of how the judges proceed when they actually seek to find the proper rule to choose in a concrete case.

Influenced by the Scandinavian realism and the American realism as well the Norwegian professor of law Ragnar Knoph has analysed the development in the use of legal standards in his book from 1948. He underlines, that the increasing use of legal standards in legislation raises a number of problems for jurisprudence:

1. The sociologists of law might clarify, why there is an increasing use of standards in the last decades. It is worthwhile to disclose how social powers and factors in this way spontaneously participate in the formation of law with no participation of the legislation or the state apparatus.

2. The normative doctrine of the sources of law as taught by the legal positivists may not give an exhaustive picture of the process by which the judge groups facts under rules and the relative force of the different influencing factors may be indeterminate. The divide between the form of law and the content of law which is caused by the legal standard may influence the understanding of the emergence of law and the change of law. The normative doctrine of the sources of law needs modifications. The (traditional) claim that customs and practices demands general observance, opinio juris (a feeling of binding force) and many years of application to be of legal relevance may be loosened by the use of legal standards.

This line of thinking is followed up by his successor Torstein Eckhoff in his empirical theory of the sources of law. (Eckhoff, 1993). He introduces the concept *sources of law factors* in order to stress the co-ordination in the practical use of the sources rather than a prescribed choice between them.

Qualifications of the judges

The focus of the legal researcher has thus moved from the study of texts to the study of the activities of judges and other legal

authorities, that are applying the texts and formulating the decisions.

In this relation it may be interesting to identify the relevant qualifications for the judge and how to cultivate these by the law curriculum combined with expiriences from practice. Will lawyers or lay people with local or trade insight or a combination of these qualifications make the best members of the courts? In political terms it is often stated, that the lawyers need a better understanding of the society they live in. They should be taught law i context and not solely black letter law.

The qualification of lay judges is a current issue in the post colonial African states. On the one hand laywers are scarce. There are not enough of them to occupy the posts as judges if the number of first instance courts shall make possible for common people access to court. On the other hand a general view among lawyers looks at the use of lay people as judges as a drawback for the administration of justice.

The following illustration may expose benefits and drawbacks by use of lawyers and non lawyers respectively as judges in a situation where the relevant rules could be classified as legal standards.

Inheritance in Zimbabwe. Content of "custom" as defined by the courts.

> "Although the choice of law rules specify whether an estate is to be governed by customary law or general law it is only in regard to the distribution of estates governed by the common law and the Deceased Estates Succession Act that the rules are laid down as to which classes and categories of persons should inherit and in what proportions. The legislation which deals with so called customary estates does no more than indicate that the customs and usages of the tribe or people to which the deceased belonged are to be the basis for the distribution of the estate or as in the case of immovable property indicates that the heir at custumary law shall inherit the property but does not indicate who that heir should be or is.
>
> However despite the apparent open endedness of the legislation there is a considerable body of case law based on supreme court decisions which defines who is the heir at customary law to the estate of a deceased African. The eldest

son of a deceased male African is his heir at customary law. Only where there are no sons a daughter may inherit. The supreme court has rejected the appointment of the wife of a deceased male African as his heir on the ground that the wife could not be the heiress under customary law. In the research process an increasing trend of widows being appointed as heiresses to the estate of the deceased husband was disclosed. It was decisions made by the community courts and normally based on the settlement in the husbands family. In the WLSA research project on inheritance it was one of the empirical findings that reference to rules was but one input to a solution of a dispute and that in the same debate arguments were used about situational conditions which should be decisive for the outcome. Such a negotiation was more common at the lowest level of the institutional hierarchy for dispute settlements manned with lay judges than at levels manned with people trained in law (WLSA Zimbabwe, 1994:67-68).

Theoretical Tools Developed in Legal Anthropology

Whatever the differences between the models presented above they have in common a conception of law as linked to the nation state - a system of rules with universal applicability within the boundaries of the nation and enforced through the executive power of the state. This picture is attacked from several quarters. It is obvious that the models here presented are developed in a certain historical period - the creation of nation-states - and within a certain geographically defined area - the first world countries. Naturally the first to find the current definitions of law inadequate were the anthropologists of law. They developed definitions of law which did not make the presence of rules of law dependent on the presence of a state-apparatus.

As anthropology of law shifted focus of interest from tribal societies to the impact of colonialism on indigenous cultures and to post-colonial states, geographical demarcations for the studies of development of law appeared. This necessarily drew attention to the concurrent existence of more than one system of law within the same politically defined country. Folk law and state law and legal pluralism were new-formed concepts. However the interest for folk law and its placing in- or outside the formal systems of law is by now not limited to research milieus,

where anthropology of law is cultivated within the traditional field of study: the peoples of the third and fourth world.

Anthropologists and sociologists of law have for some time been occupied with comparing and finding parallels between the functioning and the development of law in our countries and the more exotic.

Law as process

"Research in customary law systems ought to take into consideration that "the target" is not static but continuously on the move... An instant picture is outdated before the print is dry....A time horizon projecting likely changes in environmental and socio-economic conditions and projecting their likely impact on customary law is needed" (Berry, 1994). The quotation expresses the idea of law as process. It should however be stressed that also formal law is constantly on the move. Prescriptions and precedents are only *sources of law* and even if they in the doctrine are considered as primary sources there are other recognized sources. Sally Falk Moore states as the central theme in her book: Law as Process, the interplay between attempts at total regulation of a society and efforts at partial regulation. She makes a parallel between the ideas of older cultural anthropologists of the societies studied as relatively consistent cohesive wholes and the ideas of legal scholars of law as a logical coherent system.

These ideas do not correspond to reality in the past or in the present anywhere. They may be based on a biological metaphor of societies as living organisms. As for law she points at two traits which decisively prevent any system of law from being fully systematic, rational and coherent. One is the piece-meal historical processes by which systems of law are build up. The other is the combined, not fully controllable effect of a complexity of sources of rules and arenas for action.

Moore opposes the traditional views of the difference between law in socalled primitive societies and modern societies: that while tradition and culture shape the law of the former, intellect and intention shape the law of the latter. Ethnographic data show, that the regular capacity of some to make rules that bind others has existed at many levels of social complexity. "The conventional category of law meaning rules enforcable by government is a category of our own culture." Such a procedural criterion linked to the presence of a government or

state is useless in societies of a different structure. Consequently anthropologists have tried to develop generally applicable definitions of law. There is no general agreement about the labelling of those normative orders not originating from the state. Folk law, indigenous law, traditional law, informal law and customary law are all terms used to cover almost the same phenomena.

Customary Law

I prefer the use of the term customary law to refer to norms generated by social practice and acceptance. But the term customary law is used with different meanings.

It is now commonly held, that what in colonial times was said to be the content of customary law was at least partly a construction of the colonial administrators, as most of the colonies were composed of several ethnic and language groups with different customs and norms. Thus customary law was a variety of law systems but in the administration of justice it was often transformed to one common law system. Woodman has proposed a distinction between lawyers customary law and sociologists customary law to describe the legal situation for that period (Woodman, 1983). It is still a handy tool for analysis of the present legal situation, but with addition of the idea of law as process we may add the concept of *living customary law* to our tools.

Reglementation as a General Concept for Law-like Phenomena

Moore finds that a broad definition of reglementation opens the eyes of the researcher for law-like phenomena in pre-state societies and in modern complex societies as well. But she is not in favour of calling all law-like phenomena for law in complex societies. In stead she uses the general concept 'reglementation' for all rule-making and rule-enforcement within and outside the regime of the state. The term 'law' she reserves for rules, to be enforced by the power of the state (cfr. Galanter, 1981).

Semi-autonomous social fields

For the study of reglementation she selects as the basic element the semi-autonomous social field. It is characterized by its

capacity to formulate rules and to enforce their observation. The semi-autonomous field is not defined by its social organisation. It might be an permanent formal organisation, but it need not be (see also Fortes, 1963). The term semi-autonomous underlines, that the different social fields, where the rule formulation and the rule enforcement take place, influence each other.

In my understanding, Moore does also consider the state as characterized by a number of semi-automous fields. Different state agencies interprete the legal fundament different and apply the sources of law differently. And even if the concept semi-autonomous social field is absent in most writings within legal polycentricity it is a logical consequence of the negation of monocentrism that the different authorities in the different fields of regulation posses a certain degree of autonomy, obviously for example in the system of local government (Ketscher, 1989 and 1993).

The central authorities usually use legislation as the measure for influencing the activities and the behaviour of the population. But their attempts to control the development of the society are often unsuccessful, because the new legislation is forced upon sectors of the population, which allready are integrated in a network of self-regulations. The formal law and its function can only be understood when its interaction and collision with other rule producing and rule enforcing groups are taken into account.

The following example is a study of rule formation within the field of labour law in Britain, (Terry, 1977). Law in books are here the national agreements and law in action - at least partly - the informal rules and customs at work place level. The starter of the study is the work and recommendations of a commission whose concern was the weakening of the effect of the national agreements due to the wide spread occurrence of informal practices. Guardians and enforcers of these informal provisions were shop stewards and their members "without any legitimate authority to have a hand in the process of rule negotiations and enforcement". Even low level managers participated in the reaching of informal agreements. It is acknowledged that the informal provisions more closely than the national agreements reflect the real state of substantive and procedural affairs within the factories. The commission's report concludes that informal rules are formulated largely because the formal provisions do not regulate in detail events on the shop floor and

consequently a main recommendation is the development of formal rules with the scope and details to cover all situations at the workplace.

The follow up study found that the effectuated recommendations did not bring about the expected result, the decrease of informal provisions. Seemingly informal rules were preferred for a couple of reasons: They are more adaptable to changing conditions and in that connection to changing power relations. And from the low level managers point of view written formal rules reduce the ability to bargain over work practices such as to regularly shut one's eyes to minor breaches of formal rules in exchange for peace and stable work.

Another study of informal rules is found in Hanne Petersens recent book on informal justice and norms of consideration.

She follows Sally Falk Moore in considering women's places of work as semi-autonomous fields. She has studied the emergence of rules within these fields and uses the concept "informal law" for this production of rules. She is only interested in a limited set of norms within the selected semiautonomus fields. Her point of departure is a limited number of special traits of the life conditions of women in our society. The caretaking duties for women with minor children are often combined with having a job as wage earner. The label *norms of consideration* is used for the informal formation of rules aiming at building bridge between the two areas of responsibility and their almost non compatible claims on the woman. Hanne Petersen uncovers such norms of consideration in her empirical material and analyses the relations between this piece of informal law and the formation of law and the administration of law within the domain of the formal law (Petersen, 1991).

Hanne Petersen searches the influence of the norms of consideration on the rule production within in the officiel system of law including the arbitration councils, the labour market courts and the ordinary courts. It appears to be very difficult in her material to trace the influence of the informal law on the formal law.

But it might very well be, that the formal law has been and is influenced by the informal law in this as well as in other areas. To enlighten this problem it is necessary to get information on the placement in other networks or 'fields', of the

actors of the studied semi-autonomous fields. It might show that some of the members in other networks have capacities to exert influence on the formal law this way.

Hanne Petersen does not penetrate into this problem. But she looks for openings in current theories in jurisprudence towards use of sociology and anthropology to form hypotheses about the existence of informal norms and their interplay with formal norms.

Conclusions

It has been the aim of the article to present and discuss some useful concepts for the study of diversity and change of law. For politicians and members of NGOs and international aid agencies that are interested in supporting the legal sector in developing countries it is mandatory to have a practical understanding of the processes leading to diversity and change of law. I hope to have demonstrated, that the hegemonic legal positivism is incomplete for such studies. But in some of the traditions of legal realism and the parallel contemporary developments in the field of anthropology of law one may find a number of useful concepts to be used as tools for the analysis of data from the legal sphere in North and South.

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