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Law, justice and Reza Banakar's legal sociology

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Abstract

This work provides a specific theoretical reading of the contemporary sociology of law promoted by Reza Banakar. Specifically, it investigates how the scholar approaches the relationship between law's autonomy and justice claims through socio-legal lenses, and it proposes a partial understanding of his response. This response is critically interpreted in order to outline the potentialities and limitations of the author's theoretical proposal. The analyses found in this work were operationalized from a bibliographic review of different sets of literature. In the end, the work highlights that, despite certain gaps, Banakar's sociology of law has much to offer to the field, and it paves the way for the engagement of future socio-legal researchers interested in the different forms of intersection between law and justice in society.

Key words

Reza Banakar; sociology of law; law and justice; socio-legal theory

Resumen

Este artículo proporciona una lectura teórica específica de la sociología jurídica contemporánea que propulsó Reza Banakar. Concretamente, indaga sobre la manera en que el académico abordó, a través de la lente socio-jurídica, la relación entre la

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autonomía del derecho y las reclamaciones de justicia, y propone una comprensión parcial de su respuesta. Esta respuesta es críticamente interpretada para dibujar las potencialidades y limitaciones de la propuesta teórica del autor. Los análisis recogidos en este trabajo fueron operacionalizados desde una revisión bibliográfica de distintos conjuntos de literatura. En fin, el trabajo destaca que, pese a ciertas lagunas, la sociología jurídica de Banakar tiene mucho que ofrecer a la disciplina, y prepara el camino para el compromiso de futuros investigadores de la sociología jurídica que estén interesados en las distintas formas de intersección entre el derecho y la justicia en la sociedad.

Palabras clave

Reza Banakar; sociología jurídica; derecho y justicia; teoría socio-jurídica

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1. Introduction

> Outside the Law there stands a doorkeeper. A man from the country comes to this doorkeeper and asks to be allowed into the Law, but the doorkeeper says he cannot let the man into the Law just now. The man thinks this over and then asks whether that means he might be allowed to enter the Law later. 'That is possible', the doorkeeper says, 'but not now'. Since the door to the Law is open as always and the doorkeeper steps to one side, the man bends down to see inside. When the doorkeeper notices that, he laughs and says, 'If you are so tempted, why don't you try to go in, even though I have forbidden it? But remember, I am powerful. And I am only the lowest doorkeeper. Outside each room you will pass through there is a doorkeeper, each one more powerful than the last. The sight of just the third is too much even for me'. The man from the country did not expect such difficulties; the Law is supposed to be available to everyone and at all times, he thinks, but when he takes a closer look at the doorkeeper in his fur coat, with his large pointed nose, his long, thin, black Tartar moustache, he decides he had better wait until he is given permission to enter.
>
> *The Trial*, Franz Kafka 1925/2009, pp. 153–154

If one could freely rephrase the Kafkian words in light of the contemporary society, he/she might say that outside the law there stands not one but several doorkeepers. Following the metaphor, in terms of disciplinary doors, one could say that the sociology of law did not wait for any permission to enter. On the contrary, since its emergence, it has sought to build an alternative entrance, connecting the law room with several others. But constructing and opening up this door did not come without challenges: how large can it be? Does it need a doorkeeper too? Should it be connected or separated from the traditional, very well-known door right next to it? The list of possible questions is endless.

In view of that, this work discusses the sociology of law as an academic field, different from traditional legal doctrine, which has specific developments and debates on legal phenomenon. Among those lies the issue of the possible relationships law establishes with claims for justice, a debate that acquires different responses inside and outside the sociology of law. It concerns, then, these disciplinary borders but also a lot more.

The discussion is made through the very specific lens of an important socio-legal scholar, whose body of work has shown great usefulness for the advancement of the academic field. Born in Iran and having worked on highly qualified research and study centers for the sociology of law, Reza Banakar was amongst the most relevant contemporary scholars of the field. With an academic background and accumulation of readings ranging from law to philosophy and sociology, Banakar brought valuable contributions to the theoretical and methodological debates developed in the discipline.

It is argued here that in the core of his concerns lies the issue of law's autonomy, as it is promoted by legal positivism and some sociological accounts, and its relationship with justice claims. Banakar notes that even though the "separation thesis", that is, the contention that there is no necessary link between law and morality, appeared as a fundamental assumption shared by different versions of legal positivism, for the last decades justice has been "knocking at the door of legal positivists, and although it has not been allowed entry into the realm of law, it has made its voice heard" (Banakar 2015, p. 69).

According to him, justice remains a compelling force in society, and, regardless of any attempt to deny or mask it, empirically it is still one of law's sources of normativity (Banakar 2015). In this context, the scholar recognizes the role played by the methodological assumptions of legal sociology in limiting the potential of the field for considering the normativity of justice and its relationship with law. He presents a scenario where, in order to separate methodologically facts and norms, the sociology of law ended up neglecting somehow the socio-historical properties of modernity that lead to social integration. Banakar states that "the disembeddedness of modern law is never total and the legal system's autonomy from other social domains and processes is always a question of degrees rather than an either/or issue" (Banakar 2015, p. 6). For this reason, he seeks to provide theoretical and methodological tools for dealing with the inherent contradiction that comes with any attempt to re-embed the law while preserving some degree of autonomy for the legal system.

In view of this, this work asks how does Reza Banakar build and provide a solution to the problem of the relationship between law and justice in the field of sociology of law. As a theoretical inquiry, it adopted a bibliographic research, involving different sets of literature, for collecting and producing the necessary data to answer this question. Departing from the understanding that there are different ways of producing theoretical research, the work focuses on Banakar's texts as the main source of systematization and analysis.

Beyond this introduction and the concluding remarks, this article is divided into two main sections. The first one summarizes the sociology of law developed by the scholar, focusing on his compelling critique on the identity crisis of the field and his project for the improvement of legal sociology as an autonomous and interdisciplinary field of research. The second departs from Banakar's sociology of law to address the issue of the relationship between law and justice through his socio-legal lenses. It is argued that this is a problem that pervades much of the author's work, in so far as the issue of justice is seen by him as a fundamental matter to the constitution of this specific field.

2. The sociology of law of Reza Banakar

As already outlined by several legal sociologists (see, for instance, Cotterrell 1995, Banakar 2003, Deflem 2008, Treviño 2010, among many others), since its emergence, socio-legal research has been carried out following different theoretical and methodological assumptions and approaching a wide range of empirical topics. Although this diagnosis is practically a consensus among socio-legal scholars, this plurality has been differently assessed by theorists in the area. In this scenario, Banakar is amongst those thinkers who, to a certain extent, saw this diversity as a sign of the field fragmentation.

Based on this analysis, the scholar inaugurated an important debate on the identity of the sociology of law, and the questions he made on that occasion would become the starting point for the development of his socio-legal theoretical and empirical approaches. As an active reader and analyst of many of the theoretical accounts informing the field, Banakar became a relevant exponent in the development of the contemporary sociology of law, not only for promoting a meta-theoretical critique of

enormous significance for the discipline but also for providing a theoretical-methodological synthesis of his own as part of a project for legal sociology.

2.1. The search for a common identity in the field

At the end of the 1990s, the fragmentation of the sociology of law had been already stressed punctually by some socio-legal scholars, but Reza Banakar was one of the first thinkers within the field who dedicated some considerable space for this discussion at that moment. By seeing the lack of common basic assumptions as a relevant problem of the socio-legal field, Banakar initiated a productive debate over the identity of the sociology of law and its project as an area of research.

In his paper *The Identity Crisis of a "Stepchild"* (1998), the author highlighted the insufficiency of theoretical development in the sociology of law. The title of the polemic article was a clear reference to Parsons' text *Law as an Intellectual Stepchild* (1977), where the sociologist explored the reasons why the social sciences, and, especially, sociology, "have shown so little interest in the study of law and legal systems" (Parsons 1977, p. 11). Banakar's main argument was only similar to Parsons' in the sense that both believed law should be regarded as an important and specific social institution worthy of intellectual attention. But whereas Parsons was interested in highlighting the relevance of law in modern society and in promoting his own theoretical approach to it through his general theory of social systems, Banakar, decades later, was concerned with developing a meta-theoretical reading of the sociology of law as an autonomous field of theoretical and empirical research.

According to Banakar, the sociology of law faced an identity crisis mainly because of its lack of intellectual coherence, which prevented it from producing its own internal paradigms. Even though, he argued, the variety of perspectives on law and society provided several research opportunities for socio-legal scholars, this diversity was developed in a non-cumulative fashion, creating confusion and disagreements at the most basic levels of its academic works. Hence, the field would be marked by an underdeveloped theoretical state, sustained by the absence of a common ground for its studies as well as by the dominance of a certain "structural functional thinking" (Banakar 1998, p. 5).

Different from other academic specialties, the sociology of law would face a dichotomy produced by "inside" and "outside" perspectives of the legal order. This dichotomy would reveal an intrinsic tension in the field between two diverse epistemological premises, one coming from sociology and the other from law (Banakar 1998). Sociology of law's task, in this sense, would be to constantly address this dichotomy and to continually try to approach both perspectives of society by limiting its dependency on law and sociology and using the developments of both disciplines not as predominant approaches but rather as auxiliary ones.

Because of its vigorous critique, *The Identity Crisis of a "Stepchild"* generated major repercussions in the social-legal environment. Several replies assessing Banakar's analysis and, more generally, the identity of the sociology of law came into view. Among those, it is worth highlighting the ones developed by the Nordic scholars Mathiesen (1998), Hydén (1999), Dalberg-Larsen (2000), and Sand (2000), in so far as they were the critiques that Banakar recognized as the ones that most addressed his implicit concerns

(Banakar 2001a). The diverse objections pointed out by those scholars challenged some of Banakar's assumptions and provoked him to rearrange and clarify some of the ideas presented in that article.

In *A Passage to "India"* (2001a), Banakar, borrowing the metaphor from Franz Kafka, tried to invite socio-legal scholars to reflect deeply on the possible projects for the field. The author sustained his main thesis of the underdeveloped theoretical state of the sociology of law, but he used part of those criticisms to propose a socio-legal "reflexive matrix". This reflexive matrix was built mainly with the purpose of containing the tensions between the inside/outside dichotomy presented in his first article. He incorporated into it the idea of the different realities of the law highlighted by Hydén (1999) in his critique.

In light of Mathiesen's (1998) criticism, Banakar stressed that his project for the sociology of law involved looking for a common ground for the field to constitute itself as more autonomous in relation to sociology and legal practice, which did not mean having a single ruling paradigm or being against theoretical diversity. In the same context, he contested Dalberg-Larsen's view concerning the use of a primarily legal perspective on legal sociology:

> Taking into account the epistemological tensions in the field, which cause difficulties in matching legal and sociological knowledge, our task may be defined in terms of the paradox of devising a research tradition, which translates the claims of legal discourse into sociological language without loss of meaning. (Banakar 2001a, p. 7)

According to Banakar, the task of devising a research tradition for revitalizing intellectually the field could not be solved by only safeguarding its plurality of perspectives. Moreover, it could not be solved by merely searching for one adequate theory of law and society, as Sand (2000) apparently supposed. His claim, on the contrary, was for a search for the particularities of the law that would justify a sociology of law that is neither sociology nor legal doctrine, in order to provide some sort of "transformative disciplinary discourse or meta-theoretical umbrella capable of encompassing many theories" (Banakar 2001a, p. 9).

2.2. Theory and empirical research in legal sociology

By putting the identity of the socio-legal field into question, Banakar triggered a fruitful debate that had an impact on the contemporary discussions taking place within legal sociology. His meta-theoretical considerations also had an effect on his own theoretical constructs, and some of those initial reflections were later developed and transformed into a general proposition of a common framework for research in the field.

As seen, after receiving a set of criticisms of his first notes questioning the identity of the field (Banakar 1998), the author tried to re-address them in a more sophisticated form three years later (Banakar 2001a). But it would be only with his work entitled *Merging Law and Sociology* (2003) that the scholar would provide a more developed and detailed proposal for the sociology of law. Banakar introduced the book by claiming that:

> The sociology of law is an interdisciplinary field of research placed somewhat precariously at the intersection of the disciplines of law and sociology, each of which in turn fosters its own distinct mode of conceptualizing, describing, analyzing and experiencing social life. (Banakar, 2003, p. 1)

According to his approach, sociology of law's fragmentation would be detrimental for the establishment of the field as a specific site of discourse on law. In this context, not only those intellectual shortcomings previously identified (Banakar 1998, 2001a) would play a role in preventing the makeup of an enduring site of discourse but also the material dynamics of power surrounding the scientific struggles between disciplines and fields of research.[1]

Banakar notes that whereas sociology was successful in creating and organizing its own scientific stakes, the sociology of law would still struggle to define its fundamental paradigms and even to demarcate its own seminal works (Banakar 2003). As a consequence of this disciplinary immaturity, sociology of law would also strive for consolidating methodological discussions of its own. In *Merging Law and Sociology*, therefore, Banakar deals with the identity issues of the sociology of law through two main strands: the intellectual and the material one.[2]

Drawing mainly from Bourdieu (1975), Banakar addresses the institutional obstacles for the development of the sociology of law by regarding law as a special sociological subject:

> The strength of modern law should be examined in the context of the interdependence of law, the state and science, where it operates as a means of governance and a source of legitimacy (…). In short, the law is used by various groups to safeguard expectations and to express ideals and values, fulfilling a large number of overlapping tasks in society for which it has developed numerous techniques and mechanisms (…). In this sense, the strength of law is geared to its ability (ultimately sanctioned by the state and supported by science) to present itself as a professional body, which organizes itself around a rigorous code of ethics regulating the activities of its members, who use their expert knowledge to provide vital public services. (Banakar 2003, pp. 149–150)

The institutional strength of law, in Banakar's perspective, would make it harder for the socio-legal researcher to access empirical data and to break free from law's self-descriptions, thus creating a conflict that appears not only as an epistemological tension but also as a methodological one. It is in this context that Banakar distinguishes three sources of difficulties in the sociological study of the legal system.

First, he highlights law's mode of domination based on institutional normative control, which would cause political and disciplinary rivalries between law and sociology. Second, he addresses law's mode of communication and its conceptual apparatus, which could cause another source of confrontation with sociology's language. Third, he stresses law's mode of legitimacy founded on its function of acting as the official source of social order. This would provide law with an ability to strengthen its practical bases and to protect itself against outsiders. Faced with such institutional challenges, the task of the sociology of law would be to stop reproducing the disciplinary stakes of other disciplines and to seek to strengthen its own institutional bases.

[1] This "new" layer highlighted by Banakar in *Merging Law and Sociology* (2003) was clearly influenced by Bourdieu's relational sociology (Bourdieu 1975).

[2] Whereas the former was the focus of critique both on *Identity Crisis of a Stepchild* (1998) and on *A Passage to India* (2001a), the latter was discussed in the article *Reflections on the Methodological Issues of the Sociology of Law* (2000).

On the other hand, Banakar addresses the intellectual challenges for the sociology of law through the distinction of the "inside" and "outside" perspectives on law – a division that appeared for the first time on the paper *The Identity Crisis of a "Stepchild"* and that would guide Banakar's analyses throughout his whole career. The distinction of the inside and outside of law makes reference to two different forms of experience – either near or distant – shaped by a given relationship and social context. Furthermore, Banakar's distinction is incremented by a second analytical division: the distinction between "participation" and "observation". It would be possible, then, to identify at least four standpoints "each capable of producing a specific form of knowledge and interest pertaining law" (Banakar 2003, p. 43): the standpoint of the inside participants; the standpoint of the inside observers; the standpoint of the outside participants; and the standpoint of the outside observers.

According to the scholar, considering the different perspectives on law would be key to improving the socio-legal field intellectually, especially because "how law constitutes itself internally and creates its identity, authority and, hence, vision of society, is inseparable from the way it interacts, influences and is influenced by other social forces" (Banakar 2003, pp. 73–74). In this sense, any socio-legal research, according to Banakar, would have to recognize the dynamic and multi-dimensional character of legal phenomena. Law is able to assume different forms and each aspect of it can be seen from different perspectives. Each perspective, in its turn, is shaped by different theoretical claims and definitions as well as by different practices and experiences. Hence, the intellectual challenge posed to the sociology of law acquires, in Banakar's point of view, a complex character in so far as

> the law does not comprise one, but many forms of communication which take place at different levels of the legal system (…). The unified vision of the law emerges as sections of the legal profession speak on their own corporate behalf to ensure its monopoly of knowledge. (Banakar 2003, pp. 152–153)

As discussed, these features would enhance the need for one to look reflexively to the practice-based features of law without losing sight of the way law operates internally through the exercise of its knowledge. For these accomplishments, Banakar proposes a "reflexive matrix", which would provide one among many other possible alternatives for considering the internal and external aspects of law theoretically and empirically. The scholar borrows from Waters (1994) the idea of the "universe of discourse" of sociology, adding that the sociology of law would have to always address the concepts of norm, function, and communication, besides those of agency, rationality, structure, and system, in order to demarcate its own universe. The reflexive matrix would have to incorporate these core notions together with the substantive strands of research in an open-ended way, allowing the materialization of different socio-legal inquiries. For this matrix to be complete, Banakar asks himself:

> Is there a fundamental notion specific to the sociology of law that can be used systematically to direct the application of core concepts to the substantive strands? This notion should be able to bring into focus the socio-legal discourse by posing a fundamental problem common to all studies of law in the social context, and thus bring some forms of theoretical continuity to the ongoing discussions in the field. Furthermore, it should possess a transformative quality which will allow socio-legal studies to transcend the limited interest of any researcher or research orientation, but

> should not be ideologically charged or impose any limits on the application of the core concepts to the substantive strand. (Banakar 2003, p. 179)

This transformative theoretical role is attributed to the inside/outside dichotomy, understood in a dynamic way – that is, without reference to any static notion of law, but, instead, to its momentary picture arisen from the intersection of its external and internal realities in a given context. This way, the integration of the inside and outside perspectives on law would provide such a socio-legal matrix with its missing piece, making it neither only sociological nor just legal (Figure 1).

FIGURE 1

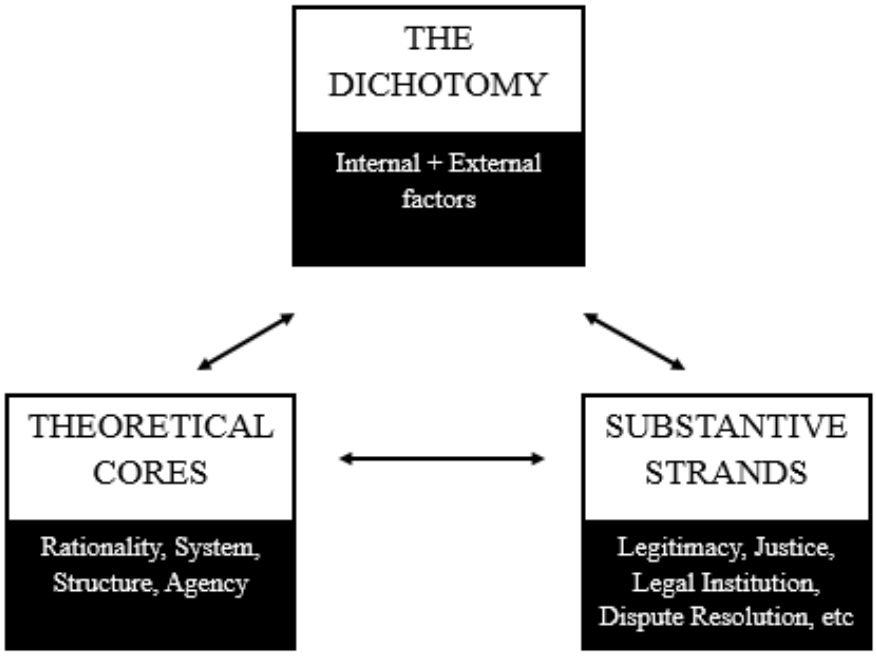

Figure 1 – Banakar's Reflexive Matrix.
(Adapted from Banakar 2003, p. 183.)

Through the reflexive matrix, Banakar tried to accomplish the difficult task of presenting a departing point for socio-legal research that highlights those aspects that are peculiar to the sociology of law. Moreover, the author sustained a changing conception of law in which both its inside and outside realities play a role, and in which "the dialectical relationship between law as a body of rules and law as a complex of institutional practices" (Banakar 2006, p. 77) appears as worthy of attention.

In this sense, Banakar relies heavily on the writings of Ehrlich, Petrazycki, and Gurvitch, who criticized both legal positivism and natural law conceptions of legal phenomena from a socio-legal perspective (Banakar 2001b, 2012). Sociology of law, therefore, should conceive itself as both dynamic and relational – i.e. should approach legal phenomena through the interaction of internal and external perspectives and of official and non-official bodies of rules (Banakar 2012). The key to this approach to law would rely on recognizing the diversity of legal forms and on putting the communicative processes that constitute legal phenomena on the center of socio-legal analysis: "Forms of knowledge and 'truth' that law produces are dependent on communicative processes

which are inherently social and fall within the scope of social theory" (Banakar 2009, p. 61).

According to Banakar, the sociology of law would still be in "the initial stages of its development" (Banakar 2009, p. 71), and, as seen, its maturity as an academic specialty would yet depend on overcoming both the intellectual and institutional challenges that somehow inhibit such effort. Moreover, the scholar also points out the challenges posed by recent societal transformations for an empirically informed socio-legal research. In this regard, the new social relations of contemporaneity could be central for the field to improve its knowledge on the varied social roles of law.

Banakar explains that contemporary global society would have transformed States and social relations, increasing socio-cultural diversification and hybridizing several legal cultures. In this sense, globalization appears as a broader social context within which current socio-legal research should be conducted and against which its historically and culturally conditioned concepts and ideas should be confronted (Banakar 2011b).

Contemporary society is approached by the scholar in terms of "late modernity", a concept he uses to express a set of different but interrelated phenomena: the growing uncertainty of social norms, relationships, and structures; the consequences of the spreading of the global market economy; the increased reflexivity on the level of agency; and, also, the disjuncture among structural relationships, institutions, and systems (Banakar 2010, 2013b, 2015). In this context, the issue of how law stands under late modern conditions would be of special importance for the sociology of law. Any attempt to address it, however, would have to understand first the meaning of these social changes and to take a position concerning the specificities of those topics.

Late modernity is developed in Banakar's theoretical account through its social manifestations on both micro and macro analytic levels (Banakar 2015). On the micro level, late modernity would refer to an enhanced reflexivity of the social actor (Archer 2007, 2010, 2012). On the macro, in turn, late modernity would be understood through the processes derived from globalization, such as the decentralization of the social sources of normativity and decision-making, and the passage to risk management strategies of policy-making (Beck 1992, 1999, Beck *et al*. 1994, Teubner 2009). In light of these features of late modernity, Banakar asks himself how would law provide the majority of the people with a reason for action, a question that the sociology of law could not answer without first understanding the normativity of law, its autonomy in relation to other social spheres and its relationship with justice values.

3. Banakar's debate on the autonomy of law and justice claims

Banakar stresses that late modernity and its macro and micro markers both challenge and intensify early modern social constructs, including legal phenomena. According to him, the idea of law's disembeddedness is mainly a reflex of modernity as a project. Through the separation thesis, legal positivism incorporated this project and promoted the central idea of law as an autonomous sphere, especially in relation to the sphere of morality and the social accounts of justice. Also, specific sociological narratives developed social theories based on these claims. The scholar challenges these assumptions together with the construction of a program for the sociology of law, which

would involve the development of a different conceptualization of law as well as the recognition of the inter-connectedness between law and justice in society.

3.1. The disembeddedness of law

Banakar departs from the understanding that modernity and its emphasis on rationality paved the way for the comprehension of law as a rational system of rules. He explains that

> the development of a modern rational approach to social organization is amongst the main factors which have transformed the law into a formal system of legal norms capable of generating decisions based on legal authority, thus distinguishing modern law from the arbitrary exercise of power or decisions made on the basis of moral principles or political expediency. (Banakar 2015, p. 10)

By bestowing law with such an autonomy, the modern theorization of legal phenomena would have produced and promoted the idea of the "disembeddedness" of law, thus putting any moral concern on the outside of the working of the legal system. Under legal positivism, he points out, the disembeddedness of law is translated into "the separation thesis", that is, the contention that there is no necessary link between law and morality.

According to him, this fundamental assumption is shared by different versions of legal positivism (see, for instance, Kelsen 1934/2002, Hart 1958/1983, and Raz 1979). Banakar borrows from Samuel (2009) the idea of the "authority paradigm" as a way of addressing the shared understanding on legal positivism that the validity of legal rules derives from their sources, not their contents. This way, "once the moral imperatives underpinning obligations are expressed in terms of legal rules and rights, they cease to require moral justification for their validity or enforcement" (Banakar 2015, p. 11). Banakar names this positivistic thinking as "rule-based reasoning", according to which law is represented as a system of rules and principles. Legal rules thus appear as both the foundation and the means through which law operates.

The positivistic rule-based reasoning came, according to the scholar, as a reaction against natural law theories which justified law based on nature or divine reason. By putting such an emphasis on the rules and on the separation of law from morality, positivistic reasoning would have provided legal theory with a decisive ideological role, in so far as law is understood to be a coherent, unified body of rules, apart from its socio-historical ties (Banakar 2003).

In this sense, Banakar explains that "according to legal positivists, the rationality, objectivity and system integrity of law depends on its normative closure and separation from other spheres of social action" (Banakar 2007, p. 218). Separating law from morality, thus, would not only ensure law's autonomy from any other center of power and normativity but also enhance its apparent neutrality, certainty, and continuity (Banakar 2010).

Furthermore, Banakar stresses that the idea of the disembeddedness of law was also part of certain sociological accounts. Max Weber, considered to be one of the classics of sociological theory and one of the "fathers" of the sociology of law, for instance, tried to show how the several spheres of social life have become progressively autonomous under modernity's development, including the law (Weber 1922/1978). According to

him, this development is marked by a rationalization process, affecting each of the social spheres. In this process, the modern legal sphere would be characterized by its increasingly rational and formal attributes.

Another remarkable sociological narrative that addressed the separation thesis was Niklas Luhmann's systems theory (2004). For Luhmann, morals are not part of the law system, and, as one of his followers, Gunther Teubner, explained "within the boundaries of law, justice cannot be weighed against anything. In this respect, juridical justice differs from its counterparts in morality, politics and economics" (Teubner 2009, p. 9).

The issue associated with this, according to Banakar, is that

> (…) in order to present itself as a rational and autonomous system, and to operate efficiently and generate legal certainty, the law has to overlook its socio-historical context, wherein its values and socio-cultural source of legitimacy lie (treating it as an extra-legal factor). The purposive rationalization of modern law, which compels the disembedding of the legal system, does not eliminate but rather only displaces moral concerns, thus giving rise to new conflicts (…). (Banakar, 2015, p. 11)

Therefore, the idea of the disembeddedness of law is regarded by Banakar as problematic, inasmuch as it dislodges law and its institutions from the societal context out of which it has grown. This, in turn, produces a scenario where any attempt to morally justify legal decisions is out of the picture.

The separation thesis, then, would impose constraints for the socio-legal understanding of law, morality, justice, and their interrelationship, especially considering the fact that, empirically, people experience these ideas in a linked way. As Banakar argues, both law and justice are an "integral part of the moral constitution of human community" and "the basis for social organization" (Banakar 2015, p. 9), a historical fact that the sociology of law could not ignore. In this sense, any overlook of the broader social and historical context out of which law emerges would "obscure and mystify the relationship between legal practice and the societal context of law" (Banakar 2007, p. 211).

An interesting example involving these issues that Banakar provides is the one concerning the rights discourse (Banakar 2010). According to him, the rights discourse involves the set of contentions that aim at establishing the boundaries of permissions and prohibitions among individuals, social groups, and institutions. It establishes a relationship of duty and obligations between rights-holder(s) and those against whom those rights are held (Banakar 2010). In this sense, rights would often contain moral elements, but, in order to have a greater efficacy under modernity, they would have to become incorporated into positive law. As illustrated, once these moral elements underpinning specific rights are expressed in terms of legal rules, "they cease to require moral justification for their validity or enforcement" (Banakar 2010, p. 27).

In this context, Banakar highlights the fact that whereas transforming the idea of rights into legal rules might enhance a sense of moral certainty, it can also make fluid and open-ended relationships become fixed and perhaps even immutable. Alongside this contradiction, the scholar stresses that even though moral justifications theoretically *disappear* once rights become positive law, empirically rights might be

> externally contested and internally subverted. Externally, individuals and groups debate and question the validity, applicability and enforceability of the moral content

> of rights, while internally, rights can be interpreted and implemented in such ways as to produce an effect very different from, and at times in conflict with, what was originally intended. (Banakar 2010, pp. 24–25)

According to the author, preserving the idea of the disembeddedness of law, that is, guaranteeing law's autonomy, remains an issue under late modernity, considering the increased functional differentiation of contemporary society. Nevertheless, the means through which this autonomy is promoted might present new features: if modernity emphasized the authority of reason, late modernity would make use of discursive tools, such as that of rights, to achieve this, as the juridification of rights marginalize morality and its specific language from the legal system (Banakar 2010). The embracement of risk management strategies in late modernity would also represent an increased public disengagement of certain ethical commitments existent in the earlier periods. In this sense, Banakar argues, "law's disengagement with the ethical dimensions of human action and social developments should be regarded as a growing trend" (Banakar 2016, p. 69).

All of these considerations, however, are limited in scope, in so far as the disembeddedness of law as it is theoretically promoted is a product of modern western legal thinking. Banakar points out that

> when studying non-western legal systems, we can easily forget that assumptions regarding the autonomy of the legal system, i.e. the need to demarcate the boundaries of the adjudicative and legislative organs and legal rules they generate from other social institutions, for example the separation of law from religion and politics, are a product of western legal cultures and traditions. (Banakar 2011b, p. 7)

Rule-based reasoning appears, therefore, as a western construct that might not have the same strength in non-western societies. Law's claim of autonomy loses its significance in environments where law is formally attached to other social spheres, such as religion, for instance. This might impose diverse theoretical orientations and problematizations for the sociology of law (Banakar 2011b).

Nevertheless, as Banakar's main focus concerning the issue of law's autonomy is on (early and late) modern western law, the question of how legal phenomena are connected with broader societal developments is kept alive on his socio-legal agenda. On that note, the scholar makes reference to classical socio-legal thinkers, such as Ehrlich and Petrazycki, whose account on the interconnectedness of law and other societal spheres questioned positivistic theories of the disembeddedness of legal phenomena (Banakar 2012). But whereas those socio-legal scholars were concerned with revealing the actual working of legal phenomena, law's disembeddedness, as an autonomous and objective body of rules, was constructed by positivistic theories not on the *de facto* level of *is*, but on the level of *ought*.

Alongside a set of conceptual questions that appear once law is described in disembedded or embedded terms, the sociology of law would also have, thus, to face the problem of prescription and its related normative questions. If the core object of the sociology of law is legal phenomenon – however broadly understood –, could it then make normative judgments, in addition to the descriptive, interpretative, and explanatory statements that are required by its scientific aspiration? If so, how? And in which terms?

3.2. The inter-connectedness of law and justice

Banakar's take on the relationship between law's autonomy and justice claims is built first through the critique of legal positivism and the separation thesis already discussed. It is noteworthy, in this sense, that, for him, the dichotomies produced by positive law – such as the separations of facts from values, law from morality, legal certainty from justice – are to a certain extent the product of modernity and, especially, the Enlightenment. He expresses:

> My approach is informed by the assumption that positive law's conception of justice involves a process of forced abstraction which differentiates justice into parts that are in practice inseparable from each other. This process of forced separation produces a series of one-sided, often false, oppositions, which invade the sphere of law as a set of antinomies. (Banakar 2007, p. 210)

Banakar develops this point with reference to Norrie (2005), whose account on modern western law, following the Hegelian tradition, is that it is essentially antinomical in form and that it plays a central role in limiting the ethical possibilities in society. Built upon the concerns of the Enlightenment, modern western law would have separated "the good" from "the right", making the promise of the former constantly repressed in favor of the latter. According to Banakar,

> this causes a disjunction between the political and ethical basis for 'the right' that modern liberal law establishes and 'the good' that it promises. In order to deliver 'the good', Norrie argues, law has no alternative but to go beyond itself, beyond its own structural limits and complexities. (Banakar 2007, p. 212)

In other words, the very promise of "the good", in the core of the Enlightenment, generated law's concern with and focus on "the right". To deliver "the good", in this scenario, law would have to transcend its own boundaries, and that is why Norrie argues that western modern law can only provide a "limited and ambivalent experience of justice" (Banakar 2015, p. 60).

This way, despite its occasional reference to justice at the symbolic and operational levels, positive law's reasoning does not base its existence on ensuring substantive justice: law and justice appear as separate entities (Banakar 2011a). According to Banakar (2015), the process that created this separation, transforming law into a modern rational system, was part of the broader separation process of the system from the lifeworld (Habermas 1981/1984, 1981/1987). He explains:

> The rise of modern social systems as autonomous spheres of social action therefore generates a series of one sided, often false oppositions which invade the sphere of law as a set of antinomies, instances of which are found in legal theory in the separation of the universal from the particular, the formal from the informal, the factual from the ideal and the individual from the collectivity to which he or she belongs (…). In essence, these antinomies expose the conflicts that are embedded in the socio-historical constitution of modernity (…). (Banakar 2015, p. 61)

Once justice is located beyond the legal system, it ceases to be part of law's internal operations. This allows legal positivism not only to provide the legal system with a paradigm where existent justice conflicts are not addressed but also to draw a sharp

borderline in relation to both natural lawyers and legal pluralists, who are accused of conflating "is" and "ought" (Banakar 2013a).[3]

Banakar's discussion on the relationship between law and justice is improved with his analysis of Alexy's theory of argumentation (1985, 2000, 2002). Banakar reads Alexy as a special scholar who engages with both analytical positivism and natural law theories to argue that legal discourse is a particular case of moral discourse (Banakar 2007, 2015). Based on a rational discursive approach, Alexy contends that law necessarily raises a "claim to correctness" (Alexy 2000, 2002), which involves

> an institutional or authoritative dimension as well as an ideal or critical one. This implies that it belongs to the nature of law that it has a double character. Law, at the same time, is essentially authoritative and essentially ideal (…). That the claim to correctness, which is necessarily connected with the law, has two dimensions implies that law is necessarily connected with two kinds of values or principles, those of the authoritative dimension of law and those of its ideal dimension. The most abstract value or principle of the authoritative dimension is legal certainty, the most abstract value or principle attached to the ideal dimension is justice. Law would not be law if it did not comprise these principles, which, as principles or values, say what law ought to be. This implies that it is impossible to say what the law is without saying what it ought to be. Indeed, it is true that law is a social institution. Its being a social institution does not, however, preclude its being a moral entity. (Alexy 2007, pp. 52–53)

For Alexy, thus, a normative system that does not raise this claim cannot be understood as law. In other words, the "claim to correctness" is a necessary element of law. With this, Alexy takes a step against the separation thesis: whereas positivists refer only to facts, non-positivists refer to both facts and ideals (Alexy 2007). In this sense, Banakar understands Alexy's enterprise as an attempt, through a neo-Kantian construct on rational discourse, to build a bridge between law and justice (Banakar 2007, 2015).

This bridge, nevertheless, is developed under the institutional context of the legal system. As Banakar notes: "Legal discourse is molded by the institutional constraints of the legal system and can be regarded as a distinct autonomous form of practical discourse" (Banakar 2007, p. 214). In this context, legal acts would always refer to non-institutional acts of asserting that "the legal act is substantially and procedurally correct" (Alexy 1998, p. 206).

Banakar compares Alexy's approach to those developed by Radbruch and Habermas. Both of them, according to Banakar, regarded law to be connected with justice. Radbruch argued that legal systems contain a legal rule, above all others, expressing that grossly unjust rules should be disregarded, even if they are positive law (Radbruch 1946/2006). Banakar (2007, 2015) notes that Alexy was deeply influenced by him, defending that extreme injustice could not be considered as law – which would not mean disregarding the principle of legal certainty. Habermas, in his turn, produced a thesis concerning the validity claims that are raised by speech acts (Habermas 1981/1984, 1981/1987). Alexy's

[3] Banakar also criticizes the sociology of Luhmann, who, as seen, also adheres somehow to the separation thesis. For Luhmann, Banakar notes, the "unit of analysis is not norms but communication – his social systems are communication systems which continuously objectify 'meaning'. The normativity of a legal system is generated internally by law recursively referring to its own previous communications or operations" (Banakar 2013a, p. 24).

"claim to correctness", in this sense, would resemble Habermas' "claim to legitimacy" (Banakar 2007).

Banakar regards Alexy's thesis as a promising approach in sociological terms, especially in what concerns the possibility of linking, to a certain extent, law and justice. However, he also identifies a problem on his "claim to correctness", in that "it wishes to remain faithful to positive law's institutional framework" (Banakar 2015, p. 67). He explains:

> This appropriation of Habermas' validity claim is, however, hampered by Alexy's need to remain on good terms with legal positivism. When positive law is regarded as the medium through which legal argumentation must be conducted in a rational (correct) manner, then the outcome of such argumentation becomes dependent on positive law's institutional constraints and standards which are, in parts, organized around a dual perception of law. Somewhat oversimplified, Alexy searches for the link between law and morality within a framework which is organized around the separation of law from morality. It means that legal argumentation, which is aimed at realizing the promise of justice, is tied to, and thus restricted by, the institutional arrangements and boundaries of positive law. (Banakar 2007, p. 219)

The result of Alexy's model, according to Banakar, is that it can only provide a limited account of justice in relation to positive law's principle of legal certainty – it can solely account for the prevention of "grossly unjust" results in law. The relationship of law and justice in Banakar's reading of Alexy is limited also because it does not incorporate the ethical judgments "which satisfy the criteria of justice [that] are external to the domain of positive law" (Banakar 2007, p. 219). Besides, it does not integrate the different legal experiences of social actors, which, according to Banakar, are "the function of a range of social, economic, political and cultural factors which exist independently of any specific theory or concept of law" (Banakar 2007, p. 220).

Whose experience is the measure of justice? The scholar addresses this question arguing that "any theory of law which is concerned with justice requires overcoming the internal/external divide" (Banakar 2015, p. 74). Banakar suggests that, instead of only taking the perspective emerging out of the inside observers and participants to law, one should also consider those emerged out of the outsiders of law processes and operations. The reference to the different perspectives on law would, ultimately, "throw light on the disjunction between legal rational forms of justice, that is, the form of justice that is produced internally within law, and the moral form of justice which transcends the internal/external divide in legal positivism" (Banakar 2007, p. 210).

The separation thesis is also contested by the author with reference to the concrete, practical experience of people, who, in their lives, would tend to link the ideas of law and justice. In the experience, he argues, the discourse on law and justice is conflated:

> In the minds of most people, the images of law and justice are intertwined, that is to say most people continue to entertain a concept of law which is closer to natural law than to legal positivism; law is expected to be just and unjust law is seen as a travesty of law. (Banakar 2011a, p. 495)

Ordinary men and women's conflation of law and morality translates into a social expectation according to which justice is understood as an integral part of law, and, consequently, legal processes are expected to deliver justice. This is because, Banakar highlights, law and justice historically emerged together as the normative elements of

social organization (Banakar 2015). Here, Banakar mobilizes Barden and Murphy's account on the inter-connectedness of law and justice (Barden and Murphy 2011), as, for them, its roots are to be found in "the emergence of the human community and the functional necessity of maintaining social order over time" (Banakar 2013a, p. 26).

Barden and Murphy's discussion recovered by Banakar brings to light the topic of law's normativity. As indicated, Banakar places a central role for justice when addressing law's normativity, in so far as, for him, law is socially required to be just and to be committed to the principle of justice (Banakar 2013a, 2015). According to the scholar, justice remains a compelling force in public discourse, and "unjust law is never recognised or accepted as a legitimate exercise in political and legal authority" (Banakar 2015, p. 224). The discursive power of justice, in its varied forms, acquires in Banakar great strength, since its absence would lead a society to "social conflict and political upheaval", and the ultimate rule through the threat of violence (Banakar 2013a, p. 24).

This means for him that "all sociological studies of law, which deal with issues of institutionalised order and social or system integration, are potentially studies of forms of normativity" (Banakar 2015, p. 229). Nevertheless, the scholar stresses that law's normativity arising from the idea of justice depends on the broader context of the legal system, and, ultimately, on the relationship established between system and lifeworld in society. If law is accepted as a mediating instance of system and lifeworld, its "claim to legality" would only be fully achieved once the justice emerging out of their interaction is acknowledged.

This is true under early and late modern social settings, as for Banakar the historical development of modernity is marked by a process of increased functional differentiation of society as well as of complexity and contingency of social action. In this scenario, law would be one of the instruments able to coordinate social action and to reproduce "the modern state and economy that are anchored in, but uncoupled from, the lifeworld" (Banakar 2007, p. 218, note 35). Under a late modern context, the complexities and dichotomies that emerged out of modernity are increased and certain moral concerns become juridified while law "limits itself to exercising legal authority and upholding individual rights and security" (Banakar 2016, p. 71). But, as Banakar argues, the resilience of the lifeworld has the potential to keep holding societies together, and,

> although the late modern strategies of risk management might work in the short term, they are bound to fail in the long term, as unresolved moral conflicts accumulate in the environment of social systems, undermining the legitimacy and authority of social institutions. (Banakar 2010, p. 37)

In this scenario, Banakar's proposal for a socio-legal understanding of law and justice interconnection departs from the assumption that law's claims are raised within and outside its institutional boundaries. Accordingly, at the heart of this assumption rests two presuppositions: (a) any intellectual account on law concerned with justice must overcome the internal/external divide; and (b) the concrete, material experiences of different social actors in diverse social contexts matter.

Therefore, law would have to overcome the sense of justice it produces internally, whether in terms of equality before the law, due process, or objectivity in decision-making, and pay attention to the justice claims made outside its boundaries. The sense of justice produced internally to positive law, as Banakar argues, "is couched in, and

constrained by, the formalism and normative closeness of the legal system – and thus limited in form and content" (Banakar 2011a, p. 495, note 19).

3.3. Overcoming the internal/external dichotomy through communicative rationality

Banakar states that it would not be enough for law to "cohere" internally, and this important step means to him that the legal system and its agents should acknowledge the limitations of their own definitions and go beyond the internal/external dichotomy (Banakar 2007, 2015). Carrying out this program, however, would amount, according to the scholar, to the adoption of a different kind of rationality:

> For law to 'cohere' internally and externally simultaneously, it needs to adopt a different form of rationality, that which already lies at the heart of Alexy's 'claim to correctness', i.e. Habermas' communicative rationality, which would not allow the practical discourse that underpins it to be limited to how officials of law discuss and define a problem which has implications for other people and social events. (Banakar 2015, p. 74)

Communicative rationality,[4] in this sense, points to the recognition of the claims made both inside and outside positive law. It provides an exit to the formalist reasoning of modern law, without falling into a complete relativistic approach to legal phenomena. Thus, in so far as it refers to the possibilities of reaching a mutual understanding, communicative rationality would provide, according to Banakar, a strong basis for law to transcend the internal/external divide that currently takes place on all sorts of legal operations.

Nevertheless, the scholar brings attention to the contexts in which claims are made, as, for instance, in a world of cultural difference "no mutual understanding or respect of the "other" can be reached where one party uses its politically and/or culturally dominant position to control intercultural communications and dictate the terms and conditions of intercultural interactions" (Banakar 2015, p. 154). He points out that law's internal reasoning is not enough for preventing the reproduction of unjust outcomes in society, and, as long as modern law keeps abstracting actions from their context, its connection with justice criteria will be, at most, a weak one. Communicative rationality appears, in this context, as a key idea for making this interconnectedness stronger, but only inasmuch as it incorporates and recognizes the social structures preventing a truly understanding to happen.

It is in this context that Banakar promotes a concept of justice as "a form of ethical judgment, which lies beyond the legal system". Positive law would have to transcend its limitations and reach out to the sphere of justice, "for law without justice, that is, unjust law, which admittedly can enjoy legality, will never satisfy the fundamental requirement of legitimacy". Thus, for law to function satisfactorily, he argues, it could not run away from "anchoring its operations in the experience of justice, which it can only produce by ethically grounding its judgments" (Banakar 2010, p. 36).

[4] In Habermas' words, the concept of communicative rationality "carries with it connotations based ultimately on the central experience of the unconstrained, unifying, consensus bringing force of argumentative speech, in which different participants overcome their merely subjective views and, owing to the mutuality of rationally motivated conviction, assure themselves of both the unity of the objective world and the intersubjectivity of their lifeworld" (Habermas 1981/1984, p. 10).

But justice, as he notes, is defined and experienced through various standpoints, involving both universal and particularistic dimensions. Claims for justice, then, might be different under different societal, and even personal, contexts, so that "to do justice" law would have to "recognise and respond to the singularity and specificity of the sociocultural contexts that form various groups' and individuals' actions and experiences" (Banakar 2011a, p. 495).

Banakar highlights, in this regard, that the tensions emerging out of the interplay of those factors create challenges to law, especially under late modernity and globalization where different communities relying upon different standards are constantly interacting with each other at several distinct environments. The potential conflicts that could result from this, as well as the maintenance of a certain social cohesion, would require not only the active exercise of a radical communicative rationality but also the development of some sort of cosmopolitanism (Banakar and Phillips 2017). As Banakar and Phillips argue more recently, cosmopolitanism, as a consciousness and a practice, would be able to link the universal and the particular, synthesizing both humanism and identity politics – being able, thus, to "renew our search for a form of law and legality that can meet the challenges of late modernity" (Banakar and Phillips 2017, p. 99).

Hence, in sum, one could argue that Banakar challenges the positivistic reasoning by bringing into light the contextual dimension of both law and justice – a dimension that amounts to the recognition of the existing social structures and social actors' experiences. As discussed, the author promotes a broad definition of legal phenomena, one that is not totally coherent and that results from communicative processes, considering the interaction of internal and external participants and observers. Moreover, law is understood as produced and reproduced out of the interaction of both micro and macro markers, supported by an autonomy that, empirically is only relative. In this sense, law would have the potential to mediate between system and lifeworld, having its core normativity relying on the idea of justice – with all the complexities here discussed.

According to Banakar, addressing the interconnectedness of law and justice is a complex task, in so far as it is not exempt from the tensions that derive from the refusal of the positivist exit supported by the separation thesis. Although Alexy's proposal appears to him as an important step in the search for an answer to those tensions, Banakar considers it insufficient because it does not totally break free from the positive law's framework. Hence, according to the scholar, any theory concerning the relationship between law and justice would have to acknowledge the forms of ethical judgments emerging outside of law's boundaries.

The idea of communicative rationality appears in this context as a key for law to be truly connected with justice, especially in the light of the great diversity of claims for justice in the late modern world. Although Banakar does not address this point explicitly, the communicative rationality is also important in that discussion because it has the potential to establish limits upon which justice claims might be considered ethically valid. The scholar also highlights the importance of contextualization in this debate, in that existing structures of power and inequality might hinder a communication in equal terms among the participants, thus promoting unjust outcomes.

The tensions emerging out of Banakar's proposal are enhanced once he argues for law to, at the expense of legal certainty, respond to the singularity of the situations it faces.

A way to cope with these tensions is presented by him later with the idea of cosmopolitanism, which is not completely developed through his body of work. The propositions presented by the scholar navigate in continuums that range from the universal to the relative, the ideal to the material, the coherent to the incoherent, as he adopts an intermediate pendular position that sometimes approaches one of the sides, sometimes the other.

In his substantive discussion of law and justice, Banakar ends up falling into certain shortcomings typical of this intermediate position, which, in order to be resolved, would require a truly interdisciplinary dialogue not only between sociology and law but also with the philosophies that deal with such a problem with centrality. To what extent can one embrace the incoherence of social phenomena without compromising the necessary coherent functioning of certain institutions, such as the law? What are the universal criteria of justice in the light of which particular demands should be considered? How can different demands for justice be ethically evaluated? How should law deal with the conflicts and evaluate the fairest outcomes in the face of different demands for justice? These are some of the questions that such a position would have to provide an answer.

On the other hand, the scholar builds an interesting disciplinary bridge by bringing this discussion into the sociology of law with a powerful argument that shows how these two instances – law and justice – are conflated in popular discourse and imagination. Perhaps the author's main concern was, indeed, with this last aim – with bringing the sociology of law to this important debate. Maybe, by taking this first step, he would be encouraging more socio-legal scholars to consciously take part in the discussion of justice. By inviting them to cross the bridge, new paths for dealing with the problem could be opened.

3.4. The consequences for the sociology of law

Traditionally, Banakar argues, legal studies developed a division of labor where legal scholars study positive law and its internal processes, legal sociologists study law as an empirical phenomenon, and legal philosophers study the moral foundations of law (Banakar 2013a, 2015). In this disciplinary differentiation, the internal and normative aspects of law are kept apart from sociology of law's main discussions. According to Banakar, this creates a problem where

> legal sociology neglects the normativity of justice (or is 'blind' to the normative possibilities and constraints of law), traditional legal philosophy overlooks the empirical dimensions of the legal system and practices (or processes) which reproduce law and its institutions, while doctrinal studies reduce them to rulebased reasoning. This makes traditional legal philosophy and doctrinal studies blind to the possibilities of, and constraints imposed by, the institutional settings within which the search for justice unfolds. (Banakar 2013a, p. 30)

Because of that, the scholar argues, socio-legal research should not restrict itself to the investigation of the factual dimension of legal phenomena. On the contrary, it should participate in the ethical and normative debates carried out by those neighboring disciplines (Banakar 2015).

One can understand Banakar's position on this matter by looking at his successive emphasis on the works produced by classical socio-legal scholars, especially on Ehrlich's

living law (Ehrlich 1912/2017). He notes that Ehrlich's work was mainly concerned with re-placing legal phenomena in its sociocultural and historical contexts, a task that involved a struggle for the defining elements of law and its broader scope (Banakar 2011a). In the light of Kelsen's critique, Banakar promotes a "re-interpretation" of living law as an approach that introduces a communicative rationality in place of formal rationality, thus bridging the gap between facts and norms:

> From a sociological standpoint, it follows that living law, which emerges out of the functional needs of social organisation and is symbiotically related to mores, customs and social organisational reality of the people who have produced it, should provide a sound basis for law, legislation and legal decision-making. This does not, however, mean that living law is necessarily humane or democratic. (Banakar 2008, p. 57)

When discussing facts and values, the scholar notes how certain "methodological constraints" have prevented the sociology of law to address "the normative cores of rights and justice" (Banakar 2013a, p. 30). According to him, strictly positivist methodologies would regard legal sociology as an empirical science oriented to the study of how things are, rather than of how they ought to be (Banakar 2013a, 2015). Nevertheless, Banakar stresses that values are present in a diversity of layers in socio-legal research.

First of all, he argues that those methodological positivisms do not represent the totality, and perhaps not even the majority, of the research in the sociology of law. Second, he adds, research choices, such as the ones concerning the object of inquiry, the perspectives used to analyze data, the points each author refers to in his/her analysis, are all permeated by values judgments. Moreover, even the empirical data that socio-legal studies address would hardly be considered as exempt from any kind of valuation:

> Closely related is the argument that sociology's empirical data do not qualify as 'facts', if by 'facts' we are referring to entities existing independently of the observer. Alternatively, sociology's empirical data are located theoretically and are thus dependent on, and a function of, sociologists' basic theoretical (or rather epistemological) assumptions. (Banakar 2013a, p. 32)

In addition, Banakar notes that although the debate on justice may end up being sidelined from many investigations concerned with such methodological criticisms, discussions and assertions on injustice, in contrast, are carried out without so much problematization. As he puts it:

> While the debate on justice is always shrouded in conceptual ambiguity and uncertainty, its opposite, injustice, is deliberated with some degree of conviction. The debate on justice is often marked by fundamental disagreements because it concerns itself with how things ought to be and with how to bring about and ensure basic rights, fairness and equal treatment, whereas debates on injustice, generally, and miscarriages of justice, in particular, are often concerned with actual cases pertaining to the abuse of power, existing unfair practices and the experience of wrongs and harm being perpetrated against oneself or others. (Banakar 2013a, p. 29)

Banakar's stance on the socio-legal possibilities of addressing justice is based on an open-ended theoretical-methodological model, which seeks to coordinate the four standpoints on law and to overcome the internal/external divide. Furthermore, to capture the

complexity involving the issue, both top-down and bottom-up approaches would be in need, as well as micro and macro considerations.

In this model, communicative actions involving the law, as seen, assume a central place, as "the interpretive and contextual nature of legal rules indicates that law consists not only of rules alone but also communicative processes through which the interpretation and application of rules are realized in various social and legal contexts" (Banakar 2015, p. 27). These processes, for Banakar, would involve different taken-for-granted values and assumptions, and part of the socio-legal task would be to explore them reflexively. Because of that, he argues,

> the focus of our study is neither the law nor the social forces underpinning it, but rather the ongoing interaction between the two fields. The central unit of our analysis can be neither legal rules nor social norms of organization, but instead they must be the communicative actions which make the production and reproduction of norms and rules, whether social, cultural or legal, possible. (Banakar 2015, p. 165)

When it comes to discussing justice, the sociology of law could contribute to an interdisciplinary debate by firstly bringing light to "the possibilities of and constraints imposed by the institutional settings within which the search for justice unfolds" (Banakar 2013a, p. 30). It could also question law's symbolic power and its internally generated values, contrasting them with those emerged out of society. But, more than that, Banakar argues that it could, by understanding law's role in society, contribute to the promotion of different modes of social reform.

For Banakar, thus, sociology of law could use its empirical knowledge to improve its judgments. According to him, although values cannot be generated out of facts, accurate accounts on what law does, as well as an understanding of what it could do in concrete cases, would have the potential to assist socio-legal scholars to assess what law should do (Banakar 2013a). Banakar emphasizes that, although sociology of law is not able to reveal universal moral truths, it can identify the moral principles and practices that support social cohesion, that is, that are necessary to stable social relations at specific societal formations (Banakar 2013a, 2015). To a certain extent, this would allow the sociology of law to produce different criteria for the evaluation of moral issues. By throwing light on how law operates as "an integral aspect of the social order", he argues, the sociology of law would necessarily involve the study of justice (Banakar 2015, p. 236).

On these bases, legal sociology's contribution to those debates would be an important but also limited one, in so far as some universal justice criteria against which those identified values could be weighed would be still in need. Banakar recognizes this limitation, addressing on different occasions the fact that not every value emerging out of social groups and supporting social stability are necessarily just. Despite these limitations, however, Banakar paves the way for renewed theoretical and empirical inquiries under the umbrella of the sociology of law. The open-endedness of his proposal for the field would allow, in this sense, an interdisciplinary flexibility that can be "used imaginatively and innovatively to challenge the existing theories and methods, or to push the boundaries of existing socio-legal knowledge" (Banakar 2019, p. 19).

4. Concluding remarks

This work discussed Reza Banakar's sociology of law and his account of the relationship between law and justice. The text started by addressing the theoretical diversity of the field and by presenting the challenges it faces in order to establish its own identity. It then moved on to present Banakar's program for the socio-legal field, which would involve the overcoming of both intellectual and material obstacles. Before entering the main topic of discussion, it also approached the scholar's reflections on contemporary society, which for him would be marked by micro and macro social changes that legal sociology would have to take into account.

The debate on the inter-connectedness of law and justice was initiated with Banakar's critique of the idea of the disembeddedness of law as it is promoted by legal positivism and certain sociological programs. As discussed, Banakar promotes a conception of law that is different from and contrasts with those developed by legal positivism. According to him, law is a dynamic, diverse and contradictory social phenomenon, resulting from the interaction of the different forms it might take inside and outside its "official" boundaries. In his proposal, thus, law's normative action can emerge out of system imperatives as well as the lifeworld. But, because of law's socio-historical properties, Banakar privileges the latter to argue that justice is the primary source of law's normativity. In light of all of those factors, law's autonomy in his understanding is only relative, and cannot be discussed without breaking with the basic assumptions of legal positivism.

Departing from these premises, Banakar asserts that law's relationship with justice claims cannot be conceptualized under legal positivism's framework. That are, according to him, universal and particular justice criteria that are external to law's official boundaries. Hence, any account on this inter-connectedness would have to overcome the internal/external divide and acknowledge the empirical experiences of different social actors, which would engender the adoption of certain communicative rationality attentive to the existing social forces influencing communicative action. At the empirical level, he argues, law is linked to, and sometimes even conflated with, justice by force of its socio-historical properties. Therefore, for law to be grounded on legitimacy, and not just in legality, it could not be conceived without reference to justice claims.

What would all this mean for the sociology of law? It would mean, according to Banakar, that the discipline should explore the strength of its interdisciplinary character to overcome the methodological constraints that draw a sharp line between facts and values in social research. It should constantly re-place law in its socio-cultural and historical contexts, considering the different standpoints on legal phenomena. Finally, it should use the empirical knowledge that the field accumulates in order to promote and improve its judgments.

The definitions of legal phenomena in Banakar take a broad, open and relational form, marking both the strength and the weakness of his theoretical and methodological propositions. On the one hand, such definitions allow for a more comprehensive understanding of law, based on its empirical manifestations. On the other hand, these same definitions make it difficult for the several research conducted in the field to take a more accurate starting point, and even for the definition of more robust explanatory

models that do not necessarily fall into the idea of "law as a multiple phenomena" as a solution. On these bases, law might be explained by reference to distinct categories, but it might also lose its descriptive or explanatory capacity in relation to other real-life phenomena. Additionally, even though the author discusses law's relative autonomy, he does not explain what are the distinctive elements of legal phenomena that secure somehow its relative independence from other social spheres. This way, the question of the extent to which the sociology of law can re-embed the law would remain open to different replies.

The gaps found in Banakar's writings might affect, to some degree, his debate on the inter-connectedness of law and justice, but they are resolved, to a certain extent, through his reference to Habermas' communicative action and rationality. The scholar seems to be successful in his criticism of the positivist reason and the separation thesis, but, as seen, his "intermediate" positioning between the universal and the particular would still seem to leave open questions concerning how different conceptions and claims for justice can dialogue and what might be the insurmountable limits of them. Without these answers, the sociology of law would have limited potential in addressing ethical valuations and prescriptions for the plural social world.

Nevertheless, it should be noted that, as a socio-legal scholar, Banakar assumes the contradictions and incoherencies of law as part of the equation, and this is regarded by him as a relevant part of his theoretical contribution. The relative openness of his theoretical and methodological propositions may serve the purpose of providing a basis for the development of future research within the field of sociology of law. They may be the expression not of a specific theoretical program, but of what could be regarded as his truly intellectual project: a project for the sociology of law as an interdisciplinary and autonomous field of studies.

From his primary commitment to the development of legal sociology, Banakar provides theoretical and methodological reflections that pave the way for socio-legal studies that take as a starting point common assumptions, but that might follow diverse orientations, attentive to the empirical reality from which different unfoldings of the legal phenomenon occur. In this sense, Banakar's discussion of law and justice is valuable because it opens space for the participation of the sociology of law, with its own contributions, in an extremely relevant debate.

Even though it is not exempt from various limitations, this work sought to systematize an important part of his enriching thought in order to serve as a starting point for a range of related research in the field. It also tried to point out some of the questions that could encourage future research. It should be noted, however, that renewed visits to Banakar's body of writings might be not only important but also necessary for a qualified and sound understanding of his thinking.

References

Alexy, R., 1985. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification.* Oxford: Clarendon Press.

Alexy, R., 1998. Law and correctness. *Current Legal Problems* [online], 51(1), 205–221. Available from: https://doi.org/10.1093/clp/51.1.205 [Accessed 19 January 2021].

Alexy, R., 2000. On the thesis of a necessary connection between law and morality: Bulygin's critique. *Ratio Juris* [online], 13(2), 138–147. Available from: https://doi.org/10.1111/1467-9337.00146 [Accessed 19 January 2021].

Alexy, R., 2002. *The Argument from Injustice: A Reply to Legal Positivism.* Oxford: Clarendon Press.

Alexy, R., 2007. An Answer to Joseph Raz. *In:* G. Pavlakos, ed., *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy.* Oxford: Hart, 37–58.

Archer, M., 2007. *Making our Way through the World: Human Reflexivity and Social Mobility.* Cambridge University Press.

Archer, M., 2010. Reflexivity. *Sociopedia.isa* [online]. Available from: https://doi.org/10.1177/205684601373 [Accessed 28 June 2020].

Archer, M., 2012. *The Reflexive Imperative in Late Modernity*. Cambridge University Press.

Banakar, R., 1998. The Identity Crisis of a "Stepchild": Reflections on the Paradigmatic Deficiencies of Sociology of Law. *Nordisk juridisk tidsskrift*, 81(2), 3–21.

Banakar, R., 2000. Reflections on the Methodological Issues of the Sociology of Law. *Journal of Law and Society* [online], 27(2), 273–295. Available from: https://doi.org/10.1111/1467-6478.00154 [Accessed 19 January 2021].

Banakar, R., 2001a. A Passage to "India": Toward a Transformative Interdisciplinary Discourse on Law and Society. *Nordisk juridisk tidsskrift*, 92(1), 3–21.

Banakar, R., 2001b. Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jural Experience. *Canadian Journal of Law and Society* [online], 16(1), 67–91. Available from: https://doi.org/10.1017/S082932010000658X [Accessed 19 January 2021].

Banakar, R., 2003. *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research.* Berlin/Wisconsin: Galda and Wilch.

Banakar, R., 2006. Can Sociology and Jurisprudence Learn from Each Other?: A Reply to Mauro Zamboni. *Nordisk juridisk tidsskrift*, 113(2), 75–80.

Banakar, R., 2007. Whose Experience is *the* Measure of Justice? *Legal Ethics* [online], 10(2), 209–222. Available from: https://doi.org/10.1080/1460728X.2007.11423893 [Accessed 19 January 2021].

Banakar, R., 2008. The Politics of Legal Cultures. *Nordisk juridisk tidsskrift*, 123(4), 37–60.

Banakar, R., 2009. Law Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law. *In:* A. Denis and D. Kalekin-Fishman, eds., *The ISA Handbook in Contemporary Sociology: Conflict, Competition, and Cooperation* [online]. London: Sage, 58–73. Available from: https://doi.org/10.4135/9781446214626.n5 [Accessed 19 January 2021].

Banakar, R., 2010. Law, Rights and Justice in Late Modern Society: A Tentative Theoretical Framework. *In:* R. Banakar, ed., *Rights in Context Law and Justice in Late Modern Society.* Farnham: Ashgate, 19–40.

Banakar, R., 2011a. Having one's cake and eating it: The paradox of contextualisation in socio-legal research. *(review essay). International Journal of Law in Context* [online], 7(4), 487–503. Available from: https://doi.org/10.1017/S1744552311000267 [Accessed 19 January 2021].

Banakar, R., 2011b. The Sociology of Law. *Sociopedia.isa* [online]. Available from: https://sociopedia.isaportal.org/https://doi.org/10.1177/20568401134 [Accessed 28 June 2020].

Banakar, R., 2012. Who Needs the Classics? On the Relevance of Classical Legal Sociology for the Study of Current Social and Legal Problems. *In:* O. Hammerslev and M.R. Madsen, eds., *Retssociologi* [online]. Copenhagen: Hans Reitzels. Available from: https://ssrn.com/abstract=2140775 [Accessed 28 May 2020].

Banakar, R., 2013a. Can Legal Sociology Account for the Normativity of Law? *In:* M. Baier, ed., *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity.* Farnham: Ashgate, 15–38.

Banakar, R., 2013b. Law and Regulation in Late Modernity. *In:* R. Banakar and M. Travers, eds., *Law and Social Theory* [online]. 2nd ed. Oxford: Hart, 305–324. Available from: https://doi.org/10.2139/ssrn.2229247 [Accessed 19 January 2021].

Banakar, R., 2015. *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity.* Cham: Springer International.

Banakar, R., 2016. Law, Policy and Social Control Amidst Flux. *In:* K. Dahlstrand, ed., *Festskrift till Karsten Åström*. Juristförlaget i Lund, 47–74.

Banakar, R., 2019. *On Socio-legal Design* [online]. Available from: https://doi.org/10.2139/ssrn.3463028 [Accessed 1 August 2020].

Banakar, R., and Phillips, A.L., 2017. Law, Community and the 2011 London Riots. *Scandinavian Studies in Law*, 62, 79–99.

Barden, G., and Murphy, T., 2011. *Law and Justice in Community.* Oxford University Press.

Beck, U., 1992. *Risk Society: Towards a New Modernity*. London: Sage.

Beck, U., 1999. *World Risk Society*. Cambridge: Polity Press.

Beck, U., Giddens, A., and Lash, S., 1994. *Reflexive Modernization: Politics, Traditions and Aesthetics in the Modern Social Order.* Cambridge: Polity Press.

Bourdieu, P., 1975. The Specificity of the Scientific Field and the Social Conditions of the Progress of Reason. *Social Science Information* [online], 14(6), 19–47. Available from: https://doi.org/10.1177%2F053901847501400602 [Accessed 19 January 2021].

Cotterrell, R., 1995. *Law's Community: Legal Theory in Sociological Perspective.* Oxford: Clarendon Press.

Dalberg-Larsen, J., 2000. Sociology of law from a legal point of view. *Nordisk juridisk tidsskrift*, 89, 26–39.

Deflem, M., 2008. *Sociology of Law: Visions of a Scholarly Tradition.* Cambridge University Press.

Ehrlich, E. (with R. Pound and K.A. Ziegert), 2017. *Fundamental Principles of the Sociology of Law.* London/New York: Routledge. (Originally published in 1912).

Habermas, J., 1984. *The Theory of Communicative Action – Vol I: Reason and the Rationalization of Society*. Boston: Beacon Press. (Originally published in 1981).

Habermas, J., 1987. *The Theory of Communicative Action – Vol II: System and Lifeworld – A Critique of Functionalist Reason*. Boston: Beacon Press. (Originally published in 1981).

Hart, H.L.A., 1983. Positivism and the separation of law and morals. *In:* H. Hart, ed., *Essays in Jurisprudence and Philosophy.* Oxford University Press. (Originally published in 1958).

Hydén, H., 1999. Even a Stepchild Eventually Grows Up: On the Identity of Sociology of Law. *Nordisk juridisk tidsskrift*, 85, 71–80.

Kafka, F., 2009. *The Trial.* Oxford University Press. (Originally published in 1925).

Kelsen, H., 2002. *Introduction to the Problems of Legal Theory.* Oxford University Press. (Originally published in 1934).

Luhmann, N., 2004. *Law as a Social System*. Oxford University Press.

Mathiesen, T., 1998. Is it all that bad to be a stepchild? Comments on the state of sociology of law. *Nordisk juridisk tidsskrift*, 83(4), 67–76.

Norrie, A., 2005. *Law and the Beautiful Soul.* London: Glasshouse.

Parsons, T., 1977. Law as an Intellectual Stepchild. *Sociological Inquiry* [online], 47(3–4), 11–58. Available from: https://doi.org/10.1111/j.1475-682X.1977.tb00792.x [Accessed 19 January 2021].

Radbruch, G., 2006. Statutory Lawlessness and Supra-Statutory Law. *Oxford Journal of Legal Studies* [online], 26(1), 1–11. (Originally published in 1946). Available from: https://doi.org/10.1093/ojls/gqi041 [Accessed 19 January 2021].

Raz, J., 1979. *The Authority of Law*. Oxford: Clarendon Press.

Samuel, G., 2009. Interdisciplinarity and the authority paradigm: Should law be taken seriously by scientists and social scientists? *Journal of Law and Society* [online], 36(4), 431–459. Available from: https://doi.org/10.1111/j.1467-6478.2009.00478.x [Accessed 19 January 2021].

Sand, I.J., 2000. A future or a demise for the theory of the sociology of law: Law as a normative, social and communicative function of society. *Nordisk juridisk tidsskrift*, 90, 55–73.

Teubner, G., 2009. Self-subversive Justice: Contingency or transcendence formula of law. *Modern Law Review* [online], 72(1), 1–23. Available from: https://doi.org/10.1111/j.1468-2230.2009.00731.x [Accessed 19 January 2021].

Treviño, J.A., 2010. *The Sociology of Law: Classical and Contemporary Perspectives.* New Brunswick/London: Transaction.

Waters, M., 1994. *Modern Sociological Theory.* London: Sage.

Weber, M., 1978. *Economy and Society: An Outline of Interpretive Sociology.* Berkeley: University of California Press. (Originally published in 1922).