



From legal consciousness to systems theory

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Abstract:

Socio-legal scholars have greatly favoured the theory of legal consciousness. Some have advocated for more studies of law in societies in Asia to adopt legal consciousness theory. Others argued that such application would be deemed inappropriate and bring adverse effects to socio-legal scholarship. This paper argues that the theoretical design of legal consciousness has three crucial shortcomings that stymie socio-legal scholarship, and the reconstructed systems theory can be better adapted to advance a global theory of legal sociology. One, the individual problem of legal consciousness theory can be redressed by the intersubjective epistemology of systems theory. Two, the ubiquitous law problem is avoided by the concrete conception of law as communication by systems theory. Three, systems theory avoids the rule of law hegemonic assumption by rejecting the normative view of law. It is time to reconsider systems theory for the advancement of a global legal sociology.

Keywords:

Legal consciousness, organisational systems theory, global legal sociology, theoretical comparison.

Resumen:

Los estudiosos de la sociología jurídica se han mostrado muy favorables a la teoría de la conciencia jurídica. Algunos han abogado por que esa teoría sea adoptada por más estudios jurídicos de Asia; otros han argumentado que dicha aplicación sería considerada inapropiada y traería efectos adversos a la investigación sociojurídica. Este artículo argue que el diseño teórico de la conciencia jurídica tiene tres desventajas cruciales que

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obstaculizan la investigación sociojurídica, y que la teoría de sistemas reconstruida puede adaptarse mejor a una teoría global de la sociología jurídica. Por un lado, el problema individual de la teoría de la conciencia jurídica puede subsanarse mediante la epistemología intersubjetiva de la teoría de sistemas; en segundo lugar, el problema de la ubicuidad del derecho se evita mediante la concepción concreta del derecho como sistema de comunicación por parte de la teoría de sistemas; en tercer lugar, la teoría de sistemas evita la asunción hegemónica del Estado de derecho al rechazar la visión normativa del derecho. Es el momento de reconsiderar la teoría de sistemas en aras del avance de una sociología global del derecho.

Palabras clave:

Conciencia jurídica, teoría de los sistemas organizativos, sociología jurídica global, comparación teórica.

TABLE OF CONTENTS

1. Introduction	389
2. Three shortcomings of legal consciousness.....	390
2.1. The rule of law hegemonic assumption.....	391
2.2. The problem of individualism	393
2.3. The problem of ubiquitous law.....	395
3. The reconstructions of systems theory	396
3.1. Luhmann's reconstruction of general systems theory	397
3.2. The criticisms of classical systems theory	398
3.3. The organisational reconstruction of classical systems theory	399
4. Systems theory for a global sociology of law.....	401
4.1. The global applications of systems theory	401
4.2. Redressing the rule of law hegemonic assumption.....	402
4.3. Redressing the individualism and the ubiquitous law problem	403
5. From legal consciousness to systems theory.....	404
References.....	405

1. INTRODUCTION

In a 2005 article, Susan Silbey suggested that it might be time for the socio-legal scholarship to move on from legal consciousness research, the field of study she led to popularity and witnessed its lost direction. Since then, legal consciousness scholars have routinely rejected her advice and attempted to find other arenas where the theory can continue to flourish (Hertogh 2018). Some accepted the shortcomings that Silbey highlighted but argued that legal consciousness research is a flexible paradigm capable of evolving and increased attention in the future can reshape its shortcomings (Chua and Crouch 2014, Chua and Engel 2019). Most recently, Asian law and society scholars advocated for more studies of Asian societies to adopt legal consciousness theory and establish an Asian legal consciousness field of research (Chua *et al.* 2023). The proliferating uses of legal consciousness to study the Asia as well as other non-Western societies raised concerns for the socio-legal scholarship (Liu 2015). As the discipline of legal sociology is confronting a world of globalising technology, it is necessary to reconsider the relevance of legal consciousness research and its effects upon the law and society research as a whole (Liu 2025).

This paper argues that the design of legal consciousness theory has three crucial shortcomings that stymie its applications to non-Western societies, and the reconstructed systems theory makes a better candidate to advance a theory of global legal sociology as it is capable of overcoming these shortcomings. The reconstructed systems theory has been addressing similar types of research questions with legal consciousness theory. Legal consciousness research has been examining questions on how experiences of law constitutes the legality where different sets of schemas and habits habitually reproduce the social and legal structures of law in society (Silbey 2005). The crux of legality here is the meso-level consciousness that binds continuous participation of actors who sustain, reproduce, or amend the circulating institutions of law that are actively harming them. In other words, the aspiration of legal consciousness theory is to explain the meso-level consciousness that binds individual experiences of law with the institutions of law. The classical systems theory was concerned only with the macro institutions of law by abstracting them as closed sub-systems of actions that orders the actions of its agents by formalising expectations (Luhmann 2020). This theorisation of law was criticised to be empirically inapplicable to analyse the social phenomenon of law. The recent revisions of systems theory by organisational studies however has introduced social organisations as the meso-level units empirically analysable. The reconstruction of systems theory by organisation scholarship addresses questions on how socially constructed schemata of culture and cognition within and between social organisations shape rules (Powell and DiMaggio 2012). This crucial reconstruction provides a theoretical model to concretely analyse the schemas of legality that threads the individual communication with the institutional structure. The empirical investigation of system communication through social organisational discourse not only reveals the “forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law” (Silbey 2005) but also predicts whether these structures of meanings will sustain or shift in its trajectories. In short, the reconstructed systems theory

offers a concrete model to answer similar questions asked by legal consciousness theory with advantageous predictive powers.

The reality of law in the globalised world has given rise to complex socio-legal phenomenon where scholars have applied legal consciousness theory to attempt answers (Baranov *et al.* 2021, Creutzfeldt 2021). However, the genesis of legal consciousness theory within the Law and Society Movement in the United States has produced three crucial shortcomings that limit its applicability to non-Western contexts. First, *the rule of law hegemonic assumption* entrenched in legal consciousness' theoretical design limits examinations of regulatory action in illiberal and authoritarian polities where law is peripheral. Second, legal consciousness studies has been misguided to examine individual cognising mind, what they subjectively think and do, undermining the intersubjective basis of sociolegal research and precipitated *the individual focus problem*. Third, a lacking conception of law has led legal consciousness to a lost direction by precipitating numerous studies finding law in everything and everywhere and resulted in *the ubiquitous law problem*. In contrast, systems theory provides a concrete conceptualisation that redress all the problems with legal consciousness theorisation. It reconstructed legality as the cultural cognitive schemas of social organisations sustained by the meaning and communication exchanged by membership and members of the organisations. The reconstructed systems theory makes a better candidate to advance a theory of global legal sociology.

This paper demonstrates that the reconstructed systems theory is the better alternative to legal consciousness theory in three sections. The first section discusses three shortcomings entrenched in the design of legal consciousness theory. They are the rule of law hegemonic assumption, the individual problem and the ubiquitous law problem. The second section will present the reconstructions of general systems theory to classical systems theory to organisational systems theory. This part first describes the adaptation of general systems theory to a sociology by the German scholar Niklas Luhmann. It then discusses the routine criticisms of classical systems theory by socio-legal scholars, and the subsequent reconstruction of systems theory by organisations studies. The third section discusses the advantages of the organisational systems theory. This discussion presents how the organisational systems theory is a better alternative than legal consciousness to advance a theory of global legal sociology. In conclusion, since Susan Silbey first suggested that it might be time to move on, the hope that legal consciousness research can redress its own problems has not seen fruition. It is time to move on from legal consciousness to the better alternative of systems theory.

2. THREE SHORTCOMINGS OF LEGAL CONSCIOUSNESS

Legal consciousness first arose from the Law and Society Movement in the United States (Silbey 2005). This movement identified a persistent and troublesome gap between “law on the books” and “law in action” (Silbey 2005). While ‘law on the books’ supposedly delivered justice and equality, ‘law in action’ routinely reproduced injustice and inequality (Galanter 2006). Scholars found that the legal processes involving social organisations, social networks and legal procedures were key constituents of this gap that routinely reproduced structural inequalities (Pound 1910, Sarat 1985). These scholars also observed a puzzling phenomenon where people marginalised by the law were participating in the very processes that reinforced their injustices and inequalities (Silbey and Bittner 1982, p. 422). Law and society scholars drew parallels from social scientists who were examining the

effects of bureaucratic legal authorities upon society, suggesting that perhaps the legal processes had become “a routinised administrative bureaucracy and on the habitual, cynical apathy of the population to acquiesce to their own subordination and domination” (Silbey 2005). To test this hypothesis, law and society scholars began investigating the ways that people might be contributing to the systemic problems and ineffectiveness of the law. Here, the concept of legal consciousness was formed.

2.1. THE RULE OF LAW HEGEMONIC ASSUMPTION

Emerging from the US, legal consciousness theory grew out a rule of law assumption that narrows its applications to liberal and democratic societies. In the 1960s, amid the US Civil Rights Movement, law and society scholars adopted legal consciousness theory to examine how law can be wielded to advance causes of the disadvantaged and oppressed groups (Polletta 2000). Polletta found that “adopting legal strategies and rights claims inside and outside the courtrooms were essential to their political organising efforts” (Silbey 2005). In periods after the Civil Rights Movement, injustice and inequality persisted in the US society (Wilkins and Gulati 1996, Reichman and Sterling 2004). Legal consciousness continued to flourish as a useful theory to examine how different forms of consciousness combined to sustain legal hegemony in the US and the mobilisation that can make law work better for marginalised people (Minow 1990). In effect, legal consciousness theory was developed from the observations and political conditions of the US society. These historical roots embedded assumptions of a rule of law distinctive to the US legal culture and political systems into legal consciousness theory. In other words, legal consciousness theory grew out a hegemonic assumption of the rule of law. Silbey’s explanation best demonstrates this observation.

Legal hegemony derives from long habituation to the legal authority that is almost imperceptibly infused into the material and social organization of ordinary life, for example, in traffic lanes, parking rules, and sales receipts, much more than in the acquiescence or capitulation to *Bush v. Gore*. In popular culture, however, the trial stands as the icon of the rule of law, whereas these routinized legal forms that constitute the law’s hegemony are rendered invisible, invisible as law that is... Although we take for granted the appropriateness and legitimacy of trials for resolving conflict and for mediating and legitimating the use of force, law and society research has demonstrated that a trial is merely the tip of a giant iceberg of matters that are shaped and interpreted through law. (Silbey 2005)

Here, Silbey described the ways in which legal consciousness grew out a ‘rule of law hegemonic assumption’, where law is seen as the natural way of ordering society. This rule of law hegemonic assumption subjects all aspects of society to the eye of the law, even in small everyday items such as traffic lanes, parking rules, and sales receipts. It positions law at the supremacy of the society; but more than that, law has been utterly supreme for so long that there is a ‘long habituation to the legal authority’ imperceptibly infused into the fabric of everyday life, no longer noticeable but soaked in a legal consciousness of the people. This rule of law hegemonic assumption is the essence of legal consciousness theory, embedding an assumption that individuals in society constantly engage with and are subjected to law, that “the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action and their common understandings of the world” is involved with law to great extents (Merry 1990, p. 5). As such, the notion of legal

consciousness grew out a rule of law hegemonic assumption, where law constitutes everyday participation, interpretation, utterance, and consciousness.

The rule of law hegemonic assumption where legal consciousness grew out of narrows the theory's applications to liberal and democratic societies. It is because this rule of law hegemonic assumption conflicts with the ideologies prevailing in illiberal and authoritarian societies. Authoritarian regime such as China, Egypt, Singapore have been increasingly using rule-of-law rhetoric to build legitimacy and distance itself from past failures; but these regimes closely constrain the court of legal challenges against the state (Ginsburg and Moustafa 2008, pp. 11-19). Law in these societies often enables rather than constrain state power. A telling example is the Vietnamese society. The Socialist Republic of Vietnam is a one-party state with a constitution stipulating that the Communist Part of Vietnam is "the force leading the State and society" (Nicholson 2001). The Vietnamese term for rule of law is *nha nuoc phap quyen*, translated as 'state rules' or 'rules of the state'. This means law does not occupy a central or supreme position in Vietnam, but law is rather "an important element of the way in which the Party Line is implemented" (Fforde 1986, p. 62). Thus, the Vietnamese 'rule of law' does not share similar meanings or functions with the rule of law hegemonic assumption in the US.

Other Asian societies such as China have also stated their own form of rule of law as distinctive from the liberal democratic rule of law in the US (see generally Peerenboom 2002). Thus, the notion of legal consciousness cannot be assumed to have a role in all Asian societies, or any society without a rule of law hegemonic assumption. Consequently, legal consciousness might exist in illiberal and authoritarian societies, but it is often peripheral phenomenon that does not say much about how states are ordered. As such, the pervasiveness of legal ideas, legal discourse, or social practice cannot be assumed to exist in societies where law does not hold a central position. As such, legal consciousness as a theoretical model is inappropriate for many Asian societies and applications risk overly prescribing the presence and role of the law.

Advocates of legal consciousness argued that criticisms of the theory are predominantly about studies of legal hegemony and less salient to the other two schools of Identity and Mobilisation research (Chua and Engel 2019). However, the assumptions underlying this liberal democratic rule of law hegemonic assumption are also fundamental to these two schools. The Identity and the Mobilisation schools were formulated on the legal ideology that "the place of law in people's lives is intimately connected to their sense of who they are" and law has the "potential for transforming society, particularly by deploying rights that are intended to achieve justice or protect disadvantaged populations" (Chua and Engel 2019). They assume that in any society legal consciousness is applied to, law plays a central role for long enough that it infused in people's sense of who they are and has potential to transform society (Chua 2022). Yet, this assumption can only be made in liberal democratic settings with a rule of law hegemonic assumption, where law is supreme and pervasive to a great extent that it occupies in the individual's sense of self.

The Mobilisation school's assumption that people turn to the law and invoke law when they seek justice and protection also assumes a society with a rule of law hegemonic assumption, where law is perceived as having the power and potential to assist their causes. As Silbey puts it, the task of legal consciousness research was "to find out more about the consistency or, conversely, the fissures in what looks like consistent allegiance to the rule of law" (Silbey

2005, p. 326). The rule of law hegemonic assumption is embedded in all three schools of legal consciousness research. However, the rule of law hegemonic assumption cannot be applied to all societies. There are three aspects to the rule of law hegemonic assumption: the applications of the rule of law in practice, the state assertion of and claim to legitimacy through the rule of law, and the popular attitudes toward the rule of law. These three aspects vary greatly in Asian societies. For example, while the Vietnam state have asserted a rule of law in the constitution and attempts to claim legitimacy through the rule of law, the other two aspects are missing. Many studies have also found limited applications of the rule of law in courts, limited endorsement of the rule of law by the public, and limited engagement of the Vietnamese people with the law (Gillespie 2009, Thayer 2014, Gillespie and Nguyen 2019). Since law does not hold a supreme position in Vietnamese society, the pursuit of justice does not always involve the invocation of law. This shortcoming of legal consciousness theory greatly limits its applicability to societies that lack a liberal democratic rule of law hegemonic assumption.

2.2. THE PROBLEM OF INDIVIDUALISM

The second crucial problem with the theoretical design of legal consciousness theory is its impairment of law and society's theoretical core by reducing the construction of legality to an individual level. This issue can be illustrated most clearly by revisiting the interconnection between subjective and intersubjective constructions of legality. Intersubjectivity refers to the collective "structural and social dimension of ideas" (Schmidt 2017). This means social meaning is not formed in individual minds but rather "become accepted by a wider set of actors and that take the form of collective knowledge, culture, and tradition" (Schmidt 2017). In other words, individuals are not the sole constructors of their own realities nor the sole constructors of a shared social reality. Rather, the shared reality upheld by individuals is the consensus resulting from a communicative process. In Gunther Teubner's words, "it is the authentic consensus of the communicative community and not the consciousness of the autonomous individual that determines truth in cognitive and normative issues" (Teubner 1989, p. 733). Subjective experiences and perceptions of law are interconnected with intersubjective construction of legality as "agents have the potential to both reproduce and alter structures as constraints", and by "making tacit or explicit choices that break away from the (structuring) ways in which they are classified" (Schmidt 2017). This means that it is crucial to go beyond the subjective individual experiences to examine the ways in which individual subjectivities interact with others to establish intersubjective meanings that construct notions of legality.

However, legal consciousness theory designed a model that focuses greatly on the everyday subjective experiences of people with the law. This issue reiterates the differentiation between social constructionist and social constructivism. Legal consciousness follows a social constructionist approach that models social construction through individual minds whereas social constructivism emphasises socially situated development where knowledge is constructed through interaction with others. In effect, legal consciousness theory facilitated a proliferating body of research focusing on the individual subjective experiences of law and then present these findings as evidence of society-wide understandings about law. The leading legal consciousness scholar Susan Silbey (2005) worried that the recent upsurge in studies of individual consciousness have "narrowed the concept's reach, while sacrificing much of the concept's critical edge and theoretical utility" (Silbey 2005, p. 324).

Advancing a different concern, sociolegal scholar Sida Liu (2015) argued that the power approach, in particular the “ideological radicalization of the power approach” has resulted in a “gradual reduction of the field’s theoretical core” (Liu 2015). Liu also problematised the adoption of legal consciousness theory to studies of law in Asia with distinctly different settings from liberal democratic societies. He observed that legal consciousness and its power approaches emerged from US-specific concerns such as gender and racial inequalities while legal discourses in Asian societies are more concerned with issues of development, human rights, institutional transplantation, and so on (García-Villegas 2006, Atuahene 2011).

Advocates of legal consciousness theory have conceded with this criticism that studies on individual consciousness are a problem with legal consciousness theory (Chua and Engel 2019). Yet, they contended that “future researchers will take on the questions and challenges...where individualistic approaches have proved to be particularly ill-suited” (Chua and Engel 2019). They argued that such shortcomings are appeals for further development of legal consciousness theory, rather than evidence the theory has reached a dead end. They also defended the adoption of legal consciousness theory in non-Western settings since “a new generation of scholars has energized the field in recent years, focusing on marginalized peoples and non-Western settings” (Chua and Engel 2019). They emphasised that legal consciousness research is a flexible paradigm capable of evolving and increased attention in the future can reshape its shortcomings.

However, until a fundamental revision to the theoretical basis of legal consciousness theory, proliferating studies of law in Asia are continuing to adopt this flawed approach. One telling example is the study by Tungnirun (2018) examining legal consciousness among foreign corporate lawyers in Myanmar. While the study aimed to identify “communities of meaning”, the article concluded by describing two communities of the “old hands” and the “newcomers” and did not go further in analysing interactions between these communities or impacts of these two communities upon social structures of the Myanmar society. The individual problem of legal consciousness is observable here as the analysis adopted a “power and resistance” model and explained it as “often used to examine the legal consciousness of laypeople as they acquiesce to or resist and challenge the hegemonic force of law in their everyday lives” (Tungnirun 2018, p. 64). This application is flawed as the sociolegal focus is not about whether the individual lawyer acquiesces or resists social structures, but it should be about the interactive social processes that they participate in to reinforce or defy the ongoing structure of Myanmar legality.

The worry is not only that this study adopted a flawed individual approach by “investigating the legal consciousness of corporate lawyers at an individual level” but more that the “paper is the first empirical study of the emerging corporate legal bar in Myanmar”, carving a flawed path for future Myanmar law and society research (Tungnirun 2018, p. 51). By not making intersubjective analyses compulsory in the theoretical design, the individual problem of legal consciousness theory has been exacerbated by its global expansion. Legal consciousness continually leads researchers to consider law and legal institutions that might not play a significant role in ordering social life. Consequently, while aiming to explore legal consciousness as a type of social practice that both reflects and reforms social structures, the loose theoretical design instead generated studies examining individual consciousness and agency.

2.3. THE PROBLEM OF UBIQUITOUS LAW

The third problem with legal consciousness theory is its ambiguous conception of law facilitating studies treating law as ubiquitous. Legal consciousness theory conceptualises law as supreme, pervasive, and socially constructed. This conception involves two theoretical components, namely that law is constructed and hegemonic. The assumption that law is hegemonic generates research that frames law vaguely as invisible, pervasive, and supreme (Sarat 1985, p. 25). Adding to the vagueness, the social construction of law means that law is whatever the people think it is. Together these assumptions result in a highly contextual understanding of law that depends on the circumstances of each case study. As a result, law can be found in everything and everywhere.

Legal consciousness research refers loosely to law as repetitive attempts to shape human behaviour—the sociological definition of regulation (Black 2002). This conception of law is so broad that legal consciousness can equate to regulatory consciousness or even social consciousness. While legal consciousness research aims to understand how society responds to law backed by the state, it often ends up discussing how society perceives regulation—an inquiry it is not well equipped to undertake. Furthermore, this theoretical design enables legal consciousness studies to find law in everything and overprescribe people's engagement with law. Without a clear conception of what law is and is not, empirical findings of people's engagement with law cannot be tested or refuted.

The empirical expansion of legal consciousness research into three schools of Hegemony, Mobilisation, and Identity have proliferated numerous studies with highly descriptive untheorized accounts finding law in everything and everywhere. The Hegemony school generated numerous studies describing the power embeds in legal relations that constructs notions of legality. This school predominantly described case studies about power imbalances and inequalities in societies all around the world. Silbey has extensively critiqued this school for aiding little theoretical advancement but generated policy projects attempting to make the law work better for different groups (Silbey 2005, p. 324).

The Identity school can generate some theoretical insights on the fluidity and multiplicity of identities constituting legal consciousness but it has largely generated descriptive studies on identities of marginalised people (Minow 1990, Engel and Munger 2003). The Mobilisation school exacerbated the ubiquitous law problem even further by generating studies that find law in the thoughts and actions of those fighting for social change. These schools have generated numerous similar studies that found law in everything and everywhere. One study by Hull (2003) even found law in the unconsciousness of people. Hull (2003) interpreted same-sex couples' desire for legal recognition of their relationships, their uses of marriage-related terminologies and public commitment rituals as efforts to enact legality. Then, when she saw that her respondents "did not attach specifically legal meanings to their participation", she claimed that "that the behavioural layer of [legal] consciousness is to some degree unconscious" because "social actors can engage in practices both reflect and produce legality without necessarily (...) recognising those practices as in any sense 'legal'" (Hull 2003, p. 653). In sum, findings from legal consciousness research have offered little more than the theoretical insight that legal understandings are socially constructed and hegemonic.

Since Susan Silbey highlighted the lost direction of legal consciousness research, this research field has continued to flourish without redressing its theoretical problems (Halliday 2019). In Asia, applications of legal consciousness theory owed its proliferation to several key scholars. For example, Mary Gallagher and Margaret Boittin used legal consciousness theory to examine law in China. Margaret Boittin studied many cases about the relationships of marginalised individuals to the laws in the societies of mainland China, Hong Kong and Nepal (Boittin 2013). Mary Gallagher studied Chinese legal consciousness through case studies related to legal aid plaintiffs, individual attitudes towards legal institutions, media role in citizen's experiences of the Chinese legal system, and so on (Gallagher 2006, Gallagher and Wang 2011, Stockmann and Gallagher 2011, Chen and Gallagher 2018). These two leading scholars have led the path of research on the everyday lives of Chinese people, particularly different marginalised groups in the Chinese society. Following this path, Lynette Chua and David Engel have advocated for more studies of law and society in Asia to adopt legal consciousness theory (Chua 2014, Chua and Engel 2018, 2019).

In a special edition, Chua and Engel collated six articles applying legal consciousness theory to examine law in China, Vietnam, Myanmar, Thailand, and India. Liu examined how Chinese people think and talk about the law when there is a gap between state law and customary qing law (Liu 2018). In Vietnam, Nguyen examined the interaction between law and alternative normative systems by analysing how Vietnamese labour workers invoke law to shape their ideals of justice (Nguyen 2018). Tungnirun described two versions of legal consciousness among corporate lawyers in Myanmar (Tungnirun 2018). In Thailand, Somanawat described the legitimisation of Thai "ideal judge" image by a cultural legal consciousness of the Thai public (Somanawat 2018). In India, Khorakiwala analysed the ways in which architecture and iconography of the Madras High Court intersect with practices, beliefs, and social arrangements of that space to constitute a legal consciousness of Indian court personnel (Khorakiwala 2018). These studies "intended to provide a glimpse of the future of the law and society field in Asia and to assure readers that an extraordinarily talented group of younger scholars who explore legal consciousness issues is about to step to the forefront" (Chua and Engel 2018, p. 1).

These recent studies have not addressed the theoretical problems that Silbey highlighted but continued to exacerbate the problems with legal consciousness theory. They continued to assume rule of law in settings without this hegemonic assumption, present findings of individuals cognising minds as evidence of society-wide understandings about law, and ubiquitously find law in everything and everywhere. As Silbey worried, the continued proliferation of legal consciousness research has sacrificed the concept's critical edge and theoretical utility. The hope that expanding legal consciousness research even further can redress its shortcomings have not seen fruition. It is time to move on from legal consciousness to an alternative theory. I propose systems theory, an overlooked law and society theory that has great potential to advance the socio-legal scholarship.

3. THE RECONSTRUCTIONS OF SYSTEMS THEORY

The globalisation of legal sociology has facilitated global adaptations of not only legal consciousness but also systems theory. The German scholar Niklas Luhmann adapted the general systems theory to social systems and established classical systems theory. Building on and moving beyond classical systems theory, scholars of organisational sociology have

adapted neo-institutional approaches that emphasised the cultural and cognitive dimensions of organisations to systems theory (Meyer and Rowan 1977, DiMaggio 1997). These adaptations have diverted focus away from the high-level abstraction of organisations as sub-systems to the middle-level units of culture, network, and cognition that stabilise the structure of organisations. This reconstruction has allowed systems theory to theorise not only organisations as sub-systems adapting to external perturbations but more importantly how cultural and cognitive heuristics stabilise both internal and external relationships to maintain the continuity of organisations. This is the theoretical ambition of legal consciousness in the quest to explain the meso-level consciousness. The theorisation by organisational sociology however offers more concrete theoretical formulations than the conception of consciousness. The useful expansions of systems theory have occurred not only in sociology and organisational studies but also in management studies (see generally Chamberlain 1968, Teece 2018), comparative legal studies (see generally Siems 2018, Valcke 2018) and international studies (Verschraegen 2002; see generally Goddard and Nexon 2005). These fruitful expansions suggest that legal sociology can benefit from this wider movement of systems thinkers.

3.1. LUHMANN'S RECONSTRUCTION OF GENERAL SYSTEMS THEORY

Niklas Luhmann was a leading figure of sociology in the era of “theory crisis” marked by the saturation of postmodern social theories and the search for what comes after deconstruction (Luhmann 1995, p. x). In response, he contended that the theoretical developments in other scientific disciplines already provided the theoretical resources needed to analyse an increasingly complex social reality. In the fields modern physics, information theory, cognitive science, neurophysiology, a fundamental revision was taking place, collapsing the boundary between the observer and the observed and stimulating the notion of self-reference (Poundstone 2013, pp. 1–30). This discovery generated the conceptual shift from parts to the whole and led scholars to adapting systems thinking to their disciplines (Capra and Mattei 2015, pp. 87–94). Luhmann adapted this conceptual revolution of the twentieth century to sociology to examine law in modern societies as social systems (Luhmann 1995).

The adaptation of general systems theory to sociology was shaped by Luhmann's unflattering view of sociology at the time (Luhmann 1995, p. xi). When first formulated systems theory to conceptualise modern societies, Luhmann criticised previous sociological theories for drawing on “selective observations derived from particular assumptions” (King 2013, p. 63). To minimise basing his theory on assumptions, Luhmann returned to the basic question of how meaning is constructed (Luhmann 1983). His answer was communication. This was because “anything that has meaning for society has to be generated by communications” (King 2013, p. 64). Since meaning is constructed by communication, it is the sum of all possible meanings that constitutes a society (Fletcher 1985). However, communication necessitates semantic context in order to pinpoint what people refer to when they communicate. This means that communication is necessarily organised into systems, because “without the existence of systems communications – the creation and transmission of information could not take place” (King 2013, p. 64). Thus, societies are systems of communication.

Luhmann formulated sub-systems by observing European societies (Luhmann 1977). He concluded that modern societies have evolved to encompass multiple functions (Cotterrell

1998). Each function is carried out by a specialised ‘system’. Since each ‘system’ carries a specialised function, they must have specific semantic contexts to enable communication within their internal ‘system’ (Luhmann 1982). Internal communication must serve the functioning of the ‘system’. Thus, each specialised ‘system’ is also a communication system, existing within the larger communication system of modern societies. Luhmann termed them sub-systems of communication (Teubner 2016). Modern societies have functional differentiation, consisting of multiple sub-systems where each sub-system serves a particular function. Examples include the legal sub-system, political sub-system, economic sub-system, education sub-system, and so on (Nobles and Schiff 2012). Luhmann contended that a key feature of these communicative sub-systems is their autopoiesis (Luhmann 1986).

Two core aspects of autopoietic sub-systems are self-reproduction, and epistemic ‘closure’ (Teubner 2016). Sub-systems are capable of self-reproducing by using internal communications to reproduce internal elements. These elements include self-referential language, logic, reality, and time exclusive to the systems (Luhmann 1986). The process of internal reproduction enables sub-systems to maintain and function by themselves. Second, autopoietic sub-systems are epistemically ‘closed’. Since the function of each sub-system is specialised and specific, the internal communication that serves their primary function is also specialised and specific (Luhmann 1986). This means that sub-systems with different functions will have different systems of communication, whereby each system is exclusive to the internal functioning of the social organisation. Coupled with the capacity to self-reproduce, communication within each sub-system cannot be translated to other sub-systems. This means one sub-system’s internal logic of communication is differentiated from the logic of other sub-systems. The internal logic of communication orders internal operations and formulates interpretations of the external world (Teubner 2016). Sub-systems apply their internal logic to interpret external activities, resulting in distinctly different interpretations. These distinctive interpretations of the external world here, however, are high-level abstractions of social phenomenon by autopoietic sub-systems. They do not include the complexities and nuances of social phenomenon in everyday life. Since Luhmann did not develop this theoretical model for empirical examination, this high-level abstraction has created great difficulties for application and had received routine criticisms from socio-legal scholars.

3.2. THE CRITICISMS OF CLASSICAL SYSTEMS THEORY

Law and society scholars have widely criticised the highly abstract notion of autopoietic sub-systems central to Luhmann’s systems theory (Tamanaha 1997, Cotterrell 1998, Nelken 2001). Tamanaha in his evaluation of different sociolegal theories contended that Luhmann’s systems analysis is “set at too high a level of abstraction to produce testable (verifiable or subject to falsification) hypotheses” (Tamanaha 1997, p. 20). When assessing the potential of applying systems theory, Liu reiterated this criticism that systems theory “seems excessively abstract” and “hard to operationalize in empirical research” (Liu 2015, p. 9). This suggests that the abstract concept of sub-systems requires further theoretical developments to operationalise. The sociolegal scholar, Gunther Teubner, developed a middle-level theory of autopoiesis to demonstrate how sub-systems are not strictly ‘closed’ but have degrees of openness to respond to their environment. Teubner’s theses on ‘open’ autopoietic sub-systems allow analyses of the systems’ responsiveness to external stimuli, yet he retained autopoietic features (Teubner 1983). Teubner’s conception of open, autopoietic sub-systems generated numerous debates among law and society scholars

(Cotterrell 1998, Nelken 2001). While adding more theoretical scope and potential, Teubner's theses could not resolve the issues of excessive abstraction.

The second major issue with Luhmann's systems theory is its difficulty in empirical application. The strength of systems theory lies in its macrostructural conceptualisation of law in modern societies. However, the macrostructural level of system theory cannot be used to examine societies at the microstructural level of everyday life. In other words, systems theory cannot be used to empirically investigate law in societies. The main reason is that sub-systems do not exist in our daily lives at microstructure level. Many examples illustrate the non-existence of sub-systems. For instance, neoliberal 'reforms' of the European welfare state precipitated a legal system where juristic decisions are not motivated purely legally but also economically, pedagogically, and sociologically (Hiller 2010, p. 67). Teubner's developments of systems theory also did not address this issue. Indeed, several critics including Cotterrell (1998) pointed out the inaccuracies and problematic implications of Teubner's autopoiesis thesis upon law and society research. For instance, the notion of autopoiesis, especially binary coding of legal/illegal presents a reductive mechanism to complex social processes of law. If this is the "entire key to [law's] functioning as a social system", then, the entire field of legal sociology as an enterprise dedicated to explaining this functioning would be rendered redundant (Cotterrell 1998, p. 92). While the sociology of law has considerably shelved the classical systems theory by Luhmann, the sociology of organisation continued to examine the theoretical formulations of systems theory. Organisations studies have made several revisions to classical systems theory that allowed for empirical examination.

3.3. THE ORGANISATIONAL RECONSTRUCTION OF CLASSICAL SYSTEMS THEORY

The field of organisations studies has attempted theoretical integration with general sociology to establish theoretical frameworks that can explain and predict the trends of organisations (Powell and DiMaggio 2012, p. 27). Institutional theory for example, pivoted to a 'new institutionalism' to reflect the cognitive turn in social theory. This shift emphasised cognitive models of "taken-for-granted" scripts, rules, and classifications that reflect how actors within organisations interpret and organise information through shared social categories (Powell and DiMaggio 2012). This theoretical development in the sociology of organisation can be applied to revise the concept of functional logic by classical systems theory. By incorporating cognition, culture, and shared meanings, neo-institutional approaches allow a revision of classical systems theory's functional logic, showing how organisational functions are not only structurally determined but also interpreted, legitimised, and enacted by social organisations (Luhmann 1995, Powell and DiMaggio 2012).

The organisational scholar Petra Hiller has explicitly revised the concept of functional logic into organisational logic in her paper "Understanding corruption: How systems theory can help". Hiller made the distinction between functional logic and organisational logic by formulating that functional differentiation is maintained at the level of society but not at the organisation level (Hiller 2010, p. 67). Functional logic is possessed exclusively by one sub-system while organisational logic can be possessed by multiple social organisations. Hiller offered the concept of social organisations to examine how communication orders social action. She observed that "most organisations have a basic orientation towards a functional logic to which they are assigned" (Hiller 2010, p. 69). This means that although social

organisations do not function like Luhmann's sub-systems (with strictly one functional logic), they still have a basic orientation towards one logic (Hiller 2010, p. 70). This thinking of systems theory allows examinations of the concrete forms that social organisations take in modern societies.

Social organisations refer loosely to organisations, networks, groups and people who embody basic orientation toward one functional logic (Hiller 2010, p. 79). One key difference between a sub-system and a social organisation is that while sub-systems have one and only one functional logic, social organisations possess many different organisational logics while orientating towards a main functional logic. To survive in a complex modern society, social organisations often have to consider different criteria when making decisions (Hiller 2010). Social organisations participate in different logics to act and make their decisions in society. This conception reveals that social organisations possess a hierarchy of logics with a primary logic and other subsidiary logics situated lower in a hierarchy. The hierarchy of logics possessed by social organisations enable them to use different logics to make decisions and adapt to a complex society (Hiller 2010). The possession of multiple logics is the key feature of social organisations. It enables social organisations to interact and communicate with one another by invoking one of their multiple logics to develop a common conceptual grammar. Similar to a person with the ability to speak different languages with different levels of proficiency, the hierarchy of logics enables a social organisation to invoke a similar logic to the social organisations they are interacting with, to communicate and exchange information. Invoking different logics in this hierarchy is a way for social organisations to interact and communicate with one another. Yet not all social organisations have a varied set of logics always readily available to be invoked when they interact with other social organisations. Analytical theories such as Structural coupling and Coevolution developed by Teubner can be applied to analyse interactions between different communicative logics (Teubner 2016). Other theories such as the Mobilisation theories of legal consciousness can also be integrated here to examine the interactions between social organisations.

This revised version of systems theory by Petra Hiller has resolved two routine criticisms of the theory being excessively abstract and empirically inapplicable. The revised version added an empirically identifiable concept of social organisations to the highly abstract concept of autopoietic sub-systems central to Luhmann's systems theory. Autopoietic sub-systems, which do not exist in the real world but are an abstraction of sociological functions have been revised into focus on social organisations. By supplementing the supra-human level of systems theory with the meso-level social organisations, the revised version of systems theory no longer bears excessive abstraction and empirically applicable. It is worth noting here that other scholars in the sociology of organisations have also attempted reconstructions of systems theory to enable empirical applications (Nassehi 2005, Besio and Tacke 2024). For example, Nassehi reworked Luhmann's abstract theory of social systems by conceptualising organisations as "decision machines" where the continuous production of decisions constitutes the operational core of the system (Nassehi 2005). This reconstruction shifts the focus from static structural descriptions to the dynamic processes of decision-making and communication within organisations, allowing the theory to be applied in empirical studies while preserving the systemic principles of self-reference and operational closure central to classical systems theory.

This article focuses on the reconstruction by Petra Hiller because it not only presents a empirically applicable version of systems theory but also an analytically concrete concept

of hierarchy of logics. Although Luhmann's social systems theory emphasises the functional differentiation of society into autonomous, non-hierarchical subsystems, the conception of hierarchy of logics does not go against systems theory non-hierarchical, horizontal organisation ethos because it applied only within the middle level of organisations. Rogowski in 'The Anthem Companion to Niklas Luhmann' underlined that this horizontal differentiation does not preclude the existence of structured forms of organisation within subsystems or organisations themselves, because hierarchy in systemic operation is analytically distinct from the heterarchical arrangement of function systems at the societal level (Rogowski 2023). The hierarchy of logics conception clarifies this distinction between functional system and organisational system. By allowing empirical data of discourse to be sorted and analysed, Petra Hiller's reconstruction of systems theory offers an applicable, concrete, and advantageous theory for a global sociology of law. The next section discusses this contention.

4. SYSTEMS THEORY FOR A GLOBAL SOCIOLOGY OF LAW

Scholars from different fields of studies have recognised the advantages of the systems theory model in explaining and predicting global phenomenon of law. The theory gained popularity in regulation studies (Teubner 1998; see generally Gillespie 2007), management studies (see generally Chamberlain 1968, Teece 2018), comparative legal studies (see generally Siems 2018, Valcke 2018) and international studies (Verschraegen 2002; see generally Goddard and Nexon 2005).

4.1. THE GLOBAL APPLICATIONS OF SYSTEMS THEORY

The sociolegal scholar, Gunther Teubner, opened the field of regulatory studies with his influential article on legal transfers, 'Legal irritants: good faith in British law or how unifying law ends up in new divergencies' that has been cited over one thousand three hundred times. Teubner provided many applications of systems theory as a regulation theory to explore the complex ways in which legal thinking shaped social behaviour (Teubner 1983, 1998, 2016). Systems theory have further evolved to aid examination of legal transfers (Gillespie 2002b, 2006, 2007). The advantage of using systems theory to analyse legal transfer is the rich heuristics that can aid examination of how recipients interpret and implement imported legal principles and laws (Gillespie 2007, p. 661). Offered heuristics on communicative logics, systems theory provides a frame for legal transfer research to analyse the ways in which local recipients, particularly its social organisations interpret and implement imported legal principles and laws. Gillespie also extensively applied systems theory to study different aspects of the Vietnamese regulatory regime including regulation of the state, commercial activities, corruption, land disputes, and so on (Gillespie 2002a, 2006, 2009, 2011, 2017). Since Vietnam was subjected to colonial influences of multiple legal traditions, its contemporary society embodies a fragmentation of logics and epistemics shaping Vietnam's regulatory regime. Systems theory provides a macrolevel model with broad applicability and useful middle-level analytical tools to examine the ways in which pluralistic social organisations in Vietnam shape possibilities and outcomes of regulations.

Scholars in the field of comparative law have shown a growing interest in applying systems theory. Catherine Valcke applied systems theory to enhance comparative law into an autonomous field of academic discipline. She observed that comparative law has been

divided by two main conceptions of law, both fail to meet comparative criteria (Valcke 2018, p. 14). She used systems theory to conceptualised law as ‘autopoietic organic systems’, meeting comparative criteria and uniting the divided conceptions. Another leading scholar of comparative law, Mathias Siems, also used systems theory to innovate comparative legal method from micro to macro comparisons. Siems adopted systems theory to extend the conventional approach of comparing legal rules from different countries to a global comparative law approach that examine the legal transplantation and convergence of different legal systems (Siems 2018). He calls for future comparative law to attend to the research of other disciplines and theoretical innovations.

Recently, several international studies have applied systems theory to examine the operations of standards, norms, and laws in different locales. Studies of international politics found systems theory has a suitable constructivist framework for examinations of international orders (Goddard and Nexon 2005). Verschraegen adopted the perspective of systems theory to examine how the emergence of fundamental human rights related to functional differentiation in modern societies (Verschraegen 2002). Palladino identified epistemic communities as a crucial factor in the constitutionalisation of digital technologies as they determine the level of technical expertise and commitment by both state and non-state actors (Palladino 2021). Since the regulation of cyberspace requires genuine commitment from a multitude of actors, systems theory becomes a particularly useful frame to understand the obstacles and possibilities of different epistemic communities in making such commitment. In short, this brief overview demonstrated how four different fields of scholarly research have utilised the advantages of systems theory. Regulation studies, management studies, comparative legal studies and international studies have recognised the advantages and used its framework to theoretically and empirically examine both the formal and informal aspects of law. Similar to these fields of studies, law and society scholarship can utilise the framework of systems theory to theoretically and empirically advance. These characteristics of systems theory can further redress the three shortcomings of legal consciousness theory.

4.2. REDRESSING THE RULE OF LAW HEGEMONIC ASSUMPTION

The global applicability of systems theory can overcome the rule of law hegemonic assumption entrenched in the theoretical design of legal consciousness theory. Systems theory has broad applicability to societies with diverse legal, social, and political makeup. Luhmann based systems theory on his observations of social differentiation in Western European societies. Social differentiation is well advanced in most countries exposed to the processes of modernisation. Therefore, systems theory can suitably apply to all the contemporary societies exposed to the processes of modernisation where social differentiation is well advanced. The only settings where his theory may not apply are pre-modern societies where there is no functional differentiation between religion, law, economics, etc. (Nobles and Schiff 2012). This assumption of systems theory makes it more applicable to more societies than legal consciousness theory.

As discussed previously, legal consciousness theory was built from observations of the US legal system and popularised by the political conditions of the Civil Rights Movement. This context designed legal consciousness theory with a rule of law hegemonic assumption, irreconcilable with studies in illiberal and authoritarian societies. The rule of law hegemonic

assumption overprescribes the uses and invocation of law in societies where law is peripheral.

Systems theory can overcome this shortcoming as it examines discourse and anchors on communication, enabling broad applicability. This means scholars can use systems theory to identify and examine law and regulatory actions in any contemporary societies exposed to the processes of modernisation without embedded assumptions that law is relevant or central. The examination of discourse through systems theory will unveil to the researchers whether and to what extent law is used by people, while also leave room for the revelation of other regulatory actions outside of law. This design enables systems theory to overcome the rule of law hegemonic assumption entrenched in legal consciousness theory.

4.3. REDRESSING THE INDIVIDUALISM AND THE UBIQUITOUS LAW PROBLEM

The concrete model of systems theory can redress the individualism and ubiquitous law problems that precipitated many descriptive studies of individual views on law. As discussed in the first section, legal consciousness undertheorizes law. Without a concrete conception of what law is, the theoretical design enables studies of legal consciousness to treat law as ubiquitous, as whatever the individuals think it is and found in everything and everywhere. These legal consciousness studies produced highly contextual understanding of law that depends on the circumstances of each case study. Consequently, many recent studies have shifted the object of analysis away from law and legality to social phenomena such as “sexual harassment, the meanings of marriage, behaviour on the streets, interpretations of capital punishment, identity as a person with disabilities, social change” and ends up describing social issues of “race, gender, class, sexuality, identity, disability” (Silbey 2005, p. 355). These studies further comprise of lengthy descriptions of social issues and individual experiences without any theoretical contributions.

In contrast, systems theory conceptualises law as the social activity of communication. Communication is the social activity that situates individual actors as the component that conducts communicative actions. Since communication actions are social activities, systems theory necessitates analyses of the social constructions of meaning. This social construction is unequivocal about the structures of meaning that enable the existence of legality through social processes of communication. It treats individuals rightfully as a social subject and offers tools to thread subjective meanings of individuals with the intersubjective meanings of the systems. Importantly, the strength of systems theory is recognising that although human agency is important, it is in constant interplay with the cognitive structures used to conceptualise law. Analysis of the intersubjective meanings constructed or contested between social organisations can unveil the social structures, notions of legality, constructions of law and regulation.

This conceptualisation of communication can redress the individualism and ubiquitous law problems of legal consciousness. The conception of law as communication provides a clear parameter around what law is and is not, preventing studies straying away from law and legality to study social phenomena and social issues. It also enables examinations of regulatory actions outside law that may be more crucial for non-Western settings while maintain the crucial boundary between law and social actions. Most crucially, systems theory has great predictive powers that legal consciousness does not attempt by offering the heuristics to examine convergence and divergence between different social organisations,

enabling predictions of how law will be endorsed, contested, and applied. This rigorous design overcome both the pernicious individualism and the ubiquitous law problems in legal consciousness studies.

5. FROM LEGAL CONSCIOUSNESS TO SYSTEMS THEORY

This paper has demonstrated that legal consciousness theory, while influential, suffers from the rule of law hegemonic assumption, the individualism, and the ubiquitous law problems that limit the theory's applicability in undemocratic and illiberal contexts. These limitations have constrained the capacity of socio-legal research to account for legal phenomena in non-Western societies where the theory has been encouraged to expand. In contrast, the reconstructed systems theory provides a concrete, empirically applicable framework that conceptualises law as a social communicative system ordered by organisational logics, sustained by communication and shared epistemes. Recent revisions in organisation studies, particularly through neo-institutional approaches, demonstrate how functional logics within organisations are interpreted, enacted, and legitimised by shared culture and cognition of agents (Powell and DiMaggio 2012). Petra Hiller's reconstruction of systems theory exemplifies this operationalisation, introducing the concept of a hierarchy of logics at the middle level of organisations without violating systems theory's non-hierarchical ethos (Hiller 2010, Rogowski 2023). The analyses of meso-level organisational processes allow researchers to capture the mechanisms through which legality is constructed, contested, and maintained within and across social systems, thereby overcoming the empirical and conceptual limitations of legal consciousness theory.

Scholars from different fields of legal studies have already recognised the advantages of the systems theory model in accounting for the global phenomenon of law. Leading comparative law scholar Catherine Valcke, for instance, utilised the macro concept of autopoietic subsystems to theoretically reconcile the two competing conceptions of law that had long divided the field. Similarly, Mathias Siems (2018) employed systems theory to advance comparative legal methods, enabling analyses that span from micro-level interactions to macro-level institutional structures. Scholars of law and technology have also adopted the framework, recognising its capacity to capture the convergence and divergence of epistemic communities engaged in digitally mediated governance. For example, Palladino (2021) applied systems theory to explore the potential and obstacles of constitutionalising emerging digital technologies, demonstrating the framework's ability to handle complex, multi-actor, and technologically mediated regulatory phenomena. These examples indicate that systems theory not only bridges theoretical gaps but also allows socio-legal research to engage with contemporary global challenges in law.

The theoretical potential of systems theory can further be demonstrated by its multidisciplinary interest. The general systems theory received scholarly interests in multiple fields of physics, information theory, cognitive science, and neurophysiology (Luhmann 1995, Poundstone 2013, pp. 1-30, Capra and Mattei 2015, pp. 87-94). The developments of systems thinking collapsed traditional boundaries between the observer and the observed to stimulate the notion of self-reference, which Luhmann adapted to conceptualise social systems. In an interdisciplinary reflection on systems theory, legal scholar Ugo Mattei and physicist Fritjof Capra argued in *The Ecology of Law* (2015) that the legal observer cannot be separated from the law they observed; scholars and practitioners alike bear a responsibility, as their analyses, interpretations, and

representations actively co-construct the reality of legal systems. This insight situates the reconstructed systems theory not merely as an analytical tool, but as a framework with ethical significance, linking the pursuit of knowledge to the promotion of justice and sustainability.

Expanding systems theory for a global legal sociology promises to transform the field, both analytically and philosophically. Its conceptual tools make it possible to trace the construction, circulation, and transformation of legality across diverse cultural, political, and organisational contexts, including technologically mediated environments. By adopting a systems thinking perspective, socio-legal scholarship can move beyond descriptive studies of individual experiences of law and instead anticipate how legal structures evolve in response to shifts in organisational logics, social practices, and digital governance. This approach equips scholars to address pressing questions of the 21st century: How do laws emerge and stabilise across global communities? How do organisations mediate interactions between law, society, and technology? How can socio-legal research responsibly study law when its observation actively shapes the legal reality? Looking ahead, the reconstructed systems theory allows scholars to trace how legal meaning is constructed, circulated, and stabilised across global networks of law, technology, and social practice, and to anticipate the trajectories of legal institutions as they interact with algorithmic governance, artificial intelligence, and global digital infrastructures. The time has come for socio-legal scholarship to move on from legal consciousness theory and embrace systems theory.

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