Socio-Legal Agency in Late Modernity – Reappreciating the Relationship Between Normativity and Sociology of Law[1]

Pierre Guibentif, DINÂMIA'CET at ISCTE – University Institute of Lisbon / Maison des Sciences de l'Homme Paris-Saclay

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Summary:

The paper takes as a starting point an article of Reza Banakar published 1998, in which he compared sociology of law with feminist scholarship, arguing, firstly, that the success of feminist scholarship would be due to the fact that feminist scholars 'share a common ideological objective that does not exist to the same extent and with the same intensity in sociology of law', and, secondly, that, just like feminists, who 'freed themselves from the limitations of the traditional and academically established disciplines', sociology of law 'must in the same fashion limit its dependency on both law and sociology'. - The discussion of these two arguments may offer an appropriate structure for a contribution to the debate about the relationship between sociology of law and normative debates. In a first part, a case for a possible ideological objective for the Sociology of Law will be put forward. In a second part, the relationship between Law and Sociology will be discussed, with a view to this objective, proposing one possible understanding of Banakar's programme of 'Merging Law and Sociology'.

> (…) By studying law's normativity from specific angles – for example by emphasising people's experience of injustice, or alternatively emphasising norms at the expenses of social conflicts – (sociological analysis) does, indirectly as it might be, take a stance on the nature of a good society. (Banakar 2015: 236)

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[1] A preliminary version of this paper was presented in July 2021 at a session organized by the *Comité de Recherche 'Études socio-juridiques – Sociologie du droit'* within the framework of the virtual 2021 conference of the *Association internationale des sociologues de langue française (AISLF)*, and I want to thank the participants to that session for their stimulating comments. That *Comité* welcomed Reza Banakar at the Toulouse RCSL meeting in 2013, where we discussed with him the topic of our sessions: 'Law and the Social Construction of Uncertainty'. I thank Ulrike Schultz for inviting me to present this paper at the opening session of the 2021 Virtual RCSL Conference in September 2021, Håkan Hydén for authorizing that presentation, and Roger Cotterell for his inspiring reviewer's comments.

This is one of the sentences in Reza Banakar's book *Normativity in Legal Sociology* (2015) where the possible role of sociology of law in normative debates is mentioned, and where the concern of Banakar with this issue finds expression. In a time when science finds itself strongly involved in political decision making processes, as well as in the implementation of public policies, it is important, taking up – actually sharing – this concern, to discuss this role. And it makes sense to put forward a tentative contribution to this discussion in this anthology honouring Reza's memory.

I will take as a starting point a paper of Reza Banakar published 1998, in which he used more radical formulations than in the 2015 book. In that paper he compared sociology of law with feminist scholarship, arguing, firstly, that the success of feminist scholarship would be due to the fact that feminist scholars 'share a common ideological objective that does not exist to the same extent and with the same intensity in sociology of law' (Banakar 1998a: 18) [2], and, secondly, that, just like feminists, who 'freed themselves from the limitations of the traditional and academically established disciplines', sociology of law 'must in the same fashion limit its dependency on both law and sociology' (Banakar 1998a: 18).

The discussion of these two arguments may offer an appropriate structure for a contribution to the debate about the relationship between sociology of law and normative debates.

An Ideological Objective for the Sociology of Law

In a first approach, the argument sounds disturbing to a sociologist's ear, as contradicting the seminal distinction defended by Max Weber (1919) between science and politics. In his 1998 paper Banakar actually did not specify any concrete objective of this kind. His 2015 book, however, emphasises a motive which could indicate that, over the years, he found such an objective: it relates to the fact that, in late modernity, 'the individual social actor becomes increasingly independent of social structures which previously exerted a regulating effect on its behaviour' (Banakar 2015: 259). This state of affair, on the one hand, is assessed in critical terms:

> Human agency might be gaining heightened reflexivity vis-à-vis social structures, but individual imagination and transcendental determination remain constrained by the normativity of consumerism and the celebration of hyper-individualism. (Banakar 2015: 284)

But, on the other hand,

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[2] This 1998 paper gave rise to several critical reactions, after which Banakar reformulated his arguments, without mentioning, however, the one about the 'ideological objectives': Banakar (2001). About the debate triggered by Banakar (1998), see Motta Vivian (2021: 6).

> Theoretical constructs such as (…) cosmopolitanism can potentially contribute to the birth of a new 'state of being' by putting ethical conflicts inherent in the global market economy under the spotlight and demanding solution. (Ibidem)

These statements, in the last pages of *Normativity in Legal Sociology*, suggest a possible function of the law in late modernity: to support individual agency in a sense that makes it more probable for it contribute to social change towards a 'good society'. This function of the law could be linked to what could be named an 'ideological objective' for the sociology of law: to inquire the contribution of law and rights nowadays to the shaping of an individual agency likely to contribute to the common good, and the impact of individual agency as stimulated or hampered as a result of law and rights. Through this inquiry, sociology of law could place itself in the condition of contributing to the reinforcement of this type of individual agency.

Such a positioning would converge with several recent references. Manuel Calvo García, who promoted sociology of law in Spain, and who left us a few weeks before Reza Banakar, gave priority in his last works to a sociological analysis of the effectiveness of rights[3]. Christopher Thornhill, in his last book, defending a 'global legal sociology', notes that

> A wide sociological reconstruction of the emergence of democracy and the formulation of democratic concepts is required both to clarify the actual nature of democracy, and to avert the tendency of democracy to collapse into populism. (Thornhill 2020)

Jacques Commaille, in a recent review of French socio-legal studies (Commaille 2021), welcomes the shift from a sociology of law focussing on the activities of states agencies to a sociology of law adopting a bottom up approach, focussing on, and thereby valuing, the individual practices that actualize the law.

Now the question is to what extent it may be justified for the sociology of law to contribute to normative debates on individual agency, and how it is advisable to do it.

Let us in a first step tackle a more general question, the status of norms in the scientific discourse in general, considering that sociology of law is linked to science, and that its societal status is conditioned by the one of science. So the question is to know if normative discourses have a place in the discourse of science. A positive answer to this question can be defended at least in relation to one specific domain: norms governing the scientific activity itself[4]. This positive answer requires a justification. As part of society, science as an activity is discussed, in particular in normative terms,

[3] See for example Calvo García (2014).
[4] About the relationship between social systems and norms, see Hydén (forthcoming).

not only internally, but also outside the scientific domain[5]. Science is an object of specific legislation, as well as of public policies which relate to political discourses. But according to a certain notion of scientific autonomy, recognized inside and outside the scientific domain, there have to be normative discourses about science produced inside of it[6]. Much of the work of Reza Banakar concerns these discourses.

These discourses may be divided in two main categories. Some relate to the intrinsic characteristics of scientific activities (a); others to the people practicing science (b).

(a) Science is supposed to produce knowledge, in other words to offer a cognitive access to the world. This means that scientific discourse has to defend itself as giving a true account of reality. As we know, two set of norms are supposed to enable science to answer this challenge. On the one hand, methodological norms[7] aiming at organizing the process of data collection, processing and interpretation in a way which makes it possible to check the conclusions put forward. Or, as Popper ([1934] 2002) would say, which warrants that the statements defended by scientists can be falsified by empirical observation. On the other hand, and in addition to these methodological norms, norms requiring the review of the results of scientific research by peer scientists.

As far as this second type of norms is concerned, we meet institutional arrangements aiming at organizing the debates among peers. These arrangements serve two opposed purposes. Some of them are designed to establish arenas where the debate is favoured by a shared background, which means that the access to them is restricted. Here we have, on the one hand, disciplines, ie specialized scientific domains, and, on the other hand, in connection with these disciplines, specialized organizations: university departments, learned societies, and so on. Other arrangements and principles serve, contrarily, to stimulate debates likely to integrate the domain of science as a whole. As a counterpart to locally based organizations, certain norms did develop in the scientific milieu aiming at internationalizing the scientific debate[8]. As a counterpart to disciplinary

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[5] The Insider/Outsider dichotomy, discussed by Banakar (1998a: 8) in the case of law, applies to all functionally differentiated activities developed in modern societies. On functional differentiation in modern society, see Luhmann 1997.

[6] The question of how a normative discourse can be part of the scientific discourse cannot be adequately discussed within the framework of this short contribution. Two important criteria are: the fact that it is connected to scientific arguments, and that it is formulated in a context usually devoted to scientific debates. The two papers of Banakar already quoted may illustrate these criteria: Banakar (1998a) and (2001) defend mainly normative arguments of politics of legal sociology, in a journal which also publishes papers presenting the results of socio-legal research.

[7] Methodology is a concern for Banakar, not only in Banakar (2015: 5), but throughout his career. Remember in particular Banakar (2000) and Banakar and Travers (2005).

[8] Reza Banakar developed particular efforts in the internationalization of sociology of law. Apart from his international career, with moves between Sweden and the United Kingdom, he was secretary of the Research Committee on Sociology of Law of the International Sociological Association, and he carried out research in

specialization, there are, with increasing relevance in recent decades, norms which require – and institutions which help (such as, in France, the *Maisons des Sciences de l'Homme*) – interdisciplinary cooperation.

In the discussion of the norms concerning the intrinsic characteristics – modes of operation – of science, two other points have to be mentioned.

One regards the role of individuals. The relationship between science as functionally differentiated activity and individuals is a complex one. Science is the result of communication processes which transcend individual contributions, and which are built by components which are the result of collective action, in the first place language. But modern science gives special significance to individual contributions by using the category of the author. Modern science in a certain way institutionalizes the individual capacity of perception, as likely to originate the stuff to be processed by methodologically sound procedures and discussed in the arenas where peer scientists do meet[9]. Moreover, it can be said that science bets on individual creativity to ensure its innovative potential. The relevance of individuality for science, apart from many other mechanisms, is revealed by the practice of honouring, by scientific publications, the memory of the members of the scientific community, as we do it here and now for Reza Banakar.

The other point leads us back to the initial statement, science as an activity specialized in the production of knowledge. Departing from the assumption of a systemic approach to science as a self-referential social system, which to a large extent oriented up to now the reasoning here presented, the accurate perception of this function of knowledge production may be helped by the comparison and the coupling with other functionally differentiated activities, in particular those which can be considered as also belonging to the cultural domain, such as art and jurisprudence[10]. This means that science should take advantage of the differentiation of cognition, expression and volition, without losing sight of the fact that the three have to be recombined in practical activities. I would interpret

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Iran, his country of origin, in parallel to research carried out in Western Europe. See 'A Case-Study of Non-Western Legal Systems and Cultures' (Banakar 2015: 169).

[9] Up to this point, several references have been made to Luhmann, as an author who proposes an ambitious theory of modern society as made out of differentiated functional systems and organizations. Here it is worth remembering that Luhmann also developed, even if he did it in a more sketchy way, a theory of psychic systems and their relationship to social systems (Guibentif 2013). The present paper is part of an effort to link these two domains of Luhmann's theoretical work, with a view to the development of tools for a reflexive approach of the scientific domain. The aim is to create the conditions for a productive bridging between the observation of the world of science through the lens of systems theory and concrete experiences gathered in the practice of science.

[10] The emphasis given here to the three domains of law, art and science, is inspired mainly by the work on Habermas, in particular Habermas ([1981] 1984 and 1987). It is encouraged by Luhmann, who gave priority (indeed after the economy), to science, law and art in the volumes he dedicated to the main functional social systems: Luhmann (1990) ([1993] 2004) ([1995]).

the interest of Reza Banakar in establishing sociology of law as a domain of its own, independent from law as well as from sociology as a branch of science – an interest less radically expressed in *Normativity in Legal Sociology* (Banakar 2015) than in the paper 'The Identity Crisis' (Banakar 1998) – as deriving from his perception of the crucial role sociology of law could play as a gatekeeper between these two domains.

(b) Science is practiced as a specialized activity, within the framework of a societal division of labour or functional differentiation. This means that it is supposed to produce knowledge to be made available to and used by others. Under these conditions, an issue for scientists is to know to whom the results of their work are made accessible, and to what end they will be used. Even more than in the case of methodological norms, norms concerning the societal uses of science are, by definition, an issue to be tackled outside the scientific domain as well. But, again, if science has to be practiced according to a principle of autonomy, this issue also has to be tackled by the scientists themselves. If we admit that modern society is made out of many differentiated domains of activities, we could say, inspired by Luhmann, that science, by taking part in the discussion of its uses, takes part in what could be called, in the language in use today, a process of co-construction of society[11].

A first question to be tackled here is the one of the addressees of science. This question has given rise to different responses over the last century. Let us remember Max Weber's statement formulated at the beginning of the XXth century, insisting on the need of science to develop autonomously. Arguably a shift took place after World War II. Science at that moment experienced itself as one instrument necessary for the reconstruction of a peaceful international community[12]. As a consequence, science involved itself over the following decades in the implementation of public policies, or in the activities of large firms[13]. A third shift is said to have recently taken place, with an emphasis on the use of scientific results by individuals and grassroots organisations, a shift that is revealed in the socio-legal domain by the growing number of researches adopting a bottom up approach[14].

A second question concerns the uses of scientific knowledge. In the case of sociology of law, as viewed by Reza Banakar, the main issue here is the challenge for the discipline to offer useful

[11] The notion of a society resulting from the simultaneous processes of operation of differentiated social systems, all of them constructing society as their environment, is to be found in Luhmann (1997: 745).
[12] An example of this self-perception is Talcott Parsons' presidential address at the 1949 annual conference of the American Sociological Society, in which sociology is placed among the 'national resources' that enabled the United States to face the post-war challenges (Parsons 1950: 16).
[13] Reza Banakar discusses the demands of the big players of globalization, actually in the legal, not in the scientific domain, in Banakar (1998b).
[14] For a reference by Banakar to this trend, see footnote 5. Today, this point would deserve to be discussed taking into account the recent development of open science policies.

knowledge. A more specific debate which deserves a mention emerged in relation to the involvement of socio-legal research in the design of policies using 'nudges' (Fluckiger 2018).

Beyond these two classical questions regarding the relationship between science and society – whom does it address? what might be performed with its help? – a third question deserves attention. Scientific activity is a part of society. Society is shaped by the operation of functionally differentiated activities taking place within it. Recent western history suggests the following hypothesis: the establishment of a public sphere, which could later lead to the shaping of democratic political structures, was favoured by the existence of differentiated cultural domains. Within these domains, institutions developed which did recognize individual contributions as providing the substance of cultural outputs likely to be reused by society, and organize the cooperation between the individuals in ways favouring these individual contributions and their combination in a collective cultural outputs. This could have supplied the organisational skills required for the setting up of the institutional mechanisms of modern democracies, and helped the construction of individualities capable of contributing to the debates in the public sphere. More specifically, three characteristics of such individualities are: the will to defend one's own position; the capacity to use, for this defence, a sophisticated set of intellectual tools – such as concepts – which gives individuals the possibility to compose contributions that are, at the same time, original and understandable as well as reusable by other people[15]; and they have acquired the notion that their contribution will be well received if other people can take advantage of it (peer researchers, students, non-scientists), in other words: that their self-actualization as scientists is to a significant extent linked to the self-actualization of other people[16].

On the basis of this reasoning, a new question arises, regarding how science has to be practiced nowadays: what might be the relevance of the mode of functioning science adopts and defends for itself for the environing society? Having this question in sight, one possible option for scientific policy could be: science has to develop practices and structures likely to have, apart from other characteristics, the potential of valuing individualities and their contributions to common activities, not only for the sake of scientific productivity, but also because such a functioning of science is likely

[15] In other words, they experienced, within the cultural domain in which they are specialized, what Axel Honneth ([2011] 2014) calls social freedom.

[16] To duly identify those characteristics, as favoured by the development of the modern cultural domains, does not mean to ignore that these domains also generate inequalities and power strategies, inside and in their societal environment, and deal with inequalities and power strategies which transcend them. The arguments here outlined should be taken as a desirable addition to the critical discussion of these aspects of scientific reality, which is indispensable, but not the object of the present contribution.

to favour democratic trends in its societal environment, which, at the end of the day, are likely to improve, from the outside, the conditions of scientific activity.

Let us now come back to the question raised at the beginning of this section. Is it legitimate for sociology of law to have an ideological objective, which would be the defence of a certain place and role of individuals in society, as active contributors?

This question may be answered in two steps. In a first step, we have to recognize that science – the same applies to jurisprudence and art – has reasons to defend that notion of individuality for its own sound functioning, considering the place of this notion in the set of norms which characterize science as a differentiated activity, and having in view a possible impact of this notion on its environment, which could serve its own development. This defence, however, takes place in a debate internal to science (where it will have to face, in particular, managerial conceptions of the scientific activity, betting on the rationalization of scientific organization, and to that end, on an evaluation of individual contributions made by metrics). But this internal debate takes places within the context of a broader societal debate on democracy, and deserves to be taken into account in that broader debate. Not as a privileged debate, but as one among other debates, in particular those which take place in the domains of art, or of jurisprudence.

In a second step, the question of the specific role of sociology of law has to be tackled. Two contributions deserve to be highlighted. Firstly, as a domain of science, more specifically of social sciences and sociology, it is specialized in the observation of social processes, which provides it with appropriate tools to observe those processes which take place within the scientific domain itself; and it is specialized in particular in the observation of the processes which concern norms (Hydén forthcoming). So it is in the condition not only to participate in the above outlined normative debates, but, as a participant observer, to give a particularly dense account of these debates. An account, however, which should not be considered as more than one input among others, to be reworked in discussions gathering scientists of all disciplines. Secondly, as a discipline observing what happens in the neighbour cultural domain of jurisprudence, it may help the discussion in the scientific domain to pay attention to that other domain, and to better identify processes which may impact not only on science but more generally on the cultural domain.

This is precisely what Reza Banakar did in his last works, focusing on the evolution of law in late modernity. And his conviction about the relevance of this effort in times of 'emerging legal uncertainties[17]' might be the reason why his appreciation of the role of sociology of law seems

[17] This title of the chapter introducing Banakar (2015) has to be related to the title of one of the first international research projects in which Reza Banakar did participate, *Emerging Legal Certainties*, a project led

somehow less pessimistic in these works than in 'The Identity Crisis'. In this new context, such a scholarship as sociology of law appears as indispensable.

Bridging Between Law and Sociology

As far as the relationship between sociology of law and sociology is concerned I had the occasion to defend a position opposed to that of Reza Banakar, arguing for sociology of law to be practiced as a sub-discipline of sociology (Guibentif 2003). The foregoing reasoning reinforces my conviction in this sense. The ideological objective which has been reconstructed here is not specific to sociology of law, but to science in general. To consider sociology of law as a discourse likely to enrich the broader scientific debates addressing this objective could strengthen its motivation in better formulating, appreciating, and defending this objective: it puts it in the position to develop a more comprehensive notion of scientific individuality, and to identify a more precise role to play in the defence of that individuality.

Reza Banakar's concern of 'merging law and sociology', however, remains legitimate, in particular if we consider the above highlighted potential of sociology of law to help science to pay attention to was happens in the realm of law.

In line with the above defended reasoning, which emphasises the relevance of individualities for the functioning of cultural domains, I would like to defend the following, actually obvious, argument. Functionally differentiated activities have to be carried out according to the above discussed norms which warrant their specificity; sociology of law has to be practiced sociologically. Individual specialists of these activities, however, may also carry out other activities. The merging of different activities takes place, among other contexts, in the individual agency.

Arguably, the notion of individuality carried by the notion of author[18] implies this involvement in different social spheres; the recognition of the person, not as an 'official' of the discipline, but as a person who is capable of bringing something new to it, possibly collected in other domains of individual experience. This notion has recently given rise to controversy in cases in which political commitments of certain authors raised doubts about what could be called the legitimacy, or the acceptability, of their contribution to their domain of specialty[19]. Even in the face of such

by Volkmar Gessner, oriented by the hypothesis that globalization would generate its own normativity (Banakar 1998b). At that time, this process could be seen as making sociology of law running the risk of being marginalized, an appreciation which may have motivated the publication, in precisely the same period of time, of 'The Identity Crisis' (1998).

[18] For a classical reference on the topic, see Foucault (1969).

[19] For a recent discussion of this issue see Sapiro (2020).

controversies, triggered by particular circumstances, the recognition of the subjectivity of the authors as a driver of scientific or artistic production could be qualified as one of the *Betriebsgeheimnisse* of functional differentiation (Teubner 2012)[20]; one of the devices which give functionally differentiated activities their momentum.

To analyse agency as generated by dynamics cutting across differentiated domains of societal activities could lead to the formulation of hypotheses about the generation of social forces. Forces may emerge where correspondences are experienced between what happens at the same time in different domains[21]. These may be individual experiences, but also experiences of a group. Or better to say, such experience may contribute to the formation of a group. Here a hypothesis could be put forward about the formation, in the recent decades, of what has been called the socio-legal field, precisely the field of interest of Banakar. Let us consider his concern – which I share – about 'the lack of common basic assumptions between different orientations constituting the field of sociology of law' (Banakar 1998a: 4). Such a situation could simply have led, without regret, to the development of different separate lines of scientific work. If there is such a concern, it is because there is also a notion of unity, which motivates the appreciation of shortcomings in the effective achievement of that unity. It is an experience of unity, which we made at a global level at occasions such as the foundation of the International Institute for the Sociology of Law in Oñati in 1989, or the World Law and Society Meeting in Amsterdam in 1991, which forced us to question what, as a matter of fact, did justify that unity. What unites this field, perhaps more than shared scientific paradigms, might be the experience, by individualities, but also by certain communities[22], of amazing – and productive – correspondences between – to use the cool language of Niklas Luhmann – sociological and legal operations. In other words – this time eschewing the luhmannian terminology – of socio-legal agency.

An intriguing question, to which it is not possible to devote here an expanded analysis, is to know what could be, more precisely, these experiences of correspondences. Two of them may be briefly mentioned. Correspondences – as well as, actually, productive tensions – may be experienced in the realm of concepts. Concepts can be connected to each other in the individual reasoning beyond the schemes which are constructed within particular disciplines, and thereby acquire new meanings. An example could be the concept of legal pluralism, to which Banakar, as many of us, gives centrality

[20] Teubner (2012); terminology of the German version of the book.
[21] For a more developed defence of this argument, see Guibentif (2020: 183).
[22] To mention here research centres as, for example, the Oxford Centre for Socio-Legal Studies, the Sociology of Law Department at the University of Lund, or the CETEL, Centre d'études de technique et d'évaluation législatives, at the University of Geneva.

(Banakar 1998a: 19)[23]. Its meaning, within the socio-legal field, is shaped in particular by the encounter of the notion of unity of the legal system with which jurisprudence struggles, and the many notions converging with plurality which structure sociological theories: inequalities, conflicts, differentiation, and so on. Another level of correspondences are procedures; methodological procedures – reflections on content analysis may enrich reflections on legal interpretation and vice-versa – but also organizational procedures – the experience of the normative debates within the scientific domain analysed in the previous section can be compared with administrative or judicial procedures, or else with political procedures in which researchers may find themselves involved as citizens.

This brings us back to the topic of this contribution, the relationship between sociology of law and normativity. The conclusion of the previous section was that sociology of law has a special role to play within the normative debates internal to the scientific domain. A second conclusion could be that the sociologists of the law, as individualities, equipped with their socio-legal habitus, but in their other personal roles – in particular of jurists or of citizens – may be in the condition to use special intellectual tools in normative debates outside the scientific domain, and to enrich their arguments in these debates by arguments trained within the framework of scientific debates. Among those arguments, let us take, as a conclusive example, the one of pluralism, which can be linked to the defence of a certain modern individuality. Indeed, to recognize individual subjectivities, in functionally differentiated cultural activities as well as in the public sphere, only makes sense if this recognition is connected to the recognition of the plurality of these individualities. Which could help to make institutions and procedures sensitive to the variety of human viewpoints, the best warrant for the development of just social arrangements[24]. Perhaps a way of actualizing 'the theoretical and empirical unoriginality of late modernity (in which) lies latent the promise of a paradigm shift' (Banakar 2015: 284).

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[23] Legal pluralism is also an issue throughout almost all chapters of Banakar (2015).
[24] To react very tentatively to the interrogation of Douglas-Scott (2013: 16), quoted by André (2019: 258), 'whether pluralism is normatively attractive, and productive of justice'.

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