

Samir Forić¹
Faculty of Political Sciences
Sarajevo
forics@fpn.unsa.ba

Review
UDC 316.334.4
DOI: 10.7251/SOCEN1407049F
Accepted 20. 2. 2014.

Sociology of law and the problem of normative closing the discourse

Abstract

Sociology of law, as well as other special sociological disciplines dealing with social institutions, is burdened by the epistemological - methodological difficulties in their studies (sociological studies of law). The difficulties are caused by the differentiation of the institutions in the terms of building self-identity and autonomy and they appear in the form of institutional resistance and discursive exclusion. All the problems can be identified as the effect of the operational closure of the institutions and production of the self-description. In the case of law we discuss the normative closure of the discourse as an expression of the institutional resistance and discursive expropriation. The focus of the work are the epistemological and methodological difficulties as a problem for the Sociology of Law, and the problem of the normative closing of the legal discourse as the cause. The manifestation of the epistemological - methodological difficulties can be seen in several instances : a) the institutional reactivity of rights as a "social problem", b) the construction of the identity rights through the establishment of differences, c) determining the sociology of law as an external perspective on law and d) the normative closing of the legal discourse through the effects of conceptual and discursive expropriation. When asked how the sociology of law can deal with these difficulties in principle corresponds in the end of this work.

Keywords: *sociology of law, normative closing, self-description, legal discourse, epistemological and methodological difficulties, identity rights.*

¹ Senior Assistant, PhD student on the studying of contemporary sociology at the Faculty of Political Sciences in Sarajevo, e-mail: forics@fpn.unsa.ba

Introduction

Cross-section of contemporary sociology, as the crown of the Social Sciences, reveals the structure of this scientific discipline consisting of a general sociology with the methodology and specific sociological disciplines or subdisciplines². Contemporary Sociology is characterized by openness, interdisciplinary and multidisciplinary, reflexivity inherent logic and scientific orientation. These features make the Sociology the open discourse formation³. However, regardless the openness, sociology is sometimes faced with the obstacles of the epistemological and methodological nature, especially if its case extends to other field of science or its focus is on phenomena that express distinct institutional resistance to any external access, including the sociological. Such experiences have some special sociological disciplines. One of them is the sociology of law. In the following, we will try to point out the causes and forms of the epistemological and methodological problems that arise in sociological studies of law. Given that such research is necessary located in the area of socio-legal studies - which belongs and in which constitutes the sociology of law as a distinct sociological discipline, we will primarily talk about these difficulties from the perspective of the sociology of law⁴. In fact, mostly we will rely on the observations of the

² In that way the sociological theory ranks among the special sociological disciplines, eg. in Mouzelis.

Nicos Mouzelis, *Sociological theory: What went wrong? (Diagnosis and assistance)* Zagreb: Naklada Jesenski i Turk. 2000. 31.

³ The “new” or modern sociology breaks up with its “naive-positivist” tradition and turns towards the reflexivity and self-reflectivity. The characteristics of modern sociology are still a tendency to deconstruct rather than universality and objectivity, the shift towards the humanities, taking a position of the “interpreters” instead of “legislators” and understanding the social reality as something that is in constant motion, as uncertain, diverse and contingent. Ivana Spasić, *The sociology of everyday life*, Belgrade: Institute for textbooks and teaching aids, 2004. pp. 17-20.

Sociology today according to Zygmunt Bauman, is constructed as an open discursive formations, as a dialogic rather than the monologue sociology (In: Ivana Spasić, *The sociology of everyday life*, Belgrade: Institute for textbooks and teaching aids 2004. pp.20).

⁴ My point of view is that sociological research, understood as a sociological discourse (which is always relied on specific theoretical or paradigmatic views or takes a special form of sociology, but in this case, not the sociology of law) can not practice law without the mediation of the sociology of law. The first reason is the fact that sociology and law are two different communications, two different discourses, although they share the same interests and similar conceptual apparatus (more in the text). Sociology of law between these communications emerges as a mediating communication (discourse) that allows their understanding. Another reason is that every sociological discourse without any reference to the sociology of law misses its object in a way that it describes it as one-dimensional, ie. it describes only its external characteristics and external appearance - reducing the right to the general normative phenomenon that by its nature is not different from other rules (moral, customary, conventional, religious, etc...). Sociology of law is not only interested in external, but also in internal features of law, it does not have a relationship

Iranian-British legal sociologists Reza Banakar on the methodological difficulties of the sociological studies of law, but also on the reference point of view of Niklas Luhmann and Pierre Bourdieu.

Law as a “social problem”

If we accept the attitude of Jeffrey Alexander that as basic questions of the “sociological sense” are the two questions / problems: “order” and “action,” and if, at least in the context of the debate about the epistemological and methodological problems of special sociology, we designate the “order” as a “social problem” and “acting” as a “social issue”, it will be clearer to us the Banakar’s division of focus of sociological research. Banakar shares this focus on two types: the first is a focus on “social institutions” and another on “social issues”. The division was established on the basis of the reactivity of the cases, what it is in the focus of sociological research. Banakar considers that reactivity is demonstrated only by those phenomena that have institutional properties. Therefore, as “social problems” are occurring the social institutions and as social issues are the phenomena that are free to “flow” in the society, which are not condensed in an institutional way. While social issues include those phenomena (eg youth, gender, ethnicity, crime ...) that are not characterized by the institutional quality, and which do not produce the epistemological and methodological obstacles in the study, with social issues is just the opposite. Specifically, in the middle of the term “the social problem” is an institutional construct, the occurrence in which is contained the institutional quality - social institutions - characterized by a certain stability of social relationships and the ability to directly or indirectly regulate the behavior of stakeholders involved in these relationships. In other words, the social problems are characterized by the institutional quality, which is basically the epistemological and methodological obstacle to the outside, and to the approaches of the sociological research.⁵ Some of the social issues are religion, education, medicine, politics and law, so pursuant to the fact that the specific sociological disciplines are formed just around the “issues” and “problems” it could be said that some suffer more from the significant epistemological and methodological difficulties than others and that are for example sociology of religion, sociology of education, sociology of medicine, political sociology and sociology of law.

only with its sociological base (relying on sociological theories and views of other special sociology as well as the use of the methodology of sociological research), but it is connected with the theory of law. It is not only special sociology but also the science of law (more in the text).

⁵ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000): 278-279.

The law as the “establishment of a difference”

Thus, the sociology of law is facing difficulties and at the level of the epistemological and methodological divisions of sociological research. Of course, its difficulties do not arise from such a simple logical operations but from its focus - from the law as a social institution. These difficulties are an expression of a kind of a “resistance” of the law to social research (external approach or perspective directed towards the law), response to external stimuli. According to Banakar, the intensity of the resistance depends on the degree of the “institutional power” of social institutions and it manifests itself both in the institutional and discursive level. If it is about the law, such a closure is called “the normative closing of the legal discourse.”⁶ The question is why the law is “normatively closed” to the socio-legal research if the sociology of law, in addition to the special sociology, is also the study of the law? The answer to this question is very simple and it is the answer to the question of how to act this “closure”: through the self-description of the law as a specific (professional) discourse whose purpose is to establish the self-identity and the identification of everything else that does not fit into this identity, through the distinction, the establishment of differences, classification, division, or coding. All of the noted expressions have the same meaning - the distinction between the law and lawlessness, legal and non-legal. Identity can not be established without establishing the differences. In the very word “law” is contained the principle of distinction⁷. Identity is inextricably linked to the autonomy of law as a social institution and autonomy is associated with social power. At the same time it is the identity of the lawyers. It is the basis of the separation of insiders and outsiders in the law as an institution, system, or field: Insiders are the lawyers (practitioners, law professors), while the outsiders are all of the non-legalists (laypersons, clients, sociologists ...).⁸

The identity of law

What is the identity of the law? Specifically, what are the facilities of the self-description of the law as the auto-reference of the legal discourse through

⁶ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000):283.

⁷ “Law” in the semantic sense indicates the correctness of the thought (to be right, as opposed to being wrong) or treatment (to move in the right direction, to go right against the move in the wrong direction, to go back). At this level, the right shares, distributes, categorizes - what is and what is not. The Ancient Greek term “nomos” is rooted from the “Nemo” - to split, to distribute. Pierre Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field”, *Hastings Law Journal*, Vol. 38 (1987): 837.

⁸ The Same, 828.

which the identity is represented? This is a representation of law as a positive law which is created and penalized by the state, as the formal law (“black-letter law”), the dogmatic law, the “substantive law” as it is called by Banakar or the “legal world”⁹ as it is called. The identity of the law as we know it today (usually in our area is called “dogmatic” or “positive” law) is established by “cleaning” the law of its non-normative content (relationships and values), leaving only the normative (legal norms), the procedure which in the middle of the last century came from legal science, from the normative or “pure theory of law” by Hans Kelsen¹⁰. This, undoubtedly the most important authority of contemporary legal thought, revitalized the classical dogmatic understanding of the law - as “the authority of the experience systematized into the positive law”¹¹, which dominated the legal identity before the emergence of sociology as a separate scientific discipline. Significant is that the revitalization effort is happening right at the time of the significant social changes that have affected the greater differentiation of law as a social institution and a greater differentiation of sociology itself. It is that time that is conventionally taken for the end of the “golden” or classical era of sociology that ends with Talcott Parsons.¹²

⁹ An example of the self-description of the law as “legal world” in a very picturesque way is demonstrating how the identity of the law is constructed through a subtle establishing of a difference between the social world (sociology), the legal world (law, jurisprudence) and the meta-legal world (theory and philosophy of law). In this sense, is revealed the “realistic concept of the law” of which the authors talk. Dragan Mitrović and Marko Trajković, “The Realistic Concept of Law“, *Synesthesia Philosophica*, Vol. 55 (2012): 166, 169- 178.

¹⁰ About “Pure theory of law” and its criticism more in Berislav Perić, “*The Structure of Law*“, Zagreb: Informator.1994. 231-249. Also, about the logical-legal and philosophical-legal point of view on the process of “cleaning” the law, more in Ivo M. Tomić, *Legal logical and ethical studies*, Sarajevo: Faculty of Law, University of Sarajevo, 2009. 23-43.

¹¹ Niklas Luhmann, *The legitimacy through the procedure*, Zagreb: Naprijed, 1992. 11.

¹² The classic era of sociology at the same time was a time of a more open understanding of legal identity. Among the sociologists at that age can be included known legal names such as Leon Duguit, Maurice Hauriou, Eugen Ehrlich, Herman Kantorowitz and others. Among the most important members of Durkheim successors or “sociological school” were educated lawyers (Maurice Halbwachs, Paul Faucon, Emanuel Levy). We should not forget Max Weber who was educated lawyer and who devoted the attention to the sociology of law in the second volume of the *Economy and Society*. In the former Yugoslavia, sociology developed thanks to the then-eminent lawyers such as Toma Živanović, Đorđe Tasić, Svetozar M. Marković and Radomir D. Lukić. Then, in the newer history there are Oleg Mandić and Eugen Pusić. In Croatia sociology as an academic discipline, was first studied at the University of Zagreb. All of these examples point to a disciplinary and discursive openness between law and sociology, lawyers and sociologists. In such an environment of the random communication between law and sociology - the sociology of law was created (in 1983., through the act “About the Social Division of Labor” by Emile Durkheim) and was founded as a separate discipline (in 1913., Through the act of the “Fundamentals of Sociology of law by Eugene Ehrlich). Nicos Mouzelis, *Sociological theory: What Went Wrong? (Diagnosis and assistance)*, Zagreb: Naklada Jesenski i Turk, 2000. 25-29.

After the (re) construction of the legal identity on the normative basis, lawyers are no longer interested in those aspects of the phenomena that are not normative, and are beginning to perceive in a strictly professional sense as the possessors of esoteric knowledge and skills¹³. As Eugen Pusić would say, they lose interest in each “target functional speculation about right.”¹⁴ And legal practice and jurisprudence are narrowing their horizons to the legal norm as the dominant element of the phenomenon of law. The combination of this epistemological turn in the law, along with the smaller interest in the law after the functionalism ceases to be a dominant point of view in sociology - is increasing the gap between sociology and law, by separating their communications in the opposite directions.¹⁵

Of course, this situation has a negative impact on the sociology of law in several ways: the risk that, if it is critical towards this identity, it will be denied the access to the empirical data (institutional resistance), the risk that its insights will in advance be dismissed based on the lack of the understanding of the epistemological (discursive exclusion) or the inability of sociology of law in general to release itself of self-description of law, remaining epistemologically “trapped” in the governing legal paradigms. The latter difficulty for the Sociology of Law, is most likely already present in the national scientific space¹⁶. But if we follow

¹³ In terms of normative (re) construction of identity of law is Significant the Luhmann's remark about the “legal-immanent” dogmatic law: “So far efforts to develop a general theory of procedures under the influence of Kelsen consciously separated themselves from the sociology of law and considered themselves very legal and immanent. In a strictly methodological sense they could not at all be addressed as a procedure, but only the procedural law.” Niklas Luhman, *The legitimacy through the procedure* Zagreb: Naprijed, 1992. 32.

¹⁴ Niklas Luhmann, *The legitimacy through the procedure*, Zagreb: Naprijed, 1992. 11.

¹⁵ It was different in the former Yugoslavia, where the academic legal area was dominated by the integralist views on the law and where the status of jurisprudence (the theory, philosophy and sociology of law) was affirmed. After the dissolution of Yugoslavia and especially after the war, particularly in Bosnia and Herzegovina, the identity of the law followed normative form of the (re) construction, which is accompanied by the loss of the status of the science of law in the domestic academic area. One of the last integral works was the doctoral thesis of Vjekoslav Miličić, defended in 1990 just before the unfortunate events. Vjekoslav Miličić, *Special methods in the methodology of law and creation of rights (doctoral dissertation)*, Sarajevo: Faculty of Law, University of Sarajevo, 1990.

Currently, in BiH we can not talk about the existence of scientific communication between law and sociology as integration is no longer current and is not the part of the identity of law nor the sociology of law as mediating communication between them is developed enough to take over this function. Therefore, there is no, as is evident, the communication between sociologists and lawyers on important socio-legal questions in a specific socio-legal context.

¹⁶ It seems to me that the last socio-legal studies in BiH, as any other sociological practicing of our constitutional and legal issues (referring to the constitutional status of “constituent people” and “Others”) are related to the epistemological ruling legal paradigm of the dogmatic law not only in the sense of referring to the law as a starting point, but referring to the law as a progenitor point

the Banakar's view, it is not so problematic because it allows the multidimensionality of socio-legal opinion. In other words, if the sociology of law would break ties with the self-description of the law, if it would develop alternative descriptions at the level of identity rights (alternative paradigmatic points of view), it would be reduced to a one-dimensional perspective which would include only the outer dimension of the law as a social institution.¹⁷

With this in mind, let us return to the question above: why is the law "normatively closed" to the socio-legal research if the sociology of law, in addition to being the special sociology, is also the science of law. If it is also in addition to external interested and in internal dimension of the law. A more detailed answer lies in the construction of the legal identity as a "dogmatic law" through the establishment of differences in research approaches, and the division of labor in the law to legal science (internal perspective) and jurisprudence (external perspective), where, according to a legal identity, legal sciences acquire and privileged and exclusive position of finding "the truth about the law"¹⁸ through coding based on internal / external. First, I would like to introduce this division as well as the perception of the sociology of law from the law (the theory of law). After that, I will present the perception of the sociology of law from the sociology of law. In both cases, I will extract the aspect of the access / perspective.

- that it is just a law trained to produce a true solution to a social problem, through its own operations. On the other hand, the above studies attempted to make a small step forward in terms of the alternative point of reference, but only at the level of the concluding paragraph. Admira Sitnić and Amila Ždralović, *Citizens in collectivist ideology: socio-legal analysis of the position of "Others" in Bosnia and Herzegovina*, Sarajevo Center for Political Studies, 2013. 65.

¹⁷ Reza Banakar, "Reflections on the Methodological Issues of the Sociology of Law", *Journal of Law and Society*, Vol. 27(2000):288-292. In the same vein Duško Vrban argues that understanding and recognition of the prevailing paradigm in law (which he calls a Western legal paradigm) is a necessary criterion for the Sociology of Law. Duško Vrban, *Sociology of Law: An Introduction and Historical foundations*, Zagreb: Golden marketing-Tehnička knjiga, 2006. 27.

Also, Niklas Luhmann believes that the sociology of law can not be complete without the imputation of the self-description of law: "All the efforts to make the knowledge of law are done in society. (...) External, scientific description of the legal system takes into account its subject only if it describes the system as a system that describes itself and constructs a theory about itself". Niklas Luhmann, *Law as a Social System*, New York: Oxford University Press, 2004. 423.

¹⁸ Therefore, the theory of law, as a third major jurisprudence, is reconfigured into a kind of legal epistemology in order to maintain its position in the system of law which can only be if it is useful for the science of law. It also deals with the problem of the structure of legal norms, the hierarchy of legal norms, validity and interpretation and if it deals with "meta-functional speculation" - with which, according to Pusić deal sociology and philosophy of law - the result fits more into philosophy (axiology and ethics) than into law. Niklas Luhmann, *The legitimacy through the procedure*, Zagreb: Naprijed, 1992. p.11.

Sociology of law and the dilemma of external and / or internal perspective of the law

As the sociology of law is perceived in law, how is determined its status? Considering the fact that was partially created and developed in the framework of the legal theory (eg, it is the case of Eugene Ehrlich), it is expected that in the complete system of legal science (the science and the science of law) has its own status. Various legal scholars have determined its equal place in this system together with the legal dogma and philosophy of law - which is the basis for the division of labor between them when it comes to the totality of the legal phenomenon built of the elements: relationships, values and legal norms. Otherwise, this typology that goes back to Max Weber (sharing knowledge about law considering the perspectives: external, value and internal), was the most elaborated by the advocates of the integrated theory of law. According to this view, for example by Anthony Kronman, there are three approaches or perspectives to the legal phenomenon: internal (legal dogmatics, jurisprudence), securities (philosophy of law) and external (Sociology of Law)¹⁹. With Manfred Rehbinder, what he calls the three-dimensional theory of law, three approaches constitute different sciences in law: the science of standards (dogmatic law), the science of values (philosophy of law) and the science of reality (Sociology of Law).²⁰

The local theory of rights allocated the integralist view of Nikola Visković separating the three approaches in jurisprudence according to the content of the legal experience: a formal theory of law (jurisprudence, dogmatic law) which is interested in legal norms, or logical-linguistic composition and technique of the application of legal norms - formal validity; philosophy of law (or philosophical theory of law) which is interested in the duration value; the sociology of law (or sociological theory of law) which is interested in relationships - positivity or efficiency of legal norms.²¹ By integralist understanding, the content of legal experience includes relationships and values and norms. Those are the essentials of legal experience that set uniform requirements for all researchers of legal experience, whether it is about a dogmatist, philosophers or sociologists.²² Jurisprudence, philosophy of law and sociology of law can not be one without the other because they share their object, and are based on the same basis - a

¹⁹ See in: Deflem, Mathieu. *Sociology of Law: Visions of a Scholarly Tradition*. New York: Cambridge University Press. 2008. p. 4.

²⁰ Jean Carbonia, *Legal Sociology*, Sremski Karlovci/Novi Sad: Izdavačka knjižica Zorana Stojanovića, 1992. p.9.

²¹ Nikola Visković, *The concept of law* Split: Faculty of Law, University of Split, 1976.p.42.

²² The Same.

“specific legal experience that only allows the abstraction of legal reality.”²³ The inseparable linkage between science and the sociology of law at the scenic way in 1907 expressed the famous Herman Kantorowicz “Dogmatism without sociology is empty, sociology without dogma is blind”²⁴

What is on the other hand, the auto-perspective of the sociology of law considering the aspect of the approach? The sociology of law can be seen as an external approach or perspective (sociological perspective on the law), in contrast to the jurisprudence that grows the inside / internal approach or perspective, as pointed out by the authors that we mention here (Ervasti²⁵, Deflem, Mitrović and Bovan²⁶, Villegas and Banakar). Based on this definition, there are critics of the sociology of law (whether they are expressed as a critical self-reflection from the sociology of law or criticism that comes from legal science) for which

²³ The Same.

²⁴ Hermann Kantorowicz *The Fight for the Legal Science*, Belgrade: Dosije, 2006.109.

Integralists believe that research of the all elements of the legal phenomenon is a scientific, epistemological and methodological requirement. On the other hand, the modern legal identity, the self-description of the law as a dogmatic law is a privilege of the element of legal norms. Ergo, privileged is the legal dogmatics in the general system of jurisprudence. But as dogma is only interested in the legal norm, does not that make the legal doctrine seem unscientific? It is claimed by Saša Bovan defining dogma as the intellectual skill rather than the scientific activity. He considers, as I fully agree, that “the fallacy on legal dogmatics is most spread by the specialists for each branch of the law on Faculty of Law,” adding that “scientific analysis always involves the non-dogmatic approach to law, which is for them, especially for dogmatists, a kind of heresy.” Milovan Mitrović and Saša Bovan, *Fundamentals of sociology and sociology of law*, Belgrade: Faculty of Law, University of Belgrade, 2009.269.

²⁵ Kaijus Ervasti points out the Dalberg-Larsen division into four perceptions of sociology of law, which differ with respect to the scope, functions and objectives. In one of these perceptions, according to which the sociology of law is the most perceived, the task of the sociology of law is to explain legal phenomena using the sociological methods and sociological theories, namely that the law researches and explains from the sociological perspective. Other perceptions on the sociology of law are reductionist or directed to the law in the context (socio-legal research tradition in the United States or sociological jurisprudence) (Ervasti, Kaijus. “Sociology of Law as Multidisciplinary Field of Research“. *Teoksessä Scandinavian Studies in Law*, Vol. 53(2008), p. 140).

As the sociology of law can not be determined beyond its sociological bases, including reliance on sociological theories and methods, only this perception of the sociology of law could be accepted in the discipline itself. This would mean to accept an aspect of the perspective (“Sociological Perspectives on Law”) as one of the fundamental postulates of the sociology of law, whose elements would then be: a) the reliance on sociological methods and b) the reliance on sociological theory.

²⁶ The part where he deals with the determination of the nature of the sociology of law Saša Bovan one of the definitions of discipline - as a special sociology - indicates precisely with the aspect of perspectives, ie. he considers that it starts from the sociological perspective on the law. Milovan Mitrović and Saša Bovan, *Fundamentals of sociology and sociology of law*, Belgrade: Faculty of Law, University of Belgrade. 2009.p.247.

the sociology of law is incomplete because of its lack of an internal perspective, because it lacks the “last step”.²⁷

This phrase, by which is expressed not only doubts in the achievements of sociology of law, but also in the way that have often unfolded the attempts of the institutional / disciplinary undermining by lawyers, can be understood in several ways: as inability of sociology of law to acquire knowledge or to contribute to the “substantive law”, to penetrate into the real nature of the law²⁸, to make a decision about the law (what is law and what it should be)²⁹, to take for its subject the self-descriptions of the law as a functioning social subsystem³⁰ and the like. From the inability to take the “final step” is still noted the critique of its usefulness and its functions (especially social) for law and legal doctrine. Although it is recognized that socio-legal investigation can give a contribution to the knowledge of the law in a social context and legal practice (eg, legislative or judicial proceedings) it is still not enough to get an external recognition of its independence, individuality and status. Rather, recognition is only partial and it applies only to the determination of the discipline as a paralegal discipline³¹ (especially if it is institutionally linked exclusively to legal studies)³². Somewhat softer approach have those lawyers who are interested in the “jurisprudential sociology of law”, and who recognize that the sociology of law can be useful to law through the performance of statistical surveys or through answering to certain questions of fact.³³

Unlike the lawyers (with the exception of those representing the integralist view) that usually stop with these criticisms, the legal sociologists seek to overcome the problem by defining the role of the sociology of law to take an internal perspective, either through the exploration of legal practice (internal operations

²⁷ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000):273; Herman Kantorovič, *Fight for Legal Sciences*, Belgrade: Dosije, 2006.106; Luhmann, Niklas. *Law as a Social System*. New York: Oxford University Press. 2004. 458-459; David Nelken, “Blinding Insights? The Limits of a Reflexive Sociology of Law”, *Journal of Law and Society*, Vol. 25, No. 3(1998):411.

²⁸ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000):273.

²⁹ Hermann Kantorowicz, *Fight for Legal Sciences*, Belgrade: Dosije, 2006.106.

³⁰ Luhmann, Niklas. *Law as a Social System*. New York: Oxford University Press, 2004.p.460.

³¹ Thus, for example, Hermann Kantorowicz claims that it is addicted to legal dogma and from it it can not be emancipated. For this reason, it can not be dealt by the social scientists but it remains “the task of lawyers by profession”. Herman Kantorovič, *The Fight for Legal Science*, Belgrade: Dosije, 2006. However, at the end of his work Kantorowicz argues that the sociology of law has value in itself, regardless of legal dogmatics.

³² Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, New York: Cambridge University Press, 2008. p.272.

³³ Kaijus Ervasti, “Sociology of Law as Multidisciplinary Field of Research“, *Teoksessa Scandinavian Studies in Law*, Vol. 53(2008), p.139-140.

and practical experience of lawyers)³⁴, through the use of internal methods of knowledge of law³⁵ through taking for the subject of the self-description of the system, including the self-reflection of the law practice³⁶, and through the contextual describing and explaining the relationship between law and other dimensions of social life: economy, politics, globalization, social integration and the like.³⁷ To the same purpose serve and the efforts for sociology of law to open to the critical self-reflection³⁸ or to be reconfigured as a multidisciplinary field of research in which it would meet and sociologists and lawyers.³⁹

So, in the law is sociology of law defined as an external access to the law, as an external perspective which has its own clearly defined tasks and clearly defined object of study (relationships as part of legal experience). Also, it is a “bridge” (mediating communication) between legal and non-legal science and is in general inseparable from the legal dogma, as it is dogma from it. It is an aspect of an outside approach that makes it undoubtedly useful and even necessary for a full understanding of the phenomenon of law. Therein lies its potential. In the sociology of law the aspect of approach wants to expand from the outside to the inside. While in the perception of theory of law the external perspective is power, in the perception of sociology of law it is a weakness. If it used to be a “blessing”, it is now “the curse”. Does it not refer to the conclusion that the perception of legal science - which is basically the identity of modern law - is negative towards the sociology of law? That the law is closing towards the sociology in general and for the Sociology of Law? Expanding the access (in the sociology of law) is nothing more than a response to the closure of law as a result of normative construction of legal identity. From its own perception the sociology of law is defined and redefined in a way that, epistemologically and methodologically allows it to take the position under the theory of law - to be necessary for legal science and to provide the greatest possible benefit to legal practice. It is willing not only to accept the criticism to her by the legal doctrine but also to “dissolve” from the position of disciplinary constitution to the posi-

³⁴ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000):283; Milovan Mitrović and Saša Bovan, *Fundamentals of sociology and sociology of law*, Belgrade: Faculty of Law, University of Belgrade, 2009.p.243.

³⁵ Milovan Mitrović and Saša Bovan, *Fundamentals of sociology and sociology of law*, Belgrade: Faculty of Law, University of Belgrade, 2009. str.237-239.

³⁶ Niklas Luhmann, *Law as a Social System*, New York: Oxford University Press, 2004.p.459.

³⁷ Mathieu Deflem. *Sociology of Law: Visions of a Scholarly Tradition*, New York: Cambridge University Press, 2008. p. 277.

³⁸ David Nelken, “Blinding Insights? The Limits of a Reflexive Sociology of Law”, *Journal of Law and Society*, Vol. 25, No. 3(1998): pp.414-421.

³⁹ Roger Cotterrell, “Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies”, *Journal of Law and Society*, Vol. 29, No. 4(2002); Kaijus Ervasti, “Sociology of Law as Multidisciplinary Field of Research“, *Teoksessa Scandinavian Studies in Law*, Vol. 53(2008).

tion of the disciplinary interface. Figuratively speaking, the sociology of law acts as “an exemplary child” who has the irrepressible need to satisfy the “always disgruntled parents” who often treat it “harsh”.

Source of the problem lies in the fact that the legal doctrine accepted the communication of the theory of law on the definition of sociology of law according to the criterion of the access in the process of “normative closure”, as well as not being ready to open towards the sociology of law and determine it in accordance with its self-perception. In other words, the cause of the epistemological and methodological problems of the sociology of law is in its definition of law as external perspective. In the final section I would like to describe how the epistemological and methodological problems of the sociology of law are manifested in the discursive level, but I will not limit it only to the socio-legal discourse, but I will take into account the exclusionary effect of the legal discourse at the moments, when being in the general discourse it comes into contact with other discourses. In this sense “normative closure of the legal discourse” as the source of the epistemological and methodological difficulties is the most prominent.

Problem of the normative closing of legal discourse

In paragraph which stated that the legal discourse is normatively closed are implicated at least two things: a) that in general there is a tendency that the law in the discursive sense⁴⁰ – complex of the attitudes of opinions and beliefs about the law from the law- closes into its borders; b) that they are within the boundaries of discourse the only ones who can legitimately participate in it. In other words, about the law can only speak lawyers, the existence of any legal discourse outside the law is undesirable and unacceptable. In the context of sociological research the phenomenon of closing the discourse is characteristic for the social problems and leads to the division of participants to insiders (participants) and outsiders (non-participants). This division applies not only to researchers but also to a wider range of entities that operate within a social institution or come with it in direct or indirect contact. Thus, in the case of law, insiders are

⁴⁰ In fact, it would be more correct to use the Luhmann's concept of the operational closure. It is the characteristic of differentiated functional social subsystems. In the system the law acquires the form of normative closure. In Luhmann's the institutional and discursive level are inextricably linked (such as the structure and operations in the system), as are the operational closing and self-description. The normative closure is reflected in both levels (through the operation of law as legal communications). Normative closure might be best expressed through the view that: “Only the law can say what is law”. Niklas Luhmann, *Law as a Social System*, New York: Oxford University Press, 2004.p.85.

lawyers - in terms of the membership of the legal profession (including law professors, legal theorists and practitioners working in different areas of legal practice), while the outsiders are non-legalists- lay people from a wider range of general, unskilled public and other researchers who access the law from the outside (including social scientists).

The division can be understood as a distinction - what separates the members of different groups on habitual basis and between them makes it difficult to communicate⁴¹. In the terms of the sociology of law, and any other special sociology which operates with insiders and outsiders - there are methodological difficulties caused by the lack of scientific communication, which is caused by a variety of motives, habitus and practices with each other, no matter they are legal sociologists (as outsiders) interested in just the internal aspects of the law⁴². As the scientific communication is the prerequisite for interdisciplinarity its deficiency can seriously endanger the status of each specific sociology that relies on the interdisciplinarity⁴³.

Lack of the communication or rather disabling the scientific communication is the term of the "normative closure." What exactly does that mean? This means that the insiders (participants) of the certain social institutions are those who know the meaning of the technical language or glosses which operate in the institution as a special form of communication but also, that determine the meaning of other terms and phrases that occur in the general discourse⁴⁴. Also, it means that insiders are the ones who set the limits and modalities of

⁴¹ More on the meaning of "distinction" and "habitus" and their application in sociological theory of Pierre Bourdieu in: Ivana Spasić, *Sociology of everyday life*, Belgrade: Institute for textbooks and teaching aids, 2008. p. 292-295 and 297-303.

⁴² „Sociologist who practice law at the level of practice lawyers estimate as assistants that throw the welcome light on the actual functioning of legal institutions, the role of lawyers as a profession, the opinion of people about a particular piece of legislation. But they do not see them as partners in a conversation about the law, legal norms and legal system” (Pusić in: Niklas Luhman, *The legitimacy through the procedure*, Zagreb: Naprijed, 1992. p.11.)

⁴³ Such is the case with the sociology of law. In the note 7 are mentioned some examples of scientific communications of the lawyers and sociologists. Status problems that the sociology of law is facing today, especially in Bosnia where it is relatively recent and still unestablished discipline, are mainly caused by a lack of scientific communication.

⁴⁴ This is a particular cause of epistemological and methodological problems of which I can not elaborate because of the limitations of text. Reza Banakar calls it "sociolinguistic sphere of power of law." It is about sociology and law sharing a similar conceptual apparatus (which, paradoxically, is the cause and not the solution of difficulty for the Sociology of Law), and that the similarity is what gives the law its particular symbolic power - creating the law as an institution of social control on one hand and "trapping" sociological discourse in the paradigmatic framework of law on the other. Reza Banakar, "Reflections on the Methodological Issues of the Sociology of Law", *Journal of Law and Society*, Vol. 27, 2000, pp.286. This phenomenon we mention below, calling it a "conceptual expropriation".

participation in the discourse to those who are not their direct participants. Discourse itself is always facing the achievement of the “truth” of social institution, it includes both technical and general language (ties general for technical), and develops around the corpus of esoteric knowledge and skills. This can be further explained by an example. In law, lawyers (insiders) are those people who know the meaning of legal terms (extradition, expropriation, material truth, *res nullius, dies ...*) and which decide on the meaning of the terms that occur in the general discourse (justice, good customs, damage, responsibility, supervision ...).⁴⁵ Meanings define the boundaries from institutions and separate the professionals from the laity. Within the limits, conceptual and linguistic constructs can have “true” meaning, while outside of them these same constructs can be vulgarized. In other words, the truth is in the institutions and it belongs to its participants, it refers to esoteric body of knowledge and skills and the participants are supplied with specific competencies that are always accompanied with a certain degree of social power.⁴⁶

While lawyers can challenge and problematize the sociological findings and perspective as both sociology and law operate with similar conceptual apparatus (social control, order, regulation, rule ...) sociologists can not challenge and problematize the law because they can not get into the legal discourse.⁴⁷ The nature of the legal discourse always includes some terms and expressions of general discourse that are simultaneously interested in the sociological discourse, but these same words and phrases bound to the structure of legal discourse - linguistic and logical structure of meaning - with which these concepts gain a legal, and not a sociological reference in the general discourse. In the Bosnian context that is the case with the concept of the “constituent peoples”. This is actually a sociological concept, but in the general discourse it always refers primarily to the law by invoking the legal discourse, with what were then binded the legal concepts of the principles of “constituency” and “constitutive equality.”⁴⁸

⁴⁵ It is similar with the social institution of religion. In religion, religious leaders and theologians (insiders) are the ones who know the meaning of religious concepts and terms (sacrament, jihad, catholicity, ahimsa, conversion ...) and that decide on the meaning of the same occurring in the general discourse (solidarity, spirituality, mission, good and evil ...).

⁴⁶ Pierre Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field“, *Hastings Law Journal*, Vol. 38 1987. Pp.828.

⁴⁷ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27(2000):273.

⁴⁸ Furthermore, since the “constituent peoples” are referred to as a collective legal entities that have exclusive group rights to the political representation in the legislative and executive branches of government at the state level, and that the issue of the constituent peoples is mostly treated just in the law, and through the law, while the sociological dimensions are neglected. This neglect is present not only in the general discourse but also in the research, where are far more present political and legal than scientific sociological research of “constitutionality”. Tying the term “constituent

This discursive effect we will call a kind of a conceptual expropriation. It works so that in the common concepts it writes its own more or less differentiated meanings simultaneously extending the self-description of the law on a common conceptual area (shares it with the sociology; the entry in the general discourse). When the self-description of the law through the expropriated concepts (and terms), expands to the whole discourse, as in the above example, we can talk about a kind of discursive expropriation. This effect is not accidental nor harmless. It has the stakeholder background of strengthening the symbolic power of law by discursive monopoly (the effect of expropriation) and strengthening the institutional power of law through the monopoly of legal capital⁴⁹ (strengthening the professional monopoly). Pierre Bourdieu, for that matter, is completely right when he says that the law is the form of “active” discourse capable to produce with its own operations its own effects.”⁵⁰ Indeed, when the self-description of law, expropriates the discourse outside the institutions of law, it can create reality through the appointment of reality, “as it creates objects.”⁵¹ Returning to the example of the “constituent peoples”, a legal discourse going into the general discourse and expropriating the sociological, making the self-description of the law the background of discursive activity, first converts the sociological construct into the legal, and then, through its performative power, creates it as a really existing social category⁵².

Conclusion

Sociology of law is capable of, so to say, reversing the process. Its greatest strength is in its critical reflexivity towards the law, reflexivity that understands the discursive logic of the self-description of the law. Of course, in order to succeed it must overcome the difficulties stemming from the normative closure

peoples” with legal discourse is not done only through legal terminology but also through, in a sense, legal symbolism. Thus, for example, seems like the decision of the Constitutional Court U-5/98 (“The Constituent Peoples Decision”) is all about the issue of constituent peoples, from which it follows that the problem is always approached from a legal point of view (which indubitably privileges just lawyers) or that the general discourse has a tendency to be formed as a legal discourse.

⁴⁹ About the power of law in the symbolic and institutional sense look in Bourdieu’s work on the law as a social field. Pierre Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field“, *Hastings Law Journal*, Vol. 38, 1987. Pp.828-851.

⁵⁰ The Same, 839.

⁵¹ The Same, 838.

⁵² About the power of appointment as the power of creation and about the naturalization process inherent to the peculiarities of legal discourse look at Bourdieu in the same place, p.838-844 i 845-849.

of the legal discourse and it can do if it builds itself into the institutional and discursive terms, or in terms of the scientific field of “social and legal struggle”.⁵³ For that it is again necessary the institutional autonomy and disciplinary maturity. We should not forget that the normative closure of the discourse as a source of the epistemological and methodological difficulties is the expression not only of the institutional force of law, but also the institutional weaknesses of sociology of law.⁵⁴ Will and when will this situation change remains an open question, depending on the social conditions of scientific activity. If we talk about the sociology of law in BiH, its institutional development and strengthening is a particular challenge, given the BiH specific socio-political context.

Literature

- Banakar, Reza. “Reflections on the Methodological Issues of the Sociology of Law”. *Journal of Law and Society*, Vol. 27(2000): 273-295.
- Bourdieu, Pierre. “The Force of Law: Towards a Sociology of the Juridical Field”. *Hastings Law Journal*, Vol. 38 (1987): 814-855.
- Cotterrell, Roger. “Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies”. *Journal of Law and Society*, Vol. 29, No. 4(2002): 632-644.
- Deflem, Mathieu. *Sociology of Law: Visions of a Scholarly Tradition*. New York: Cambridge University Press. 2008.
- Ervasti, Kaijus. “Sociology of Law as Multidisciplinary Field of Research”. *Teoksessa Scandinavian Studies in Law*, Vol. 53(2008):137-150.
- Kantorowicz, Hermann. *The Fight for Legal Science*. Belgrade: Dosijsje. 2006.
- Carbonia, Jean. *Legal sociology*. Sremski Karlovci/Novi Sad: Izdavačka knjižica Zorana Stojanovića.1992.
- Luhmann, Niklas. *The legitimacy through the procedure*. Zagreb: Naprijed.1992.
- Luhmann, Niklas. *Law as a Social System*. New York: Oxford University Press. 2004.
- Miličić, Vjekoslav. *Special methods in the methodology of law and creation of law* (doctoral dissertation). Sarajevo: Faculty of Law, University of Sarajevo. 1990.
- Mitrović, Dragan and Marko Trajković. “The Realistic Concept of Law”. *Synsthesis Philosophica*, Vol. 55 (2012): 159-180.

⁵³ Reza Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society*, Vol. 27, 2000. Pp.294.

⁵⁴ The Same, p.295.

- Mouzelis, Nicos. *Sociological theory: What Went Wrong? (Diagnosis and help)*. Zagreb: Naklada Jesenski i Turk. 2000.
- Mitrović, Milovan and Saša Bovan. *Fundamentals of sociology and sociology of law*. Belgrade: Faculty of Law, University of Belgrade. 2009.
- Nelken, David. "Blinding Insights? The Limits of a Reflexive Sociology of Law". *Journal of Law and Society*, Vol. 25, No. 3(1998): 407-426.
- Perić, Berislav. *The Structure of Law*, Zagreb: Informator.1994.
- Sitnić, Admir and Amila Ždralović. *Citizens in the collectivist ideology: socio-legal analysis of the position of "others" in Bosnia and Herzegovina*. Sarajevo: Center for Political Studies. 2013.
- Spasić, Ivana. *Sociology of everyday life*. Belgrade: Institute for textbooks and teaching aids. 2004.
- Tomić, Ivo M. *Legal-logical and ethical studies*. Sarajevo: Faculty of Law, University of Sarajevo.2009.
- Villegas, Mauricio Garcia. "On Pierre Bourdieu's Legal Thought". *Droit et Société*, Vol. 56-57(2004): 57-71.
- Visković, Nikola. *The concept of law*. Split: Faculty of Law, University of Split. 1976.
- Vrban, Duško. *Sociology of Law: An Introduction and Historical Foundations*. Zagreb: Golden marketing-Tehnička knjiga. 2006.

