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SOCIOLOGICAL METHOD IN THE FACE OF THE CHALLENGES OF LEGAL PRACTICE

Abstract: This scientific paper aims to emphasize the theoretical and practical importance of the sociological method before the social challenges of legal practice and thus confirm greater social responsibility in the process of legal interpretation. As the law is an objective spiritual and normatively shaped social phenomenon that has a temporal and spatial framework, it is also a subject of sociology, and all research techniques and theoretical principles are based on cause-and-effect analysis of social interactions of social actors in social cohesion. Therefore, it is not possible to ignore the social nature of law present through the constant influence of society on law and vice versa.

The study of law with respect for social reality was the starting point of Đorđe Tasić's scientific research, which resulted in his great interest in sociology. As one of the most deserving of the popularization of the sociological method in our legal science, Tasić always brought the state and law in connection with society as a whole or individual social phenomenon, and he created works that exude respect for social reality. The sociological method in this context enables a better, more concise, more efficient legal interpretation, taking into account the complete social situation that the law regulates and examines the dominant social interests conducting the law.

Finally, the sociological method as the basis of the theoretical-methodological platform in this paper enables a more concise interpretation of the law as a normatively sublimated social reality, and its application gives a more reliable answer to new social challenges in legal practice. Laws of law, a phenomenon that acts, but also functional phenomena.

Keywords: sociological method, law, society, legal practice.

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SOCIOLOGICAL ASPECT OF LAW ANALYSIS TASIĆ'S SOCIOLOGICAL POSITIVISM

As a specific social phenomenon, the law requires an integral approach, which implies studying law as a social reality in two ways: from the inside – essentially (the content of law); externally – structurally (constitutive elements of the legal norm). As the value aspect of the law is reserved for the philosophy of law, the law as a normative order subjected to the state has a monopoly of coercion, creating an additional opportunity for the sociological method to analyze the normative nature of law, and law will be analyzed as a spiritual, normatively framed phenomenon, being a form of social control by the state. Thus, the sociological analysis looks at law as the relationship between the state and law, where the law is partly related to the state and its mechanisms of coercion through legal norms. The analysis of law in this way, in a narrower sense, determines legal norms as a means of forced settlement of conflicts in pre-normative legal relations to achieve the essential interests and goals of ruling groups. Values and goals highlighted in legal norms are protected by coercion, as legal actions that are favorable to the ruling group are marked as obligations and powers, and those that are not favorable, as misdemeanors, or sanctions in case of non-fulfillment of obligations (Visković, 1981: 162-163). In this context, some of the foundations of the theoretical –methodological platform of Đorđe Tasić, when he talks about legal phenomena and on that occasion emphasizes the importance of social factors in their creation and application. Namely, Tasić, to shed light on the social side of the law, looked critically at the sociological positivism of Léon Duguit and thereby paved the way for the revelation of truth in legal theory. Sociological positivism in this sense leads to a reaction that results in idealism, which could only deepen positivism, which was otherwise a continuation of rationalism, and that means making it more elastic and moderate than rationalism, but not changing its foundations, object, and methods of analyzing society and law.

The focus is on a man seen as a social being, that is a member of a social community –society. In this sense, state bodies are not there to operate according to their will, but to achieve certain social goals, obeying social law, and the expression of the Constitution (Tasić, 1928: 433). Nevertheless, Tasić takes a more careful view of Duguit's position, in the sense that any man, as a citizen, could refuse to obey the law passed by the state if he did not want to, referring to social law.

However, according to Duguit, every person is aware of the relationship between the values of the hierarchy in society and there is an imperative need for the work of public services in the society-state. Therefore, Duguit only theoretically allows the right of citizens to resist the state government. As social life does not allow anarchy, resistance is allowed only to the extent where social peace is undisturbed. Based on all of the above, Tasić concludes that Duguit's notion of social law, as well as normative consciousness, is imbued with the idea of order. However, the order cannot be maintained only via consciousness and moral factors, so it recognizes force as a necessary element for enforcing rights and establishing social peace.

"Law cannot be explained in any way if a man is not understood as a being who has social consciousness and as such subject to social discipline. Only a socially aware being can distinguish law from the force, as well as from other social norms and regulations, such as moral ones" (*Ibid*. p. 435). The state is therefore designated as the creator of law (positive law), while state bodies are there to carry out social tasks. However, state (positive) law is not the best law, being determined as logical legality only by the current interests of the ruling group. As Duguit points out, the state has only one goal, and that is the rule of law. This kind of law ignores natural law, which must not be absent in the process of creating law, because only if natural law is present in positive law, one can speak of human law, that is, the law that serves not only the state but all people. The sociological analysis, therefore, points out that the creation of positive law requires the participation of the norms of natural law, because only such law will be based on a rational conception of the authority of the mind, and not the authority of force (sanctions). Combining all three elements of law requires an integrated approach because we see the law as "a system of state and social norms with which the most important and conflicting interpersonal relations are forcibly directed to achieve peace, security, justice, and other dominant values" (Visković, 2001: 117).

"As for sociologists, supporters of collective consciousness, they would like to give precedence to the idea of peace, because to preserve the dominance of solidarity, which they regard above all else, in the society of the idea of differentiation and growing social entanglements, it is necessary to give special importance to the will for peace, agreement, compromise, and mutual concessions" (Tasić, 2002: 80). Therefore, it is not possible to leave out social factors from the law, because "giving importance to social factors is necessary precisely because the law is created to achieve appropriate effects through its application, to regulate and stabilize social relations appropriately" (Stanković, 1998: 3).

If a clear distinction were made between law in the narrower and broader sense, the conclusion would be that state law is strictly formalized and precisely determined, while social law is based on the idea of social solidarity, and integration, but also social conflict, i.e. on a non-unified interpretation. In this context, in the opinion of Tasić, when analyzing Durkheim's idea, society is defined as a "hearthstone of ideals that guarantees spiritual life, because society is not a body organized according to the model of an organism and its vital functions, as he says: In that body lives one soul; it is a set of collective ideals" (Tasić, (1927/1928: 144).

Tasić finally concludes that ideals do not escape natural explanation, but are viewed like all social phenomena because ideals also originated in nature and from nature. Society in this sense, as Durkheim states, should be understood as a sui generis concept because it has the power to produce ideals for individuals, imposes its coercion, and puts itself in the role of a legislator who demands respect and obedience, and as a such society can also be understood as a lofty moral personality and collective will. Analyzing this point of view of Durkheim, Tasić says that Durkheim "postulates human society, just as Kant postulates God" (*Ibid*: 145.) Finally, Tasić believes that Duguit is more consistent

with positivism than Durkheim, and in this context, Tasić believes that collective consciousness, a social reality that acquires the contours of a supreme moral personality and collective consciousness as such, does not exist. Duguit sees it more objectively and figures with public services, which is a far more positivist position than the one that advocates the notion of a sovereign collective personality of social reality.

COMPLEMENTARITY OF THE APPLICATION OF SOCIOLOGICAL AND NORMATIVE METHODS IN THE PROCEDURE OF LEGAL INTERPRETATION

With the increasingly frequent application, the sociological method overcame the dominant normative (legal) method. In this sense, the normative method did not cease to exist, but the sociological method managed to point out the shortcomings of the normative method and thus confirmed its superiority. As pointed out by Prof. Tasić,

> "thanks to the influence of sociology, the law is seen as a social fact, and the state as a special form of society, which led to a more accurate and deeper examination of the relationship between the state and society, the source of law, as well as the interpretation of laws" (Tasić, 1937: 9).

Therefore, the interpretation insists on the mandatory application of the sociological method, but with joint complementary action with the normative method. Although present in various areas of legal interpretation, the application of the sociological method differs in the area of knowledge of the law and the area of legal technique. The scope of knowledge of law requires a two-sided role of the sociological method, for the knowledge of a certain social side of the law is applied independently, while in legal technique it is used as an auxiliary method in addition to normative or other methods in the process of creating and applying the law when it has a complementary effect combined with other methods.

Procedures for the creation and application of law are matters of judicial practice which can be studied from different aspects, for example when we investigate the influence of various social factors on the decision-making of judges when we ask how sociological expertise (the knowledge that sociology gives us about society) affects on the application of the law when we investigate the place of the judiciary within the system of separation of powers when we investigate the social characteristics of the judiciary and their influence on adjudication, when, from a more subjective, and socio-psychological point of view, we direct our attention to the other participants in the court proceedings (litigants, victims of a criminal offense, perpetrator, jurors, prosecutor, defense counsel), etc. (Bovan, 2014b: 117). It is necessary that the judicial procedure, as well as the sociology of law, apply the knowledge obtained by applying the sociological method, enabling the discovery of social, psychological, cultural, and natural factors that influence the process of creating and applying the law. In this sense, it can be said that *sociology of law is a special sociology that investigates the relationship between society and law*.

> "The sociology of law is rather abstract and vague, and ultimately imprecise. In the literature, we find it in various variants, so, for example, it is said that the sociology of law studies the social side of the law, the law as a social phenomenon, the social basis of law, and the influence of society on law, and the like" (Bovan, 2014: 131).

The process of creating a legal norm, i.e. the creation of positive law, implies the application of tradition and natural law because natural law is universal. Natural law knows no classes because it is supranational, suppositive, original, and serves justice and man, not injustice and arbitrariness. So it is important to emphasize that positive law ideologically always relies on natural law to be able to speak of it as good law for one state or society at a time. In this regard, Tasić points out:

> "As for positive law, no matter what it is, it cannot be imagined without social discipline and will, as complex and changing phenomena. There is a special form of discipline or peaceful will, knowing how to make compromises at the expense of one's interests and convenience, or knowing how to be tolerant of the opinions of others, in the general interest and the interest of the new legal order. This way of acting must not be branded as a betrayal of ideals(...) This is true idealism." (Tasić, 2002: 81).

Furthermore, Tasić states: "Compromise understood in such way bears the characteristic features of solidarity which, having released the strictness of the demands, finally paves the way for a stronger solidarity" (*Ibidem*).

Law is the dynamics of social cohesion, that is, the frequency of changes in society reflecting the content of legal norms during their creation. Dynamism and social variability must be taken into account during the legal norming process, so legal norms will change per social change. In addition, the necessity of the existence of reasons (rules –legal norms) should be emphasized, because otherwise, social life would be defective (Coleman, Himma, Shapiro, 2004: 15-39). In this context, legal norms must be harmonized with social changes, whether they are the result of evolution or revolution. In addition to legal norms, moral norms are also subject to a certain degree of transformation because moral norms essentially follow the variability of social cohesion determined by time and space.

After all, "time and space are among the most obvious phenomena, so they do not come into question" (Lukić, 1992: 54). As Kant points out, space (place) and time are *a priori* phenomena, without which it is not possible to think about the world in general, because time is a measure of duration, the existence of things, phenomena, and the world. The best example of law as a social phenomenon is a positive law as a purely social creation since it is valid among people (society), exists in people's consciousness, and regulates their behavior. The law cannot be viewed exclusively as a normative or ideal phenomenon by itself and self-sufficient, because a law exists among people, in people's consciousness, and for people. In the example of the creation of a legal norm, the creator of a legal norm must take into account that he is part of society, part of a certain

social culture, and part of valid law, so the law is attached to the creator in a positive or negative sense in the process of creation, you can see how much and how the law reflects society. This is precisely the reason why the study of law requires the participation of not only the normative but also the sociological method.

The sociological method in law was created based on two completely different points of view about society. On the one hand, it is a matter of consensual sociological theories –society is based and maintained based on organic solidarity or interest – value agreement (consensus) between people, while on the other hand, it is a question of conflicting sociological theories, proving that society is based and maintained by forced regulation of interest-value conflicts among members of the unequal ruling and non-ruling social classes and strata (Jogan, 1978). As the subject of research always determines the methods of research (Visković, 1980: 3), the study of law includes all theoretical assumptions and technical procedures that enable the knowledge, but also the practical processing of the specific and necessary subject of a lawyer's experience (*Ibid.*).

The sociological method can, therefore, for law research find its application in legal theory –science and in legal practice – the work of the judiciary. In both cases, investigates the sociological context of law, with the fact that the first case use an abstract approach, and in the second case a concrete, empirical approach. The term *sociological method* is only a group name for a large number of very different theoretical assumptions about the composition and dynamics of social phenomena that serve as hypotheses for further understanding and practical processing of social phenomena in general and special legal phenomena, where there is also a difference between sociological procedures and research technique. (Gilli, 1974).

That is why the sociological method is included in the group of causal-explanatory methods that empirically study law by establishing causal and non-causal laws (functional, developmental, etc.) of law as effective and acting phenomena (Lukić, 1965: 35). "Given that the goal of scientific activity is the acquisition of knowledge, the scientific method is an element of the internal structure of science that shows us how science achieves knowledge, i.e. how scientific activities are carried out" (Bovan, 2014: 18).

> "The structure of the scientific method consists of three elements: theoretical, technical, and logical. In the literature, the method is often equated with some of the mentioned elements. Most often, the method is equated with its technical element when the method means only different techniques of data collection and processing (these techniques are most often called the scientific method in a narrower sense)" (*Ibidem*).

These are the means to perceive the object, i.e. those concretized specific procedures, as well as material means, enabling the discovery of the properties of objects whose comprehension is the goal of scientific research (Lukić, 1975: 47-48). The role of the normative method is revealing the content through interpretation, i.e. the true and exact meaning of a legal norm, (Mitrović, Bovan, 2012: 333), revealing the logical nature of a legal norm, identifying the elements, searching for connection or a pattern

of creating a norm, and finally, investigates the relationships between norms (legal force and hierarchy between norms) and how norms are linked in the legal order (*Ibid*.).

The normative method fails to fully scientifically explain the law, the essence is reached only with the complementary action of the sociological method, because it is necessary to discover the social causes of the origin of law, and then to determine the role that law has in society and vice versa. In continuation, the sociological method will also find its application when a law is viewed in a narrower sense (a set of legal norms). Strive to establish law as a normative phenomenon arising under the influence of numerous social phenomena. Also, it will explain how the law works, as well as the efficiency factors, the goals, and the effect that the law leaves on society. The sociological method also analyzes the effect of legal norms on society and the causes of the partial or complete non-realization of the effect of legal norms in society, also dealing with issues related to social forces that influence the creation of certain legal norms and their interpretations as normatively regulated interests represented by dominant social groups.

As the normative method fails to provide answers to questions concerning the social causes leading to its creation, interpretation, and application of legal norms as a formally shaped social will, the complementary and combined action of the sociological method in the process of legal interpretation is necessary. Nevertheless, in Tasić's opinion, in the area where the normative method should be distinguished from the sociological one, that difference should not exist. Tasić believes that it must not exist because the similarities between the results of positivism and criticism do not appear either in law or in any other field. This is most evident when talking about the convergence of these philosophies when it comes to the theory of the state and law in general. Since both are empirical, what stands out is that positivism rises to normativity, which Kelsen speaks of as a supporter of criticism (Tasić, 1926/1927: 84). For Tasić, law, as well as for Duguit, is nothing but social reality shaped and manifested into normative consciousness.

SOCIOLOGICAL METHOD IN THE PROCEDURE OF CREATION, INTERPRETATION AND APPLICATION OF LEGAL NORMATIVE

It can be said that one of the many roles of the sociological method is to discover how normative law is social, that is, to which extent are legal norms present in society. It is a method that deals with the observation and research of real phenomena, which is certainly human behavior and its related actions among people, i.e. the relationship of human reactions to the presented model of behavior in the legal norm. If we compare what is stated as a model (rule) of behavior in the legal norm, and the legal awareness of the person about that stated rule, we come to a very common situation, which is the existence of inconsistencies between what should be (rights and obligations in legal norm) and what is (legal consciousness of a person, i.e. how a person reasons and accepts what is presented to him as a model or rule of conduct).

When looking for differences between social reality and written law, the task of the sociological method is not particularly difficult because it is easy to see the difference between written law and the law that manifests itself in social reality. It is much more difficult to see the differences between unwritten law and the law that exists in human consciousness, i.e. customary law. In that case, there is an established right that everyone knows and possesses in their consciousness, but still, people behave contrary to what they know and carry in their consciousness as an unwritten norm. The sociological method sees the difference between the law that exists as valid (written) and the one that is valid, that is, the one that is applied. The procedures followed by the sociological method in legal research do not differ significantly from the general procedures of sociological research - they are simply the application of general procedures to law (Šušnjić, 1973: 307-319). If the sociological method were to be excluded from the procedure of interpreting the law, the law would be viewed as an ideal phenomenon that exists as a non-spatial and timeless, independent creation and has no beginning and end, no cause of origin, no purpose of existence, and in that sense, it would have no significance. However, the sociological method cannot answer all questions, such as the content of the legal norm and the normative elements of which the norm consists, so the sociological method more precisely defines its domain of study.

When the legal method finds out the content of the legal norm, the sociological method investigates why the content of the legal norm is the way it is, that is, how it reflects on social cohesion. A legal norm has its characteristic social function, in the realization of a certain social goal, and this speaks of the social influence on the content of the norm, but also of the norm on society. This relationship is investigated by the sociological method, as well as social factors shaping the content of the legal norm, but also how the norm affects society, taking into account the complete social situation regulated by law, and then examining the dominant social interests guiding the law, thus reaching the correct interpretation of the legal norm. In this sense, the law is "a system of state and social norms with which the most important and conflicting interpersonal relations are forcibly directed to achieve peace, security, justice, and other socially dominant values" (Visković, 2001: 117)

Therefore, the structure of a legal norm will not be defined by a logical idea, but by the needs, the relationship of forces (power), and the goals (interests) of society. A normatively shaped social relationship becomes, therefore, a positive law including all the mentioned substrates of social cohesion.

A right that has an *a priori* character, to gain positive legal affirmation, must pass through the a posteriori filter of justice and thus obtain its positive legal materialization. Thus, the law becomes matter and ceases to be a theory because it replaces abstraction with concretization, imagination with realization, precisely through judicial practice, allowing the law to prove and show its a posteriori nature with the help of empirical ascertainment of judicial practice. The process of discovering the true meaning of a legal norm is a process where even the interpreter cannot be completely free in making the final decision because if we take the example of judicial regulation, the judge will

essentially not differ much from any individual, but behind his process will be a de facto monopoly coercion, i.e., the state.

> As Tasić points out "the state is an institution where all elements intertwine and are in reciprocal dependence" (Tasić, 1995: 293).

In this sense, a judge, like every citizen has his view of things when it comes to the interests that the law should protect. Nevertheless, the procedure of interpretation and application of the law by legal practitioners (judges) begins with the process of collecting and processing facts, and then with their classification and determination to make a final decision. Having processed the facts, carried out through the court expert procedure, follows the process of connecting the facts, which is carried out based on the assessment of the significance of the facts for the given case. Connecting and evaluating, as well as interpreting the facts, can only be carried out with the method of sociological reasoning used by the judge when making a decision. Every judge, however, knows or feels to what extent appropriate experience records are important for making a court decision (Rüthers, 1999: 377) to end a given court proceeding. As the criterion of interpretation is in the head of the interpreter, as Hasemer believed (Rüthers, 2009: 253-83) even when it comes to routine cases, the judge must be careful in making a decision and aware that he is deciding on human destinies. The judicial decision must therefore not be free, but it is necessary to methodize this freedom to avoid arbitrariness. Therefore, the judge, as an interpreter, is obliged to take into account all the circumstances of the social atmosphere and to adhere to the opinion that the creator of the legal norm had when he created the norm because as A. Beck points out, it is necessary to constantly evaluate the author's words (Boeckh, 1977: 11). The true meaning of the legal norm must, therefore, be limited by the given linguistic-logical interpretation, so that the judge acts within certain limits before making a final decision. If he considers that the law does not protect fundamental interests, the judge is obliged not to exceed the limits set with his arbitrary opinion. Only in the case when the court decision was made with a justified reason and a sufficiently purposeful goal, one can speak of justice per the current value system of a society.

In this context, we should conclude what Professor Tasić apostrophized when talking about justice, which is that justice in itself is the *fundamentum regnorum*, or as the Serbian language explains, "justice holds villages and cities".

> "There is no formula of justice so rational and so thin that it could determine, in a precise way, what each of us gives to society and to what extent, because our contribution, at least the one among us, cannot be a principle of justice, because by giving ourselves to society, we ensure the general conditions of life, and hence our own" (Knežević, 1995: 290-291). In all cases, justice cannot be opposed to the common welfare as a contradictory principle. The best we can accept is to put justice on a higher level. Love and justice originate from the same source (*Ibid.*, p. 291).

CONCLUSION

The specific connection between law and society can best be seen if we look at law from a sociological aspect, as a form of social existence. Law is a solid, coherent, and hierarchical system whose structure is largely influenced by the needs, the balance of power, and the goals of a society, that is, a state. In this sense, the complete social situation regulated by law is taken into account, and then the dominant social interests that guide the state are examined, not as sovereign moral persons and collective consciousness, as Durkheim pointed out, but as a system of public services as in Duguit, which is far more positivist, as Tasić pointed out.

Therefore, importance is rightly attributed to the sociological method, because by applying it uniquely and systematically, the functional rules of law are empirically investigated as active and effective phenomena. Applying the sociological method in the process of legal interpretation enables a better, more precise, clearer, and more fundamental understanding of social interactions as the causes and consequences of the complex relationship between law and society; the sociological method is irreplaceable and necessary both in the domain of legal science and legal practice.

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