

The relationship between Sociology and cognate disciplines: Law

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Abstract

This paper considers the relationship between sociology and law, as a cognate discipline, through a discussion of social research into legal processes and settings, sometimes referred to as empirical socio-legal research. It first addresses the different meanings of research for social scientists and for lawyers, then investigates some particular challenges for cross/inter/multidisciplinary socio-legal research, and identifies the growing demands for empirical analyses of law and legal processes.

Keywords: Sociology, Law, Empirical Research

Introduction

Law is a social phenomenon; however discussion of law has been and remains monopolized by legal practitioners and theorists who primarily focus on legal doctrine; they are concerned to analyse patterns, directions and inconsistencies in judicial thinking and decision making or in legislation. The enduring emphasis is on analysing appellate cases. Indeed, the sociology of law is more often taught in law schools by law academics (albeit with a strong interest in the social sciences and/or social science training) than in sociology departments. For many sociologists, law is derivative of broader (or more authentic) sociological concerns, for example social control and deviance, or is treated within other substantive areas such as labour relations, the welfare state and social policy, bureaucratic organizations and contemporary family relations. Many sociological definitions of law stress its

normative character and are concerned with the responses to behaviour that violates laws. Sociological discussions of law are often limited to discussions of the criminal law and its operation.

Law and sociology are often presented as two distinct disciplines and bodies of knowledge. The development of law and sociology in western societies occurs within different institutions and bodies of knowledge (as professionally defined). However, they have very similar subject matters: both are concerned with social relationships, values, social regulation, obligations and expectations arising from particular social positions and roles, and the linkages between individuals and society. Almost any aspect of social life can be subject to legal regulation and judicial statements do have similarities with social theory, and often read like social theory (Roach Anleu 2009).

This paper considers the relationship between sociology and law, as a cognate discipline, through a discussion of social research into legal processes and settings, sometimes referred to as empirical socio-legal research. It first addresses the different meanings of research for social scientists and for lawyers, then investigates some particular challenges for cross/inter/multidisciplinary socio-legal research, and identifies the growing demands for empirical analyses of law and legal processes.

The Meanings of Research

Research for the social scientist typically means different things and involves different methods, compared with research undertaken by a lawyer, judge or legal scholar. Broadly, empirical social research into the law/legal system relies on a diverse range of methodologies, including surveys, interviews, observation, experimentation and various written documents in order to study 'the operation and effects of the law' in multiple settings (Baldwin and Davis 2003: 880). However, 'it is principally through

empirical study of the *practice* of law (especially of the preliminary and apparently more mundane aspects), and in studying the way legal processes and decisions impact upon the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law' (Baldwin and Davis 2003: 881, emphasis in original).

Legal research for practitioners and some legal scholars primarily entails searches of decided cases and legislation to ascertain the current law applicable to a particular issue. Law schools train students to identify the legal principles or rules underlying judicial decisions, especially those of appellate courts, or the meanings of statute law, and to apply these to facts. Legal research of this kind focuses on law as doctrine – norms, rules, principles, concepts. The aim of much legal research is to clarify and influence legal reasoning in terms of a self-referential system, though it may also include a consideration of what the law ought to be, usually within the framework of existing principles (Hillyard 2007: 275). Other legal scholarship, mainly though not exclusively from legal academics, seeks to understand law in more complex reflexive and theoretical ways (eg Davies 2008), considering and analysing the modes of legal interpretation and validation (Cotterrell 1998: 171). There is relatively little legal research or scholarship designed to further the public understanding of law, legal institutions or processes.

Despite these differences in social and legal research, in many ways the logic of social science and law, as traditionally constructed, have many similarities. They share common social and intellectual origins in 17th century Enlightenment England. This period emphasized the search for rational modes of reasoning distinct from customary or traditional practices, the quest to uncover, discover or constitute underlying laws and principles, and an interest in facts. Law and social science articulate distinctive

conceptions of fact and evidence and are sites of contest, argument, debate, disagreement, competition and deconstruction (Fuchs and Ward 1994). They are both socially situated and influenced by contexts and human action. [Social] science and law 'include local negotiations on what counts as evidence and fact, political struggles over priority and property rights, and the skilful use of textual and nontextual resources to produce artefacts and convincing narratives' (Fuchs and Ward 1994: 485). (Lawyers and legal scholars might not recognise this description of their field or characterise what is happening in this way.)

However, Banakar (2000) cautions that sociological studies of the law are limited in their potential to capture the 'truth' of law as legal practitioners experience it, especially in relation to legal doctrine. Sociological and legal concepts and understandings of the world differ. '[T]he question is whether sociology is able to climb out of its own skin and get inside the law to understand and explain the law's 'truth', namely, the motives and meanings of legal phenomena from within' (Banakar 2000: 274). While not directly drawing on the work of Luhmann (1985) this question echoes his theoretical concerns. To the extent that social researchers rely on sociological concepts to understand or explain legal settings, processes, actors and so on, then the experience of those participants necessarily will be refracted through artificial (sociological) concepts and not communicated through insider descriptions and perspectives. This tension, in varying degrees, emerges in all social research (Becker 1998), but Banakar suggests it is magnified in socio-legal research because of the power of law as a discourse or form of knowledge, its strength as an institution and closure as a profession. Law is well-placed to protect its identity and jurisdiction when confronted with external and (what it considers to be) intrusive knowledge and expertise.

Regardless of the way in which this epistemological problem is resolved or managed there are a number of important practical issues in social research in the legal sphere.

Challenges/Opportunities in Social Research in Law

Ewick and Silbey (1998) argue that all social settings have legal dimensions, law is infused in every day life, there is no space without law, and thus any social issue, setting or process can evince law or legal issues or be subject to juridification: ‘Law constitutes social life to a significant degree by influencing the meanings of basic categories (such as property, ownership, contract, trust, responsibility, guilt, and personality) that colour or define social relations’ (Cotterrell 1998: 177). Nonetheless, it is useful to distinguish between institutionalized legal settings, and law in ordinary, or everyday settings. Legal institutions, organizations and settings can present distinct challenges to the social scientist.

1. Access and gatekeepers

One significant challenge is that of access. Legal organizations or settings are sometimes not accessible to social research. If gatekeepers do not consider the research project or questions of value or interest or not of direct practical relevance to them or their organization, then researchers’ access can be denied or restricted. Research in legal settings can entail ‘studying up’, that is obtaining access to powerful, influential, busy people who may not wish to or do not have time to participate by completing a survey, being interviewed or observed or providing other information to a researcher (Smart 1984).

For example, social researchers often perceive judges as ‘hard to reach’ (Cowan and Hitchings 2007), or a ‘difficult population’ due to ‘the high status and professional remoteness of the judiciary in American [and others] society, judicial time constraints,

assumed resentment or unwillingness to be tested, concerns by judges about confidentiality of responses, and perhaps a distrust, dislike, or perceived irrelevance of social and behavioural science and scientists' (Dobbin et al. 2001: 287). Dobbin and colleagues found that most of the US state trial court judges they contacted for their research on the admissibility of expert evidence were interested in the topic and they obtained high response rates to their telephone and mail survey instruments. They emphasise the importance of constructing a detailed and well thought-out plan for project administration which includes sufficient flexibility to manage the inevitable, unanticipated events and situations that arise in the field.

2. Legal areas of interest to social researchers

Some legal subjects are more accessible to the non-lawyer and hold greater intuitive appeal (Baldwin and Davis 2003: 884). Criminal law has been more appealing to social researchers than the technical intricacies of areas such as trust or contract. Criminology has become a field of scholarship and distinct occupation with a stronger empirical research capacity than some other areas of research involving law (Genn et al. 2006: 6). The focus of criminological research is typically on the institutions of the criminal law – police, courts, lawyers, corrections, and so on – or on the effects of criminal laws on segments of the populations rather than the substantive law itself. Undertaking social science research in legal and criminal justice settings can also raise special questions of ethics (Israel 2004).

3. Discourse

Both law and sociology are concerned with similar topics of social control, regulation and social relations and both disciplines use such concepts as norm, rule, crime, sanction, punishment, and dispute. However, it is this similarity and overlap which leads to competition, disagreement and debate between social and legal knowledge as

law's dominant professional and academic position resists external argument and criticism (Banakar 2000: 286). In contrast, social research has had more acceptance and credibility in the medical, health and illness sphere. As medicine's concerns are with concepts of health and illness which rely on biochemistry, anatomy, physiology and so on, there is little or no overlap or similarity with sociological concepts, thus reducing the potential for contest, debate, and disagreement. The respective spheres of expertise of the medical practitioner or scientist and the social researcher are more delineated than is the case with law and social science. Moreover, legal discourse is adversarial. Lawyers are trained to debate, argue, contest the meaning of terms, challenge evidence of various kinds and often seek to limit its relevance, value or applicability.

4. Evaluation research

In recent years the demand for socio-legal research has increased, especially for applied or evaluation research which has potential value to policy makers. This tends to be problem-driven rather than theory-testing research. Legal reforms or new legal programs such as mediation centres or services, specialist or problem solving courts, new arrangements for legal aid funding, new sentencing provisions are typically established as pilot programs with explicit expectations the reforms will be evaluated via empirical research before longer-term implementation. Other changes, for example sentencing reforms, might be subject to socio-legal research which is evaluative but not explicitly evaluation research.

Increasing government inclination to assess or monitor legal innovations and to evaluate consequences and or success however defined has increased the scope and capacity of socio-legal research (Baldwin and Davis 2003: 888). For example, the UK Ministry of Justice commissions research, including evaluation research on a wide

range of socio-legal topics and provides various statistics on the civil and criminal justice systems (www.justice.gov.uk and www.dca.gov.uk).

Commissioned evaluation research, whatever the motivation of the commissioning authority, raises a number of issues for socio-legal and social science researchers more generally, mostly relating to the political environment in which evaluation research occurs. This has been a source of particular discussion in criminology (Travers 2005). The need to provide organizations with recommendations they can understand and implement within a budget makes evaluation research distinctive: 'evaluation methods often represent a compromise between the ideal and the feasible' (Weiss 1998: 18).

Some commentators point to the problem of evaluation research in the field of criminal justice in which 'inconsistent results, non-replicability, partisan disagreement and above all, lack of accumulation remain to dash the hopes of evaluators seeking to establish clear, unequivocal guidelines to policy making' (Pawson and Tilley 1994: 292, *emphases in original*). A similar conclusion is drawn from a review of evaluation studies in alternative dispute resolution (ADR) (Mack 2003). The research question was to identify 'whether empirical research establishes specific criteria, or identifies key features about disputes and-or ADR programs, which might provide a checklist to guide a court in making a referral to ADR' (2003: 1). This review concludes that few criteria exist which are widely identified by empirical research in a range of settings. The most important criteria are framed in general, abstract terms, providing little concrete guidance to courts. What works depends on the particular goals, location, resources, organizational imperatives, type of cases and personnel (Mack 2003: 8).

5. Capacity for social research in law

A recent UK Inquiry considered the current capacity for empirical legal research among lawyers and social scientists (Genn et al. 2006). ‘The explicit focus of the Inquiry was the capacity of the academy to undertake *empirical* research on law and legal processes, defined as the study through direct methods of the operation and impact of law and legal processes in society, with a particular emphasis on non-criminal law and processes’ (2006: 3, emphasis in original). The scope of the report was limited to non-criminal law topics and processes, because unlike many other substantive areas of law and legal issues, criminal law and processes – crime, policing, and criminal justice – have received more funding and public attention.

The report identifies the low number of grant applications dealing with socio-legal topics, evidence of little interest among academic researchers in tendering for socio-legal research, and an apparent lack of interest in empirical legal research within the socio-legal community which seems to prefer ‘purely theoretical and textual analyses rather than theoretically informed empirical legal research’ (Genn et al. 2006: 9).

One of the causes of the current lack of capacity in socio-legal research is identified as the limitations of law school education and training which emphasizes teaching legal doctrine and professional practice requirements that constrain law school curricula. There is little opportunity for teaching social science research methods which do not fit into the legal paradigm of research and scholarship. ‘For commissioners of research, the capacity problem manifests itself in a shortage of researchers with the skills to conduct good quality empirical research in the civil law and policy field’ (Genn et al. 2006: 9).

Note, however, that Australia may be different, as for the last decade or more, law students have routinely undertaken joint or double degrees, and sometimes are

required to do so, and these combined degrees are often in social science, so that there is now beginning to be a pool of legally trained graduates who also have at least some degree of social science understanding and research skills.

Conclusion

The amount and complexity of new legislation is increasing, as governments consider legislation as central for policy change and implementation. Law plays an increasing regulatory role in contemporary societies, and the numbers of legal personnel continues to grow. In this context, the lack of good quality social legal research measuring the effects of some of these changes in the field is problematic. As Hillyard suggests:

The need for high quality and rigorous empirical research to investigate the form, substance, and operation of the law in modern society could not be greater. At the same time, it is clear that legally trained personnel are playing and expanding role in modern society and more research is needed to understand not only the work they do but to analyse the impact that legal training and thinking may have on different areas of life. (2007: 274)

The law is dynamic and flexible and is continuously subject to contestation and change; it is in perpetual motion. The formation, implementation, impacts and meanings of legal change are empirical questions amenable to social science investigation. However, such research can be challenging because of the distinctive aspects of the relation between law and sociology as disciplines.

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