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THEORY AND METHOD IN SOCIO-LEGAL RESEARCH

Edited by
Reza Banakar and Max Travers

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Introduction

REZA BANAKAR AND MAX TRAVERS

MOST OF THE papers in this collection were presented at a workshop that took place on research methods at the International Institute for Sociology of Law, Oñati, Spain in April 2003.[1] They illustrate how a range of topics, including EU law, ombudsmen, judges, lawyers, Shariah Councils and the quality assurance industry can be researched from a socio-legal perspective. The objective of the collection is not, however, simply to present an interesting set of papers, but to use them to explore how different methods can be used in researching law and legal phenomena, and how methodological issues and debates in sociology are relevant to the study of law.

Numerous methods texts and handbooks exist for researchers working in the fields of educational research, media studies, nursing, management, social work, criminology and even leisure and tourism. There is, however, no text that covers how one can do research about law and legal processes from a variety of social scientific standpoints.[2] Many socio-legal researchers would argue that their undertaking requires no special methods besides those already used in the social sciences. Law is, after all, only a social institution, in the same way as religion, medicine or education, and can be studied using the same methods and techniques. Having said that, criminology also requires no special research methods besides those already developed and used by mainstream sociology. Criminologists are, nonetheless, keen to produce methods textbooks on how to research crime and criminal justice and debate methodological issues arising out of their research.[3]

As we shall argue in chapter 1, too great a concern with following a prescribed method can limit creativity in research by imposing a standard way

[1] It also developed out of a workshop that took place in Oxford in September 2000, and two sessions on methodology organised for the first time at the Socio-Legal Studies Association annual conference in Nottingham in April 2003.

[2] Some of the earlier edited collections included a section on doing research—for example see RJ Simon, (ed), *The Sociology of Law* (San Francisco, CA, Chandler, 1968)—but more recent collections make no similar attempts to focus on the methodological issues of socio-legal research.

[3] For examples see V Jupp, *Methods of Criminological Research* (London, Routledge, 1999) and FE Hagan, *Research Methods in Criminal Justice and Criminology* (New York, NY, Allyn & Bacon, 2001). See also (2000) 41 *British Journal of Criminology*.

of investigating law and legal institutions. From this standpoint, the absence of a methods text might be seen as a good thing: it helps to maintain socio-legal research as a truly interdisciplinary field which is open to theoretical diversity and innovation. Alternatively, it could indicate a lack of interest among socio-legal researchers to engage in social scientific debates on methodology. This indifference towards methodology might be explained in terms of the relative isolation of law schools, which still provide a home for much of socio-legal research, or because many of those who do socio-legal research are not trained in social sciences. Using a similar explanation we could say that criminologists are interested in writing about methods and debating methodology partly because they are, unlike most socio-legal researchers, based at social science faculties where problems of research method and issues of methodology loom large.[4]

Whatever the reason for this 'anomaly', it has at least one important implication for socio-legal research. The absence of methods texts means that the experiences of researching law which were gained by one generation are not readily available in a systematic fashion to the next generation. This makes teaching socio-legal research difficult, and can disrupt attempts to develop robust or cumulative scholarly traditions.[5] In this connection, we should not underestimate the achievements of socio-legal researchers in using various empirical methods to study what is *legal* about legal processes, legal institutions and legal behaviour. These legal properties are not the primary concern of social scientists whose specialisations and interests do not include law and are, therefore, not addressed in their methodological writings and debates. Non-socio-legal methods textbooks tell us about the various techniques of data collection and analysis through surveys, interviews, participant observation or discourse analysis and introduce us to the broader methodological debates which engage many social scientists. Yet, they do not tell us the first thing about what it means to interview judges or lawyers in different jurisdictions, observe mediation, dispute resolution or other forms of negotiation in the context of different legal cultures or analyse legal documents in a sociological way.

The collection of papers presented in this volume does not aim to fill the methodology vacuum within socio-legal studies. Instead, it makes a modest

[4] Compared to socio-legal studies and sociology of law, criminology is a well-established discipline which is taught at all social science faculties. It is reasonable to expect that criminology's disciplinary standing helps to motivate many criminologists to produce methods textbooks and debate methodology. We could, however, turn this argument around and ask if the absence of similar concern with methodological issues in socio-legal studies is not one of the factors hindering its transformation into an academically stronger field of research and teaching?

[5] Not surprisingly, there have been similar discontinuities in socio-legal theorising. For a discussion see R Banakar, *Merging Law and Sociology* (Berlin, Galda & Wilch, 2003).

attempt to draw attention to the need to reflect on the methodological issues of socio-legal research and to show that socio-legal research can gain from engaging with the general debates on methodology.

A. SOCIO-LEGAL RESEARCH, LAW AND SOCIAL SCIENCE

Socio-legal studies in the UK, which provides the context of the discussions here, in chapter 1 and in the final section of the book, has grown mainly out of law schools' interest in promoting interdisciplinary studies of law. Whether socio-legal studies is regarded as an emerging discipline, sub-discipline or a methodological approach, it is often viewed in the light of its relationship to, and oppositional role within, law.[6] In that sense it should not be confused with the legal sociology of many West European countries or Law and Society scholarship in the US, which foster much stronger disciplinary ties with social sciences. The Annual Conference of the Socio-Legal Studies Association in 2003 was attended by 370 UK academics, 87% of whom were based in law departments.[7] This shows that lawyers, and not social scientists, are the main actors in the field of socio-legal research in the UK.

To further clarify the status and approach of socio-legal studies, we could, as Wiles and Campbell did some thirty years ago, contrast it with the sociology of law. The sociology of law receives its intellectual impetus mainly from mainstream sociology and aims to transcend the lawyer's focus on legal rules and legal doctrine by remaining 'exogenous to the existing legal system', in order to 'construct a theoretical understanding of that legal system in terms of the wider social structures'.[8] That is why 'the law, legal prescriptions and legal definitions are not assumed or accepted, but their emergence, articulations and purpose are themselves treated as problematic and worthy of study'.[9] Socio-legal studies, on the other hand, often employs sociology (and other social sciences) not so much for substantive analysis, but as a tool for data collection.

Admittedly, socio-legal studies has developed and become theoretically and methodologically diverse since Wiles and Campbell introduced their ideal typical distinction between the two approaches mentioned above. Socio-legal research has, for example, become on the whole less empirical—to the extent that some senior researchers in the field have declared a state

[6] See PA Thomas, 'Introduction' in PA Thomas, (ed), *Legal Frontiers* (Aldershot, Dartmouth, 1996) 3.

[7] Also see *The Nuffield Inquiry on Empirical Research in Law* at http://www.ucl.ac.uk/laws/genn/empirical/docs/background.doc.

[8] See CM Campbell and P Wiles, 'The Study of Law in Society in Britain' (1976) 10 *Law and Society Review* 553.

[9] *Ibid.*

of emergency to save empirical studies of law.[10] At the same time, forms of discourse analysis, cultural studies, feminism and postmodern schools of thought have gained ground within socio-legal research. This development is captured in more recent attempts to define the aims and disciplinary boundaries of socio-legal research not so much in relation to empirical research, but in terms of academic competition within law. Wheeler and Thomas, for example, perceive socio-legal studies as an interdisciplinary alternative and a challenge to doctrinal studies of law. For them the 'socio' in socio-legal studies does not refer to sociology or social sciences, but represents 'an interface with a context within which law exists'.[11] That is why, when socio-legal researchers use social theory for the purpose of analysis, they often tend not to address the concerns of sociology or other social sciences, but those of law and legal studies.

We are, however, arguing that the separation between the sociology of law and socio-legal study is an obstacle which hinders the development of the social scientific study of law.[12] We hope that the chapters in this volume demonstrate that social scientific studies of law can break new grounds and become a serious contender to traditional forms of legal research first, and only if, they develop a genuine awareness of the consequences of social scientific debates for their research practices. All the contributors to this collection, whether based at law schools or social science departments, are grappling with these issues, but also recognising the need to transcend beyond the boundaries of established disciplines such as law, sociology, political science or social anthropology. Socio-legal researchers show a far more sophisticated awareness, than in previous years, of different approaches in sociology, and recognise that there is always more to learn by participating in methodological debate. Sociologists and social anthropologists are, increasingly, recognising the need to address and understand the content of law. Anne Griffiths, to give one example, argues convincingly in her conclusion to chapter 6 that ethnography provides the most effective method for achieving this insight. There are many good examples of successful analysis of the substantive contents of law through sociological methods and theories from Max Weber's analysis of legal ideas and institutions to Doreen McBarnet's classical study of conviction and Yves Dezalay and Bryant Garth's study of international commercial arbitration.[13] These

[10] See *The Nuffield Enquiry on Empirical Research in Law*, above, n 7.

[11] S Wheeler and PA Thomas, 'Socio-Legal Studies' in DJ Hayton, (ed), *Law's Future(s)* (Oxford, Hart Publishing, 2002) 271. Also see PA Thomas, 'Socio-Legal Studies: The Case of Disappearing Fleas and Bustards' in PA Thomas, (ed), *Socio-Legal Studies* (Aldershot, Dartmouth, 1997).

[12] For a more detailed discussion see Banakar, above, n 4.

[13] M Weber, *Max Weber on Law in Economy and Society* (Cambridge, MA, Harvard University Press, 1954); DJ McBarnet, *Conviction: Law, the State and the Construction of Justice* (London, Macmillan, 1981); Y Dezalay and B G Garth, *Dealing in Virtue* (Chicago, IL, University of Chicago, 1996).

studies show that social sciences do not need to limit the scope of their studies to the external behavioural and institutional aspects of law and can, in fact, grasp and analyse the internal constitution of the law.

B. THE STRUCTURE OF THIS COLLECTION

This collection consists of sixteen chapters. The first chapter considers the nature of socio-legal research by examining the different perspectives of lawyers and sociologists and the challenges that arise in doing interdisciplinary work. Our main argument is that these perspectives are necessarily very different. Sociologists need to appreciate how academic and practicing lawyers approach, describe and use law. Similarly, socio-legal researchers, whose academic background is in law, but wish to do more than simply write generally about 'the law in context', must somehow find their way around the theoretical and philosophical debates that constitute sociology as an academic discipline.

We will present the remaining fifteen chapters in six sections. The first section on 'Method Versus Methodology' contrasts two papers, by John Flood and Klaus A Ziegert, which discuss how qualitative methods can be used to address law from opposing theoretical perspectives. Flood is an interpretivist, influenced by symbolic interactionism, an approach which is committed to addressing the perspective of the social actor. Ziegert is a systems theorist working in the tradition of Niklas Luhmann, and so argues that ethnographic research of this kind is limited, and not sufficiently concerned with 'universals'. By contrasting these two approaches, which are articulated by Flood and Ziegert, we hope to demonstrate how these foundational debates inform the study of law and society.

The next section on 'Ethnography and Law' contains three chapters by Thomas Scheffer, Samia Bano and Anne Griffiths. Scheffer's research uses actor-network theory to describe the work of judges and lawyers. Bano and Griffith's chapters adopt a feminist qualitative approach to law. These papers are grouped together here because each, in its own way, uses fieldwork and presents an ethnographic approach to the study of legal phenomena. Scheffer uses ethnography to study the everyday practices of legal work, Bano uses ethnographic observation to research the use of unofficial legal bodies, such as the Shariah Councils, by South Asian Muslim women living in Britain and Griffiths uses the fieldwork she carried out in southern Africa, among the Bakwena, to document how people experience law in their daily life and to challenge the western notions of law.

The papers in section three by Reza Banakar, Mary Seneviratne and Bettina Lange present different forms textual analysis. Banakar and Seneviratne focus on how to use textual and discourse analysis to study the works of ombudsmen. In addition, Banakar draws attention to the empirical properties of legal cases and how they can be used to carry out

sociological studies of legal regulation and institutions. Lange's chapter, on the other hand, uses discourse analysis to examine the socio-legal mechanisms of the European Union in an attempt to generate new insights in the EU law.

Section four on 'Structural Approaches' consists of two chapters. The first chapter by Ole Hammerlsev shows how a sociological method inspired by Pierre Bourdieu can be employed in the study of law. The second chapter by John Paterson and Gunther Teubner contains an empirical study informed by autopoiesis theory. Hammerslev shows how Bourdieu's theory may be employed empirically to understand legal institutions and to examine the social construction of the legal profession. Paterson and Teubner provide a clear and thoughtful understanding of how autopoiesis can be used to conduct socio-legal research by examining the conflicts between regulators, offshore oil industry and engineers. Despite the apparent differences between the theoretical frameworks used by Hammerslev and Paterson, both these approaches represent examples of how structural functionalism can be used to study law.

In section five we turn our attention to how the concept of 'legal culture' can be used to conduct socio-legal research. The first chapter in this section is by David Nelken, who provides an overview of comparative socio-legal research into criminal justice systems from a cultural standpoint. Nelken also describes some of the conceptual and methodological issues arising out of doing research in, and about, different (legal) cultures. The second chapter is by Marina Kurkchiyan who also engages with problems of studying legal cultures, but this time in the context of the recent transformation of the Russian legal system and with the intention to explain how law is conceived in post-soviet Russia. Kurkchiyan's chapter provides an insightful account of the process involved in the study of a legal culture in transition.

Scholars based in different countries and representing different traditions of research wrote the first five sections of this book. These studies were organised in accordance with their methodological orientations, rather than the national origins of their authors. Presenting these studies without taking into account the tradition of research in various countries gave an overview of how socio-legal research is developing. Needless to say, the studies presented here do not provide us with a sufficiently broad international base for generalising about the direction of socio-legal research worldwide. Yet, they do give us a general idea about the methods, theories and research topics, which interest socio-legal researchers.

In the final part of this book, in section six, we turn our attention to how socio-legal research has developed in the UK. Michael Adler provides an example of the applied research conducted for government agencies. He describes what was involved in designing questions for a national survey to investigate people's experiences of administrative bureaucracies and how

they pursue complaints about government departments and public bodies. The two concluding papers, by Andrew Boon and Max Travers, look at changes in the research environment that may have important consequences for socio-legal research: the rise of the ethics committee, and pressures to conduct evaluation research. The last section has a slightly different focus in that we are also looking at the debate between applied and pure research, which is particularly relevant at the moment when there is great pressure to gear our activities as researchers and the university curriculum to the needs of government agencies.

This is, to some extent, an arbitrary division of the papers, although it allows us to show how the general debates in sociology, and methodological issues that we review in the next introductory chapter, are relevant to socio-legal research. We will also use the section introductions to explain bodies of theory or methodological issues raised in the papers, so we hope that reading the papers in conjunction with the introductions should provide some useful insights, and suggest further reading in the same way as our text on law and social theory.[14]

We should make it clear at the outset that only a limited range of theoretical traditions were represented at the workshop, and we are not trying to produce a general handbook that demonstrates systematically how social scientists can study socio-legal topics. There was a lively debate between ethnographers in the symbolic interactionist and ethnomethodological traditions and researchers influenced by systems theory, but many methodological positions were not represented, so we did not have, for example, a debate between poststructuralists and critical theorists, nor did we explore the distinction between particular approaches within one methodological camp. There is, however, no need for this book to be comprehensive. We will simply be trying to convey the critical discussions about the nature of law as a topic and the difficulty of studying it that took place during the workshop.

We are pleased that the collection contains contributions from socio-legal researchers working or researching in a number of countries, including Australia, Denmark, Germany, Italy, Russia, Sweden and United Kingdom. We hope that the examples we use will demonstrate why methodological debate and discussion is valuable for socio-legal research, and indeed the only way forward to develop the field. We would also ideally like the book to raise questions and problems, rather than giving the impression that everyone agrees over how to study the social world.

[14] See R Banakar and M Travers, *Introduction to Law and Social Theory* (Oxford, Hart Publishing, 2002).

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We are grateful to the International Institute for the Sociology of Law for supporting our workshop in March 2003 and facilitating the publication of this volume. We would also like to thank the contributors for their commitment and patience—there was a long editing and reviewing process, but we are pleased that the collection has finally been published. The ideas and arguments are certainly still current!

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Contents

1

Law, Sociology and Method

REZA BANAKAR AND MAX TRAVERS

SOCIO-LEGAL RESEARCH IS, in some respects, founded on a paradox in that, while it claims or aspires to be an interdisciplinary subject with particular ties with sociology, the majority of its practitioners are based in law schools, and have not received any systematic training in either sociological theory or research methods.[1] There are, of course, many academics from other disciplines who have contributed to the field over the years, and whose studies appear on undergraduate reading lists. There has also been genuine collaboration between academic lawyers and social scientists that has resulted in many interesting and insightful studies about law. Nevertheless, we would argue that this inter-change has been limited to a few institutions, and that a sustained and open dialogue with sociology, or for that matter with other academic disciplines, has not so far taken place.

In this chapter we will consider the nature of socio-legal research, especially as it has developed in the UK, and the challenges of working in an interdisciplinary field. We will then introduce some general debates in sociology about method and show how these are relevant to studying socio-legal topics. We will conclude this chapter by referring to the *Nuffield Foundation Inquiry on Empirical Research in Law* which expresses concern for the 'dwindling of capacity to undertake rigorous empirical research in law'.[2] We will argue that to create a sound foundation for empirical research into law we need to introduce research methods and project work into the undergraduate law school curriculum, despite the current pressures in the direction of a narrow degree based almost entirely on studying legal rules.

[1] We are grateful to Julian Webb and Simon Halliday for commenting on the first draft of this chapter.

[2] See *The Nuffield Foundation Inquiry on Empirical Research in Law* posted at http://www.ucl.ac.uk/laws/genn/empirical/docs/background.doc. Also see 'Nuffield Inquiry Into Empirical Research: Progress Report' (2004) 44 *Socio-Legal Newsletter* 1.

A. THE NATURE OF SOCIO-LEGAL RESEARCH

The fact that the overwhelming majority of socio-legal researchers are based at law schools does not by itself mean that they do not, or cannot, produce sociologically-informed research about law.[3] It rather means that their academic point of reference is influenced in the first place by the aims and aspirations of law, legal education and legal studies.[4] They are, for example, more often exposed to debates within legal theory than in sociology or anthropology. This has an adverse effect on the degree to which they participate in the internal debates of other disciplines. In addition, one should not forget that legal studies does possess its own disciplinary debates and concerns too. Socio-legal scholars who make their careers in legal education and legal research have to remain informed about legal debates if they are to continue as legal scholars. They are not, however, expected to engage in debates within sociology. In fact, those very few scholars who attempt to engage in debates in both law and sociology soon discover that they are spreading their intellectual resources too thin.

Similarly, mainstream sociology pays very little attention to law and no attention to academic debates within legal studies. This is perhaps only to be expected because after all sociologists are not using legal theory and methods to conduct research. Yet, sociology's relationship to law becomes slightly more complicated when we realize that the study of law played a significant role in the formation of classical sociology and social anthropology. However, the interest originally shown by the forerunners of sociology and anthropology, such as Weber, Durkheim and Malinowski to name a few, in studying law, legal behaviour and legal institutions was not sustained by modern sociology. Besides social philosophers such as Jürgen Habermas and the systems theorist Niklas Luhmann (who happened to be a lawyer by training), we find few contemporary scholars who seriously engage with the study of law in order to develop a sociological theory. Those few who do so are not based at sociology departments, but often attached to a handful of research institutes devoted to promoting socio-legal research. Looking at the work that most of these scholars produce, we

[3] As pointed out in the introduction, only 13% of the participants in the Annual Conference of the Socio-Legal Studies Association (SLSA) in 2003 were based in departments other than law. This disparity is also confirmed by the general membership of the SLSA.

[4] This discussion refers primarily to the state of socio-legal studies in the UK, which has its own specific characteristics distinguishing it from the traditions of legal sociology or law and society research in other countries (for a brief discussion on the differences see the introduction to s 7). We should also mention that the notion of sociology is used here broadly to include much of what is generally regarded as legal anthropology. This is neither to overlook the theoretical differences between sociology and social anthropology, nor to play down the important contributions of legal anthropology. Instead we adopt this approach, because for our limited purposes, sociology and social anthropology have similar assumptions in studying law when compared to traditional legal scholarship.

often find attempts to use ideas and approaches of modern social theorists to study of law.[5] The diminishing interest of mainstream sociology in law is also reflected in sociology curricula and courses offered by sociology departments in most countries. While courses in sociology of crime, race, science, education, health (or medicine) and sport are offered by most sociology departments, courses in sociology of law are conspicuous only by their absence.

Roger Cotterrell, in what is still the most widely-read introductory text on sociology of law, argues that the interdisciplinary approach to the study of law should transcend the narrow disciplinary perspective of 'academic sociology'. Drawing on Bauman, he aligns himself with 'postmodernism's harsh judgment on science as a network of specialisms': 'Science has lost its capacity to enlighten ordinary citizens as it has become so intricate and esoteric that only the masters of sub-specialisms of specialisms within scientific disciplines can follow selected pathway's through science's knowledge-mazes'.[6]

This criticism of sociology is, to some extent, misplaced since one way of understanding the history of the discipline is as a series of debates over whether it should become like natural science. Avowedly anti-scientific intellectual movements like postmodernism and poststructuralism can also be criticised for becoming specialisms with their own technical language, and methods.[7] One can see, however, that even without this theoretical justification, the view that socio-legal scholarship does not need to engage with sociological theory or method too deeply might appeal to researchers who would otherwise have to undertake much work understanding specialist debates in sociology and acquiring a competence in technical, demanding methodologies such as log linear or conversation analysis. We have also come across academics from other disciplines who are full of praise for the interdisciplinary character of socio-legal studies after attending conferences. They like the fact that it is a friendly, tolerant field, and they do not have to face the critical responses about theory and methodology they would expect from colleagues in their own discipline.

[5] For such examples see Ole Hammerslev's application of Bourdieu's theory in ch 10. Other interesting attempts can be found in the application of ideas borrowed from Michel Foucault to the study of governance and gender studies. See A Hunt and G Wickham, *Foucault and Law: Towards a Sociology of Governance* (London, Pluto Press, 1994); and C Smart, *Feminism and the Power of Law* (London, Routledge, 1995).

[6] Z Bauman, *Intimations of Postmodernity* (London, Routledge, 1992) 37; cited in R Cotterrell, *The Sociology of Law: An Introduction* (London, Butterworths, 1992) 311.

[7] Postmodernism is used by writers like Cotterrell and Bauman inter-changeably with poststructuralism to refer to the critique of scientism advanced in recent times by poststructuralist thinkers, such as Lyotard, Foucault and Derrida. For evidence of how poststructuralism can become a sociological method, see G Kendall and G Wickham, *Using Foucault's Methods* (London, Sage, 1999).