



Reflections on the sociology of law: A rejection of law as ‘socially marginal’

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Abstract

Rejecting the concept of law as subservient to social pathology, the principle aim of this article is to locate law as a critical matter of *social* structure — and power — which requires to be considered as a central element in the construction of society and social institutions. As such, this article contends that wider jurisprudential notions such as legal procedure and procedural justice, and juridical power and discretion are cogent, robust normative *social* concerns (as much as they are *legal* concerns) that positively require consideration and representation in the empirical study of sociological phenomena. Reflecting upon scholarship and research evidence on legal procedure and decision-making, the article attempts to elucidate the inter-relationship between power, ‘the social’, and the operation of law. It concludes that law is not ‘socially marginal’ but socially, totally central.

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1. Introduction

Cotterrell (1995: p. 300) has argued in favour of a broad theory-based approach to socio-legal research which understands the position of law as a regulator of social life — the principle function of which centres upon the regulation of specific ‘social fields’. Rejecting ‘narrow’ policy-based interpretations of law (and its regulatory role in social life), Cotterrell advocates a socio-legal analysis of law which characterises social structure as existing *independently* of social actors’ subjective constructions and/or value-based perceptions of what that ‘structure’ is.

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Indeed as Henham — in his highly persuasive account of theorising sentencing research — summarises:

‘The implication is...that phenomenology does not account for the values existing in society which have become embodied in social institutions and internalised by social actors themselves...If phenomenology cannot allow for the existence of structure except on the level of individual consciousness, it cannot logically make any progress towards delineating their relationship’ (Henham, 2000: p. 17).

Adopting and inculcating both Cotterrell and Henham’s perspectives on law as a social structure, this article contends that law correspondingly intersects with socially constructed notions of justice, fairness and truth which are all underpinned by the exertion of (forms of) power in society. More specifically, it is argued that research should not examine *in isolation* substantive practices and formal legal rules and then relate them to other social variables such as power. As social actors influence the development of power structures (and thus legal processes), this article contends that both legal and social aspects of sociological research must be integrated into the study analysis and not separated for the purposes of evaluation. Indeed, it is the view of many socio-legal scholars that legal and court procedures ‘remain unintelligible when interpreted in a non-contextual manner which excludes their social, political and policy dimension’ (Charlesworth, 2007: p. 35). As such, the principle aim of this article is to locate ‘law’ as a critical matter of *social* structure — and power — which requires to be considered as a central element in the construction of ‘society’. Wider jurisprudential notions such as legal procedure and procedural justice (Adler and Asquith, 1981; Galligan, 1996a), and juridical power and discretion (Dworkin, 1986; Jowell and Oliver, 2007) are, it is argued, cogent, robust normative *social* concerns (as much as they are *legal* concerns) that positively require consideration and representation in the empirical study of sociological phenomena. In this way, it is submitted that law is not ‘socially marginal’.

As Low (1978) rightly warned three decades ago, criminal justice research must be careful to guard against the treatment of juridical aspects of the criminal justice system as autonomous and distinct entities in isolation from the wider social context in which they are situated. Hence, this article examines law and social science alongside notions of causality and normative concerns and considers whether the theory-based foundations and research methodologies of the two disciplines are mutually compatible, thus raising the question of whether it is possible to reconcile ‘sociological’ and ‘legal’ for the purposes of constructing a valid theoretical context for the study of sociological phenomena. Indeed, as Van Krieken (2006: p. 575) observes, theoretical understandings of law are important ‘for analytical purposes, such as giving us a broader conceptual vocabulary for our empirical narratives, the perception of underlying patterns, the operation of power, or the latent affinity between apparently divergent institutional arrangements’. In order to better explain the relationship that exists between *legal* regulation and *social* context, this article then reflects upon scholarship and research evidence on legal procedure and decision-making in order to better elucidate the inter-relationship between power, ‘the social’, and the operation of law.

2. Causality and normativity

The study of social institutions (and sociological phenomena more generally) would be deeply impoverished by a neglect of, or a disregard for, an examination of the associated legal aspects of their use within a socio-jurisprudential context of analysis. Yet, although many socio-

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