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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.

Keywords: Sociology; Law; Socio-legal; Social phenomenon

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 exits 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-

legal theorists will argue – correctly – for the consideration of law as an entity embodied *within* the sphere of sociology, to arrive at the conclusion that the disciplines of sociology and law are fundamentally distinct, is of course inescapable. Consider Korn's analysis of the inherent differences between scientific knowledge(s) and law:

> 'Perhaps the most fundamental source of difficulty in technical fact determination is that the law and the scientific knowledge to which it refers often serve different purposes. Concerned with ordering men's conduct in accordance with certain standards, values, societal goals, the legal system is a prescriptive and normative one dealing with the ''ought to be.'' Much scientific knowledge, on the other hand, is purely descriptive; its ''laws'' seek not to control or judge the phenomena of the real world, but to describe or explain them in neutral terms.' (Korn, 1966: p. 1081)

The sciences (social and natural) are thus concerned with the world as it substantively exists. Although Korn's summation of scientific knowledge(s) and research infers that much of the work of the scientific disciplines is concerned with positivism and the reporting of fact(s), clearly the fundamental axioms of qualitative and quantitative research (methodologies), coupled with the inferred, or expressly stated, 'policy relevance' of many contemporary pieces of research, means that contemporary research 'findings' and 'conclusions' may necessarily also require to have regard for the way the world *ought* to be. But this does not negate the accuracy of Korn's observation that the principle concern of scientific research is with the way the world *is*.

Alternatively, Kelsen's theory of law as a 'science of mind' is underpinned by his notion of a basic norm or principle (*Grundnorm*) which determines what 'ought' to be done. Importantly, Kelsen's *Grundnorm* is a fundamentally prescriptive notion within his theory of law – it is not used as a term to describe regularity. Rather, the *Grundnorm* is an overarching, foundational (and necessarily somewhat indeterminate) standard by which legal structures are defined and against which legal duties/statements are measured. In this context, law is an aspirational concept. For example, Kelsen described the normativity of the law thus:

> '[A] law of nature is a statement to the effect that if there is A, there *is* B, whereas a rule of morality or a rule of law is a statement to the effect that if there is A, there *ought* to be B. It is the difference between the ''is'' and the ''ought'', the difference between causality and normativity…' (Kelsen, 1957: p. 137).

Hence, law, in contrast to the *causal* nature of social science research, is *normative*. Indeed, Walker and Monahan (1986: p. 489) state succinctly, that the law 'does not describe how people do behave, but rather prescribes how they *should* behave'. In this respect, scientific research adduces to an empirical social reality that we ascertain from our conscious and discernable (sensory) responses, 'rather than to the value we impute to that reality' (Walker and Monahan, 1986). Law, on the other hand, concerns our normative (social) values about cause and effect, linked to our wider aspirational (social) objective(s).

However, social science and law also share distinct similarities. Walker and Monahan, who have written extensively on, and argued persuasively for, social science as a means for improving legal procedure(s), describe the most fundamentally analogous dimension of law and social science research thus:

> 'The principle similarity between social science research and law is that both are general – both produce principles applicable beyond particular instances…Indeed, the purpose of most scientific research is to obtain knowledge that, while surely not immutable, holds true

> for many people over considerable time and in a variety of place.' (Walker and Monahan, 1986: p. 490)

Similarly, Posner (1992: p. 83) has observed that science is the pursuit of the truth through 'cosmic understanding' underpinned by persuasion, while law is dispute resolution underpinned by (the threat of) force. Law and social science thus correspond in the respect that they both typically address prospective circumstances/happenings. However, sociological research may use a combination of positivist *and* phenomenological research paradigms, and can employ heuristic methods of analysis as well as statistical modes of analysis. Hence, it is important here to briefly distinguish the two sociological research paradigms, within this wider theoretical discussion of law and social science research methods.

While positivism assumes that the only authentic knowledge is scientific knowledge, and that such knowledge can only come from positive affirmation of theories through strict scientific method, phenomenological research paradigms have instead sought to understand (events and happenings in) the social world through the heuristic investigation of (elements of) the social world as distinct from the natural world (see for example, Rickert, 1962). For example, values, norms, and rules are studied using qualitative and ethnographic methods which necessarily concentrate on the *social* and *cultural* nature of the phenomena being studied.

However, in our current consideration of law and social science, the distinctive difference between the disciplines, for the purposes of this discussion, is that *phenomenological* scientific findings are evaluated in part by their heuristic value – by their ability to organise and to make intelligible new phenomena. If we briefly consider the methodology of legal scholarship, for instance, we can see this difference borne out. For example, Hillyard (2007: p. 275) has observed that, while legal scholarship is most often concerned with detailed textual analysis, social science research is generally concerned with deductive or inductive methods to elucidate identified social phenomena. Indeed, Hillyard posits that:

> '[T]he crucial characteristic of [social science] researchers is that they are trained to reflect on the extent to which their insider/outsider position affects their understanding of the phenomenon under study. In contrast, the aim of so much legal scholarship is to influence legal reasoning and produce clarity using a self-referential system. The aim is not to further the understanding of the phenomena of law, legal institutions or processes using a range of quantitative or qualitative research methodologies.' (Hillyard, 2007)

Walker and Monahan (1986: p. 488) have proposed that sociological research should thus be treated by the courts as 'a source of authority rather than as a source of facts…we propose that courts treat social science research as they would legal precedent under the common law'. As Walker and Monahan do not seek specifically to differentiate between heuristic and positivist research paradigms, the inference here must be that law, and (positivist and phenomenological paradigms of) social science – despite divergence methodologically and ontologically – can be reconciled, and are mutually compatible in terms of socio-legal analyses. Let us now, then, consider the way(s) in which the *social* character of the law fundamentally underpins the proliferation of sociological research.

3. The sociology of law

The sociologists Max Weber and Emile Durkheim are cited by many socio-legal scholars as being the most substantial and influential academic contributors to the advancement of the

concept of the sociology of law. Both were fundamentally concerned to delimit the domain academic jurisdiction of sociology, and within this newly demarcated sociological territory, they sought to embody 'law' as a social phenomenon – which could then consequently be studied through sociological modes of analysis. While Weber's concept of the sociology of law was of primary significance to his *aggregate* theory of sociology, Durkheim was, historically, the first sociologist to dedicate a significantly meaningful diligence and application to the law as a social phenomenon (Hunt, 1978).

Although Durkheim made empirically unjustifiable assertions about moral cohesion in modern plural societies (Cotterrell, 2002: p. 640) – for example, he posited that so long as one section of society is not favoured unduly over others (legal) standards can be accepted by all and so will contribute to the integration of that society (its 'organic solidarity') – Durkheim succeeded in making law a central concern for sociology (Hunt, 1978). Accentuating the significance of *moral* mellifluousness and euphony within law, Durkheim continually stressed law as an example of the concretisation of social norms and values in society – that is to say, law as a 'social fact'. Without an appreciation of the moral (and therefore the 'social') character of the law, any analysis would thus necessarily be hollow and, in practical terms, nonsensical (Cotterrell, 2002: p. 640). As Hunt (1978: p. 65) succinctly concludes: 'For Durkheim, law is a visible symbol for all that is essentially social'. In this context, Durkheim delineated social stability through a consideration of legal structure as composed of repressive (criminal) and restitutive (civil) models of law. However, neither system is (state) value neutral and both reflect and are contingent upon the collective, sociological notion of organic solidarity.

Following on from Weber and Durkheim's proposed delimiting of sociology as a discipline, Cotterrell (2002: p. 633), among other contemporary socio-legal scholars, has argued that the application of sociological principles to law does *not* require a de facto devotion to sociology as a separate and distinct discipline. Alternatively, a sociological consideration of the law is about 'rejecting the boundary claims' of law and sociology, and in this respect, requires that attention be paid to the empirical, rigorous study of the field of social activities and experience. Moreover, in their theoretical consideration of the autonomy of law, Bourdieu (1987) and Luhmann (1992, 2004) observe law as being inherently interconnected to the social world. Bourdieu goes further in identifying law as an autonomous 'juridical field', determined by a set of material social relations and practices influenced by power relations and 'juridical functioning' (cited in Van Krieken, 2006: p. 578). However, somewhat contentiously, both Bourdieu and Luhmann discuss law largely in terms of the 'conversion' or 'translation' of disputes.

Indeed, Cotterrell (2002: p. 638) has observed the somewhat bleak characterisation of law by some theorists, reductively, as disorder control and dispute resolution. Within this paradigm, law is servile, and subordinate to social dysfunction and breakdown. Thus, in defence of law as a concept that exceeds the limits of 'disorder control', Cotterrell advances the proposition that socio-legal analyses can serve to propagate an alternative perspective on law:

> 'Much socio-legal scholarship, operating in research settings far removed from courts…tells a different story: of law used (with varying degrees of success and failure) to guide and structure social relations, engineer deals and understandings, define lines of authority, make provision for future contingencies, facilitate projects, distribute resources, promote security, limit risks, and encourage trust…Socio-legal scholarship gives a more balanced view through studies of law's contributions to the routine structuring of social relations, as well as its responses to social breakdown.' (p. 639)

Cotterrell's contention that it is necessary, no less essential, that the concept of law as subservient to social pathology is rejected, forms the cornerstone of the central tenet of this article – that law is not 'socially marginal' (Cotterrell, 2002). Following on from Dworkin's (1986) elegant and persuasive theory of law as an 'interpretative' concept (whereby law is best understood as an embodiment of social facts *and* morality/moral reasoning), this article seeks to progress the perspective that law is of axial importance to the study of social phenomenon. In the same way that Dworkin critiqued the detachment of law and morality, it is argued here that social phenomena cannot be effectively studied and represented when divorced from the juridical. Furthermore, in general terms, and on grounds of pragmatic exigency, the requirement for the advancement of socio-legal research is compelling. Citing the exponential growth in statute law in recent years, Hillyard (2007: p. 274) argues that '[m]ore and more aspects of our lives are being subject to legal regulation or restraint. 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.'

An emphasis upon the social character of law thus requires the employment of sociological methodologies and perspectives to jurisprudential concepts and ideas that, in turn, bestow the principal utility of the social sciences in researching, and coming to understand, the operation of law as a social construct. Roscoe Pound (2002 [1931]) specifically advocated harnessing sociological methods in order to study jurisprudence – in direct contrast to the historically dominant influences of philosophy and political theory (Hunt, 1978). Moreover, Pound's sociological concept of law was further distilled into a set of 'jural postulates' embodying the proposition that the law reflects shared (social) needs without which members of society could not coexist. Similarly, Julius Stone's (1965) influential work on sociological jurisprudence emphasised the primacy of the social, context-bound nature of legal research. Advocating that social justice should be a principal concern of legal practice, and that sociology should be integral to adjudication, Stone did not identify Pound's jural postulates as his most salient precept – rather, he observed that his most important axiom can be found in Pound's acknowledgement that:

> '…continuity in the stream of juristic knowledge grows in importance with the rate of change. Generations…tend to lose touch with the store of accumulated juristic ideas; but it is at just such times…that this store needs to be re-examined and marshalled in the light of present experiences, insights and techniques, to meet the new tasks of law.' (Stone, 1965: p. 1548)

Undoubtedly, this speaks to notions of sociological jurisprudence, to social context(s) and to sociological methodologies. Moreover, Pound railed against legal individualism, a concept which was in its ascendancy during the nineteenth century, and which envisaged law as the archetype of the individual as paramount. As Hunt explains: 'The dogma of the maximisation of individual free will steeped into every facet of legal thought and activity' (Hunt, 1978: p. 32).

However, we must not forget that law is notably concerned to protect the individual against the excesses of *power*. An analysis of the work of the seminal political philosopher Thomas Hobbes, for example, demonstrates the parallels that exist in his sociological writing, and the contemporary (legal) preoccupation with individual rights. Kriegel, by way of illustration, goes so far as to call Hobbes 'the true founder of the modern doctrine of subjective rights', whereby 'at the heart of natural security' lies the 'preservation of individual life' (Kriegel, 1995 [1979] cited in Wickham, 2006: p. 609). Thus, Hunt is correct when he asserts that '[q]uestions about

law involve major questions that confront contemporary society. As such law presents itself as an important area of inquiry for social theory and sociology in general' (Hunt, 1978: p. 151). In a similar vein, Van Krieken (2006: p. 587) argues for an approach to law and (social) science which pays greater attention to their 'connections' rather than to the discontinuities between the disciplines in order to advance a more complete 'sociology of knowledge' through research and scholarship. With this in mind, let us now turn to an examination of a selection of empirical scholarship that appears to 'reject the boundary claims' of sociology and law as distinct and separate discipline and as such is specifically pertinent to the arguments embodied within this article. It will now be considered to what extent existing work in this area can be of use in further elucidating the concept of law as a 'social' force.

4. Socio-legal studies of the mechanism of law, legal procedure and judicial discretion

It must first be acknowledged that while a substantial body of (largely theory-based) literature on legal procedure, administrative decision-making and judicial discretion has evolved over the years (for example, see Adler, 2003, 2006; Davis, 1971; Galligan, 1996a; Halliday, 1998; Lacey, 1992), empirical socio-legal work in the lower courts has been somewhat limited. Indeed, Cowan et al. (2006: p. 548) have observed that empirical studies of lower court decision-making has, historically, been neglected by socio-legal scholarship because obtaining access to the lower judiciary can be very difficult and time-consuming, and moreover, because of general, pervasive beliefs that the work of the lower courts was, for the most part, 'commonplace' and 'dull'. Nevertheless, there do exist several older studies of the courts which are of particular significance (Hood, 1972; Lawrence, 1995; Parker et al., 1989; Rumgay, 1995) not to mention that, in recent years, there have been a number of socio-legal studies that have been concerned specifically with researching procedure and decision-making in the lower courts (see, for example, Anleu and Mack, 2005, 2007; Baldwin, 1997; Cowan et al., 2006; Hunter et al., 2005; Marchetti and Daly, 2004; Millie et al., 2007; Pawson et al., 2005).

Hood's seminal work on sentencing in the Magistrates' Courts in England and Wales found substantial variation in sentencing practices (Hood, 1962, 1972), while Parker et al. (1989) similarly found divergence in sentencing outcomes. Both Hood and Parker et al. identified local Magistrates' bench traditions as a possible explanation for sentencing disparity. Other studies in the higher courts (for example, Ashworth et al., 1984) found that a wide range of factors impacted upon judicial decision-making. In a similar vein, Lawrence (1995) (in her early work on sentencing process and judicial decision-making) developed a detailed methodological framework as a base line for understanding the multi-faceted, complex nature of judicial decision-making. This framework also appears to have been successfully (expressly and/or impliedly) inculcated into later socio-legal work(s) on judicial decision-making in the lower courts (compare with the studies of, for example, Hunter et al., 2005; Cowan et al., 2006). Lawrence's observation – that decision-making is influenced by the inter-play of both micro- and macrofactors – produced a research methodology which recognised the contribution and the influence of the individual circumstances of a case (microfactors), together with social and cultural values, and bureaucratic, administrative and legal factors (macrofactors). Indeed, *social* values are afforded as much primacy as *legal* factors in Lawrence's model of judicial decision-making. Crucially, Lawrence does not assume any rigid formula or causal link to account for, or to rationalise, decision-making outcomes. Rather, Lawrence's model for judicial decision-

making allows for the discussion and analysis of a plethora of factors involved in individual decision-making by judges who:

> 'construct meanings for cases, apply their own objectives and beliefs, and respond to contextual factors with varying biases and varying levels of self-awareness' (Lawrence, 1995: p. 70, cited in Hunter et al., 2005: p. 104).

Indeed, Murphy and Rawlings (1982: p. 34), in their insightful textual analysis of a range of judgements in the House of Lords, found the existence of an 'elaborate range of discursive techniques' impacting upon judicial decision-making. Identifying 'discursive techniques' such as repetition, assertion, the use of common sense, the invocation of the ordinary man and silence and suppression, the authors also refrain from organising them in any form of hierarchy, or system of techniques (p. 58).

The recent work of Hunter et al. (2005) and Cowan et al. (2006) again demonstrate the multi-faceted nature of judicial discretion and decision-making. However, both of these studies do indeed attempt a typology of decision-making as a way of organising data, and making findings more intelligible. Hunter et al. reported a manifold and diverse range of factors influencing judicial discretion in rent arrears cases. The variation between individual judges' decisions was analysed in respect of three specific factors (length of experience, type of legal practice before appointment, and attitudes to training and updating). However, no distinct patterns of decision-making emerged, and so the construction of a clear typology was not possible. Alternatively, Cowan et al. observed a 'liberal', a 'patrician', and a 'formalist' approach to judicial decision-making in possession proceedings, although they also noted that a certain 'type' of decision-making could additionally incorporate characteristics of other type(s) of decision-making: for example, a 'liberal' style of judicial decision-making might necessarily adopt a 'formalist' position, if an individual case requires it, and in order to obtain the 'right' outcome. Cowan et al. (2006: p. 549) also observe the potential for other 'types' of judicial decision-making in possession proceedings, and conclude that their typology is 'by no means complete'.

In respect of procedure in the lower courts more generally, the recent work of Marchetti and Daly (2004) and Anleu and Mack (2005, 2007) is of particular relevance to this discussion. In the same way that Cowan et al. observed something of a deficit in socio-legal work on the lower courts, Anleu and Mack (2007) recognise that much of socio-legal literature has tended to focus on the procedures and decisions of the higher courts (as an illustration of this point, at page 183, they cite the work of Anleu, 2000; Barnett, 1993; Brigham, 1996; Hambly and Goldring, 1976; Rosenberg, 1993; Solomon, 1992; Vago, 2003). This, they argue, is unfortunate, given that:

> 'magistrates courts are closer to [and] are more able to recognise economic, political and social change than higher courts that do not deal with the same volume and mix of cases and participants. The higher courts are more likely to be dealing with refined legal issues and not matters where the offending behaviour, social inequalities, and human emotion are directly apparent and remain fused.' (p. 196)

Although the role of the higher courts in contributing to socially constructed notions of justice, fairness and truth, should not be underestimated. By way of illustration, Lord Woolf has argued that:

> 'The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the

> defendant or the prosecution and the defence. The role of the judiciary is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.' (Woolf, 2003: p. 17)

However, Lempert (1989) has observed that wide discretionary juridical power does not necessarily mean that legal procedure is, or becomes, 'ruleless'. In fact, he argues that judicial discretion can precipitate the construction of informal 'rules'. Subsequently, Lempert (1989: p. 348) posits that 'practical experience may give rise to procedural routines that are honoured at least as regularly as the procedures specified in those formal rules that in theory order behaviour in ordinary courts'. Indeed, there is evidence of the existence of socio-legal research which has shown that formal and informal legal procedure(s) adopted by the lower courts can serve specific substantive legal – and sometimes, social – 'goals'. For example, in Lempert's study of informal procedure in eviction proceedings, he describes the historical legacy of the relaxation of (formal) procedural rules so that there would be greater access to justice for 'plain folk' who did not have the benefit of substantial knowledge of the law or its procedural workings (p. 348).

Equally, however, there is evidence that legal procedures can serve to extend existing mechanisms of (social and state) control over particular groups and/or individuals (349). As such, the impact and consequences of administrative processes and judicial decision-making on fairness in legal contexts is well established as a contemporary concern of socio-legal scholars in Britain, and is reflected in a substantial body of literature (see for example Adler, 2003; Ashworth, 1994; Galligan, 1996a,b; Harlow and Rawlings, 1997; Hood, 1992; McCubbins et al., 1989). If we consider, for example, racial disparity in sentencing, then this provides a good illustration of the *potential* for criminal justice process(es) to be targeted disproportionately at specific groups. A substantial body of research exists to show that in various countries across the world – including the United States, Canada, France and the United Kingdom – black and ethnic minorities are over-represented in prison populations (see for example, Hood, 1992; Tonry, 1994; Tonry and Hood, 1996; Von Hirsch, 1993). In particular, existing research has been concerned to examine the sentencing process and to what extent black and ethnic minorities are afforded different treatment in criminal justice processes and outcomes (Von Hirsch and Roberts, 1997).

For example, Hood's (1992) rudimentary work on racial disparity in sentencing in England found that black defendants were 5% more likely to receive a custodial sentence and there was also considerable comparative variation in the duration of sentences imposed (122). Similarly, Parenti's (1999) work on policing and incarceration in the United States found punitive and corrupt practices and the overt targeting of 'problem populations', specifically Black and Hispanic communities. Research has also found that other marginalised and/or vulnerable groups (such as – in particular – drug users, prostitutes and individuals with mental health problems) can be the subjects of inequity in the criminal justice process by virtue of 'differential policing and punishment' (Scraton and Chadwick, 1987: p. 213). Such groups have been excluded from mainstream society through de facto spatial processes of regulation or indeed through a more ideological process of exclusion and/or criminalisation which 'is influenced by contemporary politics, economic conditions and dominant ideologies' which are both emulating and responding to 'the determining contexts of social class, gender, sexuality, race and age' (Scraton and Chadwick, 2001: p. 69).

Moreover, research has demonstrated evidence of the associations between socio-economic and environmental factors that are linked with deprivation and levels of certain types of crime.

As such, Tonry (1995) has suggested that wider discretion should be available to sentencers to enable them to consider the personal circumstances of defendants 'who have, to some degree, overcome dismal life chances' (170). In order to constitute a mitigating factor, however, defendants would need to evidence that they had enacted a positive response to their social adversity, such as, for example, gaining employment. Rejecting this model as inadequate as a framework for improving inequity in sentencing, Von Hirsch and Roberts (1997) conclude that 'not many offenders are likely to benefit, so long as one clings to notions of the deserving poor' (232). Correspondingly Ashworth (1994) has observed that (within the desert model) it would be easier to reconcile 'social deprivation' – independently of positive responses – as a foundation for mitigation. As Von Hirsch and Roberts note, this is because social deprivation can, subjectively speaking, influence a defendant's culpability in the respect that:

> 'social deprivation…may reduce the person's options for leading a law-abiding life; and such increased difficulty of compliance, at least arguably, may make violations less blameworthy' (Von Hirsch and Roberts, 1997: p. 235, note 14).

While sentencing mitigation based upon a 'criteria for social deprivation' (232) would not be a positive step towards addressing disparity in sentencing (as a result not least of the fundamental subjectivity that would be required in law to determine such a criteria), the wider issue of equality before the law is of central importance. The evidence of the existence of disparity in sentencing (particularly in respect of evidence on marginalised groups) is of specific interest within the paradigm of law and the operation of power. As Murphy and Rawlings (1982: p. 61) rightly observe, questions about judicial reasoning and decision-making necessarily lead on to 'questions of power, and of how power circulates within a society'. The rights of individuals in society to have access to a system of criminal justice that is non-discriminatory in how it applies the principles and processes of law is fundamental to our understandings and interpretation of fairness and equity before the law. Subsequently, questions about criminal justice processes being applied arbitrarily, or discriminatorily, necessarily intersect with wider questions about power, domination and exclusion in society.

Hence, the existence of empirical socio-legal research on legal procedure and judicial discretion highlighted above elucidates several rudimentary (but non-exhaustive) areas of interest to this discussion of the social character of law. Socio-legal research demonstrates that law is inextricably linked to socially constructed notions of justice, fairness and truth which are all underpinned by the exertion of (forms of) power in society. In this regard, law can and should be utilised as a means to better understand the social world, and in particular, the regulation of specific 'social fields'. As Van Krieken (2006: p. 587) observes: 'law might be best understood as a kind of meta-knowledge given its role in resolving/managing social and interpersonal conflict but…it will be increasingly important…to see law as part of a ''knowledge production/governance complex'' rather than simply as gloriously distinct and autonomous'.

5. Conclusion

A recent report on the substantive capacity of empirical socio-legal research, funded by the Nuffield Foundation, found that socio-legal work had been highly efficacious in 'revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens' (Genn et al., 2006: p. 1). Crucially, however, the report acknowledged that socio-legal

research has played a pivotal role in elucidating the theoretical perception of *law as a social phenomenon*. Moreover, socio-legal research is important – and influential – because it involves analyses of the power of law. Hence law (as an internal and embedded *social* concept) can both organise and channel power – as opposed to simply controlling it (Cotterrell, 2002: p. 643). As a result, socio-legal research has made the exercise of law/power more apparent, its consequences more evident, and its operation more foreseeable, logical and progressive (Cotterrell, 2002). As such, 'law' *is* 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, 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. While law cannot of itself resolve problems such as inequality or social breakdown, as we have seen, 'law has a role not only as a primary technique of governance but also as a significant constituent of social forms, and practices' (Cotterrell, 2002: p. 643). Moreover, as the French political sociologist Alexis de Tocqueville (2003 [1835]) observed, the positive 'social benefits' of law can also be seen in terms of furthering individual liberty, through limitations placed upon the power of majority social groups. In this sense, law is not on the margins of the study of social institutions and sociological phenomena. Instead, law percolates through 'the social'. That is to say, far from existing on the periphery of sociological study, law is contained *within* this paradigm – law is not socially marginal, but socially, totally central.

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