The Future of Socio-Legal Research with respect to Environmental Problems

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If one thinks about the difficult question what is or what should be the future of socio-legal research, one could do so in two different ways. One could either look at the method to be applied for further socio-legal research or look at the contents of the research agenda, focusing on what topics should be examined in the future in the various disciplines.

Taking up the first idea, regarding the method of socio-legal research, a researcher inevitably sticks to his or her own hobbies. One of my hobbies is, and has been for a long time, the economic analysis of law. Anthony Ogus has already indicated the importance of the economic analysis of law for socio-legal research and I would very much like to support his plea for an increasing emphasis on the economic methodology in future socio-legal research.

LAW AND ECONOMICS AS A METHOD FOR INTERDISCIPLINARY RESEARCH

Looking at the method of socio-legal research more generally, I would suggest that future research should anyway be increasingly multidisciplinary. It is clear that the trans-boundary problems the world is confronted with nowadays, some of which have been discussed in the paper by Richard Abel, are so complex that any attempt to solve them can only be successful if the joint efforts of various disciplines are combined. One major advantage of the economic analysis of law, as has been indicated by Ogus¹ and Cooter² is that this methodology allows for such an interdisciplinary approach. Positive economic analysis especially shows how certain legal rules come into being and what the influence of legal institutions will be on the incentives of the various market participants. Economic analysis of law can also judge the efficiency of a certain set of legal rules. Obviously efficiency is not the

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only criterion by which the value of legal rules should be measured, but it is certainly a criterion that can be taken into account when legal rules are examined from a normative point of view. Moreover, in many cases, there is no conflict with other values such as justice, although this has often wrongly been argued. Moreover, by combining neo-classic economic analysis of law and public choice theory, the economic analysis of law can explain why in some cases inefficient legal rules come into being by showing that they provide returns to certain interest groups.

The economic analysis of law has had great success in the United States of America. Law and economics courses are taught in all the major law schools, and law and economics is gaining importance in legal practice. Leades and Posner argue from a quantitative study that law and economics undoubtedly has been the most influential movement within legal theory in the 1980s in the United States. The influence on legal practice also follows from the fact that leading scholars such as Richard Posner, Frank Easterbrook, and Robert Bork are judges at appellate court level and can thus turn their ideas into practice. Even the Supreme Court of the United States quotes law and economics literature, for instance, to decide on issues arising from a hostile takeover bid.

The law and economics approach is indeed a good example of how interdisciplinary research can contribute to a better explanation of the complex real world. One may, by the way, also note that law and economics research itself has become even more interdisciplinary over the last few years. Whereas, originally, United States scholars such as Posner, Calabresi, and Shavell used neo-classic economic models and applied those to legal problems, law and economic scholars now increasingly introduce the results of social and political sciences in their research as well. Good examples of this new trend away from the narrow neo-classic models towards a broader socio-legal approach can be found in the work of Cooter and Ogus. In this respect, reference can also be made to the public choice school which is now widely introduced in the law and economics community.

An important aspect of the methodology of socio-legal research is that the outcome of an analysis should also be empirically tested. In that respect, the work performed at the Oxford Centre for Socio-Legal Studies has been of a great value. Indeed, many scholars like Doa Harris, Roger Bowles, Paul Fenn, Allister McGregor, and Neil Rickman have shown how to combine good modelling with empirical work in order to test the results of theory. The law and economics approach is likely to be accepted widely within the European legal community only when the outcomes of theoretical models can be supported by convincing empirical research.

ENVIRONMENTAL PROBLEMS

I believe that the multi-disciplinary method, which I strongly defend, should focus on one of the most important problems of today, namely, the
deteriorating state of the environment. This brings me to a second topic on
which I would like to reflect: environmental problems and environmental
policy in general. Indeed, I believe that given the social and political priority
that this topic has, it should stand high on the agenda for future socio-legal
research. In this respect excellent work has been done by the centre as well,
by Bridget Hutter, Keith Hawkins, and Paul Fenn, on environmental policy.
But everyone familiar with this area will agree that a lot of research has still
to be done. Let me go over a number of issues which I consider merit further
research. Some of those might be of interest for areas of socio-legal research
outside the environmental field.

1. Standard setting

A first research topic is the very basic question of how much pollution should
be allowed. Let me explain. The way in which most legal systems provide
environmental protection or, in other words, allow environmental pollution
is not by a general prohibition of all pollution, but by introducing a licensing
system. In most cases the licence sets specific standards which have to be
complied with and which are enforced through administrative or criminal
sanctions. A basic question is how the standards are set. Obviously, the
quality of the environmental standards will have a considerable influence on
the quality of the environment itself. Economists have argued that one of
the ways to fix these standards is by introducing an economic marginal cost-
benefit test. A standard should be set where the marginal costs of pollution
abatement equal the marginal benefit in reduction of environmental damage.
This, or another technological kind of standard setting approach, could be
used to determine how standards should be set in the public interest. How-
ever, political scientists and the public-choice scholars have often stressed
that these standards will fail to be efficient because the bureaucrats who set
the standards might be captured by the regulated industry. The influence of
private interests will, of course, be larger if democratic control of the standard-
setting process through, for instance, environmental groups, is smaller. In
the words of an economist: when the information costs for the public at large
to discover the rent seeking by the interest group are larger, one can expect
a higher degree of success of the private interest group. Obviously, the
success of interest groups will be smaller when the public can identify that
standards are favouring certain groups. It is noteworthy that information
problems are probably the highest when standards are set by international
organizations. These are most likely to intervene for large trans-frontier
environmental problems, such as nuclear accidents and oil pollution. In those
cases, standards are set by, for instance, the international maritime organ-
ization (with respect to oil pollution) or the nuclear energy agency of the
Organization for Economic Co-operation and Development (OECD), for
nuclear accidents. So the paradox is that the more important the environ-
mental problem seems to be (since it becomes global or at least trans-
boundary), the more likely it is that private interest groups will influence
the standard-setting process and, hence, that inefficiencies will follow since the amount of control on international organizations is relatively low.

The same can be said about the standard-setting process at the European level. It is very difficult to control, for instance, how European directives are made, since the influence of powerful lobby groups in Brussels is substantial. This might be one of the reasons why many member states have difficulties implementing European directives correctly and on time. Another reason for the implementation problems might be connected to an issue addressed by Ogie, namely, whether local differences should be taken into account in the standard-setting process. It might well be inefficient to require the same emission standards in Portugal with totally different environmental circumstances compared with Belgium. Moreover, the Portuguese might have different preferences with respect to environmental pollution. If one accepts the idea that these differences can play a role, one might question whether it was such a good idea for the European union to focus merely on a harmonization of standards in order to avoid market distortion, as it has done so far.

In sum, I think research into the standard setting process should certainly be high on the future agenda for socio-legal research. This obviously involves various disciplines, for instance, to determine what is the best available technology without incurring excessive costs, as has been discussed by Keith Hawkins.4

2. Catastrophic risks

A second topic that merits special attention are the catastrophic risks and, especially, the large environmental risks, such as nuclear accidents. In the legal system, one can note the influence of interest groups which lead to a serious limitation of the compensation due to victims in case of an accident. Indeed, most of the international conventions regulating the liability for damage caused by oil pollution or nuclear accidents have introduced financial caps on liability. In these cases, there is, in the language of economics, no full internalization of the risk. For instance, in the case of nuclear accidents, this lack of internalization means that energy and the price for nuclear power do not reflect the true social costs. In that respect, many important legal and economic, but also political questions arise, such as: is a compensation for these large-scale risks at all possible? If not, because these risks are uninsurable as is often argued, does society want to accept the risks at all? In addition, complicated political issues will arise, such as: will the whole community be prepared to share these large risks or will one community be reluctant to contribute to the compensation of victims of another community? Since the question whether we are willing to accept these large risks has already long been answered affirmatively, as can be seen from the existence of nuclear power plants, I believe that we need thorough interdisciplinary research into the institutional arrangements that
can lead to an optimal prevention and compensation for these large risks. There again, combined use of law, economics, and also risk management, political science, and psychology concerned with decision making under uncertainty, can help to provide answers to these complex questions.

3. Regulation of global pollution

Finally, I think that socio-legal research focusing on environmental policy should look at the specific problems that trans-boundary pollution and especially global pollution pose. The classic problem with trans-frontier pollution is that it is very tempting for states to export their externalities to another state. We can see all kinds of examples of this behaviour. Nuclear power stations are usually located close to a border; the Walloon government seems to allow the old industry to keep polluting the river Maas because the effects are mostly felt in the Netherlands. This problem arises in almost every case of trans-boundary river pollution. Here again, the question arises how institutional arrangements could react to these negative externality problems. One obvious solution would be to make use of liability law, but, in many cases, this will not be very effective. This can be illustrated by the problem of the cutting down of tropical rain forests in Brazil and on the island of Calimantan in Indonesia. This destruction allegedly contributes to the greenhouse effect. These effects are felt mostly by other victims, situated in the northern countries. Moreover, the priorities and preferences in Indonesia could be set differently. However, I do not think that a liability suit against the states of Brazil or Indonesia will prove to be effective remedies. With respect to these large-scale problems, totally different questions arise such as: should the victims pay the polluter in the form of development aid, for instance, in order to avoid the pollution? But if we accept this idea of investing in environmentally sound technologies in developing countries, will the local polluters still have sufficient incentives to invest in additional abatement measures?

A similar set of questions can also be asked with respect to a topic that has also been discussed at the conference, namely, the transition in eastern Europe. The role of environmental policy in this transition process poses special problems. Many eastern European countries are now drafting new environmental legislation, but there is a lot of scepticism about whether this legislation is actually going to be implemented and enforced. The question of the development of environmental policy in eastern Europe is another topic that should be of interest for future socio-legal research. Here, once more, one can point not only at altruistic reasons, such as that everyone should care about the state of the environment in other countries, including eastern Europe, but research into environmental problems in eastern Europe might well be interesting for western researchers for simple, selfish reasons as well. Environmental pollution in eastern Europe, for instance, the well-known emission of sulphurdioxide, clearly harms western European
countries. In addition, one might also wonder whether it is useful to have probably the safest nuclear power plants in the world in Germany if, just a short distance away, nuclear power plants in Bulgaria pose serious risks. Therefore, socio-legal research into the institutional framework that needs to be built to guarantee environmental protection in eastern Europe should be high on the research agenda as well.

CONCLUSION

In this brief overview, I have indicated a few topics which I consider merit further research. I have indicated that these topics could be of interest to the various social sciences: law, economics, political, and social sciences. It was not possible to discuss within the scope of these brief remarks how this interdisciplinary research should be built. Should it be on the basis of cooperation between the various disciplines, or should all the scholars approach environmental problems from their own perspective first, only comparing the research results later? This is a different methodological discussion that has been dealt with by other contributors to this volume. My only goal was to formulate a few thoughts on possible topics for future socio-legal research with respect to environmental problems.

NOTES AND REFERENCES

1 See Ogus's contribution to this volume, (p. 26).
2 See, for example, Cooter's paper in this volume, (p. 50) and his handbook with Tom Ulen, Law and Economics (1988).