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Legal Culture and empirical research: Improving the socio-legal character of the sociology of law

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Abstract

This Special Issue introduces the theoretical and methodological approach for specifying the character of the sociology of law through the concept of legal culture. Including this concept in the design of the socio-legal research can improve the questions towards legal phenomena and better identify the sociological perspective concerning other disciplines and legal knowledge. Still, it requires a better specification of what can be understood by legal culture from the sociological point of view. To this end, it proposes to refer to the concept, with "legal", to what is attributable to the legal institutionalisation of the normative dimensions of social life. "Culture", on the other hand, refers to cultural components to which recourse is made to reconnect those processes of institutionalisation to social norms, values and the more general cultural and social context of the law.

Key words

Legal culture; methodology; research design

Resumen

Este número especial presenta el enfoque teórico y metodológico para especificar el carácter de la sociología del derecho a través del concepto de cultura jurídica. La inclusión de este concepto en el diseño de la investigación socio-jurídica puede mejorar las preguntas hacia los fenómenos jurídicos e identificar mejor la perspectiva sociológica respecto a otras disciplinas y al conocimiento jurídico. Sin embargo, requiere una mejor especificación de lo que puede entenderse por cultura jurídica desde el punto de vista sociológico. Para ello, propone referir el concepto, con "jurídico", a lo que es atribuible a la institucionalización jurídica de las dimensiones normativas de la vida social. "Cultura", en cambio, se refiere a los componentes culturales a los que se recurre para

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reconectar esos procesos de institucionalización con las normas sociales, los valores y el contexto cultural y social más general del derecho.

Palabras clave

Cultura jurídica; metodología; diseño de investigación

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1. Introduction

The aim of this special issue is to present empirical research outcomes and theoretical works that use the concept of legal culture to characterize the approach of the sociology of law. The papers presented were called for at the Oñati Workshop on *Legal Culture and empirical research*, originally planned for May 2020, but actually held in May 2021, on the initiative of the International Institute of Sociology of Law, and the Sociology of Law Section of the Italian Sociological Association. After an intense meeting, papers were submitted for the standard review process of the IISL series. We considered that including the concept of legal culture into the research design and insisting on this focus for debate, could be a way of improving the socio-legal character of our research and settling the many disputes in a continuous debate. So, we looked for research experiences in which the concept of legal culture was used to configure legal phenomena in a specifically socio-legal way.

The concept of legal culture is useful when defining a legal phenomenon in a specifically sociological way because without reference to sociologically significant theories or dimensions, it remains either a useful concept for anthropologists and legal philosophers, or an umbrella concept to say anything. Through this reference, the sociology of law can communicate with the theory of law, with the philosophy of law, and with different social sciences, without being captured by their matters, but rather formulating specific questions instead.

The essays presented in this special issue illustrate these differences and constitute an effort in this direction, one developed around relatively typical topics of the sociology of law: judgment, legal examination of evidence, accountability of legislators, professional diversity in the daily processes inside a penitentiary organization, and the role of supranational Courts in ruling national legal responsiveness to human rights claims. Each essay, however, makes use of the concept of legal culture, is able to submit its own empirical evidence to the attention of disciplinary perspectives and relevancies other than the sociology of law. For each essay we will briefly point out the contribution that derives from the use of the concept of legal culture, rather than its rich cognitive content, since both the conventional uses of the term and those that try to characterize its sociological specificity help us to take a step forward in clarifying the concept.

These different perspectives can be grouped into three main types: Those that refer to the internal and specific relevance of legal thinking, those that, instead, refer to specific social processes, characterized in our case by the inequality of resources and power and, finally,–those that show how the concepts of *legal culture* are also connected with doctrinal aims. In the essays presented, the first set of perspectives refers to factual issues, whose cultural weight and value are relatively independent of the choices and decisions of the legal apparatus. The second, on the other hand, finds constitutive elements for the current structures of inequality in the legal regulation. The third shows us, through a social and cultural focus, the current doctrinal and historical uses of theoretically relevant concepts.

2. Facts within legal culture

In De Felice and Giura's contribution, we can see how the concept of legal culture became a way of spotting the differences in judicial decisions and administrative practices in France and Italy, through an empirical reconstruction of the uses of doctrinal criterium in the *best interest of the minor,* in its ambiguity with respect to unaccompanied foreign minors. Considering the legal culture consisting of the administrative and judicial structure of decisions, the authors were able to reconstruct how cultural ethnocentric practices in both countries – via the concept of vulnerability – evade or adapt to national political orientations, international conventions, and European Human Rights Court rulings concerning migration, to the point of emptying the principle of the *best interests of the child*.

On the other hand, it is precisely on the juridification of *vulnerability*, in the cases dealt with by the European Human Rights Court, that Catanzariti's essay shows the role that the processes identified by the concept of legal culture play in settings changes in the law. The reconstruction of the juridification of the concept of vulnerability shows how the jurisprudence of the Court attributes, simultaneously and distinctly, new effectiveness to human rights and a response to social and cultural expectations.

But observing legal changes by means of the concept of legal culture enables us to read the precise multilayered institutionalization processes of *asylum* legal adjudication. In Ferraris and Consoli's research we can observe, at the same time, that as legal culture changes, the organizational and technical way in which judges face their cognitive and informative need regarding refugees' personal and contextual situation changes too.

Likewise, the contribution by Scivoletto, using the concept of legal culture to characterize the multi-professional dependance of extension to adult *messa alla prova*, a sort of Italian version of *probation*, shows us the empirical interplay needed to obtain legal change. The reference to professional cultures is also the way in which Maculan and Sterchele's work characterizes the condition of imprisonment through the concept of local legal culture as a combined practices and processes that reproduce the difficult balance between the conflicting aims of prison organization.

In Sbraccia and Vianello's work, we observe the complexity of each component that contributes to defining, de facto, a specific local legal culture: that of the penitentiary. Interviews and participant observation show the alternatives with which two different professions interpret this day-to-day culture (teachers and doctors) recently admitted Italian prisons. They are professionals with organizational and administrative rationalities heterogeneous to the logic of the prison's functioning. Each profession tries to build, with different strategies, daily balances by configuring in a little generalizable way the legal culture of each prison. But, as Maculan and Sterchele's work shows, vocational guidance is internally diversified concerning health personnel. In the case of the doctors, the search for pragmatic balances between the different ways of setting up the doctor-patient relationship and the different ways of interpreting the prisoner's condition maintains the solutions obtained are always contingent. They thus contribute to the specific complexification of the particular legal culture of the prison.

In each of the previous essays we can find a reference to factual issues (migration, social and personal weakness, perception of justice, professional practices) whose cultural

weight and value are relatively independent of the choices and decisions of the legal apparatus. Legal culture is used to show the sociological dimensions (professional, cognitive, valuative, organizational, etc.) involved in setting legal change, without deducing said change from the contents of the legal rules but maintaining its explanation open to empirical hypothesis about the role played by each component of the process.

3. Norms and values within legal culture

Instead, the second set concerns mainly specific social (cultural and technological) and economic issues, characterized by the inequality of resources and power. This is the case of Mantovan's work on the issue of gypsies and the influence of racial stereotyping processes on the legal treatment of Romany and Sinti populations. Administrative decisions and sentencing on this topic are considered vehicles for the structural racism of European societies, and the concept of legal culture a means to connect sociology and critical anthropological studies regarding anti-gypsyism.

More broadly, Marotta's essay proposes the use of the concept of legal culture to analyze the permeability of legal systems to economic rationality and the loss of centrality of both politics and the rule of law. The deep inequality that currently defines our social systems indicates the loss of the balance ensured by the rule of law between freedom and equality and the colonization of politics by the financial interests of a globalized economy. The concept of legal culture, re-evaluating the relationship between the legal system and social systems becomes useful when beginning to discern what to endorse in the study of social and political change.

On the other hand, in Riccio and Guedes's research, legal culture is addressed to point out the settings and difficulties in processual practices when using video images as a means of proof. Procedural rules, judicial practices, and technological confidence play an intertwined and changing role in setting final decisions and sentencing, because they condition the cognitive abilities of the trial and the information content on which the decisions are based. The main part of the empirical research about the forensic uses of video images regards common law contexts, but this work provides us with the opportunity, offered by the concept of legal culture, of avoiding isolating the analysis of the uses of technological innovation from the legal framework of judicial decisions.

The other face of the cognitive difficulties in our legal systems is exposed by Sobaczewska's research: the progressive weakening of the cognitive capacity of European parliaments through the involution of their Committees of Inquiry. Constitutional traditions and parliamentary regulations are challenged by the relevance of the balance between the effective accountability of government activity and the mediatization of the attention of public opinion. Seeing this reconstruction in the light of the concept of legal culture, we see how this balance cannot be rebuilt only with technical-juridical solutions, and why it cannot be thought that the legislative function can be remodelled only starting from its constitutional and legal design.

In each of this second set of uses of the concept of legal culture we can find reference to legal structures as constitutive elements for current social inequalities, or for having assumed an economic perspective, or for weaknesses in the cognitive functions (such as stereotyped, technologically limited, or media exposed) of the legal procedures.

4. Doctrines within legal culture

From the point of view of a sociologically oriented use of the concept of legal culture, the previous essays suggest a careful reconsideration of what can be considered "facts" and what can be considered "legal norms", when the focus of analysis is placed on the decisions of the apparatuses, their consequences, and their conditions. Can migration, poverty, stereotypes, or technological lag be considered *facts* for the sociology of law without their legal categorization? And can we consider these categorizations to be exclusively cognitively oriented? Or are we compelled to consider the performative consequences of these description? These are key questions which help us to grasp the subtle passage, in using the concept of legal culture, from a sociological to a doctrinal perspective.

In Quiroz Vitale's essay, this continuous transition from the sociological perspective to the doctrinal one is shown through reference to the pluralistic doctrines of law. However, the explanatory use of the concept of legal culture makes it possible to identify components of the legal experience to which it is possible to impute the variability of the decisions of different European courts on prostitution.

Likewise, Bengoetxea considers a definition of law essential to put order in the comparative use of the concept of legal culture and, based on the institutionalist theory of law, proposes a set of comparators by which to compare different legal cultures: legal consciousness, openness of norms to external criteria of justice, formal systematization of norms and professionalization of their uses, management of conflicts, and institutional sophistication. He indicates three levels for picking observations for these indicators: organizations, institutional arrangement, and institutional facts. Each of them is defined by McCormick's criteria of identification (institutive, constitutive, terminative). His clever rationale offers a way to bypass the contraposition between a universal definition of law and those who argue~~s~~ for the idiographic, culturally determined nature of the concept of law. Theoretically, his move consists in applying McCormick and Searle's views to argue about legal norms as action-related notion and their strong dependence on a sophisticated notion of institutions.

Both these connections of the concept of legal culture offer us an anti-positivistic orientation about law and the reference to contemporary institutional legal theory shows its transformation from an instrument of legal identification of the social dimension of law (*ubi societas ibi ius*) to an instrument of legal identification of the pragmatic dimension of the norm – a conception of law that defines the meaning (and therefore, its interpretation) through the concept of "use". In this conception of law, the concept of norm is an "action-related notion" that can be defined as the possibility of action (*ex-ante*) and condition of perceptibility (*ex post*). This change calls for ~~a~~ new attention to the concept of institution: we can consider institution in a more fruitful way, also from a sociological perspective.

5. To distinguish legal and culture

In the debate about legal culture many problems emerged from the difficulty to describe the problematic concept of culture, and so differentiate *legal* from culture as a whole. So, what brings *legal* and *culture* together? What defines this linkage both at the conceptual,

theoretical level and empirically? Not institution, which requires a predefinition of law, but institutionalization processes.

Historically and doctrinally, wide-ranging literature has highlighted the emergence of legal autonomy; however, stopping at the foundation of European nation states is not enough. As sociologists, we may wonder what the institutionalization of nature, as established by Roman law (Thomas 1991) and the reference to society as in Hauriou's concept of institution have in common. They may have different steps and types of institutionalizations of the legal dimension of social systems in common, carried out through an increase in reflexivity in law and about the law.

As sociologists, this time theoretically, we must value the fact that Weber linked the classification of legal systems neither to the doctrine of recognition (what today would be defined as consensus) nor to coercion, but to the *possibility* of coercion, by his theory of action. A move that establishes that link between law and contingency that Parsons and Luhmann have taken to extreme consequences. A link without which it would not be possible today to recognize our law as mutable and that only the reflexive mechanisms of the law have institutionalized as such.

Furthermore as sociologists, looking around at the construction of European Union by the progressive and difficult generalization of procedural decision-making procedures, does it not inform us how legal reflexivity can produce such different results in the construction of the European institutions, in terms of sentencing of courts, of the procedures that are homologating the various national administrations, in terms of the relationship between an increasingly abstract substantive law and a more intricate explosion of procedures, in penal and civil jurisdictions?

All these examples force us to concentrate on reflexive mechanisms through which law differs from the other normative structures of social systems, by which their generalization processes diverge to make it possible to establish the legal structures as a sort of meta-normative system between many other normative orders. These examples lead us to ask what kind of decisions they depend on; how we can empirically pick them as institutionalized collective and structured decisions.

The empirical *interplay* (Banakar 2019) in which the law is *actually* realized constitutes a criterion of identification of that disciplinary specificity of the sociology of law. The reference to legal culture highlights how a conception that is not exclusively instrumental or utilitarian, directs the necessary attention to many other important dimensions of social relations. The law has a cultural content with which legal texts and decisions connect interests, evaluations, consequences, and distributions of power to history, emotional and sentimental dimensions, and to the framework of belonging within which they only become recognisable as the law (Cotterrell 2006). So, we should differentiate the role of the law vis-à-vis each of these dimensions of social life and their specific history. Similarities and differences between legal systems or sets of rules can be detected by filtering them through the different role that the law plays between these different action areas in the various cultural contexts.

Legal culture is a concept to be elaborated gradually in the context of the choices we make in a strategy aimed at controlling, clarifying, and analysing the complexity with which the legal dimension emerges, penetrates, and returns to social relations. It is not

only a concept aimed at understanding and possibly explaining the autonomy of the law (and possibly criticising its ideological uses) with regard to the normative dimensions of society, but also a concept the use of which is aimed at guaranteeing autonomy to the sociology of law, cognitive this time, from questions that respond to different cognitive, philosophical, political, doctrinal, and legal interests, thus putting it in a position where it can interact in an informative way with the other disciplines that deal with law.

The concept of *legal culture* may designate both the different role of law in relation to the variation of the contexts of action analysed, and also the invariance of the legal dimension and its very particular social institutionalization, in relation to the variation of other normative sources. It is the criterion of orientation between the different levels of analysis the more useful, the more specific the reference to institutionalized practices (both sociologically and legally) of which legal culture ultimately consists of. If properly articulated with reference to practices made significant through law, it allows us to grasp the emergence of legal solutions, the evolution of the phenomena to which they are addressed, and the consequences that derive from their use.

For these reasons, it therefore seems useful to distinguish the *cultural component* of the law from its specific *legal normativity* in the use of the concept. The first is readable in reference to specific processes of meaning, areas of social action, where it is not said that legal norms always play the same role. The second, on the other hand, aims to *differentiate* the binding nature of the reference to legal norms from obligations and duties that derive from different normative sources: traditional, ethical, political, and religious, and so on.

Referring normativity to its institutional dimension for sociology means referring to essential social and cultural processes rendering the normative models, within which recognisable social action moves, meaningful and coordinated. These are essential in identifying and evaluating the general orientations of a given set of roles (and in any case of structures: frameworks of meaning, categories, definitions, rules, and so on), in guiding reactions to conduct incompatible with those roles or meanings, in orienting their being reproduced, and the process of their continuous doing and re-proposing with greater or lesser influence on these structures.

Thus, *legal* and *culture* are specifically linked both at the conceptual, theoretical level and empirically by the institutionalization processes within which the *normative* and *legal* structuring of action mirror each other and differ, more or less markedly, depending on contexts, and social and legal systems It is a sociological perspective because it highlights the mechanisms of reflexivity by which the law represents society, social action represents the law, the transition between the normal reflexivity of basic everyday decisions, even those of legal figures, and the reflexivity of institutions that can reproduce or wear themselves out in representing or not a reference for the reflexivity of action.

When we enter the processes of institutionalisation, where structures and actions are inseparably and distinctly connected, reflexivity takes on a fundamental sociological specificity: a recursiveness that proceeds with the mechanism of generalisation of the content that is gradually defined be it categories, ideas, values, or norms. And from Parsons onwards, it has been made clear how these mechanisms have progressively become the subjects of themselves: money as the possibility to exchange possibilities of exchange, ideology as the possibility to evaluate values, or precisely, the law as juridical

production of legal normativity (Parsons 1979, Luhmann 1984, Parsons and Shils 2001). This type of reflexivity, then, makes it possible to activate in action that reflexivity on which sociologists, from Giddens onwards, have long been working.

This institutional recursiveness activates *reflexive mechanisms*, which are specific reflexive processes. Everyone decides on decisions. But not everyone can decide what decisions they are deciding on. A reflexive mechanism occurs when you have the tools (categories, concepts, definitions, norms, rules) to decide whether to treat what you are deciding on as a decision, for example, ethical, or political, or legal, or subject to instrumental rationality. This *possibility* of determining the object incorporates decision-making alternatives that remain open, undecided, and make the frame of subsequent choices more complex. The reflexive mechanism is not the repetition of daily reflexivity, but the generation of additional possibilities. On these generated possibilities may depend the starting and the direction of their institutionalization, towards legal, economic, variously cognitive structures, etc. (Luhmann 1970, 2008).

The *denotata* of the concept of *legal culture* are a direct consequence of the way in which the design of research is constructed, rather than abstract attributions of meaning or puzzling definitions. In this sense, "methodologising" the use of the concept of legal culture means tying the *denotata* to processes by which cultural content becomes such, that is, the processes through which their social institutionalisation takes place. The theory of action and the sociological tradition on social action are those tools that focus on the specificity of institutionalisation processes in the cultural dynamics of social processes, they thematise the reflexivity of legal structure. They trace this reflexivity to the processes of institutionalisation of social action, retrace its common nature (it could be said: *morphogenetic homology*) with every other structuring process. In this way they highlight, in a non-residual way, the *social* nature of the law and the historical-cultural specificity that makes these structures "legal", with their necessary definitions of society, rather than religious, ethical, aesthetic, or simply "technical" or "pragmatic" ones.

If there is no law without texts, there is no social action without meanings to these texts. Legal meanings are chosen within many other possibilities. Legal culture could be a tool to see and show, also outside the legal system, the systemic and systematic choices in these differentiations.

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