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The Use of Social Science Information in Law
Comment on the British Inquiry Report (2006)[1]

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Abstract:

The British Inquiry report discussed in this brief comment focuses on the “use” of socio-legal studies in relevant policy areas and claims that “the work of empirical legal researchers influences the development of substantive law, the administration of justice, and the practice of law”. This could be wishful thinking. The experience of most socio-legal scholars is that empirical research on law is not or not adequately taken into account by legal science, judges or policy makers. The recommended consequence is to substitute our policy orientation for a theory orientation. It was tempting but largely unsuccessful to offer empirical data for changing the law and for improving legal institutions and legal education. More modest but more rewarding is the adoption of the standard research model practised in most areas of the social sciences: empirical research for the development and the testing of theoretical propositions. We have to change our audiences and address our research to competing empirical approaches and to those theoretical models which tend to be developed without taking the practice of law into account.

Keywords:

Socio-Legal Studies, Empirical Studies, Law, British Inquiry.

From a continental point of view the British situation of socio-legal studies in general and of empirical research on law in particular is good. We admire the activities documented regularly in the newsletter of the SLSA and learn a lot from publications of our British colleagues. Even more impressive is then the British Inquiry Report (Genn, Partington and Wheeler 2006) with its suggestions for further development and improvement and its more than justified ambitions to take the lead in Europe in supplying empirical knowledge on law and legal practice. The report focuses on the “use” of socio-legal studies in relevant policy areas and claims that “the work of empirical legal researchers influences the development of substantive law, the administration of justice, and the practice of law”. Continental socio-legal associations and communities would be well

[1] A previous version of this comment was prepared for a panel at the joint meeting of the Law and Society Association (LSA) and the Research Committee on Sociology of Law (RCSL) at Humboldt University in Berlin, July 25 - 28, 2007. My short comment has been further elaborated for a study presented at a seminar on “Información y Estadística para la mejor impartición de Justicia” at the Mexican Supreme Court, October 22-24, 2008 (Gessner 2011).

advised to produce similar reports or adopt the suggested measures without having to repeat the British evaluation.

Having said this about these wonderful ideas for improving the *supply* of empirical knowledge on law I would like to raise one concern which relates to the Report's premise in its introduction that there is a huge *demand* for research of how law works and that this demand will be increasing in the future. Our economic orientation should already cause some irritation with a premise that there is a demand which does not generate a supply. Aren't market mechanisms ruling also our scientific production? The demand premise could be simply wishful thinking of socio-legal scholars who suffer from their marginal position in the legal communities and strive for more power and reputation. A warning from accepting this demand premise is that as early as 1971 the social sciences emphasized the demand for policy-related research (Horowitz 1971, p. 2) and became aware later that what really mattered for policy makers were economic data provided by governmental statistical offices, banks, business associations and academic institutions. This explains why there aren't many equivalent institutions producing social science information.

Before explaining the limited demand for socio-legal data I would like to already resume my conclusions. Either together with the strengthening of the data producing institutions the demand has to be increased or else all those beautiful suggestions of the report for supporting a more dynamic development of empirical research have to be taken with caution. If empirical research on law is not or not adequately taken into account by legal science or policy makers the simple result is disappointment and frustration of career expectations within the socio-legal community. At least from the point of view of somebody familiar with the situation on the continent it does not seem advisable to encourage young people for choosing empirical socio-legal research as an academic activity with a policy orientation.

The reasons why the demand for socio-legal data is only limited are that (1) the data themselves are mostly hard to translate into a normative proposition and a legal policy, (2) independent of their specific role definition according to national legal cultures, judges never have the preparation and working conditions for researching empirical data, (3) the civil service applies predominantly its own accumulated knowledge ("experience"), (4) policy makers in the ministries, parliaments and pressure groups have their own political agenda leading to a highly selective use of social-science information, (5) law professors may read and be influenced by empirical research but hardly ever argue openly with empirical data according to social-science quality standards, and (6) even socio-legal theory either disregards entirely or misinterprets empirical data.

(1) A severe tension has frequently been observed (cf. the contributions in Beck 1982) between sociology and administrative practice, and the situation is not much better between socio-legal studies and legal practice. Questions of how to bridge IS and OUGHT are still unresolved. Social-scientific data collection has its own disciplinary logic, aims at explanation rather than social engineering and often questions central assumptions of administrative policies which cannot always be reconsidered by political actors together with the permanent rise and disappearance of research topics. Although it may be true that sociology of law is much closer to legal thinking than general sociology and therefore more able to bridge the epistemological gap, and that many assumptions about law and the state are shared, the data produced by socio-legal researchers hardly ever facilitate legal or administrative decision making. Unlike natural sciences, and also to

a certain degree unlike economics, social sciences have weak instruments for evaluating the validity of research data and generate much contradictory but nevertheless coexisting knowledge. Whereas this is considered an advantage and a sign of innovation in the scientific community it complicates the situation of the potential user and consumer of social-scientific production. In particular consumers with a legal background get lost in the data jungle since they are used to strict validity criteria or at least to ruling opinions, and they quickly develop an understandable distrust in most of what is offered by empirical researchers. There is established knowledge also in social and socio-legal studies but most knowledge is under dispute. In a situation where academics cannot decide between true or false the practitioner is at a loss and refrains from translating descriptive data into normative propositions and policy programs. This restricts the demand for socio-legal research.

(2) Judges decide dozens of cases every day on the basis of programs which define all relevant and exclude all irrelevant criteria for interpreting the situation under dispute. Empirical data questioning these programs and these evaluation criteria are unwelcome from the point of view of the decision maker. Their use would be time consuming and would thus unduly delay the judicial procedure. And their use would be risky in an institution characterized by strict control structures aiming at preserving the unity and consistency of the legal system. Despite established theoretical knowledge that judges unavoidably base their decisions on sociological assumptions (preconceptions and common sense theories about society) they never make them explicit and never openly develop new perspectives of how to explain the real world (Lautmann 1972/2011). The reasoning in judgments pretends the application of the law rather than the use and interpretation of sociological research. This restricts the judges' curiosity and imagination. Like the normal citizen judges may be influenced by publicised research results including social-scientific insights but judgments almost never refer to empirical knowledge.

(3) The civil service has a much less restricted program and more room for discretion and innovation. Information about social problems, their consequences and their possible solutions is in high demand. But in a rational bureaucracy with career civil servants in the Weberian sense this knowledge is mostly produced and accumulated *within* the public office (*Dienstwissen*). There is demand for additional information but social science knowledge has no privileged status. It has to compete with much better recognized disciplines as e.g. natural sciences, medicine, economics – knowledge which is provided by renowned and often state-financed institutions and networks of experts. Despite many initiatives from their professional associations socio-legal academics have nowhere succeeded in getting accepted as experts of a similar standing.

(4) Policy makers in the ministries, parliaments and pressure groups should be the most interested in getting socio-legal information before drafting new legislative acts and during their implementation. Preparation and evaluation of statutory law has been one of the most prominent mission statements of sociologists of law. And they have been quite successful in getting financed and in carrying out minor or major empirical projects within domestic jurisdictions and the EU. The legal background of most socio-legal researchers facilitated communication and helped producing data considered relevant for purposes of legislative change. But the real problems arose later. All agents in the ministries, parliaments and lobbies by definition have a political agenda and only search and use information supportive for those predefined goals. As Luhmann (1977, p. 3) has long time ago observed: truth is no relevant criterion for politics ("*Man kann Politiker nicht durch Wahrheit zwingen*"). Political agents simply do with empirical research what they

want to do without sufficient intention to learn and to change their minds. This leads to highly selective use, misinterpretation, over interpretation or complete disregard of empirical data. Sometimes the research is only commissioned to gain time and avoid action. Hence, there is a demand for socio-legal research in legal policy making but for politically biased purposes resulting in an abuse rather than a use of social science information. Academic intentions towards a certain rationalization of politics turn out to be naïve illusions.

(5) Law professors live in a world of law in the books which they take as reality. In their lectures or books empirical knowledge is either completely absent or is offered in the form of anecdotal evidence. Sometimes some social-science information is given in introductions but not taken up again when substantive law is discussed. Interdisciplinary contacts in teaching or writing are absolutely exceptional, and a general policy in law faculties is to keep the social sciences out of the holy grail. There are, of course, (good or bad) reasons for this hostile attitude which have been discussed for almost a century. As regards empirical knowledge one frequently articulated reason is that the data offered by social sciences aren't specific enough for those mostly very detailed questions legal scholars are concerned with in doctrinal debates. It happens that these doctrinal information needs are satisfied by interviews and questionnaires on their own – the legal scholars' – initiative, surveys which hardly ever reach the methodological standards of the social sciences.

(6) Theoretically oriented social scientists and socio-legal scholars may pay lip service to and may support empirical research but aren't much more receptive for empirical information in their teaching and writing. The idea inherited from natural sciences that theory is based on empirically controlled and in repeated tests not falsified hypotheses is not guiding theoretical production and intellectual debates. There are exceptions but most socio-legal theory is deductive and speculative. Theoretically oriented scholars never carry out empirical research themselves and even rarely refer to empirical knowledge. If they do it is done to confirm speculations and never to discuss empirical findings which contradict theoretical propositions. There is obviously a – mostly justified – fear that such contradictory findings might quickly put an end to the theoretical debate and its over-ambitious hypotheses.

Altogether this is a sad perspective for empirical research. There is no demand for it – even not in our own discipline of sociology of law as the last paragraph has shown. What is the evidence for this negative balance? Before turning to my own life experience as a predominantly empirically oriented scholar I would like to provide some examples from the literature we all are familiar with.

From the huge stock of empirical socio-legal research very little has reached our textbooks and our recognition in theory building: certainly Stewart Macaulay's (1963) Non-contractual relations in the Wisconsin automobile sector, Lisa Bernstein's (1992) Diamond Trade or Boaventura de Sousa Santos' (1977) favela study. May be a few dozens more. But these publications remain marginal in comparison to non-empirical books and articles which predominate the debates and which claim to represent the state of the art. The empirical discovery and detailed description of the injured person's situation in becoming aware of and defining a legal claim by Donald Harris et al. (1984) in their study on compensation for illness and injury remains unperceived whereas similar but rather speculative assumptions on naming/blaming/claiming mechanisms by William Felstiner et al. (1980) are quoted everywhere. The Harris et al. (1984) study – one of the

finest examples of empirical research in the civil law area – is practically unknown and never mentioned in sociology of law textbooks or readers. The same is probably true for the civil litigation research project carried out by our colleagues in the Wisconsin law school (Trubek et al. 1983) which is less known for its data than for some theoretical discussions. In legal literature – if there is exceptionally a cross-disciplinary interest – this bias in favour of non-empirical socio-legal production is even more pronounced. Catchwords like reflexive law or interlegality, conflicts as property, colonisation of the life world or constitutionalisation appeal the legal audience without their empirical substance being sought or questioned.

My own experience will be divided into two areas of empirical research where one expects a different demand and a different use: academic research and policy research, the latter being commissioned by policy makers like the EU commission, state administrations or parliaments. The bottom line is that this expectation proved wrong: a serious use of our data could be observed neither in the academic nor in the policy arenas. Whereas my policy research has been systematically evaluated previously (Gessner 1984b), the use of my academic research data will be briefly referred to here for the first time. Of course, both evaluations are discussed with the disclaimer that the author may not be aware of some of the uses of his publications. This may – despite the opportunities offered by the electronic search machines - in particular be true of the use of empirical data of academic research in the class room but also of the potential use in other disciplines.

My academic research data dealt with international conflict resolution among the American republics during the course of a century (Gessner 1969), with the modes of private law conflict resolution in Mexico (Gessner 1976, 1984a) and with cross-border claims in German first instance courts (1996). Theoretical ideas discussed in these publications got sufficient feedback, but I am not aware of a single publication making an effort to understand, discuss or question the empirical parts of my books and articles. In particular the Mexico study could have been used for current reform discussions of the Mexican judiciary and the study on cross-border cases in German courts seems highly relevant for Private International Law. The same people who constantly deplored the lack of empirical knowledge refrained from reading the books in their library.

My policy research was carried out with a large group of socio-legal researchers at the Max-Planck-Institute for International Private Law and Comparative Law in Hamburg and within several empirical research teams at the Centre for European Legal Policy at the University of Bremen. We dealt – among other smaller studies – with the practice of German bankruptcy proceedings, the practice of unfair dismissals in German enterprises and labour courts, the practice of workers compensation after closing down of bankrupt firms, the practice of consumer credit and the costs of cross-border consumer litigation in all EU member states. Most of these studies caused enormous public attention in the media and the German federal parliament, and they met the highest satisfaction within the public administrations which had commissioned and financed the research. But as far as we are aware of the legislators did not – with one exception – draw conclusions from those incredibly rich data and in no case we were asked to do secondary analyses of the material in order to clarify more specific aspects. The exception I just mentioned was the workers compensation study which finally determined the average amount of compensation after dismissal chosen by the legislator. One single figure influenced German legal policy – one out of millions of painfully collected data. Our research

became in most cases quickly outdated when the legislators took action and introduced statutory changes.

After this experience I discourage my students to specialize in empirical socio-legal research and particularly policy research. It would be irresponsible to lead them into this cul-de-sac depriving them of academic career opportunities or recognition on the professional labour market. Personally, with one exception (Gessner 2011) I haven't done empirical research for legal policy purposes during the last decade and instead turned to contributing to our rather speculative form of socio-legal discourses. This is much easier, less expensive and more rewarding. The same consequences seem to have been drawn by all members of my various research teams and by the institutions where we worked or which were our partners in public administration: none of them keeps doing empirical research. Valuable information on legal practices in the civil law and civil justice areas so forcefully and convincingly requested by the British Inquiry is there at anyone's disposal but remains in our libraries completely unread and unnoticed. It is an illusion to believe in the rationalization and critical evaluation of law by way of empirical research.

Although disillusioned and sceptical I still believe in our responsibility to improve the opportunities for empirical research. A potential remedy would be a mandatory course *How to use the social sciences* which substitutes for a course *How to lie with statistics.* Also, the ability to use empirical data could be made a prerequisite for law school appointments. In the Mexican seminar I've suggested steps toward internet transparency of empirical data on the administration of justice (Gessner 2011). Obviously, such remedies would not go far enough. What I would like to recommend is to prepare another report and to write a second volume of the Nuffield Inquiry which deals with the precarious demand side of empirical research on law.

If it turns out that the demand for socio-legal studies remains precarious everywhere the only consequence is to substitute our policy orientation for a theory orientation. It was tempting but largely unsuccessful to offer empirical data for changing the law and for improving legal institutions and legal education. More modest but more rewarding is the adoption of the standard research model practised in most areas of the social sciences: empirical research for the development and the testing of theoretical propositions. Sociology of law should become a more autonomous discipline.

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