

Review

Denis J. Galligan: *Law in Modern Society*, Oxford, Clarendon Press, 2006, 380 pages

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This is the second time that Clarendon Law Series publishes a book on law in society. The first book, entitled *Law in Society*, written by the Australian scholar Geoffrey Sawer, was published in 1965, when socio-legal research was still enjoying the innocence of early years. The second book, *Law in Modern Society*, is published against the background of a much richer and diverse body of socio-legal research, part of which has been accumulated over the last four decades.¹ Denis Galligan, director of the Centre for Socio-Legal Studies at Oxford, suggests in the preface to this second book that »the recognition of law in society as a discrete subject is proper and timely«, for law-and-society is no longer a branch of law or political science, anthropology or sociology (p. x).² Instead, it has progressed and become a tradition of research with »its own subject of study, its own methods and its own literature« (ibid.).

Developing Hart's The Concept of Law

Galligan is deeply influenced by Herbert Hart's work and his project can be partly described as uncovering the potentials of Hart's theory of law for socio-legal research. In order to perform this task, Galligan pilots Hart's *The Concept of Law* in the direction of socio-legal theory through what remain for many social scientists the uncharted waters of jurisprudence. For example, Hart argued that the minimum requirements for the existence of a legal system are satisfied »as long as officials accept the law as binding and act accordingly«, thus implying that law did not require the acceptance of the people (p. 128) who

1 Roberto M. Unger published a book with a similar title in 1976. Unger's book carries, however, the subtitle »Toward a Criticism of Social Theory« which indicates a closer engagement with social theoretical issues and debates than what we find in Galligan's book.

2 Galligan uses »law-and-society« to refer to law and society research.

are to obey the law. Hence, for the legal system to operate, we only need to ensure that officials »accept« and adopt the internal view of secondary rules, while citizens »obey« the primary rules. As a result, Hart relegated »citizens to the sidelines« (p. 121). Being concerned about the democratic and analytic implications of neglecting the role that citizens do in fact play, and ought to play, in legal processes, Galligan takes on the challenge of empowering the citizens and restoring them to their proper position (p. 122). Without abandoning Hart's legal theory, he sets out to demonstrate that the analytical distinction between the attitudes of officials and those of the people does not withstand close scrutiny (p. 128). It is not only officials, but often also the citizenry which accepts the law and treat it as binding on theirs and other people's actions. The notion of obedience becomes inappropriate when parties use the law voluntarily, for example to establish contractual relationships. Their very choice and use of law is in itself an evidence of their acceptance of it. This is how Galligan unpacks many of Hart's ideas demonstrating their relevance to law-and-society, but also making them receptive to socio-legal analysis.

From Rules to Rulings

As part of this attempt to bring Hart's ideas to bear on socio-legal theory Galligan uses a handful of anthropological and historical studies (mainly of Roman Law) to venture beyond the analytical boundaries of Hart's jurisprudence. At the risk of oversimplification, Galligan's theoretical framework may be described in terms of six consecutive levels of analysis:

- 1) Law is made of rules, but it is more than rules and it did not historically start as a collection of rules.
- 2) Systems of positive rules belong to advanced legal orders – traditional societies are, on the other hand, based on conventions and shared understanding. By moving »backwards from rules to rulings«, we can identify »law in its most elemental sense... as the expression of primary relations among the members of society« (p. 47).
- 3) Certain acts like marriage and contract are simply legal and recognised as legal acts in all societies including the primitive ones.
- 4) Law started when »rulings« were made in regard to these legal acts.
- 5) Rules were then eventually deduced from these »rulings« (legal rules are rationalised versions of the original »rulings«). In that sense, legality is an intrinsic characteristic of all societies but is manifested as a social fact once »rulings« are made in respect to legal acts.
- 6) The original legal act is a social act and continues to provide the basis for interpreting and enforcing legal rules. Hence the »social« context in which law should be analysed consists of its original legal context.

This theoretical framework perhaps explains why Galligan starts the book by unfolding Hart's views on legal rules. Starting with rules, he moves on to search for the social context of law, developing the role of the »social sphere« which contains rules, conventions and practices but also the basis for meaningful social action. He then goes on to discuss the issues related to the reception and coercion of law and explains how the architecture of law, i.e. »the detailed manner in which laws are expressed« (p. 139), interacts with the social sphere and how this interaction is decisive for making sense of the mechanisms of implementation and compliance.

From a methodological standpoint, law-and-society should, according to Galligan, start with those features of law which are »relevant to the actions of citizens and officials... and examine meanings attributed to such features by citizens and officials, and the action that follow« (p. 36). On top of the list of such features we find legal rules, but there are other normative factors such as law's contribution to »social goods« which might direct the actors' actions. This does not mean that law-and-society should limit the scope of its analysis to the study of individual actions. Far from it, it needs to examine how »social spheres« interact with law while paying special attention to law's moral and pragmatic foundations.

The Social Context of Rules

Starting our analysis with rules is justified because according to the theoretical framework sketched above law consists of rules, but also because rules are one of the features of modern legal orders that we can identify as relevant to actions of citizens and officials. Judges, officials and others who participate in legal processes express themselves in terms of, or by reference to, rules. More importantly, Galligan argues that rules defined as »conventions« are constitutive of many organised activities. This does not mean that such activities as chess, tennis or law consist entirely of a set of rules, but that once you decide to play chess or tennis, or get involved in law, whatever your reason for doing so, you commit yourself to the conventions that make up these activities. Rules in general, whether social or legal, are standards which guide action in a specific manner. They are also standards against which action can be assessed and judged. Legal rules in particular provide »a general standard which is applied in particular cases without having to reassess the merits in each case; predictability and stability result« (p. 50). However, they are expressed through language and, therefore, have an open texture which allows the outside factors to affect their interpretation and application. Thus, even the clear and precise rules are contextual and contingent upon surrounding considerations (p. 54-5).

The recognition that all rules need to be interpreted before they make an impact on social life is of little value if it fails to consider the full extent and significance of contextual contingencies of rules. Social and legal rules often signal that »a certain kind of deliberative process has to be gone through, a process of which the rule is a vital but not conclusive part«. Deliberations are required to determine if a specific rule is applicable in a particular

situation, and if it is, what it means. For example, »it may require consideration of related rules, the weighing of presumptions, and the consideration of factors to take into account« (p. 57). In short, rules are the starting point of deliberations and as such neither dictate fully what action should be taken, »nor exhaust the range of actions that may be properly taken« (p. 57).

What happens to the legal rules, whether they are adopted, enforced, alternatively modified, or marginalised, depends to great extent on the institutional settings in which they are used. Institutions consist of rules, but also of values, standards, dispositions etc., which are created once people »come together to carry out some activity« (p. 106). Galligan explains that »where an activity is itself created by legal rules, as in the case of administrative agencies, say, informal rules often emerge in order to interpret the legal rules, or even to modify or marginalise them« (p. 108). But is this not what Philip Selznick demonstrated over half a century ago in his study of the Tennessee Valley Authority?³ To go beyond Selznick's classical wisdom, Galligan turns to an unlikely ally, Niklas Luhmann, to explain that practices which underpin specific social spheres and activities can become self-contained, i.e. normatively closed.⁴ This means that once social systems import ideas from their environment, they translate them into their own operational logic: »law for instance, can influence what happens within psychiatry, *but only if* [legal activities which take place in the environment of psychiatry] are translated into its [i.e. psychiatry's] language, meanings, conventions, and understandings« (p. 110).

Taking Law seriously

If law consists of norms of organisation which precede official state law, why do we need legal rules to coordinate social relations (p. 193)? Only once we take law seriously, i.e. recognise that »law is itself a distinct social formation with its own character and features« which »in the course of its interaction with other parts of society... neither collapses into them nor becomes part of them« (p. 6) that we start to discover the added value that the state law brings to social norms of organisation. Taking law seriously, we can examine how it contributes to »positive pursuits of social goods« (p. 196) by, on the one hand, facilitating private arrangements, imposing criminal sanctions, regulating private activities (p. 194) and, on the other, by removing discrimination, protecting human rights and creating

3 See Selznick, 1949. This type of reasoning is deeply rooted in the sociology of law and can be easily traced back to Roscoe Pound and Eugen Ehrlich.

4 For Galligan to borrow ideas from Luhmann is like for Hart to borrow concepts from Kelsen. To add to this oddity, Galligan oversimplifies Luhmann's work in several places dismissing it as defective. Galligan, for example, compares Luhmann's normatively closed and cognitively open social (meaning) systems to »internal electric networks« (p. 38).

a global order (p. 196). Galligan mentions in passing that law is an instrument of power and can »fall into the hands of special interest or be the engine of cruelty and oppression« (p. 193), but does not explain why it has been historically implicated in perpetuating inequalities by acting as the vehicle of slavery, apartheid, ethnic cleansing and genocide. He focuses on how law is used »to advance the good of society« (p. 193) and goes on to discuss the limits of implementation and compliance in terms of the design of legal regimes (p. 299) and the actions taken by the officials who are responsible for bringing about compliance (p. 229), but does not ask why abuses of human rights, racial, ethnic and gender discrimination continue to persist in modern societies despite the fact that they have been prohibited in national and international law. In his enthusiasm to expose the weakness of legal pluralism and critical strands of law-and-society, Galligan forgets that many of these »social goods« remain largely unfulfilled promises.

On this point, on law's relationship with forms of inequality, Galligan might find himself at odds with mainstream law-and-society scholarship. Law and Society movement, especially as it has developed in North America, tends to address issues of justice by focusing on »marginalised groups, peripheral institutions, deviant behavior« (Abel 1980, p. 827). The movement's commitment to social justice leads many of its scholars to question law's hegemony, and its internally generated values such as the belief in the rule of law and the objectivity of legal reasoning. Law and Society scholars often regard law as an integral part of most social relationships, yet when conceiving of the relationship between law and social forces, many of them frequently conceptualise law as a »residual category« (Sarat 2000, p. 195). This is also why many of these scholars favour a methodology which is different from the one propagated by Galligan: they do not often start their studies by examining how legal rules are interpreted and enforced, but by asking how ordinary men and women view, conceptualise, use and experience the law.

Taking the Constitution of Society Seriously

Galligan writes at length about enforcement, implementation and compliance which require him to pay close attention to the social basis (or sphere) of action and the environment of law, but he discusses these issues from a vantage point internal to law. He also appears to be questioning the rule model as the sole means of deciding legal cases by emphasising that rules provide the starting point for »deliberations«. Yet he stops short of breaking down his notion of »social sphere« or »deliberation« into their constitutive social elements, i.e. into social interaction, communicative action or practices, practices which use legal rules as one among many available resources to produce and reproduce social structures over time. This has two interrelated consequences for Galligan's analysis: 1) rules remain the determinant, though not the sole, factor for guiding and evaluating social action and 2) the source of legal rules' normativity and causal power –i.e. how they are causally linked to human action– remains unexplored. In effect, Galligan is observing and

describing the *social functions* of legal rules in relation to legal decision-making rather than their *role* in the larger scheme of the dialectical relationship between law and society. Galligan tells us about how officials within an organisation interpret and apply the relevant rules, but he does not thoroughly explore *why* they regard these rules as binding to start with. One reason for this is that Galligan ultimately subscribes to the understanding of law in terms of rules and, thus, cannot acknowledge that rules are not the unit of *social* analysis of law, legal behaviour or legal institutions. To understand why officials regard legal rules as binding, we must go beyond the rules and search for the social psychological context of their professional and institutional practices. Such an analysis requires stepping out of law and into mainstream social theory.

Had Galligan searched for the social psychological mechanisms which underpin »deliberations«, make »the original rulings« possible, or oblige officials to accept legal rules as binding, i.e. had he searched for the causal link between rules and human perception and action, he would have reconsidered the usefulness of treating rules as the primary focus of his analysis. He would have instead stepped out of law and started his analysis with the study of forms of micro (face-to-face) and macro (discursive) social interaction or practices through which values, rules, norms, relationships, conventions and customs emerge and develop over time. But then it would have meant taking the constitution of society seriously.

Concluding Remarks

List of points on which I can take issue with Galligan can be made longer. My questions reflect my own disciplinary approach which is somewhat different from Galligan's and, therefore, might or might not provide a basis for evaluating his overall contribution. I am in agreement with Galligan that to explore law one needs to pay special attention to the social context against which it is interpreted and enforced. However, and this is where Galligan and I part company, in order to explore the social context out of which law emerges and upon which it remains dependent for its sources of validity and authority, we need to take social theory seriously.

Law in Modern Society is a study which pursues a clear line of enquiry through seventeen carefully argued chapters in a coherent manner. It is a systematic effort to interpret, clarify and develop Hart's ideas in such a way as to throw light on socio-legal issues while demonstrating the inevitability of social analysis in the study of law. Those who seek a contextual grasp of Hart's ideas and, thus, also a deeper engagement with the central theme of his analytical legal philosophy will find much in Galligan's treatment of law-and-society which is stimulating and inspiring. Those who seek »radical« (e.g. postmodern, feminist or critical) ways of viewing, describing and analysing law might, on the other hand, find little in Galligan's analysis which will readily facilitate their quest. Galligan's *Law in Modern Society* does not cater for »radical« taste by, for example, questioning the gendered nature

law and legal reasoning. By taking law seriously, Galligan does, nevertheless, explain how a fragmented set of practices is socially constructed through the legal discourse of a dominant section of the legal profession as »a distinct form of life« (p. 353). In this sense, Galligan makes a valuable contribution to the study of law, but also to law-and-society, a contribution which is hardly captured by this review.

References

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