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Sommaire

A Social Account of Law

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Questions and approaches

1. My object today is to present a social account of law. This is not a new activity, since the study of law from a social point of view has a long history, not only in sociological jurisprudence and the sociology of law, but also in anthropology, economics, and psychology. I want to suggest that there is now a reasonably distinct discipline of socio-legal studies or law-and-society, and my analysis is presented within that discipline. It naturally calls on and gains from other disciplinary approaches.

2. A social account of law is concerned with how law works in practice in society. This in turn means how law affects people in their actions, how it influences behaviour.

3. The traditional approach is to regard law as a coercive order in which a sovereign body issues commands to the people, which are supported by the threat of sanctions for non-compliance. Bentham and Austin developed this approach in Britain, while it was also common to the very different approaches of Max Weber and Hans Kelsen in continental Europe. This approach fits well with the modern state *and* its claim to final authority over other social associations.

4. Contemporary jurisprudence has moved away from the sovereign-command approach. While the coercive character of legal systems remains a fundamental feature of a legal system, the emphasis falls elsewhere. Two quite different traditions come together here.

5. *One* is that of jurisprudence, or legal philosophy, where law is viewed as a system of rules, particular kinds of social rules. Here I refer to the work of H. L. A. Hart in *The Concept of Law* (1961) who has been influential in the Anglo-American world. Rules are of different kinds, some imposing duties, others conferring powers. Legal rules unite to form a distinct system which is defined by acceptance of a rule of recognition, a kind of master rule. So, legal rules are social rules, but they are special kinds of social rules. And of course one of their features as social rules is that they contribute to the organization of the life of a society.

6. The *other* approach has quite different origins. It is well-expressed in the work of Douglass North, the Nobel-Prize economist, who studies the role of *institutions* in explaining economic activity. According to North, in such books as *Institutions, Institutional Change, and Economic Performance* (1990), institutions have a major place in the understanding of economies and, in particular, in explaining economic success. In an environment of limited information and knowledge, institutions provide a sta-

ble structure for human interaction. The virtue of institutions is that they reduce uncertainty. They provide, in other words, the framework within which specific economic activities are conducted. North's claim is that the significance of institutions to economic activity has not been properly understood. That claim could be extended beyond economics.

7. *Institutions* are composed of sets of rules which guide the conduct of activities. They can be formal or informal. Social norms usually arise informally through practice, while rules formally laid down, of which law is a good example, constitute sets of formal institutions. They are formal in the sense that the rules are deliberately formulated and made binding. North distinguishes *institutions* and *organizations*, the former being the rules governing an activity, the latter being the association of persons who come together to pursue the activity.

8. Bringing the two approaches together helps us to identify the direction a social account of law should take: *first*, what kind of institution is a legal system, and *second* how does it guide the actions of individuals and groups.

9. Hart emphasized two aspects of law; rules and officials, for it is the officials who play a decisive role in accepting a legal order and ensuring its continuation. Law also of course is directed at other groups, groups of non-officials, those who use it for a multitude of purposes or whose activities are restrained by it.

10. These then are the two issues I wish to consider here: the nature of law as an institution and how it influences behaviour, or more accurately to provide a structure within which to study how law influences behaviour.

Law as a social institution

1. Here there are two ideas: *first*, laws are social rules, and *second* a legal system is a collection of social rules which have distinguishing features.

2. Social rules Why is this important? The answer is that the characterization of laws as social rules is more accurate than laws as commands. Seeing law as types of social rules enables us to see how rules affect behaviour. That after all is the point of laws – to affect behaviour, to induce people to act in ways they would not otherwise. As Hart says: rules are standards according to which people act. Without understanding them as such, we would miss out on or fail to notice "a whole dimension of social life" (Hart). Hart was drawing on two major influences.

3. One was Weber whose work Hart knew, although he makes no reference to it. For Weber a social act consists in the meanings people give to their actions. Since people regard social rules as binding on them and act accordingly, they are plainly of importance in understanding both the life of a society and the place of law within it. The other influence on Hart was a little book published by another philosopher, although from Cambridge, Peter Winch. In *The Idea of the Social Science and Its Relation to Philosophy*, Winch argued that: "all behaviour that is meaningful is *ipso facto* rule-governed". Winch's book, published at the time Hart was writing his, the late 1950's, was enormously important in philosophy and the social sciences in Britain at the time[1]. If social action is constituted by rule-governed behaviour, then it must also be the case in respect of law. So, the study of law as a set of social rules is likely to be the best way of understanding both its nature and its social significance.

4. Social rules have certain qualities which I shall mention without elaborating. *First*, they are standards directing action and against which action is judged; they are the basis for explaining and justifying one's own actions, and for judging and

criticizing those of others. *Second,* rules create obligations and are binding on those to whom they are directed. *Thirdly,* certain kinds of attitudes accompany rules, namely, people have an *internal* point of view to them, meaning that they accept them as binding; this is what we mean by rules. Hart made much of this internal point of view and opposed it to the *external* point of view, that is to say, the point of view of someone who obeys the rules just in order to avoid sanctions. This is a problematic distinction, but I shall not go into it here. *Fourthly,* the fact of acceptance of rules is to be distinguished from the reasons for acceptance. In a mature legal system, there is a high level of common acceptance of the law by both citizens and officials, although the reasons for doing so can be varied. And *finally* rules occur in many different contexts – clubs, associations, informal associations, families, and so on. The contexts differ, but the character of rules remains the same. A legal system is just one set, or a series of sets, of social rules of a special kind.

5. Rules can be of different analytical and social kinds. Hart made a distinction between *duty-imposing* rules, which he called primary rules, and *power-conferring* rules, which he called secondary. In other words, rules not only *require* us to do things, they also *empower* us to achieve certain ends. This is important for both officials and citizens; officials have a wide range of rule-conferred powers to order society; citizens have a similar range of rule-conferred powers to order their own affairs.

6. Law as a system of rules In order to identify legal rules and distinguish them from other social rules, we need to see them as part of a system of rules. Here Hart introduces the idea of a *rule of recognition* or master rule. The rule of recognition refers to the constitutional arrangements which a society accepts and according to which law is recognized as law. In the UK it would be something like: the Queen-in-Parliament may enact legal rules, or in France something rather more complicated, taking account of the law-making powers of the assembly and the President. These arrangements, which can be quite complex, serve several ends: they determine what is law and what is not; they link laws together to form a system; and they confer the authority of law on rules made according to them.

7. The rule of recognition is a social convention or set of conventions that the officials and citizens of a society in fact accept. Hart gives special importance to the role of officials, but many would wish to extend that to citizens. Being a social convention, the rule of recognition is a special kind of rule; it is based on actual practice and does not derive its authority from some higher rule. It is the ultimate rule in a legal order.

8. The rule of recognition has stimulated extensive debate. Among the questions that are most often asked are: How can a social practice be a rule? Why should we assume that there is one rule of recognition, or that a legal system has a rule of recognition at all? Ronald Dworkin, Hart's successor in Oxford, argues that some laws in the form of *principles* are not made in accordance with the rule of recognition, and yet are regarded by officials as binding legal principles. We need not enter into these debates here, except to say they occupy a good part of contemporary Anglo-American jurisprudence.

Critique

1. Law as social rules is a broadly accurate description of modern legal systems. Law tends to be positive, formulated by a law-making body, and expressed in general rules. It is often said to be relatively autonomous in the sense that legal rules are

separate from other rules and practices, including moral, political, and religious. Autonomy is of course a matter of degree, but is nevertheless in general a central feature of modern legal systems.

2. This idea resonates especially well in the jurisprudence of continental Europe where codes are familiar. In a recent piece of research concerning the administrative courts of Poland, I found a dazzling example, with Polish judges thinking of themselves as *speaking the law* or simply *mouthpieces of the law*. But as always generalizations are risky; the jurisprudence of the *Conseil d'Etat*, for example, could easily be mistaken for that of a common law court.

3. The English philosopher and jurist Jeremy Bentham could be the icon of modern law. For law is, in his view, simply an instrument for achieving social ends. Whatever ends a society wishes to achieve, law can be a useful instrument for achieving them. It is purposive and goal-oriented, the realization of which often requires changing social behaviour. This is of course much too simple a generalization, since much modern law, especially private law, is directed at reinforcing existing patterns of behaviour and social norms, rather than changing them. The opposite is the case with the other major part of modern law, namely, *regulation*. Regulation is not a precise term, and arguably all law regulates in some sense. If it is confined to more plainly goal-oriented law, law directed at achieving certain social goals, then it is useful in demonstrating a major part of modern law. For regulation then refers to law which seeks to control, re-direct, restrict, and even prohibit activities that are otherwise lawful and legitimate. This is the modern face of law.

4. Three points of critique of law as rules. *First,* law need not necessarily take the form of rules. We know from anthropological studies that law in some communities, especially those lacking a developed state apparatus, are often expressed in understandings and expectations, conventions and traditions, rather than positive rules. Basic social relations constitute legal relations according to conventions and understandings, and do not need formal rules. The English Common Law, especially in its formative period, was less concerned with rules and more with deciding disputes according to customary understandings and conventions.

5. Secondly, even modern, positivist legal orders are only partly rule-based, if we take rules in the sense of fairly clear directions. An equally important feature of modern European legal systems is the proliferation of general standards rather than tight rules, standards deriving from varied sources: Constitutions, the European Convention on Human Rights, the Treaties and jurisprudence of the EU, the Charter of Rights of the EU, and a mixture of other international conventions. *Standards* are general, abstract, and open-textured, requiring more than interpretation; requiring in addition a process of reasoning that necessarily reaches far down into the understandings and values of a society. And if to standards is added the common reliance on discretion, where officials are given authority to act with only the barest guidance, then the adequacy of rules as the foundation of a modern legal order is apparent.

6. Thirdly, even the most precise rules have to be interpreted, a process which depends on the social context in which the rules occur and which draws on the conventions and understandings that prevail with it. Rules are contingent on their social context, which in turn provides the occasion for rules to be modified, refined, and even suspended according to the components of that context. Here we see the interplay between positive legal rules on the one hand, and spontaneous associations and formations on the other hand.

7. On the basis of these matters, some schools of jurisprudence are sceptical of rules, even to the point of denying their place in a legal order. Scepticism of more formalist accounts of law is warranted, but abandoning the notion of rules is not. Legal rules of different kinds are all round us, the task being to understand how they work in social situations, not to abandon them.

Social spheres

1. Some accounts of law are content to identify and describe the features common to legal systems, a process familiar in many forms of social enquiry and often referred to as *mapping*, being analogous to the mapping of a geographical domain. Mapping is a good way to start, but plainly not enough. It is now taken for granted that social enquiry must also take account of the actions of those engaged in the activity. Rules are a good example: the formal qualities of rules can be analysed, but unless we examine the role they have in people's lives, our understanding of rules would be very limited. This was Hart's point in placing emphasis on the internal aspect of rules, meaning the way they are accepted by those to whom they are directed and how they guide their actions. Hart could have borrowed this directly from Max Weber.

2. The combination of these two methods, mapping and the actions of officials and citizens in response to law, reveals a good deal about the social character of law. But not enough: we also need to understand from what position or point of view officials and citizens deal with or receive the law. The Weberian/ Hartian model assumes individual persons receiving and deciding how to deal with law. But people are already heavily socialized, meaning that they come to the law not as open-minded, rational beings, or not wholly so, but as persons who occupy different social positions and arenas in which their views of the world are formed.

3. The idea can be expressed in various ways: institutions as rule-governed contexts we have already seen; social arenas and social contexts, practices and traditions, networks and associations, are other possibilities. I prefer the notion of *social spheres*. A social sphere may be described as an area of activity in which the participants share understandings and conventions about the activity, and which guide and influence the way they engage in it. Social spheres also tend to influence the way those within it view and respond to matters outside their social spheres. In grasping the notion of social spheres, guidance can be taken from the study of institutions. Douglass North defines *institutions* as: "the rules of the game in a society or, more formally, […] the humanely devised constraints that shape human interaction"[2]. He adds: "institutions are the framework within which human interaction takes place".

4. Here we are back to the idea that all social activity is rule-governed; but not quite, an important difference being that instead of rules in any strong sense, social spheres should be regarded as having a more complex and diverse normative structure than *rules* suggests. Conventions and understandings, practices and traditions, and shared expectations, all help better to grasp the normative structure of social spheres.

5. Social spheres are not only normative; they are also both *cognitive* and *regulative*. W.R. Scott describes the cognitive dimension as: "the frame through which meaning is made"[3]. Think of psychiatrists, or lawyers, or other professions, each with a deeply embedded view of their professional activity and of the outside world. Studies of attempts in Japan to open the male-dominated workplace to women met with impossibly strong resistance from employers and male workers, according to whose culture and practices women had no place at work. This culture was so deeply embedded

that one commentator was led to write that the diversity and flexibility that women and other minorities would introduce, would not only need fundamental changes to the workplace, but would: "threaten to destroy the social and psychological basis of Japan's political stability and economic success"[4]. I wish to suggest that we live our lives in a complex of social spheres, which vary in their density, and which influence our thoughts and actions to greater or lesser degrees.

6. Why are social spheres relevant to a social account of law? The answer is that individual persons, groups, and associations normally encounter law from the perspective of one or other social sphere. How then they approach the law, understand it and respond to it, are influenced significantly by those perspectives. Let us also return for the moment to the notion of law as rules and social context around rules; it can now be seen that the social context is significantly constituted by social arenas from within which their occupants perceive and respond to law. Laws are projected into a social context which is already structured, to varying degrees of intensity, by norms and understandings.

Reception of law

1. Law can be studied as a set of doctrines, the object being to understand the doctrines, how they relate to each other, and whether they form a coherent whole. That is what academic lawyers or jurists (as they are sometimes called) do. Legal philosophers study law from a philosophical perspective which means identifying and analysing the concepts of which it is composed. In both cases the object of study is the law itself or the concepts that constitute law and legal systems; neither case is concerned with the social character of law. When we turn to that perspective, the issue is: how does law work in practice, which is to ask: how does it affect and influence behaviour. If it did not affect or influence behaviour, it would be of no interest.

2. I would like to suggest that we now have the components necessary to formulate a structure or framework within which the effect and influence of law and behaviour can be understood and studied. I shall conclude by assembling the components and showing how they form a useful framework for analysis and research.

3. First, we have seen that the rule of recognition is the foundation stone of a legal system. Remember it is the master rule according to which we know whether rules are law or not. Hart claims that, in a mature legal system, the officials accept the rule of recognition as binding and act according to it. It is enough on his account if citizens obey. The last point seems to me mistaken, since it is a feature of a mature legal system that citizens also accept the system rather than merely obey it. But leaving that aside, the more important point is that acceptance is not an all-or-nothing matter, so that you either accept or not. On the contrary, I suggest that *acceptance* is a variable quality, hat both officials and citizens accept to a stronger or weaker degree. Variable levels or degrees of acceptance seem to be a feature of rules.

4. However, it is a feature of a mature and stable legal order that officials, and I would add citizens, accept the rule of recognition, accept in other words the legitimacy and the bindingness of the legal system as a whole. Acceptance is built into the structure of their social worlds. Here a contrast may be drawn with non-mature legal systems such as Russia in its post-soviet phase.

5. Secondly, having accepted the rule of recognition, both officials and citizens recognize the legitimacy of specific laws made in accordance with it. They have a good, initial reason for accepting specific laws. However, here acceptance of specific laws is

more variable. For specific laws will vary in the extent to which they are compatible with the social spheres from which different groups view them. The law in some areas is compatible with social spheres, its object being merely to strengthen existing arrangements and practices. Much of the law relating to private transactions is of that kind; the law of contract, for example, gives added stability and security to arrangements we would enter into anyhow. In other areas the law seeks to change existing social relations and practices; this, as noted, is the point of regulatory laws. They place constraints on otherwise natural and legitimate activities. The potential for competition even conflict with social spheres is obvious.

6. This leads to the *third* variable, the law itself, or what is sometimes called its design or architecture. When social scientists look at law, they tend to see it as a whole, as one undifferentiated mass. This is a mistake, for law needs to be divided into different categories and types. The difference between duty-imposing and power-conferring is one. But other differences are equally important, between for example: laws strengthening private transactions, laws punishing certain activities (criminal law), laws regulating legitimate activities (regulatory law), laws restraining officials, and international laws trying to control nation states.

7. Even within these categories, numerous variables affect the character and force of law. These include such matters as: whether the structure is clear-line rules, general standards, or open discretion; what rights, duties, liabilities or immunities are provided for; what are the mechanisms for implementation and enforcement, which organizations are involved; what remedies and recourse are provided and how adequate are they; and what constitutional and other constraints are imposed. And so on. The position is made more complicated by there often being gaps and uncertainties, inconsistencies and contradictions in the legal design. The point is that just as the practical workings of a building depends on its design, the same applies to law.

8. Fourthly, legal design creates a legal environment in which officials or citizens must decide how to act with respect to the law. Laws designed in this way provide what Durkheim referred to as social facts; around those social facts, people must decide how to respond. This I refer to as the environment of law. For example, if the law confers a discretion, those responsible for implementing or complying must decide what factors are relevant to its exercise. Another example is where the laws are so complex, overlapping, and possibly contradictory, implementing bodies have to make sense of them. A study of inspectors of fishing off the coast of British Columbia found the regulations too complex to understand or implement. The inspectors adopted a highly simplified understanding and proceeded on that basis.

9. Finally, there is the wider social environment within which an area of law occurs. Here law confronts most directly the social spheres from within which officials and citizens view it. The two may be compatible, but often are not, so that a quite complex process of adjustment, compromise, and possibly confrontation is initiated. English psychiatrists had difficulty internalizing laws protecting the rights of mental health patients, because they directly conflicted with the practice of psychiatry according to which a sick person has to be treated. The Japanese workplace culture rejected the rather weak laws seeking to introduce women and minorities. The social world is littered with laws that are rejected, rendered ineffective, or only partially implemented, and we now see why.

Conclusion

Returning now to my original objective, it was to provide a social account of law. Naturally, this objective could be pursued in different ways, according to different methods. The advantages of the approach set-out here is that it combines a theoretical structure which is justifiable, and which draws on empirical research, as well as opening up new lines of enquiry ■

Denis J. Galligan
Centre for Socio-Legal Studies, Oxford University

1. In a later edition, published many years after, Winch retracted the stronger claims he made about social rules and meaningful behaviour: see second edition 1990.
2. D. North, 1990, *Institutions, Institutional Change and Economic Performance*, p.3
3. W. R. Scott,1996, *Institutions and Organizations*, London
4. F. K. Upham, 1989, *Law and Social Change in Post-War Japan,* Harvard

DÉBAT

Questions posées à l'issue de l'exposé

***Question** : Existe-t-il un lien entre la loi et l'éthique, entre les systèmes juridiques et la morale ? Les systèmes juridiques partagent-ils une morale commune ?*

D.J. Galligan : Les exemples empiriques ne manquent pas pour montrer que ce n'est pas nécessairement le cas. Le régime de l'Apartheid par exemple, n'était pas compatible avec le respect des droits de l'homme. De même, si l'on s'intéresse à la façon dont les systèmes juridiques des pays musulmans intègrent les principes des droits de l'homme, on s'aperçoit que ceux-ci sont traduits de façons très variées.

***Question** : Peut-on trouver un critère de hiérarchisation des différents systèmes juridiques ?*

D.J. Galligan : Chercher à évaluer un système juridique comporte le risque de se faire le représentant de ses propres valeurs morales. L'attitude compréhensive est plus prudente, même si elle ne permet pas d'évaluer, en tant que tel, les systèmes les uns par rapport aux autres.

***Question** : Prêter attention aux pratiques est très intéressant. Avez-vous des exemples qui montrent comment vous vous y prenez ?*

D.J. Galligan : Nous avons mené par exemple beaucoup de recherches sur la régulation de la pollution. Dans ce cadre, nous cherchions à observer comment le fonctionnaire chargé du contrôle remarquait qu'il y avait un problème, et quel était le type de contrôle qu'il exerçait concrètement. De même, si l'on s'intéresse au droit au soin médical, il est intéressant de se demander concrètement ce que cela signifie. Pour cela, nous avons cherché à comparer la signification de ce droit, dans deux contextes sociaux différents.

La portée de ces observations réside dans la plausibilité de l'image que l'on peut produire après l'observation. Même si nous ne pouvons être sûrs, cela n'empêche pas de généraliser. Le

processus de nos recherches consiste à faire émerger des cadres de compréhension, à partir de nos différentes recherches. Beaucoup de pays ont par exemple adopté des lois établissant un droit pour tout citoyen à des soins médicaux. Nous étudions comment ces lois sont mises en pratique dans des cas extrêmes, comme les aborigènes en Australie ou les habitants isolés au Canada. Comment les fonctionnaires interprètent-ils la loi dans ces cas-là, comment un droit abstrait se traduit-il en pratique ? Ce sont les questions que nous nous posons.

> ***Question*** *: Une série de trois questions relatives à la notion* d'acceptance. *Comment concevez-vous vos recherches empiriques, et pouvez-vous vous dispenser d'une approche statistique ? Quels sont les facteurs de* l'acceptance, *pouvez-vous prédire l'acceptation d'une règle ? Et quelles sont les dynamiques relatives à* l'acceptance *: il semble que ces dynamiques puissent être variées et complexes – une loi qui n'était pas appliquée au début se met à l'être, ou au contraire une loi longtemps appliquée tombe en désuétude.*

D.J. Galligan : Je vais commencer par répondre aux deux dernières questions. On ne peut pas faire de prédiction à partir d'un texte de loi. Il faut spécifier différents groupes, qui renvoient à différentes sphères sociales, et sont dotés de capacités de lobbying spécifiques alors qu'ils vont être affectés par la loi. En 1983, par exemple, le gouvernement de Mrs Thatcher a voté une loi très libérale cherchant à protéger les malades mentaux. Cette loi n'avait pas été mise en avant par les malades eux-mêmes, qui ont un pouvoir de lobbying faible, mais par des associations les représentant. Or, les psychiatres l'ont rejetée. Non pas explicitement, non pas en théorie, mais dans leur pratique quotidienne. Ce sont eux qui décident du traitement que doit suivre le malade, eux qui décident si le malade peut ou non sortir du monde hospitalier psychiatrique. Les psychiatres formaient le groupe le plus directement concerné par la loi et ils n'ont jamais su comment appliquer le texte en pratique. On voit par là comment l'acceptation d'une loi dépend de groupes, de sphères sociales, qui peuvent être en conflit les uns avec les autres (ici les associations et les psychiatres). On ne peut donc pas prévoir l'acceptation d'une loi : il faut étudier les sphères sociales, leurs conflits éventuels, et regarder empiriquement ce qui se passe ; c'est chaque fois une nouvelle histoire.

Nos études empiriques sont qualitatives. Nous les menons en essayant d'étudier différentes situations. En variant les observations, nous pouvons alors voir les interactions, les facteurs à l'œuvre, et mieux comprendre alors l'acceptation ou non d'une loi. Même s'il est impossible de faire des prédictions, l'architecture de la loi joue un rôle. Nous avons ainsi analysé le cas d'une loi sur la pêche au homard en Colombie Britannique. La loi était beaucoup trop compliquée. Il était difficile d'apporter la preuve d'une infraction devant une cour. Les inspecteurs se sont rapidement aperçus de cet état de fait. En pratique, ils se sont défini une version simplifiée de la loi et c'est cette version qu'ils ont appliquée. La loi adoptée en Irlande du nord pour mettre fin aux discriminations contre les catholiques en matière d'embauche était de même nature : en pratique, il était impossible de faire la preuve devant une cour qu'il y avait eu discrimination. Cette loi n'a jamais pu être appliquée. On voit par là que les prédictions sont difficiles à partir de la seule architecture de la loi, bien qu'elle soit importante à analyser : une loi compliquée peut être appliquée ou non. Il faut faire un travail de sociologie des groupes concernés et étudier la manière dont ils vont réagir. Pourquoi les forces de police choisissent-elles de poursuivre certaines infractions à la loi et pas d'autres. Elles sont obligées de sélectionner. La question empirique est : comment opèrent-elles cette sélection ? Il en est de même pour les services fiscaux. Pour revenir à la dynamique. Il y a trente ans, une infraction à la pollution n'était pas sévèrement sanctionnée. Les fonctionnaires hésitaient à mettre des amendes fortes à des entreprises qui assuraient l'emploi local. Désormais, les choses ont changé : il y a une forte pression morale à condamner les entreprises polluantes.

> ***Question*** *: En France, nous considérons que nous allons, à la suite des pays anglo-saxons, vers plus de « judiciarisation » de la société. Est-ce votre analyse ?*

D.J. Galligan : Nous n'avons pas étudié directement cette question. Ceci s'explique par le fait qu'il existe un institut de criminologie à Oxford qui traite de ces problèmes. Pour répondre néanmoins à votre question, les britanniques partagent cette même impression, par exemple que les médecins sont désormais l'objet de procès en grand nombre, ce qui n'était pas le cas auparavant. Pourtant, toutes les études empiriques tendent à montrer que ce n'est pas vrai-

ment le cas, qu'on ne peut pas parler d'une judiciarisation. La hausse n'est pas si claire, si l'on se réfère aux chiffres officiels. Il n'y a pas de certitude. De toute façon, même si c'était le cas, les chances de succès ne sont pas énormes.

> ***Question** : Est-ce que les évolutions technologiques ne minent pas le système juridique qui n'arrive plus à suivre et s'adapter ?*

D.J. Galligan : Je ne suis pas d'accord avec Luhmann sur ce point. Les systèmes juridiques sont au contraire plutôt efficaces pour prendre en compte les questions relativement complexes, comme celles de la technologie. Ils ont une bonne capacité de traduction de problématiques économiques ou scientifiques. Par contre, il y a une autre question importante : quels problèmes doivent devenir une question juridique (*a legal issue)* et quels problèmes ne doivent pas l'être ? C'est une vraie question et je pense que beaucoup de problèmes deviennent des questions juridiques qui ne devraient pas le devenir.

> ***Question** : Une perspective économique est-elle envisageable quant aux systèmes juridiques ? Peut-on évaluer la performance économique d'un système juridique, et classer les systèmes juridiques d'après ce critère, selon une approche à la North ?*

D.J. Galligan : Weber avait la même idée. Depuis deux ans, je travaille sur le système légal chinois. La Chine est incroyablement prospère et, en même temps, son système juridique est peu développé et corrompu. North essaie de comprendre ce paradoxe. Moi je pense qu'il s'agit d'une bulle. A moins que le système juridique ne se développe, cette bulle va éclater. En Chine, on a une économie libérale et un système politique totalitaire. Tout est lourdement contrôlé, sauf l'économique. Les tensions sont de plus en plus fortes, et il faudra qu'elles se résolvent d'une manière ou d'une autre. Personne ne sait aujourd'hui comment, mais le cas est extraordinaire.

> ***Question** : Une question concernant votre méthodologie de recherche : quand considérez-vous que vous avez une preuve ?*

D.J. Galligan : Nous ne travaillons pas selon une méthodologie quantitative. D'autres personnes le font déjà, et cela ne correspond pas vraiment à la perspective qui est la nôtre. Beaucoup de problèmes, pour nous, ne se prêtent pas à cette approche. Comment procédons-nous ? Un peu à la manière des anthropologues. Nous essayons de comprendre une situation de manière fine. Ensuite, nous essayons d'identifier des cadres (*patterns)*, de les voir émerger. Puis, nous passons à d'autres études, en cherchant à approfondir ces cadres, et à voir si nous pouvons les confirmer ou les infirmer. C'est une approche modeste. Dans la mesure où on ne peut pas se fier complètement à ce que dit une personne, nous vérifions et nous confrontons les discours entendus. 90% de la législation sur l'environnement n'a aucun effet, estime-t-on, parce que les inspecteurs n'ont pas les moyens de la faire respecter. Nous allons voir, et nous essayons de comprendre les situations pratiques. Une telle démarche est quelquefois difficile : par exemple, nous avons de grandes difficultés à travailler avec les services fiscaux britanniques.

> ***Question** : Quelle est la frontière selon vous entre une preuve et ce qui n'en est pas une ? A partir de quand avez-vous une preuve ?*

D.J. Galligan : On peut tester certaines affirmations. Nous n'avons pas toujours de preuve, mais nous essayons de rendre nos affirmations substantielles ■

Jean-Baptiste Suquet
PREG — CNRS / École Polytechnique

Secrétariat de rédaction et mise en forme : Michèle Breton