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Minding the 'Gap' Problem

The Relevance of Combining Top-down and Bottom-up Approaches to the Study of Law's Role in Everyday Life

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*Minding the ‘Gap’ Problem:
The Relevance of Combining Top-down
and Bottom-up Approaches to the
Study of Law’s Role in Everyday Life*

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I. INTRODUCTION

THE STUDY AND conceptualisation of law’s role in social life and in society have been discussed extensively among sociologists of law, and Reza Banakar’s work has contributed widely to these debates on the possibilities, potentials as well as challenges related to socio-legal academic endeavours. He leaves behind ideas and approaches that are, and will continue to be, of great inspiration to socio-legal scholars.

In the late 1990s, Banakar described the discipline of sociology of law as a ‘step-child’: a discipline which belongs to neither the discipline of law nor to sociology. Banakar argued that the lack of ‘intellectual coherence’ related to the character of law and the role of law in society results in a fragmented field of research which calls for a systematic development of the discipline of sociology of law (1998). This argument caused quite a debate in which among others Thomas Mathiesen and Jørgen Dalberg-Larsen participated, referring to the fragmented character of the discipline as liberating (Dalberg-Larsen 2000; Mathiesen 1998) and as ‘virtues rather than vices’ (Mathiesen 1998). Håkan Hydén argued that common themes or fields of research may bridge the differences characterising the discipline of sociology of law, however stressing, as Banakar also did, that the diversity of theoretical perspectives may contribute to insights into the different forms that law may take in social life and in society (Banakar 1998; Hydén 1999). Later, Banakar developed his arguments as a result of the debate caused by his 1998 article. In his book, *Merging Law and Sociology*, Banakar wrote, ‘sociology of law has an intrinsic value of its own that lies beyond the disciplinary boundaries of both law and sociology. It can say something about law and society which neither law nor sociology can articulate itself’ (Banakar 2003).

The development of sociology of law as a discipline has, among other things, brought along discussion on the so-called gap problem referring to, on the one hand, studies on legislature's intentions, and, on the other hand, studies on law's role in shaping normative practices in ordinary life (Banakar 2015). Studies in the gap problem investigate, for example, law's effectiveness as reflected in discrepancies between legislators' intentions and law's effect in society, and between ordinary people's use of norms to organise social life and formal law's role in organising society (Sarat 1985; Nelken 1981; Pound 1910; Ehrlich 2009). The gap problem thus takes on different forms, including a *methodological* form which refers to the different methodological approaches applied. This methodological gap problem is reflected in a top-down approach that takes a starting point in formal law to analyse its impact on society, and a bottom-up approach that investigates individuals' perception of law (Banakar 2015). This chapter attempts to mind the methodological gap by combining a top-down *and* bottom-up approach to the analysis of law's role in everyday life. To investigate law's role in everyday life, employment case handling in the context of the Danish welfare state is selected as a practice case.

First, the chapter introduces the practice case of employment case handling to provide the reader with an insight into the context of the analysis of law's role in everyday life. Then, a section outlines the methodological approaches applied and the analysis of, first, law's role in everyday life from a top-down approach, drawing on Sheila Jasanoff's co-production theory and empirical data from document analysis of relevant sections of formal law and from observations of caseworkers' practices in the employment case handling process. Then, the section applies a bottom-up approach to investigate how caseworkers' and citizens' perception of and experience with law inform their social practice, drawing on the concept of legal consciousness and empirical data from semi-structured individual interviews with both the citizens and the caseworkers. Subsequently, the chapter is concluded with reflections on the relevance of minding the gap between a top-down and a bottom-up approach in analysing law's role in everyday life and the potential explanatory forces of analyses that mind this methodological gap.

II. EMPLOYMENT CASE HANDLING AS A PRACTICE CASE

From a sociological perspective, cases offer insights into the complexity of social life and allow for analyses that move beyond the specific case in question and relate relevant findings to a societal level (Banakar 2009). In this chapter, employment case handling in the context of the Danish welfare state is included as a practice case to analyse law's role in the social processes pertaining to employment case handling (Flyvbjerg 2001; 2006).

From a socio-legal perspective, employment case handling is relevant as a practice case to understand the role of law in public encounters as these unfold between employment caseworkers and ordinary citizens who experience unemployment. The area of employment is highly legally regulated, subjected to frequent legal changes and complex social law characterised by framework law which regulates competences and procedures that invites professional discretion (Nielsen 2020;

Dalberg-Larsen 1991; Hydén 1985; 1998). The practice case allows for the analysis of law's multiple characters as reflected in, for example, formal law's structuring of employment caseworkers' space for manoeuvre, and of how caseworkers' and citizens' perceptions of law inform their practices (Banakar 2000; Nelken 1998).

Existing research which applies a top-down approach to the study of welfare states' employment policies and law identifies a tendency of so-called workfare and an increased focus on activation as eligibility criteria for income support. In the context of the Danish employment case handling, activation is both a right and an obligation and refers to labour-market related activity initiated for unemployed persons by the jobcentre. This can be, for example, internship at a company or enrolment in an educational programme with the purpose of mapping out and improving unemployed persons' ability to work. This tendency is reflected in, for example, sources of law which outline objectives and procedures for employment case handling, stressing that unemployment is to be addressed through the introduction of incentive structures for unemployed persons, such as reduced social security, stricter work tests and activation obligations (Clasen and Oorschot 2002; Kildal 2001; Handler 2004). Research that applies a bottom-up approach suggests that unemployed citizens as welfare recipients may experience law as 'all over', indicating that law pervades and dominates their ordinary life (Sarat 1990). Additionally, law may be experienced as 'encroaching' on their social as well as private sphere (Zacher 1987), which potentially causes conflicts in the interactions between caseworkers and citizens (Nielsen 2020).

In this chapter, the focus is on the role of formal law in structuring caseworkers' space for manoeuvre in employment case handling *and* on the caseworkers' and citizens' perceptions of and experiences with the law. The empirical data,¹ which consist of document analysis of sources of law, observations of caseworkers' practices in their interactions with the citizens, and semi-structured individual interviews with both caseworkers and citizens, suggest that employment caseworkers perform professional discretion informed by the legal space for manoeuvre, by their perception of law, and by their assessment of the citizens' needs for support. As public officials, the employment caseworkers are powerful actors as they hold authority to exercise professional discretion in the citizens' case handling process (Lipsky 2010; Nielsen 2020; Lemann Kristiansen 2013). The caseworkers enter into employment case handling as part of their everyday job, whereas some of the citizen respondents experience law as, to a large extent, affecting their private sphere, reflecting Sarat's findings of the law as omnipresent in the life of welfare recipients.

III. COMBINING METHODOLOGICAL APPROACHES TO THE STUDY OF LAW'S ROLE IN EVERYDAY LIFE

Some socio-legal researchers argue that sociology of law as a discipline must be empirical to analyse law's constitutive in social relations where 'law may at first glance seem virtually invisible' (Silbey and Sarat 1987). The empirical character of socio-legal

¹ The chapter is based on the PhD thesis *Ikke-jurister i et retligt højspændingsfelt – når sagsbehandlere og borgere samproducerer sagsbehandling*. The thesis is available at <https://doi.org/10.21996/9c7y-gr54>.

studies contributes with analyses of law's role as, for example, an instrument to implement policies, to express societal values, to play a normative role in informing individuals' understandings of their rights and obligations, as well as to have a constitutive effect in guiding actions and shaping social relations, thereby manifesting itself in different forms (Banakar 2003; 2009; 2015; Cotterrell 1992; Hydén 1999; Hammerslev and Nielsen 2020). It may be argued that this fragmented understanding of law's character calls for multiple methodological approaches to understand its role in society. Here, methodology is key, as it strengthens transparency and research quality control through the account of choices of method and theory (Banakar and Travers 2005b).

A. A Top-down Approach: Formal Law Structures Interactions

A top-down approach to the study of law's role in society takes its analytical starting point in formal law and in the attitudes of those responsible for law's implementation, for example public administrators (Banakar 2015), including employment caseworkers. In this chapter, the top-down approach to law's role in society draws on Jasanoff's theory of co-production and on empirical data from document analysis of relevant sources of employment law and on observations of caseworkers' interactions with unemployed citizens. The intention behind applying a top-down approach is to investigate *how formal law structures caseworkers' practices in the case handling process*.

From a co-production perspective, legal texts reflect institutionalised legitimate knowledge on societal (un)accepted behaviour (Jasanoff 1999; 2004; Lee et al 2018), and the texts may be considered a source of sociological data as they contribute to the structuring of social life (Banakar and Travers 2005a). Drawing on Jasanoff's theory of co-production, legal texts are coined as *knowledge actants* which maintain and reproduce knowledge on accepted behaviour and societal ideals. Caseworkers are coined as *knowledge actors* who in their interactions with the citizens exchange and negotiate knowledge which structures the course of the case handling process.

As a knowledge actant, formal law structures the purpose of and the procedures related to the employment case handling, reflecting societal legitimised knowledge of the aim of the process and how to realise this aim. Applying the method of document analysis to relevant sources of law enables analyses of the legislator's intentions and of the space for manoeuvre as structured by law. The objects clause of the Employment Act² states that employment case handling is, as quickly and efficiently as possible, to support unemployed citizens' re-entry into the labour market. The objective is to be realised through the legal regulation of procedures pertaining to employment case handling, for example the Act's section 27, part 1, which stresses that adequate support is to be provided in the interactions between employment caseworkers and unemployed persons. These interactions are referred to as job interviews, and the focal point of the job interviews is to discuss and assess the citizens' ability to work and their employment prospect (Nielsen 2020). As part of the

²The Employment Act, no 548 of 07/05/2019.

assessment process and the mapping of the unemployed citizens' ability to work, the citizens are referred to activation, such as wage subsidy jobs or internships, as regulated in the Act's section 28, part 2. The citizens are obliged to be at the disposal of the labour market, and as stressed in the Act's section 54, part 1, caseworkers may refer citizens to activation if there is doubt related to citizens' willingness to adhere to this obligation or may impose sanctions on citizens if the citizens fail to attend job interviews. The Act's objects clause and sections on caseworkers' options for sanctioning the citizens reflect societal accepted knowledge that the citizens' road to re-entering the labour market is paved with their willingness to contribute actively to the employment-handling process.

To examine caseworkers' practices in the employment case handling process, data was also collected through observations of the job interviews between caseworkers and citizens. The job interviews took place at municipal job centres, and the caseworkers would, as regulated by law, summon citizens to the job interviews; the citizens may, as mentioned, be sanctioned for failing to turn up. Data from the observations of the interactions between caseworkers and citizens reflect a general interaction pattern: the citizens announced their arrival at the job centre's reception desk, and the caseworkers would then come to meet them. Often, the conversations would begin with small-talk related to the citizens' family, pets, or leisure pursuits. As most of the citizen respondents had been unemployed for years, they would have interacted with the employment caseworker several times, and this conversational introduction was a means by which the caseworkers could attune to the citizens before moving on the 'real' focus of the interaction, namely the status and prospect of the citizens' situation. The caseworkers would ask about the citizens' situation, for example their wage subsidy job or internship. This part of the conversation would contribute to uncovering the citizens' experience of their work ability and to assessing the need for support to further the citizens' situation. Often, the conversations would be about the number of hours of the citizens' activation, the number of job applications that the citizens had sent, and the physical and mental state of the citizens. The caseworkers drew on this information to assess the next step in the case handling process, which generally implied an increase in the number of work hours in their wage subsidy job, encouraging the citizens to send out more job applications, and, when relevant, referring the citizens to professional help, for example to physicians, psychologists, and substance abuse centres.

Applying the top-down approach allowed for the analysis of how formal law structured caseworkers' practices in the case handling process, thereby examining the role of law in the practices of caseworkers as public officials. Based on the empirical data, it may from a co-production perspective be argued that the legal texts as knowledge actants reflect knowledge on the accepted focus of the employment case handling related to the increased focus on workfare and activation. Moreover, the legal texts reflect expectations of caseworkers' work performance, namely that of clarifying citizens' ability to work through activation schemes as means to support citizens' re-entry into the labour market. Caseworkers would, as knowledge actors, transform law's focus into practice, as they negotiated knowledge on the further cause of case handling process, drawing on the information exchanged in the interactions with the citizens (Nielsen 2020).

B. A Bottom-up Approach: Perceptions of Law Inform Practices

A bottom-up approach to the study of law focuses on, for example, how people experience law and the meaning that law has to them; the approach contributes by providing insights into individuals' use of law in their organisation of their social life (Banakar 2003; 2015). Drawing on the theoretical concept of legal consciousness and on empirical data from interviews with the unemployed citizens and the employment caseworkers, this section applies a bottom-up approach to investigate how caseworkers' and citizens' legal consciousness affect their social practices in the case handling process.

The concept of legal consciousness contributes to analyses of the construction of meaning in the social world, and it takes on a contingent and subjective character as new experiences, understandings, and perceptions of law shape individuals' legal consciousness (Cowan 2004; Engel 1998; Ewick and Silbey 1998; Hertogh and Kurkchian 2016). Thus, legal consciousness may be applied as an analytical tool to investigate individuals' perceptions of law and how the perceptions inform actions (Ewick and Silbey 1999; Hoffmann 2003; Hull 2016; Silbey 2005; Young 2014). Methodologically, semi-structured interviews were in this case conducted with both caseworkers and citizens to allow for the unfolding of respondents' narratives, which enabled the analysis of how their legal consciousness affected their social practices.

In the interviews, the subjective character of legal consciousness was, for example, reflected in the citizens' experience of their agency in the case handling process. One citizen respondent shared his experiences of being neither listened to nor taken seriously in the case handling process. Once, he had been referred to activation, which led to stress, then led to relapse into substance abuse. The experience made him suspicious of plans for future activation, but he considered himself to be 'merely a pawn in the municipality's game' and that he would 'have no say in the process, I just have to do what they tell me to'. His narrative reflected an understanding of being subjected to the municipality's organisation of the case handling process, which caused him to settle into resignation and to display passive behaviour in the process. Another citizen respondent explained that his caseworker had helped him to get clean and to structure his everyday life. 'Just be honest and tell truth. That's how they [the caseworkers] can help you', he said in the interview. His trust in his caseworker's ability to further his situation thus informed his practices and increased his agency and active participation in the encounters. Citizens would also share experiences of conflicts and confrontations in their case handling process. A respondent told me that he was referred to activation, but this was, in his opinion, incompatible with his responsibilities as a parent, as he had 'a child who needs me to be there. And I can't be there when I am off to do some activation'. In this case, his obligations in his private sphere clashed with those in the social sphere of the case handling as formulated in law, resulting in a conflict of interest between him and his caseworker.

From the caseworkers' perspective, law was considered on a general as well as specific level. On a general level, a caseworker explained that 'law is in everything we do. How we assess the citizens and what we plan for the future'. Law's structuring

effect thus informed the caseworker's understanding of her work and her practices in the interactions with the citizens. Another caseworker thought of law as potentially obstructive to establishing trust, as 'talking with the citizens about law stresses my authority, and that's no good if I need the citizens to trust me'. The caseworkers are, as public officials, legally obliged to inform the citizens about their rights and obligations, and though aware of law's role in the case handling process, the caseworker would refrain from actively addressing law in the interactions, as law, from the respondent's perspective, spoiled the process of establishing trust. Several caseworkers mentioned trust as a decisive factor for facilitating a positive change in the citizens' situation, and perceiving law as an obstacle to achieving this end indicates that some caseworkers' practices are motivated by social aspects rather than their legal obligations. On a specific level, some caseworkers would instrumentalise law to further the case handling process, as a caseworker explained, 'I sanction the citizens in case of no-show. It's a great way to get them to show up again. Then I can help them again'. In this case, the caseworker's legal consciousness spurred her to translate her powerful position of authority into that of a helper, reflecting a perception of the case handling process as a process of help and support rather than of control and sanctioning where formal law allowed her to actualise mechanisms of help to further the citizens' situation. Another caseworker explained that she would tell the citizens about their rights and obligation 'when it is *needed* for them to know, not [when it is] *nice* to know. They can't cope with the information, anyway'. Her assessment of the individual citizen, based on her interactions with the citizen, would thus determine the legal information she would share, with the potential consequence that the citizens would have only a fragmented legal knowledge. As mentioned, caseworkers are obliged to inform and advise the citizens; however, in this case, the respondent would refrain from carrying out her legal obligation, motivated by a social rather than legal understanding of the citizens' situation.

Applying a bottom-up approach to the study of how caseworkers' and citizens' legal consciousness affect their social practices in the case handling process allowed for the analysis of the complexity of law's role in individuals' organisation of their social life. Based on the empirical data, the subjective character of caseworkers' and citizens' legal consciousness potentially increases the complexity of their encounters as the subjective character informs a variety of social practices which unfold in the case handling process and affects its course.

IV. WHY SHOULD WE MIND THE GAP? REFLECTIONS ON THE RELEVANCE OF COMBINING METHODOLOGIES

As law may be considered a fragmented phenomenon, taking on a myriad of forms (Aubert 1989), the application of different methodological approaches contributes to a reflexive understanding of the concept of law. When selecting a methodological approach, the researcher also selects a focus for her/his research. This focus allows for an examination of the concept of law within the given focus while excluding other possible foci. Thus, different methodological approaches allow for a broader scope of foci on the character of law (Luhmann 1994). Analysing law's role in everyday life

situations, for example as in encounters between public officials and ordinary citizens (Hertogh 2018), through a top-down *and* a bottom-up approach invites insights into law's structuring capacity, and into how individuals' perceptions of and experiences with law guide their social practices. Existing research has, from a top-down approach, shed light upon, among other things, law's role in organising public officials' work, and the relationship between political objectives and the formulation of law (Lemann Kristiansen 2001; Kildal 2001), and, from a bottom-up approach, investigated citizens' experiences with public encounters, and how welfare recipients' perception of access to support in the welfare system affect their practices (Danneris 2018; Høilund and Juul 2015). This chapter attempts to mind the methodological gap by combining the top-down and bottom-up approaches, thereby allowing for the analyses of how formal law as well as subjective experiences and perceptions inform social practices in everyday life situations. Drawing on empirical data, the chapter's analysis investigates law's constitutive effect in the everyday life of employment caseworkers and unemployed citizens. As mentioned, cases may contribute with insights into social life's complexity, and the findings from applying employment case handling as practice case may offer suggestions for the role of law in other encounters involving welfare recipients and public officials.

Minding the methodological gap through the combination of a top-down and a bottom-up approach may strengthen the potential explanatory force related to analyses of law's role in everyday life. The research results presented in the chapter aim to stress the relevance of combining a top-down and bottom-up approach, and when applying a top-down approach, we find that formal law structures the employment caseworkers' work and their approach to the unemployed citizens. This is reflected in law's focus on activation which was also a focal point in the conversations initiated by the caseworkers in the job interviews. Applying a bottom-up approach, we find that perceptions of and experiences with law influence the actors' social practices, and that law from a citizen's perspective may be experienced as dominating, or 'encroaching' on their private sphere; in some situations this causes conflicts that potentially obstruct the case handling process. Also, we find that caseworkers' practices may be motivated by social aspects rather than legal obligations which may conflict with their powerful position and their authority to exercise professional discretion. Minding the methodological gap thus allows for an understanding of law's diverse character which provides analytical insights into law's role in everyday life and in the social complexity of public encounters.

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