Law as a Critical Tool in Applied Construction Management Research

Paul Chynoweth
Research Institute for the Built & Human Environment, University of Salford, Salford, Greater Manchester, M7 1NU, United Kingdom (p.chynoweth@salford.ac.uk)

Abstract

The paper explores the interdisciplinary nature of the construction management research and considers the contribution that the law subject discipline can make within it. It distinguishes academic legal research from empirical research and explains the distinction between doctrinal and socio-legal research. It argues that construction-related legal research is necessary to address areas which are beyond the scope of empirical investigations, and which have also been neglected by mainstream legal scholarship. Using examples it suggests that this has a particular role to play in challenging areas of practice which are not in conformity with legal requirements.

Keywords: Construction management, epistemology, methodology, inter-disciplinarity, law

1. Introduction

This paper explores the role of academic legal research within the construction management field. It describes the nature of this form of enquiry and contrasts it with more familiar styles of investigation within construction management research. It suggests that academic legal research has been a largely neglected activity within our field and that this has been to the detriment of the construction industry. It argues that this style of research has a particular role to play in the context of certain problems within the industry that are incapable of resolution by empirical or theoretical scientific enquiry.

It begins its analysis with an attempt to understand the nature of construction management research by placing it in its broader disciplinary context. It then discusses the different types of academic legal research that might be employed within the field and explores the value of these approaches to the construction industry. Finally, it introduces two different examples of construction-related academic legal research and discusses how these are providing benefits for the industry.
2. The Disciplinary Nature of Construction Management Research

Like all other academic fields, construction management is an activity that defines itself by reference to its particular subject of study. In other words it lays claim to a particular portion of the wider field of academic knowledge to justify its place in the academy. This raises questions about the characteristics of its particular portion of academic knowledge, and about the boundaries between it and those of its nearest academic neighbours. These can best be answered by reference to the Biglan [1] disciplinary model which is now widely accepted as a basis for cross disciplinary comparisons. This groups the various fields of academic study within a matrix, broadly according to a two-fold art/science and pure/applied categorisation. Based on work by Biglan [1] and Kolb, [2] the position of individual academic disciplines can be plotted on the matrix as illustrated by Figure 1.

![Disciplinary Model](image)

If the construction management discipline is considered in the context of this model the diverse nature of the field becomes apparent. There is a wide level of agreement within the field that, at a cognitive level, it is actually a combination of traditional sub-disciplines rather than a homogeneous discipline in its own right. These may be described in a variety of ways but, for the purposes of this paper, they are taken to be: Management, Economics, Law, Technology and Design.
The location of the various sub-disciplines within the matrix demonstrates the predominantly applied nature of construction management’s academic territory. It also highlights its diversity in spanning academic practices across virtually the whole spectrum of the arts and sciences. This is significant in the current context as these different academic practices (or sub-disciplines) are naturally involved in the production of very different types of knowledge. They must therefore embrace different epistemologies when assessing the validity of the knowledge with which they engage, and employ different and appropriate methodologies in its production.

It is submitted that the approach of the construction management academic community should therefore vary, according to the nature of the problem being confronted. It should have the collective capability to provide solutions to the industry across the whole range of its sub-disciplines, but can only do so effectively if it fully understands the epistemologies and methodologies which are appropriate for different styles of investigation.

3. The Nature of Academic Legal Research

3.1 Epistemological and Methodological Approaches

The epistemologies and methodologies employed in academic legal research are rarely made explicit. Nevertheless, based on a model proposed by Arthurs [3], it is possible to construct a matrix of legal research styles which broadly follows the generic disciplinary model described above (Figure 2). Once again, a distinction exists between pure and applied research and this is again represented by the vertical axis on the matrix. However, the more interesting distinction is that between doctrinal and socio-legal research which is represented by the horizontal axis.

3.2 Legal Doctrines

Doctrinal research is concerned with the formulation of legal doctrines through the analysis of legal rules. Within the common law jurisdictions legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.

Deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines (for example, the doctrine of consideration within the law of contract). These are systematic formulations of the law in particular contexts. They clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules.
3.3 Doctrinal Legal Research

Doctrinal legal research is concerned with the discovery of legal doctrines and its research questions take the form of asking “what is the law?” in particular contexts. At an ontological level this differs from the questions asked by empirical investigations in both the natural and social sciences.

This is perhaps most obvious in a comparison with research in the natural sciences which typically seeks to explain natural phenomena through studying the causal relationships between variables. This is clearly very different from the interpretive qualitative analysis required by doctrinal research which bears a superficial resemblance to the verstehen tradition of the social sciences [5].

However, this resemblance with the social sciences is misleading. Scientific research in both the natural and social sciences relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them. In either case therefore, the validity of the research findings is determined by a process of empirical investigation. In contrast, the validity of doctrinal research findings is unaffected by the empirical world. Legal rules are normative in character in
that they dictate how individuals ought to behave. They therefore make no attempt either to explain, predict, or even to understand human behaviour. Their sole function is to prescribe it. In short, doctrinal research is not therefore research about law at all. In asking “what is the law?” it takes an internal, participant-orientated epistemological approach to its object of study [6] and, for this reason, is sometimes described as research in law [3].

The actual process of analysis by which doctrines are formulated owes more to the subjective, argument-based methodologies of the humanities than to the more detached data-based analysis of the natural and social sciences. The normative character of the law means that the validity of doctrinal research must inevitably rest upon a consensus theory of truth, rather than on an appeal to an external reality. The underlying moral or theoretical basis for the consensus is a matter of considerable philosophical debate and must remain beyond the scope of this paper. Nevertheless, for present purposes, this could probably best be summarised in terms of a search for internal coherence within the existing body of legal rules.

3.4 Socio-legal Research

In practice, even doctrinal legal analysis usually makes at least some reference to other matters as well as seeking answers that are consistent with the existing body of rules. For example, an uncertain or ambiguous legal ruling can often be more easily interpreted when viewed in its proper historical or social context, or when the interpreter has an adequate understanding of the industry or technology to which it relates. As the researcher begins to take these extraneous matters into account the enquiry begins to move leftwards along the horizontal axis in Figure 2, in the direction of socio-legal research.

There comes a point, towards the left hand side of the matrix, when the ontological nature of the research changes from that of internal enquiry into the meaning of the law, to that of external enquiry into the law as a social entity. This might involve, for example, an evaluation of the effectiveness of a particular piece of legislation in achieving particular social goals, or an examination of the extent to which it is being complied with. In taking an external view of the law each of these examples could be described as research about law rather than research in law. As one continues to move leftwards along the axis one encounters a greater willingness to embrace the epistemologies and methodologies of the social sciences and there comes a point where the terms socio-legal research and empirical legal research are used interchangeably.

3.5 Pure and Applied Legal Research

Finally, let us return to the distinction between pure and applied legal research represented by the vertical axis in Figure 2. Within the context of socio-legal research this distinction simply represents that between pure academic knowledge about the operation of the law and knowledge of the same kind which has been produced with a particular purpose in mind. That purpose will generally be to facilitate a future change, either in the law itself, or in the manner of its administration. Arthurs [3] therefore describes the latter category of research as law reform
research and distinguishes this from the production of pure knowledge which he refers to as fundamental research.

The applied form of doctrinal research is concerned with the systematic presentation and explanation of particular legal doctrines and is therefore referred to as the expository tradition in legal research. This form of scholarship has always been the dominant form of academic legal research [4] and, has an important role to play in the development of legal doctrines.

When doctrinal research is undertaken in its pure form it is variously described as legal theory, jurisprudence, or legal philosophy. Although aspects of the present paper draw on conceptual research within this tradition the other three categories of legal research will undoubtedly be of greater practical relevance to the field of construction management.

4. The Role of Law in Applied Construction Management Research

4.1 A Theoretical Underpinning for Practice

The predominantly applied nature of the construction management field has already been noted and this defines the nature of the research undertaken within it. One aspect of construction management research is therefore concerned with developing the necessary theoretical underpinning for the practice of construction management.

Research of this kind, when carried out within the law sub-discipline, may be undertaken on either a doctrinal or socio-legal basis. Unfortunately there is a dearth of both types of research. There is undoubtedly a small amount of high quality socio-legal research undertaken within construction management. Work by Stipanowich [7] on dispute resolution and that by Kennedy, et al [8] on set off clauses in sub contracts may be cited as particularly good examples of this. However, these are the exception and much empirical work within the field, for example on contracts, claims and disputes, lacks the necessary legal content to provide a real basis for law reform by policy makers.

The situation with doctrinal research is equally unsatisfactory, although for different reasons. The construction management field has certainly produced its fair share of expository legal textbooks and many of these achieve a very high standard. The work of Card, Murdoch & Murdoch [9] and that by Murdoch & Hughes [10] certainly fall into this latter category. However, construction management researchers have generally failed to explore difficult areas of law to the level of detail appropriate for journal publication, and this leaves important gaps in the professional knowledge base. By way of example, some of the complex legal issues concerning causation, concurrent delay and global claims might be capable of resolution if subjected to doctrinal study from the unique interdisciplinary construction management research perspective.
4.2 Critical Research

It is submitted that a further aspect of construction management research, within all its sub-disciplines, should be to constantly challenge aspects of practice which are at variance with theory. For present purposes this will be described as a critical research function although this should not be confused with the various ideologically driven forms of research which are often collectively referred to as critical theory research. Critical research is simply that function of scholastic activity which is concerned with challenging assumptions, and with opening up the possibility of debate.

This function has a particular role in the context of academic fields like our own which underpin professional work. By challenging existing practices it can help to ensure that custom and practice reflect the latest standards of professional knowledge, rather than being led either by habit or by uninformed pragmatism. This currently has a special prominence within the UK public services professions due to government support for the concept of evidence based practice [11].

However, with or without government support, a critical approach to all areas of construction management research can play a part in safeguarding and enhancing the standards of custom and practice within the industry. Academic legal research (both doctrinal and socio-legal) can play a part in this process by challenging those areas of practice which have drifted away from their formal legal requirements. This can perform an important role in avoiding civil or criminal liability for those involved. As will be demonstrated towards the end of this paper, it also has the potential to eradicate restrictive professional practices which undermine the productivity, and public credibility, of the industry.

4.3 The Importance of Interdisciplinary Legal Research

Some might argue that the types of research outlined above should be left to those within the mainstream academic legal community. It is suggested that this approach would not be in the best interests of the construction industry, and that in any event it is not a practical proposition. This is for a number of reasons.

Firstly, not all areas of law fall within the province of mainstream legal scholarship. The academic legal community has been heavily influenced by the needs of the legal profession and some areas of law have traditionally been dominated by other professions, including chartered surveying. These areas, including construction law, commercial arbitration and aspects of the law of easements, have therefore received relatively little sustained scholarly attention [12]. In consequence, legal doctrines in these areas remain undeveloped, and the legal requirements for practitioners lack clarity. As the academic legal community has no intention of addressing these areas it is suggested that they must form a legitimate subject for research by scholars within construction management.
Secondly, as already noted, legal rules do not exist in isolation but are only given meaning by being applied to factual situations. In situations involving specialised or complex facts a professional understanding of the factual context is often as important as a mastery of the relevant legal rules. Therefore, even if mainstream legal scholars had the desire to undertake research in the construction management field, they are likely to be less well qualified to do so than those operating in an interdisciplinary construction management context.

Finally, as illustrated by the earlier discussion of legal doctrines, the law is far more than a collection of fixed rules. It is actually a fluid entity which is constantly evolving. This evolution takes place through the ongoing development of doctrines, and through the process of legislative reform. Academic legal research contributes to both of these processes and therefore provides an important opportunity to shape the future direction of the law. It seems right that the construction management academic community should contribute to this process on behalf of the industry that it serves.

5. Two Examples

5.1 Party Wall Practice

The paper concludes by outlining two examples of legal research projects undertaken from within the construction management field. The first project sought to clarify the legal requirements for those acting as appointed surveyors under the Party Wall etc Act 1996. In large part the statute simply extends a piece of legislation which has operated in London since 1855 to the whole of England and Wales. It makes provision for notice to be served on neighbouring owners before construction work is carried out to shared (or “party”) structures. Following service it provides for the appointment of surveyors by each of the neighbouring owners. The surveyors then have power to issue “awards” regulating the conduct of the works, and providing for the payment of compensation where damage is caused to a neighbouring owner’s property.

For generations of surveyors the legislation has been notorious for its ambiguities, inconsistencies and its general lack of clarity. However, as an area of practice undertaken by surveyors rather than the legal profession, its provisions received almost no scholarly attention in over a century of use and the field is characterised by an almost total lack of doctrinal analysis. Surveyors were therefore left to make sense of the legislation as best they could, often, according to Leach [13] by simply “not being too analytical or too inquisitive as to the exact scope of their powers thereunder”.

It was not so much that custom and practice drifted away from the legislation’s formal legal requirements. In the absence of any authoritative legal analysis it was more a case of them developing in parallel to it, guided instead by the largely oral tradition of facts, myths and half-truths which circulated within the profession. This situation may have been tenable when confined within an enclosed geographical and professional community but it could not survive the
transition to new pastures where practitioners were eager for authoritative guidance regarding the legal requirements.

The current research project was, in large part, a response to this demand for a more authoritative statement of the law in this area. The detailed nature of the research is beyond the scope of this paper but, in seeking to answer the question: “what is the law?” it, of necessity, adopted a doctrinal approach. It involved an examination of the various legal decisions affecting the legislation [14] together with an analysis of the law as it related to areas of practice which were causing particular difficulty. On this basis it was able to identify the judicial approach when interpreting the legislation [15] and from this, to articulate authoritative statements about the various issues. These included the surveyors’ jurisdiction, duties and the nature of their power to award compensation. Through the researcher’s involvement in the publication of relevant professional guidance it has also been possible to incorporate the research findings into standard professional practice in the field [16].

5.2 Rights to Light Practice

The second project is currently addressing expert witness work in actions for loss of light. Where a building owner has a legal entitlement to daylight English law establishes that he is entitled to a quantity of light that is sufficient for the normal use of his building, according to “the ordinary notions of mankind”. A developer who obstructs the light to his neighbour’s building and leaves it with less than this quantity will therefore be liable in nuisance.

Where actions are brought against developers in these circumstances the courts will rely heavily on expert witnesses when judging the sufficiency of the remaining light as well as the valuation of any damages which they decide to award. Experts invariably use a standard approach when deciding these matters. This has been agreed between the small number of practitioners in the field, and is based loosely on the ideas proposed by Waldram in the 1920s [17]. However, a lack of published information makes it extremely difficult for outsiders to gain the necessary expertise for practice in this area and the suspicion is that the existing experts are operating a restrictive practice.

The current project involves testing the validity of the experts’ approach from a variety of perspectives and therefore takes a socio-legal stance. It includes an element of doctrinal analysis in questioning whether any aspect of the approach can properly be described as a rule of law. The remaining aspects of the research will use a variety of methodologies to test whether there is any other basis for using this approach, apart from a legal one. This will involve elements of historical archival research as well as experimental and survey research in order to test the validity of its measurement and valuation techniques. Preliminary findings suggest that there is little basis for the current approach, either of a legal or other nature.
6. Conclusions

The paper has explored the interdisciplinary nature of construction management research and has proposed that it should have the capability to provide industry-relevant solutions across the whole range of its sub-disciplines. It has also noted the importance of understanding the different epistemologies and methodologies which are appropriate for the different styles of investigation within the various sub-disciplines.

Within the context of the law sub-discipline it has introduced the concept of legal doctrines. It has examined the central role of doctrinal research within the law subject area and contrasted this with socio-legal research, and with other forms of empirical enquiry. It has suggested that research which asks: “what is the law?” is ontologically different from empirical studies and that, in taking an internal approach to the law, it also differs epistemologically. It has also shown how these differences enable this form of research to address certain types of problems which are not suitable for resolution through empirical enquiry.

The dearth of academic legal research within the construction management field has been noted and it has been suggested that this is ultimately to the detriment of the industry. The benefits of this form of research have been illustrated by reference to two projects which have challenged industry practice in areas which are insufficiently supported by mainstream legal scholarship. It has been proposed that similar investigations could deliver benefits to the industry in other areas of law, particularly those which also fall outside the influence of the legal profession, and which therefore lack an established doctrinal tradition.

References


