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Editor : Dr. Karl Mannheim

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First published in England
1947

To
ALVIN S. JOHNSON

THIS BOOK IS PRODUCED IN COMPLETE
CONFORMITY WITH THE AUTHORIZED
ECONOMY STANDARDS

PRINTED IN GREAT BRITAIN BY
BUTLER AND TANNER LTD., FROME AND LONDON

PREFACE

Along with much that is unhappy, the war in Europe has brought in its train one distinct good for us in the enforced coming to the U.S.A. of so many eminent scholars from the Continent. In law particularly, the course of history in mediæval England, on the one hand, and upon the Continent, on the other hand, led to a deep gulf between two legal traditions—traditions of lawmaking, of law teaching, and of administering justice—which have made it difficult for one-half of the legal world of to-day to understand and make effective use of the juristic development of experience in the other. A more intimate contact is coming about which can only be of advantage to each, if only in that each will understand the other.

Again, the academic water-tight compartment idea of the nineteenth century, which sought to keep each of the social sciences strictly in its place, much as the citizen was to be kept in his place in the ideal city-state of the Greek philosopher, has been giving way before a realizing of the need of team play among the social sciences, or of co-operation among them towards common objectives. Sociology, in particular, has been working with jurisprudence towards a better understanding of what we call "law", and of what lies behind the phenomena of the legal order as those phenomena appear to the lawyer.

In Continental Europe there has grown up in the present century a branch of sociology calling itself sociology of law; whereas in the U.S.A., with our characteristic bent to direct study towards the practical problems of the legal order there has grown up a sociological jurisprudence. The one has been at work upon sociology with reference to the phenomena of group life as involving "law". The other has been at work upon jurisprudence with reference to the adjustment of relations and ordering of conduct which is involved in group life. The emphasis of the one is upon a general science of society. The emphasis of the other is upon a special science of law. Thus the jurist has been looking at the Continental treatises on the science of law as if they were treatises on jurisprudence from the sociological standpoint, while the sociologists have been looking at the literature of sociological jurisprudence as if it were an attempt at a sociology of law. It is good to have a distinguished

exponent of the present-day sociology of law set forth the scope and purpose of his science and a critique of sociological jurisprudence.

In introducing a book on sociology of law, which is not a familiar type of book in this part of the world, it would seem to be the best course to explain something of what is meant by the term and of what the author has in mind in his use of the term "law". If we grasp what is being written about, his definition of law and of the scope and purpose of sociology of law, both of which require thoughtful consideration as one reads them—require to be thought through as well as read through —will give a key to what follows, without which the Anglo-American lawyer, unfamiliar with the present-day methodology of the social sciences, may easily become bewildered.

In reading this book, as in reading the translation of Ehrlich's *Fundamental Principles of the Sociology of Law*, the reader, particularly if he is a lawyer, must continually bear in mind what it is that the author means by "law" and that it is not what the lawyer, at least, is likely to have in mind when he comes upon the, to him, familiar word. I have often written in other connections of the difficulties which arise from the multiplicity of meanings of this term, as jurists use it, and the confusions which arise from translation of Continental treatises on jurisprudence in which we employ the word "law" for a word of different import in other languages. Thus we are told that jurists are concerned solely with *quid juris*—what of right—whereas sociologists are only concerned with *quid facti*, in the sense of reducing social facts to the relations of forces. But the English or American reader may be moved to inquire whether the first proposition (at least as to the qualification "solely") does not flow from the term *droit*, *Recht*, *diritto*, *ius*, for which, perhaps fortunately, we have no exact equivalent in English. "What is right backed by law" is about as near to the idea as it can be put in our tongue. The first part, what is right in the adjustment of relations and ordering of conduct, is suggested more by the word used in the languages of Continental Europe than by our word "law". Our word suggests primarily what is backed by the force, or what carries the guinea stamp of politically organized society. Hence, on the Continent natural law has taken a first place in the ideas of jurists, while in England and America what is prescribed and given effect to by the organs of politically organized society has almost excluded the other idea and has led to the

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dominance of the analytical school in the science of law. Both sociology and philosophical jurisprudence have moved to overcome this separation of the two ideas. But I am not sure that it would not be an advantage if, while we recognized that neither idea could be kept out of relation to the other, our language could make us conscious that there are two ideas.

What, then, do the sociologists mean by law? Clearly they do not mean what the lawyer means. Thus we are told that there are "jural regulations so diffuse as to be unable ever to reach the bench". We are told that "the bench as well as the State itself presupposes a law which organizes them and determines their jurisdiction". This seems like the natural law of the seventeenth and eighteenth centuries, but, I take it, has a different meaning. However, the lawyer is likely to regard any such "law behind laws" as for philosophy and sociology and the science of politics. The law he is talking about is the regime of adjusting relations and ordering conduct carried on through the institutions and agencies of a politically organized society, in accordance with a system of authoritative guides to determination, applied and developed by an authoritative technique, by means of a judicial or an administrative process, or by both. I do not think it a reproach to the lawyer that he stops here, provided he realizes that the postulate of the legal paramountcy of the political organization of society is only a postulate for the purpose of his subject.

As Malinowski has shown, the more important regulations that order conduct in a primitive society work without the support of any tribunals. This is true also to-day. Much of social control is quite independent of the force of politically organized society. The legal order, the order of politically organized society, holds these other orderings together, adjusts them to each other, and to the extent that it recognizes them gives them its backing. This is the order with which the lawyer is concerned. The monopoly of force which the legal order claims and has held since the sixteenth century seems to him to set it off from the other orders among which it establishes a harmony. He sees how every activity of any consequence is now subjected to either judicial or administrative regulation and the legal order made to replace the inner order of so many groups and relations. He sees how juvenile courts and courts of domestic relations have superseded to no small extent the order of the household as it was formerly recognized and backed by the law

of the state. But all this does not mean that the legal order and the body of authoritative materials of determination which it has developed may be looked at apart from and ignoring the broader basis of social control with which the sociologist has to do.

" Socially significant normative generalizations ", i.e. " right-patterns ", of different degrees of precision and generality are functionally, i.e. as functioning towards social control, involved in the very fact of any group. They are implicit in the very idea of a group. Hence they are implicit also in the very idea of a politically organized society, and it is those which, from wheresoever they get their content, are established or recognized or spring up in the legal order, the order of that society, about which the lawyer is talking. There is that much truth in Austin.

It has been remarked by philosophers of law that in such things as wills, conveyances with conditions and limitations, settlement of trusts, articles of partnership or of incorporation, contractual matrimonial property regimes, and in contracts generally, men in a sense make law for themselves. This was much insisted on by metaphysical jurists who sought to deduce law from liberty and took contract to be the highest manifestation of liberty. In another way economists have spoken of the " working rules " governing groups of associated individuals in what Commons calls " going concerns ". As he says, " each going concern is indeed a government employing its peculiar sanctions ". But as things are in the society of to-day, the contracts of which the metaphysical jurists spoke and the peculiar sanctions of the going concerns or group-governments of which Commons speaks, operate subject to the scrutiny of the judicial or administrative process or of both and in subordination to the processes recognized or established by politically organized society. From the lawyer's standpoint they are subject to law in the lawyer's sense.

I do not think the thoughtful lawyer believes in " the necessary and *a priori* pre-eminence of state over other groups ". If he has given any attention to legal history he cannot. But he cannot fail to observe that we are, and have been since the sixteenth century, in an era of paramountcy of political organization of society and that the social control with which he has to do is exercised through that organization and presupposes that organization for its efficacy. For his purposes he assumes that *de facto* pre-eminence without needing to postulate it as a necessary or universal proposition to be accepted by those who look at the

phenomena of social control from other standpoints and for other purposes. The legal order—I purposely use " legal " rather than " jural " in this connection—presupposes its own supremacy and (without denying " that each group has its order, its framework of law, its own jural values ") undertakes to require such orders, such frameworks of law, and such jural values to exist or be carried on or be applied in subordination.

It is not so much that lawyers hold that only the State can make or establish law, in the sense in which the sociology of law employs that term, as it is that they postulate the State or the guinea stamp of the State or the enforcing agency of the State behind law in their more limited use of the term, since the whole development from an undifferentiated social control to the specialized form of social control, which is their concern, has gone on along with and as a result of increasing paramountcy of politically organized society. But this must not blind us to what the historical jurists saw through a glass darkly, and the sociological jurists have been bringing out clearly, with respect to the place of the law of the State in a larger view of the groups and associations and relations, and of their inner order, and the relation of that inner order to social control.

Lawyers will appreciate the discussion of " social guarantees on which are founded the effectiveness of all law ". This should be compared with Jellinek's doctrine of " social psychological guarantee " and the views of the historical jurists in the last century as to sanction. Sociology of law has cleared up this matter. The sanctions of the legal order of a politically organized society are, for the lawyer's purposes, generically distinct in that from his standpoint all the other instrumentalities of guarantee operate in subordination thereto. Indeed, the significant characteristic of the maturity of law (meaning the lawyer's law) is the increased efficacy of its sanctions. The progress in this respect from the want of sanction or feeble sanctions in archaic systems of undifferentiated social control to the organized and thoroughgoing sanctions of the differentiated and specialized social control through law in the lawyer's sense is a great part of the story in legal history.

Except as there is still in some quarters a certain hold-over from the eighteenth-century opposition of society and the individual, or of the seventeenth-century opposition of government and the individual, with the law of the land standing between them, the thinking lawyer of to-day does not identify the all-inclusive

society with the State. But beyond this it is true that lawyers and sociologists are not entirely talking about the same things.

If lawyers unfortunately tend to ignore what the sociologist is talking about, it is quite possible for the sociologist, in framing a theory which will include his idea and the lawyer's idea in one, to miss a good deal that is significant in the lawyer's law. The persistence of taught tradition in doctrines and precepts, the rule as to legacies on impossible or illegal conditions precedent, the view of partnership which came down from the Roman law, as against the mercantile view, the jealousy of corporations extended to the business device of a trading company, the idea of land as a permanent family acquisition, applied in a pioneer community where lots were as fungible as corn or potatoes—these phenomena of the legal order (and their name is legion) call for the lawyer's study and are very remote from the "living law" of the sociology of law. Yet many of them have everyday application in the courts. For the study of what lawyers mean by law we must distinguish it generically for the lawyer's purposes from the different kinds of law which the sociologist recognizes as such for his purposes. What is important is that each should recognize the legitimacy of the view of the other for the other's purposes.

It could be wished that as we have the two words "legal" and "jural" (the former the lawyer's word) we had also two words where now we have the one word "law", used by sociologist and by lawyer alike but with different meanings. In the languages of Continental Europe also there is but one word, not wholly congruent with our word "law". The Continental term comes nearer to the sociologist's meaning. But historically it has an ethical connotation on one side and a legal (i.e. a lawyer's) connotation on the other side. Perhaps it is as well that we haven't such a word in English. The word *ius* and its equivalents in the languages of Continental Europe leads to an unconscious tendency of juristic thought to lean to one side. The English word leads to a like tendency of English and American juristic thought to lean to the other.

As to the relation of sociology of law to jurisprudence, we are told that jurisprudence is a science of social engineering and that its methods are "different techniques" of such engineering "suited to the interpretation of particular needs of concrete systems of law and corresponding types of inclusive societies". "These different techniques depend upon their aims and these

aims depend upon a combination of the real life of the law" (in the sociologist's sense) at a given time and in a given *milieu*, which is studied by the sociology of law, and the variable jural (not legal) ideas and values "whose specificity and degree of objectivity is the particular province of the philosophy of law". Thus sociology of law is a foundation subject for jurisprudence giving us a sociological jurisprudence as philosophy of law is a foundation subject, giving us a philosophical jurisprudence. If, however, jurisprudence must build on these foundations, jurists must insist that the foundations cannot be made the superstructure. Sociology of law is not sociological jurisprudence any more than the latter can claim to be an adequate sociology of law. Its great service, from the lawyer's standpoint, is in bringing to light a better foundation for the understanding of lawyer's law than natural law which had to be given up, and yet left an empty space requiring to be filled. Indeed, the intimate relation of jurisprudence, philosophy of law, and sociology of law is well brought out in Chapter I, in which the author in reviewing the development of sociology of law at the same time reviews significant features of juristic thought from Aristotle to the present day.

It remains to call attention to the contrast between a sociology of law, which realizes that it cannot replace but must go along with philosophy of law, and the older sociology, which would have dispensed with philosophy. Nor does it assume to dispense with jurisprudence. Perhaps I may be pardoned for repeating that neither sociology of law nor philosophy of law can replace jurisprudence, which, if it needs both, as a basis of critique and to correct its specialized generalizations (if I may so put it), yet has a field to which neither is wholly adequate, important as each is to the jurist who would be assured of a wise knowledge of his subject.

ROSCOE POUND.

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SOCIOLOGY OF LAW

INTRODUCTION

THE OBJECT AND PROBLEMS OF THE SOCIOLOGY OF LAW

I. The Preliminary Question

The sociology of law—a discipline more recent in origin than sociology, of which it constitutes an essential branch—is still in full course of formulation. Despite the constantly increasing attention which it has aroused during the last decades, despite its burning actuality, which we will try to explain, the sociology of law still has no clearly defined boundaries. Its various exponents are not in agreement as to its subject, or the problems requiring solution, or its relations with other branches of the study of law. From where does this lag in the development of the sociology of law come? It derives from the fact that this new science must fight on two fronts for its existence. It has encountered powerful antagonists both in the camp of the jurists and in that of the sociologists who, coming from opposite directions, sometimes unite to deny any place to the sociology of law.

In fact, at first view, it would not appear likely that sociology and law could associate very well, inasmuch as jurists are concerned solely with the question of the *quid juris*, while sociologists are concerned with the description of the *quid facti* in the sense of reducing *social facts* to the relations of forces. Hence, the uneasiness of many jurists and legal philosophers who ask whether the sociology of law does not intend the destruction of all law as a norm, as a principle of the regulation of facts, as a valuation. Hence, likewise, the hostility of certain sociologists, being disturbed by the fear of re-introduction of value judgments into the study of social facts through the mediation of the sociology of law. The function of sociology being to unite that which the traditional social sciences arbitrarily divide, these sociologists, moreover, insist on the impossibility of detaching the reality of law from the whole of social reality, seen as an indestructible totality.

Finally, those who propose to avoid " the conflicts between sociology and law " by sharply defining their fields and methods, have affirmed that the (normative) point of view proper to the jurist and the (explanatory) point of view proper to the sociologist,

give social reality and law separate spheres of existence which bar all possibility of a meeting. But if sociologists and jurists must mutually ignore each other to pursue consequently the true object of their studies, we are driven to the conclusion that the sociology of law is both impossible and futile, and that in order to do away with all difficulties, it suffices to do away with the sociology of law.[1]

The alternative between exclusivism, whether sociological or jural, and the total separation of the spheres into two different worlds, has, however, been overcome, as it had to be, by the development both of sociology and jurisprudence.

Nobody has formulated the situation better than the great French jurist-sociologist, Maurice Hauriou, who declared that " a little sociology leads away from the law but much sociology leads back to it ", to which we should add, for the sake of precision, that a little law leads away from sociology but much law leads back to it. The most important American legal sociologist, Dean Roscoe Pound, expressed the latter conception with singular clarity when he wrote that " perhaps the most significant advance in the modern science of law is the change from the analytical to the functional standpoint ". The functional attitude requires that judges, jurists and lawyers keep perpetually in mind the relation between law and living social reality, a consideration of " the law in action ". " A fruitful parent of injustice is the tyranny of concepts," declared Justice Benjamin Cardozo, and he went on to describe " the limitation of their logic " by sociological considerations taking place in the present-day juridical process. This, also, was the meaning of an earlier well-known statement of Justice O. W. Holmes that " the life of the law has not been logic; it has been experience ", experience of real social existence which the juridical process, if it is not to be pure verbal play, cannot overlook. The revolt against " mechanical jurisprudence " (Pound) or " legal fetichism " (Geny), is an indisputable tendency marking all jural thinking of the late nineteenth and early twentieth centuries. Under the form of a discussion of " the broadening of the sources of positive law ", and " free law ", this current has led to the summoning of sociology to the aid of jurisprudence.[2]

[1] Cf. Kelsen, *Der juristische und der soziologische Staatsbegriff* (1921) and his article, " Eine Grundlegung der Rechtssoziologie " in *Archiv für Sozialwissenschaft* (1915), No. 39, pp. 830–76.

[2] For a detailed exposition of these discussions, which inspired an enormous literature, see my book, *Le Temps Présent et l'Idée du Droit Social* (Paris, 1932), pp. 213–333.

That is why nobody should be startled to-day, neither sociologists nor jurists, to discover that, despite so much mutual defiance, " the pick-axes of the two crews, each hollowing out its respective gallery, have finally met " (Bouglé). The meeting place is precisely the sociology of law. Conflicts between sociology and law leading to the " impossibility " of legal sociology were only the outcome of narrowness and aberrations in the conception of the object and method of the respective sciences, sociology and law. As Dean Pound pointed out with all good reasons : " These things are as much in the past in jurisprudence as they are in sociology." [1] The sociology of law is incompatible not with the autonomy of the technical study of law, but with the analytical school of John Austin (whose predecessors were Hobbes and Bentham), with continental " legal positivism " and with " normative logicism ". The sociology of law constitutes no menace to sociology proper, but only to " naturalism, positivism, behaviourism and formalism " in sociology. Since it is they which have hampered the normal development of our discipline, let us set forth these questionable and often outmoded currents in jurisprudence as well as in sociology. Simultaneously we will demonstrate how the greater maturity both of jurisprudence and of sociology have led each of them separately towards the sociology of law.

II. Trends in Jurisprudence and their Relation to Sociology

Analytical jurisprudence has taken two forms, one narrow, related to continental " legal positivism ", the other broader, identifying law with the totality of rules and principles applied by tribunals in making their decisions. That is why we will first of all examine the " analytical " and " positivistic-legal " conceptions in the restricted sense. These conceptions, which dominated the teaching of law in the second half of the nineteenth century, did not consist of an affirmation that all law is positive law, that is to say, established in a given social *milieu*. Their thesis was rather that this positive character came from the command of a superior and dominant will, generally of the State ; this latter had been proclaimed the unique source of law, detached from the spontaneous forces of the social *milieu* as well as from particular groups, and imposing upon them an independent and rigid legal order. Thus, legal positivism and analytical juris-

[1] " Sociology and Law " in *The Social Sciences and their Interrelations* (New York, 1927), edited by W. F. Ogburn and A. A. Goldenweiser, pp. 325–6.

prudence, having nothing in common with sociological positivism, projected law into a sphere quite removed from living social reality; far above this reality soared the State, a metaphysical entity rather than a real fact. For legal positivism, of course, all sociology of law appeared as a crime of lèse-majesté towards the State and its order. The jurist in his ivory tower turned with contempt from all that had to do with the social reality of law. He was proud to argue in the formalistic vacuum of the sanctuary of the State, legislative texts and decisions of official tribunals which barred the road to all contact with the life of society.

The Anglo-Saxon system of law, however, as founded on the idea of the supremacy of the common law, is linked to "judicial empiricism" (Pound) and oriented to the unwritten and flexible law, particularly case law and customary law (Coke and Blackstone). Consequently, the followers of analytical jurisprudence, especially the Americans, inspired by the "pioneers' conception of law" (Pound),[1] insisted on the dependence of all law on court practices and decisions rather than on its dependence upon the State or whatever sovereign agency. Furthermore the formula, "law is the totality of rules applied by tribunals", may be diversely interpreted. Its sense depends upon whether one views tribunals as organs of the State or as agencies of "the national community", more precisely of the all-inclusive spontaneous society subjacent to the State, as well as to other groups. This formula also varies in sense, depending upon whether one insists on the binding of tribunals by case law, customary law, and statutory law, or on the preponderant character of the free decision of tribunals (decisionism, forecast by O. W. Holmes and developed by the "legal realists") or, finally, upon the broad domain of different social codes, springing directly from social reality and imposing themselves on the deliberations of courts (Cardozo and MacIver).[2]

Obviously, the tendency of the analytical school has been to consider tribunals primarily as the organs of the State and to emphasize the subordination of their activity to case and statuory law.[3]

[1] Cf. the characteristic brilliance of Pound in *The Spirit of the Common Law* (1921), pp. 112–92 and A. L. Goodhart, "Some American Interpretations of Law", pp. 1–20, in *Modern Theories of Law* (1933).

[2] Robert M. MacIver, *Society, its Structure and Changes* (1932), pp. 287–302.

[3] Cf. the work of the major American representative of the analytical school, Gray, *Nature and Sources of the Law* (1909, 2nd ed., 1921). It is, moreover, interesting to observe that the very structure of the Anglo-Saxon system of common law, and

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