Lawyers in Society

COMPARATIVE THEORIES

Edited by
RICHARD L. ABEL
and PHILIP S. C. LEWIS

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VOLUME THREE

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COMPARATIVE THEORIES

Preface

This is the last of three volumes on the comparative sociology of legal professions. The first volume analyzed the legal professions of the major common law countries of the industrialized world (England and Wales, Scotland, Canada, the United States, Australia, and New Zealand) and that of the most populous common law country in the third world (India). We made no effort to cover other common law systems in the Caribbean, Asia, and Africa both because of limitations on our resources and our inability to identify national reporters and because the International Center for Law in Development previously produced a book on that subject (C. J. Dias et al., *Lawyers in the Third World* [1981]), and the Project on Access to the Legal Profession of the Polytechnic of the South Bank is completing a similar inquiry.

The second volume contains studies of eleven civil law professions (Belgium, Brazil, the Federal Republic of Germany, France, Italy, Japan, the Netherlands, Norway, Spain, Switzerland, and Venezuela). Limited resources and the lack of national reporters also prevented us from surveying the legal professions of the socialist and the Islamic worlds (although a Yugoslav colleague did participate in early discussions).

This concluding volume uses the national reports and other sources to address a wide variety of theoretical and methodological issues. How can we compare lawyers across radically different social and cultural environments? What is the relationship between the dramatic expansion of higher education, visible in many countries in recent decades, and the production and distribution of professionals? Why has the percentage of women in law schools increased in most countries from trivial proportions as late as the 1960s to nearly half today—and what is the significance for both women lawyers and the legal system? Should the ongoing transformation of the legal profession be seen as an instance of the growing influence of a "new class" of intellectuals or as the proletarianization of a traditional

elite? How does the structure of the legal profession articulate with that of the state, as the latter varies across societies and changes over time? How have such fundamentally different revolutions as the French, American, and English affected the power, status, and constitution of the legal profession? Can corporatist theories based on the relationship between capital, labor, and the state illuminate the changing structure and role of professional associations of lawyers? If the concept of "representation" captures the core function of lawyers, what does it actually mean, and how does it shape their interaction with the state? We end the volume by urging a reorientation of future research on the legal profession away from questions common to the sociology of the professions and toward the distinctive characteristics of lawyers: how the legal profession is shaped by its social, political, and economic environment and how it influences that environment in turn; what exactly lawyers do for their clients, and how this varies across societies; what is legal knowledge, and how it differs from other forms of expertise.

All three volumes are the product of the Working Group for Comparative Study of Legal Professions, which was created by the Research Committee on Sociology of Law, a constituent of the International Sociological Association. The Working Group began meeting in 1980 and met annually thereafter—in Madison (Wisconsin), Oxford, Mexico City, and Antwerp—during the conferences of the Research Committee. These meetings were devoted to discussing theoretical approaches to the legal profession and developing an inventory of information that national reporters were to collect. Drafts of most of the chapters were presented at a week-long meeting at the Villa Serbelloni, the Rockefeller Foundation's Conference Center in Bellagio, Italy, July 16–21, 1984. They have been revised extensively since then, assisted by further discussions during meetings of the Working Group in Aix-en-Provence, New Delhi, and Bologna in conjunction with the annual conferences of the Research Committee and in Chicago, Washington, D.C., and Vail in conjunction with the annual conferences of the Law and Society Association.

During the course of such a lengthy project involving numerous people, we have been assisted by many individuals and institutions. The Board of the Research Committee on Sociology of Law consistently offered moral and financial support. Stewart Field, currently on the faculty at the Cardiff Law School, took extensive notes of the Bellagio conference, which helped all of us revise our contributions. Pam Taylor of All Souls College, Oxford, typed those notes and retyped many of the contributions. Dorothe Brehove and Marilyn Schroeter, together with other members of the secretarial staff of UCLA Law School, also retyped contributions. We are grateful to the Rockefeller Foundation for hosting our conference and to the American Bar Foundation for financial support that made the conference possible.

Terence Halliday of the ABF provided invaluable administrative assistance in organizing that conference and since then has taken responsibility for leading the future activities of the Working Group. Richard Abel would like to thank UCLA Law School for continuing administrative and financial support. Philip Lewis would like to thank the Trustees of the Nuffield Foundation and the Board of the Oxford Faculty of Law, who made possible his participation in the early stages of this project, and Stanford Law School for its hospitality while he was writing his contributions to this volume. We also wish to thank the University of California Press, and particularly Stanley Holwitz, Shirley Warren, and Cathy Hertz, who have made invaluable contributions to this project from start to finish.

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Lawyers in Cross-Cultural Perspective

LAWRENCE M. FRIEDMAN

The literature about lawyers in cross-cultural perspective is neither very big nor, with some outstanding exceptions, particularly rich. This should not come as much of a shock. Serious barriers stand in the way of this kind of research. To do the job properly, the researcher should be master of languages and comfortable in many cultures. There is also the problem of exactly what to compare. There are important differences in the work lawyers do in various societies. These differences seem to be especially marked if we compare legal systems across the boundaries formed by different "families" (or traditions) of law—civil law as opposed to common law, for example. The chapters in these volumes are full of instances. Lawyers in countries with similar traditions are likely to have fairly similar work experiences; but there is no guarantee that comparisons between the work and characteristics of American and (say) Egyptian lawyers will be as meaningful as one might like.

People also come at the comparative study of the legal profession in a number of ways and from a number of theoretical standpoints. Some are interested primarily in the sociology of the professions. Some are interested primarily in "the law" or a particular legal system and only secondarily in how lawyers fit into the system as a whole. Some are concerned with specific social or legal functions—conflict resolution, democracy, economic growth, preservation of the status quo, or avoidance of trouble-making; lawyers become relevant because of their real or assumed connection with the function or goal.

We can also classify approaches to the comparative study of lawyers in terms of their basic starting point. First, there are studies that begin outside the profession, in the social background or context. These ask what "causes" legal professions, what makes them emerge (after all, not every society is blessed with a legal profession), and what generates the demand for lawyers' work. Second, there are studies that look at the profession

itself, focusing on its internal characteristics. Who are the lawyers? Are they men or women? Young or old? Do their politics lean to the left or to the right? Do they come from rich or poor backgrounds? How much money do lawyers make? How is the profession organized? How is it controlled? Is it state-run or independent? How are members disciplined? Third, there are questions about the *impact* of the legal profession on society. What is the effect of lawyers' work on the way the rest of the social order functions? These questions are the most difficult of all but also the most interesting. As Huyse (1988) points out, existing studies usually ignore or neglect these elusive issues.

On the whole, this chapter will discuss—or rather speculate about—the third cluster of issues, addressing the others mostly for the light they shed on it, if any. It is useful, however, to begin with the question of the evolution of the legal profession. What historical processes generate a specialized body of lawyers in the first place? Most small-scale societies do without lawyers; this has been true of some larger societies, too, such as the ancient Hebrews or Greeks. Schwartz and Miller (1964), in their essay on the evolution of legal systems, argued that only the most complex societies reach the stage of "legal counsel"; a legal profession, they claim, evolves later than systems of mediation or the police (defined as "a specialized armed force available for norm enforcement").

THE FUNCTIONAL APPROACH

Underlying the Schwartz and Miller essay is what one might call the *functional* approach to understanding the legal profession. Schwartz and Miller identify the legal profession with a certain stage of differentiation. When a society reaches the requisite level of organization (or disorganization), it needs more specialized agencies to handle certain social tasks. An occupational group will emerge whose work we can roughly identify as that of lawyers. What generates a legal profession is the felt social need to have certain jobs done, or certain functions performed, by specialists. These functions or roles are the key to understanding the profession. The more sweeping, broad-gauged comparative literature tends to take a functional approach.

If you start off this way, you tend to assume that societies at similar stages of differentiation will have similar professions. If this turns out to be wrong, the reasons will be more or less accidental or idiosyncratic—the product of some twist of history or tradition. In other words, different societies *may* split up the functions among different occupational groups. The functions will be there, nonetheless, only in disguise, and handled by different crews.

Modern society has niches that must be filled by what might be called "information-brokers." No citizen, no entrepreneur can know or understand everything about law or government regulation; the system has become too complicated. In many countries, the lawyer acts as an information-broker, receiving information, storing it, and making it available to clients. But this is not *inherently* a "lawyer job" (if anything is). In fact, thousands of other people also act as information-brokers—tax consultants, civil servants, and employees of large corporations. They are paid to know about certain rules and regulations, where to find them, and what to do about them. How this work is divided up—between lawyers and non-lawyers—may vary greatly among countries. In some countries, even litigation may be handled by nonlawyers. Nor is the relationship fixed and stable. Lawyers and accountants, for example, battle over the role of tax adviser in the United States. American lawyers once earned money looking up and unraveling information about land titles. The profession lost most of this business to title insurance companies over the course of the last century.

Still, if one starts from the notion that lawyers perform certain functions, one expects convergence between societies that otherwise resemble each other—modern, Western welfare states, for example. It surprises nobody to find that there are similarities between the legal professions of Belgium and France; but there ought to be convergences between France and the United States as well—and Japan, too, for that matter. After all, these countries have a great deal in common. The commonalities are most striking in precisely those areas of life where law and lawyers tend to play the largest role. Japan may be remote from the West in terms of history, language, or religion; but it is close to Europe or America in matters of technology and trade. Since lawyers work mostly on matters involving commerce rather than history, language, or religion, convergence ought to be visible between Japan and other Western countries as well. Similarly, there ought to be major *divergence* between the work of lawyers in Western welfare states and those in third world or socialist countries, where the profession is an arm of the state and the economy centrally planned.

The last paragraph also suggests what the functional approach rejects. It rejects a view of the profession that emphasizes historical or traditional similarities or differences. It downplays the specifically "legal" aspects of the legal profession. The functionalist is not (initially, at least) terribly interested in whether lawyers learn civil law, common law, or something else. Function and social structure are crucial, not the technical basis of professional life or its roots in a given legal past.

To be sure, the data often fail to support the functionalist view as neatly as hoped. (The nonfunctionalist may be in even worse shape.) Evidence of the expected convergences or divergences may not be that clear. Within

the West, legal professions differ greatly, or seem to, in structure, types of work, organization, and other variables. One difference, which I will discuss in some detail, is their sheer size. The ratio of lawyers to population is, or seems to be, more than ten times higher in the United States than in Japan. France and most European countries fall somewhere in between. Differences of this nature must be accounted for by the functionalist in functional terms.

The underlying assumption of the functional approach is that the German or Italian lawyer is doing work that has to be done in a modern, Western society, although not necessarily by lawyers. This work is no doubt just as vital in Japan. Hence, if lawyers are not doing this job, some other occupational group or groups must have assumed the role. This is at least a starting point, a working hypothesis.

Such an approach can be fruitful, of course, but it raises all sorts of questions. What *are* these social functions, and how can we measure them? For that matter, how is it possible to judge degrees of convergence? How much is a lot of or a little convergence? My own inclination—and it is basically only a hunch—is that Western legal professions are more similar than most people think. The *differences* are quite obvious; they lie on the skin like warts and bumps; similarities and convergences are more subtle and deep-seated. Would a French and an English lawyer have more in common, be able to talk more easily (language apart), than would an English lawyer of today and an English lawyer from the days of Henry VIII? The answer has to be "yes." The two modern lawyers could talk about income tax, products liability, European Economic Community (EEC) law, and other matters that would completely baffle the poor sixteenth-century lawyer. By contrast, he could mystify his modern counterparts by talking about the old land law and the forms of action. Modernization inevitably produces a certain amount of convergence. There is also a certain amount of conscious internationalization—EEC law is an example.

The functional approach has a tendency to downgrade the importance of lawyers. Those who use this approach are concerned more with the *functions* than with who performs them. They assume that the tasks get done in Japan, but a different label is attached to the work. The work is more significant than the label. If you carry this notion to its extreme, it makes little difference whether a society has many lawyers, a few, or none; whether they practice as individuals, work for companies or law firms, or are government employees. The important point is understanding how the social tasks are structured and performed.

Nobody carries the approach quite this far. After all, even labels (e.g., "lawyer") have meaning. The label may influence a profession's *effect* on society. Work done by lawyers is "legal." It is possible, therefore, that assigning a task to lawyers, rather than nonlawyers, loads it with some