LAW IN
SOCIAL THEORY

Roger Cotterrell

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Edited by

Roger Cotterrell

Queen Mary and Westfield College, University of London, UK

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
Amherst College

Introduction

How can social theory aid legal studies? And why might law be an important focus for contemporary social theory? This collection of essays is intended to suggest answers and show something of the range and richness of interactions between legal studies and the work of social theorists.

But what is social theory? The question is more complex today than it was three or four decades ago. Then, social theory was often regarded as the body of general theory associated with the academic discipline of sociology. Today, however, social theory is the preserve of no particular academic discipline. It cannot usefully be confined by the sometimes arbitrary demarcation lines that define each of the disciplines concerned in one way or another with human relations or social experience. In this book, less than half of the included essays are written by scholars who would be likely to label themselves unambiguously as sociologists. And, similarly, many theorists whose work is discussed here could not be so labelled. Social theory depends on, and feeds into, sociological traditions in a broad sense, but it often combines resources from many knowledge-fields – for example, history, philosophy, anthropology, political theory, legal theory and literary theory – as well as much research that resists any simple categorization.

Social theory can be defined as systematic, historically informed and empirically oriented theory that seeks to explain the nature of the social. And the social can be taken to mean the general range of recurring forms or patterned features of interactions and relationships between people. The social is the ongoing life of human beings lived alongside and in relation to others; the compendium of institutions, patterns of interaction, networks, systems and structures of collective life resulting from human coexistence. So it is the collective life of human groups and populations, but also the life of individuals in so far as this is shaped by their relation to those populations or groups. The social is a realm of solidarity, identity and cooperation, but also of power, conflict, alienation and isolation; of stable expectations, trust and confidence, but also of violence, disruption and discontinuity.

Very often the social has simply been called 'society'. Many social theorists of the nineteenth and twentieth centuries analysed what they considered to be the defining features of 'modern society', contrasted with earlier forms. The idea of modern society indicated the social as a realm that, in the urbanized and industrialized West, had substantially freed itself from earlier (premodern) determinants, especially those of religious and traditional authority. Modern society was seen as organized increasingly not by dictates of religion or by traditional statuses, but through the choices and commitments of individuals as autonomous, rights-bearing citizens. Its typical morality was secular and focused on individual freedom and autonomy. Its guarantee of security lay in the sovereignty of the nation-state. Its political outlook demanded the extension of democracy as the only acceptable legitimation of political power. And its engine of social change seemed to be free economic enterprise and individual opportunity. In such a context, modern law would necessarily shed its remaining religious and traditional overtones.

Law could be portrayed (especially in the work of the German sociologist Max Weber) as expressing a kind of moral and political neutrality, its task being to provide clear, predictable, general rules in terms of which individual projects could be pursued and conflicting interests rationally compromised. Law's destiny, on this view, would be to mix abstract formality with instrumentalism: it would be governed less by moral principle than by social or economic goals.

This was not, however, the only scenario that could be indicated for law in modern society. An alternative view points law not away from morality but *towards* particular moral values that are especially compatible with complex modern society. On this view (developed notably by the French sociologist Emile Durkheim) the law and morality of modern society must (and, on the whole, increasingly do) affirm the human worth of the individual, whatever his or her class, creed or social position. In complex modern society with its highly specialized division of labour, people may have little in common, adopting different occupational roles, lifestyles and outlooks. In these conditions, the legal and moral affirmation of a common humanity is needed to create an interpersonal respect that can bridge the differences between people and facilitate their integration into society. Modern law tends, on this view, to focus increasingly on protecting the human dignity and personal autonomy of every individual. This value system of moral individualism may often be trampled on in practice, but social theory shows it to be appropriate to modern society. Indeed no other value system can adequately underpin the whole of modern law. At least, such is Durkheim's view.

Orientations

Weber's and Durkheim's social theories provide the starting point for this book. Although their characterizations of the social and the place of law in it may, at least in some respects, be outdated, their work still provides much of the vocabulary of social theory, and so they continue to provide a useful starting point for understanding the transformations of law and society today. Wolfgang Schluchter's essay (Chapter 1) provides an excellent guide to what remains important in the views on law of these classic theorists of the early twentieth century.

Unlike many other sociolegal writers on Durkheim, Schluchter focuses not just on the problematic early theses in Durkheim's first book, *The Division of Labour in Society*, but on his work as a whole, which provides rich, though currently neglected, resources for sociological study of the relations of law and morality, and especially for a sociology of human rights (cf. Cotterrell, 1999). As regards Weber, Schluchter devotes attention not just to his famous posthumously published manuscript on sociology of law but also to his lengthy, often neglected, critical essay on the jurist Rudolf Stammler (Weber, 1977), which offered an important opportunity for Weber to distinguish and compare juristic and sociological understandings of law and rules. Most importantly, for our present purposes, Schluchter uses his summation of the essentials of Durkheim's and Weber's ideas on law to emphasize how central these ideas are to their social theory as a whole. These two writers are now considered classic theorists of sociology of law, but Schluchter properly emphasizes that their approaches give little warrant for seeing this field as a mere subdiscipline of sociology. Rather, Weber and Durkheim see legal inquiry as central to social studies. For Durkheim, Schluchter notes, '[s]ociology is first of all a comparative sociology of law' (p. 5), and law is nothing less than '*the* precondition of the constitution of social life' (p. 4). For Weber, too, it is one such precondition.

Thus, in Schluchter's persuasive interpretation, modern social theory's primary founding classics make law *entirely fundamental* to their concerns. Law is at the heart of social theory and the contrasting analyses of it in Durkheim's and Weber's work indicate different directions in which sociolegal inquiries can develop.

Legal Form and Legal Rationality: Max Weber's Legacy

Much has changed since Weber was writing in early twentieth-century Germany. His main legacy for sociolegal studies is his analysis of kinds of legal thought, especially of what he termed formal rational law which, in its most abstract form, depended on the logical interrelating of legal ideas independently of the particular contexts of their application. Law in this form tended towards a pure calculus independent of moral or policy considerations. Weber saw formal legal rationality of this kind as a product of certain Western legal systems, one aspect of a multifaceted rationalization of spheres of social life which had emerged historically only in the West and had come to define the unique character of its civilization. Formal legal rationality, with its calculability and predictability, was important to the development of capitalist economic activity but also, and in more obvious ways, to the establishment of modern forms of government and bureaucratic administration.

Weber's significance for sociolegal inquiry today is very much tied up with the destiny of formal rationality in law. Was this rationalization a phase that is now passing? Are law and governmental regulation ceasing to be characterized by formal rationality and answering to new imperatives? Since Weber always saw rationalization processes as aspects of wider cultural, economic and political developments, these questions have broad implications. Ronen Shamir (Chapter 2) uses a Weberian framework to consider aspects of modern legal thought in the United States. He associates the American legal realist movement in the first half of the twentieth century with a reaction against formal legal rationality and a move towards a more substantive legal focus driven by social reform goals; with the decline of realism, however, a move back towards legal formalism has occurred. Shamir suggests a pendulum swing thesis: movement between formal and substantive legal rationality may correspond to 'the interplay between periods of stability and reform in the political arena' (p. 47). Shamir's essay shows imaginatively how Weber's ideal types of legal thought can inspire reflection on general features of change in legal systems. Yet there are some dangers of abstracting Weberian ideas from their dense cultural matrix. For Shamir, types of legal rationality seem like legal styles, while for Weber they are an aspect of civilization. And although it is justifiable to link legal realism with New Deal politics, it should be recalled that the most influential realist of all, Karl Llewellyn, thought that New Deal politics 'threw the whole emerging [realist] line of inquiry off-centre' and, if anything, hampered its development (Llewellyn, 1960, p. 14).

Wolf Heydebrand (Chapter 3) rightly points out the ambiguities of Weber's pure types of legal rationality (an ambiguity that allows Shamir, controversially, to associate formal rationality with Anglo-American common law). Heydebrand is concerned with currently emerging forms of legal rationality and he identifies a new form: process rationality. He comments usefully on Weber's typology and its problems before elaborating the characteristics of process rationality. A logic of 'informal negotiated processes' (p. 58), it is a byproduct and agent of economic and financial globalization. Globalization promotes and requires pragmatism and

open-ended, constantly renegotiated economic relations. Formal rationality seems too rigid. So does substantive rationality if it ties law to fixed aims or values. As regulation increasingly operates through private processes it requires flexibility, diversity and negotiability. One might, indeed, ask how far this is *legal* rationality at all, but this is a matter to return to in Part V.

Harold Berman (Chapter 4) raises a dissenting voice against the widely shared view that Weber's work on law is historically sound and realistic even if changes in law and society may be gradually overtaking it. Berman discusses, interestingly, the reasons for Weber's popularity in sociolegal studies, but he also emphasizes that there are important things that the Weberian method of ideal (pure) types cannot grasp, especially the sense of a historical consciousness or self-awareness that informs social institutions and the idea of tradition as a process rather than an object. Berman emphasizes that, although the interpenetration of fact and value is an important matter for any social theory of law, Weber's sociology, with its positivist rejection of evaluation, provides few resources for addressing this.

Law, Experience and Belief: Durkheim, Durkheimians and Beyond

Given that Emile Durkheim and Max Weber were contemporaries and that both were leaders in the developing field of sociology and deeply interested in law, it is remarkable that their work inhabits entirely separate intellectual universes. Law's dependence on, and contribution to, morality are never far from Durkheim's concerns, while they hardly figure in Weber's. Thus a great deal of Durkheim's writing about law concerns the values it embodies and its contribution to wider currents of thought and belief. Yet Durkheim is best known for the early, limited and crude theses on law contained in his first book and not for the more satisfactory approaches of his later work (Cotterrell, 1999). Jack Gibbs's essay (Chapter 5) is a valuable attempt at reconsidering Durkheim's early arguments in *The Division of Labour* and at presenting them in a form that holds out the prospect of testing their empirical claims. In doing so he devotes much attention to Durkheim's theses about law. Gibbs's approach highlights the problems and inadequacies of Durkheim's theses but also shows how they could be extended. Given that discussions of them have so often quickly concluded that they are either too vague or historically inaccurate, Gibbs' approach seems to be a move forward.

Barbara Misztal (Chapter 6) shows one way in which Durkheim's thought can be productively developed. Being much concerned with the common ways of thinking that unite a population, many of which are expressed in law and morality, Durkheim offers guidance for the study of the collective memory. Collective memory is a society's historical consciousness and sense of continuing shared identity, based partly on myths and always a matter of emotion no less than reason. Collective memory can be powerfully shaped and reinforced by law, Misztal notes, through symbols and rituals (such as constitutional documents, recurring ceremonies and representations of historical events) which law and government rely on and refer to (cf., for example, Osiel, 1995). In the rebuilding of society and law after regime change (as in post-communist Central and Eastern Europe), such matters are especially salient, she suggests. Thus, Durkheim provides resources for the study of law's interactions with culture. While law can impact on collective memory, popular consciousness shapes it too, resisting legal manipulations, because memory exists in individuals' minds, and Misztal suggests (faithful to Durkheim's

sense of the irreducibility of social facts) that their memory is of facts which can only be manipulated in interpretation to a limited extent.

Durkheim did not work alone and he attracted legal specialists to his close circle of collaborators. Their writings on law remain much neglected. Very little has been translated into English and, since Durkheimian approaches to sociology became unfashionable in France after the Second World War, Durkheimian legal theory has generally been ignored. Certainly, much of it is dated, limited by crude evolutionary assumptions and excessively speculative. Yet some of it suggests lines of thought that could be productively followed in new ways. The Lyon law professors Paul Huvelin and Emmanuel Lévy were much respected members of Durkheim's circle and tried to develop his ideas to bring them closer to the concerns of lawyers and legal activists. The only essays (as far as I am aware) available in English on these two jurists are included here as Chapters 7 and 8.

Durkheim's view of law is often considered somewhat passive, treating law primarily as a reflection and support of culture, rather than as a powerful, autonomous social agency or directing force which is how many lawyers see it. Huvelin tries to correct any Durkheimian passivity and emphasizes modern law's coercive power. At the same time his speculations on magic and the origins of private rights open our eyes to the diversity of elements that may have created modern ideas of law over long ages of social development.[1] Lévy's work, by contrast, resolutely seeks to politicize Durkheim. Like Misztal, Lévy focuses especially on law's links with collective understandings but, combining Marxist and socialist influences with his Durkheimian point of departure, he sees the realm of collective beliefs as a terrain of conflict in which law is both weapon and prize. Lévy harnesses Durkheimian ideas about law and belief to a radical politics that, for all the datedness of its appeal to class solidarity, entirely dispels any lingering sense of conservatism in the Durkheimian outlook.

Georges Davy's work (Chapter 9) on the evolution of contract is another important contribution to legal sociology from the original Durkheim group. Like Huvelin, Davy was concerned with the question of how certain fundamental ideas of private law evolved, given that law, for the Durkheimians, begins its history as an entirely social and collective matter, intertwined with religion. Perhaps the most significant of these ideas – so familiar to the modern lawyer yet so problematic when seen in a broad context of social development – is the idea of contractual obligation, especially as regards future performance. This is the central focus of Davy's work on contract. Like Marcel Mauss's better-known work on gift relationships (Mauss, 1990), Davy's study illustrates that the Durkheimian emphasis on law's roots in culture provokes a rethinking of contract as something more, at least in its origins and moral structure, than just a device of economic exchange.

Georges Gurvitch, who succeeded to Durkheim's sociology chair at the Sorbonne in Paris, is the 'beyond' in the title of Part III. His work is not Durkheimian, yet as Reza Banakar notes (Chapter 10), it builds on Durkheim in certain respects, especially in its ultimate linking of law with collective values and beliefs. Gurvitch's social theory of law is not much cited today but, where it is, this is almost always for its relevance to the idea of legal pluralism – the idea of many legal orders coexisting in the same social space. Durkheim, like Weber, largely assumes that law is state law and that the social to which law relates is politically organized society, the society whose boundaries are those of the nation state. But Gurvitch thinks differently. He identifies many kinds of law linked with many different levels of social life and types of sociality. If this can be confusing (with no less than 162 different kinds of law being tediously categorized),

Banakar nevertheless thinks that Gurvitch's time may have come. Unusually and usefully, he applies Gurvitch's ideas in specific empirical contexts to highlight a central idea of legal pluralism: that law can be experienced in many different forms, some unconnected with, or unmediated by, the state and some in conflict with state law.

In my view, Gurvitch's theory is too complex, abstract and schematic to be directly useful. However, it does indicate some promising directions, all of which Banakar highlights. First, it links types of law not to specific social groups or institutions but to abstract forms of sociality (we might call them types of community) found in many different combinations, or networks, in reality. In so far as contemporary law increasingly operates beyond state jurisdictional boundaries or in networks within them, this approach that links law to communities, rather than to the state, may be helpful. Second, Gurvitch emphasizes the interdependence of legal philosophy and legal sociology, an interdependence too long denied. Third, he stresses the pervasiveness of law in social life: law need not be seen as an alien force intruding only when things go seriously wrong, but as a welcome routine ordering, fundamental to social existence. As Banakar puts it, 'our everyday life is permeated by forms of jural experience' (p. 194).

Law as Discourse, System, Field: Habermas, Luhmann, Bourdieu

The question of law's legitimacy – its claim to authority over those it purports to regulate – has long been a concern of social theory. Michel Rosenfeld (Chapter 11) points out that modern legitimacy claims tend to move in one of two directions, each of which is problematic. An appeal to democracy (the most common claim) risks the arbitrariness of majority decision (51 per cent is enough even if 49 per cent are opposed; far less than 50 per cent can win the day if the opposition is divided). On the other hand, an appeal to some universal standard of justice runs up against the problem that ideas of justice are always rooted in the experience of particular communities and therefore not truly universal. Jürgen Habermas's proceduralism seeks to escape this dilemma. It relies on consensus reached through free, uninhibited debate in which all voices are heard: law's legitimacy is based in both democracy and the protection of rights founded in a universal moral consensus. Rosenfeld asks whether this proceduralism is sufficient in itself to provide legitimacy, or whether it depends on a prior commitment to particular, contingent substantive norms. He argues the latter, so that a 'pure' proceduralism cannot in fact provide a prescription for justice adequate to deal with all the conflicts of contemporary pluralistic societies. Nevertheless, Habermas shows indirectly the contribution that proceduralism can make towards shaping the values presupposed in a legal system.

Pablo De Greiff notes that Habermas's hugely influential ideas about law have developed in two stages (Chapter 12). His early work subordinated legal legitimacy to the requirement of a universalistic moral principle. Norms could be valid only if they satisfied a principle of universalization realized through rational discourse. Later, in his major book on law, *Between Facts and Norms*, first published in German in 1992, Habermas indicated different principles of validity of laws and moral norms, adding, for law, a separate principle of democratic legitimacy. De Greiff links this development to Habermas's discussions of cosmopolitan justice and especially his advocacy of new European governmental and legal institutions. Habermas's ambiguity between (i) making the universality of morality a part of law and (ii) the apparent

rooting of law in a particular community that gives it democratic legitimacy raises many issues for his cosmopolitan prescriptions.

Gunther Teubner's discussion of Habermas (Chapter 13) provides a link to the autopoietic theory of Niklas Luhmann, from which Teubner draws much inspiration. Focusing, like De Greiff, on the change in Habermas's view of law, Teubner emphasizes his 'decisive move' towards recognizing 'a plurality of discourses – and their concomitant rationalities' (p. 270). Alongside law are morality, ethics, pragmatics and negotiation. Habermas's hope is still that these discourses can be integrated, but he does little to examine how and in what form. Teubner notes that law itself shows some ways in which 'collisions' between discourses are managed. Like Habermas, he assumes (problematically, in my view) that law is best seen as a single discourse, but his essay eventually moves on to different ground from that of Habermas. Unconcerned here with law's moral or democratic bases of legitimacy, Teubner implies instead that law might be a freestanding discourse, holding itself up by its sheer discursive self-awareness and functional utility.

This is, indeed, Niklas Luhmann's position. While Michael King and Anton Schütz elaborate Luhmann's view of law (Chapter 14), Teubner (Chapter 15) explores its strengths and weaknesses in a brilliant comparison of Luhmann's work on law and economy with that of Jacques Derrida. In Chapter 14 King and Schütz show how Luhmann has tried to bypass many issues that troubled earlier social theory. Tradition and substantive values, for Luhmann, no longer securely underpin legal rationality. Law has become a self-reproducing discourse, taking information from an environment which it understands entirely in its own terms and processing this information to make it intelligible and useful in the carrying out of law's discursive function. This function is simply to code as 'legal' or 'illegal' the situations or actions brought to law's attention. And, like Derrida's deconstruction, Luhmann's sociology emphasizes the paradox of self-observation that characterizes law: law can indicate its identity, separate from its environment, only by using the criteria (legal/not legal) that it *already presumes* as the basis of its discursive identity.

Teubner admits what has long been seen as the central weakness of Luhmann's theory: its inability to analyse the relations between discourses or systems in a satisfactory manner. But, against Derrida, he notes that the problem of paradox, which Derrida sees as a scandal for knowledge-systems such as law, appears, in Luhmann's perspective, as no problem at all. For Luhmann, legal discourse, like other discourses, progresses through its continual displacement of founding paradoxes (hiding them in doctrinal complexity). Indeed, this phenomenon is familiar to most theoretically minded lawyers. Curiously, as Teubner explains, Luhmann and Derrida complement each other's theoretical blind spots. While Luhmann dispels the practical problem of legal paradox (showing that, in practice, it is normally not really a problem at all), Derrida provides the vital idea of an unreachable but indispensable justice – a justice that represents the search for satisfactory relations between law and the discourses alongside which it must exist. While Luhmann leaves the relations between discourses as a mystery, Derrida presents it as a vital quest.

Pierre Bourdieu is also concerned with legal discourse, but in a different way. Mauricio García Villegas (Chapter 16) sees him as much influenced by his French sociological heritage and there are surely Durkheimian elements in his cultural understanding of legal discourse. Bourdieu's thinking may appeal particularly to those who find recent social theory's concerns with legal discourse too abstract and juristic in orientation. His sociological focus is on practice

and its cultural milieux. Like, for example, Emmanuel Lévy, Bourdieu sees law as a major form of symbolic power for which different social groups compete; law intervenes where habitus provides insufficient social regulation. But, Villegas notes, Bourdieu's view may be too limited by certain French legal and sociological traditions. It may underemphasize the diversity and plurality of law as a social field.

Foucault, Discipline and Regulation

The work of another, vastly influential French scholar, Michel Foucault, has had an ambiguous and controversial relation to law. Foucault's significance in this context is in his famous discussions of the normalizing disciplines that have developed to dominate modern life. Initially these emerged in particular institutional settings such as the factory, the school, the clinic, the prison and the asylum, but they extended to become more generalized patterned routines and professionalized practices that shape individuals, their identity, expectations and responsibilities. For some sociolegal writers the problem in interpreting Foucault has been not only to decide the relation between these disciplinary forms and law. More specifically, it has been to explain his apparent dismissal of law as something which discipline has largely replaced as the dominant normative structure of social life. Legal scholars and sociolegal researchers have been bewildered by Foucault's apparent ignorance of the vast range of regulatory forms and strategies that contemporary law uses, and its interplay with disciplinary practices such as those of psychiatry, medicine, social work and education.

Victor Tadros shows, in a richly illustrated discussion of the interplay of law and discipline (Chapter 17), that law, for Foucault, is not what his critics have often taken it to be: coercive sovereign power exercised through enacted rules. Foucault may have had only himself to blame for the misunderstanding since he uses the term 'juridical' to mean precisely this exercise of coercive power – the sovereign's right of force – and argues that it has been marginalized in favour of the disciplines and flexible strategies of governmental provision and direction (governmentality). Tadros argues that Foucault distinguishes the juridical from law (see also Ewald, 1990). While the juridical represents a concentration of coercive force in legal form, law embraces a vast range of regulatory strategies and devices. Hence, Foucault's critics misunderstand his claims. Discipline works in alliance with and sometimes through law (as in treatments applied to convicted offenders). Tadros shows how fundamental Foucault's challenge is to simplistic invocations of 'freedom' in much liberal thought. The regimes of discipline define freedom not as a space outside regulation but as the *experience* of that regulation (including self-regulation). It is the realm of security, peace and order that innumerable disciplines create and define.

Whether Foucault provides adequate resources for understanding contemporary regulation is, however, an open question. While Tadros's essay traces in detail the past trajectories of discipline and governmentality, Nancy Fraser and Nikolas Rose (Chapters 18 and 19) discuss, in different ways, the range of governance strategies and practices that are becoming familiar in societies such as those of Britain and the United States. Rose looks at strategies that appeal to ideas of community not only to harness local support for regulation, but also to free it from the need to address society as a whole. In modern nations the social first registered as 'civil society', the sphere of social interaction between autonomous individual citizens. Later, as

Rose describes, it became an arena for governmental intervention associated with the welfare state. While the social is not 'dead', the era of this generalized welfare-oriented governmental intervention is passing. Much more varied strategies enlisting private interests and initiatives, and using contracting as a device of government, are becoming established. Fraser takes matters further. In her view, globalization has begun to displace the disciplinary and governmental strategies described by Foucault. The scenario she paints has much in common with Heydebrand's process rationality (Chapter 3).

The sociolegal message of Tadros, Rose and Fraser is that law's place in a continuum of social regulation is rapidly changing. The issue is not the jurists' old chestnut, 'What is law?', but rather, 'How can we usefully conceptualise the tasks and forms of regulation today?'

Sovereignty, Globalization and the Rule of Law

The changing forms of regulation, the bases of law's ultimate claims to legitimacy, its relations with morality and governmental power: all these matters are brought into sharper relief as law takes on an increasingly transnational character or develops new international forms. If a new world order is gradually forming, what legal shape will it take? Can there be an effective transnational rule of law?

These questions may be the most fundamental ones for social theory of law to address today. But, as has been noted, the classic theorists of modern society usually assumed that 'society' was the politically organized society of the nation-state, firmly bounded by state borders. Similarly, modern legal theory has generally viewed 'law' as the law of the nation state, international law being considered an extension of this, developed to govern relations between states. Legal and social theory still lack adequate accounts of the emerging forms of transnational law.

One approach might be to develop traditional approaches to international law. On that basis, this law primarily concerns relations between states as legal actors, but is overlaid by law created transnationally by non-state agencies and law applicable transnationally to non-state subjects. Ultimately, then, all such law is seen as derived from agreement between states or from their shared custom. A different approach would be to see law as gradually freeing itself from its ties to the sovereign authority of states. As such, its institutional forms are taking on a life of their own, so that, for example, municipal courts become a model for courts of transnational jurisdiction (such as the International Criminal Court, the European Court of Human Rights or the European Court of Justice). These seek independent legitimacy using strategies much like those that municipal legal institutions follow in this quest (appeals to shared cultural values, historical tradition, procedural efficiency, compatibility with democracy and so on). Legal practice, too, becomes transnational without changing its professional character, transnational rule-setting agencies arise and the idea of transnational enforcement of law becomes increasingly familiar.

Theorizing law beyond state boundaries entails re-examining law's relation to state sovereignty, and social theories of sovereignty explore the social conditions that make sovereignty a practical possibility or necessity. As Jiří Přibáň (Chapter 20) points out, Nietzsche saw the political philosopher Thomas Hobbes as a 'bold spirit' (p. 425) because he was unafraid to identify war and social chaos as the conditions that give rise to sovereign power and law.