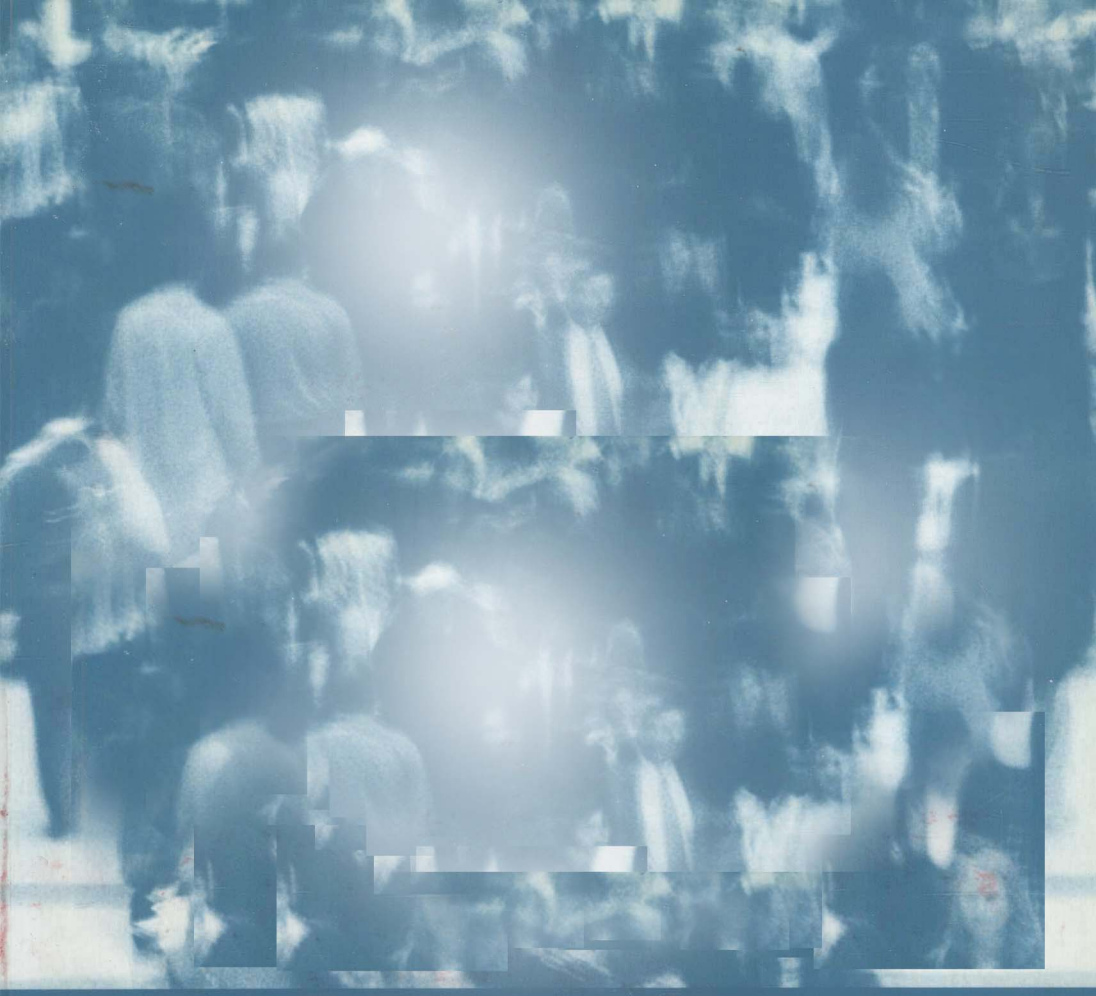

An Introduction to Law and Social Theory

edited by Reza Banakar and Max Travers

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PUBLISHING
OXFORD – PORTLAND OREGON
2002

Hart Publishing
Oxford and Portland, Oregon

Published in North America (US and Canada) by
Hart Publishing c/o
International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Distributed in the Netherlands, Belgium and Luxembourg by
Intersentia, Churchillaan 108
B2900 Schoten
Antwerpen
Belgium

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Abingdon Road, Oxford OX1 4LB
Telephone: +44 (0)1865 245533 or Fax: +44 (0)1865 794882
e-mail: mail@hartpub.co.uk
WEBSITE: http//www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available
ISBN 1–84113–208–X (cloth)
ISBN 1–84113–209–8 (paper)

Typeset by Hope Services (Abingdon) Ltd.
Printed and bound in Great Britain on acid-free paper by
TJ International Ltd, Padstow,Cornwall

Acknowledgements

We are grateful to the Oxford Centre for Socio-Legal Studies and Buckinghamshire Chilterns University College for funding the workshops we held at Wolfson College, Oxford in December 1999 and December 2000. We would also like to thank the contributors who devoted their time and creativity to making this volume possible. Finally, we wish to thank Richard Hart for his advice and encouragement.

We acknowledge permission from *Law and Social Inquiry: Journal of the American Bar Foundation* to publish material from Volume 25 (2000), which was originally published as 'Language, Law and Power', in chapter twelve.

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Introduction

REZA BANAKAR and MAX TRAVERS

LAW AND SOCIOLOGY have always had a close, if troubled, relationship as academic disciplines. They share common origins in the eighteenth century, as attempts to understand and regulate the social world according to rational principles. Each has recently weathered a sustained challenge, from poststructuralist philosophers and political critics seeking to undermine their foundations in Enlightenment thought. The founders of sociology all recognised the centrality of law for the modern world (and Max Weber was as much a jurist as a sociologist), and sociologists now study law from a range of theoretical perspectives. Jurists (the term we will be using for academic lawyers) have always been interested in the relationship between law and the rest of society. This interest is amply demonstrated in the sociological jurisprudence of Ehrlich, Pound and Aubert, in traditions of research such as the Law and Society movement which advocates inter-disciplinary research on law and legal institutions, and in the small but growing number of texts which introduce law to students contextually, rather than as a set of self-contained rules.

Nevertheless, despite some attempts to bring the two disciplines closer together, they remain frustratingly apart. Jurists complain that sociologists do not understand or respect the content of law, or seek to undermine law as a profession. Sociologists complain that 'law in context' courses, and the research pursued by the Law and Society movement, are not sufficiently sociological. Law is not always addressed as a topic on sociology degrees, or only as part of courses on criminology or deviance. Sociology (at least as a sociologist would understand it) is not taught in law schools, even though sociologists are employed in large numbers in departments of medicine, nursing, journalism, social work and education.There are only a handful of inter-disciplinary programmes in law and society in the world, and even here postgraduate students are not given the methodological training they would receive as undergraduates in a sociology department.

The case for a contextual law degree—which would mean compulsory courses in sociology, research methods and social policy in each year of the degree —was first made in the 1960s, but remains just as relevant today. We feel as powerless as other critics to change the nature of legal education, since a majority of academic lawyers, supported by a profession which is anxious to maintain its status in the face of competition from accountants and other professional groups, is still committed to a traditional 'black-letter' degree. By editing an up-to-date collection about the relationship between law and social theory, we would, nonetheless, hope to raise the issue for a new generation of law students and teachers.

In British higher education outside the law school, sociology (a scientific discipline concerned with studying society), and social policy (a discipline concerned with policy debates about public sector institutions and services) are viewed as separate disciplines. Within law schools, the two subjects are often confused, or presented together under the umbrella term 'socio-legal studies'. The same blurring between sociological and policy-oriented work (along with other disciplines) has occurred in the inter-disciplinary Law and Society movement in America. A further source of confusion is that critical legal studies, which is taught in some law schools, usually contains some sociology, although this is not taught in relation to empirical research and with a focus on methodological issues.

The main point we wish to make in this volume is that sociology needs to be taken seriously as a discipline in its own right, and this means paying attention to a whole range of traditions in the discipline, and how they can be used to study law. This is not to deny the need for policy-oriented studies, or to dispute the usefulness of critical theory for the examination of legal texts, but to demonstrate that there is a good deal more to sociology of law than the theoretical approaches and methodological techniques usually taught in courses on 'law in context', 'socio-legal research' or 'critical legal studies'. Although there are a growing number of law schools where these subjects form part of the curriculum, students are usually only taught a narrow range of sociological theories and perspectives, and never develop an appreciation of the relationship between theories, or the debates between them.[1]

Everyone would agree that law students benefit from viewing law in a wider social context. We would argue that the only way to do this properly is for law schools to adopt a deliberate policy of offering some kind of introduction to sociology of law, linked to optional courses on policy research, research methods, and critical legal studies, taught in a systematic way through the law degree. An introductory sociology of law course would not talk about 'context' in a general way, but introduce students to the different ways in which sociologists understand context (represented in the different sections of this book). This, we believe, would be interesting for students, and would also be good preparation for professional practice in a rapidly changing world.

1. THE DIVERSE CHARACTER OF SOCIOLOGY OF LAW

The sociology of law, both as an academic discipline and a field of research, embraces a host of disparate and seemingly irreconcilable perspectives and

[1] This is reflected in introductory texts on sociology of law, which usually cover a limited range of theories and approaches, whatever their other merits. See, for example, R. Cotterrell, *The Sociology of Law* (London Butterworths 1992), S. R. Anleu *Law and Social Change* (London Sage Publications 2000) and J. R. Sutton, *Law/Society* (California Sage Publications 2001), which focus mainly on structural traditions and how these can be used in studying law.

approaches to the study of law and society. This diverse character of the sociology of law is celebrated by some scholars who regard it as a source of theoretical pluralism, and criticised by others for causing the theoretical fragmentation of the socio-legal field. Whether we approve or disapprove of the theoretical state of the field, the fact remains that its diverse make-up poses difficulties of a special kind to students of the subject, many of whom do indeed perceive it as 'an incoherent or inconclusive jumble of case studies'.[2]

The starting point for sociology as a scientific discipline is the recognition that human beings are affected and shaped by, and yet at the same time influence, other people. Society exists before we are born, and will be there after we die: it was only natural for Durkheim to conceive it as having an independent existence, like the physical world, that could be studied using scientific methods. Moreover, the same can be said of the various organised and institutional groups that constitute organised social life. The legal system is, for example, a set of institutions concerned with making and interpreting legal rules. Sociologists are interested in the various groups working in legal institutions (lawyers, judges, police officers and so on), and in how laws are made through the legislative process. One encounters legal institutions and rules at various points in everyday life, from calling the police to getting divorced, setting up a company, or buying a house, and will come into contact with the technical specialists who know the law, and decide disputes. A sociological approach to law is concerned with how this institution works and the relationship between law and other areas of social life.

Unfortunately, once one begins to think about law in this way, matters quickly become more complicated. If you read any sociology textbook, it will be apparent that there are numerous ways of understanding the social world. There are all kinds of divisions, and sub-divisions, within particular traditions. There are also three general debates that cut across the whole subject. These are the 'consensus'-'conflict' and 'action'-'structure' debate, and the challenge to sociology from poststructuralism.

The consensus-conflict debate

Sociologists differ considerably in their political views, and this influences how they understand society. One influential body of social thought has argued that this must ultimately depend on maintaining a shared set of values. Law can be viewed, along with education, as the cement holding society together. If you take this view, then lawyers are not simply another occupational group: they are custodians of a cultural tradition that we largely take for granted. This balances rights and obligations, protects us from crime and makes possible the exchange

[2] L. M. Friedman, 'The Law and Society Movement,' (1986) 38 *Stanford Law Review* at 779.

of goods and services in a capitalist economy. Law also evolves over time in response to new social and economic circumstances.[3]

The most popular social theories today take issue with this view: they see society as based not on shared values, but on those of a culturally or economically dominant group which are imposed on subordinate groups and legitimate its own power. From this perspective, the law has an ideological character. The Marxist tradition saw the rule of law as a fraud imposed by force on the working class. One can, however, use similar arguments in relation to any subordinate group, such as women, homosexuals or ethnic minorities. The underlying assumption is that these conflicts cannot be resolved without a major shift of economic and political power. In other words, the solution to these problems lies outside the law.

Although one might assume that 'consensus' and 'conflict' theorists are forever talking past each other, or engaged in bitter political argument, in fact, the main trend in social theory in the last forty years has been towards a compromise or synthesis between the two traditions. Here one might note that in the 1960s and 1970s there seemed more chance of transforming society through youthful protest or industrial militancy, and the Soviet Union was still a superpower committed to supporting socialist revolution across the world. Today, on the other hand, neither anti-capitalist protestors nor Islamic 'fundamentalist' terrorists pose much of a threat to liberal American capitalism. Clearly, this does not mean we are at the 'end of history', since one can still organise politically around all kinds of issues. However, it does mean that most contemporary theorists accept the values of liberal capitalism, whereas they were more critical towards established institutions, including the legal system, during the 1960s.

The action-structure debate

Another reason why 'consensus' and 'conflict' traditions have tended to converge is because, despite their political differences, they adopt much the same approach in thinking about the social world. The key concept one finds in liberal thinkers like Parsons and Luhmann, left-leaning liberals like Giddens, Bourdieu and Habermas, but also in hard-line Marxists like Althusser, is that society can be understood as a system in which different elements can be related together. The terminology differs, so in Parsons one finds 'systems', whereas in Bourdieu one has 'fields', and in Althusser 'practices'. The common objective, however, is to produce a grand, synoptic model of society, that explains how different institutions fit together, and how the whole changes over time.

The most systematic theories also address the relationship between the individual and society. Parsons offers the fullest and most explicit discussion, arguing

[3] See T. Parsons, 'A Sociologist Looks at the Legal Profession' in *Talcott Parsons: Essays in Sociological Theory* (Collier-Macmillan Toronto 1964) at 370–85.

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that human beings acquire goals and values (for example, a respect for the law) in the course of socialisation. The problem here is how to account or allow for 'free will', while at the same time retaining the notion of a social system. Anthony Giddens is the latest theorist who has attempted to incorporate 'action' and 'structure' in the same theory, through his concept of the 'duality of structure'. The basic idea is that structures, such as institutions, are produced by people through their actions, but that actions are constrained by the structural resources available to the actor (which can include cultural or material resources).

There are, however, difficult issues that are not fully resolved by attempts to solve the action-structure problem. Twentieth century critics like the ethnomethodologist Harold Garfinkel have argued that systems theory seems to require human beings who are 'cultural dopes'. Aside from the question of free will, this kind of theorising also offers an impoverished view of human action. It cannot address, for example, how people account for their actions by giving reasons or excuses, or how they make judgements about other people. From this perspective, the initial focus on structure prevents the theorist from seeing what lawyers, judges or police officers are doing in their day-to-day activities.

There is also a deeper issue here, which goes back to nineteenth century debates about the nature of sociology. Admirers of natural science like Emile Durkheim argued that sociology should produce causal laws through observing patterned human conduct: there was no reason to investigate how people understood their own actions. By contrast, the hermeneutic tradition in Germany argued that this was an inappropriate way of studying human beings. Unlike the objects studied by natural scientists, human beings can think, experience emotions and have free will. For this reason, sociology has to be concerned with interpretation and meaning.

This nineteenth century debate has never been resolved, despite attempts by theorists like Giddens and Habermas to combine or reconcile the two traditions. One can see that any systems theory must ultimately be based on a Durkheimian conception of sociology as a science, since it looks at human beings from the outside. This can be contrasted with interpretive sociologies, such as symbolic interactionism and ethnomethodology, which address how people understand their own actions. There is no need in these traditions to make an ironic contrast between our superior knowledge, and the limited or imperfect understanding of the people we study as sociologists. Instead, the objective is to explicate and describe common-sense knowledge.

The poststructuralist challenge

Although it may in retrospect turn out to have been only a short-lived, *fin de siecle* movement, one that can perhaps best be explained as the response of utopian left-wing intellectuals to the fall of communism, it is important to recognise the immense difficulties that poststructuralism has created for sociology.

Just as systems theorists felt they had made some progress in producing a model of society that combined insights and ideas from the old consensus and conflict traditions, and which solved the action-structure problem, the discipline came under attack from a different direction. A group of mainly French philosophers set out to trash the Enlightenment assumptions underpinning sociological enquiry: including the idea that the application of reason and science can produce truth and progress (an idea which is widely shared in many academic disciplines), and that it is possible to produce objective or unproblematic descriptions through using social scientific methods.[4]

Although poststructuralism does have implications for conducting empirical research,[5] it is best understood as a philosophical critique, that makes us question the authority and coherence of classic texts. Like other radical movements in the discipline, it has largely been absorbed and tamed by mainstream theorists, and subversive thinkers like Foucault are most usually understood in law and society circles as saying something similar to Marx.

2. THE STRUCTURE OF THE BOOK

Given the diversity of social theory, it is impossible to cover every tradition in a single volume, and the reader will notice some obvious omissions. There is, for example, no chapter in this volume about the work of Donald Black, the influential American theorist who has followed Durkheim in adopting a scientific approach to law. There is also no chapter on Parsons and structural-functionalism, not because we dislike this approach, but because it proved difficult finding someone who had the time and expertise to write a review.

The text is organised in six sections on 1) classical sociology of law, 2) systems theory, 3) critical approaches, 4) interpretive approaches 5) postmodernism and 6) pluralism and globalisation; and there is also a conclusion in which we discuss the relationship between law and sociology, and the prospects for sociology of law. We realise that this way of classifying particular chapters is inevitably artificial. Alan Hunt's chapter on 'the problematization of law in classical social theory' in section 1 could equally well belong to section 4 since he employs a Foucauldian approach in analysing the writings of Marx, Durkheim and Weber. We have also put Habermas in the section on 'systems theory' (as a theorist who has engaged critically with Parsons), whereas he could also have been classified as a critical theorist.

[4] Poststructuralism should be distinguished from postmodernism, which is the belief that human history entered a new epoch in the late twentieth century (and which is also likely to be viewed as a short-lived intellectual movement). Many commentators use poststructuralism as an umbrella term for both these intellectual movements. See for example S. Best and D. Kellner, *Postmodern Theory: Critical Investigations* (London Macmillan 1991). We explain our understanding of the distinction in section 5.

[5] See chapter eight in M. Travers, *Qualitative Research Through Case Studies* (London Sage 2000).

All the sections contain chapters in which specialists review theoretical traditions, with the exception of one chapter in section 3, which is a study of race and gender in the organisation of law firms, and one chapter in section 5 on globalisation. These chapters illustrate how a particular theoretical perspective can be used in studying a substantive topic. At the start of each section, we have included an introduction, which explains the background to these theorists in simple terms, and relates them to wider debates that are not always addressed by the contributors.

When we commissioned these pieces, we asked contributors to write in a way that would be accessible to the general reader, did not assume too much knowledge, and which used concrete examples to illustrate how the approach could be used in studying law. Despite this request, many of the chapters demand a great deal from the reader, and several authors have chosen to supply an original, and sometimes contentious, interpretation of a body of theory, rather than a simple textbook introduction. This was, perhaps, inevitable in a text about social theory, which is invariably written in a difficult and demanding language, and requires us to think critically about our deepest assumptions. Whatever you think of particular contributions, we hope that it will encourage you to read more about different traditions, and how they can be used in studying law.

Section 1

Classical Sociology and Law

REZA BANAKAR and MAX TRAVERS

MOST UNDERGRADUATE COURSES on sociology of law begin with the three nineteenth century 'founding fathers' of sociology: Marx, Durkheim and Weber. The two sides in the consensus-conflict debate we referred to in the general introduction take their lead from these theorists, who were writing about the massive social and economic changes that took place in nineteenth century Europe that we now describe as the emergence of capitalism or modernity. Marx believed that the central dynamic of this new world would be a growing polarisation between rich and poor, that would eventually result in revolution. Weber offers a less deterministic view of human history, but one that places equal emphasis on the competition between different groups for wealth, power and status. Durkheim, on the other hand, believed that industrial unrest was simply a temporary symptom of adjustment; and that political elites could re-establish a sense of order and well-being through fostering shared values.[1]

All three theorists were interested in law and legal institutions, although only as one element in society as a whole, alongside the economy, political system, and cultural institutions. For Marx, the idea of 'the rule of law', celebrated by British jurists, was a means of promoting the ideological idea that law benefits everyone, whereas, in fact, it only benefits the ruling class.[2] Durkheim took the opposing view that law embodies shared values, and advanced his famous theory, expressed as a scientific law, of how laws change over time as society becomes more complex. Weber, on the other hand, was most interested in the development of law codes, as one example of a growing rationalisation of social life; and, in contrast to both Marx and Durkheim, offered a pessimistic vision of modernity as a soulless 'iron cage' with no prospect of liberation through reason or science (since they were themselves partly responsible).

The first contribution to this collection by Alan Hunt contains a summary of Marx, Durkheim and Weber's ideas on law, but it does rather more than this, and is best read as a wide-ranging and provocative statement about the field of sociology of law as a whole. Hunt is being provocative since he argues that the classical theorists have more in common than is generally realised: they each

[1] For some useful introductions, see J. Hughes, et. al., *Understanding Classical Sociology* (London Sage 1995) and. I. Craib, *Classical Social Theory* (Oxford Oxford University Press 1997).

[2] This over-simplifies matters, since the few references to law in Marx can be interpreted in different ways. See H. Collins, *Marxism and Law* (Oxford Oxford University Press 1982).

view law in a 'constuctivist' way as a tool that can (and should) be used by the state in regulating human affairs.

To give some more detail about the argument, Hunt is suggesting that there was a shift in the way intellectuals conceptualised law in the nineteenth century. Whereas in pre-modern times, law was either viewed as a 'natural' phenomenon, deriving from tradition or ecclesiastical authority, or as representing the 'will of the sovereign', the new capitalist industrial economy required a different understanding of law. Hunt argues that what has become dominant is 'legal constructivism' (which he contrasts to the idea of naturalism): the 'intentional deployment' of law 'to promote, secure or defend specific social interests'.

At the risk of over-simplifying a complex argument, Hunt suggests that a common concern of these theorists (and also of the legal thinker Henry Maine) was the relationship between law and the state. Marx believed that law would eventually 'wither away' after a socialist revolution; but he recognised its importance for nineteenth century governments as a means of controlling populations, and securing the conditions for capitalist economic relationships. Similarly, a major theme in Weber's writings was the growth of 'professionalisation and bureaucratisation', which sustained 'the stability and security of the new capitalist order'. According to Hunt, Durkheim also saw 'modern law' and 'political democracy' as the only means of maintaining social solidarity in a complex, industrial society.

Hunt's chapter ends with some general reflections about law in the modern world, and about sociology of law itself, which he argues still sees law 'as a manifestation of state sovereignty'. He argues that the relentless juridification that has occurred during the twentieth century (essentially the growth of the state) has solved many problems, but creates a reaction against the grip of law. However, initiatives intended to escape bureaucracy and law, such as the alternative dispute resolution movement or the rise of 'self-governance', end up promoting further juridification. Modern sociology of law should 'move beyond the state', and study 'new popular forms of engagement that reach out beyond . . . the classical period of state, law and sovereignty'.

Those familiar with Hunt's recent work will know that this is very much a neo-Foucauldian argument, and he also draws on Habermas's ideas about the colonisation of the life-world.[3] It is worth adding, however, that each of these theorists can be understood as developing and elaborating a theme that was already present in the writings of Max Weber. Juridification is, after all, one part of what Weber viewed as a process of rationalisation through human history. There is arguably a moral ambiguity in all these writers towards the state. They could imagine no alternative to liberal democracy; but were aware that excessive regulation reduced human creativity and freedom.

[3] See A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Governance* (London Pluto 1994) and Wickham's chapter in section 5. Also, see Bo Carlsson's chapter on Habermas in section 2.

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