Law and the Formation of Modern Europe

Perspectives from the Historical Sociology of Law

EDITED BY
MIKAEL RASK MADSEN
and CHRIS THORNHILL

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LAW AND THE FORMATION OF MODERN EUROPE

Law and the Formation of Modern Europe provides an overview of the foundations of the modern European legal order, and it explores processes of legal construction in both the national and the supranational domains. In its supranational focus, it examines the sociological pressures which have given rise to European public law, the national origins of key transnational legal institutions and the elite motivations driving the formation of European law. In its national focus, it addresses legal questions and problems which have assumed importance in parallel fashion in different national societies and which have shaped European law more indirectly. Examples of this are the post-1914 transformation of classical private law, the rise of corporatism, the legal response to the post-1945 legacy of authoritarianism, the emergence of human rights law and the growth of judicial review. This two-level sociological approach to European law generates unique insights into the dynamics of national and supranational legal formation.

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FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD

There are few areas of public policy in the western world where there is as much turbulence as in family law. Often the disputes are seen in terms of an endless war between the genders. Reviewing developments over the last forty years in North America, Europe, and Australasia, Patrick Parkinson argues that, rather than just being about gender, the conflicts in family law derive from the breakdown of the model on which divorce reform was predicated in the late 1960s and early 1970s. Experience has shown that although marriage may be freely dissoluble, parenthood is not. Dealing with the most difficult issues in family law, this book charts a path for law reform that recognizes that the family endures despite the separation of parents, while allowing room for people to make a fresh start and prioritizing the safety of all concerned when making decisions about parenting after separation.

Patrick Parkinson is a Professor of Law at the University of Sydney and an internationally renowned expert on family law. He has played a major role in shaping family law in Australia. His proposal for the establishment of a national network of family relationship centers, made to the prime minister in 2004, became the centerpiece of the Australian government's family law reforms. He was also instrumental in reforming the child support system and has had extensive involvement in law reform issues concerning child protection. He was made a Member of the Order of Australia for his services to law, legal education, policy reform, and the community. Parkinson has published widely on family law and child protection, as well as other areas of law. His most recent books include *Tradition and Change in Australian Law* (4th edition, 2010) and *Australian Family Law in Context* (4th edition, 2009), among many others.

PREFACE

This book is the result of a long-term endeavour to understand the legal foundations and the processes of legal transformation that shape and underlie modern European societies. Our specific interest is to examine how law and legal institutions have reacted to and learned from the experiences of Europe's tumultuous century, the twentieth century. Further, the book is an attempt to contribute both to the promotion of new methods for exploring the legal structures of contemporary Europe and to the construction of original and distinctive paradigms for analysing how law has influenced the formation of twentieth-century European society. In pursuit of these goals, we here propose the concept of the historical sociology of law as a new and distinct way of making the interplay of law and European society intelligible.

Many of the chapters included in this book were first presented, in very preliminary form, at two conferences held in Copenhagen in 2010 and 2011, organized by the editors of this book, both of which were entitled *Law and the Formation of Modern Europe*. We would like to extend our gratitude to the institution which hosted these two conferences, The Centre for Studies in Legal Culture at the Faculty of Law, University of Copenhagen, and to the sponsor of both events, EURECO, a research excellence initiative for European studies at the University of Copenhagen. We also wish to thank all participants in these events for stimulating discussions and questions

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1.1 Law and European society

At face value, the suggestion that we can comprehend the formation of modern European society from a perspective based in the historical sociology of law might appear counter-intuitive. There are several reasons for this. On one hand, the idea has become widespread that the legal order of contemporary Europe is founded in a categorical break with patterns of legal formation and authorization peculiar to the history of national states and national societies.[1] It is assumed, in particular, that the supranational process of European integration after 1945 marked a deep rupture with the previously prevalent belief, expressed most famously by Savigny (1814: 11), that law had its original foundation in, and drew its primary legitimacy from, its 'organic connection with the essence and character of the people'.[2] On the other hand, it is increasingly claimed that post-1945 European society has developed as a post-national society (Habermas 1998), marked by a highly distinctive and

[1] The principle of the distinctive autonomy of European law was strongly espoused in *Flaminio Costa v ENEL* [1964] and *Kadi & Al Barakaat Int'l Found v Council & Comm'n* [2008]. For excellent general discussion of the concept of the autonomy of European law in these cases and more widely see De Witte (2010). See also Azoulai and Maduro (2010).

[2] In the work of Montesquieu (1748) we can already find similar observations on the relations between land, culture and law. This historicist approach to law was of course widespread amongst legal theorists close to inter-war authoritarianism. Amongst prominent fascist legal theorists, see for example Karl Larenz's claim (1935: 19) that valid law results from the 'immanent structure and order' of the national community, and that 'community and law can never be separated from each other'. See also Hans Gerber's definition of law (1930: 56) as an 'unconditional obligation' born from an objective legal community of a historical people, and so 'rejecting natural law in any form'.

increasingly autonomous, *sui generis* legal system,[3] and that we need to renounce classical constructions of society, and of law's place in society, when we examine contemporary Europe.[4]

Quite evidently, there are justifiable grounds for such assumptions. From the outset, after 1945, the establishment of an overarching – categorically *European* – legal structure was driven by the express desire on the part of leading legal actors to draw a thick line between Europe in its contemporary form and European society in its pre-history of national statehood and national legal conflicts. This process involved the deliberate implementation of supranational norms by international actors, institutions and organizations in order to eradicate national legislative customs that had been contaminated by the rise of reactionary authoritarianism after 1918.[5] Moreover, as the process of European integration gathered momentum, leading judicial institutions enunciated the principle that European law was derived from 'an autonomous source', located outside national societies, and it needed to be fully distinguished from conventional state-based models of national statutory law and international law.[6] For these reasons, both 'history' and 'society' have become slightly controversial terms in analysis of modern European law. As a result, both historical sociology and – in particular – the historical sociology of law might easily appear rather obscure methodological

[3] For a very early variant on this see the claim in Badura (1966: 6) that the 'law of the EEC is an autonomous legal order *sui generis*' [*eine selbständige Rechtsordnung eigener Art*]. For later, more standard formulations see Ipsen (1970); Maduro (2005); de Witte (2012: 42). For reconstruction of the debate about autonomy see Bogdandy (2000: 231, 215, 223).

[4] For a critical discussion of the relative autonomy of European law see for example Weiler and Haltern (1996). On the end of methodological nationalism in sociology see for instance Beck (2003). For illuminating discussion see also Chernilo (2007).

[5] This was evident at the national level. In Germany, for example, new constitutional documents after 1945 showing continuities with corporate ideas were suppressed by the occupying forces. The most important example was the 1946 constitution of Hesse, Art 41 of which provided for the socialization of key industrial enterprises. This was opposed by the American military, and, partly for that reason, never applied. For documentation of this, see Berding (1996: 1068). Furthermore, Art 24(1) the German Basic Law declared that all statutes should accord with human-rights norms inscribed in international law. This was also evident at a transnational level. There is exhaustive documentation of the turn against nationalism in the formation of the Council of Europe and the European Convention on Human Rights. See for example Bates (2010: vii, 8). This is widely accepted as signifying a breach between pre-1945 and post-1950 legal presumptions. For recent comment see Williams (2011: 79); Pendas (2011: 215).

[6] This was the (in)famous ruling of the European Court of Justice in *Costa* in 1964. This principle of the distinctive autonomy of European law was equally strongly reiterated in *Kadi* (2008). For further discussion see the references mentioned *supra* note 1.

instruments for examining the development of modern transnational European society. The endeavour to account for the formation of modern European society as a historical-sociological process reflected – stage by stage – through the law and associated institutions involves challenging many presuppositions that are fundamental to the self-comprehension of modern European society.

Despite this, this book reflects the conviction that the distinction between the contemporary European supranational legal structure and the legal histories of different national societies in Europe is only – at most – partial. The formation of European society in its contemporary, partially integrated, form is not a historically disembedded legal phenomenon; instead, we argue, it is a process with sociological foundations in individual societies and European society at large. In consequence, this book advances the argument that historical examination of specific legal dilemmas and processes is a distinctively illuminating method for observing the emergence of modern European society as a whole. The overarching ambition of the book is, without adherence to one exclusive methodological approach, to elaborate a series of perspectives, which cut across traditional boundaries of discipline and thematic focus (for example, between law and politics, law and history, between the normative and the institutional, between the national and the transnational, or the supranational and the inner-societal), in order to address how deep social conflicts, systemic crises, group interests and historical dynamics of re-direction are reflected in the legal structure of modern European society.

In this introduction, first, we set out our primary arguments to support our framework of historical sociology of law for understanding twentieth-century Europe. Against this background, in the next section, we introduce some of the guiding lines of inquiry which have informed the analysis contained in the individual chapters. In the final section, we outline the individual contributions and discuss how they collectively contribute to the explanatory goals of the volume as a whole.

1.2 Towards a historical sociology of *European* law

On one hand, of course, it might be quite unnecessary to underline the importance of law in the emergence of contemporary society and contemporary Europe. It is self-evident that law is deeply embedded in the processes of state formation in modern European society, and a key characteristic of the national law of most European states is the fact

that it is largely based in knowledge imported from other European states. It is well known that this Europeanization of law was originally influenced by the *peregrinatio academica* of individual jurists to Bologna, Paris and Oxford from the twelfth century onwards. This formed the foundation for a permanent transnational exchange of legal knowledge, which facilitated a convergence of notions of law and legal practices in large parts of Europe as early as the high medieval period. This was not merely an academic exchange, but a circulation both of systems of legal organization and of legal institutions and professional models, which was to mark the crucial interface between the formation of the European state and the emergence of the legal profession (Brundage 2008; Dezalay and Madsen 2012; Martines 1968).

Equally, it might be superfluous to make a particular case for the significance of distinctively sociological approaches to interpretation of law's importance in European society. The focus on law and history was clearly key to the first invention of sociology as a theoretical discipline; in fact, the rise of sociology was prefigured in part by theorists such as Montesquieu, Savigny, Hegel and Bentham, in whose works – however divergent in other respects – inquiry into law, history and society was inextricably interwoven. As modern sociology emerged as an academic discipline in the nineteenth century, then, the question of the role of law and legal practitioners in the construction of society – not surprisingly – assumed decisive importance for the pioneers of sociological research (see Banaker and Travers 2002). Marx, Tönnies, Durkheim and Weber all shared an interest in explaining the precise interface between law, legal technology and the formation of modern society. The defining works of both Durkheim (1960 [1893]) and Weber (1921) are emblematic of early attempts to develop a historical sociology of law which traces historical origins of solidified legal structures, and uses historical methods to clarify their impact on society at large. Despite this, however, the case for a historical-sociological analysis of European law needs to be re-asserted. Indeed, it is striking that the methodological centrality of the historical sociology of law in sociological inquiry in the nineteenth century and early twentieth century generally diminished in the latter part of the twentieth century. With few exceptions, none of the more recent traditions of socio-legal analysis, for example law and society, have tried to resume the quest for a genuine historical sociology of law.[7]

[7] For exceptions, however, see Dezalay and Garth (2010); Halliday and Karpik (1998); Madsen and Vauchez (2004).

This book takes inspiration from the many insights into the role of law in the formation of modern society which the classical sociology of law can offer. Yet, it does not form an attempt to analyse the long history of the creation of modern law, legal institutions and society. Instead the focus of the book is limited to assessing the influence of legal institutions, professionals and practices on the evolution of society in Europe in the longer twentieth century. Generally, two distinct convictions underlie the approach running through the book.

First, this book is guided by the view that the European legal structure, as it now exists in its relatively overarching form, displays deep continuities between different European societies, so that inquiry into specific inner-societal legal trajectories enables us to gain insights that reach well beyond national contexts and illuminate problems that are general across all of Europe (Dezalay and Madsen 2012). Throughout the twentieth century, conflicts regarding both the form and function of law have impacted deeply on European society across its national fault-lines, and different societies have experienced and been determined by parallel legal conflicts at different junctures: the law integrally refracts and discloses common dynamics connecting different social settings and conditions. For example, conflicts over the distinction between private law and public law (see for example Sacriste 2011), the legal order of state planning, and the foundations of social law and welfare rights (Castel 1995), were characteristic elements of all European societies in the inter-war era. These conflicts arose as European societies were confronted – in comparable manner, although to varying degrees – with acute problems caused by social mobilization, incubated nationalism, anxiety about revolution, and the material integration of volatile political constituencies, which had been posed initially by World War I and the resultant collapse of the liberal state and the liberal political economy (see Thornhill, Chapter 2 in this book). Likewise, debates over the extent of parliamentary authority and the need for constitutional checks and procedures for review of legislation have also figured, at different times, as important and relatively uniform legal contests, shaping the form of all European societies. These debates were originally stimulated by the emergence of federal polities caused by the collapse of late-feudal empires in the later nineteenth century, by the rapid expansion of parliamentary sovereignty after 1918, and by the accelerated ascription of new regulatory duties to public institutions. Debates about these questions persist today even in polities, such as the United Kingdom and France, that have a strong historical commitment to the supremacy of elected legislatures over

other branches of government. Similarly, endeavours to implement solid guarantees for basic rights have played a crucial role in the political construction of all European societies: the conflict over rights, and over the conditions of their institutional protection, has proved one of the most enduring and universal features of modern European history (Madsen 2010). These debates have shadowed European history from 1789 to the present, but they have assumed particular prominence against the pan-European backdrop of extreme authoritarianism at different stages in the twentieth century and through the (in part) resultant emergence of a supranational legal order. On this basis, although large parts of this book are devoted to examining legal processes in particular national societies, these processes are selected because of their exemplary status in the broader formation of European law and European society.

Second, this book is guided by the view that contested legal processes in national societies have acquired vital significance in engendering a legal order that extends beyond the national context, and they have assumed catalytic importance in contributing to the formation of modern Europe. Such processes have punctuated modern European history, and they have acted as decisive causal factors in shaping the overall structure of European society in its contemporary extensive form (see Brunkhorst, Chapter 11). We can think here, by way of examples drawn from this book, of the wave of mass-democratic constitution writing after 1918; the crisis of classical liberal jurisprudence after 1918; the normative inclusion of multi-ethnic, pluralistic post-imperial societies; the judicial treatment of fascist collaboration in occupied societies after 1945; the legal dimensions of early welfare democracy; the wholesale transfer of populations after 1945; the incorporation of international human rights law after 1945; and the growth of judicial independence and constitutional review after 1945 and, especially, after 1989. In such processes, debates on law reflected and stimulated very far-reaching processes of structural redirection in European society as a whole. Indeed, in these processes, problems addressed under national jurisdictions often assumed implications reaching beyond the national level, and solutions for such problems were widely shaped by the opening of national legal systems to comparative law and to transnational legal exchanges and communications (Dezalay and Madsen 2006; 2009). As a result, we can observe that certain legal controversies have historically possessed a tendency to transcend the national domain, and legal questions originating in national contexts have in many cases driven the construction of contemporary Europe and European law at a supranational level.

The disjuncture between the transnational reality of contemporary Europe and the national reality of earlier stages in the history of Europe, thus, is never fixed and categorical, and many legal phenomena in contemporary transnational European society have resulted from problems originally articulated in national legal fields. Indeed, the basic shared supranational normative structure of contemporary Europe – arising, for example, from the promotion of universal rights norms through the European Convention on Human Rights (ECHR) after 1950; from the increasing impact of the European Court of Justice (ECJ); and from the emergence of a constitutional design marked by powerful judicial actors in the democratic transitions of the mid-1970s and from the late 1980s to the early 1990s – can be clearly identified with historical causes embedded in national societies (see Olechowski (Chapter 3), Madsen (Chapter 9) and Vauchez (Chapter 4)). This view is reflected throughout this book in the fact that those chapters focusing on nationally specific questions always show regard for ways in which the phenomena under discussion also contain implications outside and above the specifically national context.

In consequence, in two quite separate respects – that is, both in its deep sequential and particularistic inter-societal continuities and in its more recent phase of rapid, catalytic global openness – it is possible to talk of a European law, and to outline a history of the law of modern European society. Moreover, it is possible to approach European society as a whole through inquiry into patterns of legal formation in different national settings. In fact, it is implicitly claimed throughout this book that law forms a particularly important prism for observing the formation of modern European society quite generally, and law is a field in which the transformative patterns underlying European society can be palpably discerned. Of course, law gives *particular visibility* to the linkages between the national and the transnational dimensions of European society: that is, it immediately refracts both the common sociological features of European society and the dynamics of international spill-over. So, to counter the suggestion that the evolution of modern Europe is primarily shaped by a disjuncture between the European legal structure and national legal dynamics, we maintain that a remarkable, although often temporally staggered, level of intersection can be identified between different tiers of the legal fields of European societies, and different dimensions of the European legal/political system are connected through an ongoing process of legal production and cross-fertilization. In other words, Europe is always produced at the crossroads of the national and the international (Dezalay and Madsen 2006).