Lawyers in society

THE COMMON LAW WORLD

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

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VOLUME ONE

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UNIVERSITY OF CALIFORNIA PRESS
Berkeley / Los Angeles / London

University of California Press
Berkeley and Los Angeles, California

University of California Press, Ltd.
London, England

Library of Congress Cataloging-in-Publication Data

Lawyers in society.

Includes edited papers from a conference held in Bellagio, Italy, July 16-21, 1984.
Bibliography: p.
Includes index.
1. Lawyers—Congresses. I. Abel, Richard L. II. Lewis, Philip Simon Coleman.
K117.L37 1988 340'.023 87-14302
ISBN 0-520-05603-5 (alk. paper)

Printed in the United States of America

1 2 3 4 5 6 7 8 9

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Preface

This is the first of three volumes on the comparative sociology of legal professions. The present volume analyzes 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 Northern Ireland and the Republic of Ireland, the Caribbean, Asia, and Africa 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 several of those countries (C. J. Dias et al., *Lawyers in the Third World* [1981]). In addition, the Commonwealth Legal Education Association currently is investigating access to legal education and the legal profession in Commonwealth countries, including those of the Third World.

The second of our three volumes 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). The third volume uses these national reports and other sources to draw theoretical and comparative conclusions. 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 was formed 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 discussion of theoretical approaches to the legal profession and develop-

ment of 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, 16–21 July 1984. They have been revised extensively since then, assisted by further discussions during meetings of the Working Group in Aix-en-Provence and New Delhi in conjunction with the annual conferences of the Research Committee.

During the course of such a lengthy project involving a large number of 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 law faculty at the University of Wales Institute of Science and Technology, Cardiff, took extensive notes on 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, which made the conference possible. Terence Halliday of the American Bar Foundation 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 who made possible his participation in the early stages of this project.

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Introduction

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It should not be necessary to explain at length the reasons for a detailed study of legal professions. In the last one or two decades there have been dramatic increases in the professions of Western industrialized countries and even more dramatic changes in the proportion of women entrants and the size of the units in which services are produced. Challenges to these professions, mainly from within, on the basis that they have done too little for some classes of society, have been succeeded by external challenges to their professional monopolies, the limits on competition within the profession, and their powers of self-regulation. These changes and challenges have given rise to policy questions that are, to say the least, more far-reaching than any debated for many years.

Nevertheless, the importance of legal professions transcends these comparatively time-bound concerns. No matter how one approaches them, they stand between the formal legal system and those who are subject to or take advantage of it. They pass on claims from one side and statements of rights and duties from the other, sometimes modifying them in the process, and play an essential part in the enforcement or protection of rights. Insofar as the law offers generalized facilities for action, it is likely to be lawyers who structure transactions within the private sector and between the private and public sectors. In doing so they do not merely pass on messages as a telephone company transmits calls. Both in their associations and as individuals, lawyers have interests of their own, ranging from personal advantage to the organized pursuit of sectional conceptions of justice. Such interests may diminish the enforcement of particular rights or provide enhanced facilities through which certain clients may pursue their economic interests. Some bodies of law may remain as the legislature wrote them, while others—governing fields where legal representation is the norm and time or money are available for elaborated thought or argument—may be fleshed out or altered in unexpected ways. Lawyers,

thus, are a significant element in legal systems, worth as much attention for what they do and how they should act as has been paid to judges and adjudication.

We hope in these volumes to provide some background to the activities of both reformers and practitioners: the first group is perhaps overly concerned with apparent defects that have excited their attention, while the second is perhaps too restricted in their outlook by the day-to-day demands of practice and the current presuppositions of professional organization. In our view there is value in a more detached approach, one that can elucidate the demographic, economic, ideological, and cultural background to the ways in which lawyers are organized and choose and carry on their work as well as to the changes that have affected or are likely to affect them. Such an approach can also show whether actions taken for apparently worthwhile motives have had unintended consequences or have been supported by those with selfish interests. Scholarly distance can help to show the limitations on or dangers of both change and inertia. Nevertheless, there are limits to the progress that can be made without the active cooperation of lawyers; so much of what they do is invisible and confidential that, without such cooperation, important material is simply not available for discussion. The scientific foundation of medicine can be used as a basis for subjecting medical practice to scientific scrutiny; except, perhaps, for arguments about justice, there is no similar basis for examining legal practice. Consequently, self-reflection tends to be postponed until either criticism of the profession's privileges or demands for justification of the expenditure of public funds brings into play other criteria altogether.

These volumes rest on two premises. The first is that lawyers should be studied in their social context and that an interdisciplinary approach is essential. The contributors have used economics, political science, history, and sociology in their efforts to understand lawyers. Nevertheless, the dominant approach is sociological (with a strong dash of history), and this seems, for the moment, likely to be particularly fruitful. The second premise is that explicit comparison of lawyers across countries will generate more understanding than will studies confined to particular countries. I deal with these points in turn.

The contribution of traditional legal studies to our understanding of lawyers has not been impressive. There has been astonishingly little discussion about the activities of lawyers, at least in the countries with which we have dealt. Even in the United States, where post-Watergate concerns for the ethical standards of lawyers gave birth to a plethora of professional responsibility courses and accompanying textbooks, only a small proportion of what has been written addresses serious issues of principle, and still less does so on the basis of any kind of ascertained fact (but see Rhode,

1981, 1985). Fears that lawyers are no more than "hired guns" have generated some philosophical discussion (Luban, 1983), and also some empirical study of the relations of lawyers to their large business clients (Rosen, 1984; Kagan and Rosen, 1984; Nelson, 1984). This sparse literature, however, represents a boundless treasure compared to legal scholarship in other countries where, except in the field of services to those who could not afford them, lawyers have been taken for granted as part of the legal landscape, raising problems roughly comparable to those presented by the court usher. In Great Britain, for example, two Royal Commissions (1979, 1980) reviewed access to legal services, and other policy issues, without considering the effects on the professions of their business and conveyancing orientation, the purposes of the legal system, or the impact on society of the professions' activities.

Comparative law has reflected this national poverty of interest. The most sophisticated recent discussion of lawyers in Western industrialized nations (Kötz, 1982) concentrates on the policy implications of broad trends such as specialization, claims to equal access, and relaxation of controls on advertising without seeking to relate them to underlying changes in the social environment or to the power of the profession vis-à-vis the state and the university. An earlier work (Johnstone and Hopson, 1967) contained many interesting comparisons and contrasts of English and American lawyers but has not been followed up.

It is very difficult to lay a proper groundwork for discussing the future organization and activities of the legal profession without understanding how change has occurred up to now and the unintended outcomes of previous decisions by interested actors. Both history and sociology address these questions, and each offers advantages. In a comparatively new and theoretically immature field, the progress of history may depend on the ability of talented individuals to formulate fruitful hypotheses and approaches; later a set of controversial questions will appear, the field will become more routine, and our understanding of particular professions will grow more profound. Sociology provides some intellectual underpinning in the form of categories for research that may be more useful to those coming fresh to the legal profession.

Experience of the history of lawyers supports these general remarks. It has certainly managed to emancipate itself from some of the unfortunate characteristics of an older legal history; contemporary work has been less inclined to trace a determinate path toward the present day, to assume that the rules governing the behavior of lawyers should be the principal concern, or to take for granted (or at its own valuation) the importance and public spirit of the profession (see, e.g., Friedman, 1985).

Significant conceptual advances have been made by Hurst (1950) and more recently by Gordon (1984), who makes very clear the differences

between the work lawyers do, its economic significance, and the ideas by which lawyers justify and guide their actions. Gordon's is the latest, and intellectually the most far-reaching, of a number of recent historical studies, particularly in the United States and England but also on the Continent, some of which are beginning to adopt an explicitly comparative approach (Ranieri, 1985). However, the history of lawyers has not been intellectually isolated: it has engaged explicitly with theoretical approaches from elsewhere, not least the sociological approach underlying these volumes (Duman, 1983; Prest, 1984; Cocks, 1983: 10–11).

Law has long, though not continuously, been a subject for sociology, and for Weber the intellectual and economic concerns of specialized legal occupations played a distinctive and important part in legal development. Theoretical accounts of professions generally have been developed particularly in the Anglo-American world, where autonomous professions have most flourished (Benguigui, 1972; Rueschemeyer, 1973: 13 ff.; Freidson, 1983). Changes in thinking about professions generally have not always affected thinking about lawyers, however, and only recently has there been some fusion. A basis for this lag was pointed out by Hazard (1965) over twenty years ago: in theorizing about professions in general, the social consequences of their organization and activities are often rather shadowy compared to what can be known about their organization and modes of work. Consequently, the application of a sociological approach tends to emphasize what professions have in common and play down what is distinctive about lawyers. This is not a necessary result, but the criticism remains valid, simply because what lawyers do is not easily visible, and its social effects are methodologically and theoretically difficult to isolate.

We can distinguish between developments in the sociology of the professions generally and those relating to lawyers in particular. The former story is controversial and retold from time to time with different emphases (Dingwall, 1983; Abbott, 1986). Three strands are clear. Functionalism starts from the view that socially valuable expertise is the exclusive possession of certain occupations, which receive such privileges as monopoly, autonomy, status, and financial rewards in exchange for ensuring that this expertise is used in the interests of society. Professionalization focuses on the process by which different occupations reach the status of a profession. Research influenced by Everett Hughes (1971) emphasizes the actual conduct of occupations and the ways in which individuals enter and operate within them. The writings of Jerome Carlin (1962, 1966) are part of this last strand; the earlier book is perhaps the first on lawyers to stem from a sociological tradition.

A fourth strand might be found in the recurrent attacks on the functionalist approach as no more than a restatement of professional ideology.

The persistence of functionalist thinking, even if only as a target, suggests that it correctly poses some underlying problem that does not surrender easily to attacks on any particular formulation. It would be fruitful, therefore, to see changes in sociological thinking about the professions as one aspect of a recurrent question: "Is there a problem about the creation, use, and control of expertise in society?" Those who downplay the importance of this question or give a clear negative answer tend to address issues of professionalization and deprofessionalization; those who think that there might be such a problem may be skeptical about the solutions proposed by particular occupations but continue to borrow concepts from them. It is possible, for instance, to question the necessity for, or scope and implementation of, a particular bargain while still recognizing the value of some such bargain as a way of controlling the use of knowledge.

When one concentrates on lawyers, the terms of the discussion change. As a domain of knowledge, the legal system, the institutions based on it, and the courts that administer it have special features distinguishing them from more scientifically based fields (Rueschemeyer, 1964, 1973: 13 ff.). Legal phenomena are more obviously human-made and much more susceptible to argument about the values they embody than, say, health or structural safety. In addition, lawyers in private practice are expected to be at least somewhat partisan, and expertise at negotiation or argument and persuasion does not seem as mysterious as does knowledge of the workings of the newest drugs. This may be why the central question of controlling expertise has not seemed fruitful when those interested in lawyers have turned to sociology for enlightenment.

Mainstream sociological theory did not generate much research on lawyers apart from Carlin's work, Ladinsky's (1963) study of occupational stratification, and Parsons's essay (1954) discussing the way in which lawyers mediate between the legal system and their clients, thereby acting as agents of social control. From a different viewpoint, Berle (1933) wrote about the commercialization of law practice in "law factories," and Smigel (1964) studied the bureaucratization of Wall Street lawyers, but this kind of work had no real consequences. Similarly, Carr-Saunders and Wilson (1933) had explored controlled occupations in England, including the legal professions, as part of a general discussion of the purposes and outcomes of such controls. However, when Abel-Smith and Stevens (1967) came to write what they decribed as a "sociological" account of the legal profession and the courts, they were avowedly preoccupied with advocating specific reforms and adopted no general theoretical framework.

From the late 1960s onward, movements for political, social, and economic equality raised critical questions about the contribution of law and lawyers to social change. Critics also addressed the organization and control of the profession (Zander, 1968). Both the extent of professional