Sociological Approaches to Law

Edited by Adam Podgórecki and
Christopher J. Whelan

CROOM HELM LONDON

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Introduction

In 1968 Renato Treves and J.F. Glastra van Loon edited *Norms and Actions*, a book of essays by indigenous scholars describing 'law and society' research in their countries. No account of work in Britain was included, probably because there was so little activity in the field at that time. Yet only eight years later, remarkable changes seem to have occurred.

This state of affairs was reported in an article in *Law and Society Review* by Campbell and Wiles in 1976. One notable exception to the lack of activity in this field in Britain which was not referred to by Campbell and Wiles was the work of Sir Otto Kahn-Freund.[1] For several decades, Sir Otto was a major contributor to the study of 'law and society'. His studies placed family law and labour law in their social context. His use of sociology, unprecedented from an academic lawyer in Britain, placed him in a virtually unique position. The explanation for this stems largely from his upbringing in Germany and from his informal but intensive contact with a group of younger lawyers and sociologists there, some of whom were especially influenced and inspired by the writing and teaching of Hugo Sinzheimer in Frankfurt, including his *Task of the Sociology of Law* (Sinzheimer, 1935). In addition, the influence of Marx and of Weber, and also of jurists such as the Austrian Eugen Ehrlich, whose methodology had sociological leanings, can be seen in Sir Otto's introduction to Karl Renner (1949). His role as a founding father of socio-legal studies in Britain will be outlined later.

Although Campbell and Wiles did stress important factors, such as the development of social sciences in general, the real achievement of British criminology and a well established anthropology of law, they seemed unable to find a satisfactory or comprehensive explanation of the rapid and unexpected development of the 'sociological' study of law in Britain. In this introduction we shall attempt to point out some of these underlying causes, to outline some distinctive features of British studies, and to locate the place of this volume in the development of the sociological study of law in Britain.

Traditional Legal Science

Without doubt, the theoretical study of law in Britain has been underdeveloped. Although jurisprudence (especially analytical jurisprudence) has achieved a good deal by way of semantic clarification, it has never really *explained* law. Beyond 'armchair theorising' jurisprudence has little to say about the nature of real, existing legal systems, it has no methodological bases upon which to explain law or legal phenomena.

The sociological approach to studying law is quite different. While the sources of analysis for lawyers are the taken-for-granted indicators of legal rules, such as legislation and formal court decision, for the sociologist major issues might include, amongst other things, the role of law in achieving social order, social control, social organisation or social change.

The completely negative attitude of the English legal profession, and of many academic lawyers towards socio-legal studies (including a widespread distrust of criminology and penology), as well as the changes during the last ten years or so must both be explained on two levels: first, from the particular structure of the law and the profession in this country, and secondly, from causes not specific to this country but in the nature of legal practice in general. The specifically English causes are linked with Weber's insight into the 'guild' nature of the common law, and the link between guild origin and a process which encourages, indeed demands, thinking by way of case law (casuistic thinking). Law is an art or a craft, transmitted from master to apprentice; any other way is suspected as destructive — hence, the continued and continuing resistance to changes in legal education. It is taught at undergraduate level, whereas on the Continent, in contrast, the study of law at universities is aimed at teaching civil servants rather than guild members. In this country, law has developed piecemeal: current principles are derived largely from past precedents; the structure and form of English law differs markedly therefore from Civil Law jurisdictions, where codes of law are the main resource, and where reliance on pragmatism therefore is far less marked.

The absence of social theory in the training of English lawyers has thus been very apparent. One major reason for this may be the traditional English attitude to social science which (at least in the past) has itself been marked by pragmatism, and also by a preference for empiricism over theorising. Thus, there have been few, if any, major English theorists upon which lawyers could draw. Moreover,

sociologists had themselves, until recently, neglected the study of law and legal institutions.

The result is that until recently, in English law faculties, there has rarely been any reference to the 'law in context', to the relationships of law to society. Instead, law has been studied in little boxes: in terms of offer and acceptance, negligence and divorce, rather than non-contractual relations between businessmen (Macauley, 1963), insurance (Ross, 1970) and family breakdown (Eekelaar, 1971). As a result, few English law students (who, in comparison with their Continental counterparts, have studied in very small law schools) have entered careers other than the traditional legal profession. This is not surprising; since law is not regarded as a general career training they are ill-equipped to tackle public administration, labour-management relations, industry or government.[2]

More generally, lawyers are conditioned by the nature of their work (even if it is drafting legislation) to think in the marginal, the exceptional or the abnormal situations. While this may also be the concern of the empirical social scientist, the routine and typical situation is for him also an important topic of study. While the lawyer may extract a rule to handle routine situations and problems, his data base is built up by accretion from cases which are by definition abnormal. The lawyer is rarely interested in the general, only in the individual case. Hence, his lack of understanding of empirical research and of any statistical, quantitative approach to law. He also views with distrust qualitative or interpretive research which may rely on observation.

The general distrust which persists is exemplified by the response to the study by Baldwin and McConville (1977) on plea bargaining in Birmingham. It was greeted by a public debate of bitter intensity, including criticism by the Bar Council and by Sir David Napley, former President of the Law Society. While 'remarkable changes' have occurred, in that such studies are now being done, the process of change in a more fundamental, structural sense is much slower and more resisted.

A further factor which may have increased lawyers' distrust was their suspicion of explanations couched in terms of social causation. The lawyer and the empirical social scientist may operate with different concepts of 'cause' or 'causation'. The lawyer does not see law as a social phenomenon caused by and in turn causing other social phenomena, but something which is self-sufficient in itself. And as regards the conduct of individuals, the question, what caused this

conduct, is often overshadowed by the question of subjective fault or of guilt which puts a limit to any more general causal argument, and again makes it, to some extent, suspect.

Rapid Development of the Sociological Approach to Law

From the standpoint of the practising lawyer, considerable changes have occurred since the Second World War, and the tempo of change has recently accelerated. First, the profession (particularly solicitors) is getting involved in law concerning the many rather than the few (for example, through legal aid) and secondly, the law for the many is contained mainly in statute, and the study of statutes, or codes, presupposes a new, more systematic and broadly-based technique, which must go behind and beyond the words of the statute, for example, to the context in which it was framed. Increasingly, therefore, lawyers have been faced with a new set of questions which demand a sort of analysis different from the traditional approach. The creation of new rights for specific sections of the community, laws relating to labour and race relations, to consumers and to families, together with increased state intervention in the regulation of lives, have all led to a growing awareness amongst lawyers (to varying degrees) of the deficiencies of traditional legal services. A major manifestation of this has been the institutionalisation of law reform, and law reformers, in particular the Law Commission, have had a very active and positive attitude towards developments in socio-legal studies, especially in family law, since it was founded in 1965. This too may have contributed towards the gradual growth of a new mentality, caused by the changing structure of the sources of law, and of the needs of the new 'consumers' of law.

Pressures for legal reform, for greater 'access to justice' and for the 'delegalisation' of the judicial process have led to attempts to improve legal representation, the proliferation of tribunals, legal advice centres and so on, while lawyers have more often been faced with problems that go beyond the minutiae of legal analysis. Thus, over-specialisation in the 'black-letter' approach and in the pragmatic, individualistic, case-by-case attitude is being continually threatened by the growing recognition that a complete understanding of the law cannot be obtained within traditional legal science. Specialists from several legal sub-disciplines — labour law, (for example, Wedderburn, 1971), race relations (for example, Hepple, 1970), family law (for

example, Eekelaar, 1971) — began attempts to explore the potential of the empirical approach as a possible remedy for their frustrations with unresolved problems.

A useful recent example of the sorts of questions which are now being asked can be found in a study of law and consumer agencies by Cranston (1979, p. 171):

> An examination of the regulatory process of consumer agencies raises the question of whether it is successful. Do we conclude that consumer protection is a myth; that consumer law is modified in its implementation in favour of those being regulated; that consumer agencies and businesses have evolved an accommodation which harms neither; and that the occasional prosecution for a breach of consumer law is ritual with little practical significance? Is consumer protection actually favourable to the business community because it falsely deludes the public into believing that something is being achieved, and permits businesses to continue their traditional practices while surrounded with an aura of social responsibility?

To answer these questions, theoretical studies in law based on an empirical approach have become recognised by legal scholars as complementary and indispensable contributions to the understanding of the operations of law. A reliable answer is not available within traditional legal science; indeed, to formulate these questions a theoretical perspective is necessary.

The value of such studies increases when the changes which law schools introduce into the curriculum are in response to demands made from outside. Industrial innovations, political pressures and social needs force law schools to redesign their training to meet newly emerging expectations. Theoretical studies in law based on empirical research are also consistent with the new idea (prominent in North America) of the university and its relationship to the broadly understood environment; no longer are universities such ivory towers, existing independently of the rest of society.

Finally, theoretical studies in law based on empirical research tend also to criticise the 'establishment' for its quite often hidden, but oppressive, functions. Sociology is a sceptical discipline, it unmasks as opposed merely to describing or even to eulogising the law.