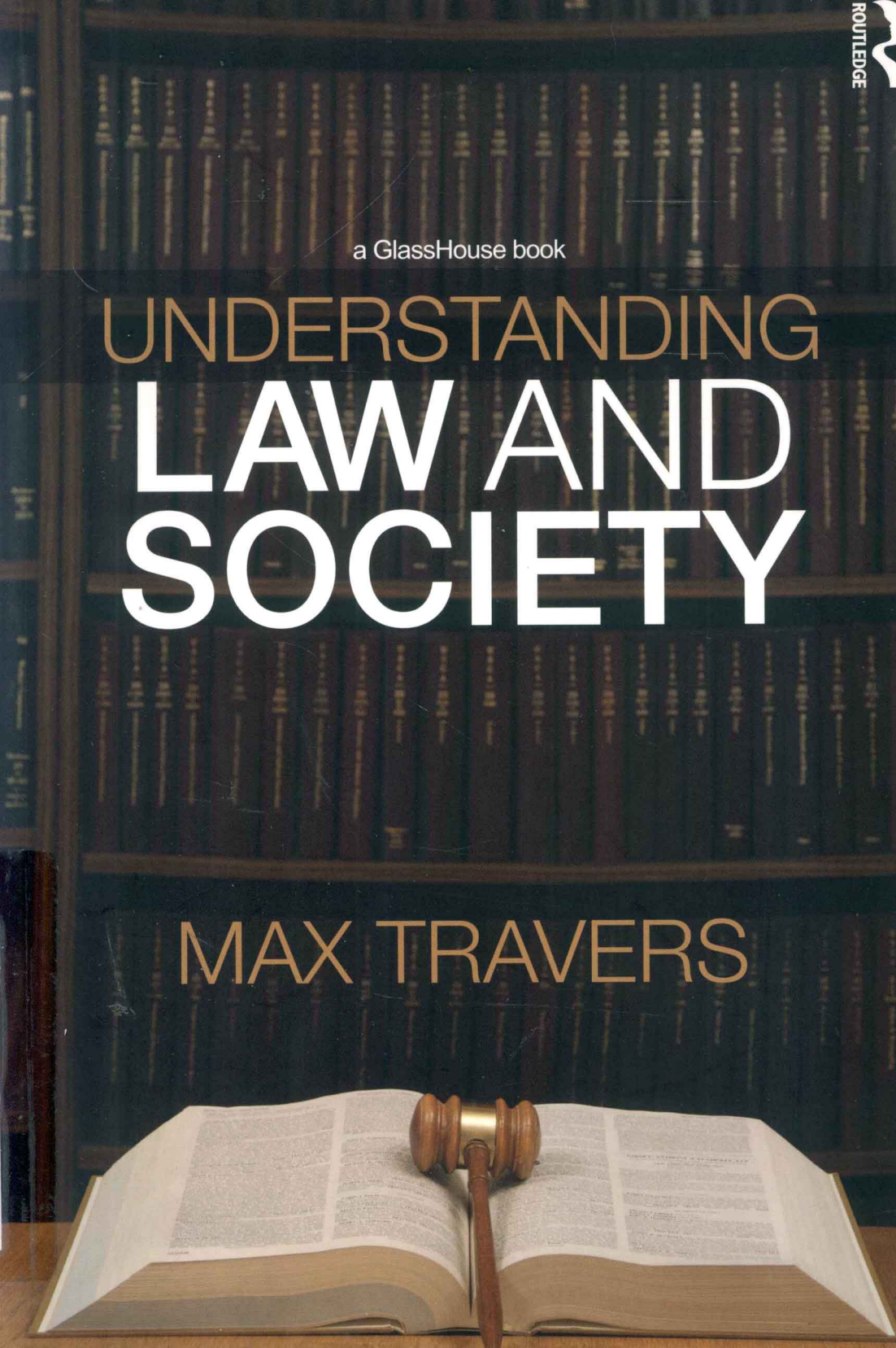
ROUTLEDGE

a GlassHouse book

UNDERSTANDING LAW AND SOCIETY

MAX TRAVERS



Understanding Law and Society

Max Travers

Routledge
Taylor & Francis Group
a GlassHouse book

First published 2010 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

A GlassHouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

Typeset in Sabon by Keyword Group Ltd.,

Printed and bound in Great Britain by CPI Antony Rowe, Chippenham, Wiltshire

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication Data
Travers, Max.
Understanding law and society/Max Travers.
p. cm.
Simultaneously published in the USA and Canada.
"A GlassHouse book."
Includes bibliographical references.
ISBN 978-0-415-43032-6 – ISBN 978-0-415-43033-3 1. Sociological jurisprudence. 2. Law–Philosophy. 3. Law–Interpretation and construction. 4. Postmodernism. 5. Legal polycentricity. I. Title.
K370.T73 2009
340'.115–dc22

2009009056

ISBN10: 0-415-43032-1 (hbk)
ISBN13: 978-0-415-43032-6 (hbk)

ISBN10: 0-415-43033-X (pbk)
ISBN13: 978-0-415-43033-3 (pbk)

ISBN10: 0-203-87125-1 (ebk)
ISBN13: 978-0-203-87125-6 (ebk)

Preface and acknowledgements

This book grows out of two collections, edited with Reza Banakar while I was living in the United Kingdom, aimed at postgraduates and those teaching sociology of law in departments of law and sociology. Our basic puzzle and complaint in those books was that sociology of law, both as a field of inter-disciplinary scholarship and a subject taught at undergraduate level, does not do justice to sociology as an academic discipline. This is evident by the fact that textbooks do not cover the range of theoretical approaches that interest sociologists, or explain the debates between them. Another weakness is that they rarely consider the issue of method, either in the sense of the different techniques used by sociologists, or philosophical debates on how to produce knowledge. We argued in *An Introduction to Law and Social Theory* (Banakar and Travers 2002) that all undergraduate law degrees should require students to do some contextual courses, and preferably give them an opportunity to study sociology of law. In *Theory and Method in Socio-Legal Research* (Banakar and Travers 2005a), we also argued that law students who are interested in doing socio-legal research should have the opportunity to take methods courses at undergraduate level, and certainly before doing postgraduate studies.

After publishing those books, we realised that what was still missing was an accessible introduction to sociology of law for undergraduates. As has happened in other projects, Reza encouraged me to work collaboratively in submitting a proposal to Routledge-Cavendish. Like many sociological jurists in the past, Reza is committed to introducing law students to sociological ideas and perspectives. My own background is complementary in that I qualified as a solicitor in Britain, through the Common Professional Examination route, before becoming a sociologist. We were pleased that the editorial board was persuaded that sociology of law had developed sufficiently as an undergraduate subject to support a textbook. Reza was, unfortunately, unable to write his half, so I have completed the project.

Anyone who has written a textbook will know that it is a difficult task. This is partly because in a subject like this you cannot cover everything, so have to make some difficult choices. In this case, we wanted a book that was

about theoretical traditions in sociology of law rather than substantive topics, such as the legal profession or dispute resolution, but was still accessible for students taking undergraduate courses in law and sociology. Getting the level right is difficult. When you try to introduce something simply, much that interests the specialist will be lost. But if you introduce the subject at too high a level, many students will find problems because they do not have the background knowledge to understand basic concepts. The preface to another recent introduction to sociology of law (Milovanovic 2003) justifies the approach taken through a cooking metaphor. It likens that book to the kind of meal you can eat in a leisurely fashion over an afternoon in a Parisian cafe tasting different dishes, as against eating a hamburger where everything has been packaged. Like any textbook aimed at helping the undergraduate student, this book is more like the hamburger, although one that uses the best international ingredients, and tells you where to go for more advanced readings.

I hope that readers will find this book stimulating, and that it will generate interest in law and society studies like the other textbooks published in recent years (for example, Kidder 1983; Cotterrell 1992; Roach Anleu 2000; Sutton 2001; Vago 2005; Deflem 2008). I would like to thank the University of Tasmania for providing an excellent working environment, and supportive colleagues who see the value in publishing textbooks alongside other research activities. I have been fortunate to have been given the opportunity to teach sociology of law, in addition to courses in sociological theory and qualitative research methods. My course is based on reviewing different substantive topics, which is appropriate for those students without a sociological background. I spent only two weeks reviewing the different sociological traditions introduced in this book. Nevertheless, I feel that I could teach an additional course based on reviewing traditions and theories. This book should help students see the relevance of sociological theories and theoretical debates to any field of law and society research.

I tend to get immersed in projects, and not spend as much time with family and friends as I should, which is not made easier by having moved to Australia. In Britain, I would like to thank my parents, Harry Travers, Denise Farran, Anjana Bhattacharjee, Roger Taylor, Wendy Burke, Paul Watt, Paul Elton, Esther Knight, Wes Sharrock, Rod Watson, Dave Calvey, Lee Epstein, Carol Bennett, Monica Mathews, Janet Entwistle, Lyn Burden, Neil Jenkings and Janet Rachel for their support in the last few years. In Australia, I would like to thank my colleagues and students in the School of Sociology and Social Work at the University of Tasmania, David Wearing, Mike Emmison, Robert Van Krieken, Maureen Fitzgerald, Ros Porter, Greg Martin, Hannah Jenkins and Terrie Dempster. In America, Western Europe and Japan, I also have a few contacts: special thanks to Jack and Marilyn Whalen for treating me to some meals in San Francisco. I should also thank the staff at the Nova StarGate hotel in Melbourne since I do some writing there.

Contents

Preface and acknowledgements		vi
1	Introduction	1
2	Classical thinkers	17
3	The consensus tradition	39
4	Critical perspectives	65
5	Feminism and law	89
6	The interpretive tradition	113
7	Postmodernism and difference	139
8	Legal pluralism and globalisation	165
9	Conclusion	189
References		201
Index		215

Chapter 1

Introduction

The relationship between law and society	3
The view that law is society	5
The view that society is greater than law	5
Approaches to studying law	6
Black-letter law	7
Jurisprudence	8
Policy-oriented research	8
Sociology of law	9
Sociology of law: a debate subject	10
Why sociologists disagree	10
Consensus versus conflict	11
Action versus structure	11
The postmodern challenge	12
Can sociologists address law?	13
The objectives of this text	15
Questions	15
Further reading	16

This introductory text on understanding law and society should interest two types of student readers. Those studying law will already know a lot about the legal system, and legal skills and reasoning, but feel less confident when thinking about the relationship between law and society. Students on social science degrees may know very little about the legal system, but have taken introductory courses in different social science theories and approaches. This in itself suggests that teaching courses in law and society studies, sociology of law, socio-legal studies or the law in context (these are all different terms for the same approach towards law) is not always easy since it involves bringing together different disciplines. Against this, a mix of students on any law and society course can be very valuable, and students often help each other not only with terminology, but in learning how to look at law differently. This chapter will, therefore, need to explain the basics of the legal system (that law students should know in more detail) and the basics of sociology (that should already be familiar to sociology students). To understand the nature of either law or society, you need to know the relevant ideas and concepts from the disciplines of law and sociology. Moreover, the moment you start to think about the relationship, you are starting to explore new territory, and will encounter difficult but interesting questions that cannot be addressed within each discipline.

The relationship between law and society

The first thing that students learn on law degrees are the sources of law as a body of rules that govern different aspects of social life. In the United States, Britain and Australia (the common law world) a significant amount of law is made by judges interpreting precedents handed down from time immemorial. The judgements made by the higher courts are reported in law reports that fill shelves in libraries or can be consulted using search engines in cyber-space. Anyone new to law as a discipline might be amazed, and perhaps disturbed, by the sheer volume of case law being produced by different courts and tribunals, and which lawyers need to know if they are advising clients. Then there is the law made by legislative bodies, such as the American Congress or the British Houses of Parliament, which fills yet more volumes, and may come before the courts generating further case law.

Every area of life is regulated by some form of law, and the amount is increasing exponentially. Criminal law creates offences for which one can be arrested and charged by the police and brought before the criminal courts. Civil law concerns the relationship between citizens. The law student has to learn and be able to apply complex bodies of rules that identify when one can obtain compensation for injury, and the rights and obligations when making a contract. There are, in fact, specialist rules, relating to every aspect of social life, including the ownership of land, different aspects of

commerce, the family, the conduct of public bodies and immigration control. The law student learns some of the main areas (tort, contract, criminal and family law) on a law degree but there is too much to learn, and like the medical student, it is often only possible to acquire skills in locating the law, and making legal arguments, rather than obtaining a mastery of each specialist area.

From a sociological perspective, the legal system can also be understood as a number of organisations or institutions that produce, administer and interpret the law. There is the law school itself which maintains law as what the structural-functionalist sociologist Talcott Parsons (see Chapter 3) described as a 'cultural tradition', and trains the next generation of lawyers. There is the legal profession which includes lawyers in private practice, those working for industry and public sector organisations and the judiciary. There are also the criminal and civil courts, and related institutions such as the police. Several thousand people work in these and other specialist organisations concerned with legal affairs in any particular country. In the United Kingdom, both the systems of criminal and civil law are administered and overseen by departments of state, the Home Office and Department of Constitutional Affairs, which are themselves massive bureaucratic organisations. Then, there is the whole political system and legislative process that produces statutory law, which itself consists of numerous organisations, each with its own ways of doing things. To give an example, the British House of Commons is an extremely complex institution with its own procedures and values that exists to review and make new laws. One group of specialists working there are the parliamentary draughtsmen who translate the objectives of legislators into what they hope are effective pieces of legislation.

Outside the nation state, there are organisations that produce and administer laws that shape the relations between states. Many of these are concerned with economic relations in a globalising world, for example, the regular negotiations that have attempted to secure a free trade agreement. Others are concerned with regional affairs, so for example there are many agreements and regulations just affecting the relationship between states in Asia or Latin America. Others are concerned with setting global standards, or attempting to police criminal behaviour. The International Criminal Court in The Netherlands holds trials for those charged with war crimes. The various Conventions that have resulted from the formation of the United Nations, and the many agencies associated with this, on the rights of children, the environment and the rights of prisoners in international conflicts, are not always respected by nation states. Nevertheless, the United Nations will become increasingly important in addressing problems, such as global warming, that can only be solved by co-ordinated, international action.

Understanding law in terms of these organisations and institutions still does not do justice to how law affects us in everyday life (even when we are not aware of it), and particularly how organisations of all kinds, from small businesses to television stations, organise their activities in compliance with external regulations. The term 'legal phenomena' seems to capture how we encounter law regularly in social life, often in dealing with documents such as tenancy agreements, employment contracts or insurance policies, or the liability notices on consumer products. The rights and obligations of the different parties involved in publishing this book (the author and publishers) are governed by a written contract. We may not read these documents closely, but in the modern world they are part of our everyday lives (Friedrichs 2006). It should also be remembered that any organisation by definition will generate its own rules and procedures. This is arguably also law even if it is not recognised as such by the courts, unless they have to intervene when a dispute arises that cannot be settled informally.

How then to understand the relationship between law and society? This difficult question has troubled legal philosophers and social theorists for many years, and there are no easy or simple answers. To get a sense of the difficulties, consider the following positions:

The view that law is society

If society is more than a collection of individuals, there must be some kind of relationship between them, and at the very least a sense of what is right and wrong behaviour. This has led legal philosophers in the natural law tradition to argue that there cannot be society without law (Finnis 1980). From this perspective, social theorists do not usually pay sufficient respect to law. It is central to everything we do, not simply as an external constraint, but because it constitutes and makes possible orderly social life. This involves taking a broad view of law, so any rule or social norm we are following, for example caring for the sick or respecting other people's property, is seen as part of law, even if lawyers or the courts are not asked to intervene, and we are not consulting legal rules. Everything in society is held together, governed and even constituted by law.

The view that society is greater than law

The opposing view, not often articulated by sociologists, but evident when they write about society, is that it is possible to go through life without giving law much thought. A lawyer might need to be consulted when buying a house, or if you are unfortunate enough to be injured in a car accident. For the most part, however, law seems rather a dry, technical subject of interest to a particular occupational group. Legal considerations may be

there in the background when you are pursuing your day-to-day work and leisure activities, but they are not central to running a business, getting married, appreciating television drama, ordering from a restaurant menu or conducting a war (to give a few examples). There is inevitably a lot more to any society, whether it is the kind of small-scale group studied by anthropologists, or our own highly complex industrialised society, than law. From this perspective, one can recognise the importance of rules and norms (how people are expected to behave),without seeing them as part of the legal system. Some legal philosophers and sociologists have also argued that we only consult lawyers, and only need law, when things go wrong. Harvey Sacks (1997, p. 43) argued that the emphasis in law on 'written matter, on coherence, clarity, completeness, impersonality [and] predictability . . . provide solutions to matters not treated as problems in the everyday world of others'. It would be intolerable if every aspect of our lives really were governed in fine detail by legal rules.

Even if one accepts that law is only one institution, among many others, it is a particularly important institution, since it is also more or less equivalent to the modern legislative state. Similarly, despite being resented for the amount they charge to resolve problems and conflicts through their knowledge of what to many seem obscure and unnecessary procedures, it would be hard to imagine our complex, industrial society without lawyers. This is why it seems strange that law hardly gets a mention in many sociology degrees, outside the area of deviance. There are likely to be options on class structure and stratification, work and the economy, crime and deviance, the family, the media, education, racial and ethnic relations, perhaps religion and science, but not law. The other side of the problem is, of course, that in many law degrees, students only encounter law as a set of rules, rather than thinking about its character as an institution in broader terms.

The objective of this text is to help you understand the relationship between law and society, without promising there are easy answers even before we look at different sociological traditions. The next section explains what is distinctive about sociology of law through contrasting it to three other ways of studying law which are taught in law schools. It also considers some general debates about the nature of society that have interested sociologists.

Approaches to studying law

Students studying law on university degrees spend most of their time learning and applying what is sometimes forbiddingly called black-letter law. They also usually have to take a course in legal philosophy, and may take courses where there is a focus on how law contributes to the objectives of government. Sociology of law, by contrast, is a subject concerned with

thinking about, and investigating using empirical methods, the relationship between law and society.

Black-letter law

'Y receives an e-mail message from X in which he offers to sell his car. The message says that if he hears nothing by the end of that week, X will assume that he is happy with the price. Y does not reply to the message. Does he have to buy the car?'

'Mary is a witness to a car accident caused by Louise in which a child is killed. For the next few months, she finds it difficult to sleep and gets flashbacks. She gets back to normal through seeing a counsellor recommended by her doctor. Can Mary obtain compensation?'

These are examples of the problems given to British law students to test their knowledge of the law and develop skills of legal reasoning. To answer the first question, you need to know the rule or principle established by the case of *Felthouse v Bindley* (1862) 11 CB (NS). You can find the surrounding case law in any British textbook on the law of contract. Since judges follow precedents, this case determines whether a contract has arisen in similar circumstances today, unless a lawyer can make a convincing case that the facts can be distinguished. To answer the second question, you need to be familiar with the case law following the decision in *Donoghue v Stephenson* [1932] AC 562 which created the right of someone to claim compensation if injured by another person or organisation in breach of a duty of care. The issue here is whether you can claim damages for a breach of duty of care resulting in psychological harm or distress. As every law student knows, there are no credits given for providing background information about the origins of contract law, or ethical debates about whether protection against every conceivable type of harm is a good thing. In fact, the flavour of the law school tutorial is that students have to solve problems quickly, with just the rules or principle that is required. Moreover, they have to sit examinations based on large bodies of cases and rules where only the most disciplined, and with good memories, will obtain high grades.

Although one can make fun of how black-letter law is taught in law schools, there is no doubt that knowing the law, or knowing how to find it, has great practical value. It also helps at a later stage of legal training to know about the procedures involved in bring a case to court. Just as medical practitioners need to know about common illnesses and how they are treated, the lawyer needs to know the general principles in a particular area of law, and how to consult specialists when this is appropriate. If cases are appealed, lawyers and judges may have to engage in academic argument over the principles and precedents in a particular area of law. The judgements written up in law reports may in turn form part of legal training for the next generation of lawyers.

Jurisprudence

The only subject outside black-letter law that has become institutionalised in the law school curriculum is legal philosophy or jurisprudence. Many textbooks are quite broad, and include discussion of sociological theorists such as Karl Marx (for an example from Britain, see Freeman 2001). They mostly, however, contrast two philosophical traditions that have been debating the nature of law since the eighteenth century. Natural law theory is the oldest, and argues that law does and should reflect enduring and eternal ideas of what is right and wrong. This view of law originated in Europe during a period when the power of the sovereign or law-maker was seen as having a religious basis: law reflected divine will. By contrast, positivist jurisprudence took the view that law as a set of rules was created by political power, and there should be no room for appeals to moral absolutes.

Although it might seem remarkable to a non-specialist that so much intellectual effort is still expended on debating these philosophical positions and various elaborations or off-shoots, it should be remembered that the objective of this field of legal philosophy is to think through fundamental problems in a systematic fashion. Classic statements by Ronald Dworkin, Hans Kelsen and H.L.A. Hart (different varieties of legal positivism) or by Lon Fuller and John Finnis (natural law theory) repay close study. None of these theorists disagree about what lawyers or judges do in practice and most have little interest in empirical research conducted by sociologists. They are concerned with philosophical debates about the nature of law.

Policy-oriented research

Law has always been an inter-disciplinary subject, and in many law schools there is some focus on teaching the development of social policy either in separate courses ('law and policy'), or as part of courses on black-letter law. Since government agencies providing health and welfare services were established by legislation, it makes sense to explain the purpose behind these on a law degree, and consider the inevitable gap between objectives and achievements. Courses which introduce the 'law in context' often introduce the development of policy in this sense, perhaps combined with some social and political history and a consideration of philosophical principles, and some sociology of law. In the past, they have often advanced a critical view in relation to the welfare state, in the sense of arguing that more can be done to help the disadvantaged. Today, there is a different political climate in that neo-liberal governments have dismantled many of the rights secured in earlier periods through new legislation, and have introduced market principles in the delivery of public services (for an overview, see Harvey 2007).

Some British writers in the law and context tradition have argued vigorously against these developments which have, among other things, made it harder for people of modest means to afford the services supplied by

lawyers. There are also, however, many policy-oriented researchers based in law schools who have welcomed the reforms, and accept the current emphasis within government on improving efficiency. This has created many opportunities to conduct evaluations for government departments (Genn et al. 2006). Whatever the policy of the day, it seems inevitable that many law and society researchers will do research for government agencies (Sarat and Silbey 1988), without seeking to raise difficult questions or political objections. There are, therefore, some similarities between black-letter law and policy-oriented research: they each seek to be useful, and speak in the same language as practitioners and politicians.

Sociology of law

Many sociological traditions ask critical questions about society from a progressive or left-wing standpoint, and can be contrasted with policy research that serves the needs of the legal profession or government (for discussion, see Campbell and Wiles 1976). Many of the traditions reviewed in this book speak for subordinate or disadvantaged groups in society (Chapters 4, 5 and 7), and often form the basis of courses in 'critical legal studies' taught in many law schools. However, by no means all sociology is critical. Some theorists and traditions are quite conservative in supporting established institutions, for example, Talcott Parsons (Chapter 3). Others, such as some varieties of interpretive sociology (Chapter 6) or poststructuralist philosophy (Chapter 7), are not interested in advancing a political viewpoint. What all sociological traditions have in common is a scientific interest in studying law. Like any other area of science, this is pursued for its own sake, and for intellectual interest, without assuming at least initially that there will be any practical pay-off.

Another way of putting this is that sociologists of law bring to law the theories and methods that sociologists use in understanding and investigating other areas of society. There are all kinds of theories with different philosophical and political assumptions and debates between them, ranging from structural-functionalism to Marxism and poststructuralism (for overviews, see Cuff et al. 2006 or Ritzer 2004). There are also all kinds of methods that sociologists use in investigating society. Moreover, and to make matters more difficult, good sociological research requires being self-conscious and reflective at all stages of a research project. When they do dissertations, undergraduate students have to write critically about the theories employed, contrasting these with alternatives, in a review of the literature. They also have to write critically about methods, and why they have chosen to use one approach rather than others, in a methodology chapter. This commitment to being self-critical and reflective, and the fact most sociologists are committed to conducting empirical research, characterises sociology as an academic discipline, and distinguishes it from black-letter law, jurisprudence and policy-oriented research.

Sociology of law: a debate subject

A central difficulty in teaching sociology of law is whether to focus on theoretical traditions or substantive topics. There are a number of textbooks on sociology of law or law and society that start by introducing theories, but then concentrate on describing substantive topics, such as the legal profession, judiciary, dispute resolution and international law. The problem here is that the nature of theories in sociology and how they can be applied to law and legal phenomena are not really explained. This text differs in trying to explain the theories, but there is a risk that it will not do sufficient justice to substantive topics. It will, however, include a few empirical studies as examples within particular chapters: you should also be able to see how the same topic (for example, the position of women in the legal profession) can be approached from a range of theoretical perspectives. How though to introduce these perspectives and the debates between them? This section will consider three general debates that characterise sociology as a discipline and relate these to law. To begin with, however, it is necessary to consider why sociologists disagree.

Why sociologists disagree

Sociology has been described as an argument or debate rather than knowledge subject, a discipline more like philosophy than physics or for that matter black-letter law (Anderson et al. 1978). There are many aspects of the world that provide scope for political disagreement: many people, for example, are strongly opposed to the Iraq war, whereas others believe the bloodshed and loss of life has been worth it. Sociologists usually, however, disagree about larger issues than this. Consider, for example, the rise of our advanced, industrialised civilisation over the last 300 years based on a capitalist economy, a world market and the modern bureaucratic state. Some social theorists, such as Auguste Comte, Emile Durkheim and Talcott Parsons, have viewed these developments with hope and optimism: modern law from this perspective is a tremendous achievement. Others, however, believe that we have to a considerable extent lost our freedom: in Max Weber's words that we are reduced to 'cogs' in a machine (Weber 1968, p. iii).

At a different level of society, the same arguments can be made about our experiences of university education, whether in departments of law or sociology. Are the rules and regulations, and the carefully timed ways in which lectures and seminars are delivered, a good thing, making possible education for the masses? Or are we reduced to being cogs in a machine, where the whole experience of education for teachers and students has become deeply alienating? You are not required to take a stand on these issues in every research project as a sociologist of law, but many of the great sociologists have taken a moral and political stand on either side of this debate.

Consensus versus conflict

Although there is less of an ideological divide in sociology following the end of the Soviet Union in the late 1980s, there remains a long-standing debate between those who understand society as held together by shared values, and those who see it as characterised by power relations and conflict. In simple terms, if you believe that society is held together by shared values, you will see it as an orderly place in which conflicts and tensions are signs that something has gone wrong. The mechanisms that Talcott Parsons (1951) identified as holding society together were socialisation, but also the legal system including the coercive forces of the police which could intervene where required. Structural-functionalism was effectively the dominant paradigm in sociology during the 1940s and 1950s but was much criticised in the 1960s and 1970s. Today, to some extent the wheel has come full circle and government ministers in the developed world often employ functionalist ideas in talking about the need to educate deviant groups.

Conflict sociologists, by contrast, believe that conflict and tensions, including crime, are healthy responses to economic inequality. During the 1960s, they believed that mass movements would develop in Western Europe and America that would overthrow existing economic and social elites and redistribute income and wealth (for a British radical text, see Taylor et al. 1973). The obvious difficulty with this position is that, even though they generate periodic recessions, over the long term capitalist societies seem both stable and economically successful. On the other hand, there is growing inequality both between and within countries. In the USA, large numbers of African Americans have a far lower standard of living and education, and are more likely to come into contact with the criminal justice system, than the rest of the population. From this perspective, law is a means of ideological persuasion: it conceals the real economic relationships through which dominant groups exploit the working class. It is also a means of coercion which is apparent whenever the police are used against protestors, for example at the regular demonstrations at international meetings of the World Trade Organisation. This organisation that represents government and business interests seeks to promote and introduce free trade as a means of creating a dynamic capitalist economy internationally. The protestors believe that this will produce even higher levels of insecurity, exploitation and inequality: a major political debate in our times.

Action versus structure

The debate between those theorists who believe that individuals exercise agency and free-will, and those who see their actions as shaped, and even determined by, social structures lies at the centre of sociological analysis. All the classical theorists were aware of, and wrote about, this issue. Talcott Parsons (1937) recognised that it was a central problem for sociology, and