

1 Introduction: the Meaning of Law

Law is a social phenomenon and has been of interest to sociology since the early days of the discipline. However, much discussion of law has been and remains monopolized by legal practitioners and legal theorists who primarily focus on legal doctrine; they are concerned to analyse patterns, directions and inconsistencies in judicial thinking and decision making. They attend to social factors in discussing the kinds of values reflected in judicial statements and the ways in which judges resolve practical, everyday dilemmas in deciding cases. The enduring emphasis is on analysing appellate cases. Indeed, the sociology of law is more often taught in law schools by law academics (albeit with a strong interest in the social sciences and/or social science training) than in sociology departments. For many sociologists, law is derivative of broader (or more authentic) sociological concerns, for example social control and deviance, or is treated within other substantive areas such as labour relations, the welfare state and social policy, crime, bureaucratic organizations or contemporary family relations. Many sociological definitions of law stress its normative character and are concerned with the responses to behaviour that violates laws. Sociological discussions of law are often limited to discussions of the criminal law, its operation and administration.

Law and sociology are often presented as two distinct disciplines and bodies of knowledge. For example, Cotterrell – a socio-legal theorist – seeks to understand ‘the nature and effects of confrontations between such different fields of knowledge and practice as those of law and sociology ... [that have] quite different historical origins or patterns of development, social and institutional contexts of existence, and social and political consequences’ (Cotterrell, 1986: 9–10). Another commentator disagrees that the common law can be considered a social science because of the two disciplines’ different epistemological approaches: the former relies on adjudication to discern ‘facts’ and on precedent to resolve present disputes, while the latter relies on ‘positivity’, the constitution of knowledge via empirical research and the deployment of statistical analyses (Murphy, 1991: 185–200).

Certainly, the development of law and sociology in western societies occurs within different institutions and bodies of knowledge (as professionally defined). However, they have very similar subject matters: both are concerned with social relationships, values, social regulation, obligations and expectations arising from particular social

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positions and roles, and the linkages between individuals and society. Almost any aspect of social life can be subject to legal regulation and judicial statements do have similarities with social theory (and often read like social theory). Nonetheless, the substance of law in western democratic societies primarily deals with the regulation of property relationships and the enunciation and protection of property rights. Sociology is more interested in a wider array of social relationships and investigates inequality and power at both structural and interpersonal levels. While jurists are concerned primarily with the activities of courts, especially the process of legal reasoning, sociologists are more interested in the interconnections between law and changing social institutions, political structures and economic conditions and the relationships between legal institutions and other forms of dispute resolution, social control or regulation. At a more individual or micro level, social researchers investigate how various actors – including lawyers, judges, social activists and people in everyday life – experience, use, interpret, negotiate and confront law, legal institutions and legal discourse (Silbey, 1991: 826–9; Travers, 1993).

Social change

Social change is a term sociologists use to describe usually large scale transformations, such as industrialization and the shift from rural agrarian, feudal or traditional societies to modern, industrial societies, the emergence of capitalism, democratization, and most recently globalization. These changes are associated primarily with economic conditions and market forces and have consequences for political, social and cultural activities. Indeed, the formative period of sociology as a distinct discipline was characterized by large-scale economic, political and social transformation. Key nineteenth century social theorists focused on social change at a macro level such as capitalism and its contradictions (Karl Marx), rationalization (Max Weber), and the increasing division of labour (Emile Durkheim) (Arjomand, 2004: 321). More specific theories of social change address the implications of overall, abstract changes for human social relations, the lives and experiences of individuals and their everyday social environments, school, work/employment, families, social control and so on (Hallinan, 1997). Especially during the twentieth century, governments often relied on the law as a route, or resource, to implement desired social change. In part this reflected aspirations for the welfare state and its social reform agenda, including the statutory implementation and bureaucratic administration of social programmes.

A distinction is often drawn between revolutionary social change and evolutionary social change. Revolutionary social change tends to derive from inequalities of various kinds and resulting conflicts which spawn political action, both within and beyond the recognized political institutions. Evolutionary change occurs ‘naturally’ as populations grow, societies become more complex (Abercrombie et al., 2006: 351–2). A third kind of social change can be imposed from external sources, as in the case of colonization.

In thinking about societies and social change, an analytical distinction between structure and action is often made. Social structures are patterns of actions and

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behaviour that exist over and beyond the activities and purposes of individuals but in turn depend on individual action for their reproduction and continuation (Sewell, 1992: 3). The idea of structure suggests a fixed, observable, enduring entity, such as a whole society or part thereof, for example the legal system, or the system of inequality. Social structure constrains human activity limiting the scope for human agency, individual choice, responsibility, motivation or intention. This image of structure is most obvious in structural-functionalist accounts that conceptualise society or social organization as constituted by different parts undergirded by the logics of integration and stability. Any change seems to be the natural process of evolution and progress, often toward modern societies characterized by the replacement of tradition and custom by science and rationality (Etzioni, 1966). Either way, social change can bring about instability; conflict and dislocation (see Parsons, 1951).

Weber observed the relationship between structure and action as paradoxical (1978). For Weber 'paradox is the defining characteristic of modern life; that is the *inevitable* consequence of all social action in modernity' (Symonds and Pudsey, 2008: 229, emphasis in original). Human action establishes and reproduces social structures which in turn confine, even undermine, that action despite the intentions or motivations of actors. Organizational contexts and everyday routines can militate against the realization of original goals or purposes of the social structure. In an important early essay Robert Merton articulates 'the problem of the unanticipated consequences of purposive action' (1936: 894). Purposive action is conduct which involves motives and some degree of choice between various alternatives or competing options. For many reasons individuals cannot or do not foresee all the possible consequences, positive, neutral or negative, of their conduct and choices, thus they are unanticipated.

One significant example of where unanticipated consequences often occur is bureaucratic organization. Putting aside cultural and social variation in the bureaucratic form, Weber's ideal type of bureaucracy is the quintessential example of legal-rational authority: it is bounded by rules, authority is hierarchical and it is oriented to the achievement of one or more identifiable goals, for example, welfare provision, education, justice, or profit. These overarching goals can become displaced from the everyday conduct and choices of employees, in turn limiting the ways the overall goals can be achieved, or the goals are redefined or undermined (Merton, 1968: 249–60). Vaughan (1999) describes the 'dark side' of bureaucratic organizations which present possibilities for mistake, misconduct and disaster with potentially adverse societal consequences. Her research (1998) shows that the National Aeronautic and Space Agency's (NASA) decision to launch the Challenger space shuttle followed a gradual increment of seemingly minor problems without major damage, which engineers defined as separate, local and within acceptable risk but ultimately resulted in its explosion after takeoff in 1986.

The example of bureaucracy is significant for understandings of law and social change because the organizations established to implement legal change usually assume some or all of the elements of the bureaucratic form. A new statute may not be translated into the expected or desired social change because of the structures of implementation, especially if that involves a bureaucratic organization, which entail contextual or local practices, values, and viewpoints. An excellent

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example of this is recent research on hate crimes (discussed in Chapter 8 below). This phenomenon might be characterized as the gap between law on the books and law in action (Jenness and Grattet, 2005).

The notion of 'structuration' conveys a dynamic relationship between structure and agency (Giddens, 1976; Sewell, 1992). Social structures, constituted by rules and resources, constrain human agency but also provide opportunities or capacities for creativity, reinterpretation or innovation, which constitute structural change. Human agents are knowledgeable and competent, can mobilize resources (which vary in accessibility), and are not viewed as over-determined by their location in the social structure. 'To be an agent means to be capable of exerting some degree of control over the social relations in which one is enmeshed, which in turn implies the ability to transform those social relations to some degree' (Sewell, 1992: 20).

Understanding law and social change will be complex. Broadly defined, as a set of shared or at least accepted rules governing social interaction, law is a social institution but the way in which law is organized or manifest in different societies varies. Considerable research in the sociology of law attends to legal institutions: the legal profession, police, courts, legislation, and judicial decisions. Many socio-legal studies focus on issues, such as guilty pleas, criminal courts, lawyering or legal services, employment, divorce and family law, within the bounds of nation states and then make comparisons across nation states. Until recently, the legal system was viewed as the primary repository of law and attention was on demarcations between criminal and civil law, the operation of various dimensions of law on citizens, the organization of national courts, and the division of labour between legal personnel: police, the legal profession, the judiciary. Conceptually, now legal processes have been uncoupled from the legal institutions or organizations in which they are typically nested: police do not monopolize policing; governance is not synonymous with governments; law operates within and beyond the legal system; and legal norms and understandings pervade everyday life (Ewick and Silbey, 1998).

Social change and law

Nineteenth century social theorists described a central role for law in understandings of social change. Henry Maine (1888) described social change in terms of the move from status (inherited and prescribed) to contract (individual and voluntary, at least in theory and only available to some members of the society). For Durkheim the prevailing type of law is an indication of type of society and changes in law signal the nature and type of social change. Weber's typology of law and legal thought implies evolutionary development and the extension of western rationality and Marx saw law as inevitability intertwined with capitalist economic relations and therefore an impediment to class struggle and revolutionary social change (see Chapter 2).

In the twentieth century, much sociology examined social change within sovereign nation states with clear territorial boundaries and law was viewed as an instrument or vehicle for the implementation of social and economic policy (Dror, 1968). The dominant conception of society was of a bounded system with clearly identifiable

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and separate subsystems: the legal system, the economic system, the cultural system, the industrial system, the nation-state and the family (Beck and Lau, 2005: 527; Giddens, 1990: 64). The systematic study of social change from the mid twentieth century onwards, particularly in the United States, was aided by the public availability of nationally representative longitudinal data sets collected by federal, state and private agencies (Hallinan, 1997: 3).

At least in the context of the US, and other states with independent judiciaries, a constitutional tradition and the rule of law, the state can be seen as 'fundamentally legal' (Skrentny, 2006: 214). Understanding the nation state requires engagement with law and legal concepts, such as legality, which can enable and constrain state actions (Skrentny, 2006: 213–4). In a discussion of the American state Skrentny shows that the relationship between law and the state varies over time and by issue. Sometimes there is no role at all for law and courts. At other times, there can be a negative role of reducing progressive social options by limiting welfare benefits and safeguarding business/ employer dominance through enforcing property rights in a way that spurs economic development and large enterprises. Sometimes there is a positive role for law with the expansion of welfare rights in the 1960s and 1970s (2006: 218).

There is often a perception, either implicit or explicit, that social change is tantamount to social progress (Connell, 1997: 1519–21). Social movement activists lobby parliaments to enact new legislation and they initiate or support litigation in the quest to have particular judicial decisions overturned. Relying on law as a source of social change is not the sole province of either liberal, radical or conservative politics (Ginsburg, 1981: 541–7). Numerous commentators point out the limitations of a simplistic instrumental approach to legal and social change: the one does not necessarily nor easily translate into the other. However, as suggested above, just considering statutory change or decided cases may not simply translate into anticipated, practical changes.

Increasingly, the study of law and understandings of law and social change go beyond national legal institutions and focus more on transnational law and legal institutions, which have expanded in size and number since World War II, and significantly in the past decade or so, especially in the wake of the September 11 (2001) attacks in the United States. Some commentators suggest that the sovereign nation state is losing its relevance and regulatory capacity in a global context where a raft of multinational conventions and bilateral agreements bind nation states, where non-state transnational entities such as the International Monetary Fund or the World Bank influence government decisions and domestic policies, and the voluminous movement of capital, commodities and people across national borders increase interdependence especially economic. 'The major factor contributing to the denationalization of law would be the declining role of the state in the world' (Glenn, 2003: 843). Others conclude that: 'Globalization certainly poses new problems for states, but it also strengthens the world-cultural principle that nation-states are the primary actors charged with identifying and managing those problems on behalf of their societies. Expansion of the authority and responsibilities of states creates unwieldy and fragmented structures, perhaps, but not weakness' (Meyer et al., 1997: 157). The relationships between nation states, globalization and law are discussed further in Chapter 3.

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This book adopts a very wide conception of law; it does not restrict attention to the activities of the courts or to legal doctrine. It examines various sociological and socio-legal theories of law; considers the legal profession, which in many ways is the gatekeeper to the legal system, with practitioners having considerable leeway and influence in determining legal outcomes; dispute processing and the role of legal institutions and actors; social control, including the operation of the criminal justice system; and social movement activism, especially regarding women and current debates about human rights and their legal recognition. At the same time, the discussion pays attention to conventional sociological concerns, for example the theories of Durkheim, Weber and Marx and their comments on the role of law and legal institutions. The book addresses:

- (a) the social conditions under which laws emerge and change;
- (b) the extent to which law can be a resource to implement social change;
- (c) the kinds of values or worldviews that laws incorporate; and
- (d) the ways in which laws shape social institutions and practices and vice versa.

While Durkheim, Marx and particularly Weber theorized the role of law in society and its interconnections with other institutions, it was not until the 1960s that a distinct subdiscipline on the sociology of law emerged (Schwartz, 1965: 1). Contemporary research on law in society is multidisciplinary, receiving input from sociologists, political scientists, anthropologists, philosophers, legal scholars and others. Often analyses of law are equated with the discussion of familiar and culturally specific legal institutions, for example the courts and tribunals, judges, the jury system, legislation, the police, the legal profession and prisons. Anthropologists point out that to restrict the discussion of law to familiar legal institutions results in ignoring other forms of law and socio-legal arrangements. In his ethnography of the Trobriand Islands (north-east of New Guinea), Malinowski (1961) adopted wide conceptions of law and legal forces as binding, reciprocal obligations and suggested that law and legal phenomena are not located in special, separate enactments, administration or enforcement mechanisms. He observed: 'Law represents rather an aspect of their tribal life, one side of their structure, than any independent, self-contained social arrangements. ... Law is the specific result of the configuration of obligations, which makes it impossible for the native to shirk his [*sic*] responsibility without suffering for it in the future' (Malinowski, 1961: 59).

Socio-legal research is inevitably shaped by the kind of legal system being studied. In western capitalist societies, and their former (and present) colonies, two predominant kinds of legal system exist: common or case law and civil¹ or code law systems. Along with cricket and the railways, the common law is a legacy of British imperialism, although its history is longer than that of colonialism. At its heart, the common law is constituted by previous decided cases. Legal reasoning is based on precedent and courts are structured hierarchically. Anglo-American legal systems are adversarial at its simplest, adversarialism means that two opponents/parties present their cases; in criminal law it is the prosecution versus a defendant(s) and in civil cases it is a

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complainant versus a respondent. The truth (that is, the facts) is supposed to emerge from the examination and cross-examination of witnesses by defence and prosecution lawyers and any other the evidence adduced. Of course, the facts of a case are not raw data but rather those items that have been selected and classified in terms of legal categories (Berman, 1968: 198; Geertz, 1983). The judge adjudicates, that is, acts as a neutral arbiter who applies the appropriate legal rule to the facts as they emerge, or are divined by a jury. The judge decides in favour of one party, or one side, with little scope for compromise: the criminal defendant is convicted or acquitted; the respondent is judged to be negligent or in breach of contract and ordered to pay the plaintiff damages, or is found not liable.

In the countries of continental Europe and their former colonies, the legal systems are more codified and there is not the same reliance on prior judicial decision to determine outcomes. Most of the laws are in a more or less permanent, organized and written form. The two major acts of codification of modern times are the French civil code (*Code Napoléon*) of 1804 and the German civil code (*Bürgerliches Gesetzbuch*) of 1900. The former has provided the basis for the legal systems of countries in the Middle East, Africa and Latin America, while the latter influenced the Japanese civil code and the pre-communist Chinese legal regime (McWhinney, 1968: 214). These systems are sometimes termed inquisitorial, as the judge has more scope to question the adversarial parties directly and may even have a role in the investigation of crime.

Legal theory

Before considering sociological discussions of law, the following section outlines various strands of legal thought that are often discussed by jurists and legal theorists.² Much jurisprudence is primarily concerned with the nature of legal reasoning and specifying the relationships between judicial decision making and the law (Davies, 2008: 37–49). Legal theory generally addresses abstract questions about the nature of laws and legal systems and the relationship of law to justice and morality. Legal change is seen as deriving from the judicial interpretation of new legislation and the logical application to new circumstances of legal rules formulated in prior decided cases, that is, via legal reasoning.

In common-law countries, legal reasoning is often equated with the intellectual processes whereby judges (especially those in higher courts) reach conclusions in deciding cases (Berman, 1968: 197; Fuller, 1978: 363–81). In this context, legal change is an incremental, continuous process in which small changes to the law arising from extended judicial interpretation contribute to the law's evolution (Davies, 2008: 56–64). In more codified systems, legal reasoning is usually identified with the processes by which the rationality and consistency of legal doctrines are maintained.

Formally, legal reasoning strives for a consistency that is achievable only if similar cases are decided in a similar way resulting in similar outcomes. As Davies notes: 'Common law theory is a way of thinking which rests on the idea that there is

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something inherently *necessary* and right about the process of legal reasoning which emerges in decided cases' (Davies, 2008: 49, emphasis in original). Legal reasoning differs from ordinary or natural reasoning processes and can only be acquired through legal education. The law, then, is not knowable by those without thorough legal education and training in legal reasoning, general legal concepts and legal logic (Dietrich, 2005; Gordley, 1984).

The most pervasive form of legal logic is that of analogy, which entails the comparison of similar and dissimilar examples. The common-law tradition stresses precedent, so that lower courts view themselves as inextricably bound by the decisions of courts superior to them in the judicial hierarchy (McHugh, 1988a: 118). Reasoning by analogy involves comparing the facts of different cases, identifying the principle or rule underlying the decision in a prior (relevant) case – that is, the *ratio decidendi* (the reason for deciding) – and applying it to the new facts. Alternatively, the facts of a case are distinguished so that the same legal principle does not apply. Reasoning by analogy uses inductive rather than deductive reasoning from legal rules; the idea is that when the facts are determined, then the process of logical reasoning produces the correct outcome. The reasons for the decision precede the decision. As cases are distinguished on their facts, changes are incremental and evolutionary; the common law develops as judges apply existing rules to new, but analogous, situations (Berman, 1968: 197–200; Bourdieu, 1987: 822–3; McHugh, 1988b: 15–18; McWhinney, 1968: 212–3).

Rather than being a mechanical, value-free process, legal reasoning involves interpretation and assessment; *ratios decidendi* are often ambiguous, amorphous and contradictory, and must be identified or constructed. Reasoning by analogy involves elasticity: judges can interpret precedents expansively or narrowly in order to achieve a particular outcome. This is especially true given the tendency of judges to provide individual reasons for their decisions, so that even though the majority of a final appellate court may reach the same decision, their reasons can be different. Thus the *ratio decidendi* may follow the decision and rationalize a particular outcome. Identifying the facts and discerning the legal rules to reach the 'correct' legal outcome often entail value judgments, policy decisions and the manipulation of arguments that are not informed by the system of legal rules. Legal reasoning is but one type of argumentative technique (Kennedy, 1990: 43–5). Nevertheless, lower courts may have little discretion to deviate from established rules without risking an appeal process overturning their decisions. The opportunity for judicial law making or activism increases as cases proceed along the judicial hierarchy (McHugh, 1988a: 118). As Bourdieu suggests: 'judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts' (Bourdieu, 1987: 818).

A perennial question among judges and legal theorists is whether judges make or find the law (McHugh, 1988b: 15). This is an unanswerable question: because of the equation between common law and judges, there is no extra-judicial way of discerning the common law. Whether judges (and others) view judicial decision making as making or finding the law, the law is what judges say it is, until a judge in a higher court disagrees with (and overrules) an earlier decision. The view that judges declare

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and apply the law with little scope for judicial activism or law making is known as positivism or legal formalism.

Positivism or legal formalism

Legal positivists view the law as a formal, logical system of legal rules. Positivism involves an adherence to legalism, that is, the process of subjecting human behaviour to the governance of rules. Positivism has been the predominant philosophy of law since the nineteenth century. Austin, who devised one of the first systematic theories of legal positivism, defined law as the command of a sovereign and wrote: 'Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular community, are a system or body of law' (Lloyd and Freeman, 1985: 231). Austin sought to show what the law really is, as opposed to moral or natural-law notions of what law ought to be. This reflects a quest for law to be scientific and impermeable to personal values or individual manipulation.

For the positivist, law is a discrete or autonomous system of logically consistent concepts and principles that have no relevant characteristics or functions apart from their possible validity or invalidity within the system. In determining whether a statute is law, judges must determine whether it is valid, that is, whether the legislative process conformed with procedural and substantive rules. The process of judicial decision making, or adjudication, involves finding, declaring and applying the correct legal rule or principle to the facts of a particular case, regardless of the consequences. Issues of economic inequality, social reform or moral values are outside judicial competence and are issues for the legislature. Once laws are passed, questions of their justness are beyond the scope of law but lie in the realm of philosophy, religion or politics. A law does not cease to be law because it is perceived by some as unjust or because it conflicts with some values, and the converse – the assertion that a rule is morally appropriate – does not render it a legal rule (Hart, 1980: 51; Lloyd and Freeman, 1985: 64). In this context, legal theory is concerned overwhelmingly with doctrinal analysis and the force of law is viewed as deriving from such textual sources as statutes, precedents or constitutions (McHugh, 1988b: 25). Hart (1961) analyses the law in terms of primary rules, which he terms rules of obligation, and secondary rules, which are the rules about rules, such as rules of recognition and adjudication. Thus, he makes a distinction between duty-imposing and power-conferring rules. He also acknowledges that occasionally there will be situations where there is no clear or settled rule – which he terms 'a penumbra of uncertainty' – where the outcome cannot be the result of deductive reasoning, but where judges have some discretion (Hart, 1980: 55). In contrast, Ronald Dworkin argues that the law is a 'seamless web' of principles that, despite the absence of an explicit legal principle on an issue, ensures that there is a right way of deciding a case and that constrains judicial discretion and creativity (Davies, 2008: 115–19; Lloyd and Freeman, 1985: 411–3, 1121–6).

Hans Kelsen proposed a 'pure theory of law', which he considered to be a science not a politics of law (Stewart, 1990: 274). He wanted to describe what the law is rather than what it ought to be. For Kelsen, the multiplicity of legal norms constitutes

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a system when the validity of each norm can be traced to its final source, which he termed the *Grundnorm*. This basic norm provides the overall rationale for and unity of the legal system. The legal system is a hierarchy of norms, with legal acts and rules traceable to norms at still higher and more abstract levels and the *Grundnorm* providing the major premise of the entire system. The validity of any law is determined solely through a process of authorization to higher norms and ultimately to the basic norm. Legal norms are not valid by virtue of their content; a norm becomes a legal norm only because it has been constituted in a particular fashion. The highest point of a legal order is the constitution, then general norms are established by legislation that determines legal organizations and procedure (Stewart, 1990: 285–8).

Kelsen's approach has been criticized because of its rigidity and ambiguity surrounding the nature and identity of the basic norm (Lloyd and Freeman, 1985: 330–6; Stewart, 1990: 274, 295–7). More generally, positivism has come under scrutiny because the legal system can never be contained fully within such a closed logical structure. Positivism tends to ignore the human dimensions of the legal process, whereby interpretation inevitably entails value commitments with individual judicial biases and broader social factors affecting decision making. From a positivist viewpoint, there is little opportunity for judicial activism or scope for the common law to be a source of transformative social change. While there has been rejection of rigid formalism, formalistic assumptions remain in some sociological and contemporary theories or conceptualizations of law, particularly in systems theory (see for example Luhmann, 1992).

Legal realism

Legal realism is often counterpoised to positivism because of realists' attack on the certainty of legal rules and rejection of any proposition that judicial decision making is free of values and politics. Realists argue that there is a basic legal myth, namely, that legal rules are certain and that their application to specific cases is essentially a rational, mechanical task to be performed by the courts. Whereas the conventional view of the adjudicative process is that judges apply rules to the facts of a case in order to reach a decision, in reality the decision is the outcome of a wholly unpredictable interaction between the stimuli bearing on the judge at the time and the judge's personality. Far more important than legal rules or precedents is the intuitive flash of understanding or hunch that may inspire and motivate a judge to reach a particular decision (Duxbury, 1991: 181–4). Legal realists assert, with various degrees of emphasis that judges make rather than find the law; judicial decision making is not the rational application of pre-existing rules but the rationalization of decisions by assertions of legality.

The central concern of legal realists is with law in action rather than the law on the books. Holmes formulates the concept of law as: 'The prophecies of what the courts will do in fact, and nothing more pretentious [for example a system of reason], are what I mean by the law' (Holmes, 1897: 460–1). Since the law is always human, it cannot be absolute, determinate or omnipotent. It is indistinguishable from human

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action – that is, judicial behaviour – and has no existence beyond it. Legal realism has been more developed in the US, where courts traditionally assume a greater role in public policy formulation and social change than is the case in the UK or Australia (Brigham, 1996: 56–61; Brigham and Harrington, 1989: 41–2; Lloyd and Freeman, 1985: 682; Tunc, 1984: 168–70). This perspective reached its zenith in the 1920s and 1930s and was revived during the 1980s with the emergence of the Critical Legal Studies movement, which incorporates many realist assumptions (see Chapter 3).

Realists criticized the case method of legal education that was introduced into American law schools in the 1870s and is now generally adopted as the basic form of legal training in many universities. The case method requires the legal scholar to demonstrate how reported decisions can be explained in terms of fundamental principles implicit in the common law. Realists argued that this approach deals with law in the books rather than with the everyday, irrational workings of courts and legal practices. They advocated greater practical training for lawyers who should experience legal practice in law offices before completing their formal education (Duxbury, 1991: 177, 186–8).

A central problem with the realist approach is relativism, an issue that became particularly salient during the rise of totalitarianism in Europe during the 1930s and 1940s. If there is no independent or external means of evaluating law, outside what judges say it is, then it is impossible to evaluate the kinds of decisions that judges make that support totalitarian regimes. Legal realists rejected the charge of relativism and amorality and viewed the flexibility in law as providing opportunities for courts to be engaged in progressive social reform. Many legal realists played an active part in developing and advancing President Roosevelt's programme of social engineering and expanding the welfare state in the New Deal in America during the 1930s.

Legal realists tend to adopt an asocial and behaviourist view of courts. Their primary concern with the behaviour of judges down plays questions about the origin of judicial power, the relationship between the legal profession and the judiciary as well as the relationships between political and economic institutions and the legal system (Brigham and Harrington, 1989: 42–6). Realists also tend to discount the limitations on judicial activity. Judges do not operate in a vacuum guided only by personal predilection, but are constrained by statutes, procedural rules, appellate cases, and the chance that their own decision will be appealed and overturned by a higher court. Certainly, within these constraints judges do experience latitude in interpreting the meaning of statutes and prior binding judicial decisions. Ironically, the focus on judicial behaviour encourages psychological research and psychology aspires to values of scientism and positivism, perhaps even more so than do judges.

Natural law

Natural-law theories assume the existence of certain fundamental moral and universal principles that establish absolute standards of justice that can be discovered by human reason (Lloyd and Freeman, 1985: 93–9). Statutes and judicial decisions are

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evaluated in terms of higher (secular or religious) value commitments regarding justice, fairness, rights and humanity. Versions of natural-law theory have existed since ancient Greece and are developed in Roman Catholicism. Scholastic philosophy as expounded by St Thomas Aquinas was highly rationalistic, as it relied heavily on truth as elicited by logic and deductive reasoning but, at the same time, its premises were not chosen on rational grounds but given by the beliefs of Christian ideology (Lloyd and Freeman, 1985: 80).

For natural-law theorists, when substantive laws deviate from higher principles they are unjust laws and, *ipso facto*, not legally binding. This poses a dilemma regarding potential conflicts between enacted law and the dictates of natural law. It raises the question of how citizens should act when their governments impose legal obligations that are contrary to natural law. The cruelty and inhumanity of Nazi policies and action during World War II brought about a renewed interest in natural law. The atrocities perpetrated by the Nazis highlighted the dangers of extreme relativism and the separation of law from morality or values, as many of those actions had been carried out according to German laws. Some contemporary secular discussions of universal human rights provide current examples of natural-law theory (see Chapter 8).

A few sociologists have attempted to offer an elaboration of natural law and avoid the positivist disavowal of values. Selznick identifies some secular natural-law principles, especially respect for others as human beings, and suggests that the chief tenet of natural law is that arbitrary will is not legally final. He argues that natural-law inquiry presumes a set of ideals or values, including reason, legalism or the rule of law, and considerable sociological and anthropological research identifies and analyses norms and systems of norms, thus revealing their complementarity (Selznick, 1982: 18). It is impossible in describing any legal system to avoid identifying values to be realized, that is, ideals that imply natural law. Selznick suggests the importance of sociology in providing knowledge regarding generalizations about human nature that are universal in social organization and pervasive in human values, despite the effects of social environment and the diversity of cultures. He lists such motivating forces as the search for respect, including self-respect, for affection, and for cessation of anxiety, the enlargement of social insight and understanding, reason and aesthetic creativity (Selznick, 1982: 25). He then advances the proposition that: 'Legal norms or principles are "natural law" to the extent that they are *based upon* scientific generalizations, *grounded in* warranted assertions about men [*sic*], about groups, about the effects of law itself' (Selznick, 1982: 32, emphasis in original). In other words, sociologists are able to identify dominant human values, which he asserts relate to a notion of human dignity, and it is these values that must inform the legal order. On this assessment, arguably all legal systems would be contrary to natural law, especially as experienced by nonproperty owners, women, ethnic minorities and other marginalized segments of the population.

More recently, Turner has proposed a minimalist theory of rights from a foundational account of human embodiment. He suggests a universal requirement for protective rights given the frailty of the human body and the precariousness of social institutions. A moral proposal that human beings have a claim to an irreducible dignity *qua* humans underlies his argument. However, he specifies that the protective rights for which he argues are not strictly human rights but are more

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appropriately called natural rights, as distinct from individual rights granted by national governments (Turner, 1993: 4–5)

Even though natural law and positivism are contrasted as polar opposites, it is not true that the former eschews legalism or rationality. Fuller, departing from other natural-law traditions, goes so far as to argue that the moral basis of modern natural-law theory is the enterprise of subjecting human conduct to the governance of rules, which is a formalist contention (Kaye, 1987: 314; Lloyd and Freeman, 1985: 129–33). Natural-law theories leave unanswered questions about determining the nature of humanity, especially in light of the range of human sentiments that are possible. There are difficulties in accepting the assertion of universal moral principles or conceptions of human rights, especially when they are being promulgated only by western societies.

Conclusion

While ‘law’ or ‘the law’ is often a taken-for-granted concept, the above discussion highlights the complexities of law. The term ‘law’ can include legal doctrine, types of norms, such institutions and actors as courts, lawyers, judges, clients and citizens, and the activities and values of groups or individuals, including social movements, that espouse legal ideology and are oriented to the legal system as a set of resources to effect social change or settle disputes. When contemplating the role of law in social change, these numerous dimensions of law must be taken into account.

The purpose of this book is to address some of these dimensions. It does so by discussing various sociological conceptions and theoretical approaches to law. Chapter 2 examines the various approaches to and comments about law made by Durkheim, Weber and Marx.

Notes

1. The term civil law is also used in common-law countries to describe laws regulating conflicts between persons (individual and corporate), for example tort, contract, property, constitutional, administrative and family law, as distinct from criminal law where the conflict, in legal terms, is between a person and the state.
2. For an excellent discussion of legal theory see Davies (2008).