CHAPTER ONE

A SOCIOPOLITICAL UNDERSTANDING OF LAW*

INTRODUCTION

Classical sociologists (including Karl Marx, Emile Durkheim, and Max Weber) understood law as closely related to social reality and political power.[1] This can be seen in classical social theory and jurisprudence. Law was, for them, an essential element of social cohesion, collective identity, and economic development. Durkheim, for instance, argued that to understand the character of a society, one had to understand the type of law that prevailed in it:

> [W]hen one wants to know the way in which a society is divided politically, the way in which these divisions are composed, the more or less complete fusion which exists between them, it is not with the aid of a material inspection and by geographical observations that one arrives at an understanding; for these divisions are moral as well as having some basis in physical nature. It is only through public law that it is possible to study this organization, for it is this

* An earlier version of this chapter was published in the *Annual Review of Law and Social Science*, *12*, 25–44, as "A Comparison of Sociopolitical Legal Studies."

[1] On Marx, see Cain & Hunt (1979); Hall (1996); Hunt (1982); Stone (1985). On Weber, see Hunt (1978); Lascoumes (1995); Pollak (1988); Treviño (1996); Trubek (1972); Weber (1922, 1978). On Durkheim, see Chazel (1991); Cotterrell (1991); Hunt (1982); Treviño (1996). For a general explanation, see Commaille (2003a, 2003b); Commaille & Duran (2009). For a general analysis, see Treviño (2010).

> law, which determines it, just as it determines our domestic and civil relations (1963, p. 12).[2]

Law, power, and society were intimately linked – so much so that the study of each one was crucial for their mutual comprehension. Thus, classical sociology was also a political sociology of law.[3]

On the other hand, jurisprudence and classical legal thinking also viewed law, society, and politics as interconnected. Indeed, the great majority of legal thinkers, from Plato to Immanuel Kant, envisaged law as intimately linked to social order, justice, and the defense of the political community (Berman, 1983, 2003; Del Vecchio, 1964; Hespanha, 2005; Sabine, 1961; Tamanaha, 2001; Villey, 1975). They understood law and politics not only as two interlocked elements but also as essential instruments for justice and the common good.[4]

The idea that law, society, and politics were closely intertwined (what I refer to as a sociopolitical vision of law) gained strength in both sociology and jurisprudence at the beginning of the twentieth century, as a reaction to the formalist conceptions of law that had previously dominated in Europe and the United States.[5] In the United States, this vision became known as "the sociological movement in law."[6] In Europe, a similar reaction spurred by the emergence of social and socialist legal ideologies arose against the French codification

[2] Weber, on the other hand, saw a close relationship between types of legal thought (substantive, formal, rational, irrational) and types of legitimacy of political regimes (Lascoumes, 1995; Rheinstein, 1954; Trubek, 1972).

[3] The same idea can be applied to other classical authors, such as Ehrlich (1922); Geiger (1969); Gurvitch (1942); Maine (1861); Petrazycki (1955); Romano (1946); Savigny (1815); Spencer (1898); Sumner (1940); Timasheff (2007).

[4] See Aristotle (1974); De Aquino (1988); Kant (1797). More generally, see Bobbio (2005); Del Vecchio (1964); Tamanaha (2006). On the classic idea of the interconnection between law, society, and politics, see Tamanaha's (2006) concept of noninstrumental theories of law.

[5] Here, I am adopting the English terminology that differentiates formalist and anti-formalist theories of the law; the former include those that regard law as a collection of norms organized in a coherent, rational, and politically neutral manner. On this subject, see Duxbury (1995); Minda (1995). According to Duncan Kennedy, formalism supposes that all questions in law can be resolved through deduction – that is to say, without recourse to politics (1997, p. 105). On the debate regarding legal formalism, see Cotterrell (1998); Nelken (1996).

[6] Its main representatives were Oliver Wendell Holmes, Roscoe Pound, and Karl Llewellyn. For a discussion of these authors, see Hunt (1978); Treviño (1996).

movement and the school of exegesis.[7] I will develop this point in further detail in Chapter 2.

Sociopolitical visions of law began to lose ground in both Europe and the United States after the Second World War, as conservative ideas and legal formalism once again took hold. At the same time, the social sciences began to distance themselves from legal thinking. Until that point, economics, political science, and sociology – relatively young disciplines – were quite often promoted and even taught by lawyers, which could have led legal science and lawyers to claim paternity of these disciplines. Thus, in their quest for disciplinary autonomy, these new social sciences excluded the law from their methods and objects, fearing that its presence would threaten their recently conquered independence (Deflem, 2010; Pécaut, 1996).

Nevertheless, despite formalism in legal theory, and sociologists' withdrawal from law, the sociopolitical perspective was never obliterated. Its advocates, however, did not face the same fate everywhere: they were more or less successful in the United States, aided by a more dynamic and political conception of legal practice, but they failed in Europe and Latin America, in particular between the Second World War and the end of the twentieth century, when the integrity of the law was preserved by a caste of jurists and professors who benefited from great social power (Boigeol & Dezalay, 1997; Bourdieu, 1989, 1991; Dezalay, 1992; López, 2004).

Today, once again, we are witnessing a renaissance of social and political visions of law in Europe and Latin America, and even in France, the country that was the greatest defender of legal formalism.[8] This renaissance, nonetheless, is founded on "disciplinary niches" that differ from country to country: while in France it has flourished largely in departments and institutes of sociology and political science,[9] in

[7] On the codification movement and the school of exegesis, see Bonnecase (1924); Jestaz & Jamin (2004); Matteucci (1988). On the influence of social ideas in law, see Herrera (2003a, 2003c).

[8] In 1986, Pierre Bourdieu published *La force du droit*, and in 1990, the French Sociological Association dedicated its annual colloquium to the question of the law. See Chazel & Commaille (1991); Garapon & Papadopoulos (2003); Israël (2008a); Israël et al. (2005a, 2005b); Jamin (2012).

[9] On the side of political science, see Chevallier (2003); Jamin (2012); Lochak (1989a, 1989b). On the side of the theory of law, see Caillosse (2011); Troper (2000). And on the side of sociology and anthropology, see Assier-Andrieu (1996);

Latin America, in countries such as Brazil, Colombia, and Argentina,[10] it has prospered primarily in law schools. It must be added, however, that formalist visions continue to dominate in most law schools, even in the United States, where the law is, prima facie, more open to social sciences. Similarly, in the overall context of international legal knowledge, the new sociopolitical visions are relatively marginal.

My objective in this chapter is twofold: first, to propose an interdisciplinary concept for the comparison of sociopolitical perspectives in law, and second, to set up the basis for comparing these perspectives in the United States and France.

THE SOCIOPOLITICAL VISION OF LAW

The Core Idea

In spite of their differences, these two approaches (European and American) share the idea that law cannot be understood outside of its sociopolitical dimension (Griffiths, 2006). They also share three fundamental theoretical premises.

First, they reject the two central tenets of legal formalism: (i) legal autonomy in relation to society and (ii) legal neutrality in relation to political power. The critique of legal autonomy assumes that law is embedded in society and therefore is not a self-sufficient knowledge that determines its own truth. The critique of legal neutrality means that law is not an expression of the people's will, interpreted and applied in a technical and impartial way by politically disinterested legislators, judges, or bureaucrats. Sometimes these rejections are radical and reduce the law to either society or politics, whereas othertimes they are moderate and lead to the recognition of relative legal autonomy or relative legal neutrality. Not all of these critiques reject both legal autonomy and legal neutrality. Some focus on only one of these formalist legal features. I develop these ideas in the next section.

Second, these sociopolitical approaches draw on the idea that the law is a language composed primarily of words and symbols that reflect

[10] Bancaud & Dezalay (1984); Champy & Israël (2009); Commaille & Duran (2009); García-Villegas & Lejeune (2011); Lascoumes (1991); Vauchez (2006). See, for example, García-Villegas & Ceballos (2016); Gargarella (2005); Olivera (2015); Rodríguez-Garavito (2015); Sieder & Ansolabehere (2017)

society's core values, such as justice, equality, order, cooperation, and freedom. They claim that legal language and values do not have a fixed meaning and that the reality of the law depends to a large extent on the political ability of social actors and institutions to determine the meaning of legal texts in an adversarial legal field (García-Villegas, 2014). The symbolic dimension of legal norms is grounded in the fluidity of legal meaning – that is, in the malleable understanding of legal words, and particularly of legal rights. A good portion of the current legal mobilization is founded in what Scheingold (1974) calls "the myth of rights," which is the fight for rights as banners of political mobilization used by social movements. Rather than simply law, rights are political and moral symbols whose interpretation depends on a political struggle for the final meaning of legal texts. Such a meaning is reached at the intersection of several discourses and approaches: "Most of what is articulated as 'law' and 'rights'," Dudas, Goldberg-Hiller, & McCann (2015, p. 369) argue, "is a complex mix of generically legal, moral, religious, technical and other logics."[11]

Third, these two approaches are cross-disciplinary.[12] Most of the time, they exhibit not only methodological flexibility and creativity but also a combination of critical reflection and empirical research.

A New Concept: Sociopolitical Legal Studies

Thus, despite their heterogeneity, these new socio-legal perspectives share many practical and theoretical similarities. For this reason, I propose grouping them under the more general label of "sociopolitical legal studies" (SLS). I use the term "studies" in a broad sense, including not just legal theories but also empirical analyses of law. This general label comprises a collection of transdisciplinary research, theories, and

[11] The symbolic idea of law is a concept that goes beyond the practice of interpreting rules and standards in the process of legal adjudication. This is why the difference between the law's symbolic efficacy and its instrumental efficacy does not necessarily coincide with the difference between an internal (technical) point of view and an external point of view (Hart, 1961). As has been shown by critical legal theories, the political dimension of law is embedded in the internal and technical point of view, due to the fluidity of legal meaning (Kennedy, 1997; Tushnet, 1984). Therefore, the symbolic efficacy of law encompasses the entire legal phenomenon, which makes it the key concept for understanding the political dimension of law. For a development of these ideas, see García-Villegas (2014).

[12] Generally speaking, they are based on sociology, anthropology, political science, and legal theory.

studies that see law as a sociopolitical phenomenon that is central to the understanding of power and society.[13]

It is worth noting that there have been other efforts to bring together critical, sociological, and socio-legal scholars. Good examples in the United States include the book series *Crossing Boundaries*, edited by Austin Sarat and others (1998); of particular interest in this collection is Munger´s "Mapping Law and Society." A book edited by David Clark (2012a), *Comparative Law and Society*, is also worth mentioning.[14] In Europe, Volkmar Gessner and David Nelken (2007a) and particularly Nelken (2016) have published an interesting collection of articles in which scholars from different disciplines compare European law with other legal systems.[15] The works of Reza Banakar and Max Travers, which seek to bring the classical sociological approach to law, are also part of this endeavor (Banakar & Travers, 2002; Travers, 1993). Likewise, scholars working in specific subfields have attempted to do the same. This is evident in Michael McCann's work on the dialogue between social movement scholars and legal mobilization scholars (Dudas et al., 2015; Lovell, McCann, & Taylor, 2016; McCann, 2006). Some integrative efforts have also been made at the regional level. In France, the recent multiauthor book *Le "moment 1900"* embarks on an important comparative effort, as do the works of Frédéric Audren and Jean-Louis Halpérin (2013), Jacques Commaille (2016), and Rafael Encinas de Muñagorri et al. (2016). In Latin America, particularly in Colombia, Mexico, Argentina, and Brazil, there is a growing interest in law and society scholarship (see, e.g., García-Villegas, 2010, 2014; Junqueira, 2001; Lemaitre, 2015; Lopés & Freitas, 2014; Rodríguez-Garavito, 2003, 2011, 2014; Santos & Rodríguez-Garavito, 2005).

I am aware of the fact that the concept of SLS might not fully capture the cultural aspects of contemporary scholarship on law and society and critical legal studies, particularly in the United States,

[13] Transdisciplinarity is the intellectual posture that is, at the same time, between, across, and beyond all disciplines (Morin, 1994; Nicolescu, 2002). For a discussion of transdisciplinarity in law, see Arnaud (2013a); Chassagnard-Pinet et al. (2013); Van de Kerchove (2013).

[14] See also Calavita (2010); Darian-Smith (2013); García-Villegas (2003a, 2003b, 2009a); Israël (2013); Nelken (1984, 1986).

[15] Of particular interest in this collection are the introduction by Gessner & Nelken (2007b), and chapters by Cotterrell (2007), Garapon (2007), and Kagan (2007).

where there is significant academic production on the cultural dimension of law (Coombe, 1998; Geertz, 1983; Harris, 1993; Kahn, 1999; Sarat & Kearns, 1998; Silbey, 2012; White, 1990). I made a good effort to seize this cultural dimension through the concept of law's symbolic value; however, this is a very large and complex subject worthy of a book in its own right.[16]

This book seeks to contribute to this literature not only by deepening the disciplinary connections within SLS but also by expanding the geographical scope of comparison of SLS. As for disciplinary connections, this book takes up the old idea of classical sociology according to which the law cannot be understood independently of society and power. As for the latter, my analysis benefits from the advances made by SLS in Europe and Latin America.

More specifically, the idea of SLS reveals the existence of a transverse field of studies between three academic areas: the sociology of law, legal theory, and socio-legal studies, which, in spite of multiple connections, rarely communicate with one another. From a comparative perspective, the adoption of this general and inclusive terminology has several advantages.

First, it helps overcome the lack of communication between the three aforementioned academic disciplines and, in doing so, highlights the multiple relationships between their legal scholarship. Replacing the conventional expressions sociology of law, socio-legal studies, and critical theory of law (susceptible to being appropriated by jurists as well as sociologists) with the more neutral SLS helps avoid disciplinary quarrels, particularly common in countries with civil law traditions, between a sociology of law crafted by jurists and one crafted by sociologists.[17] Assuming a more general point of view than that of the disciplines at stake (law, political science, and sociology) can help not only make peace in disciplinary battles (Wallerstein, 1999) but also

[16] I tried to do just that in my book *La eficacia simbólica del derecho* (García-Villegas, 2014).

[17] On this subject, see Arnaud (1998b); Banakar & Travers (2002); Caillosse (2011); Commaille (2003b); Israël (2008a, 2008b); Loiselle (2000); Travers (1993); Treves (1995). More recently, see the two volumes of *Droit et société* dedicated to this debate: the first of them (vol. 69/70) from the sociological perspective, organized by Israël, and the second (vol. 75) from the juridical perspective, organized by Brunet and Van de Kerchove. It must be said that these divisions can sometimes also be found in the United States and England; see, for instance, Banakar & Travers (2002); Deflem (2010, p. 275); Sarat & Ewick (2015); Travers (1993).

help one better understand, from a comparative perspective, the multiple connections between schools of legal scholarship that barely communicate with one another (Nelken, 2016).

Second, this more inclusive perspective highlights the fact that the great contribution of these new visions of the law resides less in the methodological or epistemological enrichment of each of these disciplines than in the analysis of certain fundamental social and political problems of the contemporary world. This can be seen in the tendency of SLS authors toward the study of subjects such as the politicization of justice, the globalization of law, human rights activism, the politicization of the juridical profession, the increasing contestation of the law, and the pervasiveness of juridical pluralism, among others. All these issues are traversed by the double phenomenon (disciplinarily unclassifiable) of the increased judicialization of politics and of the politicization of justice, which characterizes a great deal of current social relations. In short, instead of beginning with the disciplines and moving to the problems, SLS begins with the problems, moves toward the disciplines, and then returns to the problems.

On this point, I share not only the surprise of scholars (especially American ones) upon observing the persistence and even virulence of disciplinary debates between jurists and sociologists that take place in France around the existence of sociology of law, but also their concern for the unfavorable consequences that such debates have for the construction of cooperative academic communities.[18]

Third, the inclusive nature of this perspective can help overcome a kind of legal and socio-legal knowledge that is too parochial, too focused on the nation-state, and too limited to local and domestic law (Assier-Andrieu, 1996; Darian-Smith, 2013; Santos & Rodríguez-Garavito, 2005; Twining, 2009). SLS not only relativizes the dependency of law in relation to the nation-state but also expands the notions of time and space that we need to address modern issues of globalization and the weakening of nation-states (Pogge, 2008; Rodotà, 2013; Singer, 2004).

Finally, with this label, I believe we will more easily reach the objective pursued by some sociologists of law, particularly Commaille in France, of recovering the perspective of classical sociologists (and, I add, of classical legal thinkers) in order to better understand

[18] On this subject, see Arnaud (1998b); Caillosse (2004); Treves (1995).

the close connections that exist between power, legal norms, and social relations.[19]

This book seeks to compare ideas on the relationship between law, political power, and society in the United States and France. These two countries exhibit very different conceptions and practices of law vis-à-vis their historical, economic, social, and political situations.[20] It is not my intention to compare legal norms or legal doctrines as comparative legal scholars do (Legrand, 1999; Legrand & Munday, 2003). On the contrary, this book proposes a critique of the conventional idea that a country's national legal norms and doctrines – as reflected through domestic debates, authors, schools, and internal movements – account for the explanation of the law that prevails in that country. This idea undermines the strong connections that exist between the intellectual life of law and the material and social conditions in which the law operates. In the words of Karl Mannheim, stated more than a century ago:

> The sociologist in the long run must be able to do better than to attribute the emergence and solutions of problems of a given time and place to the mere existence of certain talented individuals. The existence of and the complex interrelationship between the problems of a given time and place must be viewed and understood against the background of the structure of the society in which they occur (1936, p. 109).

Drawing on this point, my task will be to compare the various sociopolitical legal cultures underlying legal norms and legal doctrines, bearing in mind that in each of these cultures a certain type of relationship between law, power, and society is established and that such relationships are the reference points around which those norms and doctrines are constructed, interpreted, and lived.[21]

[19] See Commaille (2015); Commaille, Demoulin, & Robert (2010); a similar vision can be found in the writings of Hunt (1978, 1982, 1993).

[20] For a theoretical essay on this point, see Costa (2012). More generally, see Herrera & Le Pillouer (2012).

[21] There is a vast literature on the concept of legal culture. See Mezey (2015); Sarat & Kearns (1998). Scholars often distinguish between two types of legal culture: one internal and the other external. The first is related to ideas and the professional practice of law within the legal field, whereas the second concerns the place given to law within a national (or local) culture. For an overview, see Audren & Halpérin (2013); Cotterrell (2006); Friedman (2005); Kagan (2007); Legrand (1999); Merryman (1994); Nelken (1995, 2016); Van Caenegem (1987). This notion of culture,

To set the stage for these ideas, the remainder of this chapter is divided into two sections. The first section formulates two theoretical presuppositions that inspire the comparison, and the second section addresses some disciplinary questions.

BASIC IDEAS FOR THE COMPARISON OF SOCIOPOLITICAL LEGAL STUDIES

Oliver Wendell Holmes, Jr. once said that "the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics" (1881, p. 1). More than an ensemble of valid legal norms, the law is the political history and legal culture that lie behind such norms. In order to compare these sociopolitical cultures, I propose relying on the differences between the two Western legal traditions – civil law (or Roman law) and common law – bearing in mind that such differences reside more in the implicit political culture of each tradition than in the greater or lesser primacy that they give to judges or legislators.[22] The main idea here is that these cultures are the political and epistemological reservoirs that nourish SLS.

It must nevertheless be said that the variances between these traditions have been softened over the course of the last two decades, as will be shown in the following chapters. This is due to multiple factors. First, there has been a growing influence, on the one hand, of legislated law in common law countries and, on the other, of judges in civil law countries. Additionally, globalization has created more flexible and porous national borders, which has affected the rigidity of national legal systems. Furthermore, and most importantly, rights as political tools have acquired enormous significance in civil law countries, France among them (Commaille, 2003b; Hirschl, 2004; Israël, 2009a, 2009b; Pelisse, 2005; Santos & García-Villegas, 2001; Spanou, 1989).

rooted in social reality, takes a certain distance from what is called "the cultural turn" in socio-legal studies, or at least the most micro and subjective version of it. For a similar analysis as it relates to the economy, see Fourcade (2009, p. 15). For an analysis of the cultural turn in law, see Sarat & Simon (2003).

[22] According to Legrand (1999), law offers a perspective of the world through which society represents itself. See also Garapon (1996); Merryman (1994). This is why judges in England and the United States, as well as professors in continental Europe, are, each in their own manner, political instruments for the conservation and reproduction of the political and social systems (Van Caenegem, 1987, p. 157).