Introduction: sociology, society, law

When we speak of "law," "legal order," or "legal proposition," (*Rechtssatz*), close attention must be paid to the distinction between the legal and the sociological points of view.

– Max Weber (1922c: 1)

By speaking of law *and* society we may forget that law is itself a part of society.

– Lon L. Fuller (1968: 57)

Recovering the sociology of law

The development of the sociology of law cannot be told simply as it evolved since the sociological classics, for there is, in the case of this sociological specialty, no such history directly emanating from the discipline's earliest foundations. Although the classical scholars of sociology dealt with law elaborately on the basis of their respective theoretical perspectives, their works did not provide the initial onset for the sociology of law as we know it today. And even though there were scholars – especially in Europe – who sought to develop a distinctly sociological approach to law in the earlier half of the twentieth century, the so-called "sociological movement" in law that emerged in the years after World War II – especially in the United States – was primarily a product of the legal profession by way of some of the less practically inclined members in legal scholarship. These scholars sought to found a tradition of sociological jurisprudence and other perspectives of legal scholarship informed by social science in order to articulate an interest in the effects of law on society and, conversely, the influences of social events on substantive and procedural aspects of law. The contribution of such forms of legal thought was a scholarly attention for the societal context of law beyond the technical confines of legal training, but a systematic grounding in

sociology or in other social sciences was not yet prominent. It was not until the advent of a later generation of sociologists who (re)turned to the sociological study of law, as it had been developed by the classics, that sociological jurisprudence and related strands of legal scholarship made way for the development of a specialty devoted to the study of law in the discipline of sociology. Especially during the 1960s, sociologists again took up and seriously developed the study of law from their unique disciplinary viewpoint. The modern sociology of law not only furthered the application of sociological knowledge to unravel the patterns and mechanisms of law in a variety of social settings, it also contributed to have other social sciences develop their respective approaches to the study of law and to bring these various social-science perspectives together under the banner of a law and society tradition, which has steadily gained in popularity in many parts of the world.

The relative success of the law and society movement in recent decades has, despite its scholarly and institutional achievements, also had some unanticipated consequences. Most noticeable is the lack of distinctness that is occasionally accorded to the sociological study of law, as other social scientists have begun to stake their respective claims in the study of law. This development not merely led the sociology of law to become one among other social-science perspectives of law that are presumably on equal footing, it remarkably also brought about an appropriation of the sociology of law in those fields that are not organizationally nor intellectually situated in the discipline of sociology. Additionally, the success of the law and society movement and its incorporation of the sociology of law also led to a marginalization and exclusion of the specialty area from its own disciplinary settings, indicating a Balkanization of the discipline that has been observed with respect to other specialties as well (Horowitz 1993). The resulting situation is such that the sociology of law has, some exceptions notwithstanding, lost its distinct place in socio-legal studies as well as in sociology. Yet, in bringing out the specific properties of the sociology of law in order to recapture its disciplinary and interdisciplinary standing, this book does not advocate the position that the sociology of law is superior to the other social sciences that form part of the broader domain of socio-legal studies, nor that the sociology of law is a superior specialty field in the discipline. The claim that I seek to defend in this book, instead, is that

there is a unique contribution to the study of law that is sociological and that, for this reason, the specialty deserves its place among the other specialties in sociology as well as among the other disciplinary perspectives in socio-legal studies.[1]

Both in order to frame the sociology of law as a disciplinary specialty and to secure its place in the interdisciplinary law and society field, the sociology of law is to be judged first and foremost by the standards of its foundations in sociology. Sociology of law is always and necessarily sociology. It is from this basic insight that this book is written to explore the disciplinary focus of the sociology of law through a discussion of its theoretical orientations and substantive applications. Theoretical pluralism and substantive thematization are taken as a guide to bring out what is unique about the sociology of law as one specialty among several others in a discipline to which it must always relate, as well as with respect to other social-science approaches to the study of law. These objectives are far from trivial for at least two reasons.

First, within sociology, the sociology of law is in many ways still an underdeveloped specialty area, not in terms of the quality of its contributions, but in terms of its reception and status. The relative lack of attention to law in sociology can be seen, for instance, by the fairly recent institutionalization of the sociology of law in the American Sociological Association, where the specialty section Sociology of Law was founded only in 1993. Of course, internationally the cases vary. For example, the Polish Section of the Sociology of Law was founded in 1962, the same year when the Research Committee on Sociology of Law in the International Sociological Association was established.[2] But it is clear that sociologists of law still have to actively make the case towards their peers that their specialty too belongs to the discipline at large.

Second, the retreat of the sociology of law away from the discipline into the law and society field has been detrimental to a proper

[1] The understanding of the sociology of law as a specialty area is far from uncontested as the historical and intellectual unfolding of the sociology of law throughout this book will show. For rival statements on the real and desired relationship between the sociology of law and (socio-)legal scholarship, see Banakar and Travers 2002; Comack 2006; Cotterrell 1983, 1986, 1992; Dingwall 2007; Evan 1992; Ferrari 1989; Griffiths 2006; Guibentif 2002; Kazimirchuk 1980; MacDonald 2002b; Posner 1995; Rottleuthner 1994; Scheppele 1994; Schwartz 1978; Simon and Lynch 1989; Travers 1993.

[2] The developmental path of the sociology of law across national cultures is further discussed in the Conclusion.

understanding of what sociology can accomplish with regard to the analysis of law and what the relationship is and should be between (socio-) legal scholarship and sociological perspectives of law (see Savelsberg 2002). Misunderstandings concerning the proper place and role of the sociology of law have tragically also affected its perception by sociologists in other areas of research. The reasons for this development are no doubt many and also relate to the relative inability or unwillingness on the part of (some) sociologists of law to resist the pull of the law and society movement, brought about, at least in part, not by any intellectual considerations, but by the relative attractiveness of employment in law schools. In light of these realities, the ambitions of this study are at its most immodest, for this book is driven towards the objective that the sociology of law must once and for all reclaim its position as a uniquely useful approach relative to other disciplinary perspectives on law. An analysis of the sociology of law's most important accomplishments in theoretical and empirical respects may serve this aim.

Sociology of law: a preliminary classification

Before an analysis can be made of the sociology of law's main theoretical and substantive accomplishments, the sociological specialty needs to be framed within an intellectual and institutional context. A useful preliminary specification can be provided on the basis of the work of Max Weber, who, in the best tradition of German sociological thought, clarified the role of sociology among other disciplines and correspondingly specified the place of the sociology of law relative to other knowledge systems about law. Specifically, following a typology based on Weber's (1907) work as explicated by Anthony Kronman (1983: 8–14), three approaches to the study of law can be differentiated. First, internal perspectives of law study law in its own terms, as part of the workings of law itself, in order to contribute to the internal consistency of law by offering intellectual grounding to as well as practical training in the law. The development of legal scholarship or jurisprudence corresponds to this efficiency-oriented body of knowledge.[3] Second, transcending the legal perspective of law,

[3] The term jurisprudence refers to the internal study of law (or legal scholarship) as well as to the activity of legal decision-making in the courts and the body of law that is established on the basis of such decisions. Unless specified otherwise, the term is in this book used in the meaning of legal or law-internal scholarship.

moral or philosophical perspectives of law are engaged in a normatively oriented quest to search for an ultimate justification of law on the basis of a moral principle and to criticize existing conditions of law relative to the extent to which they meet this normative standard. The philosophy of law provides such evaluation-oriented models of thought about law. Third, external perspectives of law engage in the theoretically driven empirical study of law to examine the characteristics of existing systems of law, including the state and development, the causes and effects, and the functions and objectives of the institution and practices of law. In their ambition to examine the characteristics of law, external perspectives share an orientation to analysis. Such analysis needs to be framed within the contours of a disciplinary activity in order to specify the kind of questions that can be asked. One can thus distinguish the various social sciences that study law in terms of one of its relevant dimensions, be they historical, cultural, political, economic, or social.

The ideal-typical distinction between internal (efficiency-oriented), moral (evaluation-oriented), and external (analysis-oriented) perspectives in the study of law does not imply that there are no relations among them. Analysis-oriented perspectives of law, for instance, provide information that moral perspectives can and do use to develop their reflections on law, though perhaps not as often as social scientists would hope. Internal perspectives of the law, also, can be useful to provide information that can be subject to analysis, although it is also the case that technical knowledge of the law cannot be a substitute for analysis. Among the various disciplines that tackle law externally, also, relations can and have been developed to mutually enrich the various perspectives from the social and behavioral sciences and the humanities. Situated in the external dimension, the sociological approach must furthermore be clarified in view of the pluralist nature of sociological theorizing.

Turning to the subject matter of the sociology of law, what is it that we talk about when we talk about law? Although the definition of law provides a ground of debate among the various theoretical traditions in the sociology, a minimal strategy can be followed to sociologically conceive of law as a particular category of rules and the social practices associated therewith. Definitions of law within the sociological community will further vary and contract or expand as law is understood more precisely within the contours of a specific theoretical

perspective, but the focus on rules and practices will always be present or at least implied. This dual conception of law incorporates Emile Durkheim's (1895) perspective of social facts as involving both material and non-material (ideal or cultural) conditions and circumstances, an analytical distinction that opens up rather than limits analysis and enables more precise propositions on how these variable components relate. Durkheim's work also leads to usefully specify the status of rules and practices of law on the basis of his theory of normative integration (Durkheim 1893a, 1893b). As rules, law refers to an institutionalized complex of norms that are intended to regulate social interactions and integrate society. The practices of law refer to the whole of roles, positions, interactions, and organizations that are involved with those norms in variable ways.

The inherently normative dimension of law must not be confused with its moral evaluation. As prescriptions on how social interactions should be regulated or how society should be ordered, norms always refer to an ideal state. But as institutionalized norms, legal rules have a factual existence that is beyond any ideal. Legal norms exist in the concrete settings of socio-historical societies and are never mere abstractions. Likewise, the practices of law will also contain normative elements, for instance by defining the legitimacy of law through rule-violating behavior or by justifying law through enforcement of its provisions. From the analytical viewpoint, a study of law as (ideal or cultural) rules and (material) practices is always oriented to an investigation of the factual dimensions of law. The duality of law implies that law, like any other aspect of society, is a normative issue with factual dimensions. It is because of this duality of law that its organization and function can be studied from the different perspectives specified by Weber. To Durkheim, the ability to approach law as a factually existing element of society (law as a social fact), irrespective of law's normative objectives and its self-understanding in moral terms, was synonymous with the sociology of law.

The sociological focus on norms needs an additional clarification to prevent misunderstanding. Critical legal scholar Richard Abel (1995: 1) once quipped that his (socio-legal) work on law dealt with "everything about law except the rules." Abel's comment may be provocative towards an internal understanding of law, but it is not helpful in articulating a concept of law that is useful for sociological

analysis, for law also involves rules apart from practices. Yet, the status of rules or legal norms cannot be assumed to be wholly exhausted by reference to its internal aspirations. Legal norms are explicitly formulated in order to regulate behavior and integrate society, but this primary function of law will not necessarily coincide with law's actual consequences. The whole of legal norms, as of norms in general, cannot be defined in terms of their actual capacity to regulate action and integrate society, but only in terms of their explicit function of regulation or integration. Thus, a sociological concept of law does not omit the study of rules, but instead differentiates between the proclaimed objectives of legal norms, on the one hand, and the actual workings and consequences of law, on the other. This sociological orientation breaks both with a moral and internal understanding of law to enable sociological analyses of law in its manifold relevant dimensions.

What, then, is the formal subject matter of sociology? Regardless of their specialty areas, sociologists are always engaged in the study of society. Only the discipline of sociology retains a focus on society as a whole without restricting its knowledge to any one institutional dimension of society (Habermas 1981a, 1981b). Thus, sociologists of law will always place law within the context of society. In this respect, the very expression "law and society" is sociologically puzzling for it assumes that law is not part of society. Sociologists of law therefore side with legal theorist Lon Fuller (1968) that it would be more appropriate to speak of law-in-society and to approach law accordingly as a social issue that begs for sociological elucidation, just as do other social institutions and social practices.

Extending from the conception of the primary function of law (social integration), law can be situated relative to other social institutions such as economy, politics, and culture. To provide for an initial clarification of the sociology of law, it is not primarily relevant precisely which social institutions can be differentiated sociologically on the basis of which principle of differentiation. The differentiation of law as an institution of integration next to economy, politics, and culture is evidently indebted to Talcott Parsons' four-functional systems theory (see Chapter 5). Yet, the model is here used, not in a specific functionalist sense, but as a guiding orientation that can situate law within society and specify the relations of law with other

social institutions. It is only for these analytical purposes, which enable a discussion of a variety of theoretical perspectives, that this model influences the division of chapters in the discussion of substantive themes of law in Part III of this book. Relatedly, this book also relies on a systems concept of law (and society) for strict analytical purposes of differentiating law from other social institutions and functions of society and, additionally, to differentiate various components of law. From this viewpoint, law can thus be analyzed in terms of its constituent parts and the interrelationships among them. Additionally, this perspective includes both static and dynamic components in order to differentiate between the structure and process of law and other social institutions. As structure, law can be analyzed in terms of its composition of constituent parts and how they are connected with one another. As process, law can be analyzed in terms of the processes of change and continuity that affect law both internally, among its constituent parts, and externally, between law and other institutions.

Themes and structure: an overview

Discussing the history and systematics of the sociology of law, this book contains twelve chapters divided over four parts. The first two parts are theoretical in orientation while the chapters in the latter two parts primarily offer thematic discussions. Theoretically, this book starts from the centrality in sociological thinking about law in the works of Max Weber and Emile Durkheim. Inasmuch as these classics relied on other social-science and pre-sociological perspectives of law that were current in the nineteenth century, the most important features of the theoretical developments on law before the institutionalization of sociology will be explored as well. It is also on the basis of the contributions of the sociological classics, their predecessors and heirs, that the most fundamental thematic aspects of the place of law in society will be elucidated.

In the first chapter, intellectual traditions of law will be discussed that, emanating from the Enlightenment, helped to pave the way for the development of the social sciences. Attention will be paid to pre-sociological thinkers who devoted their work to the study of law or who later became influential for the study of law, including Baron de Montesquieu, Cesare Beccaria, Jeremy Bentham, Alexis de

Tocqueville, Henry Maine, and Karl Marx. Also discussed in this chapter are early sociological authors such as Herbert Spencer, William Graham Sumner, Georg Simmel, and Ferdinand Tönnies, whose works in the area of law have not always been well remembered or lacked influence in later developments in sociology of law scholarship.

While some early sociological thinkers have not been unequivocally received as classics, the sociologies of Max Weber and Emile Durkheim are indisputably foundational to modern sociology, including the sociology of law. The next two chapters of this book are therefore devoted to the relevant works and influence of both masters of sociological thought. Given Weber's well-known and lengthy discussions on law and the generous reception of his work, the centrality of Weber in the sociology of law is obvious. Though perhaps less discussed by contemporary sociologists of law, Durkheim's work is as important as Weber's and will in this book be revisited to situate the sociological study of law around the key feature of social issues, including law, as involving both factual and normative dimensions. Recent discussions of the value and validity of Weber's and Durkheim's sociologies of law will be incorporated in these chapters.

Moving on to theoretical developments in modern sociology of law, Chapter 4 will focus on the intellectual move towards the sociology of law as it primarily took place in Europe among sociologically inclined legal thinkers and sociologists of law, specifically Leon Petrazycki and the scholars that emanated from his teachings, including Nicholas Timasheff, Georges Gurvitch, and Pitirim Sorokin, as well as other early European sociologists of law, such as Eugen Ehrlich and Theodor Geiger. It is to be noted that these scholars came from the European continent, although several of them would in the course of their careers move to other parts of Europe and even cross the Atlantic. Despite these scholars' migration, however, their impact on the development of the sociology of law was relatively small.

In the United States, as discussed in Chapter 5, another intellectual lineage developed towards the modern sociology of law, one that was more distinctly rooted in legal scholarship rather than in sociology. Especially the work of the noted American legal scholar Oliver Wendell Holmes led the way towards the development of sociologically oriented schools of jurisprudence by conceiving of law as a reflection of surrounding societal conditions. The work of Roscoe Pound emanated from this tradition into the new movement of

sociological jurisprudence. Likewise, the legal realism of Karl Llewellyn can be understood in this move towards an increasingly scientific analysis of law. The decisive moment in the transition towards the sociology of law in the United States, however, did not come from within jurisprudence but was located squarely in sociology, specifically the structural functionalism of Talcott Parsons. The major theorist of the modern era of sociology, Parsons' efforts led to the canonization of the European classics and also involved an autonomous attention to the study of law. Emanating from Parsons was a bona fide school of legal sociology, which also partnered with jurisprudence, particularly the work of Lon Fuller.

In Chapter 6, the major theoretical schools of the modern sociology of law are explored on the basis of three central dividing lines. First, in opposition to the perceived consensual thinking of structural functionalism, there emerged a conflict-theoretical perspective in sociology that was also influential in the specialty area of the sociology of law. Second, modern theories in the sociology of law are divided, because of the peculiar relation between law and morality, over the possibility and desirability of a normative sociology of law or a resolutely scientific approach. This controversy is especially well reflected in the opposition between the jurisprudential sociology of Philip Selznick and Philippe Nonet and the pure sociology of law developed by Donald Black. And, third, opposing the macro-theoretical focus of structural functionalism are various perspectives whose analyses are located at the level of social interaction. Among these perspectives are both subjectivist sociologies oriented at the understanding of action, such as symbolic interactionism, as well as objectivist approaches that seek to explain behavior, including social exchange and rational choice theory. Crystallized around these three dividing lines are also many of the most recent developments in contemporary sociology of law, which will be discussed at various points in the remaining chapters.

Parts III and IV of this book revolve around substantive themes and are in this sense more empirical in orientation and also include discussions of research in the sociology of law. Each of these chapters, however, will discuss a selected substantive issue in a manner that is sociologically meaningful and will thus also incorporate theoretical materials. Aspects of the discussions in Parts I and II will reappear in terms of the theoretical orientations that have already been introduced,