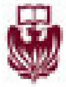
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WHAT IS "SOCIOLOGY OF LAW"?

N. S. TIMASHEFF

ABSTRACT

The sociology of law, a new science, studies human behavior in society in so far as it is determined by commonly recognized ethico-legal norms, and in so far as it influences them. Jurisprudence, on the other hand, studies the norms as such, from three main points of view: analytical or positive, historical, and theoretical. Other attempts to delimit the field of sociology of law, such as those of H. Rolin, W. Schoenfeld, H. U. Kantorowicz, J. Kraft, I. Kornfeld, E. Ehrlich, H. Kelsen, Max Weber, B. Horvath, L. Petrajitsky, C. Lombroso, M. Rumpf, and others, are of some value, although not altogether satisfactory. The studies of psychologists, anthropologists, philosophers of law, and jurists permit the formulation of a sociological definition of law as a complex instrument of social co-ordination synthesizing ethical conviction and political power.

Since olden times, law has been the object of a science called "jurisprudence." This science has had a glorious record, numbering in its annals many famous names and immortal treatises. It is a many-branched science, which has developed into a network of numerous special sciences called "civil law," "criminal law," "constitutional law," and so forth. Is there room in this field for still another science, that of "sociology of law"? Or is "sociology of law" only a new name for a science known for centuries?

Yes, there is room. No, it is not a new name for an old science. Law is, of course, the center of interest for both; but the points of view are quite different and therefore also the knowledge gained by them.

Law is a cultural force. Its function is that of imposing norms of conduct or patterns of social behavior on the individual will. It is the aim of jurisprudence to study these norms. This study may be carried out with regard to norms in force in a certain country at a given time. Each single norm has to be explained and elucidated: for very often they appear in forms far from clear. Different norms have to be brought into correlation with one another: for their true meaning appears only by comparison and contrast. Classifying them and working them into precise systems forms another task of jurisprudence. Finally, the norms of conduct included in law are sometimes not directly expressed, but only indirectly mentioned in other norms; therefore true juridical discoveries are possible. Such are the

tasks of positive or analytical jurisprudence. They are, of course, arduous but attractive tasks.

The concrete norms of conduct forming law may be also studied from the historical point of view. Instead of describing in detail the norms applied today in a certain country, we may analyze the gradual development of the principal norms within certain periods in a given country. Such a study is undertaken by historical jurisprudence.

In both analytical and historical jurisprudence the comparative method may be applied: legal norms are studied with regard to a group of countries the social structures of which present or presented some similitude. This is the task of comparative jurisprudence.

Finally, the structure of the legal norms presents, at all times and places, some unchangeable features which may be considered as belonging to the very essence of law. Studying this unchangeable form of the patterns, their natural elements, is the task of theoretical jurisprudence.

In all these cases the norms of conduct as such remain the object of study. This is, in spite of the opinion of many scientists,[1] a study of actuality, and not a study belonging to the domain of evaluation —for the social patterns of behavior included in law actually exist, forming a part of culture. Rules of evaluation are the objects of jurisprudence, but in their relation to actuality. Finding out the logical interdependence between various individual norms is the main task of this science; logical analysis is therefore its chief method.

There is another actuality, closely related to these norms, but not studied in jurisprudence. This is human behavior in society, in so far as it is determined by these norms and in so far as it determines these norms or patterns of behavior.

In general, legal norms actually determine human behavior in society: the triumph of law is the rule, its defeat in a concrete case an exception. Why is this so? What is the force of law? How does law determine human behavior in society? What are the conditions for the efficacy or nonefficacy of legal norms—in other words, of

[1] For instance, H. Kelsen, *Der juristische und der soziologische Staatsbegriff* (Tübingen, 1922).

adjusting or not adjusting human behavior to the particular social patterns of behavior forming law? This is the first group of questions which stand outside the true domain of jurisprudence and which form the first field for the sociological investigation of law.

On the other hand, the legal norms or social patterns of behavior are creations of human will, of the corporate will of social groups. What are the forces determining the creation, the transformation, and the destruction of the juridical patterns of behavior? This is a second group of questions related to law, but standing outside the true domain of jurisprudence and forming another field for the sociological investigation of law. Chains of human actions and reactions must be searched for, chains in which legal norms and configurations of human behavior determined by these norms play alternately the roles corresponding to the active and the passive voices of verbs.

When such chains of action have been discovered and accurately described, a third task may be undertaken: that of establishing correlations, causal or logico-meaningful,[2] between changes in law and changes in other social phenomena, as well as between certain legal structures and certain social structures. Searching for such correlations without an accurate knowledge of law as an actual social phenomenon would be a hopeless enterprise. The absence of precise causal knowledge of many social phenomena is one of the reasons why the study of social correlations results in rather negative or indeterminate statements.[3] Especially in criminology, where knowledge of the factors correlated with crime is essential, the idea is sometimes expressed that, without a scientific knowledge of legal behavior and of its factors, scientific statements concerning the genesis of crime are almost impossible.

Human behavior in society, in so far as it is related to law, is the object of the new science, called "sociology of law." Causal investigation is its chief method.

Other delimitations between jurisprudence and the sociology of law have been proposed. It is not an easy task to make an adequate

[2] P. A. Sorokin, *Social and Cultural Dynamics* (New York, 1937), Vol. I, chap. 1.

[3] P. A. Sorokin, *Contemporary Sociological Theories* (New York, and London 1928), pp. 279, 326, 403, 422, 598, and *passim*.

survey of them, for many authors when writing on the sociology of law do not explain their viewpoints on this subject[4] or else call investigations with quite different aims "sociology of law."[5]

H. U. Kantorowicz gives a correct, but too narrow, definition of the sociology of law: it is to be an investigation of social life in its relation to law, especially the investigation of correlations between law and other social domains—economics, politics, techniques, art, religion, etc.[6] According to J. Kraft the sociology of law should study the laws which determine the legal institutions in society.[7]

For I. Kornfeld[8] and E. Ehrlich[9] the objects of the sociology of law are actual rules of social life in their opposition to the norms included in law. These rules, according to Ehrlich, are related to a certain number of facts of law (*Tatsachen des Rechts*), especially habit, domination, possession, contract, and inheritance, which exist before the law and form the basis of the total economic and social structure of humanity.

In his brilliant reviews of both books H. Kelsen has shown that, when interpreted in such terms, sociology of law becomes general sociology or social science in its totality—for actual rules of social life are the main object of their study.[10] On the other hand, later events have already proved the fallacy of Ehrlich's cardinal axiom: in communist society contracts and wills do not belong to the basic social institutions and are replaced by other ones.

[4] H. Rolin, *Prolégomènes à la science du droit* (Brussels, 1911), which presents an ingenious attempt to construct a sociology of law by means of analyzing the individual juridical experience.

[5] Cf. W. Schoenfeld, (*Schriften der Königsberger gelehrten Gesellschaft*, IV [1927], 32), for whom the sociology of law is the theory of cognition related to legal history.

[6] "Rechtswissenschaft und Soziologie," in *Verhandlungen des ersten deutschen Soziologentages* (Tübingen, 1911).

[7] "Rechtssoziologie," in Vierkandt's *Handwörterbuch der Soziologie* (Stuttgart, 1931), p. 467.

[8] *Soziale Machtverhältnisse. Grundzüge einer allgemeinen Lehre vom positiven Rechte auf soziologischer Grundlage* (Wien, 1911).

[9] *Grundlegung einer Soziologie des Rechts* (Munich, 1913). The English translation has just been published by the Harvard University Press.

[10] "Zur Soziologie des Rechts," *Archiv für Sozialwissenschaft und Sozialpolitik*, XXXIV (1912), 601–14; "Eine Grundlegung der Rechtssoziologie," *ibid.*, XXXIX (1915), 839–76.

According to Max Weber, sociology—especially sociology of law—has the task of studying and explaining human conduct from the causal point of view; conduct is for him human behavior if and in so far as the actors endow it with subjective meaning. On the contrary, the objective or the true meaning of human attitudes is the domain of investigation for jurisprudence, as well as for logic, ethics, and aesthetics.[11] This delimitation of both scientific domains is unsatisfactory, for it limits the sociology of law to the study of conscious conduct, whereas acting according to the law is frequently carried out by means of conditioned reflexes: certain words, gestures and symbols produce "legal responses" without any subjective interpretation. Were such cases outside the domain of the sociology of law, this science would not be able to discover continuous chains of human actions and reactions and to relate the observed facts with each other.

According to B. Horvath, author of the most recent systematic study in the sociology of law, the objects of this science are "juridical rules of evaluation in their relation to actuality" (*Sollen zu Sein*).[12] This would mean that jurisprudence, on the contrary, should study legal norms without any relation to actuality. This is surely an erroneous opinion—the first task of a student in jurisprudence is to investigate whether the norms he studies are in force (that is, are related to actuality). The study of purely personal or imagined norms does not belong to the domain of science.[13]

On the other hand, it might be remarked that the domain claimed for the sociology of law is already being occupied by jurisprudence This is an undeniable fact. The sociological trend in jurisprudence is gaining more and more power.[14] The unexpected conversion of the leader of the "formalists," Professor Hans Kelsen, was stressed dur-

[11] "Grundriss der Sozialökonomie" (III. Abteilung) in *Wirtschaft und Gesellschaft* (Tübingen, 1925), pp. 1–2.

[12] B. Horvath, *Rechtssoziologie* (Berlin, 1934), pp. 66–76.

[13] The opposite opinion, expressed by L. Petrajitsky (*Theory of Law and of State*, in Russian [2d ed.; Petrograd, 1909], I, 106–7 and *passim*), forms the weakest point in his very original study of law as an actual phenomenon.

[14] A brilliant survey of the sociological trend in jurisprudence is made by R. Pound, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, XXV (1911–12), 489–516.

ing one of the last congresses of the Institut International de Philosophie de Droit et de Sociologie Juridique.[15]

But the sociological approach forms necessarily only a kind of adjunct to the analytical, historical, comparative, or theoretical study of legal norms: for it is impossible to construct a system of knowledge which would, in an accurate way, combine the formal study of norms and the causal study of human behavior related to these norms. Such a study needs a place by the side of jurisprudence, but not within jurisprudence.

Very instructive, from this point of view, is the recent history of the science of criminal law. C. Lombroso's revolutionary accomplishments[16] resulted in attempts to rebuild this science completely, to replace the formal study of patterns of prohibited behavior described in criminal statutes by a causal study of crime and the effects of punishment, and later in attempts to combine both points of view into one system. All attempts of the latter kind were a complete failure, and today a resolute separation is again prevailing—there is a science of criminal law, studying in an analytical, historical, or comparative way the patterns of prohibited behavior, and another science called criminology, studying actual human behavior in so far as it is related to crime and punishment.[17] Both should, of course, occupy definite and honorable places on the general map of scientific knowledge.

The content of the sociology of law depends on the structure of the social phenomenon called law. This is a complex, secondary phenomenon. Two primary social phenomena, those of ethics and of power, are united in it. Norms of conduct imposed upon the individual will are included not only in law, but also in morals and custom; morals, custom, and law are the ethical forces, together forming ethics. On the other hand, the strength of law, the juridical pressure on human behavior, may be considered as the display of the

[15] H. Kelsen, "L'Ame et le droit," *Annuaire de l'Institut International de Philosophie de Droit et de Sociologie Juridique* (1935), pp. 60–80; "Discussion du rapport de H. Kelsen," *ibid.*, pp. 81–82.

[16] C. Lombroso, *L'Uomo delinquente* (1st ed., 1876).

[17] In spite of this conclusive experience, M. Rumpf proposes to include the sociology of law in a "total" jurisprudence. ("Was ist Rechtssoziologie?" *Archiv für zivilistische Praxis* [1924], pp. 36–51.)

social energy concentrated in organized social power. But the display of this energy is not peculiar to law: social power may dominate over individuals by means of law as well as outside law, forming in that case despotical rule.[18] Social power may act without any connection with ethics, just as ethics may exist without any connection with social power. Therefore the notions of ethics and power are not two co-ordinated or subordinated notions. They may be considered as two circles which cross each other. The overlapping section is law.[19]

Were a sociology of ethics and a sociology of power already in existence, the sociology of law might be based upon the results of these sciences and be limited to the study of the joint action of ethics and of power, of ethics supported by power, or of power limited by ethics. But neither of these sciences yet exists. Therefore the sociology of law has to begin by studying, from the causal point of view, the phenomenon of ethics, to continue by studying, from the same point of view, the phenomenon of power, and to conclude by an analysis of the complex phenomenon formed by the joint action of both.

What are the materials to be used and the methods to be applied when constructing a scientific theory of law as of an actual social phenomenon?

In the first place, important material may be collected by means of observation, which may be of two types. The first is introspection, i.e., accurate subsequent analysis of one's state of consciousness in so far as it is related to law (acting according to law, acting against the law, acting with the intent of transforming law, reaction produced by another's acting in accordance with or against law). A prominent representative of the theoretical trend in jurisprudence, Professor G. Gurvitch, insists in his latest work on the necessity of studying the specific actuality presented by law and of beginning this study with the analysis of the "immediate juridical experience." This experience is given in acts of legislators, of authorities, of electors, of persons

[18] R. von Stammler, *Recht und Wilkür* (Halle, 1895); *Die Lehre vom richtigen Rechte* (2d ed.; Halle, 1926).

[19] For a more detailed exposition of the relation of law to ethics and to power see my article, "Le Droit, l'éthique, le pouvoir," *Archives de philosophie du droit et de sociologie juridique* (1936), Nos. 1–2.

contracting settlements, of persons taking part in the juridical life of corporate bodies—only this interpretation gives to these acts the character of being related to law. But this type of experience is, according to his opinion, veiled in the minds of the actors by too much reflection and conceptual formulation. Gradual reduction and "inversion" have to be applied in order to gain the needed knowledge.[20] This is, I may add, a method analogous to that applied by Freud's school when investigating subconscious psychic currents.

The second type of observation studies human behavior determined by law or relative to law. Material collected by those pursuing the sociological trend in jurisprudence may be very useful in so far as it shows how rigid legal formulas are transformed in actual life, or how (for example) unjust or antiquated laws are avoided. For jurisprudence with this sociological tendency the transformed norms are the objects of study, replacing the dead rules included in written law.[21] For the sociology of law—not the transformed norms of conduct, but the fact of their transformation—is interesting, and thus creates an incentive for studying, in general, the process of modifying patterns of written law by means of conflicts with other social phenomena and structures. The sociology of law does not have to be limited by data of such a type. Direct and special observation may also be applied in order to investigate such problems as, for instance, the role of conditioned reflexes in securing the triumph of law. The idea that social control, especially control by means of law, is based upon conditioned reflexes, is sometimes expressed in social psychology.[22] But there is no precise study of how this control is effected, and which are the unconditioned reflexes forming the basis of the conditioned. I. Pavlov suggests especially the study of the reflexes of freedom and submission.[23]

Experiment has to join observation. Introspective experiments

[20] G. Gurvitch, *L'Expérience juridique et la philosophie pluraliste du droit* (Paris, 1935), pp. 13, 63.

[21] For instance, Ehrlich, *op. cit.*, pp. 298, 396.

[22] F. H. Allport, *Social Psychology, passim.*

[23] *Twenty-five Years of Objective Study of the Higher Nervous Activity of Animals* (Leningrad, 1925), pp. 306–8 (Eng. trans., 1928); cf. also *Conditioned Reflexes* (Eng. trans., 1927), pp. 395–96, and K. Platonow, *Hypnosis and Suggestion* (Kharkow, 1925), pp. 41–42 (in Russian).

are proposed by Professor L. Petrajitsky. According to him, juridical or (in general) ethical impulses may be successfully studied, applying the methods of contradiction and of teasing; impulses increase in force if attempts are made to hinder their normal running, or if rapid changes of the situation occur, alternately decreasing and increasing the chances for realizing the impulses. In such cases these impulses, which are almost imperceptible when they develop in a normal way, become dominating and therefore may be described with great accuracy.[24]

Experiments by means of tests are also possible. J. Piaget[25] and I. Caruso[26] have applied an ingenious system of tests in order to study the growth of the retributive emotion in children. Their point of view was that of morals rather than law, but, in spite of this, their results are of great help when studying the "immediate juridical experience." On the other hand it would be very useful to apply the same method in order to investigate the juridical mentality of adults. Such questions as the survival of the primitive revenge mentality, or the role of the retributive emotion as one of the roots of criminal law even today,[27] or the relative force of norms of conduct belonging to the domains of law, morals, and custom, could be studied in a large number of different situations.

Just as pathology gives valuable data when studying biology, so psychopathology when studying psychology. Criminology, the study of abnormal behavior in human society, or of *not* adapting the individual will to social patterns, may, together with the sociology of revolutions, give a great number of valuable insights in constructing the sociology of law. The sociology of law and criminology must each assist the other.

Data collected by observation and by experiments of the above-

[24] Petrajitsky, *op. cit.*, p. 5.

[25] *Le Jugement moral des enfants* (Paris, 1931).

[26] *La Notion de la responsabilité et de la justice immanente chez l'enfant.* (This book is to appear next year in Louvain. The author kindly gave me permission to use his manuscript.)

[27] The question of whether the retributive emotion plays and ought to play a part in modern criminal law was amply debated during the preparation of a new criminal code for Germany. The best work concerning the above-mentioned question is that of E. Beling, *Die Vergeltung und ihre Bedeutung für das Strafrecht* (Leipzig, 1908).

mentioned types, and by using the results of criminological research, refer to the conduct of modern civilized men. In order to control the general validity of the data obtained in these ways, the data of ethnology and of historical jurisprudence have to be included, as well as data of child psychology.[28] Of course, these data should not be given an exaggerated place in the system—the sociology of law should not become a theory of primitive law, just as sociology in general should not be merely a science of primitive human behavior.

As with criminology, the support of the sociology of law on the one hand and of ethnology and historical jurisprudence on the other hand must be a mutual one.

The sociology of law is the only science which might discover objective and not purely subjective and conjectural limits for the phenomenon of law; the limit is given by differences in social interaction. In law the "equal interaction" forming the essence of the recognition of norms by group members is combined with an "unequal interaction" related to power.[29]

The absence of such considerations often hinders authors from putting correctly the problems of primitive or of historical jurisprudence. For instance, when trying to prove that law already existed at very early stages of social evolution, B. Malinowski invokes the fact that there were already rules "conceived and acted upon as binding obligations."[30] But custom and social morals (in opposition to personal moral conviction) are also binding, endowed with social pressure, and therefore the existence of compulsory rules is insufficient to prove the existence of law. Further, according to A. S. Diamond, "among the tribes, which have not yet evolved courts .... we may observe .... settled rules of conduct as to marriage and inheritance and perhaps property, and these might well be described as law."[31] Why? For these rules "are in the direct line of the history of law." On the contrary, the legal character of other rules, which were in force together with that named above, but later on

[28] Petrajitsky (*op. cit.*, pp. 95–99) makes very ingenious remarks concerning the importance of studying children at play as an aid in understanding the growth of the juridical mentality.

[29] Cf. my above-quoted article, "Le Droit, l'éthique, le pouvoir."

[30] B. Malinowski, *Crime and Custom in Savage Society* (London, 1926), p. 15.

[31] A. S. Diamond, *Primitive Law* (London and New York, 1935), p. 219.

disappeared, is denied.[32] In other words, the author separates early rules into two classes from the viewpoint of their later fate. The lack of any actual criterion for legal rules is obvious.

Last but not least, brilliant remarks of sociological character have been made by philosophers of law, historians of law, and students of positive law. These remarks in their totality are not able to replace sociology of law; for, made without any relation to a general sociological system, sometimes without knowing that sociology may exist or in conscious opposition to any sociology, especially to sociology of law, these remarks have almost without exception been conjectures rather than scientific theories. But it is not the task of the sociology of law to replace, but only to complete, the points of view of analytical, historical, comparative, and theoretical jurisprudence. Every attempt to construct a sociology of law without possessing sufficient knowledge in jurisprudence would be a failure.

There is room for a new science of the sociology of law; there are sufficient materials and methods to help us gain new knowledge; and there exist already brilliant attempts to solve the problem of the sociology of law. Continuing these efforts is an important task, not only from the theoretical but also from the practical point of view. For the sociology of law might become a basis for an applied science of legislation. And, in opposition to the belief of Savigny and the other founders of the historical school of jurisprudence, our time is called to a more rational settlement of human relations by means of consciously elaborated legislation.

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[32] *Op. cit.*, pp. 191–92.