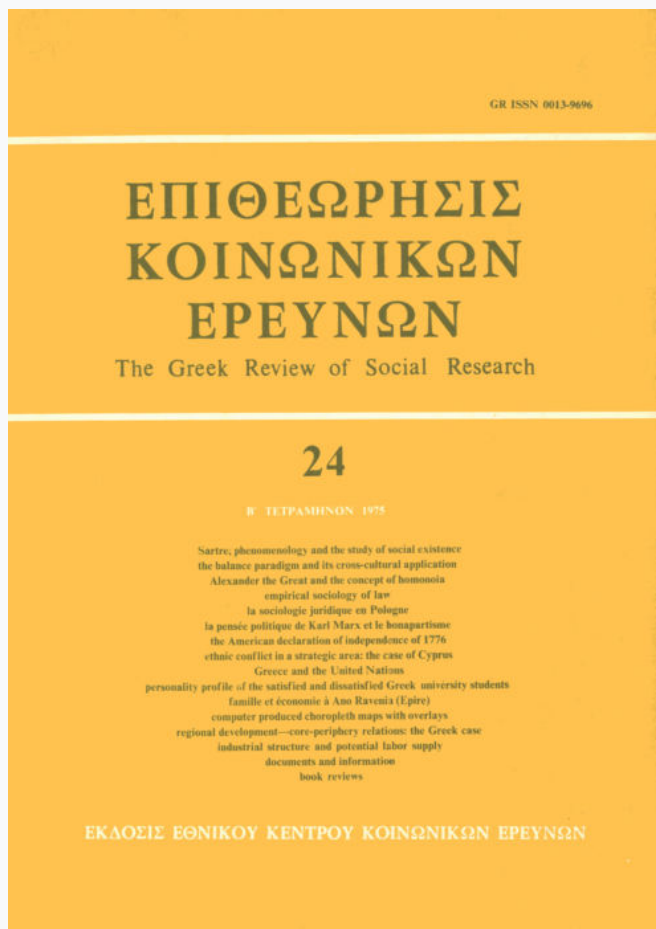


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## Empirical sociology of law

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# empirical sociology of law

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## the definition of the sociology of law

It is possible to look at the sociology of law from many points of view. It may be regarded as: (a) one of the branches of general sociology (a problem immediately arises as to what specific features distinguish the sociology of law from other sociological approaches, and also what the sociology of law may contribute to general sociological knowledge that is new and specific); (b) a modern version to replace the obsolete, semantically vague and methodologically suspicious jurisprudence (which raises the question of whether the sociology of law can replace jurisprudence without abandoning an important field of inquiry—the analysis of basic philosophical notions which are inherent in the legalistic way of thinking and problem-solving); or (c) a cryptic and misleading term supposed to cover a seemingly new (in contrast to the old, traditional) approach to essential legal problems but only introducing sociological techniques of investigation secondary to the basic legal ones (in which case a legitimate objection could be raised that the sociology of law is only a convenient and rather empty slogan which reveals several additional, and helpful, but nevertheless second-rate means of enlarging the traditional accepted legal outlook on the law).

Which point of view is methodologically the most proper? Which is the most adequate for dealing with current empirical discoveries? Which one reflects most closely the insights generated during the still lively discussions pertaining to the basic problems of the legal sciences?

In order to answer these questions we must look at some existing definitions of the sociology of law. P. Selznick says, «The sociology of law may be regarded as an attempt to marshal what we know about the natural elements of social life and to bring that knowledge to bear on a consciously sustained enterprise, governed by special objectives and ideas.»<sup>1</sup> He distinguishes three stages of the development of the sociology of law: (1) the primitive or missionary stage, (2) the stage which belongs to the sociological craftsman, and (3) the stage of true maturity where «the sociologist goes beyond (without repudiating) the role of technician or engineer and addresses himself to the larger objectives and guiding principles of the particular human enterprise he has elected to study.»<sup>2</sup> J. Skolnick has a slightly different approach to the question: «The most important work for the sociologist of law is the development of theory growing out of empirical, especially institutional studies.»

1. P. Selznick. «The Sociology of Law» in: *Law and the Behavioral Sciences*, eds. Friedman, L., Macaulay, S., Bobbs-Merrill, 1969, pp. 203.

2. *Op. cit.*, p. 3.

and also: «The most general contribution that the sociology of law may make to social theory is that of understanding the relation between law and social organization.»<sup>1</sup> V. Aubert tells us that the sociology of law is part of a general discipline, namely the sociology of science which deals with the specific legal way of thinking.<sup>2</sup> A. Podgórecki proposes as a definition: «The sociology of law has as its task not only to register, formulate and verify the general interrelations existing between the law and other social factors (law could then be regarded as an independent or dependent variable), but also to try and build a general theory to explain social processes in which the law is involved and in this way link this discipline with the bulk of sociological knowledge.»<sup>3</sup>

These definitions, like all definitions in the social sciences, try to focus attention on specific problems and to emphasize certain aspects of complicated social reality. Therefore, these and other definitions may be regarded as an academic attempt to contain within a general description the different tasks performed by scholarly specialists who consider and deliberate over various relationships existing between the law and social structure.

Nevertheless, despite these attempts to «grasp the essence» of the sociology of law, a new, in some ways completely different—but still rooted in previous, traditional attitudes—approach to the sociology of law emerges as a possible new pattern of inquiry. This attempt is visible in various other inquiries but is especially clear in a comprehensive Italian study (1965-1971) on the administration of justice.<sup>4</sup> In this particular case several features of the new type of approach become visible: (a) a social issue of great importance was selected as the object of comprehensive, interdisciplinary analysis, (b) a social diagnosis covering a vast range of problems, issues and

open questions was offered in an attempt to describe, in general language, a variety of different processes proceeding at different rates in different directions, but complying on the whole with a general pattern, (c) partial and more general explanations were proposed to find reasons for the interactions registered and described, (d) some proposals having the character of social engineering were formulated as part of this comprehensive study.

Perhaps this new attempt is simply complementary to the old one in that it tries to stress the need for solving problems of great social importance which were overlooked by classical scientists. If so, many methodological possibilities through a new combination of traditional disciplines remain open. Let us, instead of looking for a perfect definition of sociology of law prepared in a somewhat analytical manner, take into account the achievements and difficulties which the sociology of law (a relatively new science in its empirical version) has accumulated up to now. Some of these problems are of a mainly methodological character. Thus, to what extent has the lesson to be drawn from the sociology of law by the legal sciences enriched these sciences? Perhaps an elliptical answer would be proper at the beginning. The lesson imparted by the sociology of law revealed that traditional legal reasoning is limited when used as the main tool and instrument in solving legal problems. A further question immediately arises: On what grounds is so-called legal reasoning based? Again, the answer—if given at all—is: Legal reasoning is based on the grounds of common sense and specifically legalistic professional abilities. And yet common sense, with all due respect, is limited and yields to systematic knowledge. Moreover, the professional abilities of lawyers, unique to those possessing them, are biased by the experience accumulated by a given profession. These shortcomings create the major limitations of the traditional use of legal reasoning. But if this is the situation, what new and more specific sociological methods could be offered such as to enlarge, deepen and sharpen our insight into the complicated operation of legal and social processes?

In order to give a more satisfactory answer to these questions, an overview of the various methods which are useful in supplementing the traditional knowledge of law is needed.

#### methods of socio-legal research

1. J. Skolnick, «The Sociology of Law in America: Overview and Trends», *Law and Society*. Supplement to Summer, 1965, *Issue of Social Problems*, 4 (1965).

2. Aubert, V. *Sociology of Law* (mimeographed material), Oslo.

3. A. Podgórecki, *Sociologia Prawa*, Warszawa, 1962, p. 15.

4. R. Treves, *The Administration of Justice in Italy* (A Sociological Survey), Varese, 1971 (mimeographed). J. Ben-David in his article: «How to Organize Research in the Social Sciences» in: *Daedalus*, Spring 1973, Vol. 102, No. 2, makes exactly the same point: «According to my analysis, one of the principal problems in social science in this lack of recognition that many of the questions investigated by social scientists require an eclectic approach like that of clinical medicine or engineering. In this respect there seems actually to have been some retrogression since the investigation of social problems carried out in the United States during the 1930's. Projects such as *Recent Social Trends* published in 1934 as a result of the collaboration of outstanding economists, political scientists, and sociologists, or the work on racial discrimination in the USA., directed by Gunnar Myrdal, an economist working with sociologists, did not have a sequel after World War II.»

tal method, and finally, the comparative method. Let us examine briefly—as a contrast to prevailing in jurisprudence method of analytical thinking—their possible applications.

#### the historical-descriptive method

The historical method in the sociology of law assumes the diachronic approach in research, reaching back into the past. It makes use of various documents, such as private and official records, memoirs, publications, etc., recorded in any type of writing, cuneiform, hieroglyphics, or in symbols such as seals or coats of arms. The historical method requires expert critical source analysis, immediate and direct. In some cases this method may lack sufficient precision; in others it may bring many interesting results.

Traditionally used, the historical method when applied to law was supposed to describe this or that legal enactment, status or institution in its unique historical perspective. The more historical facts, the more details describing the idiosyncratic flavor and atmosphere of a given legal event, the more productive the application of this method. The modern version, which could fruitfully be used in the understanding of the law takes a different methodological orientation. It tries to compare types of social systems and the legal systems corresponding to them. Without going into detail, it is possible to say that there are at least three basic relationships between social systems and the legal systems attached to them: (1) obsolete legal systems (when social needs outpace the rigidified tradition-bound requirements of the legal system), (2) adequate legal systems (when social needs are in some harmony with the set of legal constructs and norms which constitute the legal system as a whole), (3) progressive legal systems (when the legal system is more developed, more enlightened than economic and political social conditions, which resist its creative pressure). Of course, the real situation is always more complicated: legal systems are not stable; they are, in general (as I. Raz says in this connection), temporary due to the fact that they are changing all the time; new laws are enacted continuously and some legal norms lose their binding force. (Perhaps it would be better to speak of «jumping,» «trembling,» legal systems—they «jump,» «tremble» all the time, subsequently changing their scope and content.)

This new point of view offers a far-reaching theoretical perspective. It could illuminate the up to now obscure general problem: Under what conditions can a legal system be adopted or taken over by other social systems? There are not only technical innovations; legal ideas, legal norms and constructs can

also be regarded as social innovations. Parts of German law (especially the part connected with urban settlement) were adopted in Poland.<sup>1</sup> These elements of foreign legal systems were adopted because they were needed; they were functional and in accord with the new social and economic trends. After World War II Japan (in addition to the previously adopted civil law taken mainly from France and Germany) borrowed and adopted American constitutional law.

All these «travels,» «transplantations,» voluntary and involuntary adaptations are better understood when the more elaborated scheme of sociohistorical thinking is adopted. Then the directions of and reasons for the flow of legal innovations can be grasped in a deeper perspective; not as the influence of a given institution or another institution or one legal philosopher on another one, but as a complementary interchange of legal innovations and ideas. Also, unexpected and undesired negative byproducts of these exchanges could be better understood. Some elements of a newly adopted legal system which were adjusted and «natural» in the paternal social system could be regarded as strange, alien and unacceptable by some members of the receiving social system; they do not carry the stamp of traditionally accepted institutions. This point of view also explains why some new legal systems or their elements, although rational and potentially fully functional, are violently rejected, against all rational arguments. They do not have the traditional «charisma» which stems from their own nationally, socially or historically accepted background. The presence or absence of this specific charisma is an additional, independent element that could be historically detected and which could modify the social behavior of members of a given social system in an essential way.

#### the ethnographic-comparative method

This method is somewhat similar to the historical one. It consists of studying the behavioral phenomena of various cultures in so-called primitive societies. Contemporary civilized social relations are extremely complex, whereas so-called primitive societies sometimes offer opportunities for observing legal interactions reduced to *sui generis*, laboratory simplicity. Because studies performed by means of the ethnographic-comparative method are usually carried out in cultures which differ from the researcher's own, the data obtained by this method must be very carefully cross-controlled by as many means as possible. The technique of participant observation seems to be indispensable here, for after some time it allows the

1. W. Wasjutynski, «Origins of Polish Law, Tenth to Fifteenth Centuries» in: *Polish Law throughout the Ages* (W. J. Wagner, ed.), Hoover Institution Press, Stanford, 1970, pp. 62-63.

scholar to identify more or less with the cultural environment under study. Then, losing the social distance separating him from the problems (and often thus losing the ability to grasp them), he acquires—at the possible price of anthropological bindness—a better ability to understand them.

What does a scholar who has adopted the point of view of jurisprudence gain from an anthropological perspective? At least two new cognitive dimensions may be obtained. One is recognition of the limited validity of generally accepted legal definitions; the second is recognition of the relatively narrow validity of the law itself.

Traditional lawyers are inclined (even if they disagree in the details) to define the law as official norms promulgated by legitimized authorities and provided with sanctions which safeguard conformity to these norms. There are many weak elements in a definition of this type. E. g., What does «official norm» mean? Which authorities are «legitimized»? What sort of sanctions are recognized as legal (formal, informal)? Let us omit there the eternal discussions concerned with these questions and point out, instead, that anthropological studies show that informal (living, intuitive) law functions even where so-called legitimized authorities do not exist. In the absence of these types of authorities, phenomena which could be defined by an observer as legal norms are treated by the people for whom these phenomena have validity as «law.» They produce behavior which in all so-called civilized societies is termed «legal,» and they are surrounded by institutions (serving as mediators) which, according to general standards, would also be called legal institutions. The vast evidence furnished by anthropological studies thus shows—contrary to existing theoretical beliefs—that the law as such could exist and function without the feature that would seem absolutely necessary: compulsory sanctions enforced by legitimized authorities. Briefly, it is possible to say that anthropological studies support (through evidence gathered from different types of societies) the thesis earlier formulated by L. Petrazycki<sup>1</sup> and E. Ehrlich<sup>2</sup> in connection with industrialized societies. According to L. Petrazycki (intuitive law) and E. Ehrlich (living law), a more adequate (not crippled, too narrow and therefore biased) understanding of the law could be obtained through a definition which grasps the law in its entire scope of actual functioning, not only in the scope officially described. This is the core of the first lesson which emerges when the traditional point of view is enlarged by the anthropological approach.

1. L. Petrazycki, *Law and Morality: Leon Petrazycki*. Cambridge, Mass., Harvard University Press, 1955.

2. E. Ehrlich, *Fundamental Principles of the Sociology of Law* (English translation), Harvard University Press, 1936.

A second dimension is also quite essential. Several empirical anthropological studies conducted by, for example, P. Bohannan,<sup>3</sup> U. Goldschmidt,<sup>4</sup> M. Gluckman,<sup>5</sup> as well as findings from a study conducted by Pyong-Choon Hahm,<sup>6</sup> which is on the border line between anthropological research and public opinion investigation, show that the law has a limited influence on human behavior. When the interplay of all possible kinds of motives determining human social activities is analysed, it becomes apparent that motives which have a strictly legal character play a quite limited role. In all those social situations where members of a given group are engaged in many additional activities influenced by membership in other than the basic primary group, the relations existing inside the primary group are strongly affected by the feedback from the relations outside this group. The multiple relations in which members of the society engage change and limit this pattern of behavior, that is prevalent in impersonal, industrialized, rationalized societies. In these societies, individuals suddenly, mainly by chance or voluntary decisions which can always be changed, engage in legal relations, behave according to patterns provided by them, and disengage themselves in a manner that is prescribed a priori. Then, they disappear from the social scene. This type of behavior is not possible in societies characterized by multiple relations created by affiliation to multiply interrelated social groups. In such societies the pattern of a decent (or a «reasonable») man emerges as a model which is more functional—from the point of view of an efficient instrument supposed to solve social conflicts and also to smoothe over social relations—than the limited, detached, rational, disengaged, impersonal model of a law-abiding citizen. And, as Macauley has shown, using the example of interrelations between businessmen in the most technologically advanced industrialized society, the pattern of strictly law-abiding citizens does not prevail in these professional circles, but the pattern of the decent man, who seemed so typical in the so-called primitive societies, does.<sup>7</sup>

3. D. Bohannan, *Justice and Judgment among the Tiv.*, London, 1957.

4. V. Goldschmidt, *Social Tolerance and Frustration* (mimeographed paper), Nordwijk, Holland, 1972 and earlier paper: «The Greenland Criminal Code and Its Sociological Background» in: *Acta Sociologica*, Vol. 1, Fasc. 4, 1956.

5. M. Gluckman, «Concepts in the Comparative Study of Tribal Law» in *Law in Culture and Society*, ed. Laura Nader, Chicago, 1969.

6. Pyong-Choon Hahm, «The Decision Process in Korea» in *Comparative Judicial Behavior*, ed. by G. Schubert, D. Danelski, Oxford University Press, 1969.

7. S. Macauley, «Non-Contractual Relations in Business: A Preliminary Study» in *Law and Behavioral Sciences*, ed. L. Friedman, S. Macauley, Bobbs-Merrill, 1969, pp. 145-168.

The anthropological perspective offers an additional intellectual tool which could be useful for the legal sciences: It provides criteria which make possible the classification of societies from the point of view of their relationship to the law. Before a more elaborate classification is proposed, a tentative one could be offered: (a) societies which avoid the law (members of these societies turn to the law only in ultimate situations when all accessible means of informal social control have obviously failed); (b) pro-legal societies which stress the importance of the law as a needed instrument of social change on an individualistic and global scale (members of these societies would be encouraged to use the law and thus give the state the possibility of control over all interrelations among its subordinates; also, members of these societies would have an intrinsic need to use the law as an efficient instrument to measure, manipulate and shape social distance, social costs and gains); (c) societies which regard the law as a useful tool for establishing social relations, but one of secondary importance (members being skeptical about the immediate and constant use of the law, would still be willing to use it as a subsidiary device when other instruments of social control, regarded as more reliable and corresponding more to the image of a «decent man,» have been found to be ineffective). If such a classification were to be accepted, an example of a society with anti-legal inclinations might be Italy. As an example of a pro-legal society, traditional Germany could be cited, or socialistic societies which stress the role of the law in shaping new forms of social order. So-called primitive societies, or some subcultures in modern complex industrialized societies, could be regarded—from the point of view of the proposed classification—as societies in which the secondary, subsidiary role of law prevails.

#### method for the analysis of legal material

Studies of judicial records and administrative files of statistical data related to them, of minutes, reports, explanations of legislative motives (justifications), notions *de lege ferenda*, etc., are examples of applications of this method (or rather, technique). It can help in gaining an insight into the functioning of legal precepts (e.g., a deficient functioning of a legal precept will cause an increase in the number of appeals in cases regulated by it). It can also permit us to find out whether or not some legal norms are violated (if they are, the number of the relevant cases, appeals, suits, etc., will be increased). Through this method we can also collect data for the verification of hypotheses underlying the legal precepts or normative enactments. This method, of course, has both advantages and certain disadvantages.

The obvious advantage of method of the analysis of legal material is that the same researcher, or another one (in order to check on the first one, or to supplement his findings) can utilize the same material several times. The data remain intact and accessible and any necessary double-checks or additional studies for the verification of new ideas which might have emerged during the research procedure are possible. Another advantage is that usually the data which are stored in legal materials are indicators of actions which were possible or which in fact took place. In this way the legal data refer to behavior rather than to values and attitudes connected with legal problems. This important link makes the material especially valuable, for in socio-legal studies what really counts is the legal behavior itself. Lawyers (oriented toward duty as they are) see legal behavior through the normative glasses of status, precedent or administrative decision; when asked about legal behavior they would go to the law as it appears in the books and would extrapolate this law into action. Agreements which are supposed to be contracts, different types of informal wills, notes, letters, statistics, complaints, economic records, administrative memoranda—all these are data which usually escape the normatively trained lawyer as a possible source of coded legal knowledge.

As J. Górecki has clearly shown in his studies on divorce, this sort of material can be of utmost value.<sup>1</sup> In his inquiry he went so far his records even such gestures as relaxed or clenched fists. Additionally, he was able to show in a clear way that the legal material collected in contested cases—since quarreling parties engaged in a conflict have a tendency to disclose all possible documents to support their position—gives a more adequate picture of the existing marital situation because of the variety of the evidence. On the other hand, material delivered by uncontesting parties very often gives a fabricated story prepared for the judge who, in such a situation, is neither willing nor able to check it. The recorded material remains in the archives and later on, after the flavor of each case has evaporated, the possibility of evaluating its credibility gradually disappears. Another serious shortcoming is that a substantial portion of legally relevant events does not come to the attention of legal institutions and is thus not recorded. Quite often, those actions which violate the law are covered in the records of legal institutions. Even then, only part of these represent law-breaking behavior. And still an important question is left open as to what part of this type of behavior remains outside of recorded data.

1. J. Górecki, «Divorce in Poland — A Socio-Legal Study,» *Acta Sociologica*, No. 10, 1966.

Generally speaking, socio-legal studies require a cooperative and comprehensive use of different types of research methods and techniques. But the analysis of legal materials, more than any other type of research method, requires complementary support.

### the experimental method

In spite of prevailing beliefs, the experimental method can be applied to investigations of the functioning of the law. Even though deliberate experimentation in law-making, such as passing normative acts in order to obtain some cognitive results remains quite exceptional, still intentional experiments are quite frequent, especially when law is used as an instrument of administration.

As this author learned in the People's Republic of China in 1963,<sup>1</sup> a tentative family law was passed in that country with the intention of observing the results of the new legal enactment, checking them, improving the law, and giving the final version of the law the power of a binding state force. In Poland, in 1960, a new institution for the administration of justice, the Workers' Courts, was set up (it started in a single voivodship [province] and later gradually began operating throughout the country).<sup>2</sup> These courts, the members of which are elected from among the workers by their colleagues, have no prescribed formal procedure, but make use solely of the pressure of quasi-public opinion within the given group. The idea behind this limited, quasi-natural experiment was to collect and gain professional experience about this new institution (which, according to the Soviet pattern, was supposed to enlarge the instruments of formal and, at the same time, informal control over the behavior of social groups particularly exposed to lawbreaking). In 1965, a new law was passed in Poland which gave the support of official law to the workers' courts. Interestingly enough, the professional experience of judges, lawyers, prosecutors, administrators, legislators at a lower level was carefully taken into account. Nevertheless, the sociological study which was to be carried on in a parallel manner was omitted, apparently because the habit of consultation with social science experts is still not established as a completely legitimate procedure.

However, despite the limited possibilities, the experimental method could be used to study the law in force because of the binding value of equality before the law. In fact, this method has an enormous potential in venturing into one of the most critical areas

of the legal sciences: the investigation of the link between expressed or internalized legal values and legal behavior. Knowledge of the conditions which make the ties between legal values and legal behavior strong, or weak, are still almost unknown.

### the questionnaire and interview method

The interview method consists of a controlled conversation in accordance with a prearranged schedule, and is designed to provide data on facts, opinions or judgments. Such a procedure allows for face-to-face contact between interviewer and respondent; asking additional questions in depth about some; asking carefully structured and weighted questions; controlling the situation in which the declarations are made. Moreover, conversation allows one to assess to what degree a respondent is involved in the problem about which he is asked; in addition, it allows apprehending new problems which might have gone unnoticed, and permits supplementation of the schedule during the research. A questionnaire is a much less versatile method. It is based essentially on «closed» questions, offering a list of ready, alternative answers. Such answers, of course, can be readily compared.

Opinion polling is sometimes viewed as a distinct method because of the presumed importance of the question investigated, although from a strictly methodological standpoint it is either an interview, a questionnaire, or a combination of the two. These methods can be applied above all to studying legal sentiments (attitudes) and, so-called, the legal awareness of a society. We know that the binding law is not always known in detail by all, and it is by no means accepted by the entire society. We also know that officially enacted law can sometimes be in conflict with the legal sentiment of a society or of some of its groups. These phenomena were, until recently, investigated relatively little and there is an urgent need to fill this gap in our knowledge.

These methods appear to be very useful in studying the problem of acceptance of the law, especially if we distinguish at least three levels of acceptance of the law and basic moral norms: (1) Lip-service and declaration (purely external endorsement of certain values often diverted to meet clearly perceived social expectations); (2) Internal acceptance (commitment to internalized values which sometimes are not externally expressed; for example, in cases where values could be regarded as deviant or where there is a commitment to values which is not strong enough to be a vehicle for corresponding behavior); (3) Behavior that is consistent with the values.<sup>3</sup>

The questionnaire and interview method is, for

1. Conversation with a Deputy Director of the Legislative Division of the Chinese Parliament in 1963.

2. A. Podgórecki, «Worker Courts» in *Sociology of Law*, ed. V. Aubert, London, 1969.

3. Z. Sufin, *Kultura Pracy*, Warszawa, 1968, p. 172.

the normatively oriented lawyer, quite paradoxical. For him the law properly enacted is valid and has a binding force; if it is not properly issued it has no binding force. For him the only relevant question is: Is the law in question an obligatory one or is it not?

Thus, the presently existing version of jurisprudence is hardly able to grasp the real socio-legal, let alone normative, problems. For a normatively oriented lawyer the official binding law ought to be accepted, and being accepted should be obeyed. If the law is not accepted and is consequently violated, he who violates the law should be punished. This is not only too simple to be true, it is also too simple to be a functioning model. The depth of acceptance of the law, the relationship between legal norms and moral values, rationalizations offered for and against the law, several invisible factors such as principled or instrumental attitudes, individualistic or social orientation in ethics, directions of affiliation, make the situation more complicated than described by existing jurisprudence. The poverty of traditional methods used in jurisprudence is partially responsible for this narrow-minded point of view.

Interview and questionnaire methods, when efficiently used, could bring about a broader recognition of the many ramifications of a given legal system. They could also elucidate the uniqueness of each legal system under study. To some extent, they could investigate the most crucial problem of socio-legal studies: the link between expressed values and actual behavior pertaining to legal norms. However, to study this particular problem other methods should be used as the basic tools of inquiry.

#### **the comparative method**

The comparative method could take into consideration some norms, precepts or rules which exist in one legal system and compare them to similar elements in other legal systems. The possible similarities of norms in different systems, the more or less essential discrepancies between them could lead to much speculation. But such speculations will remain just that unless the social backgrounds of the legal systems compared and the uniqueness of the systems under study are considered. Nevertheless, until recently the comparative method dealt only with comparisons of selected elements in one legal system with selected elements of another legal system. Obviously this type of traditional approach is too narrow.

If the comparative method of studying legal norms and systems intends to include studies of the social settings, then the method should investigate the values and attitudes which adhere behind these norms and legal systems. In this case, what is the difference

between this particular method and the interview and questionnaire method? From a methodological point of view the difference is not essential. The comparative study method is distinguished from other methods because of its practical importance. Comparative studies of an a priori centralistic kind may be opposed to the federalistic ones.

The a priori-centralistic study consists in adopting, in advance, some research concept. The stock of knowledge acquired so far is a basis for determining the various social systems to be covered with comparative studies and for adapting, on the basis of general a priori assumptions, the detailed hypotheses which should be verified in the social systems thus determined. It is worth stressing at the outset that this type of study carries with it a notable risk of error. That is, the studies under way are liable to prove that the social systems under investigation are not at all comparable on the ground of the generally adopted hypotheses; various additional factors omitted at the initial stage of the research play an essential part, and the already formalized and rigidified research or ossified assumptions do not permit a grasp of these factors. Moreover, it may turn out that various apparently organizational considerations are in fact methodological problems difficult to overcome. The results of pursuits based on a priori concepts are general and do not yield sufficiently interesting data for analysis of the respective social systems.

These methodological difficulties may be increased by an important additional factor. So far, no clear answer has been given to the question of whether the comparative studies (irrespective of those employing comparative control groups, apart from proper investigation) involve comparisons between different social systems determined by various nationalities, states or even political camps. There is also the possibility of conducting comparative studies of various systems and comparing the results with those of subsystem researches. Thus, the research on the functioning of different legal systems could be compared with the operation of various philo- and anti-legal subcultures acting within the framework of the given social system.

However, this means no end of the methodological difficulties involved in comparative studies. For in dealing with various social systems, they may pick as their dependent variables (i. e., those features influenced by other factors) homogeneous or heterogeneous dependent variables. The legal system is a homogeneous variable, for as a rule a given social system creates its appropriate formal system, i. e., the legal one. And, at the same time, the respective social systems (as nations) generate the specific national character, unique in its particular synthesis of features shaped by different historical factors.



I Comparative studies of such factors as the family, a bor, local authority, and so-called leisure time are not in an equally privileged situation—from a methodological point of view—as is the relevant research on law. Thus, for example, family patterns are shaped in different ways under various social systems. This is, however, due not only to the difference in the systems under which a family functions, but also to a number of additional factors such as the economic, social, demographic and other conditions also modifying it.

In this connection comparative theoretical and diagnostic research should also be mentioned. The first type aims to establish the dissimilarity of various features, for example, of families, modes of spending leisure time, the operation of local authority within various societies, etc. Nothing more is determined however; it is simply ascertained that under a given social system there exist monogamous families while, under a different system, polygamous ones prevail.

The difference between comparative diagnostic and theoretical research consists in that the latter involves—apart from the formulation of the diagnostic statements as noted above—an attempt to verify definite correlations. As has already been indicated, verification of theoretical correlations of various degree is possible only when the variables under investigation are of a homogeneous nature. And since the legal system and its elements are characterized by just the homogeneity indispensable to comparative theoretical research, comparative studies of legal systems are particularly valuable as those able to furnish not only diagnostic data but also the possibility of formulating adequate hypotheses concerning general regularities.

The federalistic type of research tends to avoid the limitations of an a priori centralized kind of research. Thus, federalistic research, availing itself of earlier investigations and treating them as pilot studies, use a two-step method in its execution.

In their first stage, federalistic research studies analyze the application of specific legal concepts against the backgrounds of their own social systems. At this first stage, attention is focussed on the following issues: analysis of similar operation of different legal concepts under similar social systems; analysis of possible cases of similar operation of different legal concepts under different social systems. The experience acquired at this first stage is conducive to the preparation of common synthetic research instruments (questionnaires, a specific set of procedures using complementary statistical techniques, modes of coding data, etc.) which would permit and prepare for the second stage.

At the second stage of the research, various legal systems may be compared in a methodologically

conscious manner that takes into account their specific character (resulting for example from historically traditional conditioning), their community with others (due, for instance, to affiliation with the same camp of socialist countries) or the possible community of legal concepts or legal norms—supreme in the respective social systems. (It may well be that no such community exists apart from that in matters of minor social importance such as the offense of incest, though certain unifying tendencies providing for such community are to be observed, e.g., the Bill of the Rights of Man.)

In order not to be too abstract, let us present as an illustration of the usefulness of this method, some findings which were obtained through its application. Some hypotheses will be given below which attempt to generalize findings from Polish,<sup>1</sup> Danish,<sup>2</sup> Dutch and Belgian,<sup>3</sup> Finnish,<sup>4</sup> and West German,<sup>5</sup> studies.

1) Legal controllers (all those agents of social and legal systems who are supposed, according to their positions, to implement the law) are more tolerant in questions of infringement of basic social rules of coexistence (the basic norms valid in small social groups) than the average population. Thus, judges in Poland and Finland, and fiscal inspectors in Holland generally display more tolerance in condemning infringements of basic social norms than does the general population. They probably realize better the illusory nature of rigorism as a means of social engineering.

2) The average population condemns infringements of basic rules of coexistence to a somewhat higher degree than do repeated trespassers of the law (recidivists).<sup>6</sup>

1. A. Podgórecki, J. Kurczewski, J. Kwás niewski, M. Kos, *Poglady Społeczeństwa Polskiego na Moralność i Prawo*, Ksiołka i Wiedza, Warszawa, 1971.

2. B. Kutchinsky, *Knowledge and Attitudes Regarding Law and Law Breaking*, Washington, 1972 (mimeographed paper).

3. J. Van Houtte, P. Vinke, *Attitudes Governing the Acceptance of Legislation among Various Population Groups* (mimeographed material), Nordwijk, 1972.

4. K. Mäkelä, «Public Sense of Justice and Judicial Practice», *Acta Sociologica*, No. 10, Copenhagen, 1966.

5. A. Blom, *National Confidence in the Judiciary*, Tutki Musselostie Research Report, University of Tampere, Finland Nr. 7, 1969.

6. W. Kaupen, *Knowledge and Opinion of Law and Legal Institutions*, Köln, 1970 (mimeographed material).

6. Data from Greece and the United States (W. Reckless and A. Mylonas) do not support this generalization (according to these studies the difference is quite substantial). Nevertheless this study tackled the problem from a different angle: the study investigated mainly the attitudes toward sanctions and agents of sanctions. This could be the reason for the inconsistency among findings. A. D. Mylonas, W. C. Reckless: «Attitudes toward Law Enforcement in Greece and the United States» in *Journal of Research in Crime and Delinquency*, Janug, 1968.

Danish and Polish data support this hypothesis. This condemnation reflects values that are declared and even accepted legal values. But they are not necessarily the values that are vehicles of behavior.

3) Legal controllers always condemn infringements of norms pertaining to administrative and procedural matters more strongly than does the average population. Trespassers of the law are always more tolerant in these matters.

Polish and Dutch data support this thesis. Stronger condemnation of violations of procedure is probably connected with the professional «bias» of legal controllers (the previous contradiction between the Danish and Polish studies and the Greek and American ones may be due to the absence of a clearer distinction between basic rules of coexistence and rules of procedure).

4) Legal condemnation induces moral condemnation.

Polish data (supported by Dutch, but not West German findings) support this thesis. The legal condemnation of behavior in violation of rules of procedure evokes a tendency to embrace these types of behaviors; this also applies to moral condemnation. It seems to be a «secondary condemnation» that is, it is not connected directly with the behavior that is dealt with, but with the fact that the legal order and its structure was disrupted.

5) The higher the educational level of respondents, the stronger the tendency toward tolerance and in favor of re-education as a recognized basic function of penalties.

Relatively higher education (and also relatively higher social position) seems to be connected with a more lenient attitude toward all infringements of basic rules of social coexistence. Scandinavian and Polish data confirm this general finding. Moreover, the better educated have a clear tendency to give, as a rationalization for penal sanctions, re-education rather than isolation, deterrence, or—especially—revenge.

The above-mentioned findings should be regarded, at the present stage of empirical sociology of law (empirical jurisprudence) as tentative and preliminary. They should be further tested. Nevertheless they offer an empirical starting point—they are not taken from the air, chair or both.

#### **basic problems of the sociology of law**

With such a battery of methods now available, for the study of the sociology of law, what sort of problems should be regarded as the targets for potential investigations? There are at least three areas of reflection and investigation which should be treated as the main fields of socio-legal studies:

- 1) Questions accumulated through a theoretical heritage;
- 2) problems relating to the effectiveness of the law;
- 3) problems relating to legislative tasks.

The second and third problems belong to the broader area of theoretical reasoning described as social engineering through law or legal policy. Problems connected with the theoretical heritage are the most complicated. They create an accumulated stock of electrical composition—enormously important questions, serious problems, ideas which should be translated into an operational and empirical language; concepts which should be rejected as too abstract for investigation; notions which are value expressions; and, finally, statements which enjoy the legitimacy of a lengthy past, but are a semantic potpourri. A list of these problems would include: legal norms, moral norms, legitimacy, natural law, official law, the State, justice, rightness, legal sanctions, elements of social control, conformity, deviance, prestige of the law, ethical systems, legal systems, legal logic.

All these problems ought to be, after careful semantic analysis, translated into operational and empirical language evaluated from the point of view of the existing knowledge and prepared, if necessary, for empirical interdisciplinary testing.

This progression from the abstract to the empirical stage of reasoning in jurisprudence and sociology of law leads to additional meta-problems. If so-called official (or positive) law is too narrow a subject for the formulation of adequate theories (because this concept omits the instinctive, living law), and if criminology does not appear to be a reliable enough basis for adequate theories (because the scope of criminology is determined by the continuously changing content of the criminal law), then maybe the theoretical understanding of jurisprudence, sociology of law and criminology should be reformulated. Then the sociology of conformity and deviance would appear to be the proper subject matter for adequate theories, from the theoretical viewpoint, while the sociology of law or criminology might limit themselves to the changeable scope of the content of the law. Jurisprudence could then play the role of a repository of heterogeneous problems accumulated because of many reasons, some of them quite important, which await theoretical clearance.

The questions pertaining to the effectiveness of the law are also not easy to solve. First of all, there is a strong need for a clear recognition of the limits of the use of the law as an instrument of possible social change. The two theories of the omnipotence and the impotence of the law are false. Undoubtedly law is efficient, but only under certain conditions; what are these conditions? There are, contrarily to the usual expectations, many kinds of effect of the law: expected,

unexpected, positive, negative, partially positive or negative, and the combinations of these, sometimes called byproducts. In order to detect these effects (and also to evaluate them), it is necessary to have at one's disposal the methods available for their recognition. These methods should be able to determine not only the real distribution of effects resulting from legal intervention, but should also provide lawyers with techniques to foresee its possible effects before a law is enacted. The question of deterrence emerges here as one of the most important with the tentative hypothesis that the punishing sanction is effective when it is used by accepted authority or when it is used with accord to more general approved values. Effective and ineffective law has many motivational effects and educational consequences which, after they have been internalized, have additional motivational functions.

All problems connected with the effectiveness of the law have several important theoretical aspects as well as practical ones. They are directly connected with legislative questions. The prevailing method operating in different countries is to rely on the common sense and professional knowledge of lawyers in helping to prepare legislation. Quite often, surprisingly enough, this procedure is rather sound. But is this always the case?

Generally speaking, it is better to rely on systematic knowledge than on common sense or professional «wisdom.» Paradoxically, in the language of law school curricula «legislation» is understood as «drafting.» But drafting deals with the semantic make-up of law while the whole area of the social setting of the law is left to the lawyer's intuition. The proper methodology—and it is necessary to stress this fact—of legislation is very complicated and consists of at least seven procedural steps: (1) comparative studies of legislation taken from different states, with special regard to the possible spectrum of expected and unexpected results; (2) recognition of limitations of legislation and awareness of the applicability of a proposed law to a given area of social life; (3) adequate diagnosis of the situation which is supposed to be covered by the legislation. The techniques of the adversary system, as currently practiced, are of some use, but the relevant factor behind these techniques is the question of the extent to which the social sciences are engaged in the process of preparation of the required diagnosis; (4) studies of values are necessary—not only the values of average citizens and the elite, but also of the strata of the population having innovative and conservative ideas; (5) access to the bank of regularities (hypotheses) governing the area of social life which is supposed to be regulated by law (this procedural step is perhaps the most important one: if it does exist, a stock of known and

tested regularities is of great importance to the social sciences; if it does not exist, then common sense and professional knowledge enter the picture); (6) the ability to unify all previously mentioned elements in a synthesis which creates a legislative plan and strategy; and finally (7) legislative technique (drafting) which is the articulation of the plan into legalistic language.

It is quite apparent that all these methodological and procedural steps are closely connected with the main interests of the sociology of law. But, in reality, is socio-legal knowledge utilized in order to meet these practical (for example, legislative) needs and demands? Only to a very limited extent. There are many reasons for this limited use: one is the reluctance of legislators to consult experts from the social sciences. Another is the prevalent academic, not practical, orientation of the social sciences, including the sociology of law. These two orientations partially overlap, but at the same time partially bypass each other.

If the sociology of law has such potentialities as were described in connection with the possible applicability of different types of methods, and if the sociology of law also has some basic theoretical and practical problems to solve, what areas of study, then, have special importance for this discipline? There are several.

#### **areas of research**

The studies, reflections, discussions which are going on within the confines set by the interests of the sociology of law point to the following main areas of research: (a) value systems, (b) processes of socialization of the legal norms, (c) social determinants of the law, (d) social modifiers of the law, (e) the dynamics of legal institutions.

The break with the traditional concept that the only law is a binding, official law has opened a vast area for investigation—that of legal values and attitudes. Although values have long been an important subject of legal studies, inquires of this kind in the past were directed toward ideal law—the goal of the law. Indeed, studies on the axiomatic aspects of law are of great importance, but for a long time these studies overshadowed the other possibility—the empirical study of the real attitudes which the different strata of a given social system have toward the law. At the present time this latter type of study is very popular.

When the law lost its sacred character it became apparent that law itself also served as an object of socialization. The law is thus not only a socializing, entity, it is also the set, the structure of values, which could be—within this or that other scope, to this or that degree—socialized. With this, many problems emerged pertaining to : (1) the agents of

socialization (it was discovered that not only the State and Church, but also the family, school and peers are possible agents of socialization as they support, contradict, and compete with each other); (2) techniques of socialization (it was found that rewards, punishments, patterns of behavior could be regarded as a means for channeling expected behavior into desired roles); (3) degrees of socialization (it became apparent that not all declared values are accepted, that not all accepted values are declared, and, finally, that declared and accepted values are not the only motives for actual behavior); (4) targets of socialization (it became clear that there are different types of targets for socialization: youth, deviants, subgroups such as immigrants, etc.).

Traditionally, the role of economic, political, and demographic factors as determinants of the law has been well recognized. Thus it is not necessary to stress and develop this particular point of view. Nevertheless, it might be proper to say that sometimes these (and other elements) have been taken into account as multiple factors and sometimes certain ones among them were particularly stressed. Economic factors, for instance, have been emphasized as playing dominant role in shaping the structure of the legal system.

The influence exerted by subcultures in modeling the law was discovered only recently. There is still a lack of clarity regarding the possible types of subcultures which should be taken into account. However, at least three should be distinguished: negative (for instance recidivists), positive (for instance law officers) and neutral.

The nature of the interaction taking place inside institutions and organizations has been considered by those concerned with the sociology of organization. Let us avoid the fruitless discussion of the borderlines between the disciplines in the social sciences. In this particular instance, it would be better to incorporate some of the findings which traditionally belong to the sociology of organization into the sociology of law. The way in which the law is perceived, transformed, strengthened, weakened, made into a symbol, instrument, pragmatic, device or defense mechanism by the organization has tremendous importance for the functioning of the law. Institutions and organizations generate, accumulate and emulate several social processes, and this takes place not only within a given institution but also between several legal or non-legal institutions, and molds the law in many different ways. All of them add some meaning to, or subtract meaning from, the abstract legal norms.

It would be a mistake to treat the above-cited areas of research as final and complete. These areas are interrelated with research methods and, above all, with

the basic problems in which the sociology of law is involved. Nonetheless, it might be useful to list them so as to cover the whole array of problems belonging to the sociology of law (or which should, for methodological reasons, belong there).

#### conclusions

The sociology of law has been able to accumulate several cognitive experiences which have validity not only for the bulk of legal sciences but also for sociology itself. For theoretical sociology the sociology of law creates a virgin area. The time is ripe to enrich vegetating sociological theory with new stimuli from the outside. The legal sciences and legal policy (social engineering through the law) need a set of middle-range theories.

One attempt of this sort was made through the formulation of the hypothesis of the three-factor functioning of the law. The hypothesis of the three-factor functioning of the law holds that an abstract binding law influences social behavior by means of three basic variables. The first independent variable is the content and significance rendered the given legal enactment by the type of socioeconomic relations within which it constitutes a binding element of the legal system. The second independent variable is the kind of subculture functioning in the framework of a given socioeconomic system as a link between the legislator's directives and the social behavior of those bound by the law. The third independent variable which may variously modify the functioning of an abstract law (within the framework of a given socioeconomic system and legal subculture) is the type of personality of the subjects affected by the law. Abstract laws begin to function and to be expressed in social behavior through the media of their human subjects. Into this mediation enter the law itself and three meta-standards: those springing from the nature of the socioeconomic system, those deriving their content from given legal subcultures, and those flowing from the individual personality of decision-makers and addresses of legal norms.

A second attempt could be made by a deliberate division which should be directed toward the very heart of the law—its concept. It seems reasonable to distinguish two incompatible definitions of the law: the practical and theoretical. The practical one (fixed for clearly practical reasons, to give a judge or a lawyer a guiding line between law and non-law) would hold that the law is a norm generated by the proper authority and supplied with a compulsory sanction. The theoretical one would say that the law is the social norm which is based on four reciprocal elements—belonging to the parallel parties and containing the corresponding pairs of rights and du-

ties.<sup>1</sup> Usually the norm is functional for the given system. It means that the norm is designed not only in such a way that it would be consistent with the legal system and its requirements, but is used also as an instrument which is supposed to contribute to the integrity of this social system. Formalized norms prescribed for different occasions among different social strata with respect to the distribution of duties and claims work in a balanced way—as tested and verified by existing, visible and accepted social experience—toward unifying and integrating the given social system, and against the possible anomie—oriented disintegration of this system. This is the theoretical definition. But in order to use the *existing* law, to apply it, the practical definition must be employed. In order to understand, and effectively to introduce a *new* law to modify an existing one or to annul it, the theoretical definition should be employed. Let us now suspend a more detailed discussion on this subject, with one salient remark: the practical definition gives a relatively good orientation as to what belongs within the scope of the binding law, but is not able to cover all types of the functioning law. On the other hand the theoretical definition gives a clear recognition of the law in action, but does not provide direct indication of which norms should be applied. This dual structure of the definition of the law reflects the dual character of the sciences involved: the practical one, which is oriented toward efficient application, and the theoretical, oriented toward understanding and explanation.

A third attempt could be made by introducing some new notions into jurisprudence and the sociology of law. Many of the existing notions are obsolete or inadequate: legal concepts tend to be abstract; sociological concepts are alien to legal problems; psychological notions do not grasp the social reality of

the law; and finally, the relevant concepts in the area of social psychology have not yet been generated. Therefore it would be advisable to work in the direction of elaborating such concepts as: principled and instrumental attitudes (attitudes which spontaneously support the law or are inclined to use it as an instrument); individualistic and social orientations in ethics (orientation toward conformity to norms characterizing behavior in small groups, or the orientation which takes into account the consequences of a person's social role or position); types and degrees of affiliation to an institution, group or social system.

A measurable answer to the question, «What is the sociology of law?» may, in the light of these considerations, be formulated as follows. The sociology of law consists not only of the bare application of sociological methods to the old problems of the philosophy of law. The sociology of law in its mature version would be an empirical replacement of jurisprudence. Attempts to deal with the traditional problems of jurisprudence from the viewpoint of the sociology of law would open a rich new area to research. The sociology of law brings something unique to general sociology: new notions which have potential explanatory power and a new sense of the integrity of the social system. And, finally, the sociology of law is now a field which is broader than it was traditionally perceived: The studies on the functioning of the law take into consideration not only sociological methods, but also such methods as the historical, statistical, comparative, experimental, anthropological, etc. The approach which is now needed is more comprehensive, more holistic. It is not ruled out that the sociology of law should now have—from the methodologically pure point of view—the name of anthropology of law.<sup>2</sup>

1. For more elaborated notion of this definition: A. Podgórecki, *Toward a General Theory in the Sociology of Law*, 1973 (mimeographed material).

2. The possible shift of emphasis from sociology of law to anthropology of law should be regarded not as a search for a formula which would solve the problems of the understanding of the law and its functioning but as a symptom of steadily but consequently growing unification of social sciences.