1

The Problematisation of Law in Classical Social Theory

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THIS CHAPTER EXPLORES the relationship between what will be termed the 'classical tradition' of social and legal theories of the nineteenth and early-twentieth centuries and contemporary trends in theoretically oriented studies in the fields of 'law and society' and 'sociology of law'.[1] A feature which the sociology of law shares with other sub-disciplinary fields is an almost reverential acknowledgement of the 'founding fathers', in particular the familiar trinity of Marx, Durkheim and Weber. This chapter will focus on the trinity with some brief comments on Sir Henry Maine.

This undertaking will be approached by exploring the forms in which classical theory problematised law. For this purpose, I shall draw upon Foucault's reflections on problematisation as opening up a new and fruitful avenue for the historical study of the human sciences. While the key figures had very different intellectual and political agendas, it will be argued that there was an underlying shared problematisation about the configuration of economic, political and legal relations that was taking shape during the course of the nineteenth century. While the problematic of Weber and Durkheim was conceived within the perspective of liberal capitalist rule, Marx exemplified a break with the problems posed by this tradition. In that tradition the problematisation of law was preoccupied by the question of how to facilitate the possibility of an extension of the capacity of political institutions to govern the economic and social conditions of a nation and its population. The liberal tradition was concerned that the capacity to rule should be exercised without transgressing proper limits that preserved the expanded economic and political rights won in the transition from monarchical to parliamentary sovereignty.

The classical sociological interrogation of the legal field demarcates the period in which 'the social' had come to the fore as the central target for the governance of the population.[2] Marx had signalled, but did not complete, the separation of

[1] For present purposes nothing hangs on the differences between these fields of inquiry.

[2] 'The social' came into being in the nineteenth century; it designated 'a certain region of society, a space between the economy and the state. It was an arena of collective needs, grievances and disruptions that were related to the transformations in the economic realm'; Cf. Stremmer, *Regulating the Social: The Welfare State and Local Politics in Imperial Germany* (Princeton: Princeton University Press, 1993) at 3.

the fields of the economic, the political and the social. This separation and the emergence of the discipline which problematized 'the social' was furthered by Weber, but he was still concerned with the political problematic of liberalism, not posed in terms of the 'limits' of law, but rather in terms of the sphere of rational bureaucracy, the vehicle through which the state regulated the social. The separation and reification of the social, dissociated from the economic, was articulated in its most complete form by Durkheim for whom law was a major agent of 'moral governance' of the social totality. It is important to recognise that sociological reflection on law still remained heavily influenced by the political problematic of 'ruling too much' and the limits of legal infringement of personal autonomy. The emergent discipline of sociology was much less preoccupied with this question.

The influence of the way in which law was ptoblematised that paralleled the emergent preoccupation with the 'social' is exemplified with 'social law', and the link between the welfarist regulation of the population as a whole was exemplified in the concern to grasp the connection between collectivist conceptions of welfare and social rights. This set of issues dominated sociologically inspired thought about law, more especially in Britain than in the United States up until the emergence of 'law and society studies' in the 1960s.[3] This movement, without at first clearly defining its own problematic, was concerned with the limits of welfare and bureaucratic legal regulation.[4] With the eruption of the crisis of the welfare state in the late 1970s, the law and society movement, while still influential, has come under mounting criticism from both the Right, who have reinvigorated a concern with law as the guardian of individual liberty, and from the unstable radicalism of critical and postmodernist currents that have lost faith in the rational and bureaucratic potential of law.

The method to be pursued will seek to identify the problematisation of law present in theorisations of law. Problematisation serves to initiate a line of inquiry by drawing attention to the rudimentaty organisation of phenomena which yields problems for investigation. I draw upon Foucault's reflections on problematisation but it should be stressed that Foucault's concept was far from completely developed. His historical method of study is a history of problematizations, that is, 'the history of the way in which things become a problem'.[5] The trajectory of his own major works can be posed as the disarmingly simply questions: How did madness, health, and sexuality come to be confronted as problems requiring intellecrual work and political interventions? The present inquiry asks: How has law been ptoblematised? Problematisation as a methodological strategy involves a commitment to challenging the 'taken-for-granted' nature of the 'problem' of law in different historical periods. One important implication of this approach is that it intentionally avoids any attempt to produce a chronological 'history' of the treatment of law in the social sciences.[6]

[3] See also W. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill University of North Carolina Press 1996) and J. Handler, *Law and the Search for Community* (Philadelphia University of Pennsylvania Press 1990).

[4] Its most immediate concerns were the effectiveness of law as a means of securing social rights and welfare, policing discretion, and generally utilising law as an agent to promote social change.

[5] M. Foucault, 'What Our Present Is' [1988] in S. Lotringer and L. Holtoth (eds) *The Politics of Truth* (New York Semiotext(e) 1997) at 164.

1. THE CLASSICAL PROBLEMATISATION OF LAW

How did classical social theory constitute law in relation to its object of inquiry? This question must be approached in a way that does not involve the implication that law necessarily formed a primary or even explicit focus of attention for the individual theorists. This is essential because, while Weber did devote self-consciously focused attention to law with the 'sociology of law' forming an important component of his monumental *Wirtschaft und Gesellschaft*;[7] and though a similar sustained attention to the evolution of law was pursued by Sir Henry Maine (1861–1905), others did not accord law this centrality. In contrast, Durkheim devoted substantive attention to law primarily in the course of a study centred upon the transformation of the division of labour of which law served to provide convenient and accessible empirical evidence.[8] Nor did Marx ever take law as his immediate object of inquiry, although he and Engels had a great deal to say about law.

The impetus that makes human thought shift has long been (but not always) a looming sense that something about life is new and different, and that things cannot or should not be discussed in the currently conventional terms. The prescient thinkers have been those able to encapsulate these shifts in ways that put together a narrative that makes sense of an array of symptoms and binds them together into a coherent account. The most popular narrative of our age has been that of 'modernity'; a fact that is sustained, not controverted, by the recent extension of that storyline by the addendum effected by 'postmodernity'. I do not want to argue that the tropes of 'modern' and 'modernity' are wrong, but rather that they are dangerous. They are dangerous because a purely chronological label, one that distinguishes the past from the present, the traditional from the modern, is made the bearer of a whole complex of substantive dichotomous characterisations (agricultural-industrial, rural-urban, Gemeinschaft-Gesellschaft and the like) that have been the focus of early twentieth century social thought.

The concept of modernity is especially precarious when applied to the phenomenon of law. Modernist theory conceives law as one of the important stars

[6] This approach, which I now reject, informed my earlier discussion of the 'sociological movement in law' in A. Hunt, *The Sociological Movement in Law* (London Macmillan 1978).

[7] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (ed. G. Roth and C. Wittich) (2 vols.) (Berkeley University of California Press 1978).

[8] E. Durkheim, *The Division of Labour in Society* [1893] (trans. W. D. Hall) (London Macmillan 1984).

in the constellation of the modern. Yet it is usually remembered that law predates modernity so the treatment of law becomes tarnished with an unexamined presentism in which the past of law is viewed as a long march towards modern rational law; the old pre-modern (irrational) elements are gradually sloughed off to reveal law in its glorious rational form. The great bulk of the writings on legal history, from Maine to the present, has been marked by the seductions of this presentism.

The issue of law comes to figure in the problematisation engaged with by classic social theory in so far as it becomes less and less feasible to treat law as a 'natural' phenomenon. The most obvious form of law as a natural phenomenon is that captured in both substance and in name by natural law theory. It was grounded on the presumption of a social order based on a taken-for-granted set of institutions and values constitutive of the social order. It makes little or no difference if these were articulated in theological form with a set of primary values stipulated in some principal religious text, or if theology was partially secularized through a process of reflection upon the human condition. Typically such reflections were expressed in terms of a generalised problem of social order; a set of questions most powerfully articulated by Thomas Hobbes in terms of a problem of order that could only be addressed through obedience to a vision of a political order grounded in a unitary conception of sovereign power.

This vision came increasingly into conflict with the challenges posed by the emergence of a capitalist economic order. Capitalism as used here involves the coexistence of the production of commodities, industrial forms of production and the mobilisation of mass wage-earning labour, with these elements being coordinated through markets. The most profound impact of these developments, even outstripping the social dislocations they caused, was the primacy of economic markets that required nothing less than the radical separation of an economic from a political sphere. But the self-regulating market could never achieve full self-regulation, and continued to require inputs from the political system to sustain and protect the market order. Law was the primary mechanism for this linkage of the economic and political orders. The crucial fact is that laissez faire itself was enforced by the state and at the same time there was a major expansion of the state; the free market was sustained by an enormous increase in continuous, centrally organised and controlled interventionism.

The emergence of law as an object of sociological investigation rests on the implicit view that legal systems are essentially constructed, social creations (not natural orders) and thus presuppose an instrumental conception of law. In line with the Enlightenment vision of 'progress' understood as a project that gives effect to an ever expanding realm of the human capacity to control its conditions of existence, law comes increasingly to be perceived as a primary steering mechanism for societies marked by complex interdependence, a task that can no longer be fulfilled by more traditional 'direct rule' through the political system. A persistent line of thought within legal theory has counterposed a divide

between law as autonomous and law as dependent on society; this has in many accounts been presented as the core distinction between the internal perspective of legal positivism and the external perspective of the socially informed approach to law. While this distinction should not be ignored, it is important to recognise that these views of law are not antithetical; the rise of law as autonomous system increasingly separated from the political sphere is consistent with a view of law as dependent on society, in the sense of being an historical achievement, one that has wider ramifications embodied in the strange co-existent reality and mythology of the idea of the separation of powers and the rule of law.

The next step in my argument is decisive. It involves a profound reversal of F. A. Hayek's rejection of the dominant 'constructivist' vision of the dynamic of the intervention of the political order in the economic order or self-regulating market. But before attending to the reversal some attention to Hayek's theses is necessary.[9] Hayek has long been a controversial figure; despite the favour he has found by providing the theoretical grounding of modern neo-liberal politics, he was one of the most important thinkers of the twentieth century.

Hayek set out to challenge what he viewed as the ruling myth of the twentieth century, shared by both welfare liberalism and social democracy, which he designated as 'constructivism'.[10] The 'constructivist fallacy' views social institutions as potentially amenable to intentional creation, reform and intervention by means of legislation and interventionist economic strategy. His objection is based on the contention that social planning is impossible; it is impossible because it is never feasible to accumulate systematic knowledge of the actions of individuals in pursuit of their interests exemplified in the uncountable markets transactions. Only the impersonal mechanism of 'the market' is capable of aggregating these actions to produce outcomes that are not reducible to the intentions of economic actors. To intervene in ways that impact on the market with imperfect knowledge can only result in the disruption and distortion of the market in ways that, far from rendering markets calculable and controllable, result in unintended consequences.

In other words, faced with the most profound implications of the commoditisation of labour and its products that constitutes capitalism, namely, the radical disjunction of the economic and political realm, Hayek endorses the necessity of that separation and the corollary that the political realm must abstain from intervention in the functioning of the self-regulating market. Thus, it follows that for Hayek the ruling vision of modern law, particularly in the increasingly dominant form of statutory legislation as a mechanism of deliberative intervention, is fatally flawed. Law can and should do no more than give

[9] F. Hayek's ideas were developed through a mass of published work; they are accessible in their most concentrated form in his three volume, *Law, Legislation and Liberty* (London Routledge & Kegan Paul 1973–1979).

[10] F. Hayek, *Law, Legislation and Liberty: Vol. I Rules and Order* (London Routledge & Kegan Paul 1973).

authoritative endorsement to the necessary conditions for the functioning of the self-regulating market such as the protection of the rights of property, free labour and capital.

This is not the occasion to engage in a critique of Hayek, but two important lines of inquiry can be indicated. While he is logically correct in claiming that full knowledge is unattainable, it is disputable whether it follows that such complete knowledge is a necessary precondition for purposive intervention; what forms and degree of knowledge are sufficient grounds for purposive intervention remain a matter of investigation. The second question is, given Hayek's radical separation between the economic and political realm, where does the concept 'society' fit into his schema; is it the mere aggregation of economics and politics or is it a field not reducible to the other constituents? What is at stake here is whether society is the passive reflex of economics and politics on everyday life, or an active arena in which through cooperation and conflict people 'construct' forms of life through which they seek to take control of their existences.[11]

The radical reversal of Hayek which I propose is that, whether we approve of its consequences, the constructivism of law, that is its intentional deployment to promote, secure or defend specific social interests is precisely what was 'new' about the legal orders that emerged in the late eighteenth century. Legal constructivism has continued to advance over the next two centuries; this fact is most simply attested to by rapid extension of constructivism into the international arena with the growth of international criminal law and human rights law. Constructivism is no aberration or accident; it is, quite simply, a social fact that law is one of the primary techniques of governance. It has displaced the two previous visions of law as either the expression of a natural social order or as the expression of the will of the sovereign. This has been a displacement, but not a disappearance. The quest for a general normative order still infuses our ongoing concerns with justice and human rights. And Foucault is right in noting that we still have not 'cut off the King's head',[12] that is law remains heavily imbricated with state sovereignty. My contention is that the problematisation of law in classic social theory was grounded in the challenges posed by the constructivist reality of law.

[11] Hayek's position on the question of 'society' is complex. He views the evolutionary formation of human instincts as being formed when hominids lived in small cooperative bands that survived through solidarity. He rejects Hobbes' primitive individualism as a myth. 'The savage is not solitary, and his instinct is collectivist. There was never a "war of all against all"', F. Hayek, *The Fatal Conceit: The Errors of Socialism Vol.1 The Collected Works of F.A. Hayek* (ed. W. W. Bartley) (London, Routledge, 1988) at 12. What is significant about this argument is that it explicitly contends that social evolution runs counter to the 'instincts' formed through evolutionary processes; learned rules that promote the individualism of market relations have to overcome primitive collectivism.

[12] M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (New York Pantheon 1980) at 121.

2. LEGAL CONSTRUCTIVISM IN CLASSICAL SOCIAL THEORY

While the substantive analyses, theoretical apparatuses and political commitments of Maine, Marx, Durkheim and Weber are radically different, nevertheless they can be understood as addressing questions that are posed by the rise of constructivist law. The issues they engage with are ones in which law is no longer the expression of the will of political authority (typical of monarchist or absolutist regimes) or a concretisation of shared religious-moral values.

Maine

Maine has not acquired the same status as the other theorists under consideration. His canvas, though broad, was not as expansive as the others and his preoccupation with legal history has largely confined his reputation to this field. This fate is compounded by the fact that Maine's intellectual universe was, like so many others at the time, framed by one of the many variants of social Darwinism. For this reason I will have less to say about him than the other figures; but this does not detract from his significance. His best remembered thesis is that the history of legal evolution can best be grasped as a transition from status to contract.[13] The ascribed status attached to individuals in pre-modern societies determined the law to which they were subject. Despite recognising the huge productivity of legislation, Maine insisted that it was the emergence of the consensual contract, by means of which individuals made their own law, that is the decisive, albeit prolonged and complex, line of development that endows the law of 'progressive societies' with the innovative capacity that allows law to keep pace with the increasing rapidity of social change.

What is significant for present purposes is the implication that individual contractual acrivity effects a decisive shift in the location of law within social life. It marks a radical break with the identification of law with sovereignty; and this is evident in Maine's sharp and telling criticism of the 'imperative theory of law', associated with Jeremy Bentham and John Austin, who reduced all law to commands of the sovereign. What Maine advances in contrast is a model in which law is attributed a distinctively liberal role as an autonomous entity that serves, as it were, the role of neutral umpire that determines the boundaries of the relations between contracting individuals. However, Maine never took the decisive step that could complete the liberal model which would have posited a separation between law and state such that courts could mediate the relations between individuals and the state.

[13] H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London John Murray 1861).

Marx

Marx's relationship to the emerging liberal model of law was far more complex. Most obvious is the fact that law never presented itself as his primary object of inquiry.[14] Marx's primary concern was with the 'critique' of capitalist society. This critique involved the analysis of the mechanisms through which capitalism reproduced itself and in so doing revolutionised all social relations. It also concerned the political question of how the gross inequalities instituted through the very freedoms which capitalism promoted in overcoming pre-capitalist forms of social organization could be superseded by the revolutionary transformation of society. His primary answer is well known; it is that one of the most important creations of capitalism, the conversion of the great majority of the population into wage-labourers, the proletariat, was the only force whose potential revolutionary action could conquer capitalism and institute a realm of equality based on the collective ownership of society's productive capacity.

Marx's treatment of law exhibits two very different emphases. While he viewed capitalism as a self-reproducing economic system, he also emphasised that capitalist economic relations secure dominance over all other major fields of social and political life. In particular, he emphasised the intimate connection between law and the state. Law in this manifestation is first and foremost a mechanism of state power giving effect to the state's monopoly of the legitimate means of violence and its capacity to use legally sanctioned coercion to advance and protect the interests of capital. Indeed, he argued that 'the bloody expropriation of the peasantry' effected by laws of enclosure and vagrancy law was a primary mechanism by which the rural population was driven to accept the necessity of submitting themselves to work in the mines and factories. Marx stressed the repressive character of law in order to redress the blindness of most liberal thought which played down the role of legal repression. But in reacting against the omissions of liberal theory Marx came perilously close to simply reversing liberalism's error by equating law with repression.

Marx's account of law exhibits a second line of analysis. Capitalist relations exhibit a powerful self-reproducing tendency, one that effects the general subsumption of wider social and economic relations under the logic of commodity relations; consumption, leisure and family relations all succumb to a greater extent to the logic of the market. But Marx stressed the instability of capitalist societies, their tendency to crisis. It is in this context that he drew attention to the significant degree of law's autonomy and separation from the state. Most importantly law provides and guarantees a regime of property and of contractual exchange. The

[14] Because of the scattered character of Marx's engagement with law individual texts will not be cited. For general compilations and discussions of Marx's treatment of law see: M. Cain and A. Hunt, *Marx and Engels on Law* (London Academic Press 1979); H. Collins, *Marxism and Law* (Oxford Oxford University Press 1982); P. Hirst, *On Law and Ideology* (London Macmillan 1979) and R. Phillips, *Marx and Engels on Law and Laws* (Oxford Martin Robertson 1980).

expansion of the forms of capital and their circulation require a regime that protects the multiple forms in which capital circulates as legal interests. Legal relations have distinctive effects. The most important of these is the extent to which legal relations actually constitute economic relations, as witnessed in the formation of corporations with limited liability; these are legal creations in that it is the ability to confer a legal status which determines the liability of participants and thus makes the corporation a viable vehicle for the cooperation of diverse capitals.

Just as important was that legal rules and procedures make provision for regulating the inter-relations of capital, through commercial law, insurance, banking and other financial services. For Marx, these mechanisms function as background conditions which constitute the framework within which economic relations are conducted. Law also provides the central conceptual apparatus of property rights, contract and other legal relations that play the double role of both constituting a coherent framework for economic activity and providing important components of the ideological conceptions of rights, duties, and responsibilities. Legal relations share important features of capitalist economic relations in that they abstract from real life relations, and in so doing, they fetishise relations viewing them as having an existence, such as ownership or liability, disconnected from their concrete conditions. It is in this respect that Marx's critique is at its most acute. The primary way in which law participates in securing the conditions of existence for capitalist social relations takes the form of endowing legal subjects with actionable rights. Marx scathingly denounced 'the so-called rights of man' and 'the rights of egoistic man'; and called talk of equal rights, 'obsolete verbal rubbish'.[15]

Marx's problematisation of law shares with Weber, in particular, the pervasive concern with law as a mechanism of rule at a distance, as if the rules were abstracted from specific economic or political interests. He gives this problematization his own distinctive inflection by focusing on the implications of this new proximity of law and capitalist economic relations by considering its implications for the forms of rule to be envisaged in a future communist society. Marx was adamant in his refusal to speculate on utopian models of future society. But it is clear that his critique of rights is not only a criticism of the fetishism of legal rules, but is asserting the proposition that since industrial capitalism operates increasingly through the medium of law such a mechanism can play no significant role in the construction of egalitarian relations. This line of thought was taken to its logical derivation by the early Soviet legal theorist Evgeny Pashukanis who extrapolated from Marx to arrive at the conclusion that, under socialism, law would necessarily wither away.[16]

[15] K. Marx, 'On the Jewish Question' [1843] in *Karl Marx Frederick Engels Collected Works Vol. III* (London Lawrence & Wishart 1975) at 150 and 165, and K. Marx, 'Critique of the Gotha Programme' [1875] in D. McLellan (ed.) *Karl Marx: Selected Writings* (Oxford Oxford University Press 1977) at 565.

[16] E. Pashukanis, *Pashukanis: Selected Writings on Marxism and Law* (eds. P. Beirne and R. Sharlet) (London Academic Press 1980).

Weber

There are strong lines of filiation between Weber's treatment of law and that embedded in Marx's writings. This connection is certainly not an identity, not least because Weber was always conscious, however much common ground he might cover, of a concern to distinguish his position from Marx's in what has come to be referred to as 'the debate with the ghost of Marx'. Another crucial difference is that Weber's treatment of law is far more systematic. With Marx, we have pithy pronouncements that are left hanging, tantalising suggestions that remained undeveloped. Weber meets just about all the hallmarks of a rigorous general theory of law. Thus in drawing attention to continuities between Weber and Marx, I will attend to the differences by pointing to the way in which a problematisation of law which exhibits continuity is inflected in different directions with respect to his substantive lines of inquiry.

Weber's problematisation of law derives from his central concern to understand 'the uniqueness of the West'; how it was that in Western Europe the extraordinary economic transformation of capitalism took place. It was this question that led him into his extensive explorations of the world's great civilisations. Underlying this concern was an anxiety about the long-term viability of industrial capitalism whose continued economic advance seemed to depend on an increasingly militant and organised working class. Weber did not share the almost religious faith in the evolutionary guarantee of progress which was still such a powerful influence into the opening years of the twentieth century. Nor did he have any great enthusiasm about the advance of mass political democracy for this was endangered, particularly in the German context, by the advance of socialist parties.

Thus, the core problematic of Weber's social and political theory addressed the question of how the stability and security of the capitalist order could be sustained. The substance of this problem is readily apparent from a consideration of his tripartite model of the forms of authority.[17] Traditional authority was readily understandable; it was the force of habit, rationalised as tradition and surrounded by religious and other legitimations, that secured its authority; but an authority that was always vulnerable to conditions that could more or less rapidly undermine its legitimacy as was the fate of most of the ancien regimes of Europe and beyond. Nor could such a system take full advantage of the economic potential of nascent capitalism. Similarly, the legitimacy of the intermediate or transitional form of political authority that he termed charismatic was readily understandable. It was the response to the attributes of the charismatic leader that endowed the leader with legitimate authority; the personal

[17] Weber's writings on law from various sections of *Wirtschaft und Gesellschaft* are collected in an English translation in M. Rheinstein, (ed.) *Max Weber on Law in Economy and Society* (Cambridge Mass. Harvard University Press 1954).

nature of such authority is attested to by the primary difficulty encountered by charismatic regimes, namely, that of securing succession or, as Weber called it, the routinisation of charisma.

In important respects the rational or rational-legal authority that Weber identified as the key characteristic of modern forms of political authority has none of the advantages of the other forms in that it lacks a readily available symbolic figurehead; rather it was, by its very nature, a faceless impersonal order. From the Enlightenment onwards political authority systematically shifted its claims to legitimacy from tradition, emotion and religion to rational, bureaucratic and professional sources.

Rational authority had to supply its own legitimacy by making a merit out of professionalisation and bureaucratisation; by no means an easy task. Such a legitimation might prove acceptable on pragmatic grounds such as its fairness or impartiality, but it starts out as a 'weak' legitimation unlikely to command strong allegiance until such ideals as the separation of powers and due process of law can be articulated as strong constitutional doctrines. Significantly, Weber himself barely made appeal to such ideals. Rational authority as he conceived it relied largely on the capacity of rational law to generate its own legitimation, requiring obedience to law in and of itself to provide the grounds for citizen compliance. The major functional attribute which Weber saw as inhering in rational law was that it facilitated predictability. While undoubtedly significant in the self-interested calculus of the market, predictability is unlikely to provide anything more than a weak legitimation. The three substantive features of rational law that he identified were a professional judiciary (always likely to be distant from popular sentiment), a bureaucratic public service following 'the rules laid down' (also distant and impersonal) and the codification of rules (only compelling when associated with democratic legitimation).

One important feature of Weber's version of rational authority is frequently overlooked, namely, that he makes only minimal appeal to democratic legitimation. The significant strength of appeal to democracy is that it has the capacity to go a long way to bind citizens of a democratic regime by invoking the collective responsibility of the citizenry. In its simplest form, democratic legitimation derives from the assertion that one's fellow citizens have chosen a system of rule or a law to be implemented, and such a decision is binding on all by virtue of their shared status as citizens.

Weber's vision of modernity draws attention to a tension between individual autonomy and formal legal rationality. He saw the consequence of the rise of legal rationality as manifesting itself in what Habermas was later to term 'juridification processes' through which not only expanding realms of social relations become subject to legal regulation, but in a wider sense law-like processes, rules and procedures are adopted in many fields of social life. Weber saw the peculiarity of the West as centred in its legalistic rationality in which rational self-control and rational economic calculation form a unity. Rationality exhibits two dimensions, one impersonal and connected to control

and mastery, and the other normative linked to choice and freedom. Legal rationality contributes to 'freedom' via purposeful self-regarding conduct. This is the root of the tension that Weber perceived between rationalisation and disenchantment.

Weber's project of solving the problem of articulating a political order for modern capitalist society capable of sustaining legitimacy is rendered more difficult by the tension which he recognised as built into the form of justice generated by rational law. There is an inescapable friction between formal and substantive justice. Formal justice generates its claim to realise justice from the impersonality of its decisions that arises solely from being the result of following the rules laid down such that any similar case would be decided in the same way. On the other hand, the claim of substantive justice requires not merely that the rules are followed, but that the results can be morally just by reference to some criteria external to the rules. Formal justice may fail to realise substantive justice, just as securing substantive justice may require the breach of the requirements of formal justice. Thus Weber tends to conflate 'law' with 'legality' and identifies 'law as order' with 'law as justice'. The 'paradox' at the heart of Weber's position is that the institutionalisation of Western rationalism raises the very possibility of its extinction in the form of a domination of means over ends that characterises the pursuit of capitalist interests.

Weber was aware of these and related problems. Its most distinctive manifestation is in his much discussed remarks about the 'iron cage' in his conclusion to *The Protestant Ethic*:

> [T]he pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which often actually give it the character of sport. No one knows who will live in this cage in the future.[18]

It is undoubtedly true that Weber exhibited a certain pessimism or lack of hope about the long term viability of the framework of rational law and bureaucratic organisation as a stable and sustainable set of supports for rationality and capitalism. It is also evident that Weber, perhaps more than other social theorists, articulated a constructivist view of law as a conscious and intentional means of governing complex social and economic relations. And the constructivist task is firmly located in the hands of the state. Here, as will be seen, there is an important link with Durkheim, for both identified the basis of social cohesion in modernity in the primacy of the imagined community of the nation-state; it is this which goes a long way towards explaining Weber's unproblematic nationalist politics.

[18] M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (trans. T. Parsons) (London George Allen & Unwin 1930) at 181–82.

Durkheim

While Marx and Weber directly confronted the problem of the legitimacy of capitalist social relations (Marx) and capitalist political order (Weber), Durkheim rarely used the term capitalism. Yet his problematic was in one important respect similar to those of Marx and Weber. Durkheim's abiding question was: How is it possible that modern society, lacking a cohesive religion or spontaneous morality, can sustain social bonds sufficient to offset the fragmenting tendencies associated with industrial societies? He sought to establish that the complexity of industrial society and the individualism that it fosters does not have to lead to fragmentation and class conflict. In modern society, individuals whilst becoming more autonomous, also become increasingly interdependent and, here is his crucial step, interdependence between individuals results in their depending more closely on society. One element of this rejection of Marx was the insistence that there could be no turning back from individualism which 'is henceforth the only system of beliefs which can ensure the moral unity of the country'.[19] Durkheim's problematic asked how could social cohesion be rendered compatible with advancing individualism.[20]

For Durkheim the task confronting sociology is to:

> discover those moral forces that men, down to the present time, have conceived of only under the form of religious allegories. We must disengage them from their symbols, present them in their rational nakedness, so to speak, and find a way to make the child feel their reality without recourse to any mythological intermediary.[21]

As Durkheim expressed it in one of his best-known formulations: 'The old gods are growing older or already dead, and others are not yet born'.[22] The task is to elaborate a secular morality as the source of social cohesion, and in this task law plays a significant role.

Durkheim had an ambivalent attitude towards industrialism and capitalism. He rejected Marx's strategy for the revolutionary overthrow of capitalism; but,

[19] E. Durkheim, 'Individualism and the Intellectuals' [1898] in W. S. F. Pickering (ed.) *Durkheim on Religion: A Selection of Readings with Bibliographies* (trans. J. Redding and W. S. F. Pickering) (London Routledge & Kegan Paul 1975) at 66.

[20] An illustration of this line of inquiry is found in Durkheim's account of the changing forms of punishment. With advancing individualism the deprivation of liberty alone becomes the normal means of social control. He identifies an historical shift from 'religious criminality' (crimes directed at 'collective things') to 'human criminality' (crimes which injure only individuals, such as homicide and theft); E. Durkheim, 'Two Laws of Penal Evolution' [1900] (1973) 2 *Economy and Society* at 285–308.

[21] E. Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education* (trans. E. K. Wilson and H. Schnurer) (New York Free Press 1961) at 11.

[22] E. Durkheim, *The Elementary Forms of Religious Life* [1912] (New York Collier Books 1961) at 427. There is a significant parallel between Durkheim's formulation and Gramsci's thesis that the crisis of capitalism 'consists precisely in the fact the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear'. A. Gramsci, *Selection from the Prison Notebooks of Antonio Gramsci* (London Lawrence & Wishart 1971) at 276.

he recognised that the pursuit of self-interest produced adverse effects and generated conflict.

> Man's passions are stayed only by a moral presence they respect. If all authority of this kind is lacking, it is the law of the strongest that rules, and a state of warfare, either latent or acute, is necessarily endemic.[23]

This led him to argue that economic life must be regulated in order to 'have its morals raised, so that the conflicts that disturb it may have an end'.[24]

In his early work, *The Division of Labour*, Durkheim's interest in law was peripheral; the tabulation of different types of laws provided a useful measure of the prevalence of two primary forms of social solidarity, the mechanical solidarity of simple societies and the organic solidarity of complex societies. When he ceased to make use of the mechanical-organic distinction, what emerged was a more sophisticated view of the intertwining of law, morals and politics.[25] His problem was to discover a secular morality to serve as a substitute for religion; hence his interest to understand law as a moral phenomenon. His primary claim was that law expresses what is fundamental in any society's morality; thus to understand law sociologically it is necessary to explore how law articulates the basic characteristics of the society. He makes the fundamental claim that human desires must be constrained and channelled through internalised self-discipline. Law is the most visible, formalised element in processes of social regulation. Most significantly, law gives authoritative voice to morality conceived as a system of rules and sanctions that stipulate how people should act, and to behave properly they must obey conscientiously. While he recognised that law may be insensitive and oppressive, Durkheim perceived in the essential nature of law the roots of social cohesion, the ties that bind the individual to the group and its collective aspirations.

This vision of the law as the embodiment of commitment to society is somewhat naive, for it grants no effectivity to the play of power, politics or even the autonomy of the formation of the substantive content of law. I suggest that the root deficiency is that, without stating the thesis explicitly, he views law as the modern substitute for religion which is the concentrated expression of the whole collective life, since in worshipping the divine, society unwittingly worships and celebrates itself. Law is the vehicle through which modern society worships itself. Durkheim, however, emphasised the necessity of incorporating individualism as the moral basis for modern law. Individualism is not necessarily egoism (that is a distorted form, manifesting itself in anomie and other negative manifestations), but rather individualism expresses sympathy for fellow humans by demanding respect for the liberty of each. Here, more clearly than

[23] Durkheim, *ibid.*, at xxxiii.

[24] E. Durkheim, *Professional Ethics and Civic Morals* (trans. C. Brookfield) (London Routledge & Kegan Paul 1957) at 12.

[25] For a detailed examination of the relationship between law and morality see R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh Edinburgh University Press 1999).

elsewhere, Durkheim is closest to liberalism. The 'cult of the individual' provided modern law with its moral basis, but this humanist vision depends on the dubious assumption that social divisions are non-antagonistic.

It is in this context that Durkheim's views on law come into contact with his account of the state and democracy. His conception of the modern state exhibits compatibility with Weber's rational bureaucracy, but as a paternalistic organisation of disinterested specialists supervising the 'cult of individualism'. Moral leadership, governmental skill and diligent administration are needed to translate the morality of complex societies into law. He had no perception of the state as a site of conflict; politicians and experts are treated as benign agents trying to decide what is best for society.

Durkheim proposed that sectional interests and immediate forms of participation be provided through expanding the role of intermediate occupational bodies (such as guilds and trade associations, but not trade unions) as a moral force capable of curbing individual egoism by invigorating feeling of common solidarity. His key idea was that only occupational groups, guilds or corporations could carry out this function because they included all who worked in the same economic field.

His question is, can a governmental morality express the conditions of solidarity in complex societies? How does it maintain authority when collective beliefs no longer unify society? Durkheim's theory of democracy sought to provide an answer to these questions. Under representative democracy, the authority of the state not only depends upon, but encourages the attachment of citizens to society. Thus political democracy is a necessary basis for government in modern individualist societies. Modern law is the form in which the results of these communicative processes are expressed in impersonal rules in a form capable of uniting the citizens. The element which has a largely unspoken but decisive place in the solution that Durkheim proposes to the general problematisation, which holds his inquiries together, is that the nation-state and the concomitant nationalism which it stimulates function as the glue that binds the imagined community of republican France into a governable entity.[26]

3. CONCLUSION

Despite the manifest differences between their projects, their conceptual apparatus and their political agendas, there is a common core to the problematisations that underlie the work of Maine, Marx, Weber and Durkheim. There is a certain linear advance in a recognition and commitment to a constructivist vision of law and one of the primary strategies and techniques of law; Marx

[26] Much of Durkheim's work is concerned with the role of education as the governmental training of citizens into a civilized nationalism; E. Durkheim, *Education and Sociology* [1923] (New York Free Press 1956) and Durkheim, *supra* n. 24.

opposed this line of development, but Weber and Durkheim were deeply committed to this strategic vision.

I conclude with a few brief conjectures on the extent to which the problematization of law has changed over the last century. During this period there has been an academic institutionalisation of inquiries that take law as their immediate object of inquiry. There has been a demarcation into a set of overlapping sub-disciplinary fields each with their own institutional apparatuses of departments, research institutes, conferences and journals. Jurisprudence, sociology of law and socio-legal studies each have their own distinguishing marks. For present purposes I ignore these, but a fuller treatment would need to take account of the differing lines of development of these disciplinary specialisms.

The primary trajectory of social studies of law has been to carry forward a variety of versions of the constructivist project in such a way as to resonate with the dominant politics of the twentieth century, namely, the social democratic or liberal welfarist model. But over time there has been an increasing realisation of the contradictory nature of the unintended consequences of the juridification tendencies inherent in deployment of law as a mechanism of conscious social change. My suggestion is that the history of the post-classical sociology of law and socio-legal studies can be understood as a range of responses to the crisis of juridification.

The theme of a crisis of juridification has been expressed in its most developed theoretical form by Habermas.[27] The most important phase of juridification manifests an inescapable side effect of the welfare state project. The web of welfare norms were intended to cushion the effects of capitalist relations (social insurance, etc.) but, in so doing, these measures, designed as means of guaranteeing freedom, operate in such as way as to endanger the freedom of the recipients of benefits. The price paid has been a bureaucratisation that undermines the independence and self-image of welfare recipients. Thus, 'while the welfare state guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life relations'.[28]

Within the predominantly empiricist and policy-oriented field of socio-legal studies there is little explicit consciousness of the crisis of juridification; but its presence is evident in the continuation of the long-standing realist preoccupation with the effectiveness of law which embodies the implicit project of making legal interventions more effective to reduce popular dissatisfaction with the legal enterprise. There is also evident a newer concern which I designate as a preoccupation with legal citizenship whose self-awareness is generally articulated as a concern with 'participation' or 'inclusion/exclusion'. In its most straightforward form the concern is to make law accessible to previously excluded, disadvantaged or marginalised groups. One of the more active trends has been the alternative dispute resolution movement; which in promoting its

[27] J. Habermas, 'Law as Medium and Law and Institution' in G. Teubner (ed.) *Dilemmas of Law in the Welfare State* (Berlin de Gruyter 1986) and 'Tendencies Toward Juridification' in *The Theory of Communicative Action: Vol.II Lifeworld and System* (Boston Beacon Press 1987).

[28] Habermas (1986) *ibid*, at 364.

vision of 'user-friendly' alternatives to litigation has been largely unaware that rather than promoting an escape from juridification, it is an active agent of juridification promulgating law-like interventions in ever wider social fields. So whether the specific topic is legal aid and resources for the poor or with advancing gay-lesbian rights, the feature that unites these projects is a vision of law as a strategy for an inclusive citizenship through legal rights and their delivery.

There is a deep tension at the root of this style of work. On the one hand, it grapples with many important dimensions of the reformist project of legal constructivism, that is the use of law as a means of directed social change. Yet its strategy is unambiguously one of juridification. While it resists hierarchical and bureaucratic forms of juridification, it furthers an increasing legalisation of expanded fields of social life. In this respect, it exemplifies the problem which Habermas' discussion of juridification tendencies has highlighted. The problem in its simplest form is that law is both part of the problem and part of the solution. Welfarist interventions participate in the 'colonization of the lifeworld' but the expansion and deepening of legal rights consolidates advances in the promotion of normative values arrived at through democratic political dialogue. In some of his earlier formulations Habermas seemed to suggest a tension, even an opposition between the positivity of law and its promotion of values. In subsequent moves away from this suggestion he advances the view that law 'functions as a hinge between system and lifeworld'.[29] While this aspiration is attractive it seems to ignore the likelihood that in each specific context legal intervention may be skewed in one direction or the other.

There has been a marked tendency for the gap between sociology of law and socio-legal studies to widen and for there to be more open hostility or, perhaps worse, a tendency to ignore developments on the other side of the intellectual fence. This gulf may, however, be more a matter of style than of substance; the language of meta-theory has become more arcane such that the texts of postmodernism verge on the incomprehensible for all but those that have pored over the privileged texts; while empirical studies become more mundane as they rework ever smaller questions about the functioning of legal institutions and processes. It does not follow that the substantive topics addressed have necessarily diverged: certain currents pursued by theoretically informed sociology of law manifest some degree of continuity with the general trajectory of socio-legal studies as described above.

Sociology of law, like so many other areas of the humanities and social sciences, has undergone a decisive 'cultural turn'.[30] This major current has

[29] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. W. Rehg) (Cambridge Mass. MIT Press 1996) at 56.

[30] D. Chaney, *The Cultural Turn: Scene-Setting Essays on Contemporary Cultural History* (London Routledge 1994); V. Bonnell and L. Hunt, (eds.) *Beyond the Cultural Turn: New Directions in the Study of Society and Culture* (Berkeley University of California Press 1999) and F. Jameson, *The Cultural Turn: Selected Writings on the Postmodern, 1983–1998* (London Verso 1998).

promoted concern with sets of issues variously termed informalism, legal pluralism, law in everyday life, and community law. It is important to recognize that such interests are by no means 'new'. As discussed above, Maine's metahistory of law gives prominent place to deep-seated shifts in the ordering of social relations that only subsequently leave their mark on state law. Eugen Ehrlich could well have been singled out for recognition as a classical founder of law and society studies;[31] he perhaps more than anyone else pressed the claim for the cultural roots of legal ordering. Thus, it might be more accurate to speak of a 'cultural return'.

My concern is not to engage in an extended discussion of contemporary scholarship, but rather to situate it. Foucault perceptively grasped that current discussion of law still starts out from a deeply ingrained assumption that law is located as a manifestation of state sovereignty. He challenges us by chiding us about our failure 'to cut off the King's head'. Nevertheless, the sociology of law has tended to focus on the modernisation of state law as a major 'steering mechanism'. The alternative proposed by the cultural turn is that a sociology of law that has freed itself from a preoccupation with state-law can discover and elaborate 'alternative legalities' and provide a source of resistance to hegemonic state projects.[32]

The shift of attention towards an informalism and community ordering that is either beyond state legality or, more cautiously, a parallel mechanism of social ordering interest, has been the dominant focus of the sociology of law for more than a decade. [33] It is part of a much wider concern with the transformation of modern liberalism into a form conventionally styled 'neo-liberalism'. This concept has the merit of avoiding the debate which has become somewhat sterile as to whether our present is still modern or is now postmodern, or that we may indeed 'have never been modern'.[34]

Neo-liberal forms of social ordering are characterised by a complex and shifting deployment of forms of state-law regulation which seek to stimulate the self-governing capacity of increasingly individualised citizens.[35] This account of neo-liberal forms of governance has been most fully developed by the Foucauldian

[31] Indeed Ehrlich was only omitted on the grounds that to have included substantive discussion would have opened up the field to other claimants and resulted in transforming this essay into an encyclopaedia entry.

[32] S. Silbey and A. Sarat, 'Reconstituting the Sociology of Law: Beyond Science and the State' in D. Silverman and J. Gubrium (eds.) *The Politics of Field Research: Beyond Enlightenment* (Beverly Hills Sage 1989), at 162; see also B. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York Routledge, 1995).

[33] The concept 'social ordering' is employed to contrast with 'social order'. Social ordering is a process of attempts that are never complete, that frequently fail or produce unintended consequences. Its incompleteness and failures only prompt renewed attempts at ordering.

[34] B. Latour, *We Have Never Been Modern* (Hemel Hempstead Harvester-Wheatsheaf 1993).

[35] Those people who are unwilling, unable or lack the resources and capacities to engage in self-governing are either excluded and left to eke out a liminal existence or encounter elevated levels of disciplinary control.

governmentality tradition.[36] This rigorous interrogation of the changing forms of liberal rule has yet to have realised its potential in work specifically focused on the changing forms of legal ordering. However, a particularly promising avenue is suggested by O'Malley's identification of the rise of a new 'prudentialism'.[37]

In welcoming the cultural turn in the sociology of law, I end with a cautionary observation. The rise of self-governance and enterprising individualism, does not herald either the death of the state or of 'the social'. We have not been witnessing the demise of the state or of state-law, but its transformation into new configurations with other modes of ordering. The task, having celebrated the cultnral turn is, therefore, to 'bring the state back in'. The task is to grapple with the changing forms in which state law is imbricated with other forms of legal ordering. This provides a problematisation which is no longer, as in the classical tradition, essentially confined to the relationship between state sovereignty and the law, but now reaches out to new connections between forms of ordering. These new prospects are at one and the same time dangerous and exciting. They are dangerous because they herald a globalisation of power without responsibility and accountability whose primary agents are giant corporations and unelected international institution; yet they also create the possibility of envisaging new popular forms of engagement that reach out beyond the classical electoral forms of politics of the classical period of state, law and sovereignty. Marx, Weber and Durkheim, despite the obvious differences between them, all problematised law with respect to sovereignty. Modern sociology of law can and should stimulate the problematisation of law in its relation to democracy.

[36] N. Rose, 'The Death of the Social? Re-figuring the Territory of Government' (1996) 25 *Economy and Society* 327–56 and M. Dean, *Governmentality: Power and Rule in Modern Society* (London Sage 1999).

[37] P. O'Malley, 'Risk, Power and Crime Prevention' (1992) 21:3 *Economy and Society* 252–75.