Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
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Reflections on some major changes in socio-legal studies (1989-2020)

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Oñati Socio-Legal Series, vol. 12, issue S1 (2022), S132–S143
Institutional Memory Papers: 1989–2021
https://doi.org/10.35295/osls.iisl/0000-0000-0000-1288

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Premise

The purpose of this article is to describe briefly the development of sociology of law over the past few decades.[1] I took the foundation of the Oñati Institute as a symbolic starting point, by all means an extraordinary event in the history of our study field, also to stress that it made a great contribution to this development. Yet, some references to what had occurred beforehand will be inevitable.

Needless to say, the contribution I am going to offer will be both reduced in scope and unilateral in spirit. Suffice to look at the international bibliographies of this discipline that appeared between the 1960s and the 1980s – e.g. Valerio Pocar and Mario G. Losano's relatively slim *Sociology of Law 1960-1970* (1970) and *Developing Sociology of Law*, the much wider book I edited twenty years later (Ferrari 1990) – and compare them with the immense IISL library (even though it has unfortunately lost its pace in recent years), to understand that such a portrait is only possible in a short time at the price of drastic and certainly debatable choices. That is to say that I will adhere to a restricted conception of the discipline and will refer to a limited set of sources, such as the materials collected in decades of socio-legal international conferences, especially those organised by the ISA Research Committee in Sociology of Law.

I will proceed through three levels of analysis: the meta-level of epistemology and methods, that of high theorizing and that of middle-range theory and research.

The meta-level of epistemology and method

I will not bother my readers by re-proposing a question about whether sociology of law should be inserted in the realm of sociology or that of jurisprudence, and wonder whether it should draw its inspiration from American Sociological Jurisprudence, which saw sociology of law and legal science as one field, or from Max Weber, who kept them separate. In fact, this question –which, incidentally, only in my country turns recurrently into a sort of battlefield –does not seem to attract the attention of international scholars in this period, since there is a widespread opinion that our subject matter implies a detailed scientific knowledge of both legal institutions, as well as law's intricacies, and

[1] For a most recent review of the current state of sociology of law see now the book edited by Jiří Přibáň (2020), which appeared when this paper had been already written.

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the theoretical/methodological frames of sociology. What is more significant, nowadays, is a visible trend of such formal boundaries to blur. Good socio-legal works appear under different labels, following a general tendency of all sciences toward more interdisciplinarity. These include such fields as legal doctrine, legal history, law and economics, law and politics, law and literature and, even more, legal anthropology, whose specific methods have tended to converge with those of legal sociology in recent decades.

On the meta level, some words should rather be spent about the relationships between theory and empirical research in the socio-legal field – a question that was a matter of vivid discussions some decades ago. Can "organized" research – I mean observation according to established protocols – inspire or orient theory? Or, rather, can it just confirm a chosen theory, or should it be discarded as too sectorial and perhaps insignificant? If we look at our history, we may perceive a kind of pendulum swing between these two extremes: symbolically, and remembering a famous discussion (Maus and Fürstenberg 1969), between Karl Popper's vision of science as "unended quest", which works through hypotheses open to refutation and re-formulation, and Theodor Adorno's vision, according to which a social theory should be taken holistically as a kind of irrefutable mirror for observing reality.

The father figures of post-war sociology of law aimed at building and re-building their theories through controlled observation. To mention some examples, Vilhelm Aubert, Adam Podgórecki, Takeyoshi Kawashima and Renato Treves championed this opinion, insisting upon the importance of empirical investigation as a background for theorizing, even though they knew that observable data are open to different interpretations according to each observer's own perspectives. Marxist socio-legal theorists, who were especially influential in Europe between the late '60s and the early '80s, upheld the opposite opinion, in that they took their theory as an irrefutable set of assertions, especially in the field of deviance and social control. To some extent, albeit with a hint of syncretism, the Critical Legal Studies movement in the US followed not-so-different paths in the same period. On a similar line of thought, the scholars inspired by Niklas Luhmann's neo-functionalism, which dominated socio-legal theorizing in Europe (and in some places in Latin America), especially between the '80s and the '90s, took their theory as a valid and unitary block and came to discard controlled empirical observation as a kind of unscientific by-product. My feeling today is that also this fight between "sectorialism" and "holism" has lost most of its impact in the last few decades.

Epistemological debates have not disappeared from our horizons, however. Whereas the older generations used to debate about the *correct* epistemology, an increasing number of scholars now wonder about the need to choose between *different* epistemologies, each of them taken as potentially correct in that it is said to represent a special vision of the social world. Feminist movements in science have developed a Feminist Epistemology as a distinct cultural and even anthropological framework for understanding and explaining reality, one that cannot be reduced to the traditional ways of organizing scientific materials, in that it reflects a special perception of the world (for an updated overview, Francis 2017). Similarly, the ever more frequent clashes between cultures, West-East and North-South, have come to be defined in terms of distinct epistemologies, particularly when referred to the *Weltanschauung* of original communities in the Southern hemisphere (Santos 2014). This approach has an increasing impact upon law and society studies, for example in the field of human rights of different kinds, and is a growing source of inspiration of socio-legal theorization.

The high theorizing level

What is law, sociologically? What about its structure as a set of interacting elements? Which functions does it perform in society? How can its relationships with other ways of human action, or communication, be described? Is it autonomous of them, can it affect them or, rather, does it depend on them, especially the economic system or the political system? Is it constitutive of, or constituted by, individual actions, values and choices? How can "law" be circumscribed among the other types of human normative behaviour, or action?

Let us try to see what has happened in this field.

When I became familiar with sociology of law half a century ago, the question was about choosing between Parsonian structural functionalism, which looked at law as a social sub-system addressed functionally to granting social integration through its rules, values and machineries, and conflict theories, which portrayed law as an instrument of social control in the hands of privileged social classes or groups. In fact, the very concept of "system" was a matter of dissent between these two groups of scholars. Taken for granted by classical functionalists, who used this scheme to describe social action in terms of pre-established structures that perform pre-established functions for the sake of a whole society's stability, the notion of "system" sounded somewhat alien to conflict

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theorists, especially those inspired by symbolic interactionism, an approach particularly influential in the field of law and society – as already mentioned – for its impact on the study of deviance.

This opposition seemed to lose some of its significance around the end of the 1970s, with the wide diffusion of the *systemic revolution* brought about by Luhmann's neo-functionalism. By representing society as a network of communications, and social systems as self-adapting structures that depend on the functions they perform in view of reducing complexity, stabilizing expectations and coping with risks, the German sociologist unquestionably launched new ways of thinking. Speaking of legal systems as complex sets of communications addressed to bringing normative expectations to congruency, as he had suggested (Luhmann 1972), or as sets of structured interactions inspired by legal rules, as we read in Lawrence Friedman's *The Legal System* of 1975, became usual also for those who did not identify with Luhmann's hosts of followers, and opted for different terminologies, such as Pierre Bourdieu's choice to speak of "fields" (*champs*) rather than of "systems" with respect to law (Bourdieu 1986).

This was, more or less, the situation in the most influential high socio-legal theory around the late 1980s. However, the clashes originally defined in terms of functionalism and conflict theory emerged again, though differently termed.

As far as the systemic approach is concerned, the dominant focus shifted from the notion of social system as such to the question of *how to portray each system*, whether closed and self-referential, as upheld by Luhmann and his aftermath, or rather open and depending on inputs coming from both other systems and individual options, as stressed by scholars originally inspired by conflict theories and methodological interactionism. There were in fact converging trends. Luhmann's acknowledgement that social systems "couple", in that they are normatively closed but cognitively open (Luhmann 1984, 1993), and Gunther Teubner's theory of reflexive law and of law as a hypercycle (Teubner 1989) offered a sort of bridge between these two worlds. In turn, conflict theorists became less reluctant to reason "systemically" as a crucial method in all sciences.

The systemic revolution brings with it some shadows that have not yet been dispelled, however. One question – in my opinion (Ferrari 2000, 2015) – remains open about the implications of the vision of law as a set of normative communications. How could one describe the meaning of communications without taking into account the diverging semantic options of individuals that intervene in any process of law, which turns into a potential or actual clash between opposite strategies in a conflictual arena? How much

may personal semantic options produce more complexity, instead of reducing complexity, in legal systems? Despite the remarkable contributions already offered by some scholars in this area – e.g., André-Jean Arnaud (with María José Fariñas, 1996; Arnaud 2003), as well as Michel van de Kerchove and François Ost (1988, 1992) – a lot is still largely unknown. The widespread opinion that law may be described as a language, as commonly upheld by analytical legal philosophers, also from a sociological viewpoint should pave the wave to further insight and discovery in socio-legal theory.

Starting again around the late 1980s, *legal pluralism* has been a second and by no means less important change in theoretical sociology of law. Throughout the first decades of discussions in our field, a monistic and state-centred vision of law was taken almost as a fact, even though approaches differed sharply, depending on how the state as such was seen. Such themes as, on the one side, the efficacy and implementation of state law, as well as the welfare state and its crisis or, on the other side, the oppressive nature of state institutions and the abuse of power of political élites occupied centre-stage. The turn to pluralism or, better, the resurrection of a pluralist conception of law, has now become the predominant focus in socio-legal theory, although under innovative theoretical options in comparison with those of the pioneers of legal pluralism, such as Leon Petrażycki, Eugen Ehrlich or Georges Gurvitch. Their assumptions about the existence of non-state kinds of legal system, formal or informal, irrespective of state boundaries, is now widely accepted, but something quite distinct has been built on such bases. Not only can we describe the legal world as a "Global Bukowina" (Teubner 1997), but the most current conceptions see human beings as belonging simultaneously to a number of different systems and displaying a multitude of diverse and changing identities, complete with corresponding legal options. Such subjects as legal cultures (Friedman 1975, Nelken 1997, 2012), legal consciousness (Ewick and Silbey 1998, Silbey 2005), as well as the portrait of the legal field in terms of "interlegality" (Santos 1995) or "as a network rather than as a pyramid" (Ost and Van de Kerchove 2010), all themes that have already been crucial in current scholarly debates for about thirty years, are strictly connected with this developed conception of legal pluralism.

A third basic change of perspective arose around the end of the 1980s, to a large extent alongside the pluralistic turn just mentioned. I refer to the shifting of socio-legal scholarly attention *from rules to rights*. When we decided to devote the 1988 annual conference of the RCSL in Bologna to "laws and rights", in view of the current and the forthcoming anniversaries (40 years since the *Universal Declaration of Human Rights*, 200 years since the *Déclaration des droits de l'homme et du citoyen*), we noticed that sociology of

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law had always focused on laws, especially official state law, whereas it had virtually ignored the rights question. Since then, human, fundamental and, more and more, constitutional rights (Santos 1995, Blokker and Thornhill 2017) have gradually occupied centre-stage in socio-legal work, as a quick glance at the literature of the past thirty-forty years and the topics dealt with in the international congresses of sociology of law easily reveal.

The rights question has been approached in sociology of law from a variety of standpoints. Rights may be respected or not, be in harmony with official law or at odds with it, be evenly or unevenly distributed and enjoyed at a social level, corresponding or not to the predominant legal culture, stimulate social groups to fight in their quest to make the law respected or rather change the law, as well as dissent between and within social groups. The rights question goes hand-in-hand with the societal problems connected to the most basic human needs, such as inequalities, deprivation, economic exploitation, new slaveries, migrations, religious clashes, power abuses, family life, individual and social identities etc.: all themes for both theorization and field observation. The gender problem, especially as far as the women's role in society is concerned, is no doubt the most important issue in this respect. Whilst its weight in socio-legal congresses until the late '80s had been somewhat marginal, it became crucial and always recurrent after that period.

The impact of the rights revolution on sociology of law has been heavy. Besides paving the way to a multitude of research projects – among them numerous workshops at the Oñati Institute, and subsequent publications – it made a classical vision of law *as a matter of perpetual fight* come to the surface again (cf. Rudolf von Ihering's *Der Kampf um's Recht*, 1872). In the sphere of cultural policy, I wish to stress that the highly promising development of sociology of law in Latin America is largely due to this shift of scholarly attention from positive law to individual and collective rights. Now a question may be: is *Law as Fight* destined to contrast *Law as Congruency* in socio-legal thought? Isn't this but an updated reproduction of the original clash between structural functionalism and conflict theories?

Some open questions still remain on the ground also about the pluralist and rights-oriented theoretical approaches.

Although we have been accustomed to reflect upon the crisis of the State and maybe to dream, echoing John Lennon, that "the world will be as one", while displaying a plethora of individual and social identities, the permanent existence on Earth of states that have

the first and the last word on the most important economic and political issues is still visible. Powerful nationalist currents, often holding a racist flag, fight tooth and nail against universalism. On the other side, some basic social values officially endorsed by virtually all legal systems are at stake today. It is worth mentioning, e.g., such problems as the devastation of the environment or transnational crime, which constitute serious risks for law as such, as a primary instrument of social regulation, as well as for the most universally shared feelings of justice. So far, little has been done in the field of sociology of law to tackle such incumbent questions.

Middle-range research and theorization

Coming to more specific subjects of research, I am confident my readers will understand that I am compelled to simplify the matter drastically. The themes dealt with in the literature and discussed in a multitude of congresses are innumerable and each of them would deserve special attention.

However, among such themes some are more recurrent than others, so that they allow us to look at them longitudinally and to describe some of the changes that have occurred meanwhile. Let me summarize them briefly.

First of all, *the family*. Already in the 1960s and 1970s. socio-legal scholars stressed the changes that had taken place in family roles and family regulation, pointing to the family's tendency to live as an autonomous network of living standards, gradually distancing itself from the state's hetero-regulation, as well as to the shift from the broad family to the nuclear family and from a hierarchic to a horizontal family structure. This evolution went hand-in-hand with the process of women's "emancipation", as it was termed at that time. Valerio Pocar and Paola Ronfani (2008) described such changes vividly in the 1980s as a move "from status to contract", echoing Henry S. Maine's renowned formula. This landscape has changed substantively over the past thirty years. The role of men in the family seems to have lost a lot of its importance, in contrast to women's increasing centrality. In itself, the structure of nuclear families has also undergone a gradual disruption in the meantime. Many feminist studies have left aside emancipation and tend to speak of genders as autonomous "universes", in accordance, amongst others, with the increasing number of single-sex families. In contrast, a measure of hetero-regulation in this field has come about as far as minors are concerned, since they are entitled to "protection, provision and participation", especially so if the structure of their families

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becomes fragile and contingent (on all such processes see, amongst others, Maclean 2000, 2005). This panorama, it should be stressed, is particularly typical of the West, rather than of other social cultures, where even "pre-nuclear" models of family still prevail. One open question is whether the tendency of legal systems to converge in many fields – as Lawrence Friedman never ceases to remind us (Friedman 2001) – will also be reproduced in this microcosm.

Secondly, I will mention the *legal professions*. Together with the family, this topic has always been dealt with in half a century of socio-legal congresses. The movement of lawyers "from patrician to professional élites" – to mention a book by Michael Powell published in 1988, may be assumed as both a point of arrival and a point of change. Three decades of studies have focused attention on fundamental changes in lawyering, as some term it. The ever-increasing rate of women in the legal professions is highly significant. Besides this and other matters, we can now perceive a kind of destructuring of this field, together with the crisis of traditional justice systems. In some countries, researchers have pointed to a trend of "proletarization" of a wide percentage of lawyers – more than 50% in some places – especially those lawyers who work outside the privileged structures of legal multinationals. Yet, the "fourth technological revolution" – featuring, e.g., Big Data and Artificial Intelligence – may have a major impact on these organizations as well: it is no coincidence that Richard Susskind has spoken recurrently about a possible "end of lawyers" or at least the need for them to re-invent their role in society (Susskind 2008, 2013).

Disputing, also, has always attracted the attention of law and society scholars throughout the decades. To give a short insight into the matter, I would say that the most significant change in this area has been the shift from the "Access to Justice" or "Total Justice" approach, typical between the 1960s and the 1980s, to the crisis of traditional justice systems, epitomized significantly by Marc Galanter's formula "The Vanishing Trial" (Galanter 2003) and by the wide diffusion of the ADR movement, whose potentials and limits, at any rate, have still to be identified. This is indeed a "hot" question, both socially and politically: how much of social conflict will be channelled along the paths of ADR in the near future, and how much will it tend to escape all institutional channels and give rise to (often violent) forms of "doing unilateral justice" outside the realm of any legal system?

Deviance and social control have also occupied the scenarios of legal-sociological debates recurrently. As is well known, a fundamental shift, not coincidentally termed

"paradigmatic" at that time (Baratta 1982), already occurred between the late '70s and the early '80s, with the almost universal adoption of the labelling theory, as opposed to the "positivistic" ways of looking at deviance. This line of thought, which sees deviance as a both symbolic and concrete projection of political power, has not been abandoned since then. Rather, it has progressed by examining special institutions of social control, first and foremost prisons, increasingly seen as ethically and politically unjustifiable: the abolitionist stance, spreading from Scandinavia – suffice to mention Thomas Mathiesen (1990) and Nils Christie (2004) – to the rest of Europe may be more than a utopian suggestion for the future, albeit contrasted by evidence, which reveals how widely such total institutions are still the predominant way to cope with "crimes", whether *mala in se* or *mala quia prohibita*, to refer to a classic distinction sketched at the origins of Enlightenment jurisprudence. .

I should continue referring to other fields of research. I have already described the potential of the human rights approach, also as a matter of field investigation. I will not insist with further examples, with just one exception about migrations, which have become a predominant concern not only of public policies around the world, but also as a common study area for our scholarly community in the last few decades, especially for their significance, precisely, in the sphere of the basic rights of both migrants themselves and the societies they seek to reach, in particular as far as the clashes between different – mainly religious – identities are concerned.

Having referred to some of the most recurrent subjects dealt with in our field, I should finally make reference to a difference perceivable between European (and to a certain extent also Latin American) studies, on the one hand, and North American studies, on the other. While the former seem to focus mainly on the areas I have just mentioned, the latter display a wider plethora of subjects. Such problems as property, inheritance, contract, company, insurance, tort, civil liability, banking, financial tools or bankruptcy, i.e. the core of civil and commercial law, as well as, for example, questions connected with new technologies (both in communications and in biology) do not look too familiar to Europe's law and society movement, with perhaps the exception of labour law, to which a remarkable measure of research activity and theorization has been offered in this hemisphere too (amongst others, Rogowski 2015). There were and are other notable exceptions, obviously (such as, e.g., Maria Rosaria Ferrarese in Italy, Volkmar Gessner in Germany and Sol Picciotto in Britain), but such is the prevailing trend. On the contrary, these and other themes of "ordinary law" seem to be part-and-parcel of US socio-legal production, as is revealed by such journals as the *Law and Society Review* or the *Journal*

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of Empirical Legal Studies. Maybe not all these studies display solid roots in sociological grand theory, yet they make an important contribution to both the knowledge of positive law and the permanent need to adapt it to changing times, which should be, I hold, if not the primary, at least a "lateral" but anyway important *raison d'être* of sociology of law as a distinct field of scientific study.

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