Sociology of law

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abstract Many of the original sociological premises, concepts and ideas regarding social action, legal change and social reform were initially formulated by studying conditions specific to western industrial societies. The sociocultural consequences of globalization over the last three decades have, however, affected the relationship between state, law and society, blurred sharply drawn distinctions between the West and the rest of the world and transformed the sociocultural setting within which legal regulation is devised and social reform planned. This article asks to what extent socio-legal research has reconsidered its theoretical premises regarding the relationship between law, state and society to grasp the new social and cultural forms of organization specific to global societies of the 21st century.

keywords globalization ◆ law ◆ legal regulation ◆ social reform ◆ state

> All fixed, fast-frozen relationships, with their train of venerable ideas and opinions, are swept away, all newformed ones become obsolete before they can ossify. All that is solid melts into air ... (Marx and Engels, 1967[1848]: 224)

Introduction

The sociology of law, or legal sociology (henceforth SL), is an interdisciplinary field of research consisting of a large number of disparate approaches to the study of law in society. These are brought together by a common epistemology that views law as a social construct and argues that law and all its manifestations should be studied empirically and contextually. These approaches are, however, distinguished from each other by the way they conceptualize the 'social', how they employ the tools of social sciences and where they draw the boundaries of law and legality. In what follows, I try to describe the diversity of the field, account for some of its main concerns and trace the contours of its development against the backdrop of the spread of globalization and the rise of the network society. Many of SL's original sociological premises, concepts and ideas regarding legal change and social reform were initially formulated by studying conditions specific to western industrial societies. The sociocultural consequences of globalization over the last three decades have, however, enhanced the 'radicalization of modernity', i.e. have accelerated the process which melts the apparently solid contours of the industrial society, thus paving the way for the emergence of a radical (or 'reflexive') form of modernity (Beck et al., 1994). This transformative process has affected the relationship between state, law and society (Cotterrell, 2006a; Gessner and Nelken, 2007; Priban, 2007; Twining, 2000), blurred the sharply drawn distinctions between the West and the rest of the world and transformed the sociocultural setting within which legal regulation is devised and social reform planned. The rise of the network society, which is seen here as an integral part of the globalization process, 'has created new forms of action and interaction in the social world, new kinds of social relationships and new ways of relating to others and to oneself' (Thompson, 1995: 4). This article asks to what extent SL has reconsidered its sociological premises regarding the relationship between law, state and society to grasp the new social and cultural forms of organization specific to global societies of the 21st century.

This objective is pursued in three parts. Part 1 presents SL partly in relation to social sciences and partly in relation to law and legal studies, briefly examining some of the central debates within the field. Part 2 draws attention to the asynchronous development of SL across various countries, asking why the main body of socio-legal research continues

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to be produced in western countries. This part considers various factors which might cause this imbalance and also asks if socio-legal theories that are born out of studies of western industrialized societies are suitable for examining law and social order in non-western contexts. Part 3 concludes the article by arguing that the sociocultural consequences of globalization erode the traditional boundaries of law and legal systems, hybridize legal cultures and create new conditions for legal regulation.

It is worth noting at the outset that there are many equally valid ports of entry into the discourse that constitutes the socio-legal field. This article will adopt a methodological approach and introduce the field by accounting for the way various traditions of research have developed in response to social, political and legal changes. Those interested in the theoretical aspect of SL will find a recent overview in Deflem (2008) and Travers (2009) (see also Banakar and Travers, 2002; Cotterrell, 2008; Podgórecki, 1991). Moreover, to avoid presenting SL as an exclusive field, I shall define sociology broadly to take into account the interaction between SL and social sciences and branches of humanities such as history (similar broadly defined approaches are suggested by Chiba, 1993: 12 and Cotterrell, 2006a: 6). This is somewhat at variance with the traditional definition of SL as a subdiscipline of sociology (see Deflem, 2008; Evan, 1980; Travers, 1993; Treviño, 2001), but, as I hope to demonstrate, a broadly conceived SL allows us to stay true to the intellectual origins of the subject, parts of which are older than the discipline of sociology, as well as to the aspirations of those scholars who have worked to maintain SL as an interdisciplinary space open to theoretical and methodological innovation.

Part 1

Law and social engineering in industrial society

The intellectual pedigree of SL can be traced back to the works of the founders of sociology such as Herbert Spencer (1820–1903), William Graham Sumner (1840–1910), Emile Durkheim (1858–1917) and Max Weber (1864–1920), on the one hand, and jurists interested in employing social scientific methods in the study of law such as Eugen Ehrlich (1862–1922), Leon Petrazycki (1867–1931) and Roscoe Pound (1870–1964), on the other (for a presentation of pre-social scientific roots of SL, see Gurvitch, 1947: 53–155; Treviño, 2011). The first group was driven by sociological concerns and explored the development and application of law as part of efforts to describe and analyse the salient features of modern society. At the risk of oversimplification, Weber employed law as a vantage point from which to study the forms of rationality and authority (cf. Weber, 1978; Hunt, 1978; Kronman, 1983), whereas Durkheim explored it as a means of describing the transformation of society from a form of social organization based on mechanical solidarity to one based on organic solidarity (cf. Durkheim, 1984; Cotterrell, 2000). The second group employed sociology as a tool to better understand law and its operations, to improve the science of law and legal education and to develop law as a more effective instrument of social engineering (cf. Banakar, 2003: 189–222; Nelken, 2009a: 1–2). These scholars criticized analytical jurisprudence for its conceptual formalism and for neglecting the role played by social forces in creating the legal order and shaping legal behaviour. They also argued that legal research, legal education and judicial decision-making should adopt the methods and insights of the social sciences to counterbalance this shortcoming. Ehrlich and Petrazycki refuted natural law theories, which 'sought a permanent and universally valid basis for law in nature and/or divine reason' (Banakar, 2009: 60) and contested the claims of legal positivism that stipulated a norm became a legal rule only if it was posited by the state.

From the outset, the 'gap' between the law and the intentions of legislature or policy-makers, on the one hand, and the social norms of organization and the outcome of legal regulations, on the other, figured prominently in the works of socio-legal scholars (cf. Nelken, 1981). How these scholars conceptualized and studied the 'gap' was determined by at least four factors: first, their concept of law – whether they understood law strictly in terms of official state law or described it broadly to include norms of social organization; second, their understanding of how society was constituted and reproduced – if they saw conflict or consensus as the driving force behind social developments; third, how law and society were related together – if they regarded law and society as independent variables, one dependent of the other or as interdependent; and fourth, what methods of enquiry were regarded as most suitable for the study of this relationship – if they used qualitative methods to study micro processes or social action, or if they applied quantitative methods to explore macro processes, structural relationships and social systems. The awareness of a discrepancy between official state law and the norms used to decide disputes and organize society motivated Ehrlich to search for a form of law more in tune with the sociocultural make-up of society (Ehrlich, 1936 [1912]; for a recent collection of essays on Ehrlich's work, see Hertogh, 2009). Pound too was concerned with the

'gap', but in his case it was conceptualized in terms of the distinction between 'law in books' and 'law in action' (Pound, 1910). For Pound, valid law consisted of legal rules and principles laid down by authorities, and the distinction between law in books and law in action served to highlight the social nature of the legal process, a process which, once grasped sociologically, could be engineered to manufacture a tighter fit between law and the social reality it tried to regulate. For Ehrlich, however, a norm could acquire a sense of legality even though it had not been laid down by the state. Instead, a norm gained legal authority when it dominated 'life itself even though it has not been posited in legal propositions' (Ehrlich, 1936: 496). These social norms he called 'living law' (for a comparison between Ehrlich and Pound's concepts of law, see Nelken, 1984).

This initial interest in the sociological studies of law was somewhat abated during the period between the two World Wars (cf. Black and Mileski, 1973: 2), but received a new impetus in the decades following the Second World War while the social landscape underwent dramatic changes. Renato Treves and Glastra van Loon describe the revival of SL in terms of industrialization and urbanization:

> The general development of industrialisation and urbanization, the increase in social mobility, and the great economic and sociological transformations which have taken place since the end of the Second World War ... have drawn attention, with increasing emphasis, to a number of pressing needs: The need to study the relations between static and often antiquated legal systems and the continually changing social structure; the need to appreciate how law and the various practitioners of law operate within society; the need to examine public attitudes towards the current legal situation and to calculate and forecast the consequences of possible legislative reforms. (Treves and Glastra van Loon, 1968: 1)

Thus, SL emerged as a distinct field of research after the Second World War and consolidated itself in West European and North American universities from the mid-1960s. Building on the legacy of legal realism, the law and society movement in the US promoted social scientific studies of law in response to the need to introduce moderate social reform through public policy in areas such as 'the civil rights movement, the War on Poverty, and the rights expansion of the Warren Court' (Trubek, 1990: 9). The founders of law and society were, according to Trubek (1990), mainly liberal minded 'legalists', who were committed to social justice, but also 'believed that most of the "flaws" in American society could and would be corrected through legal means'. In Western Europe, SL also developed in response to the need to bring about social reform through law, but this need was linked more directly to the rise of the welfare state. The modern welfare state, which started its growth gradually in the late 19th century, expanded rapidly in western countries through governmental intervention in various walks of life from the 1950s onward. A host of social policy measures were introduced by legislation or through legal frameworks, implemented and enforced by lawyers working within traditional institutions of the law as well as by non-lawyers (such as social workers and civil servants), resulting in increased juridification of the social sphere (Habermas, 1984; Teubner, 1987). Law was often employed by the state as a regulatory device to bring about conformity and/or social change, was assumed to have universal application and was treated as superior to, and independent of, other norm-generating social fields. In contrast, socio-legal research demonstrated that law was mediated through, and its implementation and enforcement were contingent upon, social and legal institutions with their own sociocultural mechanisms and imperatives (for an early but influential postwar study, see Selznick, 1949). Law's dependency on these social institutional mechanisms caused divergence between the intentions of the legislature and policy-makers, on the one hand, and the outcome of policies that were executed by law, on the other (cf. Griffiths, 1995). The insight that law was not an effective vehicle for social engineering is shared commonly by various approaches within SL. Some have argued that social engineering through law is not only an ineffective exercise, but also endangers the very autonomy of the legal system (for a debate, see Paterson, 2006).

Socio-legal research has also shown that law's ability to resolve social conflicts is restricted by its modus operandi, in general, but by the internal formal rationality of its concepts and operations, in particular (Shamir, 1996: 235). When a social conflict is recognized as legally relevant and is brought before the law, it is transformed into a legal dispute and resolved by imposing law's formal categories on the conflict. Sociologically, law avoids dealing with the conflict at hand by redefining it in its own terms, using concepts which might have nothing to do with the original cause of the conflict (Niklas Luhmann describes this process in terms of 'complexity reduction'; see Luhmann, 2004). 'In this way law confirms the normality of its own categories and reconstructs society in its own image' (Banakar, 2005: 149). This does not mean that law has no impact on social change or no effect on how social conflicts are managed. Instead, it means that law's impact is often different from what policy-makers have intended and the public has envisaged. Law might not provide the

most effective way of resolving social conflicts, but various studies show that it can be used to cope with disputes (Felstiner, 1974; Felstiner et al., 1981). There is also a new wave of interest in the relationship between law and development, which acknowledges that reforming substantive areas of law does not necessarily lead to social development, and yet argues that enhancing the quality of institutions responsible for the administration of law can have positive social impacts (Davis and Trebilcock, 2001). As we shall see in the next section, in connection with more recent debates on legal transplants, the belief in law as an instrument of social reform lives on, albeit in new forms.

Insight into the inefficacy of official (or state) law as a tool for implementing public policy (cf. Silbey, 2005: 324–5; on efficacy of law see also Friedman, 1987) led to a growing demand for the type of knowledge that could help policy-makers to devise laws that worked. This, in turn, required an understanding of the relationship between (legal) regulation and social behaviour and a type of knowledge that social sciences in general, but SL in particular, could provide. Thus, the spread of the welfare state and the need for social reform boosted SL following the Second World War. This development has had at least one major negative side effect for socio-legal research. In Britain, Colin Campbell and Paul Wiles raised concerns regarding the relationship between Socio-Legal Studies (SLS) and the values and assumptions of the legal system and policy-makers. (SLS should not be confused with SL – the former has an applied approach to the study of law and legal institutions and is, thus, considered useful, whereas the latter works with the broader sociological questions and is, thus, 'chastised' as abstract, divorced from reality and lacking in practical relevance [Campbell and Wiles, 1976: 549].) In Campbell and Wiles's opinion, in its eagerness to gain support and academic legitimacy, SLS endorsed and furthered 'the hegemony of law' and treated the nature of legal order as 'unproblematic' (Campbell and Wiles, 1976: 553). It became, in other words, an instrument of research that is an *auxiliary* to legal studies and polity – 'on tap, not on top', as Willock (1974: 3) put it. A similar point was raised in the American context some years later by Austin Sarat and Susan Silbey (1988) as 'the pull of the policy audience'. Sarat and Silbey meant that the effective regulatory devices sought after by policy-makers led many socio-legal scholars to become 'influenced by official criteria and definitions of legal problems' (Sarat and Silbey, 1988: 97) and to adopt the official understanding of the relationship between law and society, which was often instrumental, partial and distorted.

So far we have discussed the development of SL in western democracies. From the 1950s through to *perestroika*, which initiated the fall of the Soviet Union (its initial phase began between 1985 and 1986), socialist law was one of the major legal systems of the world, and almost half the global population, in Europe as well as in Asia, Africa and Central America, lived under its various forms (Bogdan, 1994: 198). Eastern European countries, ruled under totalitarian communist regimes, also used law as an instrument of social engineering, but in their case it frequently worked in a violent and overtly repressive form (Podgórecki and Olgiati, 1996). In Soviet Russia, sociology was considered a bourgeois subject and suppressed during the Stalin period (Weinberg, 1974: 8–9), and although it was somewhat revived from the mid-1960s, it was dominated by a positivistic behaviourism, which did not antagonize the Soviet ideology and stayed clear of ideologically sensitive research areas such as law and politics. Law and the legal system were, in turn, subordinate to, and a tool in the service of, the Communist Party, as a result of which an authoritarian legal culture emerged. As Shelley (1996: 251) explains, ordinary people for whom the law had neither legitimacy nor authority stopped using 'the courts to foster their objectives'.

Under these conditions, applying sociology to probe the relationship between law and society could easily be interpreted as subversive, which explains the absence of SL in Soviet Russia during this time. In East Germany, the situation was no different and SL was denied a foothold in academia until the fall of the Berlin Wall in 1989 (Machura, 2001). In Poland, on the other hand, SL establish itself after the Stalinist era and two research orientations grew: one politically independent orientation led by scholars such as Podgórecki and the other a more official orientation called 'legal-empirical research' (Kurczewski, 2001: 88). In Poland too the attempts to combine 'academic honesty with direct political utility' proved to be impossible under the communist rule (Kurczewski, 2001). Podgórecki's university unit was eventually dismantled and Podgórecki himself forced to migrate. It is theoretically noteworthy that some of the research conducted in Poland was also concerned with a 'gap', but in the Polish case the discrepancy was 'between the empirical interests of the ruling class and the rules imposed in its name by the rulers' (Kurczewski, 2001: 89).

Beyond the 'gap'

The gap problem, versions of which informed the works of Pound and Ehrlich about a hundred years ago, has been developed theoretically by studying the implementation of public policy and welfare measures, and is now employed to study aspects of

the information society and globalization. One recent study (Svensson and Larsson, 2009) explores the discrepancy between copyright laws, which through international treaties and conventions have become uniformly established in most countries, and actual social behaviour in cyberspace, which radically deviates from the rules of copyright. The 'gap' has also linked the concerns of SL and comparative law. The comparatist Alan Watson (1977), for example, has used his studies of legal transplants, i.e. legal institutions and ideas borrowed from one jurisdiction and transplanted in another, to refute the dependency of law on its sociocultural context (for an overview of the debate, see Nelken, 2001). This shows a continuity of research interest which stretches from the classical works of Ehrlich and Pound, through debate and research on industrialization and the welfare state, to current debates on the possibility of law and legal institutions 'travelling' between jurisdictions (Nelken, 2001: 8–9) and unifying or harmonizing laws across various legal systems (Legrand, 2001). The spread of legal transplants and attempts to unify and harmonize laws at the international level also demonstrates that our debate is no longer confined to western industrial societies. As Nelken (2009b: 255) explains:

> Law is on the move. Social engineering through law, for all that is somewhat out of fashion 'at home' in many industrially developed societies is increasingly practised abroad. The range of societies recently caught up in what may still be described as 'legal transplants' … is not confined to those in the developing world, though even this covers places as different as China, south-east Asia or Latin America.

Emphasis placed here on the role of the 'gap' in the growth of SL should not mislead us into concluding that SL consists only of studies which reveal that law has at best limited impact on social change. As Garth and Sarat (1998) point out, law would be uninteresting to policy-makers and social scientists alike if it were an ineffective tool. Later research, for example, explored how law creates images of society internally, images which in turn impact upon society at a discursive level and influence the way we think about and experience law. The question becomes how law constitutes society:

> The constitutive approach sees law more as a pervasive influence in structuring society than as a variable whose occasional impact can be measured. Law is seen as a way of organizing the world into categories and concepts, which while providing spaces and opportunities, also constrains behaviour and serves to legitimate authority. (Garth and Sarat, 1998: 2)

Correspondingly, researchers who choose to study law from a cultural standpoint might do so to identify the obstacles to social engineering, i.e. to discover how internal and external legal cultures of a group create a 'gap' (Nelken, 2007: 111). However, studies of legal cultures have also been used to make sense of law as a cultural artefact and to describe and understand how law manifests itself as a form of experience in everyday life (Kahn, 1999). For some researchers, they have provided a method to circumvent the ideological dominance of legal studies and to create distance from one's own taken-for-granted values, attitudes and beliefs. Whether socio-legal research is dealing with the 'gap' in its more traditional sense expressed by Pound, the way transplants work and evolve in their new sociocultural environment or how law creates images of society, it conducts its studies in two ways. It either starts with law and carries out its research top-down or starts with the sociocultural context and conducts its study bottom-up. Which of these two general approaches, or *ideal types* of research, we choose might prove decisive for which aspects of law and society we emphasize and what type of insights we produce.

Two ideal types of socio-legal research

The first ideal type consists of research conducted against the backdrop of an omnipotent nation-state and in response to the need to devise effective public policies. These studies often regard the state as the source of law and legality and take the attitudes and concepts of law's officials and administrators, i.e. those responsible for the interpretation, implementation and enforcements of legal rules, as the point of departure for exploring the effects of legislation on social patterns of behaviour and social conditions. It means that they perceive, describe and analyse the relationship between law and society *top-down*. A classical example of this type of research is found in Vilhelm Aubert's pioneering research in the early 1950s regarding the impact of the Norwegian Housemaid Act 1948 on the behaviour of housemaids and their employees. This Act was introduced to improve the working conditions of domestic help through precise provisions regulating their working hours, termination of contract wages, days off, vacations, etc. To enhance its impact, the Act limited the freedom to contractually set the law aside. Aubert, Eckhoff and Sveri studied the effects of this Act on the working conditions of housemaids in 1952 by examining the behaviour of housemaids and their employers. This was achieved through interviews aimed at evaluating knowledge of the provisions of the Act among a representative sample of housewives and housemaids in Oslo (see Aubert et al., 1952; Aubert, 1969: 117). Although Aubert and his collaborators departed from legislation, they

nonetheless paid close attention to the social context of law and studied the relationship between the legal knowledge of ordinary people and how they used the law. This is perhaps why this study continues to be of methodological interest after more than half a century. More recently, a strong case was made by Denis Galligan for this type of top-down research. Galligan argued that socio-legal research should start with those features of law which are 'relevant to the actions of citizens and officials … and examine meanings attributed to such features by citizens and officials, and the actions that follow' (Galligan, 2006: 36). Failing to do so, we would, according to Galligan (2006: 3–4), run the risk of abandoning any sense of law as a distinctive formation, i.e. we could overlook those social properties of the law which make it different from norms of social organization. This ideal typical top-down research is often deductive and proceeds with implicit or explicit assumptions about law and society (for a critical assessment see Banakar, 2011).

The second type of studies are carried out using a bottom-up perspective, i.e. by departing from the social and institutional context in which law is employed by the citizenry. Stewart Macaulay's study of non-contractual relations in business (1963) is a classical example of this type of research. This study found that businessmen frequently ignored the legal aspects of their contracts and agreements. When they succeeded in reaching an agreement during their informal social exchanges, they kept their word as if they were bound by a formal contract. When a dispute arose as a consequence of the breach of a formal contract they frequently settled it without reference to the contract or legal sanctions. Business people actively sought to avoid legal formality and the use of law and lawyers in their affairs because in their opinion it was bad for business. In most situations a contract was not needed and could have had negative consequences, mainly because its functions were often served by other mechanisms. This also meant that the business community could avoid most of its problems without resorting to legal sanctions. Moreover, it was observed that there were many effective non-legal sanctions which made the use of law unnecessary. Marc Galanter's (1974) study of 'why the "haves" come out ahead' is another classical example. Galanter's methodology is described at the outset in simple and clear terms:

> Most analyses of the legal system start at the rules end and work down through institutional facilities to see what effect the rules have on the parties. I would like to reverse that procedure and look through the other end of the telescope. Let's think about the different kinds of parties and the effect these differences might have on the way the system works. (Galanter, 1974: 97)

The bottom-up model lends itself to qualitative research and can produce 'grounded theory' (Glaser and Strauss, 1967). In addition, it portrays law and legality, not as an autonomous system consisting of rules and formal procedures, but as an integral and constitutive element of the cultural life of a modern society. How ordinary people use law to organize their daily life, or how social institutions and organizations condition the way law is employed and legality realized, rather than how law is interpreted and enforced by officials of the legal system, is taken as the starting point for the second type of studies (see also Santos, 1977; Selznick, 1949; Silbey, 2005; Stjernquist, 2000). The first type, the top-down approach, adheres to the concept of state (official) law, whereas the second type, the bottom-up approach, employs a broader (often pluralistic) concept of law akin to Petrazycki's 'intuitive law' (see Podgórecki, 1991) or Ehrlich's 'living law' (1936). For the bottom-up approach, the domain of law and legality could not be restricted to official sources of state law, for law is regarded as sociologically 'thicker' (or more complex) than state law but 'thinner' (or sociologically less complex) than the social interactions and institutional arrangements which lay the basis for social order (cf. Carbonnier, 1965, quoted in Olgiati, 1998: 91). 'Semi-autonomous social fields', to borrow from Sally Falk Moore (1973), are fields of social interaction that lie outside the realm of state law. When focusing on the law we lose sight of the fact that these fields 'have their own customs and rules and the means of coercing or inducing compliance' (Moore, 1973: 721). Not surprisingly, policy-makers have traditionally preferred to promote top-down research, which equates law with state law, giving rise to 'the pull of the policy audience' discussed above by Sarat and Silbey (1988).

Part 2

Western and non-western sociology of law

In his introduction to the special issue of *The American Sociologist*, devoted to presenting SL from a global perspective, Javier Treviño (2001: 5) writes that 'today, interest in law amongst sociologists reaches world-wide proportions' and goes on to depict an optimistic picture of the development of the subject in the US, Europe, Japan, Korea and China. While the growth of the subject in parts of the world mentioned by Treviño provides cause for optimism, the global spread of interest in the sociological studies of law appears uneven and

concentrated, above all in industrialized nations with democratic political systems. Some important research has been produced by South American researchers (for an overview, see Lista, 2004), as well as by Indian scholars (Baxi, 1986; Deva, 2005), but we find only a limited amount of socio-legal work by researchers from, for example, the Middle East or central and northern parts of Africa (for an earlier overview of the field, see Ferrari, 1990). There are, admittedly, a large number of studies of non-western law in Africa, India and elsewhere, but these are often conducted by Europeans (cf. Chiba, 1993; Galanter, 1968). In this sense the global expansion of SL is not taking place uniformly across national boundaries and appears to correlate with a combination of factors such as national wealth/poverty and form of political organization, as well as historical factors such as the growth of the welfare state mentioned in Part 1. However, none of these factors alone can explain this disparity. Some oil-rich countries in the Middle East enjoy a high level of average annual income and have some of the most developed welfare systems in the world, yet they appear to have no need for socio-legal research. In the absence of empirical research in this area, the causes of this 'anomaly' remain unclear, but by using existing socio-historical evidence we can venture to formulate at least three hypotheses. First, their welfare systems are not based on the same welfare philosophy that necessitated social reform and experimentation through social engineering in Western European countries during the 20th century. Second, these countries do not have an open tradition of public political debate, critique and free speech, which are among the basic requirements for the growth of subjects such as SL. The former communist regimes of the Soviet bloc also did not tolerate socio-legal research. For example, in East Germany, 'attempts to introduce it into the universities were suppressed almost until the breakdown of communist rule' (Machura, 2001: 44), whereas in Poland, as we mentioned in the previous part, soon after the establishment of a socio-legal research unit at Warsaw University, SL was set on a collision course with state ideology and the unit was dismantled (Kurczewski, 2001: 89). Third, perhaps their notion of law has not been divorced from their concept of society in such a way as to merit investigating the 'gap'.

When studying non-western legal systems, we can easily forget that assumptions regarding the autonomy of the legal system, i.e. the need to demarcate the boundaries of the adjudicative and legislative organs and legal rules they generate from other social institutions, for example the separation of law from religion and politics, are a product of western legal cultures and traditions. Expressed differently, it is conceivable that SL is not promoted in certain non-western countries because it is not historically or culturally in tune with their conceptions of law and society. This concern has been expressed previously within SL in different terms and contexts. In the 1970s, David Trubek and others argued against the ethnocentric and evolutionist assertions which underpinned beliefs that the introduction of the western type of law was essential for economic, political and social development in the Third World (Trubek, 1972). There has been a widespread presumption among many social scientists and lawyers that the conception of law and society found in the West is (and if it is not, then it ought to be) universally valid. The main body of socio-legal theories and their underlying ideas has been developed by studying western social conditions, legal systems and cultures. These social theories should not be employed as a starting point for studies of non-western social settings, some of which have very different forms of social, legal and political organization requiring historical and cultural contextualization.

Scholars engaged in the study of comparative legal systems have also been grappling with similar issues. The notion of legal family, originally developed using ideal types of western legal traditions in order to classify and make sense of the legal systems of the world, has come under growing criticism for its Euro-centric assumptions (Menski, 2007: 191). Legal families were defined in terms of 'law as rules' and evaluated and classified with the help of criteria such as substance, style, method, ideology, structure and sources belonging to common law, civil law and socialist law. This approach, which has dominated much of comparative law, is now questioned for being too concerned with the study of private law relations at the expense of other areas and for promoting a Euro-centric approach. Beyond Europe, as Menski notes, law is often culturally embedded, pluralistic and, in some cases, not geared to the state. Law is not 'just about rules and their codified rule systems, but about a plurality of voices and values, and thus negotiations of difference and diversity at many different levels, and at all times' (Menski, 2007: 195).

The pressing question begging an answer is: How can SL produce theories applicable to non-western settings? Some of the founders of social anthropology were aware of the problem raised here and tried to sensitize their *methodology*, rather than their theories, to the sociocultural and historical contexts of societies and the people they studied. In *Crime and Custom in Savage Society* (1926), Malinowski drew attention to the *function* (as a generic property of all human societies) rather than the *form* (which varies in time and place) of law and through his

ethnographic fieldwork among the tribes of the Trobriand Islands in the Western Pacific Ocean, demonstrated that in non-western societies law was not necessarily dependent on courts, the legal system or the threat of physical sanctions (a point which may be extended to the operations of law in modern societies). He also refuted the western theory of the 'savage man' as the slave of custom and tradition. Malinowski could neither free himself completely from certain basic western assumptions and prejudices (see Malinowski's diaries, 1989 [1967]) nor could he eliminate the gap between the researcher (the subject) and the object of study, yet he saw the role of anthropologists as 'to grasp the native's point of view, *his* relationship to life, to realize *his* vision of his world' (1922: 22). As a researcher he necessarily remained an outsider to his object of study – and there are advantages to being an outsider with experience-distant concepts (for a discussion, see Geertz, 1974). Nevertheless, he knew that he needed a method to bridge the gap between his and the natives' concepts and experiences. Had he instead conducted his study top-down starting with the western assumption and experiences of law in terms of the state, courts and officials of the law, he would have concluded that the 'savages' of Trobriand had no law and no order. The crucial lesson for SL is to start its studies of non-western social environments bottom-up, in order to reflect how law and society are in fact conceptualized by people on the ground. If we agree, as it was maintained by Menski, that law is a culturally embedded phenomenon, then to study it we need to understand how a person living and participating in the culture of law experiences and describes it. Cotterrell expands this point in connection with comparative studies of law in culture:

> Such a study must recognize the integrity, identity and coherence of the culture in which law exists, and the interwoven characteristics that make that culture unique and distinguish it from others. To understand law the scholar will try to operate, as far as possible, in the thought patterns of that law's particular culture. (Cotterrell, 2006b: 711)

Let me reiterate that no single factor can on its own explain the uneven spread of socio-legal research across countries and legal traditions. However, especial attention should be paid to the historical and cultural limitations of theories based on western models of social organization and development, which misrepresent and misunderstand non-western societies by ignoring their social, religious and cultural history. As demonstrated earlier, a great deal of socio-legal research has been motivated by the 'gap' problem which stems from attempts to engineer society or to bring about social change through the imposition of a western model of law. This model among other things claims autonomy from political, economic and religious systems. The 'gap', as defined in terms of state law vs norms of social organization, loses its significance in jurisdictions where law is not positive law in the strict sense of the word, is perhaps linked to religion, and polycentric or pluralistic.

Part 3

Law and regulation in global society

The consolidation of SL as an academic field of research after the Second World War was described above in terms of the spread of industrialization, increased mobility and urbanization, which changed the social landscape of many countries in the West. The spread of globalization has brought about a transformation of the state, the dismantling of welfare systems, the rise of transnational forces and the increased sociocultural diversification of contemporary societies. At the same time, it has made us aware of the necessity to consider the law beyond Europe in its own right (Menski, 2007). The law beyond Europe, however, can no longer be contained to international relations or kept at an arm's length within international human rights, refugee law or the relationships between states. In contemporary society, the more important aspects of this interface are realized *internally* at the level of municipal state law. To borrow from William Twining (2009: 43), a gradual 'diffusion of law' is taking place through the interface 'especially of religious and customary practices' of migrant communities with municipal state law in northern countries. Our analysis can no longer be limited to, say, the interaction between Islamic law and English or German law at the level of international relations or within traditional legal areas such as conflict of laws (for a study of the application of religious arbitration by British Pakistani Muslim women, see Bano, 2007; for a general discussion on recent debates on the role of Sharia in the UK, see Banakar, 2008). These global developments bring about a gradual erosion of the boundaries between legal systems by hybridizing legal cultures.

Sociologists have been debating these same developments since the 1990s in terms of reflexive modernity (Giddens, 1994, 1997), risk society (Beck, 1992) and late modernity (Bauman, 2000). Modernity replaced the claims of tradition by reason and conferred a 'solid' appearance upon social institutions by transforming their authority from one based on traditional relationships to one based on legal-bureaucracy, which facilitated the centralization of institutional power (Lee, 2005: 63). According to Giddens:

> … when claims of reason replaced those of tradition, they appeared to offer a sense of certitude greater than that provided by the preexisting dogma, which traditional authority could not provide. But this idea only appears persuasive so long as we do not see that the reflexivity of modernity actually subverts reason, at any rate where reason is understood as the gaining of certain knowledge. (Giddens, 1997: 39)

The combined power of modern institutions made the expansion of modernity unavoidable, yet this power which reached its peak under industrialization could not totally dominate social developments. As Lee points out, 'charisma and reflexivity' were the solvents that could 'dissolve the existing institutional arrangements' (Lee, 2005: 63). Globalization has enhanced the reflexivity of modernity both at the individual and at the institutional level. The rate of structural change has, according to Bauman (2000), accelerated, causing the 'liquefaction' of the ostensibly 'solid' structures and relations of early modernity. For Bauman, contemporary society is best described in terms of 'liquid modernity', i.e. a 'society in which the conditions under which its members act change faster than it takes the ways of acting to consolidate into habits and routines. Liquidity of life and that of society feed and reinvigorate each other. Liquid life, just like liquid modern society, cannot keep its shape, or stay on course for long' (Bauman, 2005: 1). Under these conditions, agency (the individual social actor) becomes increasingly independent of social structures, which previously exerted a regulating effect on its behaviour, while systems such as polity and law become less capable of responding to sociocultural complexity and moral diversity in their environment by further functional differentiation (Beck, 1992: 2). Social forces, which could be harnessed to reshape society and mould social behavioural patterns under the first stage of modernity, have now either lost their efficacy or became redundant.

Although cyberspace is far from the only arena for this development, the spread of various forms of cybercrime, ranging from child pornography to money laundering, identity theft, terrorism and illegal file-sharing, can exemplify the point made here. As Grabosky and Smith suggested a decade ago, a large part of the growing 'computer-related illegality lies beyond the capacity of contemporary law enforcement and agencies' (2000: 29). This is not only because cyberspace does not recognize social, cultural or national boundaries, because it is a multi-jurisdictional space (offenders can commit a crime in one country while residing in another) or because Internet Service Providers (ISPs) 'have a rather fluid status' (Wall, 2000: 173), but also because social interaction and behaviour in cyberspace are different from everyday face-to-face interactions. This point becomes significant against the growing dependence of communication, trade, commerce, entertainment and education on the Internet, an electronic network which is organisationally different in significant ways from the early institutions of modernity.

At the level of social interaction, we find an increased significance of agency vis-a-vis structures (Beck, 1992). Following Martyn Denscombe (2001: 160), this 'does not imply that "structural" factors cease to exert any influence at all. But it does mean that there is a tendency for them to exert less influence than in the past and for greater significance to attach to individual choices in terms of the creation of self-identities.' The increased significance of agency in relation to structures can have long-term implications for our understanding of regulation, for these modern structural relationships, which could be manipulated through legal and economic policy measures to regulate patterns of behaviour at the level of agency, exert less influence on individual behaviour. An example of this can be found in the widespread infringement of copyrights through file-sharing (Strahilevitz, 2003a, 2003b). The traditional methods of regulating social behaviour have proved inadequate in preventing loosely knit networks or people in cyberspace disrespecting the copyrights of record- and movie-producing companies. The perplexing aspect of this development does not lie in why millions of people choose to download files containing sound recordings online instead of paying for them, but why they allow their fellow anonymous users to upload for free, for as Strahilevitz (2003a: 3) points out 'downloading content from a peer-to-peer network depends entirely on another user's willingness to upload such content'. Strahilevitz explains the puzzle in the following way:

> File-swappers share their content with anonymous strangers mainly because charismatic technologies make the community of file-swappers appear to its users far more cooperative than it really is. In so doing, the networks tap into deeply held social norms of reciprocity that people develop offline and bring with them to cyberspace. (Strahilevitz, 2003b: 509)

Whatever the social psychological mechanisms of the file-sharing phenomenon, the fact remains that the loosely knit community behind it cannot be regulated using traditional forms of legal regulation.

At the level of social organization, we observe the coming into being of public spaces, which exist beyond the reach of formal (official) and informal (unofficial) regulatory mechanisms of early modernity. These formal mechanisms – nationally generated policy and legal measures, backed by the threat of

sanctions against non-compliance and enforced by the nation-state – prove to be ineffective when applied to transnational relations and the mobile elite (cf. Banakar, 2010). Informal (unofficial) mechanisms such as social norms, moral rules and cultural values regarding fair play, social responsibility and trust also prove ineffective because late modern societies no longer aspire to one set of apparently solid moral and cultural values. These spaces provide a fertile ground for the development of neo-modern communities; new forms of community which appear to require some degree of objectivity, but 'are not necessarily fixed or limited and may be fluid and transient' (Cotterrell, 2006a: 65).

Concluding remarks

The societal implications of globalization – including the emergence of transnational forces, transformation of the state, social diversification of societies, growing cultural hybridization, increased uncertainty and liquefaction, etc. – is the broader social context against which all socio-legal research pertaining to contemporary society should be conducted (cf. Twining, 2007). The solidity and timeless *appearance* of early modernity offered an ostensibly durable foundation for building relationships based on trust, social certainty and stability, while providing a rational basis for social engineering and reform. These solid structures are now undermined by the 'endlessly shifting diversity of interests, values, projects and commitments of individuals' (Cotterrell, 2006a: 66). SL's scope of analyses, concerns and debates can no longer be restricted to Europe and North America, where the subject originated and continues to flourish (cf. Gessner and Nelken, 2007). We have to recognize non-western legal systems beyond Europe – many of which are deeply conscious of their pluralistic make-up (Menski, 2007: 189). In addition, the expansion of multiculturalism requires us to take heed of various cultural and religious practices within Western European societies, some of which are considered legal by those who practise them, or considered to have legal implications by authorities. This means that law and legality should be perceived and conceptualized comparatively to account for the interactions between different legal traditions and cultures (Twining, 2000: 255). Perhaps most importantly, we need to consider the possibility that many of our ideas, concepts and theories are historically and culturally conditioned by the recent experiences of western modernity and, subsequently, fail to note the essential characteristics of social order in non-western contexts.

For socio-legal research to meet the challenges of the contemporary global society more effectively, SL must fulfil at least three conditions. First, it needs to remember how its intellectual origins in western culture and history continue to tint the lenses through which it views socio-legal developments, even when considering non-western legal and customary practices. Remembering the past will also help SL to bear in mind that one of its most important properties lies in remaining intellectually open and resisting the imposition of the artificial limits of academic disciplines. Second, SL needs to recognize law beyond the West, the hybridization of legal systems brought on by the interface of western and non-western legal traditions and cultures and forms of non-western law. Limiting our definitions of law to western positive law will amount to reification of law and legality and blindness towards the existing social and cultural sources of law. Finally, SL must look forward and not lose sight of how modernity continues to unfold and move rapidly from industrial to global forms of social organization. The total liquefaction of the solid structures of industrial societies will probably never happen, yet the trend identified by Bauman and other sociologists does signify a shift in the rate and form of social change (for a discussion, see Banakar, 2010). Instead of stressing the possibility of permanence, certitude and stability, the new trend promotes and magnifies social rootlessness, cultural hybridization and shifting identities. By looking forward, SL will be able to capture the ongoing interaction between the solid and liquid forms of social life and map the emergence of new forms of law.

Annotated further reading

Banakar R (2009) Law through sociology's looking glass: Conflict and competition in sociological studies of law. In: Denis A and Kalekin-Fishman D (eds) *The ISA New Handbook in Contemporary International Sociology: Conflict, Competition, and Cooperation*. London: Sage, 58–73.
This chapter presents an overview of the theoretical debates within the sociology of law and asks why sociology has not exerted a greater influence on the development of legal studies. The chapter concludes by reflecting on the potential of law and sociology to learn from one another.

Banakar R and Travers M (eds) (2005) *Theory and Method in Socio-Legal Research*. Oxford: Hart.
This is an edited collection of papers which explore the nature of socio-legal research and the challenges of working within an interdisciplinary field. It introduces some of the main general debates in sociology about method and shows how these are relevant to studying legal topics.

Cotterrell R (2006) *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. Aldershot: Ashgate.

This book is concerned with the sociology of legal ideas. Although richly sociological, it approaches the field of socio-legal research from the standpoint of legal studies. It develops a socio-legal framework for the study of community, culture and society, which it then employs to examine the relationship between legal studies and social theory.

Deflem M (2008) *Sociology of Law: Visions of a Scholarly Tradition*. Cambridge: Cambridge University Press.
This is an advanced introduction to the sociology of law which views and describes the development of the field from a sociologist's point of view. This book contains a comprehensive overview of various schools of thought and theoretical approaches within the sociology of law.

Ehrlich E (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press. (Orig. 1912 *Grundlegung der Soziologie des Recht*.)
This book is a major classic in the sociology of law. Although originally published in 1912, it continues to exert a strong influence on the theoretical development of socio-legal research. It is an important book for anyone interested in the sociology of law, but essential reading for researchers interested in a broader (pluralistic) definition of law.

Gessner V and Nelken D (eds) (2007) *European Ways of Law: Towards a European Sociology of Law*. Oxford: Hart.
This collection of papers introduces the recent debates within the field of socio-legal research and maps out the present state of the sociology of law in Europe.

Travers M (2010) *Understanding Law and Society.* London: Routledge.
This book provides a recent introduction to the sociology of law. It is suitable for students and postgraduate researchers. It presents and discusses both the classical and modern sociological theories of law, while paying special attention to the methodological issues of the field.

Treviño AJ (ed.) (2011) *Classic Writings in Law and Society*. New Brunswick, NJ: Transaction Publishers.
This volume consists of essays on classical writing on law and society. It provides a basis for exploring the intellectual origins of the sociology of law and a better understanding of its potential.

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résumé Beaucoup des prémisses, concepts et idées sociologique originaux concernant l'action sociale, le changement de la loi et la reforme sociale ont étés formulés à partir des recherches fondés sur les sociétés industrielles Occidentales. Les conséquences socio-culturelles de la Globalisation pendant les trois dernières décennies ont, pourtant, modifié la liaison entre Etat, droit et société, en brouillant les distinctions entre le Ouest et le reste du monde, et en transformant les établissements socio-culturelles qui produisent la loi et aménagent la reforme sociale. Cet article questionne jusqu'à quel point la recherche socio-légale à considéré ses prémisses théoriques concernant la liaison entre droit, état et société afin d'apprécier les nouvelles formes d'organisation qui caractérisent les sociétés globales du 21ème siècle.

mots-clés droit ◆ Etat ◆ globalisation ◆ reforme sociale ◆ régulation

resumen La mayoría de las premisas sociológicas originales, los conceptos y de las ideas relacionadas con la acción social, con los cambios legales y con la reformas sociales, fueron originalmente formuladas bajo el estudio de condiciones especificas en sociedades industriales occidentales. Sin embargo, las consecuencias socio-culturales de la globalización en las tres últimas décadas han afectado la relación entre Estado, ley y sociedad, borrando así las fuertes distinciones establecidas entre occidente y el resto del mundo. De esta manera se ha Transformado el entorno socio-cultural en el que es ideada y planeada la regulación y la reforma social. Este ensayo parte del siguiente interrogante; ¿hasta que punto la investigación socio-legal ha reconsiderado sus premisas teóricas con respecto a la relación entre ley, estado y sociedad, para comprender la nueva forma de organización social en la sociedad global del siglo 21?

palabras clave estado ◆ globalización ◆ ley ◆ reforma social ◆ regulación