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The formative sociological theorists were all concerned with social change and in varying degrees with the ways in which law is implicated as both a product and a catalyst of change. As many stressed the primacy of economic changes and market relations, a focus of their discussions is the extent to which law (and other social institutions) is autonomous from economic forces. Durkheim's discussion of law occurs within his analysis of social differentiation and complexity; Weber seeks to identify the relationship between law and rationality; and Marx identifies connections between capitalism and law.

Law and the division of labour: Durkheim

Durkheim's interest in law is secondary to his overriding concern with social solidarity and the scientific study of society. He seeks to analyse law in a general way in order to reveal principles of social organization and collective thinking. Durkheim tends to conceptualize law as derivative from and expressive of a society's morality (Lukes and Scull, 1983: 1–4; also see Smith, 2008a). For Durkheim, social solidarity is the social phenomenon binding individuals together to create a society that exists *sui generis*. Social solidarity has a life of its own and is more than the sum of its constitutive parts. Social life is constituted by social facts, the characteristics of which are external to the individual, they exercise constraints on people and provide sanctions for nonconformity, and they are independent of the actions of particular individuals but exist throughout the social group (Lukes, 1975: 8–15). The most important social facts are 'collective representations' and Durkheim comments:

While one might perhaps contest the statement that all social facts without exception impose themselves from without upon the individual, the doubt does not seem possible as regards religious beliefs and practices, the rules of morality and the innumerable precepts of law – that is to say all the most characteristic manifestations of collective life. All are expressly obligatory, and this obligation is the proof that these ways of acting and thinking are not the work of the individual but come from a moral power above him [*sic*]. (Durkheim, 1974: 25)

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Even though social life is experienced as an objective reality, it is not directly amenable to empirical observation and scientific study. This presents a significant problem for Durkheim's aspirations for a positivistic sociology. He observes that in science we can know causes only through the effects that they produce and, in order to determine causes precisely, the scientific method selects only those results that are the most objective and the most quantifiable. Durkheim asks: 'Why should social solidarity prove an exception?' (1984: 26–7). He proposes that solidarity is a social fact that can only be known thoroughly through its social effects and can be measured. Durkheim says:

[S]ocial solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter. That visible symbol is the law. (Durkheim, 1984: 24)

Durkheim's interest in the evolution of societies and the implications of the increasing division of labour for social solidarity means that he is concerned to identify and classify different types of social solidarity. Where the society or social type is relatively small, there is only a rudimentary division of labour, members are relatively homogeneous in needs and interests, the social structure is relatively simple and there is a dominating collective consciousness, mechanical solidarity prevails. On the other side, where the society has a relatively large population, a complex division of labour causing interdependence between the specialized component parts, greater differences between individuals and a relatively weak collective consciousness, organic solidarity dominates. The method is clear and simple: in order to discern the type of solidarity, it is necessary to distinguish and examine the types of law, specifically: 'Since law reproduces the main forms of social solidarity, we have only to classify the different types of law in order to be able to investigate which species of social solidarity correspond to them' (Durkheim, 1984: 28).

The next methodological question is how to classify and measure different types of law. Durkheim defines legal precepts as rules of behaviour to which sanctions apply. He then makes a bold assumption and claims that 'it is clear that the sanctions change according to the degree of seriousness in which the precepts are held, the place they occupy in the public consciousness, and the role they play in society' (1984: 28). Different legal rules are then measured according to their sanctions, which are of two main types: repressive and restitutive.

Repressive sanctions entail the imposition of suffering or disadvantage on the perpetrator of a crime. The purpose of the sanction is to deprive offenders of their life, fortune, honour, liberty or other possession. Repressive sanctions are usually contained in the criminal or penal law. An offence against an individual offends the entire society and the criminal law reflects this. Penal law is an expression of the shared outrage against acts that offend the collective morality and, where mechanical solidarity prevails; there is only a collective morality. Repressive law corresponds to what is at

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the heart and centre of the collective consciousness, indeed: 'an act is criminal when it offends the strong, well-defined states of the collective consciousness' (Durkheim, 1984: 39). An act does not offend the common consciousness because it is criminal but the converse: the act is a crime because it is condemned. Durkheim observes: 'Crime is not only injury done to interests which may be serious; it is also an offence against an authority which is in some way transcendent' (1984: 43). Ironically, crime serves to reinforce and strengthen the collective consciousness. The common expression of anger enhances social solidarity by reaffirming agreement on social norms. In primitive societies law is wholly penal or repressive in character; it is the people assembled together who mete out justice.

Restitutive sanctions aim to restore the *status quo ante*, they do not necessarily imply any suffering on the part of the offender, who may be an individual or corporate citizen. The aim of the sanctions is to reestablish relationships and restore the previous state of affairs that have been disturbed through the actions or inaction of one of the parties to the relationship. Rules with restitutive sanctions are not established directly between the individual and the society but between limited and particular sectors of society, for example between and among individuals, associations, companies or governments, which they link together. Examples of laws with restitutive sanctions include civil law, tort, commercial law, contract, laws that concern personal status, for example family law, administrative and constitutional law. Violation of these relationships and the obligations thereby established generally does not offend the entire collective consciousness, it inconveniences or harms only the plaintiff or complainant. In civil law cases the judge awards damages or orders specific performance to complete the requirements of the obligation; the sanctions are neither penal nor expiatory. The losing plaintiff is not disgraced nor their honour impugned. While repressive law tends to stay diffused throughout society, restitutory law sets up for itself ever more specialized bodies, for example consular courts, industrial and administrative tribunals. The institutions of the civil law are more specialized than those of the criminal law.

Restitutive law nevertheless remains connected, albeit weakly, to the *conscience collective*: it does not just involve private actors. While restitutive law does not intervene by itself and of its own volition but must be initiated by one or more of the parties concerned, it is society that lays down the law through the body representing it. Society is not absent: if a contract has a binding force it is society that confers that force. 'Every contract therefore presumes that, behind the parties binding each other, society is there, quite ready to intervene and enforce respect for undertakings entered into' (Durkheim, 1984: 71). However, contract law does not enforce all obligations between private parties, only those that conform to the rules of law, that is, obligatory force only attaches to those contracts that themselves have a social value. In the law of contract agreements can be null and void if they contravene the criminal law, entail coercion or conflict with public policy.

The reliance on restitutive laws to regulate many and various types of social relationship indicates organic solidarity: law becomes a way of coordinating the differentiated parts of the society and integrating the diverse needs, interests and expectations. As societies expand, the collective consciousness must transcend all

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local diversities and become more abstract, thereby leaving more scope for individual variations. As a result, transgressing restitutive laws does not evoke the same strong sentiments as violating repressive laws. The evolution of societies from those characterized by mechanical solidarity to those where organic solidarity dominates is indicated by a drift towards more and more restitutive law, while repressive law regulates a smaller quantity of offences and range of relationships.

Durkheim's tight definitional alignment of types of law with types of sanctions is difficult to maintain in practice. The distinctions between criminal and civil law are not necessarily clear. Some kinds of behaviour may be subject to both kinds of laws/sanctions simultaneously. For example, a medical practitioner who causes the death of a patient may be sued in the civil courts for breach of duty and negligence as well as be subject to criminal proceedings for manslaughter or murder. Secondly, some civil laws have repressive and even penal sanctions, for example corporate law may provide for prison sentences for company directors who lie to shareholders; and courts can specify that some orders for damages are punitive, not just aimed at restoring the status quo. Thirdly, civil sanctions are increasingly being used to achieve criminal-law aims, especially crime prevention in some jurisdictions (Cheh, 1991; Green, 1996; Roach Anleu, 1998).

Durkheim anticipates some of these complications when he examines not only the effects of the division of labour on legal patterns but also the growth of governmental power, which he now regards as autonomous from the division of labour. He attempts to articulate general tendencies and suggests that throughout history punishment has passed through two kinds of changes: quantitative and qualitative. He formulates the law of quantitative change as: 'The intensity of punishment is the greater the more closely societies approximate to a less developed type – and the more the central power assumes an absolute character' (Durkheim, 1973: 285). Durkheim qualifies this by saying that a complete absence of limitations on governmental power does not exist empirically. Traditions, religious beliefs and resistance on the part of subordinate institutions and individuals place constraints on governmental power; however, they are not legally (either in written or customary law) binding on the government.

The degree to which a government possesses an absolutist character is not linked to any particular social type. Absolutist governments can be found in a very simple, primitive society or in an extremely complex society. This is why Durkheim seeks to distinguish the two causes of the evolution of punishment: the nature of the social type and of the governmental organ. Accordingly, the movement from a primitive type of society to other, more advanced types may not entail a decline in punishment (as might be anticipated following Durkheim's earlier references to the division of labour), because the type of government counterbalances the effects of social organization. With the advent of the Roman Empire governmental power tended to become absolute, the penal law became more severe and the number of capital crimes grew. During feudal times punishment was much milder than in earlier types of society, until the fourteenth century, which marks the increasing consolidation of monarchical power. Durkheim says that 'the apogée of the absolute monarchy coincides with the period of the greatest repression'; during the seventeenth century

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the galley was introduced, countless corporal punishments emerged, and the number of capital crimes increased because the crimes of *lèse majesté* expanded (1973: 293). Historical research in England documents the enormous expansion of capital crimes during the eighteenth century (Hay, 1975: 18–26; Thompson, 1975: 190–218). Reforms in the late eighteenth and early nineteenth centuries introduced greater leniency into the penal system, suppressed all mutilations, decreased the number of capital crimes and gave the criminal courts more discretion and autonomy from the government.

Durkheim specifies the law of qualitative change as follows: ‘Deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control’ (1973: 294). Punishments become less severe with the move from a primitive to an advanced society. Primitive societies almost completely lack prisons and, where these exist, they are not punishments, but forms of pre-trial detention for those accused of crimes. Durkheim explains this absence in terms of a lack of need. In relatively underdeveloped societies, responsibilities are collective so that when a crime occurs it is not only the guilty party who pays the penalty or reparation, it is the clan or kin group. If the perpetrator disappears, others from the kin group or clan remain. It is not until the late eighteenth century that imprisonment – that is, deprivation of liberty that can vary in length according to the seriousness of the offence – became the basis of the system of control and the use of capital punishment declined. Governmental/political power became more centralized, elementary groups lost their identity and responsibility became individual (Durkheim, 1973: 295–9; also see Foucault, 1979; Smith, 2008b). For Durkheim, this development did not emanate from greater humanity or altruism but ‘it is in the evolution of crime that one must seek the cause determining the evolution of punishment’ (1973: 300).

Durkheim identifies two forms of criminality: religious criminality, which is directed against collective things, for example offences against public authority and its representatives, mores, traditions or religion; and human criminality, which only injures the individual, including theft, violence and fraud. The penal law of primitive societies consists almost exclusively of crimes of the first type; but as evolution advances religious forms of criminality diminish, while outrages against the person increase. The two kinds of criminality differ because the collective sentiments that they offend are different, thus the types of repression cannot be the same. Offences of the first type are more odious because they offend a divine power exterior and superior to humanity. In the second type, as there is not the same social distance between the offender and the victim, the moral scandal that the criminal act constitutes is less severe and consequently does not call for such violent repression: both the perpetrator and the victim are citizens with associated individual rights. In contemporary times, crimes against the person constitute the principal crimes and offences against collective things lose more and more of that religiosity that formerly marked them. So crimes directed against these collectivities – for example, the family and the state – partake of the same characteristics as those that directly injure individuals and punishments become milder. ‘The list of acts which are defined as crimes of this type will grow,

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and their criminal character will be accentuated. Frauds and injustices, which yesterday left the public conscience almost indifferent, arouse it today, and this sensitivity will only become more acute with time' (Durkheim, 1973: 307).

In a later essay, Durkheim offers some thoughts on juridification. 'Each day the involvement of law in the sphere of private interests becomes greater. ... Superior animals have a nervous system more complicated than that of the lower animals; similarly, in so far as societies grow and become more complicated, their conditions of existence become more numerous and complicated, and this is why our legal codes grow in front of our eyes' (Durkheim, 1986: 350). On the one hand, it seems that the strictly individual or personal sphere of life will continue to diminish but, as with progress, the increasing separation of human personality from the physical or social environment creates more liberty at the same time as increasing social obligations.

Problems

Numerous problems exist with Durkheim's exposition of law and its connections with social structure. The following points identify some of the main issues.

First, Durkheim's rendition of legal and social change is too simple and neat to properly reflect social reality. One consequence of this is that Durkheim's conception of law remains very undeveloped. While his view of laws and sanctions tends to conceptualize differences in terms of dichotomies, with the understanding that intermediary types emerge during the process of evolution, there is very little articulation of what these intervening types look like. Durkheim devotes little attention to the institutional structure of law: the organization and actions of those who interpret, formulate, make, apply or use the law. The organization and interrelations between police departments, legislatures, corrections, the legal profession, organizational pressures and career aspirations, as well as legal culture and ideology, do not figure in Durkheim's primary concerns. Often the aims and practices of these organizations and actors are in continual conflict; they are not integrated and the importance of negotiation and processing of cases demonstrate how fluid, inconsistent and contradictory law can be. Only in 'Two laws of penal evolution' does Durkheim begin to examine the independent role of political action and political structures, and thereby acknowledge the state as separate from the collective conscience (Durkheim, 1973: 286–9).

Secondly, in Durkheim's scheme, as law is an indicator of social solidarity, there is little scope for investigating conflicts or discontinuity between them. Such a situation is an aberration, exceptional and pathological for Durkheim. He recognizes that customs might be out of step with the law, they might modify the law in practice or be an antidote to rigid formalism, but assures us that normally customs are not opposed to law (Durkheim, 1984: 25–7). This stance, then, is not very helpful in analysing colonial legal regimes and the imposition of western European law on indigenous normative systems. He casts little attention on the possibility of plural legal systems that coexist and even cooperate. Durkheim's overcommitment to a

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unilinear, evolutionary theory of legal and social change closes off opportunities to theorize alternative models of development and to articulate the various relationships between law and morality (Jones, 1981: 1014).

Thirdly, Durkheim emphasized the external, constraining and controlling aspects of law, thereby precluding systematic inquiry into its positive or enabling aspects as a set of procedural rules permitting individuals and groups to act in certain ways. Nevertheless, he recognized the importance of regulatory law in highly differentiated societies as a mechanism for coordinating different segments of society.

Fourthly, little evidence supports Durkheim's claims that repressive sanctions prevail in primitive societies and that as societies evolve the dominant type of sanction becomes restitutive. Critics identify Durkheim's empirical errors as stemming from his lack of anthropological data, incorrect treatment of the material from ancient societies and an undue emphasis on the religious nature of early law (Barnes, 1966; Faris, 1934; Sheleff, 1975).

Anthropological studies point to the predominance of restitutive laws and sanctions in pre-industrial societies and show that the management of crime does not necessarily involve the collectivity and the expression of penal sanctions (Merton, 1934: 324). Diamond indicates that in the early stages of development repressive law is restricted to a very few serious offences and early law involves a regulated or part-regulated system of private vengeance or feuding. The rise of repressive law parallels the emergence of economic class divisions and state formation (Diamond, 1951). On the basis of a cross-cultural survey of 51 societies, Schwartz and Miller tentatively conclude that their findings contradict Durkheim's major thesis that penal law predominates in simple societies. They found that restitutive sanctions – mediation and damages – which Durkheim believed to be associated with an increasing division of labour, are found in many societies that lack even rudimentary specialization (Schwartz and Miller, 1964). The research suggests that the division of labour is a necessary condition for punishment but not for mediation (Schwartz, 1974). They conclude that an evolutionary sequence occurs in the development of legal institutions, but the direction seems to be the reverse of that which Durkheim predicted. Similarly, an examination of punishment in 48 societies finds that the severity of punishment does not decrease as societies become more concentrated and complex; rather, greater punitiveness is associated with higher levels of structural differentiation (Spitzer, 1975a: 903).

Following Sir Henry Maine's argument in *On Ancient Law* that law progresses from status to contract (Lloyd and Freeman, 1985: 895–7), Durkheim argued that 'the prominence given to penal law would be the greater the more ancient it was' (Durkheim, 1984: 97). In defining the area of the criminal law, Maine uses the criterion of harm caused to another, which also incorporates the area of tort law. Maine indicated that Roman law, the laws of the Germanic tribes and Anglo-Saxon law all provided for compensation: the person harmed normally proceeds against the wrong doer via civil action and, if successful, receives damages (Sheleff, 1975: 20–1). Historical research in early modern Europe also demonstrates that repressive sanctions involving violence and barbarism were exceptional and only exacted for specific types of serious offences and certain categories of offender, whereas civil actions were far more common as a legal remedy for harm done (Lenman and Parker, 1980: 14).

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In tribal societies, religious systems and legal systems were so intertwined as to be almost synonymous. Malinowski conceptualizes law as a system of mutual obligations that constitute definite rules constraining behaviour. He argues that these obligatory rules are 'not endowed with any mystical character, not set forth in "the name of God", not enforced by any supernatural sanction but provided with a purely social binding force' (Malinowski, 1961). The rules of law are the obligations of one person and the rightful claims of another. Explicitly contrasting Durkheim's views, Malinowski asserts: 'We may therefore finally dismiss the view that "group sentiment" or "collective responsibility" is the only or even the main force which ensures adhesion to custom and which makes it binding or legal' (Malinowski, 1961: 55).

Finally, Durkheim's view of the law as a reflection and index of social solidarity assumes that the nature of the law is determined internally, that is, within the structure of the society in question, and not imposed from outside. Many studies of colonial regimes, however, document the imposition of law in an attempt to effect rapid social change, specifically modernization.

In light of the above, we might ask why Durkheim's ideas on law are important. This is a potent question, especially as Durkheim's ideas are empirically unverified and by his own positivistic standards this is a problem in itself. The following are some suggestions.

First, Durkheim's ideas on law are important arguably because it is Durkheim who formulated them. As many sociologists consider Durkheim's writings to be a central foundation of sociology, everything he wrote merits attention. One commentator goes as far as to suggest that Durkheim's writings 'remain the last neglected continent of classic theory in the sociological study of law' (Cotterrell, 1991: 924).

Secondly, Durkheim offers a way of thinking about law and morality that is sociological, as he examines the connections between legal forms and other major dimensions of social life. Discussions of law and legal institutions have traditionally been the domain of jurists, legal historians and philosophers. Rather than viewing law and morality as ideational systems, Durkheim points us to the connections between law and other dimensions of social structure, especially social complexity and individualism, even though his version of the connections is too simplistic and rigid. His writings highlight the importance of examining the implications of broader social changes in social organization and collective sentiment for types of law. Even some critics of Durkheim's views on the evolution from repressive to restitutive law wish to salvage them, suggesting that law is probably 'the outer symbol of the nature of a society' (Sheleff, 1975: 45).

Thirdly, Durkheim's discussion of law offers a good starting point for a sociology of punishment, which surprisingly is a relatively recent subdiscipline (Garland, 1990: 1; Smith, 2008a: 335–7; 2008b). This leads to an examination of the ways in which punishments reflect or are interconnected with other aspects of social structure rather than solely linking them with an ethical system, or an assumption that punishment is the nonproblematic response to criminal deviance (Spitzer, 1975a: 634). A sociology of punishment must investigate how social controls interrelate with political, economic and ideological dimensions of social organization and social change, rather than treating punishment as emergent and spontaneous or imposed (Jones, 1981: 1019; Spitzer, 1979: 208). Examining the connections between the types and severity of punishments

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and such broader social changes as a weakening *conscience collective*, or increasing individualism, becomes the focus of investigation rather than simply assumed. Durkheim's approach also emphasizes the expressive, emotional and symbolic elements of punishment, and the way in which it can be a realm for expressing collective values and concerns. This is an antidote to approaches that emphasize only the instrumental, purposive and control dimensions of punishments (Garland, 1990: 4–8; Rock, 1998; Smith, 2008b).

Law and rationality: Weber

Law was a central aspect of Weber's education and his career as well as his sociological theory. Weber studied law during the height of German historical jurisprudence and was always interested in the complex relationship between legal development and economic history, which distinguishes his approach from idealist legal theory, on the one hand, and economic determinism, on the other (Turner, 1981: 318–23). Weber taught commercial law and legal history at the University of Berlin, but moved to the newly created chair of economics at the University of Freiburg in 1894 (Hunt, 1978: 94–5; Rheinstein, 1954: xxxii–xxxiii). His major analysis of law (*Rechtssoziologie*) is contained in *Economy and Society* (Weber, 1978). Parsons goes as far as to suggest that 'the core of Weber's substantive sociology lies ... in his sociology of law' (Parsons, 1971: 40), and Kronman observes that 'his lifelong interest in the law is reflected in nearly everything he wrote' (Kronman, 1983: 1). Even so, it is only in the last few decades that Weber has been taken seriously as a sociologist of law.

In elaborating a theory of law, Weber pursues his general methodological concern to develop a value-free scientific approach to society, especially to normative and value-laden phenomena. His analysis of law also reflects an interest in comparative sociology and in adopting multi-causal, pluralist explanations (Gerth and Mills, 1977: 55–65; Parsons, 1964b: 8–29). It is sometimes said that Weber's sociology is shaped by its debate with Marxist approaches and a denial of economic determinism; however, that is less relevant to a discussion of law given Marx's sparse writings on the topic (Birnbaum, 1953; Hunt, 1978). Arguably, Weber's approach to law is positivist: he is at pains to provide systematic, formal definitions and to develop a classificatory scheme that implies evolutionary potential (Parsons, 1971: 43; Trubek, 1986: 583–7). At the same time, he demonstrates how legal forms are shaped by economic and social forces and vice versa.

Weber's discussion of law is intimately linked with his concern to explain the distinctiveness of the West, in particular the pervasiveness of rationality in economic and social life. He identifies four main kinds of social action:

- 1 Traditional conduct is performed in the way it is simply because it has always been carried on in that way.
- 2 Emotional action is determined by passions and feelings.
- 3 Value-rational (*wertrational*) action is oriented to value systems – religion, ethics or aesthetics, for example – and is regarded as proper regardless of its immediate practical consequences.

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- 4 Purposively rational (*zweckrational*) action is oriented to a practical purpose and is determined by rational choice. Modern capitalism constitutes the prototype of purposively rational conduct, as it involves conduct oriented towards profit and rational choice of the means to achieve that end. Rheinstein asserts that Weber makes an explicit connection between rationality in economic activity and in legal thought: 'The categories of legal thought are obviously conceived along lines parallel to the categories of economic conduct. The logically formal rationality of legal thought is the counterpart to the purposive rationality of economic conduct' (Rheinstein, 1954: lviii).

Weber distinguishes legal rules from other normative systems, including morality and convention. He writes: 'An order will be called law when conformity with it is upheld by the probability that deviant action will be met by physical or psychic sanctions aimed to compel conformity or to punish disobedience, and applied by a group of men [*sic*] especially empowered to carry out this function' (Gerth and Mills, 1977: 180, also see Weber, 1978: 313–4; Parsons, 1947: 127, emphasis deleted). Weber does not define legal norms in terms of their substance but in terms of their administration: the existence of a specialized enforcement staff (themselves bound by legal rules) distinguishes legal norms from convention or morality. Law is more than the use of coercion to achieve certain ends; it involves recognition that the agents of the law act with legitimacy, that is their sphere of authority is bounded or defined by legal rules, which distinguishes legal compulsion from other forms of coercion or domination. Those people subject to legal regulation consider compliance obligatory. Recognizing the legitimacy of law or the obligation to conform with legal sanctions does not imply that the law being enforced is consensually agreed on, appropriate, just or reasonable. It is the form of a norm, not its substance, which identifies it as law. To the extent that sanctions are applied in accord with a system of rules, law is said to be rational (Kronman, 1983: 30; Trubek, 1986: 727).

Typology of law

Weber constructs a typology of law based on different modes of legal thought. He addresses the process of legal thought in general and recognizes that legal systems can be dominated by such figures as priests, professors, consultants or judges. This typology is an example of an ideal type, that is, a hypothetical construct that involves the theoretical enumeration of all the possible characteristics against which empirical material may be compared. The concept of rationality is central to the typology of law. Both law making – the establishment of general norms that assume the character of rational rules of law – and law finding – the application of established norms and legal propositions deduced via legal thinking to concrete facts or particular cases – can be rational or irrational and can vary in terms of being formal or substantive. Weber's typology of law has four main variants, as illustrated in Figure 2.1.

Formal irrationality In a legal system characterized by formal irrationality, law makers and law finders apply means that are beyond the control of reason.

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| <i>Formal irrationality</i> | <i>Substantive irrationality</i> |
|--|---|
| A prophetic revelation Oracle Lay magistrates, juries | Kadi justice tyrant |
| <i>Formal rationality</i> | <i>Substantive rationality</i> |
| (a) External: English common law (b) Logical: German civil law Continental codified legal systems | Socialist regimes Talmud Church law |

Figure 2.1 Weber's Typology of Law

Recourse to the pronouncements of an oracle or a prophetic revelation, for example, determines legal outcomes.

Substantive irrationality In this situation, decisions are influenced by concrete factors of the particular case evaluated in terms of ethical, emotional or political values rather than general norms. Law makers and law finders deal with particular cases arbitrarily or in terms of their own conscience based on emotional evaluations. Examples include decisions of the tyrant or the kadi (the Middle eastern Islamic judge in the marketplace), who apparently renders decisions without reference to general rules but assesses the particular merits of individual cases (Weber, 1978: 976–8). Weber also considers aspects of the English common law to be irrational, especially the role of the jury in determining questions of fact and the process of decision making guided by human emotion, intuition and persuasion, rather than by logical thought and reasoning. Arguably, in actuality neither the kadi nor the common-law judge administers justice according to arbitrary whim or fancy without considering or being guided by broader values, be they legal, religious or other. Judicial case law requires some degree of consistency that is evidence of rationality. As no two cases are identical, it is impossible to follow precedent except by following the principle on which previous decisions were based (Hunt, 1978: 108–10).

Substantive rationality A legal system characterized by substantive rationality occurs where legal decisions are made by reference to rules that reflect value commitments or ethical imperatives, for example a set of codified religious rules or a political ideology. An example is Jewish Talmudic law or Church Canons, where a central issue is the interpretation of scripture in the light of general principles articulated as part of the religious value system. Implementation of welfare policies, collectivist goals or social justice policies via legislative programmes and principles that determine, or at least influence, judicial pronouncements is also an example of substantive rationality.

Formal rationality This is the most sophisticated form of systematization. A law is formally rational insofar as significance in both substantive law and

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procedure is ascribed exclusively to operative facts, which are determined not from case to case but in a generically determined manner. 'All formal law is, formally at least, relatively rational. Law, however, is "formal" to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account' (Weber, 1978: 656–7). Two kinds of formalism can be distinguished:

- 1 *Extrinsic*: where the legally relevant characteristics are of a tangible, observable nature, they are perceptible as sense data and include the utterance of certain words, and the execution of a signature. The reasons relevant in the decision of concrete, individual cases are reduced to one or more legal propositions, which usually depend on a prior or concurrent analysis of the facts of the case as to those ultimate components that are regarded as relevant by the judge. The most important example of extrinsic systematization is the common law found in England and its former colonies, which operates primarily on a case-by-case accretion of legal principles. For Weber, extrinsic formal rationality tends to exhaust itself in casuistry, case-by-case quibbling about facts and the meaning of words, which draws practitioners towards ethical rather than purely procedural judgements.
- 2 *Intrinsic*: here, the legally relevant characteristics of the facts are disclosed intrinsically via the logical analysis of meaning and, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied (Weber, 1978: 657). Weber confines most of his discussion of formally rational law to this type, drawing on the example of Pandectist German law, which was based on an original set of Roman principles from the sixth century. Only the modern code systems developed out of Roman law and produced through the legal science of the Pandectists reflect, to any really significant extent, attitudes and methods of a formally rational sort (Kronman, 1983: 78; Weber, 1978: 657). Law making and law finding can be logically rational insofar as they proceed on the basis of generic rules that are neither determined by any religious, ethical, political or other system of ideology, nor do they regard as relevant the observance by the senses of formalized acts, but are formulated by the use of generic concepts of an abstract character (Rheinstein, 1954: xlix). The legal propositions are integrated to form a logically clear, internally consistent and theoretically gapless system of rules. All situations of fact must be capable of being logically subsumed within the system (Weber, 1978: 655–6).

Weber maintains that present-day legal science, at least in those forms that have achieved the highest measure of methodological and logical rationality produced through the legal science of the Pandectist Civil Law, proceeds from the following five postulates:

- 1 Every concrete legal decision must be the application of an abstract legal proposition to a concrete fact situation.
- 2 It must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic.

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- 3 The law must constitute a gapless system of legal propositions or must at least be treated as if it were a such a gapless system.
- 4 Whatever cannot be construed rationally in legal terms is legally irrelevant.
- 5 Every human social action must be visualized as either an application or an execution of legal propositions or as an infringement thereof, since the gaplessness of the legal system must result in a gapless legal ordering of all social conduct (Weber, 1978: 657–8).

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Weber's typology of law is not just a descriptive classification but implies evolutionary legal development, with formally rational law being the most advanced type. Weber proposes that the general development of law and legal procedure passes through the following stages:

- (a) charismatic legal revelation through 'law prophets';
- (b) empirical creation and finding of law by legal honoratiorees. This entails the creation of law through adherence to precedent, that is, judicial law;
- (c) imposition of law by secular or theocratic powers, that is, legislative law;
- (d) systematized elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner (Weber, 1978: 882–3).

Weber views developments in contemporary western law as moving from substantively rational law to formally rational law, but argues against any specifically economic causation. He recognizes that there are multiple causes for particular types and degrees of rationalization in law. Nevertheless, logically formal rationality is not evident in other legal systems and is a peculiar product of western civilization. This raises questions of the influence of rational law in the development of modern capitalism and the extent to which economic factors determine the development of law (Hunt, 1978: 118; Kronman, 1983: 118–37). 'Has perhaps, the rise of formal rationality in legal thought contributed to the rise of capitalism; or has, possibly, capitalism contributed to the rise of logical rationality in legal thought?' (Rheinstein, 1954: 1). While Weber acknowledges a link between the distinctiveness of modern capitalism and the salience of the logically formal rationality of legal thought, the precise nature of the relationship remains unclear. He vehemently denies economic determinism and priority, yet notes the indirect influence of economic factors. He states that all purely economic influences occur as concrete instances and cannot be formulated in general rules, but recognizes that: 'certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law' (Weber, 1978: 655).

For Weber, law constitutes a sphere of relative autonomy, influenced in its development by economic forces, but in turn influencing economic and other social

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processes. Developments in economic and legal rationality are parallel; there is no direct causation in either direction. However, the nature of the relationship and interpretations of Weber's articulation of the relationship are the source of a great deal of academic controversy, especially following some commentators' assertions that the logically formal rationality of legal thought is the counterpart to the purposive rationality of economic conduct (Ewing, 1987: 492). Debate on the relationship between legal and economic rationality focuses on the empirical case of England, which experienced the first historical onset of modern capitalism. Yet, the English legal system has never been as formally rational as in Germany, where capitalism emerged later. The English legal system constituted by the common law has been highly durable (and transportable) and was not a fetter to the development of economic rationality.

The common law is an admixture of various stages of legal development, namely:

- 1 Jury trial and royal courts indicate the retention of oracular methods with appeals to the sentiments of the layperson; the verdict is delivered as an irrational oracle without any statement of reasons and without the possibility of substantive criticism. The notion that a jury decision had to be unanimous indicates the reliance on a collective subjective response to the facts as presented. 'Irrational kadi justice is exercised today in criminal cases clearly and extensively in the "popular" justice of the jury' (Weber, 1978: 892).
- 2 The adversarial trial procedure is also an outgrowth of oracle. The judge is bound by formalism, rules and procedures and can only respond to material presented by the parties, unlike the continental inquisitorial system where the judge has more scope for intervention.
- 3 A lay magistracy, especially in the administration of the criminal law, exhibits many of the elements of kadi justice. Magistrates are not bound by the same degree of formalism as higher courts; there is more informal justice, greater scope for value judgements and the inclusion of nonlegal, subjective evaluations to determine outcomes. This is particularly true of the patriarchal and highly irrational jurisdiction of justices of the peace who deal with the numerous daily troubles and misdemeanours of many ordinary people. Cases before the central courts are adjudicated in a strictly formalistic way, with a high cost of litigation and legal services. This denial of justice aligns with the interests of the propertied, especially the capitalistic classes (Weber, 1978: 814, 891).
- 4 The precedent system is a form of substantive irrationality comparable to kadi justice because: 'formal judgements [are] rendered, not by subsumption under rational concepts, but by drawing on "analogies" and by depending upon and interpreting concrete "precedents". This is "empirical justice"' (Weber, 1978: 976). Reliance on precedent is irrational: it is inductive, it generates empirical propositions from particular facts, and allows the inclusion of extra-legal factors into the judicial process due to its emphasis on facts rather than on general principles of law. Nonetheless, a process of internal rationalization does take place, so that precedents that are grounded in facts become a system of general and abstract principles important in determining the outcome of subsequent cases, although their origin is empirical not logical. Weber concludes:

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Even today, and in spite of all influences by the ever more rigorous demands for academic training, English legal thought is essentially an empirical art. Precedent still fully retains its old significance. ... One can also still observe the charismatic character of law finding ... In practice varying significance is given to a decided case not only, as happens everywhere, in accordance with the hierarchical position of the court by which it was decided but also in accordance with the very personal authority of an individual judge. (Weber, 1978: 890)

English law finding is not, like that of the European continent, the application of legal propositions logically derived from statutory texts, but the logical derivation of legal propositions from previous decided cases. While English common law is less highly rationalized in the systematization of legal doctrine, it has been even more highly developed on the procedural side (Parsons, 1971: 42). In explaining the unique character of English law, Weber identifies two key factors:

- (a) the role of the legal profession; and
- (b) the political framework within which the common law developed.

The dominant role of the craft-like English legal profession, characterized by a highly practical orientation to the law with an associated instrumentalism in the utilization of technical skills to advance clients' interests, resulted in a very pragmatic jurisprudence. This form of legal training was also linked closely with the class structure. Training for the profession was monopolized by lawyers from whose ranks, particularly barristers, the judiciary is recruited. Moreover, lawyers actively serve the interests of the propertied, and particularly capitalistic, private interests who turn to the law for property conveyance and the resolution of contractual and other disputes (Weber, 1978: 892). The profession's pecuniary interest in preserving its technical skills was an obstacle to the rationalization of law. The failure of all efforts at a rational codification of law, including the failure to receive the Roman law at the end of the Middle Ages, resulted from the successful resistance by centrally organized lawyers' guilds, which retained legal training as a practical apprenticeship. Rationalization of the law could not occur, because concepts formed are constructed in relation to actual events of everyday life and are distinguished from each other by external criteria, rather than by general concepts formed through abstraction or logical interpretation of meaning. Lawyers' guilds successfully resisted all moves toward rational law, including for a time those from the universities that threatened their social and material position (Weber, 1978: 891–2). In Germany, scholars driven by the requirements of oral and written teaching to conceptual articulation and systematic arrangement of legal phenomena dominated legal thought. On the European continent, legal uniformity was not achieved by a national legislature nor a national supreme court, but by scholars of university law schools.

In a radical tone, Weber comments that capitalism could manage a less rational and less bureaucratic judicature and trial process because this enabled widespread denial of justice to economically weak groups, thus converging with capitalists' interests. The high time and financial costs of property conveyancing – a function of the economic

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interests of the lawyer class – exerted a profound influence on the agrarian structure of England in favour of the accumulation and immobilization of landed wealth (Weber, 1978: 977). The centralization of justice in the higher courts in London and the extreme costliness of legal action and lawyers' fees amounted to a denial of access to the courts for those with inadequate means. This illustrates the clear class dimensions of English law: the development of law in the hands of lawyers who, in the service of their capitalist clients, invented suitable forms for the transaction of business, and from whose midst judges were recruited who were strictly bound to precedent (and therefore conservative). Here Weber gives considerable importance to the value of economic factors, almost instrumentally, in shaping the development of English law. He notes that the resilience of the common law is illustrated in the Canadian situation, where the two kinds of administration of justice confront one another but the common law prevails. This leads him to conclude that: 'capitalism has not been a decisive factor in the promotion of that form of rationalization of the law which has been peculiar to the continental West' (Weber, 1978: 892).

Evaluations of Weber's sociology of law point out that the so-called England problem illuminates the contradictions and ambiguities in his conceptual scheme (Albrow, 1975: 22; Kronman, 1983: 1204; Turner, 1981: 330–5). Hunt suggests that Weber's treatment of the 'England problem' exposes a weakness in his substantive, as opposed to his conceptual, sociology. He fails to advance any coherent solution to the problem that he recognizes, but seeks to explain it by identifying discrete and historically specific causes, bearing no direct relationship to his conceptual sociology (Hunt, 1978: 127). He holds two mutually inconsistent positions: the English legal system has a low degree of calculability, but within the central courts that dealt largely with capitalist classes and their disputes there emerged a high level of calculability arising from the formal requirement of the bindingness of precedent (Trubek, 1972: 746–8). Later, Trubek suggests that the tension in Weber's sociology of law arises from his commitment to the superiority of rational legal thought, but pessimism regarding the cultural implications of formal legalism and the denial of substantive justice (Trubek, 1986: 587–93). Some historians disagree with Weber's argument that going to law was the sole domain of the wealthy, propertied classes and show that instruments and the courts were used by people from various occupations and classes to both avoid and settle disputes in early modern England (Brooks 2004; Churches 2004).

To be fair, Weber's schema is an ideal type and we should expect to find empirical deviations. He is careful to disclaim any economic reductionism and carefully identifies the ways in which the English legal system incorporates elements of formal rationality. To an extent, debates about the empirical validity of Weber's conceptual scheme and his handling of the so-called English problem are artefacts, arising from commentators' assertions about Weber's alleged enthusiasm for the proposition that forms of legal rationality directly correlate with types of economic rationality. All along, Weber is much more guarded against economic determinism and sees economic influences as indirect and mediated by political circumstances and internal legal development. Ewing disputes the claim that Weber was determined to find a relationship between the extreme rationalization in legal thought, which found its clearest expression in the logically formal rationality of German Pandectist law, and the purposively rational

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action of capitalist economic relations (Ewing, 1987: 488–91), and Turner suggests that ‘it would be perfectly possible to make Weber’s position coherent by dropping the assumption that there is an affinity between capitalism and formal, rational law’ (Turner, 1981: 350).

Ewing distinguishes Weber’s sociology of legal thought from his sociology of law and suggests that: ‘For Weber, the “legal order” that was relevant to the rise of capitalism was not a particular type of legal thought but a social order in which law facilitated capitalist transactions by contributing to the predictability of social action’ (Ewing, 1987: 498). It did this through contract. With the extension of the market, legal transactions, especially contracts, become more numerous and complex. The kinds of contracts recognized and enforced by the law are affected by diverse interest groups and, in an increasingly expanding market, those with market interests constitute the most important group. Their influence predominates in determining which legal transactions the law should regulate (Weber, 1978: 669–81). ‘The present-day significance of contract is primarily the result of the high degree to which our economic system is market-oriented and of the role played by money’ (Weber, 1978: 671–2). Bourgeois interests promoted formal legal rationalization in the sense of establishing guaranteed rights, and the evolving body of case law enforced contractual agreements, thereby enhancing predictability in social and economic relations (Ewing, 1987: 500–1). This facilitates market relations by enhancing calculability and the opportunity for rational calculation in relation to the actions of others.

Ambiguity persists around the idea of legal rationality, which is the most important concept in Weber’s sociology of law. When he says that a particular legal institution or mode of thought is particularly rational, at least four meanings are discernable: it suggests a system governed by rules or principles; it designates the systematic character of a legal order; a method of legal analysis; and control by the intellect (Kronman, 1983: 72–5). A larger problem for Weber’s sociology of law is the empirical impossibility of formally rational law; it is impossible to contemplate law as uninfluenced by religious or other values or political ideology. Indeed, the concept of rationality is profoundly value oriented; Weber explicitly considers rational legal behaviour and thought as superior and more advanced compared with irrational legal thought (Hunt, 1978: 100). It is not a coincidence that Weber, a fervent nationalist, saw the German legal system as the most rational. When discussing English law and the formally rational aspects of it – namely the central courts and binding precedent – he himself shows how unjust this formal system is, as it excludes people without means from access to justice or legal resources, thereby perpetuating class division and illustrating the affinity in interests between lawyers, judges and capitalists. This generated a dual legal system: one kind of law for the rich; and another kind – the irrational kadi justice of the lower courts – for the poor.

Law, class and capitalism: Marx

The legal system and law were not specific objects of inquiry for Marx. Indeed, Marx comments that he only pursued law ‘as a subordinate subject along with philosophy

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and history' (McLellan, 1977: 388). Neither he nor Engels wrote on law directly, and they did not offer theories of law, or even a definition; however, many of their writings and concerns dealt with issues of law. Marx's comments on law are scattered throughout material that he wrote alone and with others, thus it is often difficult to disentangle some of his views from those of Engels, whose aims were often more political. The incompleteness, diversity and interweaving with other topics have been the cause of various and often incompatible interpretations of Marx's views on law. Some commentators observe that Marxist theories of law, crime and deviance are at best tenuous and at worst impossible. As Marx does not offer a theory or even a concept of law – since his concern was with concepts of the mode of production, the class struggle, the state and ideology – any attempt to generate a Marxist sociology of law is revisionist and necessarily distorts Marx's original arguments (Collins, 1982; Hirst, 1972).

Nevertheless, considerable scholarship seeks to retrieve Marx's and Engels' writings on law and demonstrates that a Marxist approach to law, especially an understanding of the relationship between law and economic relations, is possible and useful (Cain, 1974; Cain and Hunt, 1979: ix; Vincent, 1993). Marx's fragmentary writings are the source of many critical approaches to deviance and crime that experienced a resurgence during the 1970s (see for example Quinney, 1978; Spitzer, 1975b; Taylor et al., 1973). In the 1990s degrees of disillusionment exist regarding Marxist theory, especially in light of the dismantling of the communist governments of eastern Europe and the way in which laws were used as instruments of repression in those regimes, which, in the post-communist era, are adopting constitutional democracies (Krygier, 1990; Sajo, 1990; Scheppele, 1996).

Generally, Marx's treatment of law insists on establishing its class character and class specificity (Cain and Hunt, 1979: 62). Two different orientations towards law are discernible.

First, a simplified view considers the class character of law as a controlled instrument that protects and advances the interests of the bourgeois class. An example of this conception is contained in the political tract, *The Communist Manifesto*:

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class. (Marx and Engels, 1948: 140)

Earlier, Marx and Engels state that the bourgeoisie 'has converted the physician, the lawyer, the priest, the poet, the man [*sic*] of science, into its paid wage labourers' (Marx and Engels, 1948: 123). The law, as a set of concepts, the recognition of rights and the activities of lawyers operating in the service of the bourgeoisie, is determined by capitalist economic relations.

Secondly, there is a more complex and sophisticated rendering of law as an integral part of economic relations that cannot be reduced directly and simply to class interests and does not only reflect economic conditions (Cain and Hunt, 1979: 63). The increased interest in developing Marxist theories of law indicates wider concerns within Marxian

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scholarship to reject economic determinism (reductionism) and instrumentalism in favour of a more dynamic or dialectical approach, where there is interaction between the economic structure and such social institutions as law, education, religion and the state (Chambliss, 1979: 7–8; Jessop, 1980: 339–41; O'Malley, 1987: 75–9).

In tracking Marx's more complex rendition of law, it is important to note that various phases are discernible in his theoretical development and political purpose that affect the kinds of approaches that he adopted towards law. Roughly, Marx's positions on law and crime can be classified into three distinct kinds (Hirst, 1972: 30).

1840–42, The Kantian–Liberal critique of law Marx advances a position of rationalism and universalism and espouses radical democratic and egalitarian views. He contrasts positive law and official morality founded on mundane interests with the true, universal and free necessity of laws and morality founded on reason. In a newspaper article defending the freedom of the press, Marx says:

Laws are rather positive, bright and general norms in which freedom has attained to an existence that is impersonal, theoretical, and independent of the arbitrariness of individuals. ... Thus it [law] must always be present, even when it is never applied ... while censorship, like slavery, can never become legal, though it were a thousand times present as law. ... Where law is true law, i.e. where it is the existence of freedom, it is the true existence of the freedom of man [*sic*]. (McLellan, 1977: 18)

This is a conception of true law as natural law and superior to bourgeois law, which violates natural rights and undermines natural human equality. One of Marx's most important early statements on law is an article that he published in 1842 in the *Rheinische Zeitung*, a newspaper of which he was editor until the paper was suppressed due to its blatant criticism of the government. The article entitled 'Debates on the law on thefts of wood' deals with a debate in the Rhenish parliament regarding a proposal to make the law prohibiting thefts of wood more stringent. The collection of fallen wood had been a customary right and unrestricted, but laws facilitating the transformation of common land to private property rendered such gathering of wood theft. The extension of the definition of theft to include fallen wood was part of the general attempt under capitalism to privatize all property. The specific proposal would circumvent the courts and enable the gamekeeper to be the sole arbiter of an alleged offence and the sole authority to assess any damage.

Marx considered that the state should defend customary law and communal interests against the pragmatism and self-interest of the bourgeoisie (McLellan, 1977: 20–1). He argues (almost like a criminal defence lawyer) that the gathering of fallen wood and the theft of wood are essentially different: the objects concerned and thus actions in regard to them are different; in the case of fallen wood nothing has been separated from property, it is fallen not felled wood. The owner possesses only the tree but the tree no longer possesses the branches that have fallen from it; the frame of mind, that is the intention of gathering fallen wood, is different from that involved in cutting down trees or branches. '[I]f the law applies the term theft to an action that is scarcely even a violation of forest regulations, then the law *lies*, and

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the poor are sacrificed to a legal lie' (Marx, 1975: 227, emphasis in original). The legal distinctions being made are shaped by class interests. Marx rhetorically asks: 'If every violation of property without distinction, without a more exact definition, is termed theft, will not all private property be theft?' (Marx, 1975: 228). He refers to the partiality in the content of law despite impartiality in its form. Even though the rule of law means universal rather than unequal application to all classes, the effect or substance of the law is biased in favour of bourgeois class interests:

The Assembly ... repudiates the difference between gathering fallen wood, infringement of forest regulations, and theft of wood. It repudiates the difference between these actions, refusing to regard it as determining the character of the action, when it is a question of the interests of the infringers of forest regulations but it recognises this difference when it is a question of the interests of the forest owners. (Marx, 1975: 228)

He continues: 'We demand for the poor a *customary right*, and indeed one which is not of a local character but is a customary right of the poor in all countries. We go still further and maintain that a customary right by its very nature can only be a right of this lowest, propertyless and elemental mass' (Marx, 1975: 230, emphasis in original). Thus Marx shows how legislation – that is, positive law – abrogates the customary rights of the propertyless by offering a transcendental, universal view of law and reason and a conception of natural rights in which private property violates the rights of others, and legislation, protecting the interests of the bourgeoisie, is not collective but contravenes natural law (Hirst, 1972: 30–3). Marx advocates distributive justice *vis-à-vis* property and calls for a more radical democratic state to uphold fundamental rights and freedoms. So here legislation is implicated in direct oppression, which is applied by the bourgeois class to control the propertyless or in order to advance its own economic interests and protect its own property.

1842–44, The Feuerbachian period *The Economic and Philosophical Manuscripts of 1844* are the most important here, where Marx discusses alienated labour, private property and communism, as well as the relationship of capitalism to human needs and criticizes Hegel's abstract philosophy (McLellan, 1977: 75). Law ceases to be an important element in Marx's argument and the conceptual structure of the Manuscripts reduces all particular phenomena – for example the law, the state, the family and religion – to the essential contradiction in society, between the essence of labour as a self-realizing human activity and its alienation in an object, private property (Hirst, 1972: 33). 'Religion, family, state, law, morality, science, and art are only particular forms of production and fall under its [capitalism's] general law. The positive abolition of private property and the appropriation of human life is therefore the positive abolition of all alienation, thus the return of man [*sic*] out of religion, family, state, etc. into his [*sic*] human, i.e. social being. (McLellan, 1977: 89)

1845–82, The formation and development of historical materialism Commentators identify the mid- to late 1840s as a key turning point in Marx's analyses. In 1844 he met Engels, with whom he subsequently

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collaborated, and in 1848 a series of popular revolts across Europe left Marx disenchanted with the revolutionary potential of the working class. He develops a materialist conception of history that emphasizes the way in which productive forces or economic relations of production both constrain and enable social change and social action. These economic forces exist beyond the history of ideas and lie outside the will or intention of individuals.

One of Marx's clearest statements on law was written in this period and is contained in the Preface to *A Critique of Political Economy*, published in 1859. This Preface is also taken as a central statement on two dimensions of social structure, the substructure (economic foundations) and the superstructure, which includes legal, political, religious, aesthetic and intellectual institutions, indeed every facet of life not subsumed within the economic substructure. The relationship between the substructure and the superstructure has been the focus of considerable academic debate. The Preface is widely acknowledged as the starting point for a Marxist approach that seeks to relate law to the economic structure of society (Cain and Hunt, 1979: 48; Collins, 1982: 17; Stone, 1985: 47). Marx writes:

[L]egal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which Hegel ... combines under the name of 'civil society' ... [T]he anatomy of civil society is to be sought in political economy ... In the social production of their life, men [*sic*] enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. (McLellan, 1977: 389)

Marx does not propose that economic relations determine the law or that laws are subservient tools of the bourgeoisie, but that legal relations are rooted in 'material conditions', thus juxtaposing his materialist orientation with idealism and the philosophy of law. The key to understanding the legal superstructure lies within the production relations themselves, which are essentially class relations in capitalist society (Young, 1979: 135). Marx recognizes that laws in capitalist society favour bourgeois interests, as they are entirely congruent with the goals and conditions of capitalism. While granting primacy to economic relations, he does not argue that they determine legal and political institutions, but that the latter are based on the former; the relations of production are the foundation of legal and political institutions and ideologies. This is not a reductionist argument. It suggests that the economic structure sets parameters on the limits of variation of the superstructure, but it does not specify the cause or origin of superstructural forms or the ideologies that correspond to them (Hirst, 1972: 36). The argument does not deny that legal and political institutions can alter economic relations, thus opening up the potential for a dynamic conception of social and legal change.

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The distinction between substructure and superstructure has led to debates about the relationship between economic relations and the legal system and a view of the law as relatively autonomous but not disconnected from economic forces (Cain and Hunt, 1979: 48–51; Chambliss, 1979; Collins, 1982: 77–93; Thompson, 1975). Stone proposes that the notion of legal superstructure contains two distinct but related concepts: one that Engels termed ‘essential legal relations’ and the other, law or judicial practice (Johnstone and Wenglinsky, 1985: 49). Essential legal relations include legal conceptions that are central to a capitalist economic order, such as property, contract and credit. A general theme in Marx’s writing subsequently developed is the notion that bourgeois law is the legal expression of the commodity exchange relationship; it presupposes a free and equal juridical person defined by the idealized characteristics of an individual engaged in contractual exchange (Sumner, 1979: 292). Nevertheless, Marx’s notion of law remains ambiguous. Later in the Preface he states:

At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production, or – what is but a legal expression for the same thing – with the property relations within which they have been at work hitherto. ... With the change of the economic foundations the entire immense superstructure is more or less rapidly transformed. In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic, or philosophic – in short, ideological forms in which men [*sic*] become conscious of this conflict and fight it out. (McLellan, 1977: 389–90)

This passage suggests a more economic determinist view of law, where a change in economic foundations transforms the entire superstructure, and there seems to be little scope for institutions of the superstructure to ameliorate economic conditions or to resist or delay change stemming from change in the substructure. Marx also suggests that economic conditions are not the site of class struggle, but that this occurs within the superstructure. Young suggests that the conflict of which people become conscious in law is not the economic contradiction within production relations, but the conflict between class interests (Young, 1979: 136). The two conflicts are related but distinct. First, phenomena and changes within the legal superstructure arise from phenomena and changes in class relations at the level of the social relations of production. Secondly, law can affect these class relations in a dual process; law is an ‘ideological form’ by which people conceptualize and experience class relations and law is a means by which people can maintain or alter those relations.

Ideology is an important concept in Marx’s writings and in Marxist theorization of law. For Marx ideas, including politics, law, morality, religion and metaphysics, are produced by human actors within the conditions of a definite development of the productive forces in a society. The concept of ideology refers to ideas or forms of consciousness that are shaped by material conditions. In the *German Ideology*, Marx and Engels write:

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The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling *material* force of society is at the same time its ruling *intellectual force*. The class which has the means of material production at its disposal, consequently also controls the means of mental production, so that the ideas of those who lack the means of mental production are on the whole subject to it. (Quoted in Cain and Hunt, 1979: 116, emphases in original)

Marxist theories of ideology use the term in various ways to indicate that the law reflects class interests, thus distorting reality and shrouding the real interests of non-dominant groups. Such concepts as equality, freedom and justice that form part of legal ideals in capitalist society in effect serve to reproduce unequal class relations. Sumner, while eschewing economic determinism, considers law to be 'a conjoint expression of power and ideology. ... Law is a public, ideological front which can often conceal the true workings of a social formation' (Sumner, 1979: 267). However, he denies that law is simply an instrument in the hands of the dominant class and says that: '[L]aw is only an instrument of class rule through the mediating arenas of politics and ideology ... it is not just an instrument of class rule' (Sumner, 1979: 268). While law does not directly reflect unified class interests, neither does it represent the plurality of all views: 'it is a much closer reflection of class inequality than other forms [for example music or literature]' (Sumner, 1979: 270). The idea that the law reflects or distorts social reality or that it entails 'false consciousness' assumes some pre-given relationship between the real and its ideological representation, and removes the empirically important issue of the association between ideas and interests (Hunt, 1985: 13, 21).

In his later writings, for example *Critique of the Gotha Programme* published in 1875, Marx rejects the notion that socialism is a matter of distributive justice. His ideas are founded on an analysis of the mode of production, the relations of production and the productive forces, which enforce a definite mode of distribution in a given social formation. He also rejects the egalitarianism of 'equal rights' and is not interested in abstractions like equality, but in the social relations generated by capitalist and socialist societies (Hirst, 1972: 37–8; McLellan, 1977: 564–70). He considers equality or equal rights to be bourgeois rights, thereby inevitably perpetuating inequality where class differences prevail. While not using this language, Marx recognizes the distinction between formal and substantive equality:

This equal right is an unequal right to unequal labour. It recognizes no class differences, because everyone is only a worker like everyone else; but it tacitly recognizes unequal individual endowment and thus productive capacity as natural privileges. It is, therefore, a right of inequality, in its content, like every right. [He elaborates that not all workers are equally situated; some have families and varying numbers of dependants] ... To avoid all these defects, rights instead of being equal would have to be unequal. (McLellan, 1977: 568–9)

In his defence speech at the trial of the Rhenish District Committee of Democrats, Marx expresses a complex view of law in which he echoes some of his earlier natural

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law presuppositions as well as recognizing that legislation can be the expression of sectarian interests and not resonate with actual social conditions. He states:

Society is not founded upon the law; this is a legal fiction. On the contrary, the law must be founded upon society, it must express the common interests and needs of society – as distinct from the caprice of the individuals – which arise from the material mode of production prevailing at the given time ... [Bourgeois society] merely finds its legal expression in this Code [*Napoléon*]. As soon as it ceases to fit the social conditions, it becomes simply a bundle of paper. (McLellan, 1977: 274)

In addition to social class and the law, it is important to investigate the relationship between the law and the state (Jessop, 1980). The state develops after irreconcilable antagonisms have arisen, when it becomes necessary to have a power seemingly above and independent of civil society, whose function is the alleviation of conflict and the maintenance of order. Marx and Engels appear to be arguing that the capitalist class as a whole, in order to maintain its dominant position, gradually creates a set of linked organizations (the state) with the dual purpose of protecting their common interests, such as the formulation of clear rules for commercial transactions, and of protecting them against external threats from other classes or states. The idea that the law is above or untainted by class politics and divisions, exemplified in the rule of law ideology, gives the illusion that all members of society are protected by the general law, that all have equal legal rights by virtue of the social contract.

Law, legislation and capitalism

Debate exists on Marx's interpretation of the role of law in the transition from feudalism to capitalism. Hindess and Hirst suggest (1977) that law is one of the 'conditions of existence' of the development and reproduction of the capitalist mode of production. They argue that it is a necessary, indispensable and independent presence with specific effects that are necessary and precede the transition from feudalism to capitalism. Marx and Engels' writings suggest that the emergence of a capitalist mode of production requires a generalized system of commodity production with circulation based on exchange value, and the creation of 'free labour' or the separation of agricultural workers from the land in such a way that they become available for industrial employment. When members of the bourgeois class gained control of the political institutions, specific legislation was passed to destroy feudal land tenure, displacing agricultural labourers and thereby creating the landless poor who became the potential 'free' labour force for capitalist production. Law also provides the necessary contractual framework within which labour power itself is transformed into a commodity (Cain and Hunt, 1979: 634). These processes were historically facilitated by coercion and violence, as in many cases of enclosure; however, law also expedited the whole process in developing sophisticated systems of property law, contract, tort and criminal law (Cain, 1974: 145). In *Capital* Vol. 1, Marx writes:

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The advance made by the 18th century shows itself in this, that the law itself becomes now the instrument of the theft of the people's land, although the large farmers make use of their little independent methods as well. The parliamentary form of the robbery is that of Acts for enclosures of Commons, in other words, decrees by which the landlords grant themselves the people's land as private property, decrees of expropriation of the people. (Quoted in Cain and Hunt, 1979: 74)

An outcome of these policies was an increase in begging, robbery and vagabondage. The rise in legislative and punitive severity was aimed at suppressing vagabondage and forcing displaced people to work for very low wages. The process of land enclosure and clearance paralleled the growing severity of laws against vagrancy and refusal to work became a criminal offence. Their combined effect drove the expropriated population towards the labour market and induced the forms of labour discipline required for the capitalist organization of production (Chambliss, 1964).

Marx and Engels also identify the complex way in which legislation, particularly in England from the fifteenth to the nineteenth century, had a determining role in a general, historical process. Significant legislation included the *Reform Act* of 1832, which extended the property qualification for the franchise; the *Poor Law Amendment Act* of 1834, which incarcerated the indigent poor into large workhouses; and factory legislation that regulated the employment relationship and work conditions (Young, 1979: 149–62). Marx and Engels do not advance a conspiracy theory that the bourgeoisie pre-mediates the use of legislation to secure its interests, nor do they argue that all legislation favours the interests of the bourgeoisie to the detriment of the working class. Each piece of legislation had its own specific historical context incorporating contradictory features and effects. Despite facilitating capital accumulation, these laws often recognize workers' rights and represent a cost to factory owners. The *Factory Acts* passed in the first half of the nineteenth century governed the hours of labour and restricted work by women and children. This disadvantaged segments of the bourgeoisie, as it decreased the size of the labour pool and increased wages. However, Marx suggests that the legislative protection of labour, while 'protecting the working-class both in mind and body', facilitates capitalist expansion and accumulation because it 'hastens on the general conversion of numerous isolated small industries into a few combined industries carried on upon a large scale' (quoted in Cain and Hunt, 1979: 88). Implementing such reforms is expensive and small-scale capitalists lose their profit margin and competitive edge and thus are unable to continue.

Conclusion

Of the three sociological theorists examined in this chapter, only Weber viewed law as a central topic of inquiry. Nonetheless, each of the theorists explored the relationships between law – including legal thought, legal institutions and actors – and such other dimensions of social structure as the level of differentiation, the nature of

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social relationships and economic relations. Not surprisingly, their general views on social change and social organization influenced their commentaries on law. Durkheim's attention to law was subsumed within his general focus on the division of labour, social solidarity, the collective consciousness and evolutionary social change. For Weber, changes in the types of legal action and legal thought are inevitably intertwined with broader processes of rationalization. He saw changes in the direction of law linked with economic conditions, but did not advance an economic reductionist conception of law. Marx's discussion of law is the most fragmentary and reflects several shifts in his thinking. His early writing held out more prospects for legislation to facilitate justice, but later emphasized the materialist dimensions of social institutions, including law. The differing perspectives formulated by Durkheim, Weber and Marx, as well as their actual observations on law and social change, have influenced the development of contemporary theories, which are the topic of the next chapter.