

## PREFACE

This book draws on the nature of law to understand the nature of society, but strictly speaking, it is not a sociology of law. It draws on the work of Max Weber, Emile Durkheim, and Karl Marx to reflect on the implications of their theoretical perspectives, but it is not only a study of their work as such. It refers to a variety of writers in different fields as a basis for a critique of these three sociologists, building on this for further explorations and extrapolations about social reality and social theory. It acknowledges the obvious importance of the work of Weber, Durkheim, and Marx, both the initial originality and the subsequent impact, but claims that errors in their factual material and, even more so, biases in their underlying assumptions and inarticulate premises, have, directly or indirectly, subtly or bluntly, affected the resultant overall sociological enterprise.

The book goes back to the very roots of this enterprise, arguing that law, in its substance and procedures, is a window on the world, both a reflection and a formulator of reality, as well as a yardstick for measuring and understanding society. For Weber, Durkheim, and Marx it was law that provided the impetus for much of their sociological frameworks—Weber was a practicing, part-time lawyer and brought his sociological work to its (anticipated, but unfortunately uncompleted) fruition in his analysis of the role of law in society; Durkheim relied on legal data in his first major work as the best kind of what he termed “social facts” available, particularly in dealing with earlier historical periods; Marx openly acknowledged that it was during preliminary studies in law that he gained his significant insight as to its true role as a manipulated and manipulative part of what he later called the super-structure, echoing and serving the economic base.

It is not possible to understand their work without an awareness of the central role of law in their thinking; thus it is only possible to critically evaluate their sociological analyses by examining the legal data they used (or occasionally that they failed to use) and the theoretical frameworks that they and some of their followers formulated in relation to the law. More specifically, it is necessary to focus on those key variables in their thinking that pertain to law, in order to examine and question many of their general factual statements and theoretical constructs; for if they are wrong in their perceptions of the legal situation, they are likely to be wrong in those parts of their larger social theory which are linked to law.

Specifically, I shall argue that they were indeed wrong in much of their use and understanding of law, and that unavoidable questions accordingly arise as to their sociological presentations. I shall, in each case, focus on their key concepts—in the case of Weber, his stance on the unique rationality of the

modern, western world, a rationality expressed also in its law; in the case of Durkheim, his explanation of the importance of social solidarity and the nature of restitutive aspects of modern law, in contrast to an earlier repressive law, as the proof at the heart of his evolutionary theory of society; in the case of Marx, his emphasis on the search for a radically transformed and ultimately just society, and the confusion arising not just in theory but also in subsequent practice, by his failure to adequately clarify the role of law in relation to other aspects of social life.

Each of these three thinkers has left a tremendous legacy that affects both the actual nature of the modern world and the way in which it is perceived. Each of them also has his disciples and followers who have preserved the vital impact of their writings, as well as adding significant extensions of their own. Together, these three writers serve as the focal points of the three major trends of modern sociology—liberal, conservative, radical. Their influence is also felt outside of the academic world in daily ongoing political struggles among protagonists of these ideologies, as well as with other theoretical and ideological frameworks. Nevertheless, there is a common thread to their writings—their commitment to modernism as expressed, for instance, in the evolutionary approach, implicit or expressed, at the core of their work. It is most notably here, however, that their partiality affects their objectivity.

I argue that serious flaws and errors were committed in their analysis of law, partly stemming from their evolutionary models, and that prior assessment of this aspect of their work is necessary in order for a true evaluation to be made of their contributions to social thought; further, that the essence of their work can be best elucidated by moving out of the confines of their regular frameworks. I have tried to do this by using mainly the works of writers outside of the field of sociology, particularly in the field of law, to establish my own critique of their separate works. I do so not only in an awareness of their unquestioned major contributions to social science, but also in an awareness of the strictures that their theories have imposed on it because of their uncorrected flaws, flaws which can best be ascertained by an examination of the legal aspects of their work.

We cannot work within sociology without the full cognizance of the role of Weber, Durkheim, and Marx, but we cannot progress in sociology unless we can move beyond them, divesting ourselves of the false theoretical premises that have emerged from the incorrect perception of factual data. We cannot ignore their importance and impact, but we can avoid the perpetuation of their errors. Most pertinently, we would be well advised to continue their tradition of using law as a key variable in our continuing sociological endeavors, but it is necessary to be sure that we are using law as it exists in reality, and not in the hypothetical constructs or presumed assumptions of biased theoretical or ideological reasoning.

In many respects, much of present-day post-modernism seems to be a reaction to the gnawing and growing doubts as to the accuracy with which the social sciences have described modern society. However, whereas post-modernism tries to distance itself from the problematic paradigms of the past, my work emphasizes the essential validity and value of the leading progenitors of modern social theory, but adds the urgent necessity for re-examining their factual data and their underlying premises and prejudices, divulging and correcting their errors, and then restructuring their theoretical frameworks, shorn of the defects that hampered their work. The dilemmas of present-day society will not be resolved by the replacement of a failed modernism by a fashionable post-modernism. We need not to haughtily reject the past, but to return to the early thinkers and critically and painstakingly enquire as to where—and why—they went wrong.

Rationality for Weber, in both law and society; social solidarity for Durkheim, linked to repressive and restitutive legal systems; social justice for Marx, with the law as part of the super-structure arising out of an economic base—these are their key ideas, the crux of their theories. These major ideas need re-examination not only in the light of existing societal patterns, but also in the context of the societies about which they wrote and in which they lived, for it is more than just the benefits of hindsight that expose some of their fallacies. Some of the work of Weber, Durkheim, and Marx must be reinterpreted as an essential prerequisite for a vital, meaningful, and accurate sociology, relevant to today's realities.

Within this work I focus on law, while also touching on other variables such as philosophy, religion, science, economics, politics, and culture. My overall aim, though, is to suggest directions for further elaboration—on the meaning of community in the modern world, on the role of altruism in social life, on the clarification of ideological definitions, on the need for interdependence across national boundaries, on the strivings for a pluralistic society tolerant of the diversity of human behavior. Above all, I attempt to probe the role of legal coercion in either positively contributing to, or adversely affecting, social cohesion, the specific variable that so concerned Durkheim but that, in one way or another, also lies at the center of the work of Weber and Marx—and of the sociological enterprise in general. Indeed, a key issue for social theory may be the optimal amount of legal coercion required to achieve the maximum amount of social cohesion, consistent with adequate protection for individual and minority group expression.

The basic ideas formulated in this book reflect, to a certain extent, a personal perception of the connection between law and sociology: more specifically, my initial critical reaction to the study of sociological theory which, inasmuch as it touched on law, appeared to me to be in direct conflict with what I, as a student of law, had earlier learned of the nature of law, and

particularly of law in its historical perspective, and as practiced in the customary law of tribal societies. This customary law seemed to have far more positive and desirable qualities than the leading early sociologists were prepared to concede. Whatever the differences between them, their work seemed adversely affected by their commitment to evolutionary concepts, sustained by a deep-seated belief in progress and the inherent advantages of modern society. Social reality and historical evidence indicated that the total picture was far more complex than the almost axiomatic, but unjustified, assumptions of the founders of social science.

My debt of gratitude to those who provided stimulating introductions to the disciplines of law and social science goes back many years. Firstly, to legal anthropology courses at the University of Cape Town, where I was fortunate to have studied under the late Jack Simons, before he was exiled for his opposition to apartheid—and several decades later was, with his wife, to be the first of the exiles to return to the new South Africa; then to sociological studies at the Ohio State University, where Ted Vaughan and Leon Warshay were exciting teachers of theory, open to the queries I posed and encouraging of my early probings.

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Finally, I wish to dedicate this book to the memory of my friend, Mohammed Hashem Abu-Sha'aban, a courageous civil rights lawyer from Gaza, whose belief in and efforts for peace between Israelis and Palestinians were an inspiration to all, on both sides, who had the privilege to know him.