

LAW AND SOCIETY, 10/E
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Chapter 2

THEORETICAL PERSPECTIVES

Outline

- Evolution of Legal Systems
 - Primitive Legal Systems
 - Transitional Legal Systems
 - Modern Legal Systems
- Theories of Law and Society
 - The European Pioneers
 - Classical Sociological Theorists
 - Sociolegal Theorists
 - Contemporary Law and Society Theorists

Outline

- Current Intellectual Movements in Law
 - The Functionalist Approach
 - Conflict and Marxist Approaches
 - Critical Legal Studies Movement
 - Feminist Legal Theory
 - Critical Race Theory
- Summary

Evolution of Legal Systems

- Formal codified law emerges when:
 - Informal controls are no longer adequate for maintaining order
 - Regulatory systems and methods of dispute can no longer be dependent on customs and social, religious, or moral sanctions
 - As society progresses from primitive to modern, law and legal systems become more complex

Evolution of Legal Systems

- Informal social control is adequate in societies that are:
 - Small
 - Homogenous
 - Isolated
 - Little division of labor

Evolution of Legal Systems

- Formal social control is necessary in societies that are:
 - Large
 - Modern
 - Heterogeneous
 - Complex
 - High division of labor

Evolution of Legal Systems

- Primitive legal systems
 - Typically found in hunting/gathering and simple agrarian societies
 - Laws are not written or codified
 - Laws usually coexist with ancient norms
 - Some distinction between substantive and procedural law

Evolution of Legal Systems

- Primitive legal systems
 - No well-developed political subsystem
 - Laws enacted by elders, chiefs, councils, or kin leaders
 - Judges and political leaders are one and the same
 - Emphasis is on court-enacted law
 - Courts and police forces are temporarily assembled to address a problem

Evolution of Legal Systems

- Transitional legal systems
 - Advanced agrarian and early industrial society
 - Economic, educational, and political subsystems are increasingly differentiated from kinship relationships
 - Legal subsystem becomes more complex
 - Greater differentiation between law and tradition, custom, and religion

Evolution of Legal Systems

- Transitional legal systems
 - Distinction between public and private law
 - Distinction between criminal law and tort law
 - Courts become increasingly complex
 - Roles of judges and lawyers are institutionalized
 - Increased bureaucratization of the courts
 - Emergence of stable, somewhat autonomous police

Evolution of Legal Systems

- Modern legal systems
 - All the features of transitional system, but more distinguishable and defined
 - Proliferation of administrative law
 - Courts mediate and mitigate conflict
 - Clearly defined and organized police force
 - Emergence of regulatory agencies
 - Emergence of a stable legislature

Evolution of Legal Systems

- Modern legal systems
 - Law becomes a mechanism of social change
 - Notion of modern law (Marc Galanter's conceptualization of contemporary law)

Theories of Law and Society

- Why did changes in the legal system take place?
- What factors contributed to legal development from a historical perspective?

Theories of Law and Society

- The European Pioneers
 - European view that law is separate from society
 - Natural law
 - Aristotle – law is reason free from passion
 - St. Thomas Aquinas – natural law is part of human nature and human beings participate as rational beings in the eternal laws of God
 - Nature of human beings can be known through reason
 - This knowledge is the basis for the social and legal ordering of human existence

Theories of Law and Society

- Under natural law, European scholars believed:
 - Law in any society was a reflection of a universally valid set of legal principles
- Mid 1800s - natural law is displaced by historical and evolutionary interpretations of law and legal positivism
 - Legal positivism – legal and moral are separate realms

Theories of Law and Society

- Baron de Montesquieu
 - Active in politics
 - Against the absolutism of the French monarchy
 - Law is integral to a people's culture
 - Law is a result of a number of factors-custom, physical environment, etc.
 - No good or bad laws

Theories of Law and Society

- Baron de Montesquieu
 - Separation of powers
 - Legislative, executive, and judicial
 - Influenced the framework for the Constitution of the United States

Theories of Law and Society

- Herbert Spencer
 - British philosopher
 - Theory of unregulated competition
 - Evolution of civilization and law
 - Primitive homogeneity to ultimate heterogeneity
 - Two main stages in the development of civilizations:
 - Primitive/military
 - Higher/industrial

Theories of Law and Society

- Sir Henry Sumner Maine
 - Founder English historical school of law
 - Legal history shows patterns of evolution
 - “The movement of progressive societies has hitherto been a movement from Status to Contract”
 - Along with Spencer, influenced the notion of *laissez-faire*

Classical Sociological Theorists

- Karl Marx
 - Very influential legal theorist
 - *Communist Manifesto*
 - Every society rests on an economic foundation
 - Mode of production
 - Physical or technological arrangement of economic activity
 - Social relations of production

Classical Sociological Theorists

- Karl Marx
 - Three principal assumptions of law
 - Law is a product of revolving economic forces
 - Law is a tool used by the ruling class to maintain power and control over the lower class
 - In a communist society law will wither away and disappear
 - Dialectical materialism

Classical Sociological Theorists

- Max Weber
 - Typology of legal systems
 - Law is rational or irrational
 - Formal law and substantive law
 - Four ideal types
 - Substantive irrationality
 - Formal irrationality
 - Substantive rationality
 - Formal rationality

Classical Sociological Theorists

- Max Weber
 - Three types of administration of justice:
 - *Khandi* justice
 - Empirical justice
 - Rational justice
 - Modern society is the pursuit of the rational

Classical Sociological Theorists

- Emile Durkheim
 - *The Division of Labor in Society*
 - Law is a measure of the type of solidarity in society
 - Mechanical
 - Organic
 - Two types of law
 - Repressive and restitutive

Sociolegal Theorists

- Albert Dicey
 - Theory on the influence of public opinion
 - Public opinion: “the majority of those citizens who have at a given moment taken an effective part in public life”

Sociolegal Theorists

- Albert Dicey
 - “The rule of the law”
 - No one is punishable except for a distinct breach of law
 - The rule of law means total subjection of all classes to the law of the land
 - Individual rights derive from court precedents

Sociolegal Theorists

- Oliver Wendell Holmes, Jr.
 - Supreme Court justice
 - Legal realism
 - Judges are responsible for formulating law
 - Judges exercise choice
 - Judges make decisions based on their conception of justice

Sociolegal Theorists

- Edward Hoebel
 - Professor of anthropology
 - *The Law of Primitive Man*
 - The trend of law
 - No straight line of development in the growth of law
 - Lower primitive societies
 - Grows more complex

Contemporary Law and Society Theorists

- Donald Black
 - Law is a quantitative variable that can be measured by the frequency by which, in a given social setting:
 - statutes are enacted,
 - regulations are issued,
 - complaints are made,
 - offences are prosecuted,
 - damages are awarded,
 - and punishment is meted out.

Contemporary Law and Society Theorists

- Donald Black
 - Five measurable variables of social life:
 - Stratification
 - Morphology
 - Culture
 - Organization
 - Social control

Contemporary Law and Society Theorists

- Roberto Unger
 - *Law and Modern Society*
 - Places the development of rational legal systems within a broad historical and comparative framework
 - Emphasizes the historical perspective
 - Law is indicative of the normative structure of social life

Current Intellectual Movements in Law

- Functionalist approach
 - Key assumptions:
 - Societies must be analyzed holistically
 - Cause-and-effect relations are multiple and reciprocal
 - Social systems are in a state of dynamic equilibrium

Current Intellectual Movements in Law

- Functionalist approach
 - Key assumptions:
 - Perfect integration is never attained
 - Change is a fundamentally slow adaptive process
 - Change is the consequence of outside changes
 - The system is integrated through shared values

Current Intellectual Movements in Law

- Conflict and Marxist approaches
 - Social behavior can best be understood in terms of tension and conflict between groups and individuals
 - Law and the legal system designed to regulate and preserve capitalist relations
 - Ruling class vs. those who are ruled
 - Separation of these classes inevitably leads to conflict

Current Intellectual Movements in Law

- Conflict and Marxist approaches
 - Critics: conflict theory involves
 - Enormous simplification
 - Reification
 - Absence of sensitivity to the complexity of social interaction

Current Intellectual Movements in Law

- Critical legal studies movement
 - Nothing about the law makes any judicial decision inevitable
 - Reject the idea that there is anything distinctly legal about legal reasoning
 - Reject law as value-free and above political, economic, and social considerations

Current Intellectual Movements in Law

- Feminist legal theory
 - Concerned with issues central to a broader intellectual and political feminist movement
 - Emerged from mass political movements
 - Male-dominated jurisprudence perpetuated women as objects

Current Intellectual Movements in Law

- Feminist legal theory
 - Three themes:
 - Women's struggle for equality
 - Male bias in every feature of law
 - Law is not value neutral, objective, rational, dispassionate, and consistent

Current Intellectual Movements in Law

- Critical race theory
 - Concerned with questions of discrimination, oppression, difference, equality, and the lack of diversity in the legal profession
 - Rectify the wrongs of racism
 - Racism is an inherent part of society
 - Commitment to liberation from racism through reason and separation of legal institutions from racist roots