

Modern and postmodern traditions in power and law



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The Law and Power Relations in Society: A Brief Review of Modern and Postmodern Traditions

To achieve an understanding of how, at the beginning of the 21st century, law has come to be understood as a manifestation of social power, it is necessary to place the question within the framework of the dominant intellectual paradigms of the past one hundred years. Such a consideration is relevant because the two major paradigms - namely, modernism and postmodernism - have operated according to contrary assumptions about reality in general and social reality in particular. Modernism, which dominated Western society throughout the 20th century until the 1960s, assumed that all human enterprises should be conducted according to the principles of universal rationality, with a strongly centralizing tendency emphasized in all social institutions. Postmodernism, on the other hand, assumes that human beings are mainly motivated, not by rationality, but by a virtually endless diversity of individual and cultural values. Thus, any overarching theory about how people do, or should, live in society is bound to be inadequate, and social institutions must allow for the full range of human diversity.

In the discipline of sociology Functionalist Theory dominated the modern period, but during the past few decades Critical Theory has come to dominate the postmodern period. To put it simply, Functionalism assumes that society works, because of its inherent harmony, while Critical Theory assumes that society does not work, because of its inherent conflicts. As far as law is concerned, during the modern period a rationally independent and fair distribution of justice was supposed to characterize the legal system. But

during the postmodern period the legal system has come to be regarded by many of its critics as the source of often inequitable i. e. distributions of power, specifically motivated by, and ultimately working for, the interests of the state in general and the cultural elite in particular.

The writings of Max Weber (1864-1920), one of the founding spirits of sociology, illustrate the modern conception of law perfectly. According to Mathieu Deflem (2009: 45-46), Weber argues that the law, like all modern social institutions, including politics and the economy, is dominated by purposive rationalization, posited as the standard for both jurisprudence (legal theorizing or lawmaking) and adjudication (law-finding) in the courts. Rationalization leads to the establishment of the principle of “ the rule of law.” This means that all social conflicts are to be settled in the courts according to established laws that are written down and codified. The rule of law is intended to be impersonal and objective, giving rise to a adage “ Justice is blind,” a central value of Western democracies, sometimes phrased as the sayings “ All are equal before the law” and “ No one is above the law.”

According to Joyce Sterling and Wilbert Moore (1987: 68-69), Weber accepts law as “ creating its own sphere of autonomous social reality,” but its influence is relative, not absolute. “ The more a legal system looks to itself rather than to external social, political, and ethical systems in making and applying law, the greater the degree of relative autonomy.” In the United States legal system The Exclusionary Rule and The Miranda Rule are examples of the law defining itself and acting independently of other social concerns. A second characteristic of legal autonomy is the principle of “

equal competencies” whereby counsel is provided for those who cannot afford it.

Weber distinguishes between subjective rationality, in which values influence individual decisions, and objective rationality, in which principles determine social decisions. He also distinguishes between formal or purely legal law, and substantive or extra-legal law. Similarly, Weber distinguishes between rational law, determined by general principles, and irrational law, determined by individual and contextual considerations. Formal rational law is called positive law, while formal irrational law is called charismatic or revealed law. Substantive rational law is called natural law, while substantive irrational law is called traditional law. In the words of Sterling and Moore (1987: 75), “Although Weber denied that he was posing a unilineal process of rationalization, he did tend to view legal systems as moving from irrational to rational, and from substantive to formal rationality.” Moreover, Weber links his typology of law to his typology of politics. He identified three types of political legitimization: traditional, charismatic, and legal. Once again, according to Sterling and Moore (1987: 76), “As law becomes rationalized, it becomes its own legitimizing principle” – in other words, the rule of law, what Weber calls “formal legal rationality.” This is aided by bureaucracy and professionalization, ensuring “calculability” or predictability in legal matters and making the system self-contained and seamless, almost totally isolated from moral, economic, political, and cultural interests. Weber’s modern rationalistic conception of law has suffered a severe critical attack on various fronts since the 1960s. Austin Turk (1976: 276) sums up the critical legal position perfectly: Contrary to the rational model, law is actually “a set of

resources whose control and mobilization can in many ways . . . generate and exacerbate conflicts rather than resolving or softening them.” In short, power is the “ control of resources” and “ law is power” (280). The mere mention of power in relation to law is bound to evoke the spirit of Karl Marx (1818-1883).

According to Alan Hunt (1985: 12, 20-22), the content, principles, and forms of law are all matters of “ ideology” - that is the reflective distortion of reality in any human claim to knowledge, making Weber’s political legitimation by rule of law nothing more than one opinion among many (sometimes irrational) competing opinions about the proper relation of law and power. Moreover, as Elizabeth Armstrong and Mary Bernstein (2008: 75-76) point out, the modified Marxist argument whereby governments are the only rule makers and social reformers define themselves solely in relation to the state has now become obsolete. According to these authors, culture itself is constitutive of power. If this is true, then law has already lost much of its supposed power merely by definition.

Kim Lane Scheppele (1994: 390-400) provides an excellent overview of critical jurisprudence theory, all of it based on the foundational belief that rational jurisprudence theory masks the fact that political interests or power relationships are what really drives the legal systems of Western democracies. An attack on liberal legalism argues that rights, neutrality, and procedural justice are all fictions designed to maintain social inequalities. The indeterminacy thesis argues that contradictions and inconsistencies within the law make purely rational adjudication impossible. There are many particular manifestations of critical jurisprudence theory. Feminist

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jurisprudence, for example, contends that the way gender is defined socially often makes the law patriarchal and oppressive to women, especially in regard to such issues as abortion, rape, domestic violence, pregnancy, sexual harassment, employment discrimination, child custody, and pornography. Feminists are divided on how to right the wrongs of rational jurisprudence. Some advocate treating women exactly the same as men, while others argue that women should be treated differently. In either case, the objective is to achieve equality with men through the law. Similarly, critical race theory argues that people of color have been oppressed by the law by being silenced or having others speak for them, and they have pleaded vigorously for the opportunity to “tell their stories,” so their culture and their lives can be treated fairly by the law. In fact, the theme of the relationship of power to the law has been most compellingly addressed in terms of the indeterminacy of language itself – an argument expressed by Jacques Derrida in his theory of deconstruction. If the rational rule of law is enshrined as a written code, but language itself is open to a diversity of interpretation, how can the rule of law be trusted not to be abused by the judges and lawyers representing a powerful political élite? Critics would argue that such an abuse is inevitable.

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