

On Pierre Bourdieu's Legal Thought

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Résumé

Commentaires sur Pierre Bourdieu et le droit

Dans cet article, l'auteur analyse la contribution de Bourdieu à la sociologie du droit à partir d'une perspective comparée. L'hypothèse développée est la suivante : les analyses de Bourdieu sur le droit se comprennent mieux si on les examine en ayant à l'esprit l'opposition entre sociologues et juristes en France. De même, l'auteur montre que cette approche du droit par Bourdieu liée à sa théorie de la domination politique est influencée par une vision étato-centrée fortement en relation avec l'histoire politique de la France et qui ne prend pas en compte les mutations actuelles de la régulation juridique. Riche théoriquement, la sociologie du droit de Bourdieu est néanmoins marquée par le contexte dans lequel elle a été produite.

Débats disciplinaires - Droit et politique - Histoire du droit - Pierre Bourdieu - Sociologie comparative du droit - Théorie socio-juridique.

Summary

This essay discusses Bourdieu's contribution to the sociology of law from a comparative perspective. It argues that Bourdieu's ideas about law may be understood through an explication of the disciplinary debates among sociologists and lawyers in France. The paper is divided into three parts. The first section discusses fundamental ideas in Bourdieu's legal thought. The second part locates his thinking within the theory of law and in social theory. Finally, the third part discusses the disciplinary squabbling among French sociologists and jurists, comparing their situation to that of colleagues in other countries, and explains how these misunderstandings had a significant influence on Bourdieu's work.

Comparative sociology of law - Disciplinary debates - Law and politics - Legal history - Pierre Bourdieu - Socio-legal theory.

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- *Sociología jurídica*, Bogotá, Universidad Nacional de Colombia, 2001 ;
- *Derecho y sociedad en América Latina* (sous la dir., avec C. Rodríguez), Bogotá, ILSA Universidad Nacional, 2003.

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Pierre Bourdieu showed remarkably little interest in the study of law. His thought in this area is fragmentary and incomplete. Disciples, followers, and commentators of Bourdieu manifest the same lack of interest regarding the legal phenomena. In the United States, for example, although references to his work are common in studies of law and society¹, in depth analyses on Bourdieu's legal thought by either sociologists or jurists are absent. In France, scholars interested in his legal contributions are no more than a handful of academics, who try to apply his theory to the study of specific legal areas in a somewhat hit-and-miss fashion². Should we then conclude that Bourdieu's ideas are not important to the study of law? I think not. The fact that the law is a marginal topic in Bourdieu's work can better be explained by the uncertain nature of the communications amongst French sociologists and jurists and the relative marginality of the sociolegal perspective in France than by the importance of Bourdieu's legal ideas to the two disciplines. Bourdieu himself recognized on several occasions that he had not dedicated the time and effort to this subject that its importance warranted.

In this essay I propose to discuss Bourdieu's contribution to the sociology of law from a comparative perspective, taking advantage of my position as an external observer to the French sociolegal debate. The principal idea that I wish to develop here is the following: Bourdieu's contribution to theorizing legal phenomena needs to be understood through an explication

1. Above all in those that take a cultural approach: this is the case of Legal Consciousness Studies (on this see Mauricio GARCÍA VILLEGAS, « Symbolic Power Without Symbolic Violence? », *Florida Law Review*, 55 (1), 2003, p. 157-189; ID., « Symbolic Power Without Symbolic Violence?, Critical Comments on Legal Consciousness Studies in USA », *Droit et Société*, 53, 2003, p. 137-161). It is significant, for instance, that in the 2004 Law and Society Association annual meetings, not one paper was presented on Bourdieu's legal thought out of more than seven hundred papers read.

2. In the United States, Patricia EWICK and Susan SILBEY, *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press, 1998. In theoretical studies of sociology of law, Bourdieu is frequently cited to justify a theoretical framework (see for instance: Ruth Margaret BUCHANAN, « Context, Continuity, and Difference in Poverty Law Scholarship », *University of Miami Law Review*, 48, 1994, p. 999-1062; Michael W. MCCANN, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago, University of Chicago Press, 1994; Sally Engle MERRY, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*, Chicago, University of Chicago Press, 1990). For a general assessment see Mauricio GARCÍA VILLEGAS, « Symbolic Power Without Symbolic Violence? », *op. cit.* In France, perhaps the best known repository of the ideas of Bourdieu on the legal field is Dezalay (Yves DEZALAY, Austin SARAT and Susan SILBEY, « D'une démarche contestataire à un savoir méritocratique. Élément pour une histoire sociale de la sociologie juridique américaine », *Actes de la recherche en sciences sociales*, 78, 1989, p. 79-90; Yves DEZALAY and David TRUBEK, « La reestructuración global y el derecho », *Pensamiento Jurídico*, 1, 1997 p. 5-41); other authors in France who have shown an interest in Bourdieu's work include: Alain BANCAUD and Yves DEZALAY, « La sociologie juridique comme enjeu social et professionnel », *Revue interdisciplinaire d'études juridiques*, 12, 1984, p. 1-29; Alain BANCAUD, « Une "constante mobile": la haute magistrature », *Actes de la recherche en sciences sociales*, 76/77, 1989, p. 30-48; Alain BANCAUD, *La haute magistrature entre politique et sacerdoce*, Paris, LGDJ, 1993; Frédéric OCQUETEAU and Francine SOUBIRAN-PAILLET, « Champ juridique, juristes et règle de droit: une sociologie entre disqualification et paradoxe », *Droit et Société*, 32, 1996, p. 9-26; Francine SOUBIRAN-PAILLET, « Quelles voix(es) pour la sociologie du droit en France aujourd'hui? », *Genèses*, 15, 1994, p. 142-153.

of the disciplinary debates amongst sociologists and lawyers in France ; these debates both locate his theory and enable us better to understand the scope and type of discourse that he employs. The paper is divided into three parts. In the first section, I discuss some ideas that I believe are fundamental to the writings of Bourdieu on law. In the second part, I try to locate his thought within the theory of law and in social theory and to show its sociological roots and its sociolegal limitations. Finally, I will discuss the disciplinary squabbling amongst French sociologists and jurists, comparing their situation to that of colleagues in other countries, and I will explain how these misunderstandings had a significant influence on Bourdieu's work.

I. Bourdieu and the Law

A complete exegesis of Bourdieu's legal thought would require the explication of a series of theoretical assumptions proper to his social theory that I lack the space to embark upon in these pages. I will limit myself to the explanation of one point that I consider essential to Bourdieu's conception of the legal field as well as better to understand the French debate that his thought on the question of law has provoked. This point concerns Bourdieu's attempt to construct a theory of legal practice that could transcend the subject/object dichotomy.

In Bourdieu, culture cannot be understood outside the economic conditions in which subjects act. Cultural tastes are never disinterested and can only be understood by starting from a theory of symbolic power³. Culture is a set of dispositions internalized by individuals through a process of socialization that constitute schemas of perception and understanding of the world. These internalized dispositions work only to the extent that there is a certain correspondence with the hierarchical order that they represent. According to Bourdieu, « *il existe une correspondance entre les structures sociales et les structures mentales, entre les divisions objectives du monde social - notamment en dominants et dominés dans les différents champs - et les principes de vision et division que les agents leur appliquent* »⁴. This correspondence fulfills essential political functions in society. Thus symbolic systems are not only tools of knowledge but, first and foremost, instruments of domination. A central objective of Bourdieu's work is to show how culture and social class correlate. In general terms Bourdieu's sociological theory asks the following question : how is it possible that hierarchically based systems of domination persist and reproduce themselves through social practices ? Bourdieu views society as a stratified and differentiated

3. According to Swartz, interpreting Bourdieu : « If his theory of practices extends the idea of interest to culture, then his theory of symbolic power extends culture to the realm of interest with the claim that all forms of power require legitimation » (David SWARTZ, *Culture and Power : The Sociology of Pierre Bourdieu*, Chicago, University of Chicago Press, 1997, p. 89).

4. Pierre BOURDIEU, *La noblesse d'État. Grandes écoles et esprit de corps*, Paris, Minuit, 1989, p. 7.

space in which individuals struggle to defend positions and interests. Now, domination, more than something linked to the use of physical violence, is articulated through, and experienced through, the use of symbolic violence. The ones who are dominant in society do not achieve that position merely through possession of economic capital. They also attain it thanks to the cultural capital that they possess and to the close connection between these two forms of capital. This articulation operates in such a way that the symbolic systems – through which we establish classifications and determine the essential categories of social inclusion and exclusion – have both a cognitive/social organization function⁵ and also a political function of domination. The law is a good example of symbolic system.

The law is a social field – set of objective and historical relations between positions of social actors who struggle for power or capital – in which participants struggle over the appropriation of the symbolic power that is implicit in legal texts⁶. Thus, the law becomes a form *par excellence* of symbolic power – and of symbolic violence – given the possibilities possessed by its practitioners to create institutions and with them historical and political realities through a simple exercise of naming⁷. The internal dynamic of the field is associated with the question of domination. The potential of the law to establish classifications that are essential to the social order – legal/illegal, just/unjust, true/false – entails enormous political power. Legal authority is the privileged form of power, especially in terms of legitimate symbolic violence – monopolized by the State – which the State both produces and practices⁸. The use of the symbolic is an inherently violent practice to the extent to which it imposes meaning on the world and on social relations in which economic and political power lose their original arbitrary and exclusive connotation and appear as something normal and acceptable.

But the law can not be reduced to a tool for political domination. In understanding the symbolic force of law or its legitimizing effect, we must avoid both those materialistic accounts that see only power relations in the explanation of law, as well as idealistic ones that explain it through the general recognition of the universal values expressed in its norms. « We can no longer ask whether power comes from above or from below », says Bourdieu with reference to the debate between critical and doctrinal expla-

5. The cognitive structures which social agents implement in their practical knowledge of the social world are internalized « embodied » social structures (see Pierre BOURDIEU, *La distinction : critique sociale du jugement*, Paris, Minuit, 1979).

6. Pierre BOURDIEU, « The Force of Law : Toward a Sociology of the Juridical Field », *Hastings Law Journal*, 38 (5), 1986, p. 814-853 (p. 817-818) ; French original : « La force du droit. Éléments pour une sociologie du champ juridique », *Actes de la recherche en sciences sociales*, 64, 1986.

7. *Ibid.*, p. 839.

8. This idea of symbolic power is also usefully explored by Georges BALANDIER, *Le pouvoir sur scènes*, Paris, Balland, 1992 ; and Harry PROSS, *Violencia social de los simbolos*, Barcelona, Anthropos, 1989.

nations of law⁹. Bourdieu counters the materialistic accounts, acknowledging the existence of an autonomous social universe capable of the production and reproduction, by the logic of its specific functioning, of a legal corpus relatively independent of external constraints¹⁰. However, he also recognizes that, the legal field has a smaller degree of autonomy than others, such as the artistic or the literary fields, given the essential role it plays in social reproduction.

Since the law is a social field in which a great deal of social and symbolic capital resides, it is not surprising that inside the field there are fierce clashes among its members for the possession, and distribution, of this capital. From this point of view, the theoretical debates inside the legal academy – for instance between formalists and anti-formalists in the early 20th century in United States, or between *iuspositivism* and *iusnaturalism* in 20th century-Europe – seek to consolidate a specific possession-position-distribution of the symbolic capital that is at play both inside and outside the field. Inside the legal field, actors located in different positions and endowed with different dispositions, fight for the chance to pronounce the final word about the meaning and ultimate scope of the law. Such a struggle is not only intellectual but also political, given the fact that the most legal debate has direct implications for the distribution of power and goods that occurs in the political field. Controlling the law is important to social control¹¹. This is why the struggle also takes place outside the field.

The conventional idea that the legal culture of countries, with its debates, its authors, its schools and internal movements, is sufficient to explain the origin, evolution and actual status of the legal traditions and legal practices found therein is seen to be problematic. That explanation ignores the strong connections that exist between the culture and the social and material conditions in which it prospers. « *Il n'est pas trop de dire qu'il fait le monde social, mais à condition de ne pas oublier qu'il est fait par lui*¹². » Structures limit and mold perceptions, discourses, and practices from which social reality is constructed. The subject is as much of the world as the world is subjectivized, says Bourdieu. In short, the internal struggle among legal actors for the appropriation of symbolic power has not been independent of the political context in which it has taken place. Connections between the political and the legal field are multiple and mutually constitutive.

This does not mean, as some theories of the law have led us to believe, that knowledge of the material conditions in which the legal discussion takes place is sufficient to know the outcome. The legal field in its majesty,

9. Pierre BOURDIEU, « The Force of Law : Toward a Sociology of the Juridical Field », *op. cit.*, p. 841.

10. *Ibid.*, p. 816.

11. So, for example, the legal delimitation of the right to property is also a response to poverty and social marginality.

12. Pierre BOURDIEU, « La force du droit. Éléments pour une sociologie du champ juridique », *Actes de la recherche en sciences sociales*, 64, 1986, p. 13 ; English version, p. 839.

its rites, and its shrines is not amenable to being reduced merely to existing economic forces. It is not just a reflection of the material world¹³. Neither is the law pure erudition that can be detached from the social conditions in which it is found. These extremes ignore the existence of law understood as a social field that is relatively independent of external demands – the logic of which is determined, according to Bourdieu, by two factors :

[...] *d'une part, par les rapports de force spécifiques qui lui confèrent sa structure et qui orientent les luttes de concurrence ou, plus précisément, les conflits de compétence dont il est le lieu et, d'autre part, par la logique interne des œuvres juridiques qui délimitent à chaque moment l'espace des possibles et, par là, l'univers des solutions proprement juridiques*¹⁴.

II. Social Theory and Legal Theory in the Writings of Bourdieu

The core concepts of Bourdieu's conception of law are found in his text « La force du droit », published in 1986¹⁵, although elements appear scattered throughout his entire output¹⁶. One of the difficulties with this article is derived from the fact that in it Bourdieu utilizes critical arguments against legal theorists and sociologists alike, with the aim of making his diatribe against the jurists and the legal system more effective. In the course of outlining his legal conception, Bourdieu attacks both sociological and legal theories of law, and both conservative and progressive legal approaches. As a result it is difficult neatly to classify his thought. No legal perspective is privileged in the discussion : Felix Cohen and the realists appear in opposition to Kelsen and the positivists just as Kelsen and Luhmann are opposed to Althusser, and to E. P. Thompson, and that in a presentation of the juridical debate that seems to render all of them inadequate. This suggests that his theory both distances itself from the sociolegal currents or traditions, and also tries to attain a broader scope than that of a simple sociological critique of the legal science of jurists.

What Bourdieu terms a « rigorous science of law » (*une science rigoureuse du droit*) as opposed to a « legal science » (*science juridique*) is a critical explication of law from the field of sociology, that is to say, a *critical*

13. Evgeny PASHUKANIS, *Law and Marxism : A General Theory*, London, Ink Links, 1978.

14. Pierre BOURDIEU, « La force du droit », *op. cit.*, p. 3-4 ; English version, p. 816.

15. See note 12.

16. Above all in some chapters contained in Pierre BOURDIEU, *Choses dites*, Paris, Minuit, 1987, especially : « De la règle aux stratégies », « La codification » and « Espace social et pouvoir symbolique » ; Pierre BOURDIEU, « Habitus, code et codification », *Actes de la recherche en sciences sociales*, 64, 1986, p. 40-44 ; and Id., « Les juristes, gardiens de l'hypocrisie collective », in François CHAZEL and Jacques COMMAILLE (sous la dir.), *Normes juridiques et régulation sociale*, Paris, LDGJ, 1991, p. 95-99.

*sociology of law*¹⁷. Above all, Bourdieu distances himself from the critical or progressive currents of legal thought that dominated France over much of the 20th century. Here I am referring basically to two : materialist perspectives, whether of a marxist (Althusser) or anthropological (Levi-Strauss) cast, and « social » or « communitarian » perspectives. Materialist approaches in large part found a home in the movement *Critique du droit*, created at the end of the seventies. The second, which I may term « social », found initial expression in the *Free Law Movement* represented by Eugen Ehrlich and Kantorovitz in Germany, and later in the work of Gurvitch in France¹⁸. According to this perspective, the law should be an expression of the interests and the existing patterns in communities ; the official law then should be constructed « from below, » out of the social realm.

The fact that Bourdieu's ideas on law could have some influence on the legal thought of lawyers, or so-called *science juridique* (legal science) could be important but it does not seem to be the essential point. It is true that very often, when Bourdieu refers to the law, he treats specific problems of legal theory - such as legal interpretation - but this does not mean that his aim is to construct a theory of law. Bourdieu wanted above all to construct a sociological explanation of law that was consistent with his theory of social fields, and particularly with his concept of *habitus*. Therefore, Bourdieu's theory should not be read, or at least not exclusively, from the starting point of legal science but rather from a sociological perspective. Stated more specifically, jurists who become interested in Bourdieu's work should first immerse themselves in his social and critical theory of rules and habitus, and from there explain subjects such as symbolic violence and the « hypocrisy » of jurists¹⁹. Only in this way can his pejorative statements about law and lawyers be assessed in their correct proportions. So, for example, Jacques Caillousse - in the article published in this journal - questions the coherency of Bourdieu's discourse in the following passage : « *Si l'opposition entre règles et régularités dont Bourdieu fait gros usage n'est en tant que telle en rien discutable, jusqu'où est-elle totalement compatible avec la réflexion qu'il esquisse par ailleurs sur la fatalité de l'interprétation juridique ?* » There would be, according to Caillousse, « *une représentation démiurgique du Droit et du Législateur, totalement incompatible avec la théorie*

17. In the sociology of law it is important to distinguish between at least two types of approaches. Some authors attempt to integrate law as one aspect of the general explication of the workings of society. This view was adopted by the classical sociological theorists and may be termed *sociology of law*. The second approach sets itself the task of explicating the law from a sociological perspective. The authors who are mining this vein generally consider themselves to be working in a current that is critical of formalist legal dogma. This second approach can be called *sociolegal theory*. On this see the classic distinction made by Renato Treves between « sociology in law » and « sociology on law » (Renato TREVES, « Two Sociologies of Law », *European Yearbook in Law and Society*, 1977) ; see also Jacques COMMAILLE, « Sociologie juridique », in Denis ALLAND and Stéphane RIALS (sous la dir.), *Dictionnaire de la culture juridique*, Paris, PUF, 2003.

18. See Pierre BOURDIEU, « La force du droit », *op. cit.*, p. 14, footnote 36 ; English version p. 84.

19. Speaking of an article of Bourdieu (Pierre BOURDIEU, « Les juristes, gardiens de l'hypocrisie collective », *op. cit.*).

de l'interprétation ». Similarly, Violaine Roussel – essay also published in this volume – considers that Bourdieu's idea of formalization of the norms supposes a rigidity in legal practice that does not actually exist and thus should not be contrasted to the flexibility of habitus. It seems to me that the problem with these interpretations lies in the fact that they do not start from Bourdieu's social theory : they do not take into consideration the different meanings that Bourdieu gives to the word *norm* or *rule* : as social regularity or as legal norm.

The meaning of concepts such as rule, norm and habitus in Bourdieu's *théorie de la pratique* is a central point in his work, and for this reason it merits a detailed treatment. Let's begin by examining the following passage from *Choses dites* :

*Le jeu social est réglé, il est le lieu de régularités. Les choses s'y passent de façon régulière ; les héritiers riches se marient régulièrement avec les cadettes riches [...]. Je peux dire que toute ma réflexion est partie de là : comment des conduites peuvent-elles être réglées sans être le produit de l'obéissance à des règles ?*²⁰

Bourdieu's idea was to construct a « model of the game which will not be the mere recording of explicit norms or a statement of regularities [...] ». His purpose was to account for socially regular actions which cannot be explained, either as the result of obedience to rules, or as brute causality. Bourdieu rejects the notion of norm – understood as legal or moral commandment – with the intention of « *échapper aux naïvetés les plus grossières du juridisme qui tient les pratiques pour le produit de l'obéissance des normes* »²¹. Frédéric Ocqueteau and Francine Soubiran-Paillet are correct in suggesting that the rejection of rules – understood as commands that produce obedience – as an explanation of certain social regularities is a rejection that ought to be interpreted in the context of the ethnological debate that Bourdieu unleashed during the 1970s in his *Esquisse d'une théorie de la pratique*²², and in which the concept of habitus was central²³. In other terms Bourdieu's solution for this intermediate model between rules and norms was the concept of habitus. The habitus is

[...] un système de dispositions durables, structures structurées prédisposées à fonctionner comme structures structurantes, c'est-à-dire en tant que principe de génération et de structuration de pratiques et de représentation qui peuvent être objectivement « réglées » et « régulières » sans être en rien le produit de l'obéissance à des règles, objectivement adaptées à leur but sans supposer la visée

20. Pierre BOURDIEU, *Choses dites*, *op. cit.*, p. 81.

21. Pierre BOURDIEU, *Esquisse d'une théorie de la pratique*, précédé de *Trois études d'ethnologie kabyle*, Genève, Droz, 1972, p. 171.

22. Pierre BOURDIEU, *Outline of a Theory of Practice*, New York, Cambridge University Press, 1977.

23. According to Ocqueteau and Soubiran-Paillet, in this debate Bourdieu attempts to differentiate his position from those of Radcliffe-Brown and Malinowski. For Radcliffe-Brown norms are what ensures order in society, and Malinowski's interest lay in individual choices and the way individuals act to achieve their own interests (Frédéric OCQUETEAU and Francine SOUBIRAN-PAILLET, « Champ juridique, juristes et règle de droit : une sociologie entre disqualification et paradoxe », *op. cit.* ; chapters published in English in *Outline of a Theory of Practice*).

consciente des fins et la maîtrise expresse des opérations nécessaires pour les atteindre et, étant tout cela, collectivement orchestrées sans être le produit de l'action organisatrice d'un chef d'orchestre 24.

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The concept of habitus then – always viewed within this sociological perspective of explication of social practices and their regularities – is intended to move beyond the institutionalized epidermis that makes up the legal rules by which persons behave or do not behave in a certain manner. As Jacques Bouveresse wrote : « As the habitus is not necessarily of a mental nature (there are forms of habitus which are simply corporeal) it is independent of any distinction between the conscious or unconscious, and it is not less independent of distinctions like that between the product of a simple causal constraint and an action that is “free” in that it escapes any constraints of this nature ²⁵. » The habitus is then an intermediate concept between rules – in the legal sense – and causality or rules in a physical sense.

The pejorative sense in which Bourdieu often uses terms such as rule or norm finds its explanation in his structural theory of practice (*théorie structurelle de la pratique*) where he attempts to connect culture, structure, and practice. Norms are accorded this treatment, in the first place, because they are seen as obstacles to real knowledge of social practices, or in Bourdieu's own words for the knowledge of « the immanent principle to practice » that is to say, habitus. In the second place, the meaning and scope of norms is generally monopolized by jurists, the owners par excellence of symbolic violence in the society, through the so-called *science du droit*. For this reason Bourdieu speaks more disparagingly of lawyers than, for example, sports figures.

However, as outlined above, Bourdieu himself was careful not go too far in his condemnation of the legal sphere : « *La réaction contre le juridisme en sa forme ouverte ou masquée ne doit pas conduire à faire de l'habitus le principe exclusif de toute pratique, bien qu'il n'y a pas de pratique qui n'ait l'habitus à son principe* ²⁶. » The legal rules are a type of substitute that intervenes when the habitus is incapable of fulfilling its regulatory functions. The law is, then, the exception whereas habitus is the rule ²⁷. Exceptions arise in moments of crisis in the habitus : « *On peut poser en loi générale que plus une situation est dangereuse, plus la pratique tend à être codifiée. Le degré de codification varie comme le degré de risque* ²⁸. » Here we see the virtue of codifying a rule which is that it allows, like all rationalization,

24. Pierre BOURDIEU, *Esquisse d'une théorie de la pratique*, *op. cit.*, p. 175.

25. Jacques BOUVERESSE, « Rules, Dispositions, and the Habitus », in Richard SHUSTERMAN (ed.), *Bourdieu : A Critical Reader*, Oxford, Blackwell, 2000, p. 53.

26. Pierre BOURDIEU, *Esquisse d'une théorie de la pratique*, *op. cit.*, p. 25.

27. This of course is particularly clear in those societies in which there is no developed legal order, such as, for example, among the Kabyle people.

28. Pierre BOURDIEU, *Choses dites*, *op. cit.*, p. 96.

« *une économie d'invention, d'improvisation, de création* »²⁹. But the form or the codification does not operate simply through its technical efficiency in clarifying or rationalizing, according to Bourdieu :

Il y a une efficacité proprement symbolique de la forme. La violence symbolique, dont la réalisation par excellence est sans doute le droit, est une violence qui s'exerce, si l'on peut dire, dans les formes, en mettant des formes. Mettre des formes, c'est donner à une action ou à un discours la forme qui est reconnue comme convenable, légitime, approuvée [...]. La force de la forme [...] est cette force proprement symbolique qui permet à la force de s'exercer pleinement en se faisant méconnaître en tant que force et en se faisant reconnaître, approuver, accepter, par le fait de se présenter sous les apparences de l'universalité - celle de la raison ou de la morale 30.

Hence, for Bourdieu, the law is not reducible to a question of interests – as Weber or Marx thought – just as interests are not reducible to law. Hence, the first lines in his article « *La force du droit* », in which Bourdieu tries to construct a relatively autonomous legal sphere between the positivist formalism of Hans Kelsen, in which the subjective view dominates, and the materialism of Louis Althusser, in which the objectivist perspective does. As I said before, we are here assessing Bourdieu's challenge to construct a theory of legal practice that could transcend the subject/object dichotomy. It is :

[...] un univers social relativement indépendant par rapport aux demandes externes, à l'intérieur duquel se produit et s'exerce l'autorité juridique, forme par excellence de la violence symbolique légitime dont le monopole appartient à l'État et qui peut s'assortir de l'exercice de la force physique 31.

While Bourdieu is interested in the law as a social field in which an important part of the mechanisms of social production and reproduction are defined and executed, Caillosse is interested in the law itself and the possibilities of constructing a science of law. In his analysis of Bourdieu, Caillosse emphasizes, among other points, one that, in my view, is somewhat secondary : his pejorative view of lawyers and of their claims to possess their own rational and politically neutral truth. Caillosse could be correct in his complaint about Bourdieu's negative bias in that it is true that the law is something more than a symbolic pantomime maintaining the political power of certain social interests. However, in my view Bourdieu's emphasis is more rhetorical than analytical ; Bourdieu is trying to deconstruct the myths of the so-called *science juridique*, insofar as the law is a bastion of symbolic violence that allows the reproduction of the structure of social domination and the perception of the legitimacy of that process.

The above does not mean that Bourdieu's conceptualization of the law is invulnerable to criticism. The theory of Bourdieu can be challenged either as a critical theory or as a flawed critical theory. My reservations, which I

29. *Ibid.*, p. 103.

30. *Ibid.*

31. Pierre BOURDIEU, « *La force du droit* », *op. cit.*, p. 3 ; English version p. 816.

think I share with Professor Caillosse, address the second point ; that is, they refer to the inadequacies of its critical proposition. Although as stated above, the sociological theory of Bourdieu on law has great explanatory power and represents a significant advance over both materialist and communitarian critical theories, it has also important limitations. The emphasis on symbolic efficacy of law as an expression of legitimated state violence gives one the impression that the law is part of a hegemonic monolithic institutional order and that the fissures in this order are insignificant. This view of the state and of law has obscured the emancipatory potential which occasionally arises in the discourse on rights ³².

These statist and monopolistic outlook on the law is closely linked to French history and to the relationship of law and political power in that history. Since the French Revolution the law is conceived of as a matter of legislation, a fact which led to a clear separation between, on the one hand, legal doctrine aiming at being formalistic and « scientific, » and on the other hand, legal critique or sociolegal perspective, being political and ideological. Critical or anti-formalistic perspectives in France, and to a lesser extent on the European continent, usually dismiss legal autonomy and overestimate the sociological and political dimension of law.

In the Anglo-Saxon tradition, the role of the judge encouraged an interpretivist and political understanding of law. Whereas, in England and USA the term *law* relates to political power and does not necessarily include a concept of *right* - see for instance John Locke or the American Declaration of Independence -, in Europe terms like *droit*, *recht*, *diritto*, *derecho* had a larger meaning, including what was right. This is why critical view in Europe tends to get rid of the *law* in order to highlight rights as social rights not legal rights.

For anti-formalists and socio-legal movements in France - as well as in Latin American countries - law was seen as *political power* that ought to be denounced and replaced by another power and another law. This conception is part of a long European tradition rooted in the beginnings of the absolute monarchy in France at the dawn of the 17th century ³³. According to this, the law is the expression of state sovereignty embodied in the monarch. The French Revolution did not break with this tradition. On the contrary, it accentuated it by proposing the idea - initially put forward by Sieyès and later by Robespierre - of popular sovereignty. The writings of Rousseau, interpreted by Sieyès, did not leave much room for political critique through law.

32. See Michael MCCANN and Tracy MARCH, « Law and Everyday Forms of Resistance : A Socio-Political Assessment », in Austin SARAT and Susan SILBEY (eds.), *Studies in Law, Politics, and Society*, London, JAI Press, 1995 ; Michael MCCANN, « Resistance, Reconstruction, and Romance in Legal Scholarship », *Law and Society Review*, 26 (4), 1992, p. 733-749 ; Boaventura DE SOUSA SANTOS, « Oppositional Postmodernism and Globalization », *Law and Social Inquiry*, 23 (1), 1998, p. 121-139.

33. On this point, see for instance Jean VAN HOUTTE, « La sociologie du droit ou les limites d'une science », *Droit et Société*, 3, 1986, p. 171-186.

In short, Bourdieu's critique of law should be understood as an attack on a particular type of political domination through law that had a particularly successful moment in French political and institutional history. That model, nowadays, is in crisis, in France and throughout the world, or at least it no longer has the force that it once had. This does not necessarily mean that domination is less effective ; simply that it utilizes multifaceted and frequently opposed conditions. In the specific case of the law, Bourdieu's theory does not enable us to understand the intricate problems of inter-legality and legal pluralism that occur in contemporary societies as an outgrowth of the confluence of national, local and transnational orders that can be and often are mutually exclusive. Bourdieu had a view of the legal field that was too nationally rooted, as authors like Dezalay and Garth have assumed the task of disproving through their own Bourdieu's theory of social fields.

III. Bourdieu's Approach to the Disagreements between Lawyers and Sociologists

One of the first surprises for researchers new to the sociolegal debate in France is the enormous importance that disciplinary differences between jurists and sociologists assume in this country. In general terms, these disagreements have been fueled by political-cultural factors : opposing perceptions of the world owing to the social and institutional emphases of the two profession ; differentiation between lawyers and sociologists in terms of hierarchal social status which leads to conflicting political opinions, etc.³⁴. Of course this does not happen only in France ; different cultural and political sensibilities characterize the legal and sociological communities in other countries as well. However, what in other countries is a difference in the focus, in France is almost antipathy. I will use Bourdieu's social theory to assess this point.

The clash between lawyers and sociologists in France may be associated with the type of legal doctrine created out of the French Revolution, and the strength with which lawyers exert the monopoly of legal interpretation inside this legal doctrine. Let me explain. In each legal tradition different protagonists of the legal debate - judges, legislators, and professors - have attained different positions and amount of power. The contrast between Common Law and Civil Law jurisdictions is rooted in the political and social history of England and the continent. Since 1200 England has possessed a unified legal system called, for this reason, common law. This is even more important if we take into consideration the fact that France reached the stage of one code of laws for the whole realm just before the Revolution of

34. André-Jean ARNAUD, *Le droit trahi par la sociologie*, Paris, LGDJ, coll. « Droit et Société. Recherches et travaux », 1998 ; Jacques COMMAILLE, « La sociologie du droit en France. Les ambiguïtés d'une spécialisation », *Sociologia del diritto*, 16 (2), 1989, p. 19-42.

1789 and Germany accomplished the same task in the 19th century³⁵. Codification on the continent was the response, brought about by the Enlightenment, to a great need for rationalization and organization. English lawyers never felt such a need. Since feudal times the King of England had been able to organize and centralize judicial practice so the local jurisdiction and feudal courts diminished in importance.

In France, efforts aiming at the consolidation of a unified legal system came about with the creation of the absolutist state in the 16th century³⁶. But the French legal system was not really unified until the end of the Revolution, when the Civil Code was put in place. Since the Revolution, legislation is alleged to be the source of the legal system whereas the role of the judiciary is relegated to the task of mechanical application. Not only did the law acquire a great deal of formality and rationality but also there was a clear separation between the political function of creation – corresponding to the legislators – and the technical function of adjudication, which was supposed to be driven by free value judgment³⁷. This is why the legal mainstream never accepted the limitation on the autonomy of the law vis-à-vis social facts and political powers. The main debate vexing legal scholars pitted scholars supporting legal positivism against those advocating natural law. It was framed to answer the question of whether or not the legal system was autonomous from fundamental values, not from social values or constitutional values.

In short, the dominance of professors and lawmakers in the process of fostering autonomy in the French legal system favored a formalistic type of legal science, divorced from practice, and self-sufficient. This in turn accentuated the importance of the symbolic capital earned by protagonists in the legal field, individuals whose fate was closely tied to that of the dominant interests. This particular historical formation not only created a type of legal critique that reduced law to political manipulation, as explained above, but also established epistemological barriers to communication between sociologists and lawyers. It is important to bear in mind that Bourdieu writes in this very particular French context, and therefore it is also important to understand his theory from that context.

Conclusion

In this essay I have tried to bring a historical and comparative perspective to the debates on law and society in France and particularly to the as-

35. R. C. VAN CAENEGEM, *Judges, Legislators and Professors: Chapters in European Legal History*, Cambridge, Cambridge University Press, 1987, p. 94.

36. Perry ANDERSON, *El Estado Absolutista*, Madrid, Siglo Veintiuno Editores, 1979.

37. A different development took place in America over the course of the 19th century, with the consolidation of the idea that judges make a significant portion of the law. The explanation of this trend had to do with the history of judges in America and their relation to political power. On this point see R. C. VAN CAENEGEM, *Judges, Legislators and Professors*, *op. cit.*

assessment of Bourdieu's conception of the legal field within this debate. My first point has been that such an assessment should be contextualized in the disciplinary disputes and prejudices reigning between sociologists and lawyers, which have been determined by the history of legal doctrine and legal formalism in France. Because Bourdieu's view of the law did not escape this disciplinary dustup, it is useful to put his thought in context, beginning from the particular features of the legal field that he had in mind.

In the second place, criticisms of Bourdieu's thought on law are often launched from the theory of law (*jurisprudence*) and thus tend to underestimate the importance of his social theory and especially his idea of habitus, to the comprehension and correct appraisal of his contribution on legal phenomena.

In the third place, the sociolegal debate in France frequently hides a deeper and more fundamental debate between *consensus* and *conflict* theories, which likewise implicates a division between progressive and conservative theories. Generally speaking, the true debate on the sociological meaning of law - and this is what Bourdieu's work takes up, and not a science of law - is determined by theoretical presuppositions on social theories, *i.e.* the author's position on a theoretical spectrum on which these two theories are at the extremes³⁸. So, for example, lawyer's reservations about the idea that the law is a particularly efficient form of symbolic violence exerted legitimately by the state, originate - mostly unconsciously - in a sort of consensus, or liberal, conception of society rather than in a legal conception.

Finally, the critical and disciplinary emphasis in Bourdieu's thought on the law obscures the political complexity of law in contemporary society and, particularly, the ambiguous nature of rights as tools for social emancipation. Although they generally operate to bolster state legitimacy (symbolic efficacy) they also have the potential to be appropriated by social movements and to serve as a political weapon against hegemonic power. Bourdieu's lack of acknowledgment of this complexity is closely linked to the French history of rights and the political role that they have filled. Nevertheless, Bourdieu's critical theory represents an advance in comparison to other critical theories, which, in France, have basically been related to the work of Durkheim or Marx. Pierre Lascoumes, for example, has argued that those countries in which legal sociology developed under the influence of Durkheim - such as France, Belgium, and Spain - created a positivist legal sociology that little by little lost its independence from law³⁹. On the other hand, the countries influenced by Max Weber's legal sociology - Anglo-Saxon countries, Germany, and Italy - put more stress on interpretation and were more flexible in epistemological terms, which facilitated its develop-

38. On the concept of theoretical presupposition see Jeffrey ALEXANDER, *Twenty Lectures*, New York, Columbia University Press, 1987.

39. Jacques COMMAILLE, « The Law and Science : Dialectics Between the Prince and the Maidervant », *Law and Policy*, 10 (2/3), 1983, p. 253-265.

ment⁴⁰. The scholarly work of Pierre Bourdieu may represent a third path – closer perhaps to Weber than to Durkheim – with the potential to move the studies of law and society ahead. But of course these ideas deserve more time to be developed⁴¹.

40. See Pierre LASCOUMES, « Le droit comme science sociale. La place de E. Durkheim dans les débats entre juristes et sociologues à la charnière des deux derniers siècles (1870-1914) », in François CHAZEL and Jacques COMMAILLE (sous la dir.), *Normes juridiques et régulation sociale*, Paris, LGDJ, 1991, p. 39-49 ; also Évelyne SERVERIN, *Sociologie du droit*, Paris, La Découverte, 2000, p. 46, and Michael POLLAK, « La place de Max Weber dans le champ intellectuel français », *Droit et Société*, 9, 1988, p. 189-203. In the French context the underestimation of Weber's sociology of law lies also in the political opposition between two French sociologists : Raymond Aron – defending Weber's ideas – and Georges Gurvitch drawing upon Durkheimian social theory (Michael POLLAK, « La place de Max Weber dans le champ intellectuel français », *op. cit.*), the latter being the most important representative of French sociology of law in the mid-twentieth century.

41. I would like to thank Director Jacques Commaille for his invitation to participate in this discussion on the work of Pierre Bourdieu and its implications for the study of law.