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The Prospect for Change:

The Question of Justice in a Law & Society Framework

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Abstract

• What is the law and society framework and where has it gotten us? A student in a classroom might raise their hand and offer “understanding legal pluralism” as a possible answer. However, the conceptual problem with legal pluralism is the coexistence of potentially conflicting bases of justification. Given this, desiring to understand how the law shapes the structural underpinnings of whichever “legal” phenomena and its “ongoing transformation”, is nevertheless an immense achievement that stops short of its underlying goal – the achievement of human dignity through human rights. For example, to talk about ‘multi-stakeholder consultations’ and other pithy phrases that describe different kinds of ‘collective actors’ that can come together and have a “meeting of the minds” is to conflate the moral principle on which a ‘human right’ stands with a legal framework based on cooperation of independent actors. As we try and come together to regulate for substantive change, it is necessary to recognize how the discourse we engage in divides us further. The law and society framework needs a new direction.
Outline

1. The Terms and Conditions of Socio-Legal Research?
2. The Logic of Discovery and…
   a. The Development of the Law and Society Framework
   b. The Unit of Analysis in Socio-Legal Research
3. The Prospect for Change
4. The Prospect of Cognitive Mediations
Questioning the ‘Terms and Conditions’ of Socio-Legal Research

• Outside of a ‘natural law’ perspective, we sociologically face the problem of theoretical pluralism in the identification of ‘legal’ phenomena.

• This is important for basic assumptions concerning validity and argumentation.

• As socio-legal scholars, we seem torn between “order” and “conflict” in how we understand what the organizing principles of society are and our ongoing debate between “is” and “ought”.
The Development of the Law and Society Framework

Classical Sociologies of Law & Traditions of Jurisprudence

The Move From Scientific Jurisprudence to Legal Sociology

Legal Realism

Present

The Law and Society Movement
• + Many Other Parallel 20th Century Movements

And, Sociological Jurisprudence
# What is law?

## Classical Sociological Approaches
- Karl Marx
- Max Weber
- Emile Durkheim
- Eugen Ehrlich
- Leon Petrazycki
- N. S. Timasheff

## Post- Classical Sociological Approaches
- Structural Functionalism
  - Donald Black
  - Pierre Bourdieu
  - Michel Foucault
  - Jürgen Habermas
  - Niklas Luhmann
  - John Rawls
  - H.L.A. Hart
  - Ronald Dworkin

## 20th Century Movements
- Critical Legal Studies
- Empirical Legal Studies
- Law and Economics
- Law and Literature
- Law and Psychology
- Legal Formalism
- Legal Realism
- New Legal Formalism
- New Legal Process
- New Legal Realism
- Post-Critical Legal Studies
- Post-Modern Jurisprudence
- Sociological Jurisprudence
- The Law and Society Movement
The Unit of Analysis in Socio-Legal Research

• What all these disagreements point to is a propensity to, at times, “talk past each other” by using the “same words” in “different languages”.

• The “is” versus “ought” debate needs to be restated to formulate a means of providing law and society a coherent framework / paradigm.

• Such a paradigm focuses on how the question of change relies upon sociological conditions, broadly understood, which poses problems for observation and the attribution of legal categories to a person or class of persons.

• This is why I teach my students that sociology deals with the relationship between the social and societal contract.
The Prospect for Change: Bringing Law & Society Back to ‘Big’ Ideas

• Focusing on the differences between the social and societal contract presents a contrast between two different models of the actor where competency is not assessed as narrowly as in the naturalistic explanations that tend to be offered in the cognitive sciences.

• A true sociological conception of justice, its relative, “freedom”, and therefore “choice”, relies on law and society taking a “cognitive sociological turn”, instead to a merely cognitive one.

• What would this look like?

This is a question of “cognitive mediations”.
The Prospect of Cognitive Mediations
A Brief Introduction to Cognitive Sociology
<table>
<thead>
<tr>
<th>Type of Cognitivism</th>
<th>Levels of Thinking</th>
<th>Basis of Mind</th>
<th>Locus of Cognition</th>
<th>Scope of Thinking</th>
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<tbody>
<tr>
<td>Individual</td>
<td>Personal</td>
<td>Personal Experience</td>
<td>Individuals</td>
<td>$i = 1$</td>
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<tr>
<td></td>
<td>Idiosyncrasies</td>
<td></td>
<td></td>
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<td>Plural</td>
<td>Social Mindscapes</td>
<td>Society</td>
<td>Social Beings</td>
<td>$i \geq 2 \cap h-1$</td>
</tr>
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<td></td>
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<td>Cognitive Diversity in Thought Communities</td>
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<tr>
<td>Universal</td>
<td>Universal</td>
<td>Cognitive Science</td>
<td>Human Beings</td>
<td>$h = \text{humanity}$</td>
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<tr>
<td></td>
<td>Commonalities</td>
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</table>

*This analysis is based on a reading of Zerubavel, 1997: 1-22 and a personal communication with Zerubavel on 02/28/2015.*
<table>
<thead>
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<th>Author</th>
<th>Model</th>
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<tr>
<td>Zerubavel*</td>
<td>Human Being + Social Being + Personal Idiosyncrasies = The Individuality of the Actor</td>
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<td></td>
<td>Cognitive Socialization of Socio-Mental Structures</td>
</tr>
<tr>
<td>Raphael</td>
<td>Human Being + Social Being + Personal Idiosyncrasies = The Individuality of the Actor</td>
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<td>Cognitive Mediation of Sociality</td>
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<td>Cognitive Mediation of Society</td>
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<td></td>
<td>Societability</td>
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<td></td>
<td>Socio-Mental Structures</td>
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</tbody>
</table>

*This analysis is based on a reading of Zerubavel, 1997; Zerubavel & Smith, 2010.*
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<tr>
<th>General Features</th>
<th>Scope of Mediation</th>
<th>Type of Mediation</th>
<th>Type of Competency</th>
<th>Spectrum of Calculation</th>
<th>Type of Regulation Learned (Institutional Reflexivity)</th>
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<tbody>
<tr>
<td><strong>Cognitive Socialization</strong></td>
<td>Sociability</td>
<td>Accessing Sociality</td>
<td>Primarily Strategic, Yet Not Calculative Conditions</td>
<td>Indigenous to Encounters</td>
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<td><strong>Cognitive Societalization</strong></td>
<td>Societability</td>
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**Level Specific Features**

<table>
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<tr>
<th>Level of Cognitive Mediation</th>
<th>Epistemological Status of Content</th>
<th>Scope of Learning</th>
<th>Type of Relational-Patterned Procedures</th>
<th>The Freedom to Learn / Type of Contract</th>
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<tbody>
<tr>
<td><strong>Cognitive Socialization</strong></td>
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<td>Relational-Patterned Procedures for Processing Relational-Patterned Procedures</td>
<td>No Agency: Rousseau’s ‘Social Contract’ as ‘Each is Dependent on All’</td>
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<td>Secondary</td>
<td>Cognitive Skills</td>
<td>Primarily Heuristics</td>
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<tr>
<td><strong>Cognitive Societalization</strong></td>
<td>Primary Knowledge</td>
<td>Societal Expectations</td>
<td>Primarily Algorithmic Heuristics</td>
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</tr>
<tr>
<td>Secondary</td>
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<td>Cognitive Division of Labor</td>
<td>Algorithms &amp; Algorithmic Heuristics</td>
<td>Agency in Private Contracts</td>
</tr>
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Questions and Comments?

Thanks For Listening!

Please feel free to inquire further at mraphael@gradcenter.cuny.edu!

If you are interested in finding out more about my work, follow me on Academia.edu at http://gc-cuny.academia.edu/MichaelWRaphael

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