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Socio-legal studies in France: beyond the Law Faculty

Introduction

Setting out to explain the presence - or in this case the relative absence - of the 'socio-legal' in a particular jurisdiction requires some attempt to set out an understanding of what remains a notoriously malleable concept. This is all the more important given that one striking difference between France and the United Kingdom is the very absence of a body of knowledge explicitly conceptualized and characterised in terms of the label 'socio-legal.' Furthermore, in Anglo-American scholarship, there are not only diverse ways of characterising the 'socio-legal' but there are tensions and even contradictions at the heart of the concept which flow in part from different ways of viewing its relationship to more traditional forms of legal scholarship.¹ The 'socio-legal' can be seen as a supplement or even complement to the doctrinal analysis of primary legal sources that is made desirable - or indeed even necessary - by the need to maintain law as a functioning social institution (law in action) as opposed to pure text (law in books). Effective decisions about legal reform may be seen to require some analysis of the practical effects of law on society or parts of society and some analysis of the social interests and claims in play. This is the kind of socio-legal work sometimes associated with the term 'law in context' and with the kind of policy-oriented research based on empirical social science that is often fostered and financed by Governments. But the rise of the 'socio-legal' since the 1960s has also been associated with various explicit and radical challenges to law as a social institution in general and doctrinal analysis as a disciplinary practice in particular. The influence of feminism, Marxism and other forms of critical legal scholarship has been profoundly felt in direct, frontal critique of traditional assumptions about the autonomy of law and legal analysis. Indeed, some legal scholars from these critical currents might eschew the label 'socio-legal' exactly because of its association with more reformist ambitions: they do not want to see themselves as repointing the legal brickwork when the aim should be to tear the house down. These different and contested ways of understanding the 'socio-legal' as either supplement or challenge to law as a discipline, are

¹ The literature on the nature of the 'socio-legal' is too extensive even to cite conveniently here. But some references can be found in previous reviews in this series in the *Journal of Law and Society*. Both articles adopted - as we do here - very broad church definitions of the concept: K Economides 'Socio-legal studies in Aotearoa/New Zealand (2014) 41 *J. Law and Society* 257, H Arthurs and A Bunting 'Socio-legal Scholarship in Canada: A Review of the Field' (2014) 41 *J. Law and Society* 487

reflected in different relationships between law and other disciplines. Sometimes, work drawing on other disciplines may complement and sustain the dominant paradigm (for example, certain kinds of philosophy of law or legal history). But insights drawn from sociology and other disciplines (including certain strands of philosophy and legal history) have also been key parts of the critique of traditional conceptions of the autonomy of law as a discipline and of the legitimacy of law as a social institution purporting to depersonalise the exercise of power. This critical edge, drawing on a range of disciplines, while by no means a dominant force in socio-legal studies, has been a key element of an increasingly pluralist approach to legal scholarship in Anglo-American societies. What we want to do in this analysis of the 'socio-legal' in France is not to try to determine and apply a particular 'correct' interpretation of the term but to chart the presence and absence of these related yet distinguishable views as to how to study and teach law in the debates and practices in the French academy. We will argue in Part I that it is the disturbance in Anglo-American Law Schools of the traditional paradigm of law and legal analysis that is one key point of contrast with France where that paradigm has continued to dominate scholarship in the Law Faculties. The untidy and unruly co-existence of very different strands to socio-legal studies in the UK has been accompanied by the sense (amongst supporters and detractors alike) that it has gained an important foothold inside the Law Faculty and shaped the scholarly identity of many legal academics and researchers.² In contrast, French Law Faculties are marked by greater disciplinary orthodoxy characterised by a highly and distinctively structured form of doctrinal analysis and relative closure to the external critique of law. Our initial story is about how those key features were historically constituted and have been institutionally and discursively maintained, in part because the centralized formation of disciplines and sub-disciplines in France shapes institutional development and scholarly identity in a way that it does not in the UK. Accordingly, in Part I, we set out the way in which the historical construction of legal science in France and its relations with the broader social sciences have entrenched a particular paradigm of legal scholarship which has prevented the effective construction of alternative 'socio-legal' conceptions of the discipline. But in Part II,

² The strength of that foothold is a matter of some debate. Witness the question in R Collier's 'We're all socio-legal now? Legal education, scholarship and the Global Economy – Reflections on the UK experience' (2004) 26 *Sydney Law Review* 503 and see generally F Cownie *Legal academics: culture and identities* (2004).

we outline the presence of various fragments of the socio-legal in France to be found sometimes inside but more often outside the Law Faculties.

I. EXPLAINING ABSENCE

Law Faculties in France remain dominated by doctrinal analysis. Socio-legal research, in any of the diverse forms outlined above, remains atypical of their intellectual production and continues to be treated as heterodox by the socialising institutions of the legal academy. This relative absence is the product of the distinctive history of legal thought in France and of the particular development of its universities as institutions. So we will explore first the foundation of law as a scientific discipline, as a distinct legal science (A) and secondly the development in France of a central state framework guaranteeing the institutional reproduction of disciplines within the university system (B).

A. Genealogy of French Legal science

French political history has been marked by ruptures which have often had considerable effects on domestic law: the 19th century codifications following the Revolution are a prime example. In contrast the history of legal science in France is one of remarkable continuity. The academic practices of jurists have their roots in a tradition that stretches back beyond the Revolution (1). Scholarly discourse in law has been clearly distinct from that of the social sciences and although there have been significant moments of dialogue between the two, these have proven to be interludes rather than an enduring process of exchange (2).

1. Before the Revolution: tracing the origins of the French civil law tradition

The self-identity of French legal scholars is as inheritors of a long and noble academic tradition. Despite many changes over the centuries in the way in which legal scholarship is conducted, it is still not uncommon to evoke explicitly the long lines of this collective intellectual inheritance.³ The nature of these genealogical claims reveals much about the way the discipline is defined by French legal scholars themselves: looking for ancestors, they are more likely to choose the medieval jurists than the 20th century founders of social science. Because legal scholarship is seen

³ F. Audren and J.-L. Halpérin, *La culture juridique française. Entre mythes et réalités (XIX^e-XX^e siècles)* (2013) 11, P. Jestaz and C. Jamin, *La doctrine* (2004).

as a key element in the construction of the civil law tradition generally, this emphasis on continuity is a source of prestige.⁴ The link in France is particularly strong because the drafters of the iconic Civil Code of 1804 are widely seen as having drawn many of their key organising concepts from the synthesizing Treatises of the jurists of the 17th and 18th centuries.⁵ The line of filiation back to medieval predecessors continues to be emphasized by modern French scholars as a means of reinforcing their claim to be the primary authorised interpreters of legal texts and guardians of their legitimacy.⁶ Here the history marks a difference between the romano-germanic tradition and that of the common law, where it is the judge who is more frequently accorded the primary role in legal interpretation and guardianship.

This historically constituted notion of scholars as guardians of the legal tradition is linked to a particular interpretive role which reflects a dominant paradigm in the way legal knowledge should be structured and set out.⁷ Domat's *Loix civiles*⁸ provided a classic 17th century model for the writing of text books and treatises that was passed from generation to generation. First in the richly detailed 19th century commentaries on the Code Civil but later in independent works of exposition, analysis is typically built around a series of conceptual binary oppositions (such as law/rule, positive law/natural law, law/equity, public law/private law). These bifurcations provide a structured intellectual framework within which legislative texts are understood, explained and interpreted.⁹ During the 19th century this model was used to set out a comprehensive theory defining persons and their substantive rights: what it did not do was to describe the practice of civil law and certainly not the process of enforcing those rights. This emphasis on systematic doctrinal exposition, rooted in a concern to promote abstract conceptual coherence and unity, still organises the modern textbook which introduces students to law and its various branches in France.¹⁰ Indeed, the abundant and tangled growth that is

⁴ R. David and C. Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (2002, 11th ed.) at 117, J.-L. Thireau, 'La doctrine civiliste avant le Code civil' in *La doctrine juridique*, eds. Y. Poirmeur et al. (1993), 13.

⁵ A.-J. Arnaud, *Les origines doctrinales du Code civil* (1969). On French legal doctrine prior to the Revolution see A. Wijffels, *Introduction historique au droit. France, Allemagne, Angleterre* (2010), 214-225.

⁶ For a general examination of ways in which Law Professors have emphasized their status as privileged interpreters of legal texts, see J. Chevallier, 'Les interprètes du droit', in Y. Poirmeur et al., op. cit. (*La doctrine juridique*), 259.

⁷ Arnaud (A.-J.), 'La tradition française dans la théorie du droit des civilistes', (1988) 33 *Archives de philosophie du droit* 261.

⁸ Id., esp. 262-264.

⁹ Id.

¹⁰ On the history of legal textbooks in France, see A.-S. Chambost (ed.), *Histoire des manuels de droit. Une histoire de la littérature juridique comme forme du discours universitaire* (2014).

modern case-law in France is seen to combine with the multiplication of legislative texts to call even more clearly for a structuring and ordering of - and thus an abstraction from - the increasingly detailed rules of positive law. This is seen to require elaborate organisation through the identification of distinct branches of law as well as the search for, and exposition of, general principles which explain and render coherent and consistent existing legal rules (and thus also offer a guide to future solutions).¹¹

The perceived importance within legal science of the search for intellectual coherence through systematisation and structure has been reflected in the development and institutionalization of a highly particular and elaborately structured way of presenting academic legal writing. This requires not only that argument be structured in two parts with two sub-parts (often with the sub-parts being divided into two sub-sub parts) but also be accompanied by compliance with elaborate requirements as to the structure of the introduction, the form of headings and sub-headings and transitional phrases from one part to another. The effect is to require an explicit focus throughout on the interrelations between the elements of the whole argument. Since the mid 20th century, this has become an orthodoxy of structure rigorously enforced by teachers on students from the first year of legal study at university and is a requirement of published academic articles, presentations and even examinations.¹² Because *le plan binaire* is an intellectual practice particular to the Law Faculties, it reinforces the disciplinary autonomy of legal science.

Distinct both from the philosophy of law and the social sciences, this notion of a 'fundamental legal science'¹³ thus has as its specific purpose the systematization of norms. In its search for internal coherence within the body of positive rules, legal scholarship can be seen as reinforcing the ideological legitimacy of the legal order in its claims to the apparent depersonalisation of the exercise of power. A key critical strand within socio-legal studies within the Anglo-American common law world since the 1960s has been to point out and expose the contradictions in this role of legal scholar as ideological guardian.¹⁴ But within the romano-germanic tradition,

¹¹ Jamin, Jestaz, op. cit., at 231.

¹² M. Lemieux, 'La récente popularité du plan en deux parties', *Revue de recherche juridique. Droit prospectif* (1987-3) 823, M. Vivant, 'Le plan en deux parties, ou de l'arpentage considéré comme un art', *Études offertes à Pierre Catala. Le droit privé français à la fin du XXème siècle* (2001), 969. To illustrate the operation of the structured approach we have chosen to draft this article more or less in accordance with its dictates.

¹³ C. Atias, *Epistémologie juridique* (1985), at 58.

¹⁴ In the United States, this kind of critique is associated with critical legal studies and work of the likes of Duncan Kennedy and Mark Kelman. For a particular application to criminal law in the United Kingdom see A. Norrie, *Crime Reason and History*, (2014, ch. 1), Third edn for his deconstruction of the assumptions

the centrality of that role can be traced back to its origins and in France it has been subject to much less contestation within the Law Faculty.¹⁵ This view of legal scholarship sets it apart from some of the broader questioning characteristic of the social sciences. There have been moments in which opportunities have developed for exchange and synthesis between law as a discipline and those other social sciences. But these moments of dialogues have not led to a major challenge to the dominant place of the doctrinal conception of legal science.

2. Historical interludes: brief and interrupted dialogues between legal doctrine and social science

A hundred years after the promulgation of the Code civil, there was a moment when a new generation of legal scholars sought to challenge established practice and to break with the dominant academic tradition by claiming allegiance to a 'scientific' approach.¹⁶ Around the turn of the 19th and 20th centuries, they argued for a theoretical revolution that would refine and reform the methods of legal analysis.¹⁷ Aging codes, dynamic growth in case-law, the development of the social sciences and finally the need to counter 'legal socialism' were all said to call for this renewal of legal scholarship.¹⁸ The argument was informed by a sharp critique of traditional practices, most notably François Génys's¹⁹ assessment of 19th century legal literature as dominated by the blind cult of legislative codes and the false pretensions of abstract logic.²⁰ A remaking of legal scholarship was advocated that would go beyond a mere exposition of the Codes to draw on legal history,²¹ on

underpinning classical liberal legal scholarship (citing Williams, Smith and Hogan and MacCormick).

¹⁵ See however the work of P. Legendre which has been dedicated to revealing the role played by legal scholars in legitimating the established order from the medieval period onwards starting with *L'amour du censeur* (1974).

¹⁶ A.-J. Arnaud, *Les juristes face à la société du XIX^e siècle à nos jours* (1975), 75-124.

¹⁷ C. Atias, 'Philosophie du droit : les enjeux d'une fin de siècle', in *L'évolution de la philosophie du droit en Allemagne et en France depuis la fin de la seconde guerre mondiale*, eds. G. Planty-Bonjour, R. Legeais (1991), esp. 241-251, C. Jamin, 'Relire Labbé et ses lecteurs' (1992) 37 *Archives de philosophie du droit*, 248.

¹⁸ R. Saleilles, 'Introduction' in Collège libre de sciences sociales, *Les méthodes juridiques* (1911), at xxiii.

¹⁹ F. Génys, *Méthode d'interprétation et sources en droit privé positif*, (1919, Tome 1), 17-204 (first published in 1899). On Génys's work, see C. Thomasset et al. , *François Génys. Mythes et réalités. 1899-1999, centenaire de Méthode d'interprétation et sources en droit privé positif* (2000), B. Oppetit (B.), *Droit et modernité* (1998), 231-254.

²⁰ F. Génys, op. cit., at 124.

²¹ J. Gaudemet, 'Les écoles historiques du droit en France et en Allemagne au XIX^e siècle', (1998) 19 *Revue d'histoire des facultés de droit et de la science juridique* 87, A. Dauteribes, 'Laboulaye et la réforme des études de droit' (1990) 10/11 *Revue d'histoire des Facultés de droit et de la science juridique* 13.

experimental sciences and on comparative law. Raymond Saleilles argued that an historical approach represented the adoption of a scientific method because history sort to free itself of the subjective by holding to the facts.²² It was thus the ideal means for analysing the life of the law as existing legislative texts were adapted to new social needs.²³ Other legal scholars evoked the experimental sciences and the philosophy of Auguste Comte: they argued the need to go beyond a metaphysical approach to one that saw law as just another observable social reality.²⁴ For example, some legal scholars used analogies drawn from biological explanations of organic life to explain legal transformations.²⁵ The third and final strand in this attempt to renew legal scholarship was founded on the comparative. The key stimulus was the first International Congress of Comparative Law which took place in Paris during the Universal Exhibition in 1900. The argument was that the comparative method would enable scholars to guide legislators and judges: doctrinal analysis of foreign laws would enable the identification of an 'international legal consciousness' consisting of universal principles that could be used to inform the development of national law.²⁶

These arguments for an opening out of legal thought were reinforced by the development of the nascent discipline of sociology within Humanities Faculties. Durkheim was the key figure in both establishing an intellectual framework for sociology of law and defining its major tasks. *L'Année sociologique*, the periodical that he founded in 1896, became a site of rich dialogue between law and sociology. As a result, some renowned Professors within the Law Faculties began to draw inspiration from sociology in their legal research and teaching. Perhaps most famously, Léon Duguit explicitly used Durkheim's concepts in his work on public law, rejecting all that was 'metaphysical' in order to found legal analysis on the 'real facts' of social interdependence. He was not alone: certain other legal

²² R. Saleilles, 'Le Code civil et la méthode historique', in *Le Code civil (1804-1904), Livre du centenaire* (1904, Tome 1), 99. On Saleilles, see. R. Beudant *et al.*, *L'œuvre juridique de Raymond Saleilles* (1914). More recently, see F. Tellier, 'Le droit à l'épreuve de la société. Raymond Saleilles et l'idée du droit social' (1999) 20 *Revue d'histoire des facultés de droit et de la science juridique* 147.

²³ R. Saleilles, 'École historique et droit naturel' (1902) 1 *Revue trimestrielle de droit civil* at 97.

²⁴ C. Jamin, 'L'oubli et la science. Regard partiel sur l'évolution de la doctrine privatiste à la charnière des XIX^e et XX^e siècles' (1994) 93 *Revue trimestrielle de droit civil* 815.

²⁵ For an application of the evolutionary theories of Herbert Spencer to law, see R. Fremont, 'De la formation des notions juridiques et du rôle de la jurisprudence dans les institutions', *Pandectes françaises* (1886, Tome 1), at vi.

²⁶ K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Transl. by T. Weir (1998, 3rd edn), 2. See also R. Munday, 'Accounting for an Encounter', in *Comparative Legal Studies: Traditions and Transitions*, eds P. Legrand and R. Munday (2003) 3-8.

scholars of the early 20th century began to examine legal transformations from a sociological perspective.²⁷

But the important point for our story is that this moment of interdisciplinary dialogue did not provide the foundation for the development of a socio-legal current within the Law Faculties. The advocates of an opening up to sociology remained marginal. From now on there was an interest from legal scholars in social questions but the disciplinary separation of Law and Humanities Faculties remained strong and legal scholars retained their monopoly over law as an object of inquiry by reaffirming the specificity and distinctiveness of legal science. In the end, the vast majority of Law professors never attempted the descriptive sociology of law associated with Durkheim.²⁸ They were content simply to expand the range of legal sources studied beyond legislative codes to include case-law. Increasingly, from the start of the 20th century, jurisprudence was seen as providing a privileged point of observation for social reality, as the 'law in action.'²⁹ This enabled legal scholars to deepen their accounts of the relations between law and society while retaining for legal science an object of inquiry that was distinct from that of the other social sciences.³⁰ Thus any opening up to 'scientific' influences that took place was not accompanied by a shift from the traditional conception of the mission of legal science, that is to say to develop coherence and consistency of legal norms by systematic exposition.³¹ From then on, one can trace more frequent references to history, social sciences or to comparative law. These new 'scientific' elements involved the observation of social facts but their significance and meaning continued to be defined by a normative conception of legal scholarship that was based on giving structure and coherence to a body of positive legal rules rather than to defining the social causes of those rules or explaining the complexity of their actual social functioning.³²

There are many reasons for the persistence of this traditional approach in French legal scholarship: one of the most central is the institutional framework within which the legal discipline operates in French universities.

²⁷ See for example J. Cruet, *La vie du droit et l'impuissance des lois* (1908).

²⁸ F. Soubiran-Paillet, 'Histoire du droit et sociologie : interrogations sur un vide disciplinaire', (1997) 29 *Genèses : Sciences sociales et histoire*, 156-159.

²⁹ E. Serverin, *Sociologie du droit* (2000), 21-24.

³⁰ P. Lascoumes, 'Le droit comme science sociale. La place de Durkheim dans les débats entre juristes et sociologues à la charnière des deux derniers siècles (1870-1914)', in *Normes juridiques et régulation sociale*, eds. F. Chazel et J. Commaille (1991), esp. at 46.

³¹ Arnaud (1975), op. cit., esp. 122-125.

³² Jamin, Jestaz, op. cit., at. 146.

B. Disciplinary frameworks and the maintenance of scholarly orthodoxy

The distinctive political and institutional history of the university system in France has had an important impact in maintaining disciplinary orthodoxy in French legal science. Both its doctrinal focus and its relative closure to external influence can be explained in part by French traditions in the organizing of academic disciplines (1), and in part by very particular ways of recruiting academic staff (2). Both have made it more difficult to break with traditional disciplinary orthodoxies.

1. French Faculties and the discipline of disciplines

The very structure of French higher education provides a key to understanding the capacity of disciplines to resist disruptive external challenges. The *tabula rasa* of the 1789 revolution led to a complete reconstruction of the university system. What emerged under the Empire was a classic example of statist and centralizing Napoleonic reform.³³ Distinct both from the German model with its vaunting of academic freedom and the English tradition of universities with strong institutional autonomy,³⁴ the effect of the reorganization of the French university system was to make both Faculties and academics much more clearly dependent than elsewhere on the political will of the central state.³⁵ Curricula were defined nationally and identical rules for examination procedures and the content of teaching were applied to the whole nation. The structure of the new university was standardized by national regulations which divided France into distinct geographic units for administrative purposes (*académies*). Faculties of theology, medicine, law, sciences and humanities were established in each *académie* according to an identical model. Each faculty was independent from the others but subject to the control of the central state in the allocation of funding, the definition of curricula and the conferring of academic status. The state appointed leading academic figures to a national *Conseil de l'Instruction Publique* to manage the particular discipline they represented.³⁶ There was no attempt at coordination between faculties: each was free to develop its own standards of regulation thus reinforcing disciplinary compartmentalization.³⁷

³³ C. Musselin, *The Long March of French Universities* (2004), at 11.

³⁴ C. Charle, J. Verger, *Histoire des universités*, (1994), 63-75.

³⁵ C. Granger, *La destruction de l'université française* (2015), at 20.

³⁶ C. Musselin, *op. cit.*, at 12.

³⁷ C. Charle, *La République des universitaires* (1994) 135.

The Faculties of Law themselves were conceived and established by Napoleon as being guarantors of the legal culture of the central state and guardians of the established legal order.³⁸ In general, in the 19th century the French government relied on the universities to reinforce the legitimacy of its authority and maintain social cohesion.³⁹ If the *lycée* was seen as the primary instrument of social integration at the level of secondary school, the Law Faculties were seen as serving a similar purpose at university level.⁴⁰ By monopolizing legal education, the central state could determine competence in law. And by determining the content and methods of the teaching of law it could ensure the social acceptance of the new Codes. The Law Faculties' role in confirming the legitimacy of the 19th century social order was reflected in the growing social prestige of Law Professors and a certain deference on their part viz a viz political power.⁴¹ The establishment of the Republic in 1870 and the reinforcement of academic freedom that accompanied it did not fundamentally alter the idea that the universities' principal role was to support a central state whose mission was the governance of the collective and the framing of its future.⁴²

The institutionalized subordination of the mission of the University to that of the central state tended to favour the orthodoxy of traditional legal science rather than its critical challenge. From their promulgation in the early years of the century, legal education became centred on the textual study of the Napoleonic codes, privileging distinctive techniques of legal reasoning and the objective of training future legal practitioners. Attempts in 1819 to broaden the subjects studied to include natural law, history of the philosophy of law and administrative law foundered on opposition from within the discipline. It was only in 1889 that Government regulations introduced political economy, general history of law and elements of constitutional law into the law curriculum.⁴³ Slowly over the 20th century, elements of general culture were introduced in the form of courses on history, political science and economics. But this did not represent a challenge to doctrinal analysis as the central

³⁸ Audren, Halpérin, op. cit., chap. 1.

³⁹ Granger, op. cit., 22-23.

⁴⁰ The Ministry of Justice declared in 1801 that the Law Schools were seen as building a second level of education onto that of the lycées', 'Un rapport du ministre de la justice sur les écoles de droit en 1801' (1988) 7 *Revue d'histoire des facultés de droit et de la science juridique* 164.

⁴¹ Audren, Halpérin, op. cit. at 35. See also P. Bonin, 'Education juridique et politique sentimentale. L'École de droit de Paris et les journées de 1848', in P. Gonod et al., *L'École de droit de la Sorbonne dans la cité* (2012), 61-67.

⁴² C. Granger, op. cit., 34-35.

⁴³ Audren, Halpérin, op. cit., 119.

core of the discipline of law: rather it was thought that some kind of familiarity with social sciences would help to produce more intellectually cultivated lawyers.⁴⁴ This idea that Law Faculties fulfilled a social as well as intellectual function can be traced back to the Revolution: legal studies had long been seen as not just valuable for those engaged in the conduct of public affairs and business but as transmitting a certain common culture essential to notable public figures.⁴⁵

Given the disciplinary conservatism of Law Faculties and limited acceptance of social sciences into the curriculum, it is perhaps not surprising that when the new sciences of government emerged they did so outside the academy. In the 19th century, a number of institutions emerged aimed at the production of practical knowledge with potential application to the problems of government. But they did so at the interface between the world of the universities and that of state bureaucracy rather than within the Law Faculties.⁴⁶ Even today not only most senior French civil servants but also its administrative judges are trained in matters of law and government in these institutions. This has developed into a very particular French division in the training of elites as between Universities and *les grandes écoles*.⁴⁷ The latter are the most prestigious institutions of post-school education in France but are not Universities. Their status is linked not only to superior resourcing but also to powers of selection at entry in relation to students. University Faculties, including Law Faculties, must accept all local students who have passed the *Baccalaureat* whereas the fierce elitism of *les grandes écoles* is entrenched by *concours d'entrée* and *numerus clausus*.⁴⁸ What this means is that the most gifted students interested in the study of relations between law, politics and government tend to gravitate not towards University Law Schools but towards national institutions whose alumni constitute a Republican technocratic elite and a formidable network of political influence. Faced by the challenge of these prestigious rival institutions camped in this key

⁴⁴ C. Jamin, *La cuisine du droit. L'École de droit de Sciences Po : Une expérimentation française* (2012), 64-72. See also C. Moreau de Bellaing, 'Un bon juriste est un juriste qui ne s'arrête pas au droit. Controverses autour de la réforme de la licence de droit de mars 1954' (2013) 83 *Droit et société* 83.

⁴⁵ Audren, Halpérin, op. cit., 65, 74

⁴⁶ The *Académie des sciences morales et politiques* was founded at the start of the 19th century, the *École libre des sciences politiques* (the precursor to *Science-Po*) was originally founded in 1872 and the *École nationale d'administration* in 1945: Heilbron, "The rise of social science disciplines in France", *Revue européenne des sciences sociales / European Journal of Social Sciences* (2004)XLII-129, esp. 147-148. See also C. Delmas, *Instituer des savoirs d'État : L'Académie des sciences morales et politiques au XIX^e siècle* (2006), esp. 104-118.

⁴⁷ Jamin, op. cit., 73-76.

⁴⁸ Faculties of medicine are an exception to the prohibition on selection at entry to Universities.

interdisciplinary space, it is not surprising perhaps that Professors of Law have continued to emphasize their distinctive lawyerly skills in doctrinal analysis. Furthermore, the system of recruitment of Law Professors reinforces the weight placed on specialist technical lawyerly skills rather than interdisciplinary innovation.

2. Recruiting the discipline: the moulding of French legal scholars

Although there have been many legislative reforms to university governance in France, the structure of university disciplines remains fundamentally as established in the 19th century.⁴⁹ Key to this is the continued existence of a central authority in the form of the *Conseil National des Universités* (CNU) which controls and manages the progression of scholarly careers within the French academy. This is a national council made up of 52 sections, each corresponding to a discipline, staffed by tenured academics who are partly elected by their peers and partly appointed by the Ministry of National Education, Higher Education and Research.⁵⁰ The CNU determines centrally whether candidates are academically qualified to apply to become *maître de conférences* (tenured lecturer) or to be promoted to professor. Universities make local hiring and promotion decisions but only on the basis of these nationally established lists of qualified candidates within each discipline. There are three sections relating to law: private law (section 01), public law (02) and legal history (03). All the other academic disciplines that provide an external perspective on law also have their own sections (for example political science (04), economics (05) and sociology and demography (19)). But critically, there has never been a section for socio-legal studies. This means that work that might be defined in such terms is separated out and divided up into adjunct sub-disciplines of existing sections which thus remain marginal to those sections and disciplines (examples would be criminal sociology, law and economics or legal linguistics). As each of the sections develops its own set of criteria for disciplinary excellence and acts as “gate-keeper” to academic recognition,⁵¹ those who aspire to be socio-legal researchers must nevertheless create for themselves an academic identity that is recognizable to the guardians of disciplinary standards. A researcher with a socio-legal profile, however excellent, may find it difficult to

⁴⁹ G. Weisz, *The Emergence of Modern Universities in France, 1863-1914* (1983), C. Muselin, C. Paradeise, “France: From Incremental Transition to Institutional Change”, in *University Governance: Western European Comparative Perspective*, eds. C. Paradeise et al. (2009), 21-49.

⁵⁰ Décret n°92-70 (January 16, 1992) *relatif au Conseil national des universités*.

⁵¹ N. Le Feuvre, M. Metso, *Disciplinary Barriers between the Social Sciences and Humanities: National Report on France* (2005), 57. The report is available online: http://www.york.ac.uk/res/researchintegration/National_Report_France.pdf (retrieved February 27th 2016).

be recognized as suitably qualified by any of the CNU sections:⁵² his or her work may be seen as marginal to the relevant discipline, either too legal for the social scientist or too 'socio' for the lawyers. The importance of this single central national authority charged with defining standards of scholarly excellence is that it makes it easier for disciplines to resist challenge to the dominant paradigm of scholarship. In the United Kingdom, where each University has substantial autonomy in defining its own teaching and research needs and indeed its own local appointing practices, it is hard to impose a particular disciplinary model of scholarship at a national level. Yet that is exactly what France seeks to do.

These central mechanisms for controlling the appointment and recruitment of tenured lecturers operate in all disciplines. But in law there is a particular and additional central mechanism controlling promotion to Chair in the form of a highly competitive exam called the *agrégation du supérieur*. There are other tracks by which lecturers can be appointed Law professors on the basis of experience and published work (though they all involve the relevant national committee of the CNU having to judge them qualified on the basis of their submissions). But the vast majority of the available posts for Chair (and the number is determined nationally) are filled by the *concours d'agrégation* (in other words by a classic French competitive exam in which candidates are ranked and the top candidates appointed up to the prescribed number of available posts). This examination has been at the heart of the intellectual reproduction of Law Faculties since its introduction nationally by Napoleon III in the 19th century.⁵³ The regulations which constituted and organised this corps of *Professeurs agrégés* explicitly declared the objective of establishing order and hierarchy amongst teaching staff.⁵⁴ Successive reforms have varied the particular form of the exercises set for the candidates⁵⁵ but the underlying spirit has remained largely unchanged: candidates are asked over a limited time-period to prepare and present structured oral lessons to the examiners on a subject assigned to them. The competitions for private law, public law and history of law are all organized similarly. Candidates must have a doctorate and the jury consists of 6 Professors and one high-ranking judge all of whom are chosen by the Ministry of Higher Education and Research. If you apply in private law, your allocated topics may be chosen from anywhere within the broad domain of private law (which paradoxically to the British eye, would include

⁵² Conseil National du développement des sciences humaines et sociales, *Pour une politique des sciences sociales de l'Homme et de la société* (2001), 81-82.

⁵³ J.-M. Carbasse, 'L'agrégation des facultés de droit' (2009) 2 *Revue du droit public et de la science politique en France et à l'étranger* esp. 301-305.

⁵⁴ Audren, Halpérin, op. cit., at 50.

⁵⁵ Patricia Ducret, 'Les agrégés de droit de 1856 à 1914', juillet 2005 [on line] <http://rhe.ish-lyon.cnrs.fr/?q=agregdroit> (accessed 27 January 2016)

criminal law and justice). The first test consists of a discussion of 30 to 45 minutes about the published research of the candidate. If the candidate is allowed to progress to the next stage, it consists of the preparation and presentation of a lesson about a prescribed text. The candidates that survive then go on to two further tests: in the first, the famous *épreuve de 24 heures*, the candidate is randomly given a general topic which he or she has 24 hours to research with the help of a team recruited from academic friends and contacts. The candidate must then present an exposition of the topic in 45 minutes before the jury. After this there is a similar but shorter presentation on a more technical text that the candidate has 8 hours to prepare alone (no team of supporting researchers for this one). These lessons have been described as 'a lesson in formalism pushed to the extreme.'⁵⁶ We have already mentioned the distinctive binary plan required in almost all forms of legal scholarship. The presentations for these tests must be constructed in two parts (with headings numbered I et II) and four sub-parts (which are identified I.A., I.B., II.A. et II.B.). The presentations must be carefully timed: for the eight hour test it must last exactly 30 minutes and there is an ideal duration for each of the parts. For presentation for the 24 hour test, after 45 minutes – when he or she will be interrupted by the President of the Jury – the candidate should have just completed the presentation of the first sub-part of the second part. The jury look at both the technical quality of the content and the intellectual coherence of the structured plan to evaluate the expository talent of the candidates who are then ranked in an order of merit that is published.⁵⁷

There are many articles which testify to the mythic quality of the *concours d'agrégation* and its key role in the socialisation of Professors of Law.⁵⁸ Many candidates will prepare together for the tests and the experience often forms very strong academic bonds that may be foundational for subsequent careers. And the examination sustains a symbolic hierarchy within Law Faculties that has no obvious equivalent elsewhere. One can become a *Professeur agrégé* in one's early thirties with a volume of publications that would not guarantee even a senior lectureship in the United Kingdom. There are no direct consequences in terms of formal power and the financial rewards are limited. Yet to be, or not to be, a *Professeur agrégé* has

⁵⁶ P.-Y. Gautier, 'Le concours d'agrégation au plus intime : Institutes coutumières', in *Mélanges dédiés à Louis Boyer* (1996), at 223. For a 'how to' guide, see also R. Merle, 'La leçon d'agrégation dans toute sa splendeur', *Recueil Dalloz* (1987), chron. 142.

⁵⁷ D. Truchet, 'A propos du concours d'agrégation et de sa préparation' (1995) 22 *Droits* 178.

⁵⁸ L. de Naurois, 'La leçon d'agrégation. Vieux souvenirs et réflexions d'un candidat 'malheureux'', in *Mélanges dédiés à Louis Boyer* (1996), 507, J. Rivero, 'Pour la leçon en équipe', *Recueil Dalloz* (1976), chron. 137.

consequences for academic status that will last an entire career. Those who are *maîtres de conférences* (tenured lecturers) or who have become Professors by building up over time a record of published work and administrative or teaching experience will always lack what remains the ultimate intellectual accolade in the legal academy.

What are the consequences of this particular form of academic recruitment for the nature of legal scholarship in France? By comparison with the United Kingdom, where appointment to a Chair is a matter for autonomous universities, the *concours d'agrégation* effectively defines at a national level what constitutes an outstanding legal scholar. Indeed it is a handful of Professors, all of them themselves *Professeurs agrégés*, all of them appointed by the Ministry, that effectively make the decisions on the appointment of the most prestigious and numerically largest category of Chairs. The danger is that this may perpetuate relatively closely defined norms for legal scholarship and privilege the traditionally established model of doctrinal analysis. Even the initial examination of published work presents the danger that certain kinds of topics and analysis may be preferred to others and lead to the exclusion of candidates doing more unconventional work. It is often said that within the private law competition the profile of publications of those who progress shows more evidence of classical doctrinal analysis of the law of obligations than it does the empirical analysis of criminal justice, interdisciplinary studies, comparative law or work in a foreign language. And beyond that, the three tests of presentation skills all place the emphasis on the capacity to set out positive legal rules in an ordered, systematic and coherent fashion. Although such a talent for close doctrinal analysis does not preclude an interest in interdisciplinary or critical approaches, it tends to make them less than essential. Each year, the system promotes to the highest rank scholars who are remarkably young (averaging around 33 years old) but to be promoted they have to prepare assiduously for a highly formalized examination, set and enforced by an older generation of *Professeurs agrégés*. The successful candidates tend disproportionately to have done their doctorates in one of the Parisian Faculties and to pursue research that tends to follow classical lines.⁵⁹ Criticism of the system is sometimes heard⁶⁰ and the model shows some signs of fissure,⁶¹ but the dominant discourse is one that defends *le concours*

⁵⁹ M. Fabre-Magnan, 'Radiographie de l'agrégation. Les résultats du concours d'agrégation externe de droit privé et de sciences criminelles depuis 1968' in *Mélanges Philippe Malaurie - Liber amicorum* (2005), 215.

⁶⁰ The lesson in 24 hours has been the object of fierce criticism, for example T. Le Bars, 'Agrégation de droit privé et de sciences criminelles : libres propos pour la suppression de l'épreuve de 24 heures', *Recueil Dalloz* (2004), Point de vue 4.

More generally, see <https://suppressionagregation.wordpress.com/>

⁶¹ Jamin, op. cit., at 89.

d'agrégation as a way of constituting a national elite of legal scholars and guaranteeing its quality.⁶² But having been required to make huge personal intellectual investment in their early years in the cultivation of skills of highly structured doctrinal exposition and having been rewarded by early promotion to the highest ranks of legal academia, perhaps it is not surprising if this shapes the intellectual pattern of subsequent careers.⁶³ In turn, this constitutes a highly powerful elite that will then select the next generation.

II. CHARTING PRESENCE (a state of the art)

In Part I we argued that socio-legal studies does not have the same contested yet visible presence within the discipline that it does in the Anglo-American academy. We offered an explanation for this relatively limited presence of the socio-legal in France in certain aspects of the intellectual history of law as a discipline in France and the institutional history of Law Faculties themselves. In this second Part, we want to chart the presence of the socio-legal, the way in which, despite these constraints, socio-legal research has managed to construct certain spaces within the academy. If one were to seek to identify a primary moment of presence for socio-legal research within the Law Faculties, one would have to go back to the 1970s (A) whereas the new trends towards critical and sociological analysis of law are developing outside and beyond the Law Faculties (B).

A. Inside the Law Faculty

There have been many attempts within the Law Faculties to draw in insights from other disciplines but generally the tendency has been to be to look for ways in which those other disciplines can serve the legal, in other words to provide practical or symbolic support to the legal order (1). But since the 1970s, one can identify certain currents within the Law Faculties where more critical interventions have developed to challenge the dominant doctrinal discourses (2).

1. Interdisciplinary encounters with the mainstream

The first real interdisciplinary encounter within French Law Faculties in which legal scholarship began to step beyond the doctrinal exposition of rules was in the 19th century with the history of law and especially roman law.⁶⁴ In 1855, the *Revue historique de droit*

⁶² Truchet, op. cit. ; J.-M. Carbasse, op. cit.

⁶³ P.-Y. Gautier, op. cit., at 234.

⁶⁴ For a review of French legal history, J.-L. Halpérin, 'Histoire du droit', in *Dictionnaire de la culture juridique*, eds. D. Alland and S. Rials (2003), 783.

*français et étranger*⁶⁵ was founded and set ambitious goals for an historical understanding of law which would situate legal phenomena in time and space. By the 1880s and 90s, the teaching of legal history was becoming general in the Law Faculties. But paradoxically, as legal history began to gain clearer professional recognition and autonomy, it narrowed its conceptual ambitions.⁶⁶ This is evident in the contents of the *Revue historique de droit français et étranger*: studies of foreign legal principles become increasingly rare and the focus sharpens on exposition of specialised legal techniques from the past and their historical evolution.⁶⁷ Thus rather than an interdisciplinary challenge which would open up questions of social and political context, legal history became an internal reading of law: lawyers turning to the ancient sources rather than historians turning their broader gaze on the law. Furthermore, French legal history from the first half of the 20th century began to demonstrate a certain legal nationalism. Textbooks tended to tell a story in which the French state, characterised in terms of key distinctive specificities, emerged through a series of stages (the Frankish period, feudal monarchy, absolute monarchy, the Revolution and its consequences).⁶⁸ The tone was often nostalgic and sometimes reactionary.⁶⁹ The accompanying disconnect with social history produced a story that emphasized, sometimes implausibly, the continuity of legal traditions. Thus rather than a broad-ranging external challenge to doctrinal orthodoxies, much of the legal history written and studied in Law Faculties comforted established ways of doing things.

Although this was not generally a critical legal history that constructed bridges to the other social sciences, certain of its key leading figures during the 20th century (Henri Lévy-Bruhl, Gabriel Le Bras...) did maintain links with sociologists and over time legal historians have begun to integrate social, political and cultural analysis into their research. The development of the prestigious *Ecole des annales* (The Annales School) with its re-thinking of the French historiographical tradition within the Humanities Faculties was important in this. So there is now a stronger interpenetration of general perspectives from the humanities and social sciences in the study of legal history in France (particularly in new areas of

⁶⁵ La *Revue historique de droit français et étranger*, which covers legal and institutional history from ancient to modern times, is still the leading French academic journal on the history of law.

⁶⁶ J.-L. Halpérin, 'L'histoire du droit constitué en discipline : consécration ou repli identitaire ?' (2001) 4 *Revue d'histoire des sciences humaines*, 9.

⁶⁷ F. Soubiran-Paillet, op. cit., 155.

⁶⁸ J.-L. Halpérin, 'Est-il temps de déconstruire les mythes de l'histoire du droit français', *Clio@Thémis* (2012)5, <<http://www.cliothemis.com/Est-il-temps-de-deconstruire-les#nb1>>.

⁶⁹ Halpérin, op. cit. ('Histoire du droit'), at. 786.

research such as the history of labour law).⁷⁰ But there has been no equivalent to the impact of general social historians like E.P. Thompson in their challenge within British Law Schools to thinking about the relations between law and society. Legal history in French Law Faculties has generally not been a disturbance to the dominant focus of doctrinal scholarship.

Ultimately the same can be said of the relations of sociology to law within the Law Faculties. In France, a specialised legal branch of general sociology was introduced into teaching and research by certain lawyers and legal historians in the second half of the 20th century.⁷¹ The key driver was Jean Carbonnier (1908-2003),⁷² widely known both for his famous text book on civil law (*Manuel de droit civil*) and as the founding figure of legal sociology. Developed in his *Laboratoire de sociologie du droit* at the University of Paris II and through several influential works,⁷³ his legal sociology called for a move away from the exclusive study of legal texts to the observation and explanation of legal practices as social phenomena: he sought to introduce sociological methods and the empirical study of legal actors and practices.⁷⁴ But this was not an attempt to construct a pure science: his aims were instrumental, indeed utilitarian. Conceived as a sub-discipline of law rather than of general sociology, his legal sociology was aimed at lawyers.⁷⁵ While it had scientific functions, its primary *raison d'être* was practical: it was an applied science existing to support and guide those actually involved in the making of law.⁷⁶ Legislation was the primary product in this process.⁷⁷ The legal sociologist existed to inform the legislator as to the application of the law (or the absence of it) and about the practices and aspirations of those using the law. But,

⁷⁰ F. Audren, 'L'histoire à contre-courant. Discipline et indiscipline dans la section d'histoire du droit (1970-1990)', in *Le droit en révolution(s). Regards sur la critique du droit des années 1970 à nos jours*, eds. X. Dupré de Boulois, M. Kaluszynski (2011), at 63.

⁷¹ A.-J. Arnaud, *Critique de la raison juridique*, vol. 1 : *Où va la sociologie du droit ?* (1981), at 144-153.

⁷² J.-F. Niort, 'Jean Carbonnier', in *Dictionnaire historique des juristes français (XII^e-XX^e siècle)*, eds. P. Arabeyre et al. (2008), 161.

⁷³ *Flexible droit. Pour une sociologie du droit sans rigueur* (2001) (originally published 1969) and *Sociologie juridique* (1972).

⁷⁴ J. Carbonnier, 'La sociologie juridique et son emploi en législation : communication de Jean Carbonnier à l'Académie des sciences morales et politiques. Communications (23 octobre 1967), Paris, Académie des sciences morales et politiques, 1968, 91-98', *L'année sociologique* (2007/2)57, 393.

⁷⁵ J. Commaille, 'La construction d'une sociologie spécialisée. Le savoir sociologique et la sociologie juridique de Jean Carbonnier' (2007) 57 *L'année sociologique* 282.

⁷⁶ J Carbonnier, *Sociologie juridique* (2004), at 257.

⁷⁷ Carbonnier, op. cit. ('La sociologie juridique et son emploi en législation...'), at 393.

while legal sociology could inform and guide the legislator, it could not substitute for the political act that was legislation.

Carbonnier did not just set the terms of this specialised and applied sociology of legislation, he demonstrated its potential application by providing practical assistance to the Ministry of Justice. Thus he was commissioned to conduct major sociological investigations into key issues and drew up many draft Bills of important reforms in Family Law. His practical impact and his status as a great scholar of civil law gave credibility to his legal sociology in the Law Faculties. But nevertheless there is not really an active current school of thought built around his legacy: his 'Centre for Legal Sociology' still exists but research done there now is essentially doctrinal analysis. The idea of a sociology of legislation has not really been picked up and carried on by the modern generation of Law Professors. But Carbonnier remains a figure of enormous prestige and his achievement in making known and respectable a sociological approach in the Law Faculties is a considerable one. In part, his influence may reflect the fact that his thinking was not ideologically suspect.⁷⁸ While Carbonnier envisaged that legal sociology might lead to overt critique of legal dogma, that was not its principal function.⁷⁹ On the contrary he saw the new sub-discipline as *ancilla jurisprudentia*, as a support to the legal order⁸⁰ and he explicitly warned against the excessive glorification of critique.⁸¹ Those who have adopted the critical voice in Law Faculties have often been marginalized.

2. Against orthodoxy: critical legal studies 'à la française'?

The image of French Law Faculties that we have drawn so far has emphasized its conservatism: an established orthodoxy built around a doctrinal vision of legal scholarship is reinforced by patterns of socialisation and recruitment. But at various points alternative theoretical approaches have emerged to challenge the dominant culture. In some cases, the challenge to academic orthodoxy has been overtly political in claiming allegiance to socialist ideas. Ever since the end of the 19th century, there have been lawyers who have sought to develop a socialist perspective on law in France.⁸²

⁷⁸ D. de Béchillon, 'A propos de la réception de la sociologie de Jean Carbonnier dans les facultés de droit françaises' (2007) 57 *L'année sociologique* 547.

⁷⁹ Carbonnier, *op. cit.* (*Sociologie juridique*), at 254.

⁸⁰ J. Foyer, 'Présentation d'une communication à l'Académie des sciences morales et politiques de Jean Carbonnier « La sociologie juridique et son emploi en législation »' (2007) 57 *L'année sociologique* 391.

⁸¹ Carbonnier, *op. cit.* (*Sociologie juridique*), at 254.

⁸² C.-M. Herrera (ed.), *Les juristes face au politique. Le droit, la gauche, la doctrine sous la III^e République* (2003), F. Audren, 'Le droit au service de l'action.

But these movements outside the Law Faculty had little influence within it. Only from the 1970s can one begin to identify a group of legal scholars from within the academy beginning to develop a socialist critique of law.

The social and political context of May and June 1968 was critical to this. A series of social movements, strikes and demonstrations coalesced together to become a major cultural, social and political challenge to traditional authority. For certain key political and professional actors – including a legal profession and judiciary in the processes of unionization - law and justice became part of the terrain of political struggle.⁸³ In the midst of this tumult of radical ideas, new practices and disciplinary alliances emerged. Historians and economists began to pay a new and particular interest to the law while at the same time certain legal scholars within the academy began to be converted to Marxist ideologies. At first these were isolated individuals but over time they began to organise collectively.

'*Critique du droit*'⁸⁴ was a group formed in 1978 from Law Professors and Lecturers mainly from strongly unionized Faculties in the provinces that were openly committed to the political left. Publishing a manifesto, launching a journal and a book series,⁸⁵ the group had both scientific and pedagogical aims, seeking both to develop an alternative understanding of law and to transform teaching practices in order to promote the transition to socialism.⁸⁶ The project was overtly rooted in a Marxist historically materialist approach in which both state and law were seen as a product of class struggle. Claims of the neutrality of law were manifestations of bourgeois idealism and formalism which served merely to reinforce the dominance of the capitalist mode of production.⁸⁷ Yet the impact of the group on the academic mainstream was much more limited than that of the various radical and critical strands that developed

Eléments pour une biographie intellectuelle d'Emmanuel Lévy (1871-1944)' (2004) 56-57 *Droit et Société* 79.

⁸³ L. Israël, 'Un droit de gauche ? Rénovation des pratiques professionnelles et nouvelles formes de militantisme des juristes engagés dans les années 1970', (2009) 73 *Sociétés contemporaines* 47.

⁸⁴ M. Miaille, 'Critique 1 - Critique du droit', in A.-J. Arnaud *et al.* (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (1993, 2nd ed.), 131-133, X. Dupré de Boulois, M. Kaluszynski (eds.), *Le droit en révolution(s). Regards sur la critique du droit des années 1970 à nos jours*, (2011).

⁸⁵ The manifesto was published as *Pour une critique du droit* (1978). See also M. Miaille, *Une introduction critique au droit* (1976).

⁸⁶ Miaille, *op. cit.* ('Critique 1 - Critique du droit'), at 132.

⁸⁷ *Id.*

within the Anglo-American legal academy in the 1970s.⁸⁸ After 12 years, the group stopped meeting and publishing and no longer exists as such. But its traces remain in certain pockets of critical practice to be found in the Law Faculties where orthodox doctrinal assumptions about legal practice are unpicked and challenged. The nature of the critical approaches adopted varies greatly in different places.

The Centre for Critical Legal Research (*Centre de recherches critiques sur le droit* - CERCRID) at the Jean Monnet University in Saint-Etienne explicitly claims a direct line of descent from 'Critique du droit'.⁸⁹ It remains a rare example of a university research centre essentially made up of lawyers which seeks to promote an approach that goes beyond the doctrinal. Unlike the sociologist who addresses legal rules and practices from an external perspective without considering the internal logic underpinning them, research at CERCRID aims to take law seriously. But this is done not simply in order to ask questions about the normative coherence of legal doctrine as a body of rules, but rather to see legal rules as measurable social phenomena and therefore legitimate objects of sociological analysis.⁹⁰ Thus a lot of empirical studies of courts and judicial activity have been conducted (often based on statistical analysis).

A very different kind of critical approach can be observed at the *Centre de Théorie du Droit* which was created in 1978 by Michel Troper. He argued the need for an epistemological break with dominant legal discourses and the construction of a new legal science.⁹¹ Drawing together strands as diverse as Kelsen, legal realism and the linguistic turn, Michel Troper's theory of law has little in common politically with the socialist critique of law aside from a shared desire to reveal the ideological assumptions of doctrinal analysis.⁹² Although it cannot be said to have created a distinct school of thought, the Centre provides a training in legal

⁸⁸ In fact the international connections of the movement tended towards continental Europe and South America rather than the United States or the United Kingdom. Id., 133

⁸⁹ The web-page of the Centre has a history of the movement by its former Director, Antoine Jeammaud, "Critique du Droit", <<https://www.univ-st-etienne.fr/fr/cerclid.html>>.

⁹⁰ A.-J. Arnaud, *Le droit trahi par la sociologie. Une pratique de l'histoire* (1998), at 30-32. And see the presentation of CERCRID par A. Jeammaud et E. Serverin dans la revue *Droit et Société* (1993/1)25, 335.

⁹¹ M. Troper, 'L'idéologie juridique', in *Analyse de l'idéologie*, ed. G. Duprat (1980), 221.

⁹² For example, see his latest book, *Le droit et la nécessité* (2011).

theory and has trained a certain number of researchers who carry on its critical project.

There are other important examples of individual legal scholars and research groupings who are trying to go beyond orthodox doctrinal analysis. Sometimes individual,⁹³ sometimes more collective,⁹⁴ this work often receives recognition for its quality and innovation from fellow scholars. But because they run against the grain of established patterns of recruitment, promotion and thus socialisation within the Law Faculties, these initiatives struggle to leave an enduring institutional effect on the way law is researched and taught. In the end, most of the socio-legal work done in France is now being done outside the Law Faculties.

B. Beyond the Law Faculty

We have argued that the institutional structure of French universities has not helped the development of socio-legal studies. The national state framework for defining a discipline marginalizes areas of research like socio-legal studies which have no official section within the CNU. The consequence is that socio-legal research takes place as a series of separate appendages to recognized disciplines like economics, political science or sociology for which law is not a central concern (1). But the effect of this loss of institutionalized academic legitimacy has been mitigated both by the fact that some of the most influential figures in French social science have given a major role to law within their broader social theories and that, in part in consequence, we are witnessing a flourishing of empirical studies of law and legal practices outside the Law Faculties (2).

1. Constructing socio-legal sub-disciplines

The structure of disciplines within the social sciences in French universities was transformed during the 20th century. After the emergence of sociology at the start of the century came the development of political science and economics after the 2nd World War. Paradoxically, these last two disciplines actually first developed within the Law Faculties before shifting their focus away from legal contexts as they developed their own institutional autonomy. This shift to other research areas reflected not only the difficulty of making

⁹³ In very different ways, one could cite (amongst others) Christian Atias, Jacques Chevallier, Mireille Delmas-Marty or Alain Supiot.

⁹⁴ See the issue of *Jurisprudence. Revue critique* (2010) 1 on the teaching of law, or the empirical studies of shifts in penal responses by the criminal justice research group based at Nantes University within the Centre for Law and Social Change (*Droit et Changement Social*): J Danet (ed), *La réponse pénale. Dix ans de traitement des délits* (2013), V Gautron and J-N Retière (eds), *Les recompositions de la justice pénale délictuelle en France* (2014) 88 *Droit et société*.

connections with a highly doctrinal legal science but also the perceived need for the new disciplines to establish a distinct identity.

The economic analysis of law provides a remarkable illustration of the tensions. For legal scholars, economic relations are inevitably constituted by the law and so economics is clearly a related area of knowledge. But French lawyers have been quite reluctant to embrace concepts drawn from economics or to develop economic analysis of legal practices. Thus the field known as economic law actually contains little economic analysis of law.⁹⁵ Such an instrumental view of law generally seems within the Law Faculties to be in tension with the conceptual categorizing at the heart of the civil law tradition.⁹⁶ Thus the paradox is that the teaching of political economy has taken place within Law Faculties for 150 years but the economic analysis of law largely takes place within the Economics Faculties which developed their own institutional autonomy in the 1960s.⁹⁷ Noticeably the economists working on economic analysis of law have tended to avoid the analysis of French law, perhaps an indication of the difficulty of cooperating with the Law Faculties.⁹⁸

Political sciences provide another example of the rather distant relationship between law and other disciplines. After some initial developments at the end of the 19th century,⁹⁹ French political sciences then re-emerged within the Law Faculties as a discipline allied to Public Law. One might have anticipated that the obvious links between politics and law might have led political scientists very quickly to develop socio-legal studies, but until recently this has not been the case. After the 2nd World War, political scientists emphasized the search for disciplinary autonomy by creating their own research networks, degree programmes and distinct teaching institutions. The introduction of a separate version of the competitive exam to become Professor (*concours d'agrégation*) for political science in 1971 was a final recognition of this new independence.¹⁰⁰

⁹⁵ G. Fargeat, 'La notion de droit économique' (1992) 37 *Archives de philosophie du droit* 27.

⁹⁶ For example, see the general tone of the first part of the *Revue de droit Henri Capitant* (2011) entitled 'Civil Law Perspectives on Law and Economics', available on line :

<http://www.henricapitantlawreview.fr/edito_revue.php?lq=en&id=18&lateral=18>

⁹⁷ P. Le Merrer, 'L'affirmation de l'économie comme discipline scientifique : une histoire française particulière', *Tracés. Revue de sciences humaines*, 163.

⁹⁸ C. Jamin, 'Economie et droit', in *Dictionnaire de la culture juridique*, eds. D. Alland and S. Rials (2003), at 580.

⁹⁹ P. Favre, *Naissances de la science politique en France : 1870-1914* (1989), and 'Histoire de la science politique', in *Traité de science politique : 1. La science politique, science sociale, l'ordre politique*, eds. M. Grawitz, J. Leca (1985), at 31.

¹⁰⁰ M. Milet, 'L'autonomisation d'une discipline. La création de l'agrégation de science politique en 1971' (2001) 4 *Revue d'histoire des sciences humaines* 95.

It remains true that political science continues to be taught within Law Faculties but this is now an institutionally separate discipline with its own section of the CNU.

This disciplinary separation has been accompanied by intellectual autonomy in the definition of research questions and methods. It is not just that the particular agenda for investigation is now very different from that of Public Law (with particular emphasis on studies of political behavior and affiliation, elections and political parties). The new discipline uses inductive methods to study scientifically the reality of the exercise of power in a way that is very different from the traditional deductive search for normative coherence that has been the mark of the civil lawyer.¹⁰¹ For some this represents not just a break with the world of the legal scholar but a negative re-evaluation of the significance of law by political scientists.¹⁰² Thus the continuing delivery of political science programmes within Law Faculties has not until recently led to many interventions by political scientists into the domain of law. But things are changing and although disciplinary splits persist, one can observe the emergence of legal questions in political science research particularly in public policy analysis¹⁰³ and the development of European Studies.¹⁰⁴ This trend amongst other disciplines to reach out to law is also evident in relation to sociology.

The marked separation of the intellectual world of legal scholars and sociologists that was obvious from the start of the 20th century made it difficult to construct sociology of law as a sub-discipline.¹⁰⁵ Despite an illustrious precursor in Durkheim, faced with a legislative sociology already entrenched in the Law Faculties, not many sociologists sort to construct a specialized branch of sociology devoted to law. The well-known exception was Georges Gurvitch, who developed a theory of social orders in his *Eléments de sociologie juridique* in 1940. But despite the range of his work, his lead was not taken up by other

¹⁰¹ J. Chevallier, 'Science du droit et science du politique', in CURAPP (ed.), *Droit et politique* (1993), 252.

¹⁰² J. Caillousse, 'Droit et politique : vieilles lunes, nouveaux champs' (1994) 26 *Droit et Société* 132.

¹⁰³ See especially the work of Patrick Le Galès and Pierre Lascoumes, for example their book *Sociologie de l'action publique. Domaines et approches* (2012).

¹⁰⁴ See for example, the work of Antoine Vauchez, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe* (2003).

¹⁰⁵ M. Garcia Villegas, A. Lejeune, 'La sociologie du droit en France : De deux sociologies à la création d'un projet pluridisciplinaire ?' (2011) 66 *Revue interdisciplinaire d'études juridiques* 1.

lawyers nor sociologists¹⁰⁶ and was even subject to sharp criticism.¹⁰⁷ It is only more recently that social scientists in France have rediscovered the legal dimensions of the social world.

A key starting point was criminal and penal justice. From the 1970s, the Ministry of Justice began to commission research in the sociology of penal institutions. Developments have been constrained by the dominance of a doctrinal approach to criminal law¹⁰⁸ and the difficulties of constructing a criminology that is genuinely interdisciplinary: the national disciplinary structures of French universities make that just as difficult as they have made the construction of socio-legal studies.¹⁰⁹ But the study of social (particularly legal) response to criminal activity has nevertheless developed in a number of research centres over the last thirty years.¹¹⁰ And in recent years a variety of theoretical approaches have been used to develop sociological interest in law beyond the realm of criminal and penal justice. These developments were mapped in the late 1990s for the *Journal of Law and Society* by André-Jean Arnaud and Pierre Noreau¹¹¹ and the story has been brought up to date recently by Liora Israël.¹¹² Certain key figures, notably Jacques Commaille,¹¹³ have been critical over the last 30 years to the creating and sustaining of institutional frameworks for the sociology of law. A central role has been played by the journal *Droit et société*,¹¹⁴ and to a lesser extent *Droit et cultures*, in developing a pluralist dialogue between sociologists, anthropologists and legal theorists. What we seem to be witnessing is a shift in emphasis from grand theory to empirical research which corresponds to what Anglo-american

¹⁰⁶ See the special edition of (1986)4 *Droit et société* on Gurvitch and especially J.-G. Belley, 'Georges Gurvitch et les professionnels de la pensée juridique', 353. More recently see the same author, 'Le « droit social » de Gurvitch : trop beau pour être vrai ?' (2014) 88 *Droit et société* 731.

¹⁰⁷ F. Soubiran-Paillet, 'Juristes et sociologues français d'après-guerre : une rencontre sans lendemain' (2000) 41 *Genèses : Sciences sociales et histoire* 125.

¹⁰⁸ J.-L. Halpérin, 'L'originalité de la doctrine pénaliste depuis la codification napoléonienne' (2010) 53 *Archives de philosophie du droit* 26.

¹⁰⁹ R. Colson, 'Criminology à la française. French Academic Exceptionalism', (2013) 53 *British Journal of Criminology* 588.

¹¹⁰ For example CESDIP (Center for Sociological Research on Law and Criminal Justice Institutions : <http://www.cesdip.fr/>) has produced high quality criminological research on penal institutions with a team of sociologists, historians and political scientists but very few lawyers. The journal *Déviante et société* provides a key outlet for criminological work in French.

¹¹¹ P. Noreau, A.-J. Arnaud, 'The Sociology of Law in France: Trends and Paradigms', (1998) 25 *Journal of Law and Society* 257.

¹¹² L. Israël, 'Legalise it! The rising place of law in French sociology' (2013) 9 *International Journal of Law in Context* 262.

¹¹³ See for example J. Commaille, *A quoi nous sert le droit ?* (2015).

¹¹⁴ P.-Y. Condé, 'Droit et Société, ou le pluralisme d'une revue de théorie et sciences sociales du droit' (2015) 91 *Droit et société* 687.

scholars might categorize as socio-legal research (as contrasted with sociology of law).

2. From grand theory to fieldwork

The influence of a number of grand French theorists in Anglo-american humanities and social science faculties has been considerable in recent years. But what has been their influence on socio-legal research in France? In terms of influence on social scientists working on law the impact has been variable. Deleuze, Baudrillard and Derrida are rarely cited whereas Foucault, Bourdieu and Latour have had significant influence. Over and above the theoretical markers they have left on the way law is conceptualized, what they done collectively is contribute to a renewal in the interest in the sociological study of law.

Foucault occupies a particular position in that his analysis of power goes well beyond an analysis of the legal order. Though sometimes associated with a rejection or marginalization of law it is now recognised that his approach is far from an expulsion of law.¹¹⁵ In the study of the disciplinary technologies of modern governmentality, law is recognised, alongside other non-legal techniques, as both on the one hand, shaping the conduct of populations and on the other, as a resource for action by individual subjects. Although he had no intention of establishing schools of theory or training disciples, Foucault's theoretical perspectives on law have had a marked influence on the development of French socio-legal research. This is because Foucaultian theoretical tools have been picked up creatively by different researchers and used to re-think major areas of law (for example, François Ewald's work on the welfare state¹¹⁶ or that of Pierre Lascoumes on criminal law.¹¹⁷)

Unlike Foucault, who always came at law at something of a tangent through a more general reflection on power, Pierre Bourdieu set out directly to describe the characteristics of a legal order but to do so within the broader framework of his more general sociological concepts. Thus he developed concepts like 'juridical labour' by applying his major concepts of habitus and social field to reveal the

¹¹⁵ For French commentaries on the relations between Foucault et le droit, see M. Alves da Fonseca, *Michel Foucault et le droit* (2014) and B. Mazabraud, 'Foucault, le droit et les dispositifs de pouvoir' (2010) 42 *Cités* 127. For a recent re-thinking in English see B Golder and P Fitzpatrick, *Foucault's Law* (2009).

¹¹⁶ F. Ewald, *L'Etat providence* (1986).

¹¹⁷ P. Lascoume, 'Foucault et les sciences humaines, un rapport de biais: l'exemple de la sociologie du droit' (1993) 26 *Criminologie* 35.

'symbolic violence' underpinning doctrinal legal analysis.¹¹⁸ By challenging the concept of an autonomous legal science he paradoxically rekindled the tensions between lawyers and sociologists while at the same time renewing the interest of the latter in the world of the former.¹¹⁹ Adopting his approach, several French researchers have conducted empirical studies of the world of legal practice, both on the French judiciary¹²⁰ and the international market in private legal practice.¹²¹

Bruno Latour completes our triumvirate of major contemporary French social scientists who have sought to engage with legal practice. Better known originally for his work on science and technology studies (STS) and for a series of ethnographies investigating Western ways of constructing truth,¹²² he spent many months immersed in the world of the Conseil d'Etat, the final court of appeal in France on matters of administrative law. More directly a contribution to the sociology of knowledge than of law, nevertheless the richness of the work has important implications for socio-legal research. Beyond the particular theoretical interest of the argument, the status of its author and the distinctive empirical nature of its investigation are likely to reinforce other tendencies already enhancing sociological interest in law. Here, one can pick out what has been termed the '*juridicisation*' of the political¹²³ as well as rapid shifts in the nature of legal regulation.¹²⁴ But it is the form of that interest that is particularly striking: empirical studies and ethnographic research seem suddenly to have overtaken the traditional French sociological orientation towards abstract theory. This may be part of a general evolution (or even erosion) of the

¹¹⁸ P. Bourdieu, 'La force du droit. Eléments pour une sociologie du champ juridique', *Actes de la recherche en sciences sociales* (1986) 64, 3 [translated by R. Terdiman, 'The Force of Law : Toward a Sociology of the Juridical Field', *Hasting Law Journal* (1987) 38, 814].

¹¹⁹ See for example the introduction by Jacques Commaille of a special issue of *Droit et société* (2004) 56-57 devoted to the place of law in the work of Pierre Bourdieu. Also see '*Norme, règle, habitus et droit chez Bourdieu*' (1996) 32 *Droit et société*

¹²⁰ See for example A Bancaud, 'Une constance mobile. La haute magistrature', *Actes de la recherche en sciences sociales* (1989) 76, 30, or *Une exception ordinaire : La Magistrature en France 1930-1950* (2002).

¹²¹ See particularly the work of Yves Dezalay:
<http://www.cessp.cnrs.fr/spip.php?rubrique88>

¹²² B. Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat* (2002) [Transl. M. Brillman et al. *The making of law: an ethnography of the Conseil d'Etat* (2009)].

¹²³ J. Commaille and others (eds), *La juridicisation du politique. Leçons scientifiques* (2000).

¹²⁴ L. Israël, op. cit., esp. 269-272.

traditional role and status of the French intellectual.¹²⁵ But this modern shift in the world of the academy has had the positive effect of generating new lines of development in French socio-legal research. Whether this will in the end affect even the classical figure of the Law Professor remains to be seen.¹²⁶

¹²⁵ Arnaud, *Le droit trahi par la sociologie*, op. cit., 49-50. See generally S Hazareesingh, *How the French think* (2015)

¹²⁶ For an analysis of shifts in French higher education that may lead to change in legal education see (2013) 83 *Droit et société* 99 and the discussions on the training of lawyers in France in 2015 (n° 150, 151 et 152) *Commentaires*