Review Article

Who is afraid of jurisprudence?

Alice Schneider[1]

Sociological Jurisprudence: Juristic Thought and Social Inquiry by Roger Cotterrell (Abingdon, Oxon: Routledge, 2018), 256 pages.

The signifier 'jurisprudence' has multiple uses. It can refer to the case law of a particular court (as in, 'the jurisprudence of the European Court of Human Rights'), it can be used as a synonym for legal theory (or a branch thereof, such as in the case of 'General Jurisprudence') and, in its broadest sense, 'jurisprudence' simply means 'legal knowledge and scholarship'. In the context of legal education at Oxford, we use the term both in reference to the tutorial course in legal theory – the one about Hart, Dworkin and others – and as the official name of the undergraduate degree in law, the *BA in Jurisprudence.*

In *Sociological Jurisprudence*, Roger Cotterrell cares about nomenclature. He wishes to reverse what he sees as a 'decline' of jurisprudence (p.5) by motivating an understanding of it as a sociologically informed body of legal knowledge that aims to "serve social needs and social values" (p.45). Such *sociological jurisprudence*, he argues, is a necessary resource for *jurists* – certain kinds of legal scholars who are *committed* to an ideal of law that is informed by values like justice, security, order and solidarity (pp.32, 33, emphasis as in original).

In part one (the book is divided into three parts), Cotterrell sets out an ideal type of the virtuous jurist that he contrasts with the greedy, manipulative image that lawyers tend to have in popular culture. It is the responsibility of jurists, Cotterrell explains, to "guard" (pp.32, 43), "promote" (pp.30, 53, 220), "preserve" (p.43) and "nurture" (p.6) "the well-being of the idea of law" (p.53). A critical reader may be inclined to pause here and wonder whether more normatively committed jurists are truly necessary. After all, law is already a deeply entrenched institution in modern societies and sociologists have long been proclaiming the juridification of modern life.[2] If anything, the ideological power of legal concepts and institutions seems to be

[1] DPhil Candidate, Centre for Socio-Legal Studies, University of Oxford.

[2] See, for example, Jürgen Habermas, *The Theory of Communicative Action Volume One: Reason and the Rationalisation of Society* (Beacon Press 1984) 242, 270; Günther Teuber, 'Juridification– Concepts, Aspects, Limits, Solutions' in Günther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter 1987); Jürgen Habermas, 'Law as Medium and Law as Institution', *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1985) 207.

proliferating; Samuel Moyn famously dubs human rights "the last utopia".[3] Viewed in this way, law seems hardly in need of patrons and advocates.

On the matter of why jurists are necessary, Cotterrell offers that "if no one speaks forcefully and influentially for law in this sense but people generally seek only to make use of it for their political or personal ends, history shows a range of risks, ultimately including that of constitutional collapse, as in the Weimar republic"(p.42). That the Weimar republic collapsed because of an absence of committed legal idealists reads like an ambitious claim.[4] But it seems true enough that to be socially valuable, law – like other human artefacts – requires the efforts of those who work to continually update and to improve it. So I am on board with Cotterrell's claim that normatively committed jurists are needed (though, of course, they may already be abundant).

Part one of the book explains in more detail why the jurist's enterprise of working towards said 'idea' of law should be systematised into the multidisciplinary bricolage (p.45) that is "sociological jurisprudence". A central consideration here is that General Jurisprudence, or "contemporary Anglo-American legal philosophy", as Cotterrell refers to it (p.47), is not up to the task. This, we are told, is the case for two reasons: firstly, philosophical concepts of law are too abstract and thin to be practically relevant (p.49), and secondly, they are too normatively inert to promote "an ideal juristic understanding of law" (p.45).

The first point is a familiar socio-legal critique of legal philosophy.[5] Cotterrell laments that contemporary legal theory has developed into a professionalised branch of analytical philosophy that focuses on generalised concepts and universal truths. Thus, in working towards a conceptualisation of law, this discipline is often blind to social and cultural variation in legal phenomena (p.54).

But the claim that legal philosophers do not sufficiently engage with empirical social realities is controversial. As Cotterrell rightly notes, analytical legal philosophers are typically concerned with discovering what is *necessarily*, or, as he prefers to phrase it, *universally* (p.52) true of law; the kinds of features, one might say, that make it so that some phenomenon counts as a 'law' or as a 'legal system' in the first place. The flipside of building a theory on the basis of general features is that one predictably

[3] Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010).

[4] Normative legal thought seemed to be alive and well in Weimar; for a discussion of the notable Weimar dispute on legal method and legal positivism, see Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre - ein abgeschlosssenes Kapitel der Wissenschaftsgeschichte?* (Franz Steiner Verlag 2001).

[5] That jurisprudence ought to concern itself more with empirical socio-legal insights has been proposed in the works of various scholars. See, for example, Fernanda Pirie, *The Anthropology of Law* (Oxford University Press 2013) 19,20; Nicola Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: 4th Series* (Oxford University Press 2000); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, vol 1 (Cambridge University Press 2009) 22; Denis J Galligan, 'Legal Theory and Empirical Research', *The Oxford Handbook of Empirical Legal Research* (2010); Brian Z Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 *William and Mary Law Review* 2236.

skims over variations and idiosyncrasies. For a different field – like socio-legal studies, or the sociological jurisprudence that Cotterrell advocates – it may well be that detailed differences are of particular interest.

What, then, is the relationship between analytical and 'sociological' jurisprudence? Can those academic projects not exist alongside each other? The answer Cotterrell gives in the book is not entirely clear. At one point, he states that it is not his concern "to debate whether a philosophical search for truth […] is appropriate as a philosophical project" (p.53). Indeed, the introductory chapter explicitly recognises that legal theory can have various different disciplinary orientations (p.7). At the same time, significant portions of the book call into question the purpose and utility of formulating 'essentialist' conceptions of law (pp.50 f, 90, 222).

The brunt of this criticism is directed at one branch of legal theory: contemporary legal positivism. Here, the second consideration that supposedly justifies the need for sociological jurisprudence becomes important: positivism, we are told, is not sufficiently evaluative. The book is strongly committed to the view that a concept of law should have an evaluative dimension: the first few chapters tell us that *sociological jurisprudence* is concerned with developing an *idea* of law, but halfway through part one, Cotterrell begins to add, in parenthesis; '*ideal'* to this agenda. But are idea and ideal the same thing? When it comes to law, Cotterrell evidently proposes they are. Or at least that they ought to be, since a non-evaluative conception of law is, in itself, an allegedly purposeless endeavour (p.50).

In advancing an idea (or rather, *ideal*) of law infused with values like justice, security and solidarity, Cotterrell draws inspiration from the works of some of the biggest non-positivist names in Anglophone legal philosophy debates. In this way, *Sociological Jurispudence* presents a surprising allegiance between socio-legal thought and natural law theorists like Radbruch, Dworkin and Fuller.

The word 'surprising' seems apt here because there is an obvious kinship between empirical social sciences and legal positivism. Cotterrell himself points out that socio-legal scholars "usually treat as law what is accepted by lawyers and officials […]" (p.204). This is strikingly reminiscent of H.L.A. Hart's approach to identifying legal rules in reference to the rules of recognition that are accepted by legal officials.[6] My guess is that most socio-legal scholars are casual legal positivists – possibly without being aware of it. Social scientists typically view law as a social construct: it is human societies who came up with the idea of law. Human societies determine what counts as law, and they are the ones who make and change legal rules. 'Legal positivism' nothing but reflects those very same presumptions: it is a handle used to refer to the position that legal validity is ultimately determined entirely by *social sources* and not by

[6] HLA Hart, *The Concept of Law* (2nd Edition, Clarendon Press 1994) 94, 100.

considerations of merit.[7] This, of course, means that positivists insist on a strict demarcation between an *idea* of law and an *ideal* of law.

Cotterrell happily accepts that social scientists typically aim to scientifically describe and explain legal phenomena, rather than to morally evaluate them (pp.172, 173). Why does he not make the same disciplinary allowances for branches of legal philosophy? Notably, insisting on a distinction between theorising what law *is* and what law *ought to be like* does not imply the claim that the latter question lacks importance. The opposite is the case; separate from their stance on law's nature, many legal positivists pursue evaluative projects that fall into the category of normative jurisprudence.[8]

The treatment of philosophy in general and the harsh critique of legal positivism in particular are perhaps the least convincing parts of the book. In particular, it remains unclear why the usefulness of Cotterrell's sociological jurisprudence should hinge on the merits and caveats of analytical legal philosophy. Is it not possible to view one as seeking thorough engagement with issues outside the other's ken? In one passage, Cotterrell claims that "the intensity, intricacy and assumed cultural importance of arguments around contemporary legal positivists divert attention from other philosophical issues about law" (p. 49). It seems counterintuitive to view ways of theorising law as a zero-sum-game in academic scholarship.

Perhaps Cotterrell's concern is more plausible when it comes to legal education. It is true that analytical jurisprudence continues to have a more established place on the law student's curriculum than other approaches to law. In his lecture *Socio-Legal Studies, Law Schools, and Legal and Social Theory*, published in the present issue of this journal, it becomes apparent that it is primarily with view to a spot on the law student's tightly packed syllabus that analytical legal philosophy and 'sociological jurisprudence' are competitors; "vying to give theoretical guidance for legal studies".[9] To the extent that Cotterrell is concerned with (prospective) legal practitioners, his claims warrant our sympathies; in many instances, contextual sociological knowledge of law will be more practically useful than conceptual insights into law's general nature.

But what about those (prospective) scholars who have a predominantly theoretical or academic interest in law and legal institutions? In his lecture, Cotterrell concedes "[…] this is certainly not to say that all the issues of jurisprudence are

[7] This way of explicating legal positivism is also referred to as 'the sources thesis'; see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 47.

[8] Consider, for example, H. L. A. Hart's evaluative writing on crime and punishment (HLA Hart and John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) , or Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986).

[9] Roger Cotterrell, 'Socio-Legal Studies, Law Schools, and Legal and Social Theory' (2018) 2 *Journal of the Oxford Centre for Socio-Legal Studies* 19, 29.

sociological, or that jurists should become social scientists, or even that all law teachers should think of themselves as jurists".[10] Who then are those 'jurists' for whom legal philosophy and socio-legal studies really are "parallel enterprises in competition"? To justify the call for sociologically-oriented jurisprudence to "invade the law school",[11] the category of 'jurist' requires further delineation – and it may end up being much narrower than parts of *Sociological Jurisprudence* suggest.

The validity of analytical philosophical theorising aside, Cotterrell does make a convincing case for why a focus on empirical social realities may benefit philosophical approaches to law – even on their own terms. Especially the essays contained in part two of the book offer insightful explanations for how salient developments in late modern legal systems like transnationalism, legal pluralism and multiculturalism challenge the archetypal municipal legal system that has traditionally been taken for granted in legal theory and in legal scholarship more generally. One of Cotterrell's examples is 'legal authority', a topic that reappears throughout Part two. Chapters six to nine offer examples for how both descriptive and normative concepts of legal authority can be usefully rethought in sociologically informed ways. Cotterrell emphasises that in practice, the extent to which people accept authority, as well as the particular reasons for which they accept it, are variable and culturally contingent (p.124). It seems to me that sociologically informed answers to the well-posed question of "which phenomena are to be seen as involving authority?" (p.122), have the capacity to speak back to sticky debates in legal philosophy, such as whether how law motivates action is significantly different to a gunman's threat.[12]

Part three develops the jurists' ideal of law in more detail and outlines two main ways in which a sociological perspective may aid the moral evaluation of law. Firstly, sociological theory may provide normative resources for legal evaluation (p.172) and secondly empirical data may help to refine jurists' knowledge of socially held values. To illustrate the first point, chapters 12 and 13 outline how jurists can draw inspiration from Durkheim's treatment of morals, especially the view that whether something counts as morally good depends on whether it promotes "integration and cohesiveness" (p.173) in a given society. Cotterrell illuminates various facets of Durkheim's work and makes a strong case for why Durkheimian concepts like solidarity and moral individualism ought not to be missing from the legal theorist's worktable. A core merit of Durkheim's moral thought, Cotterrell claims, is that is adaptable to culturally specific circumstances.

What remains unexplained is that social theorists like Durkheim are, as Cotterrell insinuates, a more useful source of normative guidance for jurists than moral philosophers (p.172). There seems to be no *prima facie* reason for why philosophical

[10] Cotterrell (n9), 29.
[11] Cotterrell (n9), 29.
[12] Hart famously proposed this distinction in The Concept of Law (n6), 6, 19. For a critical perspective, see Kenneth M Ehrenberg, 'The Anarchist Official: A Problem for Legal Positivism' (2011) 36 *Australian Journal of Legal Philosophy* 89, 93, 94; Frederick Schauer, 'Was Austin Right after All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris 1.

approaches like consequentialism should be less sensitive to socially varied conceptions of the good, or less successful at yielding culturally sensitive conclusions in their application. Perhaps Cotterrell prompts jurists to draw inspiration from the views of social theorists rather moral philosophers because he takes the former to be more likely to be overlooked. As mentioned above, it is a reoccurring claim throughout *Sociological Jurisprudence* that professional philosophy contributes to the marginalisation of sociological thought. If, like me, you are unconvinced that this is true, you might view social theory and moral philosophy as disciplines that both provide valuable resources to those who seek to normatively evaluate law.

Regarding the necessity of sociological insight into social norms and expectations, Cotterrell explains that the jurists' ideal of law must be amenable to culturally varied values. Words like 'justice' and 'security', we are told, are not universals but mere "receptacles" (p.224); they are to be fleshed out by particular societal or group values (p.159). This likely reads as intuitive to socio-legal scholars: it is empirically true that laws tend to be followed more reliably when they are considered legitimate and chime with socially held values[13]. Cotterrell points out that legal scholars and professionals tend to have a rather crude and homogenous image of the societies regulated by law (pp.160, 161), so empirically informed knowledge of social norms is undoubtedly useful for developing more effective regulation.

But in some cases, the claim that law ought to reflect culturally specific values may be controversial from an ethical perspective. What if the society in question happens to harbour racist, homophobic or other discriminatory values – should those be translated into the local conceptions of justice that law promotes? If Cotterrell's answer to this is 'no'– which it is, as the conclusion reveals – then he faces the charge that his own concepts of justice or solidarity have at least some degree of universal meaning – a core that remains stable across cultural and historical difference. To this 'core' extent, Cotterrell's concepts would not be all that different from the "essentialist" thought of philosophers he so heavily criticises. In the final chapter, Cotterrell himself raises the question, "Are these concepts then, despite what I have written earlier, timeless, meaningful beyond any specific references to context, valid in and of themselves?" (p.223).

I wish this consideration had been raised so explicitly before page 223 (the conclusion ends six pages later). Moral relativism is a challenging position to defend, and cavalier claims such as "everyone knows that justice and security are important" (p.224) are unhelpful. My interpretation is that the position Cotterrell occupies mixes universalism and relativism: concepts like justice and solidarity have *some* general meaning and must be *somewhat* amenable to locally held views. This view is intriguing and attractive, but it would be more practically and academically useful if Cotterrell elaborated how, in his view, the boundaries are to be drawn.

[13] Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006).

As a research programme, 'sociological jurisprudence' draws attention to the ways in which sociological insights can inform and improve conceptions of law. The independent merit of this project is undeniable. But in calling this enterprise "jurisprudence", Cotterrell ostensibly aims to provoke comparison and disagreement with legal philosophers. To what end? Contrary to the claims in the book, I struggle to see that the ambitions of sociological jurisprudence substantively contradict with the analytical philosophical project. The signifier 'jurisprudence' has various uses. Surely, and without defiance, one additional meaning is available for the kind of sociologically informed and normatively committed legal scholarship that Roger Cotterrell advocates.