Legal Consciousness Studies according to Susan Silbey: Dissonance between Empirical Data and Theoretical Resources?

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* Translated by Benn Williams

Résumé

Les Legal Consciousness Studies selon Susan Silbey : une dissonance entre données empiriques et ressources théoriques ?

À la lecture des observations de Susan Silbey tirées des entretiens réalisés, laissant notamment entrevoir des capacités de résistance de la part des citoyens ordinaires, la question est posée dans le présent article de la pertinence de la formulation d’un constat général qui reste celui d’une « legal hegemony » s'imposant massivement. Un tel positionnement conduit alors Susan Silbey à solliciter des théories européennes valorisant exclusivement cette idée d’hégémonie, de systèmes de domination et de « fausse conscience ». La conséquence est que ne sont pas véritablement prises en compte d’autres théories fondées précisément sur la thèse selon laquelle les acteurs sociaux, y compris les plus dominés, sont susceptibles de s’opposer et, pour cela, de s’approprier le droit comme instrument de résistance.

Contradiction entre empirie et théorie – Domination versus résistance – Legal hegemony – Théories européennes.

Summary

Reading Susan Silbey’s observations pulled from completed interviews, notably allowing glimpses into the capacity for resistance on the part of ordinary citizens, this article raises the question of the validity of a general observation that remains one of a legal hegemony that would impose itself massively. Such a position leads Susan Silbey to solicit European theories that exclusively value this idea of hegemony, of systems of domination and of “false consciousness.” The consequence is that other theories founded precisely on the thesis of a capacity of resistance, of appropriation of the law as a mode of resistance by the most dominated, are not really taken into account.

Contradiction between empirical data and theory – Domination versus resistance – European theories – Legal hegemony.
We have already underscored, in the introduction to the dossier, how Susan Silbey’s analyses inscribed in the current of legal consciousness could be perceived as the announcement of a new paradigm in research on law: one disqualifying even the idea of a simple causal relationship between law and society. But this idea is inseparable from another dimension that these works also highlight: the idea of political issues surrounding how one thinks about the law, the idea of the relationship between knowledge of the law and conceptions of power and political order. The perspective is certainly a matter that we have considered for a long time as a political sociology of law. It is, of course, present in the choice of seizing the life of the law in the framework of ordinary citizens’ “legal consciousness.” This perspective is also present in the theorizing undertaken to give meaning to the relationship between the law and these ordinary citizens. This passionate interest can mobilize resources in this area and effectively sustained the developments proposed by Susan Silbey. In referring to theories of domination, these developments illustrate, exemplarily, the relation between law and politics to the study of and the demonstration that a sociology of law is also a sociology of politics.

We have thus undertaken a critical work that does not aim to judge for judgement’s sake, but to seize this superb opportunity, offered by Susan Silbey to attempt to further the analysis of domination in contemporary societies and this legal approach is liable to reveal all of the complexities involved.

I. The Thesis of a Duality in the Connection to the Law Serves as the Basis for Perpetuating Domination

The central objective of the legal consciousness current is to free the signification of “legal hegemony,” that is, explain how the law perpetuates its institutional power notwithstanding the fact that a permanent gap exists between “law in books” and “law in action.” The realization of this gap exposes, in fact, a difference between the formal equality and the real, substantive inequality. There is indeed a structural relationship between the legality and the manifestations of inequalities and characteristics of industrial capitalism.

It is this basic realization that substantiates a research position that focuses first on ordinary citizens and then relationships that they establish with the law rather than drawing on the law itself. The goal is to “explore the submerged iceberg to trace this hegemonic power of law.” ¹ This positioning justifies the choice of qualitative approaches (it worth noting here that Georges Gurvitch himself advocates the appeal to a “legal microsociology” to grasp expressions of spontaneous law, of “unorganized law.” Legal consciousness Studies are thus brimming with ordinary citizens’ accounts of their relationship with the law, on their experiences of justice, as they are rich with observations on the presence of the law in citizens’ daily life.

From empirical observations on ordinary functioning of legality, the looming question is an apparent contradiction: on the one hand, despite the promises of equal treatment for all citizens in the legal and judicial domain, the legal system

does not cease to perpetuate inequalities; on the other hand, the ordinary citizens, do not cease to continuously demonstrate their belief, their adhesion to this legal system. The perpetuation of hegemony, and the law as an instrument of domination, is at the heart of this contradiction.

II. Searching for the Meaning of “Legal Hegemony” in European Theories of Domination

To understand the genesis of this contradiction, Susan Silbey borrows from “venerable traditions of European social theory that had been addressing just these questions with the concepts of consciousness, ideology, and hegemony in an effort to understand how systems of domination are not only tolerated, but embraced by subordinate populations.”

What seems to pose a problem in this borrowing of European theoretical resources is that they all bear a unilateral sense of Antonio Gramsci’s “cultural hegemony,” a conception that I call unilateral domination. Indeed, their genesis is Boétie’s notion of voluntary solitude. The author defines “voluntary servitude” as a “servitude that does not proceed from an exterior constraint but an interior willingness of the victim cum accomplice of his tyrant.” For Boétie, there is “the jurisdiction and the secret of domination, the support, and the grounds of tyranny.” There is the Gramscian “cultural hegemony,” producer of the this “false consciousness” aiming to naturalize the resulting domination, to the fatalist acceptance of the social order, to an active complicity with the dominated. One finds the same construction of the argument in the works of Michel Foucault and Pierre Bourdieu.

For Michel Foucault—considering that he then shifted his interest toward the process of subjectification, toward the experience of the subject of the law “asserting its subjective rights,” and that he conceived of the possibility of “thinking differently” about the law, “the law only appears as the mask of power, and its reality resides in the domination, a reality that the theory of law as well as its technique essentially function as camouflage.” Parallel to Michel Foucault, for whom the legal technique firstly conceals the domination, Pierre Bourdieu finds law an efficient instrument for ensuring reproduction of the social order, for perpetuating

2. Ibid., p. 328.
6. Ibid., p. 7 of Tristan Dagron’s presentation.
7. Ibid., p. 85.
hegemony of the dominant classes, and for exalting the established order, “a vision of this order that is a vision of the State, guaranteed by the State.” 11

To summarize: that which finally would be a functional complementarity between notions of inequality and injustice in ordinary citizens’ connective experiences to the law and justice and the indestructible nature of their belief in the legal system, would ensure the perpetuation of the hegemony, of the domination, and would justify the recourse to European theories marked by the unilaterality of this idea of domination. Such an analytical device leaves no room for resistance, for the capacity for resistance of the dominated, for their aptitude to enlist the law as a resource.

In the restitution of the empirical material collected, this possibility for resistance is present. It is said that their relationship with the law is perhaps “reluctant and resistant,” that in the collected accounts there are “openings for change or resistance.” 12 Susan Silbey also mentions that “although the historical record clearly revealed the law’s development as an ideological tool of repression, research also uncovered spaces of freedom. It began to seem as if the law was constituted by both domination and resistance, consensus and conflict.” 13

III. An Omission from the Critique of “Critical Theory”?

Numerous theories relativize the idea of domination and underscore the potentialities of resistance, notably in the relationships with the law. An author like Michel de Certeau illustrates this. For him, the “tactics” of the “weak” are susceptible of neutralizing or redirecting the “strategies” of the “powerful.” This example illustrates how:

The spectacular success of Spanish colonization of Indian ethnicities has been redirected by the use of it: even subjected, even willing, often these Indians utilize law, practices, or representations that were imposed upon them, either by force or by seduction, for other goals than the conquerors’. They did something else, they subvert from within—not without rejecting or transforming them […] but by a hundred means of employing them in the service of rules, of customs, or convictions foreign to the colonization that they could not escape. 14

This analytical perspective is thriving with the important literature on social movements mobilizing law as a resource, nationally and supra-nationally, to trigger

a “reversal.”  

But this approach is also present in the history of sociological thought. For example, in his definition of community, Ferdinand Tönnies speaks of “masses” of self-governing people “that become like the brains of the social system, exercising perception.” Representing “the dominant intellectual power, this intellectual center can function more perfectly than its predecessors, for, although confronted with more difficult problems through close contact with its members, its faculties are heightened by constant practice and experience. It is, therefore, much more likely to produce the highest and noblest intelligence in the political field.” As Ferdinand Tönnies writes, “the society […] can [thus] resist by affirming either its own right to this unlimited extension of the legislative power* or to the repression of natural or conventional law or by state or political law.”  

This idea of resistance is also tellingly present in the subset of pragmatic sociology found in France, in part after a split with the “Bourdieusien,” and for which:

The asymmetries must be prejudiced, as well as the possibility of their reversibility, even in cases where it the least likely, must not be dismissed apriori […]. In the optic that it [pragmatic sociology] favors, no power can be exercised unilaterally since its exercise necessarily implies the action in return of he who obeys or, if need be, resists*. 

A new critical current of the critique is asserting itself. It is not possible to present all of its variants here. We will simply say that we find its traces in the last developments of the Frankfurt School and in an entire literature highlighting, generally speaking, the urgency of redeploying the critique, the overtaking of social actor’s disqualification in speaking of “the competent actor” and of the imperative of “developing the secular capacities for emancipation.” 

The historian Edward P. Thompson showcased this analytical perspective when he criticized “a reductive and instrumental vision of a schematic and ultra-determinist Marxist law.” He considered that class relations can manifest themselves through forms and uses of the law that reveal the possibility of conflicts, of struggles around and with law. “It is only in exploring its complexities [those of the law] that we can show what it is worth, the way it was manipulated, and how the values that it proclaimed was, in practice diverted.” 

Drawing from his observation of Southeast Asian peasants, anthropologist/political scientist James C. Scott paved the way for renewing approaches to resisting domination. In speaking of “infrapolitics” of the dominated, he reveals

*Our emphasis.


21. Id., La guerre des forêts, op. cit., p. 121.
revelation of modes of resistance based on the observation of real material experience of the quotidian of the dominated. 22

On the side of political philosophy and sociology, it was Axel Honneth who broke with the exclusivity of a unilateral vision of top-down power. For him:

The exercise of the capitalist domination is always subject to the condition of consent of all the parties concerned, whatever their origins. It is precisely this condition of a mediatized accord on the intersubjective plan that [...] effectively enables, at any time and place, the fracturing of thin façades of the legitimation of the established system of domination, letting the social resistance flourish*. 23

The history of law has a long tradition of recognizing a law acted by society, “submerged in the society.” This is what Eugen Ehrlich’s current of “living law” illustrates vis-à-vis social law, 24 which seeks namely 25 to recognize the importance of the “social sources of legal rules” besides the “legal sources of social practices.” The subset of social law illustrates this or the sociological notion of “social law” highlighted by Georges Gurvitch, 26 suggesting that the law could be a resource, an instrument of resistance, 27 a law as it appears in collective mobilizations illustrated by the pay equity movement in the United States. 28 These mobilizations indicate the place in legal life accorded to “legal competences of social actors,” to their “manipulative strategies.” 29 These cannot be grasped from individual interviews, which logically place the individual at the center, while leaving in the shadows the individual’s condition of being inscribed in contexts 30 and their aptitude for being a stakeholder in collective appropriations of this legal resource in the framework of

*Our emphasis.

22. See, notably: James C. Scott, Domination and the Arts of Resistance: Hidden Transcripts, New Haven: Yale University Press, 1990, translated as La domination et les arts de la résistance. Fragments d’un discours subalterne, Paris: Editions Amsterdam, 2009, or, Scott’s Zomia ou l’art de ne pas être gouverné, Paris: Seuil, 2013. It is noteworthy that the position taken by James C. Scott brings him to question the classicism of political science, ignoring the levels “rarely recognized as political” and to underscore the virtues of social history and ethnography.


25. This is underscored in this dossier by contribution Daniela PIANA, Emilia SCHIRMAN and Noé WAGENER, “Où chercher le droit ? Juridicité et méthodes d’enquête dans les travaux de Susan Silbey”.


27. Id., À quoi nous sert le droit ?, op. cit.


the emergence of a “collective me.” 31 What could be in play here is the necessity of fully assuming a revolution in knowledge of the law, analogous to the knowledge of science that one finds in Science and Technology Studies 32: a revolution that, first and foremost, consists of researching the preeminence given to knowledge of a law that is inevitably inscribed within the contexts that construct it. As writes an author 33: “the belief in the purported ‘necessity’ of science melts under the relentless beam of ethnography. In the place of necessity, one sees negotiations that randomly lead to scientific ‘discoveries.’ The same applies to the necessity of law.” 34

Finally, there seems to be an incongruity between a data set comprised of accounts and observations of the “common place of law” and a theoretical framework mobilized exclusively to undergird the thesis of perpetual domination. Do we see here confirmation of the observation formulated by Pierre Bourdieu in a critical analysis of the law: that of a dissonance between empirical studies and the theoretical framework? 35 There could be an extraordinary paradox to observe, wherein an American author analyzed her empirical data of theories in which Pierre Bourdieu’s is inscribed, but the critical analysis is only valid in the French context in which the dissonance is historically, culturally, ideologically situated 36... contrary to the American context.

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Susan Silbey will excuse us for having taken the pretext of the theoretical development that she has specifically adopted in part of her work in order to highlight the pluri-dimensionality of the question of domination in place of a too unilateral conception of it. In conclusion, we just ensure, again, that certain other of her own analyses suggest this pluri-dimensionality. If we attach as much importance to this compounded approach of domination, it is not only because it seems the most just, in terms of scientific objectivity, but also because it opens the path to a new conception: of law as an instrument, under new forms, of realizing a democratic project... to which Susan Silbey and her entire oeuvre demonstrates a strong attachment. This rejuvenated research on law demonstrates that the life of the law can be something other than the support for “radical critique of a radically immutable situation.” 37

32. See the Virginie Albe’s and Stéphanie Lacour’s contribution to this dossier in the shift from a mythicized “Science” to scientific practices marked by contingencies.
33. Echoed in the aforementioned contribution as well the one co-authored by Daniela Piana, Emilia Schijman, and Noë Wagener in the dossier.
36. Ibid. Mauricio García Villegas offers a brilliant demonstration on the importance of context in the creation of research on the law.
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