Legal consciousness studies according to Susan Silbey: Dissonance between empirical data and theoretical resources?

Jacques Commaille
Translation Benn E. Williams

In Droit et société 2018/3 No 100 , pages 657 to 664
Publisher Lextenso

ISSN 0769-3362
DOI 10.3917/e.drs1.100.0657
Uploaded: 12/13/2018

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

Jacques Commaille

Institut des Sciences sociales du Politique (ISP/ ENS Paris-Saclay – Université Paris Nanterre), Bâtiment Laplace, 61 avenue du Président Wilson, F-94235 Cachan cedex.

<jacques.commaille@ens-paris-saclay.fr>

* 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

1. Susan S. SILBEY, "After Legal Consciousness", *Annual Review of Law and Social Science*, 1, 2005, p. 335 and the French translation is published in this dossier (see p. 585).

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." [2]

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," [3] a conception that I call unilateral domination. [4] Indeed, their genesis is Boétie's notion of voluntary solitude. [5] 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." [6] For Boétie, there is "the jurisdiction and the secret of domination, the support, and the grounds of tyranny." [7] 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, [8]—"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." [9] Parallel to Michel Foucault, for whom the legal technique firstly conceals the domination, [10] Pierre Bourdieu finds law an efficient instrument for ensuring reproduction of the social order, for perpetuating

2. *Ibid.*, p. 328.

3. Antonio GRAMSCI, *Selections from the Prison Notebooks of Antonio Gramsci*, ed. and trans. by Quintin Hoare and Geoffrey Nowell Smith, New York: International Publishers, 1971.

4. See my critique of the "paradigm of domination", *in* Jacques COMMAILLE, *À quoi nous sert le droit ?*, Paris: Gallimard, coll. "Folio essais", 2015.

5. Étienne DE LA BOÉTIE, *Discours de la servitude volontaire* [1576], Paris: Vrin, 2014.

6. *Ibid.*, p. 7 of Tristan Dagron's presentation.

7. *Ibid.*, p. 85.

8. Pierre GUIBENTIF, *Foucault, Luhmann, Habermas, Bourdieu. Une génération repense le droit*, Paris: LGDJ Lextenso éditions, coll. "Droit et Société", "Sociologie" series, 2010, p. 74.

9. Catherine COLLIOT-THÉLÈNE, "Pour une politique des droits subjectifs : la lutte pour les droits comme lutte politique", *L'Année sociologique*, 59 (1), 2009, p. 236.

10. Michel FOUCAULT, *Histoire de la sexualité. 1. La volonté de savoir* [1976], Paris: Gallimard, 1994.

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

11. Pierre BOURDIEU, "La force du droit. Éléments pour une sociologie du champ juridique", *Actes de la recherche en sciences sociales*, 64, 1986, p. 13.

12. See Patricia EWICK and Susan SILBEY, *The Common Place of Law: Stories from Everyday Life*, Chicago: University of Chicago Press, 1998; Susan SILBEY, "After Legal Consciousness", *op. cit.*

13. Susan SILBEY, "After Legal Consciousness", *op. cit.*, p. 341. Moreover, in other publications, Susan Silbey underscores the abusive usage that can come from the notion of hegemony. See, for example, Patricia EWICK and Susan SILBEY, "Looking for Hegemony in All the Wrong Places: Critique, Context, and Collectivities in Studies of Legal Consciousness", Paper presented at the Working the Boundaries of Law Conference sponsored by the European Research Council, International Institute for the Sociology of Law, Oñati, Spain, 2016.

14. Michel DE CERTEAU, *L'invention du quotidien. 1. L'art de faire*, Paris: Gallimard, coll. "Folio essais", 1990, p. 79. One could also refer to the converging analyses on the matter in Scott's famous observations of Malaysian peasants' practices, *in* James C. SCOTT, *Weapons of the Weak. Everyday Forms of Peasant Resistance*, New Haven: Yale University Press, 1985.

a "reversal." [15] 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." [16] 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**. [17]

A new critical current of the critique [18] 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." [19]

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. [20] "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." [21]

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.

15. Liora Israël, *L'arme du droit,* Paris: Presses de Science Po, 2009.

16. Ferdinand Tönnies, *Communauté et société. Catégories fondamentales de la sociologie pure* [1887], Paris: PUF, coll. "Le lien social", 2010, p. 238, 243.

17. Yannick Barthe *et al.*, "Sociologie pragmatique : mode d'emploi", *Politix*, 103, 2013, p. 194.

18. Luc Boltanski, "Sociologie critique et sociologie de la critique", *Politix*, 10-11, 1990, p. 124-134.

19. See, notably, Patrick Baert *et al., Le tournant de la théorie critique*, Paris: Éditions Desclée de Brouwer, 2015.

20. See, for example: Edward P. Thompson, *Whigs and Hunters. The Origin of the Black Act*, London: Allen Lane, 1975 (French translation: *La guerre des forêts. Luttes sociales dans l'Angleterre du XVIII^e siècle*, Paris: La Découverte/Poche, 2017).

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: Éditions 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.

23. Axel Honneth, *Critique du pouvoir*, Paris: La Découverte, 2016, p. 9.

24. Noé WAGENER, "Droit social", *in* Marie CORNU, Fabienne ORSI and Judith ROCHFELD, *Dictionnaire des biens communs*, Paris: PUF, 2017, p. 433-439.

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

26. Jacques COMMAILLE, "Les enjeux politiques d'un régime de connaissance sur le droit. La sociologie du droit de Georges Gurvitch", dossier *L'actualité de la pensée de Georges Gurvitch sur le droit,* coordinated by Jacques Le Goff, *Droit et Société*, 94, 2016, p. 547-563.

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

28. Michael MCCANN, *Rights at Work. Pay Equity Reform and the Politics of Legal Mobilization,* Chicago: University of Chicago Press, 1994.

29. Simona CERUTTI, "Normes et pratiques, ou de la légitimité de leur opposition", *in* Bernard LEPETIT (dir.), *Les formes de l'expérience. Une autre histoire sociale,* Paris: Albin Michel, 1995, p. 130, 131.

30. Analyses published in the American literature engaged in critical commentaries about Legal Consciousnes Studies highlight the importance of these *contexts* and the weakness represented by not returning to the individuals concerned. See, for example: Michael MCCANN, "On Legal Rights Consciousness: A Challenging Analytical Tradition", *in* Benjamin FLEURY-STEINER and Laura BETH NIELSEN (eds.), *The New Civil Right Research: A Constitutive Approach,* Aldershot: Ashgate, 2006, p. IX-XXX; Laura BETH NIELSEN, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment", *Law and Society Review*, 34 (4), 2000, p. 1055-1090.

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 an author writes [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.

*

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]

31. Paolo GROSSI, *L'Europe du droit,* Paris: Seuil, coll. "Faire l'Europe", 2011, p. 208. On this point, see the critique formulated in the present dossier by Daniela Piana, Emilia Schijman and Noë Wagener, underscoring the biases introduced by the choice of the method utilized.

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 Noé Wagener in the dossier.

34. Jean DE MUNCK, "Les trois dimensions de la sociologie critique", *SociologieS*, July 2011, (URL: <http://journals.openedition.org/sociologies/3576>).

35. Mauricio GARCÍA VILLEGAS, "On Pierre Bourdieu's Legal Thought", *Droit et Société*, 56-57, 2004, p. 57-70.

36. *Ibid.* Mauricio García Villegas offers a brilliant demonstration on the importance of context in the creation of research on the law.

37. Jacques RANCIÈRE, *Les scènes du peuple (Les Révoltes logiques, 1975/1985),* Lyon: Éditions Horlieu, 2003, p. 365.

■ About the author

Jacques Commaille is Emeritus Professor at École normale supérieure de Paris-Saclay, senior researcher at the Institute of Social Sciences of Politics (ENS Paris-Saclay/Université Paris Nanterrre/CNRS). He is a specialist of political sociology of law and justice as a contribution to a theory of political regulation.
His latest publication:
— *À quoi nous sert le droit ?*, Paris: Gallimard, coll. "Folio essais", 2015.