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Emmanuel Lévy and Legal Studies :
A View from Abroad

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Résumé

Emmanuel Lévy et les legal studies vus de l’étranger

Summary

Emmanuel Lévy is almost entirely unknown in the anglophone world, yet his originality deserves international recognition. His work can be compared with radical legal theory in other societies but is more subtle than that of some internationally better known jurists. His ideas about the political practice of law and about the social significance of legal thought predated, by many decades, similar views of the American critical legal studies movement. His understanding of law as grounded in potentially unstable beliefs resonates with themes of postmodernist legal studies. Where Lévy is ambiguous and unclear, the cause often lies in the profoundly contradictory influences that shaped his thought.

L’auteur

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– Law and Society (ed.), Aldershot, Dartmouth, 1994 ;
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To be invited to contribute, as a writer from the common law tradition, to this symposium on a remarkable French legal scholar is an honour. Yet the task is daunting because vast intellectual distances must be bridged. Emmanuel Lévy’s ideas, developed early in the twentieth century, are far removed from current tendencies in both Francophone and Anglophone legal scholarship and his work (none of it translated into English) is almost entirely unknown in English-language literature on law.

Until very recently, the only introduction in English to Lévy was in a translated adaptation of Georges Gurvitch’s *Éléments de sociologie juridique* published in London as *Sociology of Law* in 1947. For theoretically-oriented researchers in England who, like the present writer, committed themselves to legal sociology in the 1970s, Gurvitch’s book was essential reading to gain perspective on pioneer socio-legal theorists. But it criticised Lévy without explaining his ideas fully. Misleading translation of some key words (*e.g.* valeurs, créances) also made the discussion opaque.

At that time, Jean Carbonnier’s *Sociologie juridique* (1978) surveyed the pioneers of sociology of law and briefly but intriguingly noted Lévy’s originality and his socialist notoriety. Then André-Jean Arnaud’s valuable *Critique de la raison juridique I : Où va la sociologie du droit ?* (1981) and some of Lévy’s articles and pamphlets introduced me to his ideas and his unique style. Later I found copies of Lévy’s *Les fondements du droit* and *La vision socialiste du droit*, dusty, fragile and yellowing in the basement of a London library. The books had clearly lain undisturbed for many years.

Learning more about Lévy over two decades, I realised that his situation and achievement had no parallels in the common law world, but his moral integrity and intellectual honesty seemed to shine like a beacon. The mixture of activism and scholarship in his career, and his apparently unquenchable idealism and personal tenacity, suggested that it would be good to know more about the details of his biography. A decade-long project of research on Émile Durkheim’s legal sociology convinced me of Lévy’s importance in radicalising aspects of Durkheimian legal thought, transforming it into a philosophy of political action by fusing and challenging it with other intellectual influences. I felt that although Lévy’s work had no direct relations with Anglophone legal scholarship, comparisons with « realist » and « critical » common law traditions were potentially worth exploring. This paper offers a few suggestions about possible directions for this exploration.

I. Between Marx and Durkheim

The main influences on Lévy’s legal thought might be divided broadly into two clusters. One is the range of socialist thinking – related to but of-
ten in tension with Marxism – that contributed to socialisme juridique in France and elsewhere in Europe at the beginning of the twentieth century\(^2\). The other is the sociological influence of Durkheim and the Durkheim school, of which Lévy was an active, committed and longstanding member. Neither of these intellectual movements seems to have left a living legacy for contemporary legal scholarship, so that the terrain in which Lévy worked might be thought to have become barren. But it would be far too negative and too unfair to his achievement to leave the matter at that.

He wrote: « Au point de vue école, j’ai trouvé chez Durkheim confirmation de ceci : nous vivons de croyances. »\(^3\) In stressing the link between law and collective belief, Lévy focused on a matter that has become central to critical legal theory long after he wrote. The idea that we live by beliefs, and that law must be understood in its relation to collectively held convictions or understandings is an idea that is widespread in recent legal theories, though they explain that relation in many different ways.

Lévy’s fusing of Durkheimian and socialist thought allows him to adopt a complex theoretical position. The path he traces runs between theories of ideology, on the one hand, and Durkheimian understandings of the nature of collective representations (représentations collectives), on the other. But these very different approaches to understanding the nature of shared beliefs or understandings suggest contrasting kinds of legal theory: on the one hand, theories of law as an instrument or reflection of ideology; on the other, theories of law as a repository of social values, or as an expression of bonds of solidarity.

Theories of « law and ideology » tend to emphasise law’s mystificatory functions or its contribution to the maintenance of dominant ideological currents. Legal doctrine and legal practice are seen as helping to promulgate broad systems of ideas and beliefs. The theoretical image of law is as a site of struggle for hearts and minds, a struggle between world-views, or between interpretations of the nature of social life. In Marxist terms, the conflict of ideas and beliefs is clearly part of class struggle. Law is both a prize and a weapon in this struggle\(^4\). The state is, in part, a mechanism through which ideological control is exercised\(^5\).

Theories of « law and collective representations », derived from Durkheimian traditions, are likely to have a very different orientation. Law is not seen primarily as a site of struggle or a weapon but as an expression of

\(^2\) Nicole et André-Jean Arnaud, « Le socialisme juridique à la "Belle Époque" : visages d’une aberration », in André-Jean Arnaud (with Nicole Arnaud-Duc), Le droit trahi par la philosophie, Rouen, CESPJ, 1977, p. 115-144.

\(^3\) Emmanuel Lévy, Les fondements du droit, Paris, Alcan, 1933, p. 168.


moral conditions. Law embodies the moral realities of social life. It represents collective convictions. Law’s task is to define, rationalise and make explicit the currents of moral understanding and belief existing in society. Law expresses, in a public and codified form, social ideas that are otherwise inchoate and diffuse. The state is a mechanism for discovering, refining and expressing collective representations in a normative and institutional form, strengthening them and enabling them to foster social integration and solidarity.

The most serious ambiguities of Lévy’s work arise from the fact that it uneasily combines the influences of these contrasting approaches to the relations of law and belief. But both approaches remain strongly present in current theoretical analyses of law. Certainly, in the Anglophone legal world, ideas about legal ideology, hegemony and the struggle of ideas conducted through law are now discussed in terms of critical legal studies (of many different kinds) and rarely in terms of explicitly socialist legal thought or even less in terms of Marxism. Correspondingly, ideas about law’s relation to morality, and about the importance of shared values expressed through law and serving as a foundation for solidarity, are rarely discussed at present in terms of Durkheimian sociology. But they are much debated in the language of communitarianism or republicanism.

The ambivalence in Lévy’s approach can easily be noticed in his views on the state. On the one hand, he sees it as having the Durkheimian task of expressing and clarifying collective beliefs - especially those affecting credit, security, property and contracts. Where these beliefs are unstable, the state « participe à l’instabilité des valeurs ; le droit devient perpétuellement en rupture ».

Law and state reflect the shifting currents of collective belief. Law attempts to measure and reconcile conflicting representations. But Lévy sees the state itself becoming diffuse (even internationalised) as it seeks to support a society that has become increasingly a regime of securities depending entirely on unstable collective convictions that cannot be contained within the borders of state jurisdiction.

Implicit in this view is the idea that changes in collective beliefs entirely determine the nature and function of the state and the role and content of law. Just as for Durkheim, « les idées morales sont l’âme du droit ».

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10. Ibid., p. 152.
Lévy « la croyance crée le droit » 12. Law is rooted in belief: it is « un substitut pratique de la religion » and judges are its priests 13. One senses that « croyances » might break law apart and force it into new forms. The state would have no option but to acquiesce in what might be called the social or cultural creation of law.

On the other hand, Lévy (citing Lassalle in support) suggests that law and rights depend utterly on the state. They are politically created and have no existence except through the state’s directive force. « Seul l’État assure ou enlève aux individus leurs droits […]. C’est la loi qui donne, c’est la loi qui ôte, la loi, c’est à dire la volonté de l’État (législateurs, administrateurs, juges) 14. »

Thus, while one strand in Lévy’s thought treats the state, as Durkheim did, as a deliberating « brain » distilling collective representations into legal form 15 and dependent on these representations, another strand treats the state as sovereign « will » without which collective representations cannot acquire legal force. The question is: is law ultimately dependent on the state which gives it force and authority, or is the state merely the servant of culturally or socially produced law? Putting it more bluntly: are law’s sources essentially political or moral?

Lévy’s ambivalence on the relations of law, state and society (the legacy of the conflicting theoretical influences on him) is unresolved because he leaves key ideas vague. His central concept of « croyances » is unclear, as Georges Gurvitch emphasised 16, and Lévy does not explain how collective beliefs arise, change and have effects. So their sociological character remains obscure: are they rooted in class interests (as ideology) or in conditions of social integration (as collective representations)? How does law « measure » collective convictions? By what processes are conflicts between them reconciled – by public deliberation (Durkheim) or by coercion or ideological mystification (Marx)? How does law express « croyances »? Does law alter them in the process because legal thought and doctrine have their own special qualities? As a lawyer, Lévy could hardly be unaware of this issue, yet he has little to say about it. And these matters are not just of historical interest. Today the question of how far law reflects or mirrors collective understandings and how far it « constitutes » (defines and shapes) them remains a matter of debate 17.

13. Ibid., p. 35-36 ; Emmanuel LÉVY, La vision socialiste du droit, Paris, Giard, 1926, p. 117-118.
Can law and morality be distinguished clearly? For Lévy the distinction is that law provides a «measure» to limit, define and reconcile moral or other beliefs. But does morality not also «measure» (i.e. fix degrees of merit or responsibility) and address conflicts of beliefs or understandings? Durkheim treats the difference between law and morality as only one of degree, legal rules being moral rules that have been institutionalised in certain vaguely defined ways. Marx, by contrast, sees legal ideas and morality mainly as parallel expressions of ideology. Neither the Durkheimian nor the socialist traditions, on which Lévy draws, justifies any sharp separation of law and morality such as he seems to assume.

Despite its ambiguities, Lévy’s work has enduring value for current legal studies. First, it stresses in a most striking way the fragile grounding of law’s structures of meaning, and its dependence on social currents of belief and understanding that may combine (from the lawyer’s standpoint) rational and irrational judgments. Secondly, Lévy’s work is valuable for its provocative analysis of the conditions of stability and change in these social currents. It stresses that law is grounded in certain faiths that are not timeless, and that its legitimacy is never to be taken for granted.

Lévy’s view of law is profoundly populist, asserting that law’s strength lies ultimately not in the expertise of lawyers and judges who serve the state legal system but in the ideas of citizens at large. Eugen Ehrlich famously declared that the centre of gravity of law lies not in courts or legislation but in society itself. Lévy goes much further: law’s centre of gravity lies not just in «the social», understood as the patterns of social relations that make up society. It lies in the shifting social understandings and convictions of society’s members: in collective psychology rather than observable patterns of social action.

Hence, in a striking radicalisation of legal thought, Lévy privileges, in every important respect, the understandings of non-lawyers over those of lawyers. Because he asserts that legal ideas depend for their legitimacy and ultimate meaning on the pre-legal convictions (croyances) of citizens, he cleverly turns on their head all traditional assumptions about the ultimate control of law. It is hardly surprising, then, that he should have provoked such antagonism to his theories among jurists; and that he should have wanted primarily to address non-lawyers (socialist activists, industrial workers and, not least, the citizens of Lyon whom he served as deputy mayor) through his work.

II. Lévy and Critical Legal Studies

What connections exist between Lévy’s ideas and modern legal thought? Can there be points of contact with an international world of legal scholarship that has dismissed or, more often, simply been unaware of his work?

Lévy can be regarded as a remarkable precursor of modern critical legal studies in some of its aspects. More than seven decades before the critical legal studies (CLS) movement came into being, initially in the United States, Lévy (with other adherents of socialisme juridique) emphasised the central CLS idea that legal concepts reflect broader social currents of thought and that as part of the process of challenging these broader currents, legal ideas themselves can be turned to new purposes and reinterpreted in new, more liberating and just ways. Long before CLS, Lévy saw legal argument as a form of political practice 20.

From the time of his thesis on Preuve par titre du droit de propriété immobilière (1896), he held the view that property rights existed only through the well-founded conviction of property owners in the soundness of their title. This conviction is made well-founded only by the general collective conviction as to what acts and circumstances are appropriate to give good proprietary title. Lassalle had argued that legal entitlements depend on and vary with collective belief in them: Lévy added to this the idea that these entitlements (or their value) could be destroyed by the withdrawal of belief.

Nearly a century after Lévy, CLS saw the political potential of forms of legal practice that aim to secure this withdrawal of belief in legal certitudes. CLS describes the establishment of these certitudes as the « reification » of legal ideas – their tendency to appear as solid, unshakeable and « thing-like ». To challenge reification involves a radical legal practice aiming to secure the withdrawal of belief in dominant interpretations of legal ideas. CLS describes this practice as one of attacking legal « hegemony ».

For CLS, legal ideas can potentially be turned upside-down by able, politically-aware, critical legal argument. Assumptions that underpin previous legal interpretations can be undermined and the possibility arises that judges might be forced to see legal ideas in radically new ways. Concepts of « property », « ownership », « contract », « responsibility », etc. might have to be reinterpreted in ways not foreseen by the court but brought forcibly to its attention. In the specific circumstances of a case, they might have to be broadened or narrowed to reflect changes in the social realities that the concepts presuppose.

As early as the beginning of the twentieth century, Lévy’s prescription for radical legal practice in the service of the working classes was, in all es-

sentials, the same as these CLS positions. To have thought through such ideas so long before American CLS scholars discovered and popularised them makes Lévy more than just a precursor. Even to call him a prophet seems inadequate. Although his analyses in simple class terms now seem archaic, his view of the social sources of the stability of legal ideas and his advocacy of a legal practice based in understanding those sources has striking contemporary resonance. His work in this respect is truly prescient.

Interestingly, Lévy’s work also shows some similar faults to that of CLS. For all his proletarian sympathies, his political activism and his disdain for orthodox legal scholarship, Lévy’s legal thought (like much CLS scholarship) is rooted in a law school environment. His analysis of the transformations of property and credit rights is in terms of juristic technicalities. Lévy devotes little attention to detailed social inquiry, despite his sympathy for sociology. The content of «croyances collectives» is largely assumed. He takes, from the socialist tradition and from Durkheimian sociology, broad assumptions about social change, using them as a generally unstated background for his juristic analysis. In a very similar way, American CLS writers cite the work of social theorists (e.g. Gramsci, Foucault, the Frankfurt School) often without engaging very much, themselves, in rigorous social analyses. In general, neither Lévy nor CLS recognises that a politics of law needs to be based on detailed empirical social inquiries about law’s sources and effects and about the specific practices by which it is created, interpreted and enforced.

Lévy differs fundamentally, however, from CLS in the deterministic nature of his thought. This reflects both its Durkheimian and socialist origins. This determinism is perhaps the clearest marker of the decades that divide his thought from contemporary legal studies. CLS generally rejects any kind of social determination, any idea of history’s inevitable movement in certain directions 21. For Lévy, however, the movement from the traditional social regime of property rights to the modern social regime of credit rights and rights to securities is a structural movement, which he takes for granted as an historical process. Understood and interpreted correctly, this process guarantees, in Lévy’s view, that the rights of labour will eventually absorb the rights of capital: the future is preordained 22. Lévy’s optimism about the role of law in ensuring the triumph of socialism is founded in his view that a historical transition in forms of wealth is occurring. In his analysis, this will inevitably benefit organised employees at the expense of capitalist employers. Whereas CLS insists that nothing is preordained and no laws of history make the future predictable, Lévy’s theory is left in the dilemma that always haunted Marxist theory: how far is social change structurally


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determined and how far can it be produced by political initiative (for example, through law).

Lévy’s work has disturbing implications for orthodox jurists not only because he turns the practice of law into a radical political practice. Perhaps more fundamentally, his idea that law rests only on subjective belief appears to remove all objectivity from juristic analysis. Legal edifices, on this view, are not just built on sand. A better metaphor would be that they float like hot-air balloons – and can collapse quickly if the thin fabric of belief is suddenly punctured. Otherwise, they can sink slowly if the air of conviction supporting them gradually cools. Similarly disturbing ideas about the radical « ungroundedness » of legal ideas were expounded during Lévy’s lifetime (though after his main ideas were formed) by « legal realists » in the United States and other countries. More recently, in a different way, the idea has been associated with postmodern legal theory.

The American Felix Cohen wrote that any legal concept « that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it » 23. It is nothing more than « transcendental nonsense ». The response of Cohen (and other legal realists) to the apparently ungrounded character of many legal ideas was, however, different from Lévy’s.

For Lévy the convictions that underpin law are not entirely free-floating. In some way, they reflect structural conditions of society. As we have seen, Lévy’s view of the nature and determinants of these conditions remains unclear (because of the ambivalence of his appeal to both Durkheimian and socialist traditions). A task of legal practice and legal analysis, however, is to help to bring law and the « croyances » it reflects more closely in touch with these structural conditions.

For American legal realists such as Cohen, legal practice and legal analysis must bring law into touch with « fact », meaning actual social behaviour. On the one hand, this involves discarding broad concepts and categories in favour of narrower ones that reflect distinctions in social practice (such as different kinds of contracting) 24. On the other hand, bringing law into touch with facts involves focusing on judicial behaviour (what judges do, rather than what they say). It involves observing distinctions and categories employed by judges in deciding cases, even where these distinctions and categories are not recognised in orthodox legal concepts 25.

24. See e.g. the « Introduction » to Karl N. LLEWELLYN, Cases and Materials on the Law of Sales, Chicago, Callaghan, 1930.
From a certain viewpoint, Lévy’s theoretical approach to making law “realistic” is much more sophisticated than that of some American realism in his era. Instead of requiring that legal ideas “pay up in the currency of fact”, Lévy asks that these ideas be attuned to theoretically explicable tendencies of social change. Though he offers no sociology himself, Lévy’s legal theory presupposes a need for sociological interpretation of the environment in which law exists. In general, American legal realism made no such connections to social theory. Instead, its strength lay in its focus on the judicial function understood in behavioural and institutional terms.

III. Faith in Law

Lévy makes the dramatic claim that law is grounded in faith and that it has no substance beyond this. His legal theory, indeed, was sometimes called fidéisme.

This position may give him a limited affinity with aspects of postmodernist writing on law. Contemporary postmodernist scholars devote much attention to showing law’s lack of ultimate foundations, and that its authority resides in myth or circular reasoning. Some scholars are much concerned with the theoretical dependence of law on faith.

Here, Lévy may even offer useful correctives to recent tendencies in postmodernist thought about law. He sees law as grounded in (sometimes irrational) faith but he sees this grounding in the same constructive way that Durkheim does. Faith in law, if it is to be a living faith, must reflect the requirements of solidarity in society and must demand that these requirements be met through law.

In one sense, as some postmodernists claim, law is empty, supported only by fragile beliefs. Legal statuses may be masks to disguise the lack of more solid or meaningful bases of social relations. It is as though a puff of wind could blow away the whole edifice. On the other hand, postmodernist legal writing often suggests that despite (or even because of) its lack of foundations, law is strong. When all social knowledge has been revealed as lacking foundations and the age of “grand narratives” has passed, law’s transience, disposability and infinite adaptability seem congenial. Its moral emptiness makes it a form of knowledge entirely appropriate to a morally empty world.

For Lévy too, law can be morally empty, a mere shell, supported only by a lingering faith in its rationality or its elusive authority. This is how he sees the credit rights (droits de créance) of capital, when finally confronted by the credit rights of labour 30. As law continues to ignore the social conditions of solidarity it must become ever more empty. One might even imagine that Lévy would not have been surprised at postmodernism’s picture of the barrenness of contemporary law, a law that so often flies in the face of moral demands for just social relations.

Against the implications of much postmodernist writing, however, Lévy insists that law does not have to be like this. Something has to stand behind the mere faith that supports legal ideas as legitimate. Law need not be morally empty. Indeed, for Lévy, following Durkheim, law’s vitality depends on it being morally rich. And this means that law should express the normative requirements of social solidarity, in the various social relations of community that law is called on to regulate. Lévy’s tragic failure was that he thought this process was predetermined: that the movement of history would eventually ensure that law would reflect the conditions of solidarity. One can only imagine his anguish as experience (perhaps especially the experience of two world wars) surely eventually made him realise his mistake.

The legacy of Lévy’s work for current legal studies is in its fertile suggestiveness more than in its specific positions. He reminds us of law’s dependence on faith and belief. He stresses that the conditions of its legitimacy are ultimately moral. He emphasises that law’s vitality depends on its contribution to social solidarity, and he insists that legal practice as a form of political practice should promote that contribution. Lévy suggests (through his own theoretical ambivalence, noted above) the problematic relation of law and the state. Very importantly, he stresses that the social forces shaping law now increasingly escape limitation by national boundaries. All these orientations in his work are highly relevant to current legal theory.

As is so often noted by those who read Lévy’s writings, they are frustratingly allusive, unclear and ambiguous: full of rich but undeveloped observations. We can regret, as Durkheim did 31, that Lévy, « plein de dispositions », did not write more and complete his projects more satisfactorily. Yet, given the still profoundly stimulating qualities of many of his ideas, this fascinating French jurist surely deserves to find some of the international recognition that has eluded him for a century.