

Law in other contexts

German sociology of law: a case of path dependency

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Abstract

German sociology of law has developed along a peculiar path which is still shaping its development today. Unlike other special areas of sociology that extended sociologists' inquiry to new fields, the sociology of law was founded mainly by lawyers in the early twentieth century as a tool for enhanced professional practice. The sociology of law became part of a struggle over the academic identity of jurisprudence. This first wave of German sociology of law was then overshadowed by a second wave in the 1960s and 1970s along the lines of legal reform and radical scholarship. Today, the sociology of law in Germany is receiving renewed interest under the labels of empirical legal research and of inter- and transdisciplinarity, and scholars are to a large degree still driven by political interests.

Introduction

Among some German sociologists of law (*Rechtssoziologie*) it would be odd to confess that one is interested solely or mainly in understanding the function of law within society, combined with the aim of extending sociological approaches to the field of law, just as to other areas of inquiry. Many would point out the utmost relevance of the sociology of law for an agenda of legal reform and for the purposes of challenging legal orthodoxies. It will become evident that, for lawyers engaged in the sociology of law, the subject is often simply an instrument for, and sometimes an integral part of, a better type of jurisprudence. This is the path along which German sociology of law has mainly developed: interests in legal reform and in the reshaping of the legal profession, of jurisdiction as well as of jurisprudence, have determined the faith of *Rechtssoziologie*. The subject was therefore driven largely by political impulses among lawyers who aimed both outside, into society, and inside, into their professional and academic environment. Most of the reform efforts aimed at either specific material legal problems or at favouring general issues of material justice.

The mainstream within German sociology of law is anti-mainstream within jurisprudence. There is usually little effort to work out the virtues of modern law. At any time however, there are dissenters, of whom Max Weber (1922/1980) and Niklas Luhmann (1972/1985; 1993) are the most well known. Their influence within *Rechtssoziologie* derives from their decision to follow a genuinely sociological line of inquiry, which placed their interest in law firmly into a general theoretical design that was sociological by nature.

The following places German sociology of law – the scholarship expressed in a German-language discourse, thus occasionally including Austrian and Swiss voices – into its various historical contexts. Legal, economic and political developments have to be taken into account.

What is the sociology of law?

The perennial debate in German sociology of law is about its identity as a subject. There is both a wider and a narrower understanding of the sociology of law. Erhard Blankenburg provides a strictly sociological concept. The sociology of law would be a social science 'dealing with legal

institutions and law-oriented behaviour, striving to explain these from the canon of sociological theories and which simultaneously subjects itself to methodological standards consented among social scientists' (Blankenburg, 1982, p. 206; my translation). This definition would exclude most of the work by sociologists of law, as they often work with social science methods but may derive the pivotal part of their theory from jurisprudence, philosophy, media studies and other disciplines. Some regulars at sociology of law conferences would not even accept being bound by social science methodology. Arguably, around the core of the sociology of law, that may be properly defined by Blankenburg, there is a much larger field of inter- and transdisciplinary work similar to what American scholars know as 'critical legal studies', or what UK scholars would call 'socio-legal studies'. The smallest common denominator would be that of addressing the social impact of law and/or society's influence on the legal sphere. Most of these scholars have a practical-political agenda and they tend to be lawyers by education and profession. In following their research interests, they replicate a fundamental difference of perspective between the academic subjects of law and sociology. Where lawyers, according to Klaus F. Röhl (1987, p. 73) would typically ask 'What should we do?', sociologists, according to Blankenburg (2000, p. 34), would typically answer, 'What are you doing?'. Sociology's tenet, according to Max Weber (1922/1980, p. 1), is to understand social actions and to explain their development and consequences. Academic jurisprudence, argues Hubert Rottleuthner, 'identifies itself with the real world (practice); it puts itself into a position in which decisions have to be made' (1973, p. 86; my translation).

This understanding of jurisprudence, as described by Rottleuthner, is sometimes shared by sociologists of law. Consequently, it leads to the sociology of law playing the role of the maiden of jurisprudence. For example, according to Manfred Rehbinder (1993, p. 283; author of an introduction to the sociology of law which has been through seven editions), in order to fulfil their social function, jurisprudence and lawyers need a 'knowledge of the legal reality'. Thus 'auxiliary science' would be a title of honour for the sociology of law. Yet, another influential author, Thomas Raiser (like Rehbinder a teacher of the area most geared to dogmatic scholarship, namely private law), insisted that the sociology of law and legal dogmatics 'need each other and also are equally important complementary elements of a combining legal science' (1986, p. 1; my translation). Raiser at the time adopted the view of the prime founder of German sociology of law, Eugen Ehrlich.

Starting the sociology of law

For a while Thomas Raiser notably called his influential introduction *The Living Law – Sociology of Law in Germany* (1999). Every German law student attending a lecture on the subject will invariably hear about Professor Eugen Ehrlich, who lived in the most remote corner of the Austrian Empire, in a city that now belongs to Ukraine. There, people of different ethnicity lived, entered contracts and regulated claims according to their own customary rules (Ehrlich, 1912/1967). For them, Austrian codified law, the topic learnt by students across the vast empire, was an irrelevant 'dead' law. What mattered, according to Ehrlich (1913/1989), was the 'living law', the rules people actually use. The sociology of law, telling lawyers about living law, therefore becomes an invaluable, indispensable tool for every lawyer. Law students should study contracts and other legal documents; they should observe legal actions. The characteristics of lawyers that Ehrlich valued the most would be 'eyes that see and ears that hear' (Ehrlich 1920/1921/2007, p. 200; my translation). The sociology of law, according to Ehrlich, forms the best method in the arsenal of jurisprudence. Legislation would also profit from the study of living law. This concept proved revolutionary, and still inspires sociologists of law today. With the advent of the modern nation state had come a codified law, joining forces with a bureaucratic administration and a

professionalisation of legal practice in all its forms. Ehrlich's important idea is that things are still moving on; local and ethnic customs and practices continue. Black-letter law will often find itself surpassed by developments within society.

Ehrlich's initiative fell on fertile ground, and a section of German lawyers favoured 'sociological jurisprudence' (for an overview, see Röhl, 1987, pp. 43–49). The sociology of law would be a promising new method to understand 'law'. As in other sciences, disputes over methodology are often disputes about the identity of a subject. This will turn out to be a recurrent trope in the development of German sociology of law to this day. Very practical concerns and professional interests of the time were connected to sociological jurisprudence. Lawyers resented the idea that they are but a cog in the complicated state machinery, having to obey commands laid out in codified law (Weber, 1922/1980, p. 509). Idealists of the 'free law movement' dreamt instead of 'judge kings', as English judges were imagined, ruling with wise and independent decisions.

Sociological jurisprudence, however, encountered a number of problems (Röhl, 2000, p. 51). A legal decision-maker could not afford to wait until a sociological analysis has addressed the legal problem at hand, to say nothing of the mismatch between costly empirical work (Röhl, 1987, p. 100) and the sheer number and diversity of different legal cases. Readily available sociological research that could help in deciding a dispute will exist only by chance. Social science theories take a long time to discuss and to develop, with substantial research to be supported, while a legal trial needs to finish within a reasonable timeframe (p. 101). The decision-maker's own resources are also limited. It is very likely that there will be only a few trial judges who are sufficiently knowledgeable in the social sciences (which have also expanded beyond recognition since Ehrlich's time). As a consequence of the state monopoly of legitimate violence and of the principle of guaranteed jurisdiction, the state and its courts have a duty to decide cases brought before them even if they are completely unique. Dogmatic jurisprudence is technically superior insofar as it allows jurists to identify premises for any decision. Another aspect also counted heavily against a radical idea of the judicial creation of law on the basis of what will for the most part inevitably be – at best – amateur social science: legal decisions have to be calculable. Only this allows the state to project power into every corner of the realm and only this allows investors to harvest the fruits of their capital. Just as today's law students have begun to warm to Ehrlich, they will be told about Max Weber's defence of modern dogmatic law. According to a poignant formulation, the judge would be no more than an automaton of legal decision-making. One inserts the case description plus the process fee and the appropriate ruling appears (Weber, 1922/1980, p. 507). Strictly predictable jurisdiction is necessary for the functioning of capitalism, and in Continental Europe it is achieved by dogmatic law in the 'Roman' tradition. Obviously, there is Weber's 'England-problem' (Treiber, 2011, p. 49): the motherland of capitalism has a case-law system in which judges are the typical finders of law. However, according to Weber, England would have achieved calculable law for the ruling classes through a time-honoured system of class injustice that had already started with the cases worked on by lawyers and also extends to the recruitment of judges. According to Weber, the socially disadvantaged classes would at least not fare worse under the existing Continental European system than with a radically reformed system in which the individual judge rules as 'kadi' (Weber, 1922/1980, pp. 509–512).

Weber coined the term 'formal rational law' to cover law systematically constructed by trained lawyers as a concise conceptual system,¹ allegedly technically superior and reliable, and the term 'material rational law', to cover law tailored to 'natural law' and social imperatives like 'fair price',

¹ Weber (1922/1980, p. 396) also notes a kind of 'formal' law which follows the strictly empirically detectable 'outer' aspects of a case, like whether a declaration or a signature has been given. But Weber's emphasis is on the kind of abstract formal law which derives from the logical construction of case aspects and proceeds to defined legal terms and strictly abstract rules.

'fair wage', etc., with the insecurity of content that comes with it (Weber, 1922/1980, pp. 396–97). Weber's typology helps to reconstruct the clashes of different schools of legal thought in Germany.

Later in the twentieth century, German jurisprudence 'solved' its methodological and identity problem not by adopting sociological jurisprudence but rather by combining conceptual legal analysis with tools taken from logic, philosophy and linguistics. Klaus Zwingmann (1968, p. 269) summarizes it thus: 'legal theorists not only forgot the genuine beginnings of sociology of law, but even discredited the concept as an attempt to oust jurisprudence from its own scientific field with means outside the legal sphere.' Even today it can be said that mainstream legal scholars in Germany choose to avoid the rather thorny issues of methodology; they concentrate instead even more on practical problems and conceptual construction. Partly as a consequence of this, by the end of the twentieth century German jurisprudence had almost completely disintegrated as a discipline. In the main, lawyers and their scholarship are divided into three different pillars: listed according to their prestige they are private law, public law and criminal law. Interestingly, the sociology of law can sometimes be found in private law (Röhl, 2000), perhaps more often in public law, and finally is closest to criminal law, which in many respects forms the flip-side of 'social problems'. These three legal subjects are developed independently by different cadres of specialists and taught in complete separation. Few legal scholars today are courageous enough to define the common ground of the discipline of 'jurisprudence'. Today, it would be impossible without taking into account socio-legal scholarship (e.g. Röhl and Röhl, 2008).

Law and society before '1968'

Before the sociology of law was revitalised in the 1960s, it was practically non-existent in Germany. A very small number of sociologists of law survived National Socialism in exile, among them Theodor Geiger and Ernst E. Hirsch. In contrast, Franz Jerusalem had initially aligned himself with the National Socialists (Dyk and Schauer, 2010) and was thereafter 'ignored' (Blankenburg, 2011, p. 246). Some legal sociology occasionally formed a small part of the teaching of legal philosophy (Rasehorn, 2002, pp. 15–16).

The early postwar years in East Germany were marked by the Socialist Unity Party's ascent to power. They applied Soviet legal thought. At first, the remnants of 'bourgeois rule' had to be abolished and a new material rational law introduced. At the core of the new law was to be the 'interest of the working class'. As soon as the German Democratic Republic (GDR) was more established, the decision was made that the socialist state had essentially overcome class injustice and would not need a sociology of law. Despite the initiatives of a few reform-minded scholars, the sociology of law remained oppressed until the demise of the GDR in 1989/1990 (Will, 1990, pp. 3–8).

The Federal Republic of Germany west of the river Elbe consisted mainly of provinces with Catholic majorities who had a long history of tensions with the Prussian and Protestant capital Berlin on grounds of religion and provincial identity. After 1945, Catholic political traditions became dominant. The Christian Democrats ruled in federal government for two decades, regularly achieving around 60 per cent of the vote in rural Catholic strongholds (e.g. Bick, 1985, p. 205). The relation between God and the individual ('Person') in society is at the heart of Christian social theology,² and after the experience of totalitarian rule has to be protected against the state. Christian Democrat thought on this partially coincided with that of the Liberals and Socialists. As a consequence, legal thought centring on 'natural law' became very influential in jurisprudence, in parliaments and in the highest courts of the land. The 'provisional' constitution

2 Coing (1969, pp. 22–23). For a Catholic interpretation, see Höffner (1963, pp. 29–34).

of West Germany not only shielded the individual by providing extensive basic rights of protection³; in the spirit of ‘material rational law’ the constitution effectively directed politics to support marriage, family and religion and to develop a ‘social state of law’. In the application of law, the courts were increasingly bound by these imperatives. Within legal academia, this new state legal philosophy had strong supporters, but was from the start at odds with the ‘formal rational law’ orientation of most German legal scholars.⁴ The latter by and large gained the upper hand at law schools, only to be confronted in the late 1960s by a rival they had forgotten about: sociological jurisprudence.

A political and cultural earthquake took place at the end of the 1960s. To fully understand its intellectual causes and effects requires an anatomy of society, sociology and jurisprudence in West Germany. The contrast between ‘formal rational law’ and ‘material rational law’ still existed, but the institutional and cultural arrangements in West Germany reconciled somewhat the interests of capitalism and social justice. Unprecedented economic growth from the 1950s helped to calm down social tensions. Finally, the German public equated liberal democracy not with the chaos and decline of the worst years of the Weimar Republic, but with prosperity.⁵ Food rationing was abolished earlier than in Britain. Between 1950 and 1965, allowing for inflation, the wages of workers in industry had more than doubled; and they rose again by more than a third within the next ten years (Statistisches Bundesamt *et al.*, 1994/1995, p. 342). Huge economic growth allowed the demands of interest groups to be met step by step, and gradually the ‘social state of law’ developed into a ‘social state’, in which pensions and health care were provided, and housing and other needs were met according to ever-improving standards. The popular view was that traditional class divisions had practically disappeared. Catholic unionists formed the conservative government’s social policy, the Social Democratic Party abolished socialism as its objective, and the labour movement addressed issues like co-management in the factories and fewer working hours. Within the legal world, there was a division of activity, in which an elite of public law scholars and judges, especially in the new powerful Federal Constitutional Court, interpreted law along the lines of constitutional principles and ‘occidental values’ – natural law – and intervened forcefully from time to time, while everyday lawyering and applied legal scholarship followed technical positivist virtues. In what appeared to be a time of plenty, conflicts between social imperatives and material interests were more easily resolved.

Soon, a number of tensions would arise. West German society initially embraced discipline and a strict work ethos. Like Weber’s (1904/1905/2000) puritan pioneers of capitalism, most agreed that investment was more important than consumption, at least initially. However, as the economy grew, people wanted to spend more, and waiting for these demands to be met at some point in the future became less popular. Other issues also simmered in the background. Fuller integration into the West and NATO defined foreign politics, while integration into the EEC and the free world market opened up by the United States allowed the ‘economic miracle’. One price for this was the need to support the Western defence effort with a large modern army, but military service was immensely unpopular and young men after 1956 faced compulsory conscription. In addition, wars fought by the Western powers, e.g. in Algeria, and

3 The ‘basic rights’ of the Federal Constitution partially overlap with ‘human rights’, the latter defined as rights which exist independent of the state (Siekman and Duttge, 2000, p. 38).

4 For an attempt to reconcile these two, see Coing (1969, pp. 198–210), while Rehfeldt and Rehbinder (1978, p. 152) suggest a move from ‘natural’ to ‘cultural’ law, following a ruling by the Federal High Court which emphasised legal principles common to ‘civilised countries’.

5 Fuchs (1989, pp. 92–108) reconstructs stages of the development of trust in the political regime in response to economic and political events.

especially in Vietnam, as well as the nuclear arms race and the civil rights struggle in the US emboldened the left.

A topic young people would soon raise was the tainted personnel of state, schools, universities and the business world. With regard to the millions of former Nazis, who were not regarded as among the main criminals, the Allies and German politicians had faced a Hobbesian choice: there was no future for a democratic (and functioning) state without the economic, social and political participation of these people. As in other academic professions, most lawyers and most legal scholars had to varying degrees been implicated in the Nazi Party (NSDAP) or at least in the Nazi state. Leading legal thinkers were National Socialists (Kaufmann, 2004, p. 79): Carl Schmitt (he at least was barred from a professorship), Karl Larenz, author of an influential theory of jurisprudence (Larenz, 1960) and Ernst Rudolf Huber, theorist of state (Walkenhaus, 1997), among them. While politics generally managed to steer away from the past, and some effort was made to punish Nazi crimes, many perpetrators found support among politicians, judges, public prosecutors, and the police and managed to escape justice.

Those who claim the early years of the Federal Republic as a time of restoration are generally wrong, as, for the first time, a democratic and social state of law was successful in Germany, but right when it comes to family and gender relations.⁶ The constitution, as well as the politics of the churches and conservative politicians, reacted to the intrusion of Nazism into the private sphere by reinforcing the institutions of marriage and the family. Alternative life choices were not respected socially and legally. For example, allowing unmarried adults to cohabit under one roof already constituted a crime (Göppinger, 1980, pp. 638–39). The courts found it increasingly difficult to uphold norms like these against the current of social change.

German sociology by the mid-1960s was on the rise as academic subject. Yet it took until the 1970s before genuine sociology training was broadly available, and sociologists who were not initially educated as philosophers, lawyers or economists started academic careers (Luhmann, quoted in Guibentif, 2000, p. 237). Post-war German sociology was divided into factions and was ill-prepared for addressing the needs of a new generation of students looking for a sociology of law. Chairs in sociology were roughly divided up between three different ‘schools’. Two of them had roots in Hegelian philosophy and both heavily criticised the modern society. The Frankfurt School, after returning from America, became very influential and basically redefined education in West Germany. Its central tenet was the emancipation of the individual from institutions. This, coupled with a critique of the capitalist state and an ever-present suspicion of authoritarianism, was a handicap when it came to the sociology of law. Frankfurt-style analysis would invariably come down as a critique of law as a force of oppression, and its perspective therefore proved limited. Only much later would Jürgen Habermas combine political and legal philosophy in one concise theory of liberalism which recognised the enabling qualities of the law (see especially Habermas, 1993).

Hans Freyer, the central figure of the ‘Leipzig School’, described modern industrial society as gloomy, as e.g., Theodor W. Adorno (Freyer, 1955; Horkheimer and Adorno, 1947). However, what was a problem for the Frankfurt School was a solution for the right-wing Hegelians. Their basic message, formulated most clearly by Arnold Gehlen (1940), was that human beings need social institutions to compensate for their existential weakness. Gehlen’s focus on institutions echoed French and American social thought (Rehberg, 2005, pp. 16–18). The theory of institutions was picked up later by sociologists of law: law is an important institution with a key function in society.⁷ From the Leipzig school academics, Helmut Schelsky became most important as someone

6 König (1998, p. 555) goes so far as to say that views from pre-World War I were returned to, not to those of the more liberal Weimar years.

7 Even Niklas Luhmann might have been influenced by Gehlen’s theory of institutions, as both emphasise the life of the institution independent from individuals (Rehberg, 2005, pp. 16–17, 25–26).

at first advocating sociology and the sociology of law in many respects, but then ferociously attacking sociologists (Schelsky, 1975) and organising resistance against the ‘left-leaning’ sociologists of law among legal scholars and the public.

Where these two Hegelian schools of thought were decidedly philosophical–theoretical, the third adopted Durkheim’s concept of sociology as an empirical science (Durkheim, 1894/1976). Scholars from the ‘Cologne School’ introduced modern quantitative research, as had been developing in the United States. As a group, they could not be easily located into categories such as ‘right-wing’ or ‘left-wing’. Wolfgang Kaupen, who specialised in the empirical analysis of legal institutions and professions as well as knowledge and opinion on law, became the personal link to later developments (Rasehorn, 2002).

Reform movement

Sociology in the 1960s received increasing attention because it promised to be an instrument of social reform. Under the later Christian Democrat and Liberal Party governments, the now wealthier society began not only to rebuild destroyed cities and infrastructure, but also to create a new, decidedly modern, environment. New universities were founded, and old universities expanded. Governments took advice from Frankfurt School intellectuals on education and used public opinion research strategically to assess the mood of the people. Elisabeth Noelle-Neumann had studied in the United States after the war and introduced opinion research in Germany. Today, her Allensbach Institute’s decade-long research on the public’s view of legal topics forms one of the best sources for the study of popular legal culture. The advice of sociologists was sought by ministers, industry and party managers. In 1966, the Social Democratic Party could end its long wait and join a ‘grand coalition’ with the Christian Democrats. This move, after the party had already struck ‘socialism’ from its objectives, emboldened the political left and made them search for an ‘outside parliament opposition’. Finally, in 1969, twenty years of Christian Democratic government ended when the Social Democrats and the Liberals formed a cabinet that vowed to liberalise and modernise society. ‘Risking more democracy’, famously promised charismatic new chancellor Willy Brandt. The pace of reforms, including legal reforms, was accelerated and social scientists engaged in social engineering alongside other scholars (Lucke, 2010, pp. 155–56). The circle of Social Democratic Party lawyers became influential, and especially senior judge Rudolf Wassermann supported the few sociologists of law that were around.

In the 1960s, a small group of people had indeed restarted the sociology of law in Germany. Ernst E. Hirsch, one-time vice-chancellor of the Free University of Berlin (Möckelmann, 2008), after returning from exile took stock of the heritage of Ehrlich, Weber and others. He also introduced American texts, including Parson’s analysis of law. Hirsch’s collection of essays became a highly regarded starting point for the teaching of the sociology of law at German universities (Hirsch and Reh binder, 1967/1971).

A group of authors had attacked the class background of judges, and also that of law students and lawyers. Famously, Ralf Dahrendorf (1963, p. 195) wrote that in court the upper half of society would sit in judgment of the lower half, which plainly they would not know. Ernst Fraenkel’s Marxist critique of class justice from 1927 was revived, which by then had already been deemed too extreme by its author (Fraenkel, 1927/1968). Judge Theo Rasehorn (under the pseudonym of Xaver Berra, 1966), with his insider knowledge, added a lucid critique of the bureaucratic nature of the judiciary that mocked the idea of judicial independence. He later joined forces with Kaupen (Kaupen and Rasehorn, 1971). The writings of Dahrendorf and Rasehorn did not shy away from polemic, which contributed to attracting a larger readership. Later research endorsed Rasehorn’s

perspective: demographic factors like gender and class are less important in shaping judges' behaviour than the disciplining mechanisms inside the court apparatus.⁸

This was the birth of the sociology of law in West Germany, if it is understood as a more solid body of literature; however, it still needed to be established in university faculties, and to produce its own academic journals and academic associations. The 'student movement of 1968' finally provided the necessary pressure and support for the establishment of the sociology of law in law faculties. Students demanded that it should be part of their curriculum; though the more radical voices might have mistaken Marxism for the sociology of law.

Eventually, the laws governing legal education listed the 'social foundations of law' among the subjects to be taught and examined. Law schools had to organise the teaching of the sociology of law, and most of them resorted to creating professorships with a partial denomination in the subject. This approach had severe consequences, because the professor's main duty was still private, public or criminal law, and candidates were selected primarily for their mastery of dogmatic law. Original research and the development of teaching in the sociology of law depended on the personal interests of the individual professor. One consequence of this was that sociologists and left-leaning academics were kept out of law schools (Luhmann, quoted in Guibentif, 2000, p. 230).

Until recently, sociology departments almost never advertised professorships that were even partially concerned with the sociology of law. According to Alfons Bora, the professionalisation model prevalent in sociology during the 1960s counted on integration with other disciplines (Bora *et al.*, 2000, p. 320). But more than that, German sociologists had largely forgotten about law (Schäfers, 1993, p. 195), or they did not deal with jurisprudence (Estermann, 2010, p. 108). Again, whether or not there was (and is) any activity would depend on individual research interests. However, some sociology of law, and sometimes a substantial amount, is taught in criminology classes at law schools and in courses on 'social problems' in social science faculties.

As already mentioned, student protesters, and those who supported them among the intellectuals (Sontheimer, 1979, p. 27), had radical ideas for reform. Various socialist countries all over the world were studied to provide political guidance. A pact was sought with the labour movement, but was largely rejected by unions and workers who had strong allegiances to the traditional parties. Nonetheless, the ethos was to support the socially weak and oppressed. Naturally, students opposed compulsory military service and demanded better access to alternative arrangements. Marriage and family as exclusive life choices were rejected, and more flexible forms experimented with. Divorce and abortion rights were part of the reform demands. The student movement also brought about a new relationship towards consumption; some embraced new fashions, and others entirely rejected 'goods fetishism' (Sedlmaier, 2010). Consumer protection became an issue for public discussion and socio-legal research. In Weber's terms, the student reformers showed more interest in the 'material rational' side of law, while the historical 'formal rational' law Weber preferred was regarded as oppressive.

Radical voices within the new generation demanded everything, now. Better funding for education, low transport prices, affordable housing, more support for developing countries, and enhanced consumer rights were just some of the issues raised. Most of the demands contributed to a discourse on rights and justice. The basic contract between different interests in the Republic until then had been to successively meet social demands. 'Time perspectives', in Luhmann's (2000, p. 123) categories, were 'used to defuse social tensions', thereby upholding the legitimacy of the political system and maintaining its capacity to function. When a substantial part of the

8 Judges are much more influenced by court organisation and culture than by social background (Werle, 1977; Rottleuthner, 1982). Female and male judges, for example, did not differ in sentencing criminal cases in Drewniak's (1994) study.

younger generation rejected the expectation to quietly queue, the political system and most of the population, including the working class, turned against them.

Rules, customs and boundaries were relentlessly tested and the authorities systematically questioned by the student movement. Law appeared on the one hand as an instrument of necessary and inevitable reform, and on the other hand as oppressive in the hands of the bourgeoisie and the state. Much attacked was the drafting of the 'state of emergency law', a cornerstone which had been 'missing' in the West German state as that element of sovereignty had still been in British, American and French hands (Sontheimer and Bleek, 2004, p. 51). The police occasionally brutally waded in when confronting protesters. Legal procedures appeared as arcane, and legal authorities became something of a laughing stock. Some students even questioned their own parents and their teachers about their Nazi past, but got an unsatisfactory response.

In this climate there was suddenly a larger number of young lawyers and university assistants who concentrated their study on the sociology of law. They challenged the orthodoxies of the older academics, looked at issues of social injustice connected to law, rather than at how to subsume case constellations under abstract legal rules, and suggested a fundamental change of direction: *Sociology before the Gates of Jurisprudence* (Lautmann, 1971) and *Jurisprudence as Social Science* (Rottleuthner, 1973) were typical of books being published. The confrontational style of the debate on both sides is still remembered and even today makes life difficult for sociologists of law in some quarters. Another social science emphasised dialogue with lawyers, and as a result enjoyed less fraught relations. The Legal Psychology Subject Group in the German Psychological Association even symbolised this on a conference logo. Here, symbols of Law and Psychology sit together peacefully (see Figure 1).



Figure 1

Programme brochure, conference of the Legal Psychology Subject Group in the German Psychology Society in Kiel, October 1997.

Conservative lawyers were more alarmed when a new structure for legal education was introduced. According to the unified model, students would no longer spend their first years at law school and after this have an apprenticeship in a legal institution. Rather, the split between theory and practice would be overcome and sociology would aid in this. Legal education threatened to take a new form and content. Traditional scholarship would be devalued and careers shattered.

Two studies in particular provoked wide discussion. In *Justice – the Mute Power*, Rüdiger Lautmann (1972) highlighted how different the deliberations among judges were from the written reasons provided later. Every insider already knew this: the judge drafts the judgment primarily to stand the scrutiny of a higher court. Lautmann, as a trainee judge on the bench, had employed the method of participant observation. That he reported to outsiders about backstage scenes, albeit sheltering individual identities, was interpreted as betrayal by many jurists (Struck, 2011, pp. 138–39). Further to this, conservative legal academics, as well as professors of philosophy and political science, took offence when Niklas Luhmann (1969/1975) published his *Legitimation by Procedure*. The book contained a theory of legitimation under positivism. No longer was legitimacy provided by the qualities of the decision itself or by divine authority (Luhmann 1969/1975, pp. 30–31), rather, the system is producing its own legitimacy by manoeuvring people into a position where they are expected to accept a decision. In a court trial, for example, parties have to take up social roles that require them to state their case consistently and react to the opposing party's arguments, and so they narrow down the possibilities. In the end, only a few alternatives are left and the judge can decide (Luhmann 1969/1975, p. 115; 1972/1985, p. 203). This works as long as there is a social 'climate' in which the public expects that decisions are binding (Luhmann 1969/1975, p. 34). Critics missed the legitimation of results by values, which they saw replaced by activity (Machura, 1997b).

The response among German legal scholars to Luhmann's work nicely illustrates a point which needs to be emphasised. Any type of sociology of law in Germany on a theoretical level, whether it is a politically detached kind of work, or a bold attempt to criticise society, encounters two different layers of disapproval. Critics of the sociology of law can draw on them to varying degrees and combine them. They amount to a warning of 'don't rock the boat'. The first point of criticism is a conservative legal dogmatic view. 'Conservative' in this context does not necessarily mean a political position to the right of centre, as this view is often shared by the Social Democrats among the law professors and high court judges. Rather, this position is informed by pride in the achievements of German dogmatic jurisprudence. The second criticism could be described as more philosophical. Its proponents look at the lessons of political history and they fully embrace the state philosophy of West Germany, with its emphasis on constitutional rights on the one hand and 'European social values' on the other. To them, sociological analysis should not even remotely touch on these cornerstones of a good society. While there are certainly many lawyers who welcome the sociology of law, and make it part of their scholarship, the above-mentioned views remain powerful.

Publications like Luhmann's, containing investigations into the legal reality, attracted many younger lawyers to a sociology of law which became the 'future discipline of law', addressing problems jurisprudence became aware of only much later (Röhl, 2003, p. 1). At the same time, university education expanded, new faculties were opened and new professorships advertised. Those who entered academia at this point in time still influence the sociology of law today, although increasingly from retirement.

Steps towards further institutionalisation were taken. In 1972, the Sociology of Law Section within the German Sociological Association was founded, mainly on the initiative of Wolfgang Kaupen (Rasehorn, 2002, p. 30). However, by the mid-1970s the community had already started to split up. More conservative scholars, most notably law professors, opposed the direction taken by their younger colleagues. According to an eye witness (personal communication), there were even

cultural differences between the law professors on the one hand and long-haired young academics, perhaps arriving on motorbikes, on the other. The Association for the Sociology of Law was created in 1976 as an independent lobby to cater for the needs of teachers at law schools (Raiser, 1998), but also as an instrument for social scientists in the field to establish business relations. According to one of the Association's founders, a key problem was the 'balancing' of membership between young scholars tending 'toward Marxist materialism' and liberals (Raiser 2007, p. 1550). Protagonists of the Association early on defined a canon of what should be taught in sociology of law lectures at law schools. This selection still influences teaching today. To have both bodies follows the logic that law faculties would inevitably ignore a Section of the Sociology Society and social scientists would forget about the sociology of law completely were there only the Association. All the presidents of the Association were law professors with a qualification to practise law and to become a high court judge. Speakers of the Section were usually researchers by status, often on time-limited contracts. This 'two-track tactic' allowed the sociology of law to at least survive 'from topic to topic', according to Blankenburg (quoted in Machura, 2002, p. 150). Academic differentiation continued further with *Rechtspolitik* being advocated by a group of political scientists around Rüdiger Voigt. Yet, as in sociology, socio-legal studies remained marginal in German political science, too. These events partially took place after the big wave of the sociology of law had already receded.⁹ And if sociologists of law had a Section and an Association, criminologists were even more fiercely fighting among themselves, creating three professional bodies (Herrmann, n.d.).

The aftermath of the big reform movement

Eventually, faced with the grim realities of two oil price crises, the reform movement collapsed. The pace of legal and other reforms seemed unsustainable. Influential social scientists, most notably Renate Mayntz (1980), described the problems of implementing reform policies against the resistance of bureaucracies, interest groups and local powers. In addition, the youthful reform movement had splintered into numerous groups which proved most able in the art of in-fighting (Sontheimer, 1979, p. 33). A tiny part, like the Red Army Faction, turned to political violence and did much to discredit the cause of the radical left. Others joined small sects deliriously theorising about the real communist way. The majority decided for the proverbial 'walk through the institutions', by joining the established parties, or simply making their own public service careers.

One branch within the student movement, however, had developed late, perhaps partially in response to 'macho left' attitudes, but was transforming German society: the new women's movement. Feminist lawyers and social scientists undertook a critical analysis of society and law and worked together successfully to shape an agenda for equal rights. One of their achievements is that the state today hires at least 50 per cent female candidates for judgeships and public prosecutors. Feminist scholars were most active in the sociology of law. Their research concentrated on the 'material rational' side of law, namely the discrimination against women, and on gender differences in dealing with the law. The latter topic stretched from different inclinations to 'mobilise' the law to the hypothesis of female professionals taking a more 'caring' stance (see the overview in Heitzmann, 2002). Female lawyers who worked in socio-legal studies sometimes made remarkable careers. Ruth Herz, for example, became a popular TV judge (Herz, 2006; Machura, 2009); Jutta Limbach rose to the position of Justice Minister of Berlin and later President of the Federal Constitutional Court.

⁹ That sociology of law develops in waves had earlier been expressed by Fritz Jost on a meeting of the *Sektion Rechtssoziologie* (Machura, 2002, p. 152).

The sociology of law in Germany continued its course towards becoming an established subject in 1980, when the first issue of its specialised journal, *Zeitschrift für Rechtssoziologie*, appeared. The ground had been prepared by a grey-literature circular ‘Informationsbrief für Rechtssoziologie’, edited by the DGS Section and Wolfgang Kaupen, which had been publishing quality articles. Book publishers also started producing series in which a growing number of dissertations, research studies and conference volumes soon appeared.

The economic downturn of the 1970s, however, had heralded an age of austerity for German universities. It hit the sociology of law especially severely, as the interests of dogmatic law subjects prevailed faculty by faculty. No longer were chairs for the sociology of law founded, and existing positions were often abolished when the professor retired.¹⁰ Similarly, social science departments took a severe blow. As a response to constantly high, if not rising, student numbers in classes, law departments concentrated on the three traditional main subjects at the expense of ‘foundational’ areas like the sociology of law. The reformed lawyer education combining theory and practice was ended at the beginning of the 1980s on the initiative of provinces governed by the Christian Democrats. This might also have served as a signal to the legal community that the sociology of law was no longer essential.

A change in student support contributed to the end of the rise, just as it had fostered the sociology of law in the first place. The rebellious students of the 1960s and early 1970s could count on finding not only an income, but prestigious jobs in a growing economy. By the late 1970s this boom was clearly over, and the now much larger proportion of youth in higher education faced bleak job prospects. At the universities, a professor who had started with five posts for assistants would have been very lucky to retain two. The prospect of an academic career became increasingly unlikely. The majority of students could not hope for a public sector job and for law students this meant that they would have to start their own practice. Soon, established lawyers panicked, and lobbyists warned of the corruption of law that would follow from a ‘glut of lawyers’ (Hartmann, 1993). While the Federal Lawyer Chamber registered 23,599 attorneys in 1961, their numbers rose to 59,455 in 1991 and to 155,679 in 2011 (Bundesrechtsanwaltskammer, 2011). For new lawyers, incomes depend dramatically on their exam marks: while novices at big law firms may receive as much as 140,000 per year, at the other end of the professional career spectrum the prospects were grim, with the Professional Court for Lawyers in North-Rhine Westphalia Province seeing reason to declare that offering a ‘salary’ of 12,000 constituted ‘dishonest practice’ (Budras, 2008).

Faced with bleak job prospects, law students started to concentrate on their studies, and not on politics. State law exams in Germany are demanding and the law professors and legal practitioners taking them hardly ever stray into the socio-legal area. Still, students had to regularly listen to introductions to the sociology of law and criminology. Those planning a PhD had to qualify by attending advanced-level seminars, which was (and is today still) another inroad of the sociology of law into legal education.

A steady expansion of legal dogmatic content made it much more difficult for law students to succeed. Looking out for the best possible preparation, almost all German law students pay *Privatrepetitoren*. These private tutors’ business model involves the reduction of legal knowledge to the absolute minimum. With a barrage of advertisements and through offering well thought-through professional preparatory classes, *Privatrepetitoren* effectively discourage students from organising their own exam preparation. A *Repetitor’s* flyer shall be cited for illustration. Three soberly dressed young men are quoted as saying ‘We have done something “good”. We have been at Alpmann’s’, alluding to a good mark and the name of the *Repetitor*. The subtext does not fail to point out that they have already been accepted as PhD candidates. What especially worked against

¹⁰ On the development of chairs for sociology of law and of university classes, see e.g., Machura (1997a), Heitzmann (2003), Wrase (2006, pp. 296–98), Uebach and Leuschner (2010).

the sociology of law was the culture of intellectual simplicity, reinforced by private *Repetitors* (maybe unintentionally) and picked up in law school teaching. Alternative views within legal dogmatics were already being instinctively rejected and denounced by law students, and sometimes by scholars, as *Mindermeinung*, in-group slang meaning a ‘minority’ and ‘less valuable’ (*minderwertig*) opinion. Where the sociology of law, legal philosophy and related studies stood in this hierarchy soon became obvious.

German unification in 1990 did little to change the situation. As with all other institutions, West German structures were transferred to the legal system and the universities east of the Elbe river. For reasons mentioned above there were almost no local sociologists of law, so colleagues from the West settled in. Most of the law faculties placed little emphasis on the subject. But, notably, the Humboldt Universität in Berlin attracted a voice of the sociology of law with Thomas Raiser, and Halle University offered chairs to three active socio-legal researchers.

While the influence of the sociology of law at law schools varied from places where a professor usually had a seminar with three students to universities where lectures attracted hundreds, there was a stunning success in judicial politics. Judges for the Federal Constitutional Court are selected essentially by the two main political parties in Germany (Machura, 2008, pp. 61–62). The Social Democrats regularly looked to members of the Association for the Sociology of Law.¹¹ During the previous decades, several legal scholar-sociologists of law served on this most powerful court. In international comparison, this forms a unique success. The sociology of law in Germany has attracted some of the country’s most outstanding lawyers, many of whom continued to contribute to academic and intellectual debates after the end of their term at the Constitutional Court. Their work testifies to the strength of a ‘pragmatic’ form of sociological jurisprudence that seeks to combine dogmatic scholarship with sociological background knowledge and area-specific expertise in the social reality of law. The country’s best jurists, not only in the highest courts, are able to combine ‘material’ and ‘formal’ legal rationality.

A third wave?

In the days of Ehrlich and Weber, and again in the West German reform years, the sociology of law gained from political movements, whether they were directed specifically at the law or more generally to the whole of the society including law. In each case, the newcomers to the debate were dissatisfied with the everyday running of the legal system and conditions within the legal professions.¹² The sociology of law may in the future once again benefit from a professional or political movement.

Today, at least, there is renewed interest among young lawyers, sociologists and academics from related areas.¹³ This development is mainly self-organised by PhD students and young scholars. The Berliner Arbeitskreis Rechtswirklichkeit (BAR – Berlin Working Group on Socio-Legal Studies) may serve as an example. When founded in 2001, BAR adopted the broader approach of the American Law and Society Association, which does not put the sociology of law centre stage but rather invites

11 When the Green Party had the opportunity to suggest a judge, they nominated a former President of the Association. The Christian Democrats on one occasion elsewhere an external candidate who had written a social science dissertation about Niklas Luhmann’s systems theory. Germany also sometimes sent judges with sociology of law credentials to European courts.

12 US and UK authors talk about ‘the legal profession’, meaning lawyers. Germans use the term *Rechtsberufe* (‘legal professions’), as, in the Continental European tradition, there are not only many lawyers, but also large numbers of, e.g., public prosecutors and professional judges. The German state employed 5,122 public prosecutors and 20,100 professional judges in 2008 (Brings, 2011, p. 38).

13 For a recent example for the sociology of law as a critique of law, see Baer (2011, pp. 11–12, 17).

everyone who is interested in socio-legal research and debate (see, for example, Wrase, 2006, pp. 305–309). Most of those meeting at the BAR simply do not burden themselves too much with academic tribal history. Work is concentrated on ‘material rational’ aspects of law. In co-operation with the DGS Section and the Association, and with colleagues from Austria and Switzerland, the BAR has already attracted large numbers to conferences for several years. In addition, an e-mail list helps to draw in young scholars from other provinces. Professor Susanne Baer offered BAR the use of the infrastructure of the Law and Society Institute at the Humboldt Universität. They also organise a lively series of talks in connection with the Free University and local associations. If there is one main difference from their predecessors, it is that today there is a larger emphasis on human rights scholarship and on gender- and identity-related topics. Contributions are also much more internationally oriented than forty years ago, as today’s researchers can easily travel and communicate worldwide. While Niklas Luhmann had suggested that pairing empirical research and claims for equality would have somehow exhausted its academic potential (quoted in Guibentif, 2000, p. 236), many young scholars today would disagree.

The inter- and transdisciplinary focus of BAR ties in with larger developments in German sociology of law. Not that the DGS Section and the Association would have rejected social anthropologists, political scientists and others – quite the contrary. The Association even expressed this in a name change. Since 2010 it adopted the name *Vereinigung für Recht und Gesellschaft* (Law and Society Association). According to Peter Weingart (quoted in Machura, 2002, p. 151), sciences today are generally marked on the one hand by work which is confined to self-referential disciplinary communities, while on the other hand trans-disciplinary co-operation achieves the necessary opening up to new developments. The second generation of editors of the *Zeitschrift für Rechtssoziologie* expressly stated in this vein that different perspectives have their own rights. Yet there should be a common set of theories which allow transdisciplinary practice as ‘marginal art’ (Bora *et al.*, 2000, p. 323). This, however, has proved difficult. Recently, Klaus F. Röhl (2010) has recommended that the disciplinary traditions of the sociology of law should not be abandoned in favour of a very general ‘anything goes’ approach, as found within cultural studies. His position makes a plea not to fall behind the methodological and theoretical standards already achieved. Thus, there are possibilities for extending the discipline, and the sociology of law has survived with this strategy into the new millennium, but there are dangers, too.

Similarly to the BAR, another group also organises meetings and has a regular circular. The *Junges Forum Rechtsphilosophie* (JFR) describes itself as an association of young German-speaking scholars from the areas of legal and social philosophy, legal theory and the sociology of law. Their parent organisation is the International Association for Philosophy of Law and Social Philosophy. Discussions within the JFR are certainly of more of a philosophical and legal-theoretical nature. Their work is much closer to mainstream German legal thought than, for example, that of the BAR or the Section. The successful stories of the JFR and the BAR clearly indicate some demand by a new generation for the sociology of law.

Path dependency

Within German socio-legal studies broadly conceived, the biggest and a truly perennial debate is fought over the identity and the status of the sociology of law. From the early twentieth century onwards, lawyers and sociologists have engaged in discourses about the subject. What, if any, should be the extent to which jurisprudence opens up to social science? Has sociology a role to play in legal education? And, should the sociology of law first and foremost address issues of social justice? Should it become part of a social or professional movement? Individuals over the last hundred years have found different answers to these timeless questions.

In retrospect, however, it becomes clear that there has been an incremental development of the sociology of law as an academic subject since at least the middle of the last century. The sociology of law at times gained momentum from social and professional movements. In the days of Ehrlich and Weber, jurists hoped that the study of the ‘living law’ and the greater independence of legal decision-makers would set them free from bureaucratic pressures and would enhance their professional standing. The West German reform movement of the 1960s and 1970s aimed to use the law as an instrument of wide-reaching social change. Conservative forces eventually limited the progress made. The law forms a powerful actual and symbolic social force within society and will therefore always be an object of academic, social and political struggle. Whilst the sociology of law profited from reform movements, it also suffered from attracting the opposition of different conservative professional and political groups.

Not all sociologists of law were at ease with their subject being used as a vehicle for social, political and professional change, nor did they welcome being identified with certain political and professional interests. They may occasionally have dedicated their studies to topics related to social issues, but they were mainly driven by an academic agenda: to analyse and understand law in society. In pursuing this objective, they may have sometimes been confronted with resistance on the part of ‘political’ sociologists of law, and with rejection by traditional sociologists and jurists. Yet it is probably the work of figures like, for example, Max Weber and Niklas Luhmann, which has contributed most decisively to German socio-legal scholarship.

In any case, it needed and it still needs the efforts of both sociologists of law primarily interested in developing the subject and sociologists of law interested in social reform. This is the path that the sociology of law in Germany takes: its prominence in public policy and in academia depends on its use as a tool of reform pursuing ‘material justice’, while the core content is formed by steady academic endeavour and the consolidation of knowledge.

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