

# Sociology of Law in Germany

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**Sociological perspectives in the study of law** have a long history in German scholarship. As early as the beginning of the nineteenth century the “Historical School of Jurisprudence” had insisted that the law is embedded in the developing patterns of social and cultural life, and that this aspect should guide the analysis of law as well as govern legislation.<sup>1</sup> Still, it was only during the decades before and after 1900 that more specifically sociological analyses began to appear. German jurisprudence was not characterized by close contact and intimate interaction with social and economic reality. Among the reasons for this were the following:

- (1) the coexistence of regionally fragmented and relatively traditional legal practice with legal scholarship shaped by the tradition of Roman law;
- (2) the relative segregation of legal personnel by class and subculture from people without a university education and from business and enterprise; and
- (3) the dominant role of government bureaucracies, staffed mainly by lawyers, which in many instances did not have to be particularly responsive to the demands of new groups with interests in the law.<sup>2</sup>

Around the turn of the century, the radical changes which industrialization had forged in German society led a substantial

minority of scholars in jurisprudence and the social sciences to search for basic intellectual reorientations. That these were often sought on a high level of abstraction and principle may be due to deeply ingrained scholarly traditions as well as to a delay in the mutual adaptation between this emergent industrial world and the world of education and government officialdom characteristic of Germany. In any case, both the endeavors to formulate a sociological interpretation of the modern world of a Tönnies, a Simmel, and a Weber, and the various attempts to reorient a jurisprudence dominated by the conception of the law as a closed system of logically interrelated norms may be seen as responses to the "great transformation" of economy and society, of polity and culture, which we call modernization.

It is well known that changes in the law and its interrelations with society and economy were central themes in the works of the founding fathers of modern sociology. In Germany, both Max Weber and Ferdinand Tönnies in many ways built on Sir Henry Sumner Maine's thesis of a long-run change from "status" to "contract." The new developments in jurisprudence had a far less pervasive influence in their field. They were also quite varied in character. The most famous works, and the ones closest to the sociology of law, are probably those of Eugen Ehrlich who published his *Grundlegung der Soziologie des Rechts* in 1913.<sup>3</sup> From several quarters, attempts were made to give new directions to legal education and, by combining greater social and economic realism with greater freedom of judgment, to give new rationales for the decision-making of judges. The legal movements most relevant here are the *Interessenjurisprudenz* and the *Freirechtsschule*, whose goals included freeing legal scholarship and practice from the highly developed conceptual formalism and directing more attention to the function of law in balancing real interests.<sup>4</sup> In some ways linked to these movements, but independent of them, was the demand for research on the factual use of legal instruments and on the social and economic conditions which shape this use and determine its meaning. Most important in instigating this *Rechtstatsachenforschung* was A. Nussbaum (1914).<sup>5</sup>

The work of these men in sociology and jurisprudence provided the nucleus of the sociology of law as an emergent discipline. For political reasons, it was to have a short life in Germany. There was

a lively interest in these and related problems during the Weimar period which followed the breakdown of Imperial Germany at the end of World War I, and some volumes were added to the body of relevant literature. Two works may be singled out, even though they were not typical of the publications of the period which often had a general and programmatic character. E. Fraenkel (1927) wrote a short treatise on social class influences on the administration of justice. Though not based on systematic empirical research, it is a remarkably informed analysis of the social background and the subculture of the judiciary, of the effects of these on the administration of justice, and of working-class attitudes toward the law. Max Rumpf (1926) made an original attempt to extract from the published decisions in disciplinary cases the social profile of the bar in private practice and its changes in Imperial and Weimar Germany.

The Nazi takeover in 1933 led to a complete breakdown of sociology, and the twelve years of this regime were enough to destroy virtually all living continuity of sociological tradition. Law, of course, was not abolished as an academic discipline, but the rational analysis of the social consequences, conditions, and forms of legal organization and the administration of justice was severely impeded, to say the least. Furthermore, many progressive lawyers and law teachers who had been involved in the new developments were forced to leave the country because they were Jewish.<sup>6</sup>

This interruption of scholarly work during the Nazi period is of crucial importance for any understanding of the present situation both in sociology and in the special field of sociology of law. After 1945, teaching and research had to be built up from scratch. In the decade of the 1950s, this redevelopment mainly took the form of absorbing the advances of Western, specifically American sociology rather than that of a continuation of the traditions of the 1920s. This was true not only of methodology, but also of general theory and the theoretical analysis of various institutional spheres.<sup>7</sup> Of the different substantive fields, social stratification, family sociology, and industrial sociology received the greatest attention. Although a few words cannot do justice to the variety of work done, sociology of law did not constitute a theme of any significance.

The last statement remains valid in spite of the publication of Theodor Geiger's *Vorstudien zu einer Soziologie des Rechts* in 1947—without doubt the first important theoretical treatment of the subject since the 1920s, and one that still has value because of its anti-ideological stance, inspired by the Uppsala school of philosophers, and because of its insistence on precision in a field where ambiguous and ideological formulations abound. It was published in German but appeared in Copenhagen and was the work of a sociologist who had left Germany permanently. Its immediate impact in Germany was not very consequential. Some critics reacted sharply against its antimetaphysical orientation, but no sociological research followed its theoretical leads. Although republished recently (1964), the book is not likely to be central to future developments, since in many parts, especially in its general discussion of social norms and social control, it has been made obsolete by more recent sociological theory and research.

In remarkable parallel to the recent developments in the sociology of law in this country, interest in the field increased rapidly in the 1960s. A number of empirical and theoretical studies have been published; others are in preparation. The leading sociology journal had a special issue on the subject, *Studien und Materialien zur Rechtssoziologie* (Studies and Materials in the Sociology of Law), edited by E. E. Hirsch and M. Rehbinder,<sup>8</sup> and a yearbook for sociology of law has appeared.<sup>9</sup> The German equivalent of the National Science Foundation included the field among its areas of special emphasis, and while until recently courses in sociology of law were rare, their number has increased considerably during the last few semesters.<sup>10</sup>

It is interesting that a fairly large proportion of the present publications are reissues of books of the “founding fathers” or discussions of these older works.<sup>11</sup> In contrast with other developments in postwar German sociology, the new interest in sociology of law—especially on the part of the legal scholars involved—presents itself consciously as a continuation of older German traditions. One may surmise that the persuasive weight of an honored tradition is used to legitimate an enterprise which still encounters much resistance. Correspondingly, much of the contemporary writing still has a proselytizing and programmatic character.<sup>12</sup>

A heritage of great works is certainly one of the factors which made the present development possible. Other conditions, how-

ever, seem to be of greater immediate significance. Sociology has gained an institutional footing within the universities it never had before. It is thus a more respectable partner for the older discipline of law. Usually taught in a broad and open-ended way, it has attracted a number of able lawyers and law students who combined in their later work the two fields of interest. Johannes Feest, Wolfgang Kaupen, Rüdiger Lautmann, and Niklas Luhmann may be mentioned here. The importance of the social and cultural context for the meaning of legal norms was drastically experienced by some legal scholars who emigrated during the Third Reich. Ernst Hirsch, for example, worked in Turkey, where European statutes had been enacted virtually in literal translation.

As a dogmatically trained and oriented jurist [Hirsch] was supposed to and tried to teach this transferred Western law; [he] noticed very soon that the paper law of the statutes and the real law of social life did not correspond to each other [Hirsch, 1966: 7].

Another source of the new interest are tensions and unrest within the German judiciary. Problems of social status and economic conditions of this very large group of career civil servants came together with reflections on the role of the judiciary in the past—not only, but very prominently, the Nazi past—and have led a number of judges to analyze critically the place and function of their profession within society.<sup>1 3</sup> The role of the legal profession during the Nazi era is largely unexplored. The prosecution of Nazi crimes left the judiciary practically untouched, a development that is explained, though not adequately justified, by the difficulties created by the legal safeguards for judicial independence. A largely defensive treatment of the subject is by H. Schorn (1959). A more comprehensive treatment is promised by a multivolume work on the German administration of justice and National Socialism, of which the first volume (with contributions by Weinkauff and Wagner) appeared two years ago (1968).

Germany's political and moral history is also the background for a greater interest in, or at least a greater tolerance of, sociological analysis of the law among academic jurists. Where the authority and presuppositions of such central social institutions as the law are unquestioned, the rational scrutiny of these patterns has little chance. The succession of constitutional forms from

Imperial Germany to the present second republic and, even more so, the moral catastrophies of the Third Reich have put into doubt the past ideological foundations of the law. While the results of empirical research cannot substitute for the ultimate values which legitimate a legal system, sociological analysis is slowly becoming acceptable as an instrument of jurisprudence. The highly differentiated and pluralistic character of modern society is increasingly recognized in legal reasoning, and a more realistic outlook is said to replace a primarily "dogmatic" solution of legal problems (Hirsch, 1966: 24).

In sociology, too, a good deal of theorizing and research originated from reflections on "the German problem," i.e., on the causes of Germany's alienation from Western political orientations and of the catastrophe of National Socialism. The role of law and jurisprudence in this course of German history did not, up to now, occupy the center of interest. However, Ralf Dahrendorf's book (1965: chs. 13 and 14, esp.), *Gesellschaft und Demokratie in Deutschland*, not only attempts to delineate the prerequisites for the functioning of democratic institutional order, but its case analysis of Germany also contains a profile of the German legal profession in terms of social background, prevailing ideological orientations, and links to the structures of power.<sup>14</sup>

Most of the published empirical studies are concerned with the legal profession, particularly with its recruitment from different social backgrounds. In some cases, these are mainly descriptive reports. W. Richter (1960), for example, has given statistical accounts of the social background of the German judiciary.<sup>15</sup> Others, for instance R. Dahrendorf (1960), J. Feest (1965), and W. Zapf (1965), go beyond mere description and analyze the higher judiciary and other subgroups of the legal profession as part of the German upper classes. The present author has compared the recruitment structure of the German legal profession with that of the American bar and related the different recruitment patterns to differences in the structure and the orientations of the two professions (Rueschemeyer, 1961).<sup>16</sup> W. Kaupen (1969), finally, combines elaborate theoretical analysis, based mainly on the work of Talcott Parsons, with empirical materials on both social background and socialization of German lawyers.

The reception of these studies on the legal profession<sup>17</sup> by the bar and legal scholars indicates some reluctance to accept

demonstrated facts and their implications. It seems likely that a public discussion of recruitment patterns which draw heavily on the upper-middle class and the subculture of the civil service evokes memories of exacerbated debates in the 1920s about the class character of the German administration of justice. More generally, and in a comparative perspective, it may be said that in the more conservative segments of the German educated classes, normative as well as ideological perspectives continue to prevail over sustained concerns with relevant empirical conditions. While the situation is changing slowly, it seems important for an understanding of the sociology of law in Germany to stress this character of a large part of its audience.<sup>18</sup> Bare empirical facts are thereby given a polemical importance which detracts from their theoretical interpretation; the relationship of demonstrated empirical conditions to traditional notions, normative expectations, and vested interests becomes then easily more interesting than the implications of evidence for a theoretical analysis. Theoretical analysis is for such an audience more attractive on the highest level of abstraction where philosophy of law and the “grand perspectives” of sociology meet than on that lower level where testable theoretical propositions can be interrelated with each other and checked against empirical evidence.

Although the scope of empirical studies is broadening,<sup>19</sup> theoretical work without immediate connections with empirical analyses is at least as important for the whole picture.<sup>20</sup> The first observation here pertains to that level of social theory where the conceptual framework, the delimitation of various domains of theory, and interrelations between different problem formulations are at issue. The sociological study of the law is taken by many not as a specialized inquiry in one institutional sphere among others, but as a contribution to some of the most fundamental questions raised in sociology; it is understood as an integral part of general sociological theory (e.g., Schelsky, 1970). In my opinion, this is a promising conception because certain advances in sociological theory—concerning, for instance, the bases of social control and compliance or the integration problems of different types of social systems—could give new directions to the sociological analysis of the law while these and other lines of sociological inquiry could in turn profit from a more sustained concern with specifically legal phenomena. The utility of this



conception would, however, be limited if it did not break out of the confines of general sociological perspectives, social philosophy, and philosophy of law, and if it did not proceed to the development of testable "theories of the middle range."

Law is a crucial subject for any social theory. While the functions of law should not be narrowed down to social control through penal norms and the regulation of conflict, the theoretical importance of legal phenomena is increased if a theory emphasizes domination, coercion, and conflict, as well as their forms of organization and regulation, as basic elements of social order and social change. This was one rationale for the central place held by law in the work of Max Weber, although his conceptual framework and his basic orientations cannot simply be categorized as "conflict theory"—to use a label of our contemporary theoretical discussion. From such considerations one should expect the work of men like Ralf Dahrendorf to reflect a much greater concern with the law than is actually the case, even if one takes into account that the general approach of "conflict theory" has yet to be specified in systematic detail. Still, it is interesting to note that in his version of role theory, legally guaranteed role expectations are considered the hard core of every social role (Dahrendorf, 1958).<sup>21</sup> Predominantly conceptual analyses of norms, of the interrelations between different types of norms, and of patterns of legitimation are found in essays of Heinrich Popitz and various others who would not necessarily consider their work as specialized contributions to the sociology of law (Popitz, 1961, 1967, 1968; Spittler, 1967; König, 1967; Lautmann, 1968).

The most prolific and most interesting of the authors who deal theoretically with problems of the sociology of law is without doubt Niklas Luhmann. After a number of contributions to the analysis of formal organizations and public administration (Luhmann, 1964, 1966), he has recently been concerned with the sociological analysis of law and is at present preparing a monograph on the subject. His works reflects Parsonian system theory. However, he uses this framework in original and stimulating ways and combines it with other theoretical orientations, for instance, with basic ideas of symbolic interactionism. Of particular interest are a number of essays on long-term developments in legal history, the growth of so-called "subjective rights" and the increasing freedom of the law-making process through greater differentiation



between legal norms and legitimating ideas, which are interpreted in a neo-evolutionary framework (Luhmann, 1970a, 1970b, 1967). The interpretation of broad trends in legal development is also the subject of several other writers (Rehbinder, 1964; Willms, 1970).

At present, much of the work in sociology of law in Germany still has an improvised character; not infrequently it is outright amateur work. Furthermore, one finds everywhere traces of the older tradition, which was great in its vision but remained with few exceptions in that vague zone between social analysis and legal metaphysics. I would contend, however, that the new developments described are potentially very fruitful and important for work in this country. On the one hand, the close connection that is developing between general theoretical reflection and sociology of law may open up interesting new perspectives for the social analysis of law and result in more theoretically oriented empirical research. On the other hand, the accumulation of descriptive materials and the development of research facilities and personnel for the sociological study of law increase the opportunities for comparative studies, whether they are based on diverse published work or whether they are executed cooperatively, based on a genuinely comparative research design.

Such possibilities of comparative research are crucial for the chances of theoretical progress in the sociology of law. The more an institutional complex is intertwined with, or constitutes itself, a singular feature of a society, the more intersocietal comparison becomes an indispensable requisite for theoretical advances. After a time when such comparison had to work mostly with purely legal materials, relying on impression and speculation as to the social conditions and consequences, it now becomes possible to base the comparative study of law in its social context on empirical research. To this, the developments in Germany, which have parallels or precedents in several other European countries, contribute significantly.

## NOTES

1. See, for example, Savigny (1814). It is interesting to note that the context of these perspectives was a conservative and romantic one. Where similar connections with ideological positions can be discerned in later periods, they often have progressive and

rational orientations. The notion of a one-sided dependency of the law on the "more basic," nonlegal social regulations and traditions is, incidentally, inherited from these conservative beginnings of the sociology of law in the nineteenth century.

2. This subject is in itself of great interest to the sociology of law. Of the historical works dealing with the broader societal setting, the following may be singled out as particularly significant: Rosenberg (1958), Ringer (1969), and Zunkel (1962). For works dealing with peculiar aspects of German legal institutions and scholarship in the nineteenth and early twentieth centuries, see Ehrlich (1913, 1967), von Jhering (1877), Nussbaum (1914, 1968) and Fraenkel (1927). For the legal profession as a whole, these problems are discussed in "Lawyers and Their Society: A Comparative Analysis of the Legal Profession in Germany and in the United States," a monograph I am at present preparing for publication.

3. See also the collection of his essays (1967).

4. An important forerunner of these developments may be seen in Rudolf von Jhering (1877), who, after beginnings along the lines of the historical school linked jurisprudence and evolutionary theory and arrived later at a "teleological" conception of the law.

5. A collection of several essays by Nussbaum (1968) under the same title was edited by M. Rehbinder.

6. On the consequences of this forced Jewish emigration on German legal practice and scholarship, see Kaupen (1969).

7. Until quite recently, it was fair to say that most German sociologists were better acquainted with American society than with their own as far as specific sociological knowledge was concerned. Similarly, there are at least a few German sociologists who absorbed the work of Max Weber through the writings of Parsons and Bendix and even through the English translations of Weber's work.

8. Special issue no. 11, *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (1967). The volume contains an extended classified bibliography by Rehbinder.

Although the present report concentrates on developments in West Germany, it is of interest that this issue of the Cologne Journal includes one contribution from East Germany: Grandke et al. (1967). Another relevant publication from East Germany is Steiner (1966). East Germany, like most of the Eastern Bloc countries, is not the most fertile ground for sociological research, although the situation seems to be somewhat improving now.

9. R. Lautmann, W. Maihofer and H. Schelsky (eds.) *Jahrbuch für Rechtssoziologie und Rechtstheorie*, Volume 1, 1970. Bielefeld: Bertelsmann Universitätsverlag.

10. I owe this information to W. Kaupen. One can only speculate about the content of these courses. They are typically given by law professors, often those whose main field is the philosophy of law.

11. In addition to the republications already mentioned in notes 3 and 5, Geiger (1964), Ehrlich (1913), and Weber (1960) may be mentioned. The latter is, like its American counterpart edited by M. Rheinstein, a part of the larger *Wirtschaft und Gesellschaft* (1921). A number of publications of Rehbinder can serve as examples for discussions of these older works; see Rehbinder (1963, 1967, and 1970).

12. See, for example, the essays of Hirsch (1966), one of the most forceful protagonists of the sociology of law on the side of jurisprudence, or the paper by Maihofer (1970). It should be added that Maihofer is now launching a large research project at the University of Saarbrücken and that Hirsch founded the Institut für Rechtssoziologie und Rechtstatsachenforschung der Freien Universität Berlin (Institute for Sociology of Law and Study of Factual Conditions Relevant for the Law of the Free University of Berlin). The Berlin Institute publishes a series which includes a number of studies in the field of "Rechtstatsachenforschung," particularly on the factual use of legal instruments; cf., for example, Limbach (1966).

13. Berra (1966); Rasehorn et al. (1968). Rasehorn is collaborating at present with W. Kaupen on an analysis of the judiciary and prosecuting attorneys in Germany.

14. See also his "Zur Soziologie der juristischen Berufe" (1964).

15. See also his *Zur soziologischen Struktur der deutschen Richterschaft* (1968).

16. A more inclusive analysis of the German and the American bar in their societal contexts is given in the monograph mentioned in note 2.

17. A few more books, written by lawyers and combining historical, sociological, and reform perspectives, may be mentioned: Middendorf (1963); Wagner (1959); Zwingmann (1966).

18. The audience for a good deal of sociological work in Germany is less confined to the professional fraternity than in this country. The assertions made in the text about the orientations prevalent in the educated classes are difficult to substantiate without going beyond the confines of this article. For the historical background, see note 2. Evidence and interpretations regarding the present situation are found in Dahrendorf (1965), Kaupen (1969), and my monograph mentioned in note 2.

19. Several studies on the judiciary, on decision-making in civil cases, on sentencing, and on other aspects of judicial roles are underway or in preparation; so are studies on the handling of various situations by the police and on popular attitudes toward law and legal institutions. On the latter, which is of special interest because it replicates questions asked in other countries, there was a report to the Research Committee on Sociology of Law, Seventh World Congress of Sociology, Varna, 1970: W. Kaupen and R. Werle, "Knowledge and Opinion of Law and Legal Institutions in the Federal Republic of Germany. Preliminary Results."

20. Aside from the majority of book publications, the contents of the special issue no. 11 of the *Kölner Zeitschrift* (see note 8) and of the first volume of the *Jahrbuch für Rechtssoziologie und Rechtstheorie* (see note 9) are indicative of this.

21. The success of this work and the unusually lively debate it provoked are symptomatic of what was said above about the tendency of theoretical discussions to gravitate toward the most abstract problems and to merge with philosophical considerations. Certain philosophical questions regarding individual autonomy and social constraints raised by Dahrendorf found at least as much attention as his review and reformulation of sociological role theory.

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