Articles

Keynote Address: "Sociology of Law in Germany"*

*By Thomas Raiser**

Abstract

The following essay was the keynote delivered at the International Conference of the German Law & Society Association in Bremen, Germany, in March 2010. In seeking to understand the formation of the Association of the Sociology of Law it is important to be mindful of the context of the spirit of the 1960s and 1970s in which it arose. Sociology of law's beginnings can be traced to the start of the 20th century with especially Eugen Ehrlich, Max Weber, Hermann Kantorowicz, Arthur Nußbaum and Theodor Geiger. However, after nearly being wiped out under German National Socialism, it began to re-emerge slightly in the 1960s.

A. History of the Association of Sociology of Law

In seeking to understand the formation of the Association of Sociology and Law it is important to be mindful of the context of the spirit of the 1960s and 1970s in which it arose. Sociology of law's beginnings can be traced to the start of the 20th century with especially Eugen Ehrlich, Max Weber, Hermann Kantorowicz, Arthur Nußbaum and Theodor Geiger. However, after nearly being wiped out under German National Socialism, it began to re-emerge slightly in the 1960s.

An important impulse came from the young shooting star of this period, Ralf Dahrendorf. He posed the question of what it meant if "one half of society was authorised to judge over the unbeknown half".[1] He deemed that nearly all of the German legal professions, who were involved in exerting the authority of law, descended from the upper class while judging disputes and criminal offences

* Delivered at the Bi-annual International Conference of the German Association of "Law & Society" [formerly: *Deutsche Vereinigung für Rechtssoziologie*], Bremen, 3-5 March 2010. Translated from German by Philip Groth, research fellow, University College Dublin, School of Law.

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[1] RALF DAHRENDORF, *Deutsche Richter. Ein Beitrag zur Soziologie der Oberschicht*, (1960), *in* GESELLSCHAFT UND FREIHEIT, 176 ((Ralf Dahrendorf ed., 1961); compare to RALF DAHRENDORF GESELLSCHAFT UND DEMOKRATIE IN DEUTSCHLAND 260 (1965)..

https://doi.org/10.1017/S2071832200018599 Published online by Cambridge University Press

concerning the lower class. This provocative note was followed by innumerable sociological employee studies mostly confirming Dahrendorf's statement.[2] However, the criticism of having a two-class law system[3] could not, at this time, be substantiated by these studies.[4]

In 1964 Ernst Hirsch established the Institute of Sociology of Law and Legal documentary Research at the University in Berlin ("*Freie Universität Berlin*").[5] Being a Jew, he was expelled from Germany in 1933. He then went to Turkey, where he was well known as a professor of commercial law and sociology of law. Nevertheless the then-mayor Ernst Reuter convinced him to return to Berlin.[6] It is owed to his work that his then-assistant, Manfred Rehbinder, was able to re-divulge the nearly forgotten works of Eugen Ehrlich.[7]

Prior to Hirsch, Johannes Winckelmann had already started to re-publish the works of Max Weber.[8] Critical appraisals of methods used by Josef Esser in *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*[9] as well as *Vorverständnis und Methodenwahl in der Rechtsfindung*[10] were well recognized and sparked discussion within the legal world.

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[2] Compare to KLAUS ZWINGMANN, ZUR SOZIOLOGIE DES RICHTERS IN DER BUNDESREPUBLIK DEUTSCHLAND (1966); WALTHER RICHTER, ZUR SOZIOLOGISCHEN STRUKTUR DER DEUTSCHEN RICHTERSCHAFT (1968); KAUPEN, DIE HÜTER VON RECHT UND ORDNUNG (1969); WOLFGANG KAUPEN AND THEO RASEHORN, DIE JUSTIZ ZWISCHEN OBRIGKEITSSTAAT UND DEMOKRATIE (1971); WEYRAUCH, ZUM GESELLSCHAFTSBILD DES JURISTEN (1970).

[3] See, for the Weimar Republic , ERNST FRAENKEL, *ZUR SOZIOLOGIE DER KLASSENJUSTIZ* (1927); for the Federal Republic, ROLF GEFFKEN, KLASSENJUSTIZ (1972); Essays from Rasehorn, Wassermann, Kaupen, Lautmann, Sack, in KLASSENJUSTIZ HEUTE, (Heft ed., 1973).

[4] Compare to HUBERT ROTTLEUTHNER, *RICHTERLICHES HANDELN,* (1973); Hubert Rottleuthner, *Abschied von der Justizforschung? Für eine Justizforschung mit mehr Recht*, Zeitschrift fuer Rechtssoziologie (ZfRSoz) 3, 82 (1982) ; THOMAS RAISER, *Zum Problem der Klassenjustiz*, *in* ZUR SOZIOLOGIE DES GERICHTSVERFAHRENS, 123 (Lawrence Friedman and Manfred Rehbinder eds., 1976); KLAUS F. RÖHL ,RECHTSSOZIOLOGIE, 284 (1987); KLAUS F. RÖHL, RECHTSSOZIOLOGIE, 357 (1987).

[5] Compare to ERNST HIRSCH, *DAS RECHT IM SOZIALEN ORDNUNGSGEFÜGE,* (1966).

[6] Compare with Hirsch's autobiography, ERNST HIRSCH, ALS *RECHTSGELEHRTER IM LANDE ATATÜRKS* (2008).

[7] Compare to: EUGEN EHRLICH, RECHT UND LEBEN, GESAMMELTE SCHRIFTEN ZUR RECHTSTATSACHENFORSCHUNG UND ZUR FREIRECHTSLEHRE (1976); EUGEN EHRLICH, POLITISCHE SCHRIFTEN (2007); MANFRED REHBINDER, DIE BEGRÜNDUNG DER RECHTSSOZIOLOGIE DURCH EUGEN EHRLICH, (1967).

[8] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (1956).

[9] Published in 1956.

[10] 1970, 2nd edition, (1972).

https://doi.org/10.1017/S2071832200018599 Published online by Cambridge University Press

Further, Helmut Schelsky must also be credited as a significant sociologist in this time period. Already well known for his books from the 1950s, *Wandlungen der deutschen Familie*, *Soziologie der Sexualität* and *Die skeptische Generation*, he now turned to the sociology of law and published a number of important studies.[11]

Also, in the middle of the 1960s Niklas Luhmann became a shooting star with his early works *Grundrechte als Institution*[12], *Legitimation durch Verfahren*[13] followed by his "Sociology of Law" in 1972[14].

Looking abroad, one can also recognise a re-emergence and revaluation of the sociology of law in foreign countries at this time as well.[15] In 1962 the International Sociology Association established the Research Committee on Sociology of Law, and in 1964, the U.S. Law & Society Association was founded in America.

B. The Establishment of the Association of Sociology of Law

Given the atmosphere of change in society during this period, it is no surprise that it also attracted many young law and sociology scientists. This attractiveness was further amplified by critical societal revaluations ushered in by the student protests of 1967. Even though only a minority took to the streets and adhered firmly to the critical ideologies professed by the spokesmen of the movements, a majority found in sociology an ample number of critiques that could be mounted against the traditional structures of jurisprudence and the hierarchies in the universities. This atmosphere of change was echoed further when then-Federal Chancellor Willy Brandt advanced the slogan: "dare more democracy".

In 1972 the movement ushered in fundamental reforms of professional legal education. In the new mono-phase, as well as in the common two-phase education models, the lawyer training regulations ("*Juristenausbildungsordnung*") of the

[11] Helmut Schelsky's essays to the sociology of law are collected in HELMUT SCHELSKY, *DIE SOZIOLOGEN UND DAS RECHT* (1980); compare to THOMAS RAISER, GRUNDLAGEN DER RECHTSOZIOLOGIE, 148 (2009).

[12] 1967, 4th edition (1999).

[13] 1969, 6th edition (2001).

[14] 3rd edition (1987).

[15] Abstract about the development given by RAISER (note 11, 41) an even more detailed report can be found in: Thomas Raiser, *Die Entstehung der Vereinigung für Rechtssoziologie*, *in* SOZIOLOGIE DES RECHTS, FESTSCHRIFT FÜR E. BLANKENBURG, 11 (Jürgen Brand and Dieter Strempel eds., 1998).

Federal States together with § 5a German Judiciary Act ("*Deutsches Richtergesetz*") aimed to educate and test "the sociological basics of law."
Neither the traditional law faculties at the Universities nor the younger academic generation, who, aside from their youth, would have been otherwise appropriate for teaching this subject matter, were prepared for that challenge. It then became necessary to come to an agreement on the content of the teaching. Thus a workshop brought together thirty-five experts, most of whom specialized in law, *inter alia* with Josef Esser and Helmut Schelsky. The workshop was held in 1975 in Gießen under the heading of "Issues of the Sociological Legal Education of Law Students". As was expected, the group was rather heterogeneous with regard to not only the range of social and scientific backgrounds represented, but also the diversity of political alignments. During the workshop, however, there was a spontaneous desire to institutionalise the expert-round of the workshop as an incorporated society. A commission was thus founded to elaborate articles of association. Members of this commission were the early forebearers of sociology of law in Germany: Limbach, Blankenburg, Esser, Hassemer, Heldrich, Lautmann, Raiser, Schelsky and Weiss. Schelsky, however, dissociated himself from its aims for political reasons. Esser declared his participation with the wonderful sentence: "if you need me as a cover girl".

Following a heated discussion, a final meeting was held in autumn 1975 in Bielefeld. At this meeting the commission agreed to formulate the aims of the incorporated society. The aims were to encourage:

- the sociology of law in research,
- the collaboration of sociologists and jurists,
- the integration of sociological knowledge with methods in legal scholarship and practice, and finally,
- a better understanding of judicial decision problems in sociological research.

This formulation reflected, even then, a clear awareness of the methodological and clinical difficulties posed by uniting the sociological and legal professions with one another. Although the opening sentence of the articles of agreement was discarded after a long discussion at the inaugural meeting after being deemed dispensable, the fundamental purpose of the association remains unchanged today.

The formulation of assumptions for becoming a member posed some difficulties. On the one hand, the association aimed to be open to as many interested persons as possible. On the other hand, however, the acceptance of inadequately qualified or politically extreme applicants was to be avoided. The commission's recommendation was as follows: "Whoever has published scientifically in the field of sociology of law can become a member. The board of directors will decide on the application of membership with a two-thirds majority of members. In case of a

dissension in the board of directors, the decision is to go to a general meeting". Alternatively they formulated: "Whoever has published scientifically in the field of sociology of law can become a member. Graduation is not a necessity, provided there are sociological legal studies which are comparable to a dissertation".

Shortly after the political environment became more settled, these concerns pertaining to membership proved to be overblown. At the inaugural meeting the majority decided in favour of a liberal rule expressed by the following standard of membership which still remains in effect today: "Whoever represents the purposes of the association in research and device can become a member".

The formal establishment of the Association was decided in a meeting of all fifty members in April, 1976 in Berlin. Mrs. Limbach made the registration in the register of associations, which, today, remains the reason for still having the registered office in Berlin. In its initial years the association registered a remarkable growth. Eighty-five members were already registered in 1975, consisting of fifty-three professors, twenty-five other employees of universities and ten practitioners. By 1980 the number of members had grown to 140. What was once a fledgling organization has since proven its viability by evolving into a mature entity over the course of thirty-five years.

C. Comments on the Development of the Association Between 1980 and 2010

Admittedly, however, it is easily conceded that there have been many lean times for the Association. Even today the Association is impoverished. If pressed for reasons, a number of causes may be posited. In the interests of not being exhaustive, I will point out only four of the most pertinent causes.

First, one of the more salient causes is grounded in the ever increasing faculty to student ratio which has a detrimental impact on both the quality of education and the range of course offerings. Granted, law is no different than other disciplines in suffering under these pressures, however the sociology of law is impacted in a special way. Even fewer resources for sociology of law are made available, resulting in little chance for scientific advancement in this subject.

Second, digging deeper reveals more fundamental problems. Being questioned from sociological point of views in several ways since the 1960s prompted the jurisprudence to repel the sociology of law. Old and steeped in tradition, the legal profession saw the upstart sociology of law as an unwelcome rival. Sociology of law was, and still is, often seen as a disassociation from the law, impinging on the legal order instead of being a necessary sociological amendment to the normative-dogmatic jurisprudence.

Third, on the other hand, sociologists ushered in their own estrangement in nearly the same way. As far as being heard and noticed, sociology of law does not have a prominent place within social science faculties and is relegated to the background by other subjects such as sociology of family, city or parties. One reason for this might be the ubiquity of law in a society shaped principally by a constitutional state. It seems as if the appeal to engage with this particular facet of society is limited given that specialized rules are part of the specialties of all subjects in sociological science. Besides, it is difficult for a non-legal specialist to understand the highly complex structures of the law.

Finally, it should be mentioned that a recent surge of interdisciplinary modes of inquiry has actually repelled sociology of law in favour of the economical analysis of law. We live in a period in which economics leads the way of thinking not only in science decisively, but in other disciplines as well. However, it seems as if economists and legal professionals find it easier to locate a common denominator with this mode of analysis.

All this criticism should not negate the fact that much progress has been made in sociology of law courtesy of a steady process of maturation in the last thirty years. This is underscored by some key achievements:

By now it should be common legal knowledge that law is not only a notional system of logically combined rules, but also a real and salient factor in the arrangement of social life. Law is not only "law in the books", but also "law in action". As such, it has to be studied scientifically. Even though sociology of law as a subject is generally repelled, at the same time, sociologically-oriented thinking has become part of the scholarship on the current law as well as in *de lege ferenda*, which would have been unimaginable thirty years ago. Several leading members of the Association became judges at the Federal Constitutional Court.[16] Sociology of law has reached a certain stability and visibility as evidenced by now current educational texts.[17] That's why the aim should be to widen the base of sociology of law as a solitary subject in both science and education. However, it is no longer necessary to prove and propagate its importance as such.

Aside from the aforementioned obstacles it has nevertheless proven possible to accomplish important legal-sociological empirical studies throughout the last three

[16] Mrs. Limbach was president, as well as Professors Hassemer, Hoffmann-Riem and Bryde.

[17] Compare NIKLAS LUHMANN, RECHTSSOZIOLOGIE, (1972); NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT, (1993); MANFRED REHBINDER, RECHTSSOZIOLOGIE, (2009); RÖHL (note 4); HUBERT ROTTLEUTHNER, EINFÜHRUNG IN DIE RECHTSSOZIOLOGIE, (1987); THOMAS RAISER, GRUNDLAGEN DER RECHTSSOZIOLOGIE, (2009).

decades. Due to support from the Federal Ministry of Justice, the studies mostly addressed questions that are connected to the organisation and administration of justice.[18] Several of these proved to be a noteworthy success in affecting reform-legislation.

Regarding the current state of sociology, it is noticeable that legal-philosophical, legal-sociological and legal-theoretical thinking have become more and more interlocked. To this end, Jürgen Habermas' book, "*Faktizität und Geltung*" ("Between Facts and Norms"), may be mentioned, which even in its title articulates these dual aspects of legal inquiry. Moreover, the foreword remarks that legal-philosophy no longer resides solely in the realm of philosophers, but today demands "a methodical-pluralistic approach from the perspective of legal-theory, legal-sociology, legal-history, morality-theory as well as theory of society ".[19]

D. Perspective

To conclude, four points may be highlighted in considering the future development of sociology of law:

First, the planned change of the Association's name seems urgent to me. The change seems necessary now, as some regard the current name "Association for Sociology of Law" as being too narrow, not contemporary and therefore inappropriate. Indeed, nowadays it is more essential than ever to embody the openness of the legal profession and the social sciences to one another in the name of the Association itself. Besides, it is important to open the gates as wide as possible so as to encourage an interdisciplinary collaboration. Further, the phrase "law and society" highlights the openness to foreign countries better as this phrase is more common abroad than "sociology of law".

Second, interdisciplinary collaboration has to be practically realized or consolidated. Theoretical concepts as well as the methods of research have in itself become so differentiated that substantial research generally can only be achieved with a concerted joint effort. The intellectual and social distance between social scientists and legal professionals is still far too large. Economists who have been in

[18] See only HUBERT ROTTLEUTHNER AND MARGARET ROTTLEUTHNER-LUTTER, DIE DAUER VON GERICHTSVERFAHREN, (1990); RAINER WASILEWSKI, STREITVERHÜTUNG DURCH RECHTSANWÄLTE, (1990); PETER GILLES, ZIVILJUSTIZ UND RECHTSMITTELPROBLEMATIK, (1992); WOLFGANG JAGODZINSKI, THOMAS RAISER AND JÜRGEN RIEHL, RECHTSSCHUTZVERSICHERUNG UND RECHTSVERFOLGUNG, (1994); WOLFGANG STOCK, HEIMFRID WOLFF AND PETRA-IDA THÜNTE, STRUKTURANALYSE DER RECHTPFLEGE, (1996).

[19] JURGEN HABERMAS, FAKTIZITÄT UND GELTUNG, 9 (1992).

https://doi.org/10.1017/S2071832200018599 Published online by Cambridge University Press

dialogue with commercial lawyers for a long time demonstrate that it need not be this way.

Third, what seems problematic to me, upon closer inspection, is the narrowness of the research presently carried out under the banner of law and society. There are numerous amounts of strictly circumscribed research of interest only to a small circle of experts, while outside viewers merely acquire a diluted picture of the relevance and effectiveness of the research field. Unmistakeably, there is a widespread timidity regarding penetrative theoretical efforts. However, at the same time, differentiation and the development of specialised topics is also a strong indicator of maturity for a research field. In the long term, nevertheless, such an attitude has to lead to fragmentation, which questions the fundamental relevance of the field as a distinct entity. This results in daring ambitious projects, which, in the form of a book, might cause a sensation both theoretically as well as empirically. Not all publications need to have titles like "Sociology in front of the gates of jurisprudence" or "Sociologists assault the fortress of legal professions".

Finally, the furthering of interdisciplinary and international collaboration requires a useful and adequately influential organisation. It would be more beneficial if, beyond the current collaboration, the two legal sociological associations could merge into one. Standing across from one another in competition encourages mutual degradation. For third parties, particularly sponsors, it will prove easy to play one off against the other true to the maxim "*divide et impera*". Having one solitary association with a common aim of researching the social function of law could be much more effective. Such an association would have the potential of achieving common targets both internally and externally. For example, it could aim to establishing a Max-Planck-Institute for research in law and society, which could potentially be the place for groundbreaking and influential research not otherwise possible in universities due to the relative insularity of their faculties.