

Lecture

The Sociology of Law as an Empirical Theory of Validity

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Contrary to current tendencies, the founders of sociology as a discipline regarded the sociology of law as an integral part of social theory. Law and its historical variations were treated by them as constitutive components of social life. This can be demonstrated especially with regard to Émile Durkheim and Max Weber. It also provides an opportunity to highlight the differences between these authors, not only in methodological but also in substantive terms. In the essay it is shown how both authors treated law in comparative and developmental perspectives and varied in assessing the role of penal law and human rights in the course of history. Connections to the current theoretical debate in Germany are also drawn.

Introduction

The Sociology of Law between General Social Theory and Application

I would like to begin the following considerations with a preliminary remark. I am well aware that within the title that I have chosen there lurks the danger of a naturalistic fallacy. However, I am not concerned with the distinction between validity (*Geltung*) and facticity, but rather with the distinction between various *sorts of validity* which reciprocally presuppose one another. From my point of view, the sociology of law is not merely concerned with legal effectiveness, but rather with legal effectiveness in relation to validity. One can investigate this issue with regard to the ‘classical writers’ of the ‘discipline’

who therefore stand at the centre of my further reflections.

The fund of ‘classical writers’ is of course great, too great for my restricted purposes. Émile Durkheim, Max Weber, Eugen Ehrlich, and Theodor Geiger are only a few of the names which may come to mind. I shall confine myself to Max Weber and Émile Durkheim. The reason is simple. For both Max Weber and Émile Durkheim the sociology of law is in the first part an aspect of *general* social theory.

It is precisely for this reason that a review (*Rückbesinnung*) of the origins of the sociology of law in Émile Durkheim and Max Weber is useful. I would like to introduce the comparison between these two authors

with two theses. First, for both Émile Durkheim and Max Weber, law is primarily a precondition of the constitution of social life which is to be elucidated within the framework of general social theory, and only secondarily an institutional realm to which this general social theory is bound to be applied. Second, Durkheim's and Weber's social theory leads to very different understandings of law.

I shall begin my comparison with a presentation of Durkheim's general position in four steps: (i) a positive science of the rules of conduct; (ii) outline of a science of morals and rights; (iii) the two laws concerning the development of penal law; and (iv) human rights as penal law.

Émile Durkheim

A Positive Science of the Rules of Conduct

Durkheim developed his sociological program very early, and indeed primarily through a highly peculiar combination of two lines of reasoning, namely the French in which sociology was conceived as a positive science or social physics, and the German in which, under the influence of the historical schools, a positive science of morals had arisen. The French line was primarily represented by Auguste Comte who, with the help of his law of the three stages in the development of the human mind, and his law of the hierarchy of sciences, wanted to raise sociology as a positive science of social life to become the leading science of the modern stage (see especially Comte, 1956: 5, 205). The German line was primarily represented by Wilhelm Wundt who in his *Völkerpsychologie* provided an illustration of how this leading science would have to be formed into a science not only of humankind and its morals, as with Comte, but of various peoples and their morals.¹ It can also be said that, according to Durkheim, French Cartesianism and German Kantianism should be combined within the new science of sociology understood as a kind of social psychology, while both are decisively modified through an empirical-inductive procedure. An *inductive physics* of morals and rights was to replace the previous *deductive metaphysics* of morals and rights. Thus, morals (*Sitten*) and rights (*Recht*) were certainly, from the very beginning for Durkheim, not physical but rather mental, and not individual but rather social facts, arising through an

association of individuals, possessing thereby a character *sui generis* and great historical variability.

Outline of a Science of Morals and Rights

At the centre of this *science of morals and rights* therefore stands the comparative analysis of rules of conduct reinforced by sanctions. The comparisons are set up interculturally and intertemporally. Already in Émile Durkheim's opening lecture of his 'Cours de science sociale', which was held in the winter semester 1887–1888 at the University of Bordeaux and which is, to a certain extent, the starting and constant reference point of his doctrine,² one finds the decisive designations concerning the object and method of this new science.

1. Every society possesses a certain number of common ideas and sentiments which are passed on from generation to generation. These phenomena are of a mental nature, but they are resistant to any discernment by individual psychology, and can be identified only by social psychology, a *Völkerpsychologie à la Wundt*.
2. Some of these common ideas and sentiments refer to the practice of social life and are obligatory. They are formulated as maxims which are addressed to the individual and demand respect and compliance.
3. Some of these maxims are so important to society that it sets up organs in order to guarantee this observance and compliance. As soon as this is the case, moral judgements and condemnations are turned into 'juridical formulas' (Durkheim, 1981: 46). At this point, a sociology of law may stand beside a sociology of morals.
4. Even economic phenomena, which are centred in the first place around self-interest and not in duty, must be placed in this context. Economics is, just as the sociology of morals and law, a social science.

The focus of this science of morals and law is accordingly upon the sociological analysis of rules, particularly *rules of law* from a comparative perspective. Sociology is first of all a comparative sociology of law.

Durkheim's sociology accordingly commences with an analytical dissection of the concept of 'rule' and a classification of rules derived therefrom (Figure 1).³ Important to him first of all is whether or not a rule

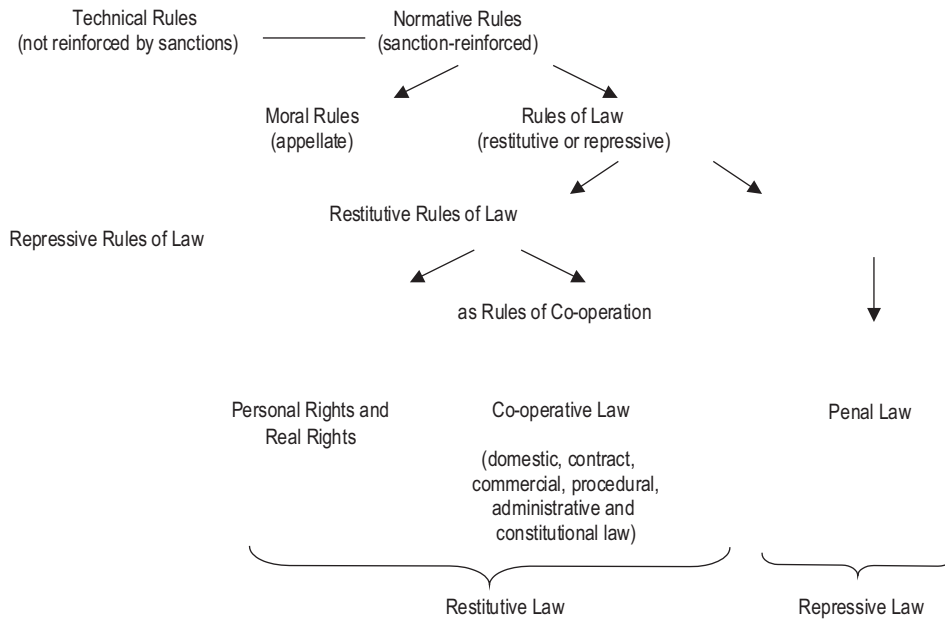


Figure 1. *Durkheim's typology of rules of conduct*

of conduct is reinforced by sanctions. If it is reinforced by sanctions, then it becomes important what kind of sanction is applied, whether appellate, for instance through an appeal to conscience, or impairing, which indeed carries a further sense. If it is impairing, it can provide retribution or the restoration of the status quo ante. This is the meaning of Durkheim's well-known distinction between repressive and restitutive law. It is analytical and relatively independent from concrete matters of law, although an affinity exists between it and the latter (penal law versus the rest of law).⁴

However, within social life law does more than play this negative role involving retribution or restoration, along with protecting society from deviant behavior. It also plays a positive role through producing solidarity. The rules of law indeed ultimately represent simply those ideas and sentiments that are recognized by members of a society as desirable and considered as obligatory, *because* they are for them exemplary. Like law in its negative role, so too law in its positive role may serve two main goals. It finds either a similarity between the members of a society or a (complementary) dissimilarity. In the first case, the (positive) solidarity is mechanical and in the second, organic. Repressive law represents the first,

whereas restitutive law represents the second. The typology of rules of conduct is rendered complete in Durkheim's work through a typology of solidarities (Figure 2).

The Two Laws Concerning the Development of Penal Law

The range, intensity, and solidity of the common conscience of a society are for Durkheim, therefore, closely connected with a consciousness of law which at its core is a consciousness of penal law (Figure 3). Around this core, concentric circles are formed, whereby the distance from the core says something about how intense and firm the shared ideas and sentiments still are. Of course, not only dutiful but also self-interested action is well-regulated and can therefore help establish solidarity. This was Durkheim's great discovery in working upon the division of labour from which he wrested a 'moral' dimension. For he recognized that even the division of labour under certain circumstances can produce solidarity, though a solidarity of a particular kind. He called it, as has already been said, organic in contradistinction to mechanical. However, from his theoretical perspective organic solidarity cannot be the result of

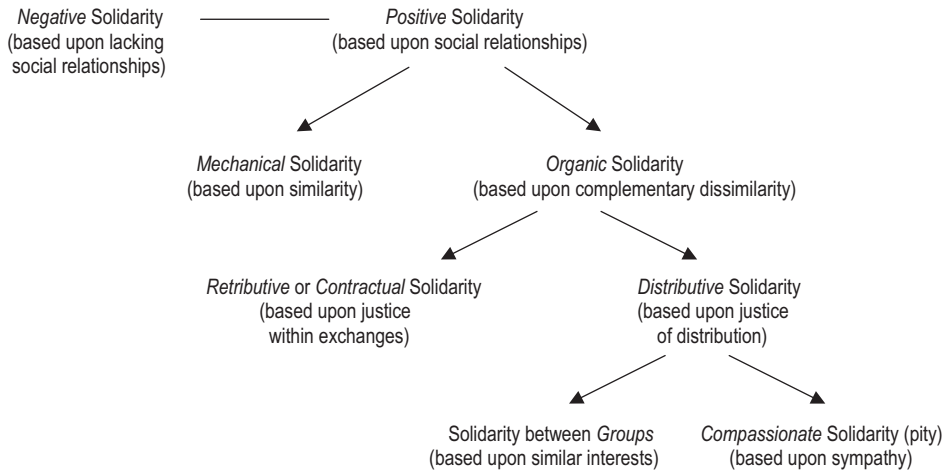


Figure 2. Durkheim's typology of solidarity

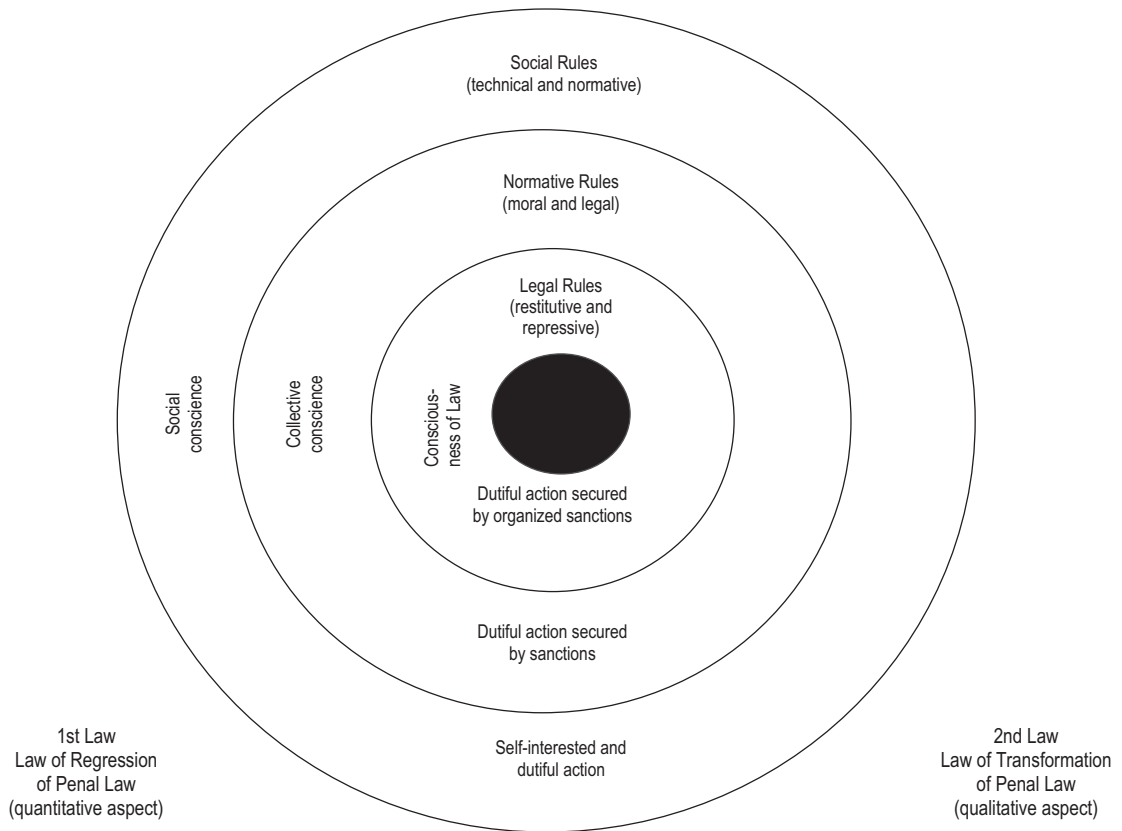


Figure 3. Range, intensity, and solidity of the common conscience according to Durkheim

self-interested action alone. No matter how rational and calculated it may be—and it may also include the insight that under certain conditions it is more advantageous to cooperate voluntarily with others, if one wants to increase one's gains—the cooperation based upon self-interest will, according to Durkheim, never yield a stable social order. Towards that end, it requires dutiful action to be joined to self-interested action. That, however, refers to rules of conduct reinforced by sanctions. Hence, organic solidarity is more than contractual solidarity. It is based ultimately upon *repressive* sanctions. If these become weaker, then the intensity and solidity of the common conscience suffers. Every society, even modern society, remains, therefore, in the final analysis, centred around penal law.

Durkheim started with the assumption that the development of law is characterized by the fact that restitutive law *replaces* repressive law. The more a society underwent a division of labour, the less it could be guided with the help of repressive law and the more it became dependent upon restitutive law. Although in the beginning everything in fact had concerned penal law, this could not remain so in a society based upon the division of labour, because its members became increasingly dissimilar to one another. For this reason, the relative range of penal law shrank with social development, while in contrast co-operative law especially grew. In a society in which the similarity between its members decreased, penal law would lose not only its range, but also its intensity and solidity.⁵

In his later writings, Durkheim would modify these all too simple theses that still informed his studies on the social division of labour by combining the idea of a *substitution* of repressive law by restitutive law with the idea of an *evolution* of repressive law. According to this insight, penal law undergoes not only a development in relationship to restitutive law, but also *in itself*. (The same also holds true of course for restitutive law.) Penal law does actually regress with the increasing division of labour in society (quantitative aspect); however, at the same time it fundamentally changes its character (qualitative aspect), and can therefore still form the core of a society based on the division of labour. Reflected in this fundamental change is a radical change in the shared ideas and sentiments. They no longer 'sanctify' the social group, but rather the individual to the extent

that the latter represents humanity. In the place of the cult of the group there arises the cult of the individual.

Durkheim consequently distinguishes between *two* laws in the development of penal law: the law of regression and the law of transformation.⁶ The law of *regression* states that the range of the repressive core shrinks with social development; that all social bonds which derive from similarity lose cohesive force; that restitutive law advances at the expense of repressive law; and that all this is a consequence of increasing individualization. The law of *transformation* states that, above all the intensity and solidity of the repressive core change, the social bonds which are due to the complementary dissimilarity gain, in comparison to those from similarity, cohesive force, and that the repressive core is still preserved, though in a new form. All this becomes especially apparent in the changing conception of punishment.

Human Rights as Penal Law

If one pursues this early classification of rules of law throughout Durkheim's work, it becomes clear that it already contains those two kinds of repressive rules of law that later are more emphatically elevated into a perspective of the evolution of mankind, namely, those rules which protect the group and those which do the same for the individual. The more the *collective ideal* of individualism gains ground, which therefore for Durkheim prescribes not an egotistic, but rather a *moralistic* individualism, the more do individual rights take precedence over group rights.⁷ The science of morals and rights describes from a comparative perspective how humanity's development of law culminates in human rights and human obligations (Figure 4). While human beings counted for nothing, or at least little, in simple societies, they would count in complex societies for almost everything, at least since the political revolution of the 18th century.

What Kant had posited *a priori*, namely, that the human being is an end in itself, Durkheim develops historically. The human being as an 'owner with contractual capacity' is not only embedded within the concrete group life of a society based on the division of labour with its intersecting social circles, but is also always above any concrete group life. It is indeed not the concrete human being which modern repressive law ultimately protects, but rather the ideal of the human being, the Individual, *la personne humaine*,

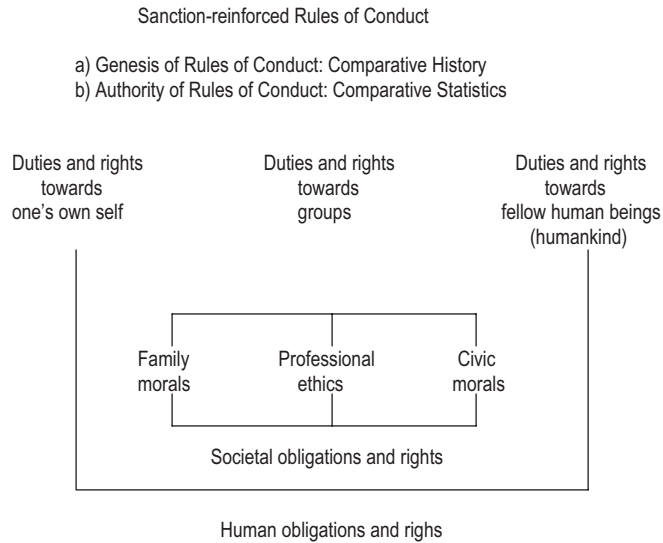


Figure 4. *The construction of the science of morals and rights*

that is to say, the humanity in him. Rules which obligate the state to protect this Individual possess, therefore, in 'higher societies', the highest authority. Of course, it would be more precise to say that they *should* possess it. Any statistical investigation in Durkheim's time, or even today, would show that things are in no way at a optimum with regard to respect and compliance with human rights and obligations.

Let us now summarize Durkheim's perspective concerning the developmental history. In segmentary societies, however extensive and interlocking, particularistic group rights and obligations take precedence over the rights and obligations of the individual; but in societies with division of labour, this is otherwise. Here the relationship is reversed. Particularistic group rights and obligations must now attempt to integrate into themselves universalistic human rights and obligations. These, however, are conceived by Durkheim as rules of penal law!

Beginning in 1895, Durkheim would increasingly ground the development of law in the development of religion. Within the development of religion arises the distinction between sacred and profane objects, which is also carried out within the development of law, particularly the development of penal law. There is, it is true, a process of secularization, but this is to be sharply distinguished from the process of profanation. Through the process of secularization, religion is not destroyed, but rather recast. Human

rights and obligations must, therefore, ultimately be embedded in a *civil religion* by which they are linked together with societal rights and obligations—civic, professional, familial. One can further say that they become thereby contextualized.

Because civil religion, unlike a redemptive religion, is ultimately weak in cohesive force, the law again attains, precisely in modern society and in spite of its partial descent from religion, a central significance, though only that law which is connected to an organized apparatus of sanctions. All this, however, then poses a problem for human rights and obligations in Durkheim's time just as today. Therefore, he would have certainly welcomed more recent developments in international law to the effect that the sovereignty of the state and its so-called internal affairs are relativized with respect to human rights and obligations.

In regard to Durkheim's social theory, the sociology of law, therefore, plays a major role. Strictly speaking, society is conceived as a system of law (*Rechtssystem*). Law is not only *one*, but *the* precondition of the constitution of social life.

This is not the case for Max Weber to whom I shall now turn, again considering his work in four steps: (i) an interpretive science of social action; (ii) outline of a typology of social relationships, orders, and organizations; (iii) formal and substantive rationalization of law; and (iv) human rights as regulative idea.



Figure 5. *Architecture of the 'Basic Sociological Terms' according to Max Weber*

Max Weber

An Interpretive Science of Social Action

In his 'Basic Sociological Terms' ('Soziologische Grundbegriffe') written in 1919–1920 as part of his newest formulations for his contribution to the *Outline of Social Economics (Grundriss der Sozialökonomik)*, Max Weber defines sociology as a science 'concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences' (Weber, 1978: 4) (see Figure 5). Three claims stand out in this definition. First, sociology is an empirical science (*Erfahrungswissenschaft*) which, like all empirical sciences, strives for valid explanations. Second, sociology explains its phenomena through 'action types' which are constructed as adequate on the level of meaning, while starting out from the subjectively intended meaning of actors. Third, sociology also explains its data by means of structural principles, i.e. it methodically alternates between the micro and macro level without restricting itself to either one. It therefore requires basic concepts that are level specific. This can be illustrated with regard to the architecture of the 'basic sociological terms' which stretch from

action to social action, to social relationships, societal orders, and to organizations, accordingly displaying level-specific concepts which stand not in a genetic, but rather in a *logical* sequence.

Since sociology is concerned with action within the context of structures, it can also employ interpretive explanation in addition to mere observational explanation, an idea which was foreign to Durkheim. For Max Weber, action is related to meaning and meaning is incorporated into structures which restrict and at the same time render possible action, while themselves being produced and reproduced only in action.

Outline of a Typology of Social Relationships, Orders, and Organizations

Max Weber's reflections on law are a constituent aspect of these basic concepts. In order to correctly understand this, one needs to become aware of two related contexts. The first concerns Weber's dispute with Rudolf Stammler, who in 1906 had come out in his own view with an improved second edition of his socio-philosophical investigation into the historical materialist conception of economy and law. Weber's

‘basic terms’, or categories, were originally developed ‘in order to show what Stammler ‘should have meant’ (Weber, 1968: 427), particularly in regard to a sociological formulation of the concept of law. The second context concerns Max Weber’s contribution to the *Handbuch der Politischen Ökonomie* (*Handbook of Political Economy*), later called *Grundriß der Sozialökonomik* (*Outline of Social Economics*), for which he intended to write under the titles of ‘Economy and Society’ and ‘Economy and Law’, first, on their ‘relationship in principle’ and, second, on the ‘epochs up to the present’.⁸

Among the texts which were found after Max Weber’s death in his literary remains, two correspond approximately to this table of contents: (a) ‘The Economy and the Orders’ (‘Die Wirtschaft und die Ordnungen’) of which there are two versions; an early one, presumably from the period before 1910, and a later one not older than 1913; (b) the text known as his sociology of law which, however, one should not misunderstand as a mere ‘sociology of’, that is, as a sociology of a specialized area. On the contrary, it is concerned with the development of law in relationship to the development of the other societal orders and powers (*der gesellschaftlichen Ordnungen und Mächte*), and indeed in a universal historical perspective that considers this development, on the one hand, as a process internal to law and, on the other hand, as external to law.

What may be derived from these texts with regard to our present interests? I shall begin with the text ‘The Economy and the Orders’. It deals with the relationship of the legal order to the economic order, but also with the relationship of the legal order to the conventional order and to custom, and, finally, with the significance and limits of legal coercion (*Rechtszwang*) in relationship to the economy. Thus, it is in fact centred upon the *fundamental* relationship between law and economy from a sociological point of view. The text also involves, as has already been implied, an attack upon Stammler. The following remark renders this particularly clear:

‘Above all, Stammler confuses the ideal validity of a norm with the assumed validity of a norm in its actual influence on empirical action. The former can be deduced systematically by legal theorists and moral philosophers; the latter, instead, ought to be the subject of empirical observation. Furthermore,

Stammler confuses the normative regulation of conduct by rules whose “oughtness” is factually accepted by a sizable number of persons, with the factual regularities of human conduct. These two concepts are to be strictly separated, however.’ (Weber, 1978: 326).

How does Max Weber himself arrive at these conceptual distinctions which he insists upon? To begin with, he strictly distinguishes between two *points of view*: the legal, and the social economic or sociological. This leads him to the distinction between two *kinds of validity* concerning norms which reciprocally presuppose and must be related to one another: the *normative* and the *empirical*. After that, he strictly separates between two *regularities of conduct*: the mere *factual* and that *directed by rule*. This leads him to the distinction between convention, law, and ethics, on the one hand, and mere custom on the other. Conduct directed by rules, however, is particularly suited for becoming an order (*ordnungstauglich*). Thus, it depends upon the kind of rule and its guarantee *which* order arises from it (Figure 6).

Max Weber worked this early typology of societal orders into his ‘Basic Sociological Terms’ from 1920 but in a modified form, insofar as between this early typology and the ‘Basic Sociological Terms’ lies the unfolding of his sociology of domination (*Herrschaftssoziologie*) in whose centre stands the concept of legitimacy. Accordingly, in Section 5 of ‘Basic Sociological Terms’ he says:

‘Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order. The probability that action will actually be so governed will be called the ‘validity’ (Geltung) of the order in question.’ (Weber, 1978: 31).

And he continues further below:

‘Only then will the content of a social relationship be called an order if the conduct is, approximately or on the average, oriented toward determinable “maxims”.’

We may add that these maxims can be technical as well as normative. Then follows the qualification:

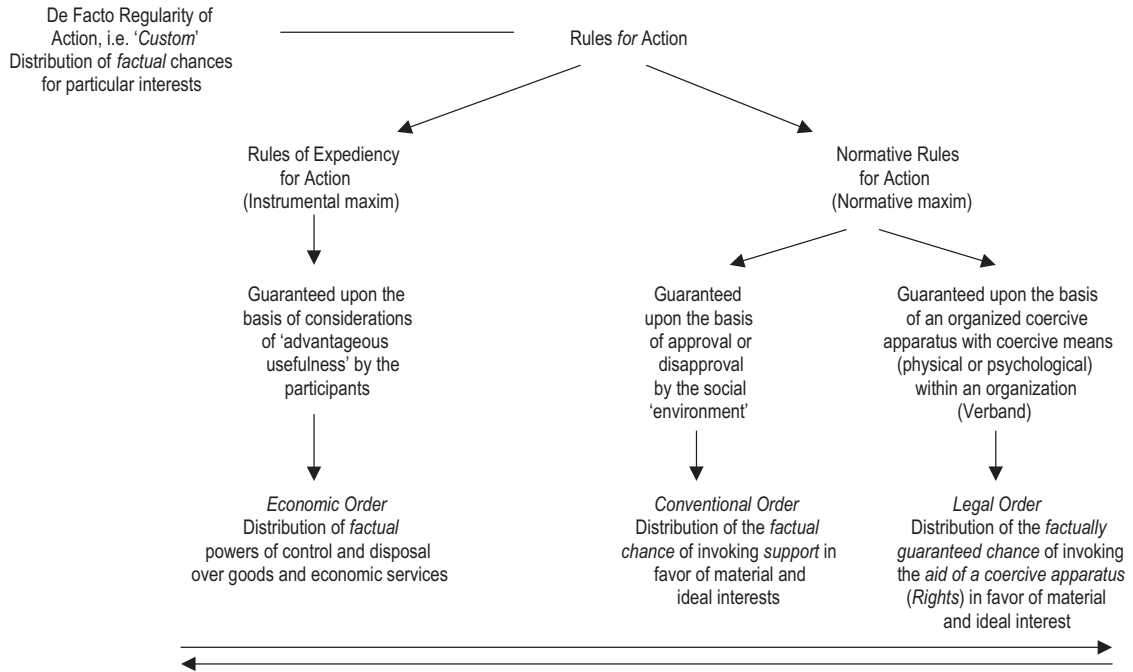


Figure 6. Max Weber's (early) typology of social orders

‘Only then will an order be called “valid” if the orientation toward these maxims occurs, among other reasons, also because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him.’ (Weber, 1978: 31)

This, however, is ultimately the case only for normative maxims.

Within these definitions are included: (a) both concepts of validity; (b) both concepts of regularity; (c) the distinction between an instrumental and a normative order; and (d) in regard to the normative order, the distinction between the conventional order and legal order. However, in connection with the legal order, Weber now emphasizes legitimacy in the sense of an empirically provable belief in legitimacy. This is a consequence of his sociology of domination which had been developed meantime.

The sociology of law therefore assumes as its main topic the empirical validity of the legal order consisting of a sum of legal propositions as opposed to legal dogmatics (*Rechtsdogmatik*) which occupies itself with the normative validity of those propositions, whether

these be a product of customary law or enacted law. A legal proposition connects a state of affairs with a legal consequence (if A, then B should follow), and since it is characteristic of this connection that this does not always occur, it must be guaranteed by means of a coercive apparatus. Here arises the greatest proximity to Durkheim, although in this regard Weber simultaneously thinks more in depth about gradations. Thus, law may also be indirectly guaranteed or even unguaranteed without losing its character as law, and where it is guaranteed, the guarantee need not be by the state for it may also be extra-state or pre-state. To law, however, corresponds rights. Weber defines a right sociologically as the chance factually guaranteed to a person by virtue of the legal order ‘of invoking in favour of his ideal or material interests the aid of a “coercive apparatus” which is in special readiness for this purpose’ (Weber 1978: 315).⁹ In turn, this right can be indirect, e.g. a by-product of other rights, or direct, and as such either inherent or acquired.

Six points are important in connection with Max Weber’s concept of an empirical legal order. First,

every empirical legal order contains gaps. The depiction of the objective meaning of legal propositions as a system in itself logically closed and without contradictions is an ideal of legal dogmatics that is never entirely obtainable. Second, in every empirical legal order legal propositions are more or less valid. Even this way of looking at things in terms of degrees ultimately contradicts the ideal of legal dogmatics. Third, the degree of empirical validity of a legal order is usually dependent upon the validity of other normative orders, in particular conventional norms, but also norms of ethics. Fourth, legal orders are not only linked ‘in a fluid gradation’ with ethics, convention, and custom. There are usually several legal orders in a society which are in conflict with one another and with other orders so that one may speak of a ‘battle of the orders’. Fifth, legal orders regulate only a small portion of action—grasp ‘only fragments of the same’¹⁰—and they can certainly be normatively valid, but empirically completely powerless. Sixth, although legal orders are only capable of becoming more or less rationalized, there are three developments which have become important from the perspective of the history of law and which fall under the title of the rationalization of law: (a) the standardization of the legal order; (b) its relative autonomization compared to other normative orders; and (c) the monopolization of legal coercion through the state. The latter however is, according to Weber, the result of the development of the market economy.

In contrast to Émile Durkheim, for Max Weber law is not *the*, but rather only *one* precondition of the constitution of social life. Of course, it gains in importance from his point of view with increasing societal differentiation because that process can also, or even primarily, be described as a legalization (*Verrechtlichung*) of social relationships. In this connection law undergoes a thorough change. Max Weber, unlike Durkheim, expressed this process in terms of the formula of a formal and substantive rationalization of law.

Formal and Substantive Rationalization of Law

It is impossible to provide an account here of Max Weber’s encompassing presentation of the various ‘epochs up to the present’ as found in his manuscript on the sociology of law. However, unlike Durkheim, he does *not* see this development from the point of

view of a change in repressive and restitutive law and their interrelationship. Instead, he is interested in demonstrating that the contemporary law is primarily the result of a process of *formal* rationalization in adjudication and lawfinding (*Rechtsfindung*) which produces, so to speak, as a dialectical countermovement, the demand for a substantive rationalization of law on the part of the legally interested parties. The modern legal order exists not only in tension with other societal orders, but is also governed by an idea of law which in itself is tension ridden. Drawing on Gustav Radbruch, it can be said that it consists of a tension between the idea of justice on the one hand, and the idea of calculability (*Rechtssicherheit*) and expediency on the other. Wherever law is formally rationalized, legal calculability and expediency inevitably take the lead.

Max Weber treats in detail the powers which have advanced particularly in the Occident this formal rationalization of law, including the political and hierocratic powers, the exponents of various schools of law, the various groups of legally interested parties, and the organizational composition of the legal order itself. But what about the substantive rationalization of law? What about justice in this context of legal certainty and expediency?

Human Rights as Regulative Idea

Max Weber, of course, also describes the countermovements to legal formalism. They are, in the first place, of a thoroughly intrinsic legal nature. He refers, for instance, to the displacement of the formally bound law of evidence by the free evaluation of proof, the displacement of the formally bound characteristics of the facts of the case by taking into account the real intentions of the parties, and the increasing consideration of ‘mental attitudes’ during the ascertainment of legal consequences. However, he refers above all to the penetration of vague legal concepts into formal law such as good faith and fair dealing, or fair practice (*gute Sitten*). Even more important are the developments extrinsic to law. Particular groups of interested parties and especially the legal ideologists, according to Weber, wanted to *substitute* substantive justice for formal legality (see Weber, 1972: 507). Weber locates such leading groups supporting an anti-formalism within the monarchical welfare bureaucracy as well as among the social democrats and the ideologists of the status

of legal practice. They all held in common the wish to place formal law into the service of a political and ethical postulate external to law, and they thereby also tended to level out the differences between a legally extrinsic and legally intrinsic substantive rationalization.

For Max Weber it is one of the distinguishing features of contemporary law that, with the decline of natural law, the legal system as a whole was transposed from an external to a legally internal postulate of justice. Today modern formal law knows at best only a few transcendental principles of law which, as Hermann Heller once formulated, can be understood as building principles of legal content with an ethical claim to validity.¹¹ To such building principles, which in the first place are culturally *bound*, there undoubtedly belongs human rights which Émile Durkheim had shifted into the centre of his attention to 'higher societies', and which Max Weber considered essential to the life of modern citizens. Kant's insight, for Max Weber, also holds true that human beings are ends in themselves and should never be degraded to a mere means as they would then forfeit their own dignity. Nevertheless, Weber certainly would never have thought of interpreting human rights as penal law. He was not even certain whether they could be understood as *detached* from a cultural group, and consequently as universalistic in the constitutive sense. Of course, if one does not at the very least *presume* such a universalism, then the formal rationalization of law stands in danger of autonomizing legal calculability and efficiency, while no longer bringing legal formalism into a tension-rich balance with the idea of justice as a constituent part of the idea of law. Just as too great a substantivization can undermine the productive capacity of modern law, so too can the uncoupling of its formal rationalization from any legally extrinsic or intrinsic substantive rationality.

Future Perspectives: A Return to the Sociology of Law as General Social Theory?

Let us begin our concluding remarks with a summary comparison of the two classical authors of the sociology of law which we have considered here. What

do they have in common and what not? Without a doubt they share in common the attempt to elucidate the limits of the economic interpretation of social life, along with the non-economic presuppositions and consequences of economic orders, in particular that of the capitalist market economy. Durkheim pursues this in his study of the social division of labour in direct contrast to utilitarian social theory, while Weber does the same in his investigations of the rise of modern capitalism in direct contrast to, on the one hand, historical materialism and, on the other, the neoclassical school of economics. For both, law plays an eminent role in these confrontations. However, how they define the role of law is what differentiates them.

1. For Durkheim, law is the *core* of social life, while for Weber it is only one important causal component among others. In spite of the increasing tendency towards legalization (*Verrechtlichungstendenz*) to which the modern societal orders are subjected, it always grasps only a *fragment* of action and nothing more.
2. For Durkheim, law is a symbol of social life and therefore in the first place part of *culture*, while for Weber law is *order* and therefore in the first place part of the configuration of order within which social life takes place.
3. For Durkheim, apart from occasional times of crisis, there exists a *correspondence* between the development of law and social development, while for Weber the development of law proceeds in part *autonomously* and also acquires its *own inner logic* (*Eigenrecht*) as compared with other developments.
4. For Durkheim, the differentiation of law is part of the functional differentiation of modern societies, while for Weber the differentiating of law means, in the first place, a differentiation of values with different normative dignity in regard to which an institutional differentiation, a differentiation of orders, can then follow.

In reducing the above to a formula of key words, one may speak of core versus fragment, of culture versus order, correspondence versus autonomy, and of functional differentiation versus differentiation of values. These differences mark out distinct conceptions of law within the framework of very different social theories.

Is this embedding of the sociology of law within general social theory antiquated? I think not. If one

considers the contemporary scene in Germany, it may be said that two of its most prominent social theoreticians only quite recently undertook precisely such an integration. First, Niklas Luhmann treated law within the framework of his general theory of social systems as a differentiated, operatively closed, and independently structured subsystem which develops through structural coupling with other subsystems.¹² Second, Jürgen Habermas assigned to law—within the framework of his general theory of communication, which is founded in language philosophy—a bridging function between communicative and administrative power through which it is to cope with the dual task of modern societies, namely, to ensure social integration as well as system integration (see Habermas, 1992).

Of course, the theoretical foundations of these two approaches are completely different from those of Durkheim and Weber. And the differences between them are at least as marked as those which can be said to exist between Durkheim and Weber. Also, the role thereby ascribed to law differs from the judgment of our classical writers. In the view of our classical authors, at any rate, law is neither an autopoietic system (as in Luhmann), nor could it secure the ‘double’ integration of modern societies, in spite of the fact that at least Durkheim undoubtedly came very close to such notions. At least Weber did not undertax (like Luhmann) nor overtax (like Habermas) the role of law in social life. Perhaps for this reason one should, after almost a century, recall more often these classical writers of the sociology of law, before carrying out without any reservation the autopoietic or linguistic-pragmatic turns in social theory.

Notes

1. Émile Durkheim, after his studies at the *École Normale Supérieure* and starting off as a teacher of philosophy at a Gymnasium in Saint-Quentin, undertook a study trip to Germany in 1885 which led him to Berlin and to Leipzig from where there emerged two longer texts which belong to the constitutive components of his sociology: ‘Philosophy at German Universities’ and ‘The Positive Science of Morals in Germany’ [both in German translation in Durkheim, (1995)].
2. Starting in 1890, Durkheim regularly held the course ‘Leçons de sociologie. Physique des mœurs et du

droit’ at the *Faculté des lettres* of the University of Bordeaux, and later at the Sorbonne. The manuscript of this lecture, which has been edited from Durkheim’s posthumous works, appeared in German translation under the title *Physik der Sitten und des Rechts. Vorlesungen zur Soziologie der Moral* (Durkheim, 1991).

3. The clearest formulation in this regard occurs of course in a later text, namely, in the article ‘The Determination of Moral Facts’ from 1906 where Durkheim clarifies the difference between technical and moral rules, and more generally between rules of prudence and happiness and those of obligation by means of a *Gedankenexperiment*. The question is: ‘How is action and the consequence of action connected, ‘naturally’ or ‘artificially’, analytically or synthetically?’ Where the latter is the case, the connection is established by sanctions (see Durkheim, 1967: 84, 93).
4. Durkheim’s classification does not follow the usual distinction between private law and public law. The decisive criterion of demarcation in regard to matters of law concerns rather the kind of sanction involved. Even this criterion, however, cannot always be maintained. Thus, for example, American law recognizes so-called punitive damages, hence a combination of repressive and restitutive law.
5. Durkheim’s analysis is unsatisfactory because it is not clear what ‘member’ means. Is he talking about individuals or social units, and if about social units is he referring to (occupational) groups or institutional domains as carriers of functions? In addition, he vacillates between an analytical and concrete use of the mechanical-organic distinction. This has engendered considerable confusion in the secondary literature and has led to unusable remedial constructions (e.g. to the distinction between social integration and system integration). See, in this regard above all, Lockwood (1992).
6. The relevant text can be found in Durkheim (1969: 245–273), carrying the title ‘Deux lois de l’évolution pénale’. The two laws in the original read: 1. ‘Loi des variations quantitatives’: ‘L’ intensité de la peine est d’ autant plus grande que les sociétés appartiennent à un type moins élevé – et que le pouvoir central a un caractère plus absolu’ (p. 245). 2. ‘Loi des variations qualitatives’: ‘Les peines privatives de la liberté et de la liberté seule, pour des périodes de temps variables selon la gravité des crimes, tendent de plus en plus à devenir le type normal de la répression’ (p. 256).
7. For a more extended analysis of this point, see ‘Über Individualismus’ in Schluchter (2000).
8. See in this regard the ‘table of contents’ (*Stoffverteilungsplan*) outlined by Max Weber for this collective venture from May 1910 (Weber, 1994: 766, 768).

9. Weber, by the way, later replaces the concept of 'coercive apparatus' (*Zwangsgapparat*) employed in the older manuscripts with the concept of 'a staff engaged in enforcement' (*Erzwingungsstab*).
10. Weber, 1972: 194. [The precise German phrase which Schluchter cites from Weber is not explicitly rendered in the English translation and, thus, the independent translation given here. See Weber, 1978: 331.]
11. See in this regard also with reference to Hermann Heller and Max Weber, Schluchter (1998: 223).
12. See Luhmann (1993, 1999). Luhmann was already concerned with law before his autopoietic turn. See for instance Luhmann (1972).

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References

- Comte, A. (1956) *Rede über den Geist des Positivismus*. Meiner, Hamburg. [Comte, A. (1844) *Discours sur l'esprit positif*. Paris.]
- Durkheim, É. (1967) *Soziologie und Philosophie*. Suhrkamp, Frankfurt. {Durkheim, É. (1924) *Sociologie et philosophie*. Félix Alcan, Paris. [Durkheim, É. (1974) *Sociology and Philosophy*. New York, The Free Press].}
- Durkheim, É. (1969) *Journal Sociologique*. Paris, Presses Universitaires de France.
- Durkheim, É. (1981) In Lore Heisterberg (ed. and trs), *Frühe Schriften zur Begründung der Sozialwissenschaft*. Darmstadt and Neuwied, Luchterhand. [Within this edited collection of essays by Durkheim, Schluchter is referring to the German translation of Durkheim, É. (1888) *Cours de science sociale: Leçon d'ouverture*. *Revue internationale de l'enseignement*, **15**, 23–48].
- Durkheim, É. (1991) *Physik der Sitten und des Rechts. Vorlesungen zur Soziologie der Moral*. Suhrkamp, Frankfurt. {Durkheim, Émile (1969) *Leçons de sociologie. Physique des mœurs et du droit*. Presses Universitaires de France, Paris. [Durkheim, Émile (1983) *Professional Ethics and Civic Morals*. Westport, CT, Greenwood Press].}
- Durkheim, É. (1995) In Schultheis, F. and Gipper, A. (eds), *Über Deutschland. Texte aus den Jahren 1887 bis 1915*. Konstanz, Univ.-Verl. Konstanz. [Within this edited collection of essays by Durkheim, Schluchter in note 1 is referring to the German translations of Durkheim, É. (1887) *La philosophie dans les universités allemandes*, *Revue internationale de l'enseignement*, **13**, 313–338, 423–440, and Durkheim, É. (1887) *La science positive de la morale en Allemagne*, *Revue Philosophique*, **24**, 33–58, 113–142, 275–284].
- Habermas, J. (1992) *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt, Suhrkamp.
- Lockwood, D. (1992) *Solidarity and Schism. 'The Problem of Disorder' in Durkheimian and Marxist Sociology*. Oxford, Clarendon Press.
- Luhmann, N. (1972) *Rechtssoziologie*, Volumes 1 and 2. Hamburg, Rowohlt.
- Luhmann, N. (1993) *Das Recht der Gesellschaft*. Frankfurt, Suhrkamp.
- Luhmann, N. (1999) *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtslehre*. Frankfurt, Suhrkamp.
- Schluchter, W. (1998) *Die Entstehung des modernen Rationalismus. Eine Analyse von Max Webers Entwicklungsgeschichte des Okzidents*. Frankfurt, Suhrkamp.
- Schluchter, W. (2000) *Individualismus, Verantwortungsethik und Vielfalt*. Weilerswist, Velbrück Wissenschaft.
- Weber, M. (1968) *Gesammelte Aufsätze zur Wissenschaftslehre*. Third Edition. Tübingen, J.C.B. Mohr (Paul Siebeck).
- Weber, M. (1972) *Wirtschaft und Gesellschaft*. Fifth Revised Edition. Tübingen, J.C.B. Mohr (Paul Siebeck).
- Weber, M. (1978) *Economy and Society*, Volumes 1 and 2. Berkeley, University of California Press.
- Weber, M. (1994) *Stoffverteilungsplan für das 'Handbuch der politischen Ökonomie'*. In *Max Weber-Gesamtausgabe II/6*. Tübingen, J.C.B. Mohr (Paul Siebeck), pp. 766–774.

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