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Private Law Theory at the Intersection of Legal Scholarship and Sociology

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Although there is certainly no lack of literature on the intellectual history of German legal thinking nor (to a lesser extent) on the history of sociological theory, little research exists that looks at the co-development of these disciplines from the perspective of the history of theory. Doris Schweitzer's habilitation provides a much-needed contribution to this field of research. The main title of her book, »Juridical Sociologies«, expresses the focus of the study on the question »how and in what form the discovery of society in 19th-century German private law has influenced the emerging discipline of sociology« (19). While the author is a sociologist (who also holds a law degree), and the book is written for a sociological audience, it nevertheless has the potential to stimulate productive debates between sociology, legal theory, and legal history.

Schweitzer starts from the observation that contemporary German sociology is not interested in the law. Despite law's enormous significance in social life, the sociology of law plays almost no role in sociological teaching and research, even less than in law schools, where there is a token presence in the curriculum. This is even more surprising given that law plays a central role in the work of scholars who today are considered pivotal in defining both the scope and the content of the emerging discipline. Once established, sociology lost its interest in the law. Why is that? Schweitzer argues that we need to look at the way this relationship was, on the one hand, problematized both in 19th-century private law theory and in the early 20th-century legal-methodological debates, and on the other, in the early sociologies around the turn of the century. She rejects Luhmann's view that the positivization of law was the crucial factor in creating the (semantically based) division between »law« and other subsystems of society. Instead, she opts for a theoretically much more fluid and open heuristic framework that integrates concepts from the history of science and makes use of Foucauldian theory. Using Hans-Jörg Rheinberger's concept of »epistemic thing«, she observes and analyzes the discourses that show how scholars were grappling with a yet undefined subject. This allows her to avoid essentializing concepts such as »law«, »society«, or the disciplines that formed with the express aim to scientifically study them. Schweitzer makes use of Foucault's theorem of »dispositif« as a way to analyze the inseparability of knowledge and power. In her view, Foucauldian analyses, which concentrate on discourses about »truth«, might be of limited value in understanding legal discourses as such. Instead, they are useful when trying to grasp the way disciplines have been grappling with »law« and »society«, and have made truth claims about these epistemic objects (52). The other methodological approach used illustrates the theoretical argument with a close reading of the original scholarly discourses. The author's extensive knowledge of the literature is on display throughout the 662 pages of the book. As she explicitly states, her book does not present new historical sources. Instead, it aims at a sociologically informed analysis of these discourses, with the view to the »sociological rationalities in law«.

The book is divided into two parts. The first part will be very familiar to legal historians of the 19th and early 20th centuries, but less so to sociologists: how Savigny, against the background of extreme legal fragmentation in the various German-speaking territories, successfully created the narrative of law being the emanation of the »Volksgeist« in the form of classic Roman law. According to this narrative, lawyers had the »scientific« methods to recognize the right law by ways of conceptual logic. Though Puchta further refined and formalized this position, it remained contested and its dominance was anything but inevitable. As Schweitzer shows, the question about what the

* Doris Schweitzer, Juridische Soziologien – Recht und Gesellschaft von 1814 bis in die 1920er Jahre, Baden-Baden: Nomos 2021, 664 S., ISBN 978-3-8487-6878-3

law had to do – or should have to do – with society or, in a more abstract and less political way, »life«, became a recurring theme in legal scholarship. For example, Jhering introduced the social via viewing law as a means to an end (*Zweck*). His ideas were successful in the areas of public and criminal law, and early sociologists eventually came to adopt them. However, the dominant private law theorists, such as Winscheid, emphatically rejected Jhering's ideas.

A real turning point in many of the discourses, which reverberated throughout later discussions, was the codification process and eventual adoption of the *Bürgerliche Gesetzbuch* (BGB) in 1900, which ended the idea of law being the exclusive domain of the »legal scientists«. The long-running process provided the occasion for fundamental and critical discussions on the legal theory behind the BGB (among others, Schweitzer presents the contributions made by Gierke, Ehrlich, Menger, and Petrazycki). The debate about the BGB's legal origins, i.e. the influences of Roman and/or German law was intimately connected with the question of whether it was adequate to the task of addressing the social problems of that time – above all given the challenges posed by socialist and social democratic ideas. Particularly interesting is Schweitzer's presentation of the legal-methodological arguments on the question of what influence the emerging social sciences should have. In any case, the forceful critique of self-sufficiency in »legal science« did not have an immediate effect on the outcome; the BGB formalized the abstract-conceptual nature of legal-dogmatic thinking.

A few years later, the status quo was again challenged by the »Free Law Movement« as well as by other groups. In particular, Schweitzer discusses well-known figures such as Kantorowicz, Ehrlich, Heck, Fuchs, Nussbaum, Sinzheimer, and Kelsen, but also lesser-known writers such as Kornfeld and Wurzel. The key was the discovery of the judge as an agent of the voluntaristic creation of law. These discussions began in the 1880s (Bülow, Rümelin, Zitelmann) and continued into the Weimar Republic – Carl Schmitt's writings, for example, have to be read against the background of these discussions. Schweitzer compares the debate to the *Werturteilsstreit* (value-judgment dispute) in the early *Nationalökonomie* (economic sociology), in which the question was whether normative conclusions could be deduced from facts. In legal scholarship, however, the problem was reversed: given the inevitable value judgement inherent in judicial decisions, the question was how empirical evidence could be integrated into legal-dogmatic arguments to ensure the relevance of »life« in the law (365). Schweitzer concludes that while these authors were united in their rejection of the abstract-conceptual logicism of the prevailing method, their positions were too diverse as to be able to bring about a change in doctrinal thinking. As she argues, one major problem was that the attempts to define the role sociology should play for and in legal scholarship depended on how »sociology« was understood (362). The lack of consensus among these writers isn't really so surprising given that no such consensus existed in the young discipline – which meant that there was no clear »other« for legal scholarship to turn to. In the end, the separation of »is« (sociology) and »ought« (law) prevailed, a position that was most forcefully argued by Kelsen. Mainstream legal scholarship perceived sociology as a competitor, a challenge that needed to be handled by an internal legal discussion on how, if at all, specifically defined empirical knowledge could enter the realm of the legal.

The second part of the book differs from the first inasmuch as it concentrates on the relevant sociological writings of Durkheim, Tönnies, and Weber, without embedding the writings in the general sociological discussions of their time analogous to the discussion of the discourse in legal scholarship. Early sociologists were reacting to the same basic situation: the unresolved relationship between the law and the social. They also referred to the same discussions (obviously, as a French scholar, Durkheim to a lesser extent). Contrary to the legal scholars, however, they were interested not in how the social (or »life«) helped to solve legal questions, but rather what the law could empirically teach them about »society« as an epistemic thing. They approached this question from very different perspectives. Durkheim's aim was to reject all philosophical speculation and provide a firm empirical basis for reasoning about »social facts«. For him, law was interesting as a representation of social solidarity. This led him to provide a very narrow reading of the law that ultimately, Schweitzer concludes, was unable to provide a sociological account of law capable of answering questions about legal change or the ordering function of the law. Such an account is of little interest to legal scholars. Tönnies, in contrast, was very much interested in the relationship between law

and order, but understood sociology, despite its empirical focus, as a philosophical discipline. He envisioned the discipline as providing a value-free system with concepts and theories that were able to describe and explain social phenomena, very much analogous to the system of German legal scholarship. He explicitly rejected, however, any relevance of sociological concepts for law itself, and was not interested in the social significance of legal theory or method. This proved to be theoretically unattractive for legal theory.

Finally, Schweitzer turns to Weber to locate the missed opportunity for a closer intellectual bond between legal and sociological scholarship. Weber, too, was interested in constructing a system of well-defined concepts as a toolkit for making precise statements about social phenomena and causal relationships that exist between them. As a lawyer, not only did he use the legal terms in his sociological theory, but he also had intimate knowledge of the legal debates discussed in the first part of the book and commented on them in his sociological and comparative account of German legal history. Most importantly, in contrasting the sociological from the legal perspective, he defines the legal as a strictly normative enterprise. This led him to reject the free law movement's demands for greater methodological freedom for judges. To be sure, Weber's objection is not one of principle but is embedded in the particular historical context: due to his comparative research into the nature of the common law, Weber was well aware that it was possible to base a legal system on completely different judicial methodologies. However, he was skeptical – probably rightly so – that the proponents of free law were careful about what they were wishing for. Rather than relying on judges who were recruited and socialized in the German empire's bureaucratic-authoritarian justice system, Weber trusted the democratic process to create the necessary social legislation and hope that doctrine will help to force even conservative judges to implement such legislation.

Be that as it may, Schweitzer's point is that by neatly separating sociology and law along the is-ought axis, Weber was strengthening the separation between sociology and law, or more precisely, »immunizing sociology against the law« (571). His aim was to secure the autonomy of sociology. It also meant that normative questions involving the theory and method of law application were beyond the scope of sociology. This is the point of departure for Schweitzer's criticism of Weber: he places the question of legal normativity outside the reach of sociological analysis and critique. Sociologists, he says, can only observe, whereas the legal-governmental complex with the technologies of power that Foucault focused on stays safely in the hand of the lawyers and outside the challenges of society (580). This is where, for Schweitzer, sociology has taken the wrong turn.

Schweitzer provides a convincing account about the importance of the 19th-century legal discourses for the early sociologists. The detailed presentation of these discourses shows the richness of the debate of that time – almost all the arguments that are still part of today's fundamental legal-theoretical discussions are already present. They could have provided fertile ground for interdisciplinary debates after 1945, and especially in the short-lived blossoming of sociology of law in the 1970. Yet, this did not happen. For Schweitzer, a major reason is internal to the theory – Max Weber assigned the »is« to sociology and the »ought« to law, reaffirming an apolitical view of the law. As I understand Schweitzer here, this created a path-dependent development that ended in a situation where sociology no longer had anything to say about the law (577). I wonder, however, whether Schweitzer's theory-internal explanation might not be too deterministic and too centered on the sociologies of Durkheim, Tönnies, and Weber. For one thing, Marxism-inspired theory never accepted the is-ought dichotomy and provided the motivation for many of the – ultimately unsuccessful – attempts in the 1970s to move legal thought closer to the sociological. The role of the political and intellectual rupture caused by National Socialism would also have to be discussed. Finally, for a more complete picture, we need to look at the external, historically contingent factors in the post-war disciplinary histories to understand the current configuration of sociology and legal scholarship.

Schweitzer ends her book with a call for sociology to reappropriate the law. In order to be able to critique the law and legal power, sociology needs to be able to analyze issues of legal doctrine and method (578). This is only possible if sociologists have the necessary knowledge of these domains and of their histories. On the other hand, legal scholars and legal historians can profit from looking at the intertwined histories of law and sociology. Schweitzer's book provides valuable impulses for these cross-disciplinary perspectives.

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