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The Chequered History of Sociology of Law in West Germany

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dungsprozesses verdeutlicht. Daraus folgt, dass Sondervoten als Rechtserkenntnisquelle für spätere Rechtsprechung, für neue gesetzgeberische Initiativen und den wissenschaftlichen Diskurs von hohem Wert sein können. Gesetzgebung, Rechtsprechung und Rechtswissenschaft stehen in einem engen und wechselseitig einander bedingenden Gesamtzusammenhang. Das Sondervotum ist dafür ein Scharnier im Rechtsquellensystem. Insofern legt Matthias Klatts überzeugende Arbeit die Frage nahe, ob das Sondervotum als »Instrument« rechtsprechender Verfassungsinterpretation nicht auch für die anderen Höchstgerichtsbarkeiten entsprechende Bedeutung haben sollte.

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Ralf Rogowski

The Chequered History of Sociology of Law in West Germany*

The history of German sociology of law is chequered due to discontinuity, and characterised by quite a few ups and downs. The publication under review, the special issue of *Mittelweg 36*, the journal of the prestigious Hamburg Institute of Social Research, contributes to writing this history by focussing on a rare period of »ups« in the 1970s. The editors, Clemens Boehncke, Karlson Preuß and Doris Schweitzer, consider the »long« 1970s as the peak period in the controversy over the relationship of sociology and jurisprudence in Germany. The publication contains a collection of papers that derive from a 2021 conference on the relationship of the social sciences and law and follows on from a previous conference on »disciplinary boundary disputes« between law and sociology.[1]

The portrayal of the resurgence of the subdiscipline of sociology of law in the 1960s and 1970s after a long period of subdued existence is well covered in the publication under review. What is remarkable is the context of this resurgence, which the editors' insightful introduction relates to the student rebellion (revolt) and attempts of an interdisciplinary legal education (reform). It was the period of experimentation with a one-phase legal education (instead of the traditional two-phase model of academic education at university followed by a period of practical training in the courts, administration and law firms) that boosted the sociology of law in Germany.

It is difficult, however, to locate the actual focus of the special issue. It is not a comprehensive account of an important stage in the evolution of the discipline of *Rechtssoziologie*, which originated in the late 19th century and constituted a central part in the development of sociology into a separate academic discipline. The importance of »juridical sociology« in the works of Emile Durkheim, Ferdinand Tönnies and Max Weber has been well researched in a major publication by one of the editors (Schweitzer). Rather, the aim of the special issue is to portray the »struggle« over the relationship of law and sociology, mainly within debates over reforming legal education in West Germany in the period under consideration.

In the first contribution of the special issue, Rüdiger Lautmann investigates »discourses and actions surrounding sociology and jurisprudence«. The focus is on the origins and the demise of the reform of legal education in West Germany. Lautmann is well placed to report on the events since

* Clemens Boehncke, Karlson Preuß, Doris Schweitzer (Hg.), Reform, Revolte, Rechtssoziologie. Zum Verhältnis von Sozialwissenschaft und Jurisprudenz während der langen 1970er-Jahre [Mittelweg 36, 31,5], Hamburg: Hamburger Edition 2022, 128 S., ISBN 978-3-86854-768-9

1 The contributions of the first conference were published in: Zeitschrift für Rechtssoziologie 41,2 (2021).

his writings from this period[2] were most prominent and shaped the sociolegal discourses at the time in decisive ways. He is a true participant observer.

Lautmann analyses in detail events, institutions and main protagonists in the period under investigation. He distinguishes three discourses that emerged in this period and labels them the »reform« discourse of legal education, the »fusion« discourse of law and sociology, and the conservative response and rejection of the reform efforts, which he calls »the discourse of tradition«. He emphasises the importance of two key figures who represented the intellectual discourses surrounding the reform efforts: Rudolf Wiethölter on the »fusion« side and Helmut Schelsky on the »tradition« side.

Lautmann provides insightful information of the rise and demise of the reform of legal education in West Germany. He concludes that as a consequence of that experiment, legal education and legal doctrine in Germany have nowadays become more interdisciplinary, at least at the conceptual level.

Susanne Karoline Paas in her contribution analyses the use of social science literature in legal textbooks. Her title »Sociology in free fall« plays with the double meaning of *Fall* in German, which denotes both a descent or drop and a legal case. Her analysis concentrates on private law textbooks that tried to »sociologise« private or civil law in the wake of the curriculum reforms in the 1970s. In Paas' view, there are two ways of applying sociology in legal education: as providing contextual or background information or actually in solving cases. She is particularly interested in the second approach and comes to the sobering conclusion that, despite well-meaning authors, the actual use of sociological knowledge in the new interdisciplinary textbooks was minimal. Surprisingly, she suggests that sociology of law should change the way it offers sociological information to become useful in legal practice of decision-making rather than criticising the current ways of »solving cases«. In this view, sociology of law remains a mere »auxiliary science« *(Hilfswissenschaft)*.

In the contribution entitled »Delimitation: which legal science from which sociology?«, Joachim Rückert reflects on his experience as a member of the law faculty at the University of Hannover. This law school was founded in 1974 as an ambitious experiment integrating sociology and other social sciences as part of legal education. The Hannover faculty was deliberately staffed by social scientists alongside reform-minded lawyers. Rückert spent ten years there from 1984 to 1993, which was, of course, the period after the experiment of one-phase legal education had already been abandoned. Rückert is interested in the cooperation of lawyers and social scientists and concludes that it was characterised by »delimitation«, not on the surface but underlying their collaboration. Rückert, a legal historian, sees the reason for this in what he calls the different »normativities« guiding lawyers and social scientists. These were formed in normative disputes over long historical periods, leading sociologists and lawyers to develop different understandings of the normative underpinnings of society. However, this account rather reveals the author's own difficulties with sociology, and the historical account does contribute little if anything to understanding the history of the sociology of law as a separate discipline.

Patrick Wöhrle, in »Sociology of law without law, without sociology and with ›too much‹ law«, focusses on two prominent sociologists, Helmut Schelsky and Niklas Luhmann, and their understanding of law in modern society in their writings of the long 1970s. Wöhrle argues that in demanding in his later, increasingly polemic work »more law« from sociologists, Schelsky remained abstract in his contribution to the sociology of law, which is also full of contradictions. Luhmann, by contrast, offers for Wöhrle a more convincing way of combining legal doctrine and sociological analysis in form of a functional method. However, Luhmann's understanding of law as conditional programming is too narrow for him in understanding legal practice.

In the final contribution, Berthold Vogel reassesses a key research project in the resurgence of sociology of law in West Germany, Wolfgang Kaupen's 1969 empirical study of German judges, *Die Hüter von Recht und Ordnung*. He analyses Kaupen's findings in light of current judicial re-

2 Rüdiger Lautmann, Soziologie vor den Toren der Jurisprudenz, Stuttgart 1971; idem, Justiz – die stille Gewalt, Frankfurt am Main 1972.

search. Kaupen's portrayal of the typical post-war German judge being the son of a Catholic civil servant with a rural background *(katholischer Beamtensohn vom Lande)* is challenged by findings from a recent study of lower court judges in Lower Saxony. Judges nowadays come from a variety of backgrounds and do rarely cling to an authoritarian state ideology. The author emphasises the changes in the institutional infrastructure of courts and pleads for current judicial research to enlarge its scope to include other judicial personnel beyond judges.

In addition to the main contributions, we find in the special issue shorter interventions by Ulrike Schultz, Eva Kocher, Stefan Machura and Andreas Fischer-Lescano. They comment on the period of the 1970s from today's perspective. Their own approaches differ widely, ranging from feminism and legal pluralism to critical systems theory. However, they unite in indicating the continued blindness and shortcomings of German legal education when it comes to integrating the social sciences.

Overall, the publication demonstrates convincingly that the subdiscipline of sociology of law became primarily a »juridical project« in the 1970s, carried out in West German law schools. Its development was supported by efforts to reform legal education that were, however, doomed and came to end in 1984, not because of internal difficulties among social scientists and lawyers in the new faculties, but due to massive political resistance from both the legal profession and conservative politicians.

What is not well covered in this portrayal of the upsurge of the sociology of law during the 1970s is the development of empirical research. This includes the transformation in research interests from judicial behaviour research *(Richtersoziologie)* to litigation research *(Verfahrenssoziologie)*. To grasp this change, the focus in analysing the history of sociology of law must switch to the rich landscape of research carried out in research institutions outside universities. This should include, for example, socio-legal research undertaken by Erhard Blankenburg and his team, including Blankenburg's role in creating the German Journal of Law and Society *(Zeitschrift für Rechtssoziologie)* in the period under investigation, which was a major boost in developing the sociology of law in West Germany.

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Jan-Henrik Meyer

Die übersehenen Experten – zur Rolle von Juristen in der Europäischen Union*

Experten haben kein gutes Image, nicht erst seitdem der damalige britische Justizminister Michael Gove im Juni 2016 während der Brexit-Referendums-Kampagne äußerte, die Briten hätten »genug von Experten«, und zwar insbesondere von solchen, deren Voraussagen sich im Nachhinein als unzutreffend herausstellten. Kritik an Experten, die die Fähigkeit für sich in Anspruch nehmen, sachlich-rational auf der Basis höheren, oft technischen Wissens zu beraten und die objektiv bestmögliche Entscheidung zu empfehlen, kennzeichnet die politische Debatte spätestens seit den 1970er Jahren. So kritisierten soziale Bewegungen diesseits und jenseits des Atlantiks die Dominanz von technokratischen Experten-Entscheidungen – z. B. bzgl. der Atomkraft – und forderten stattdessen mehr demokratische Teilhabe.

Experten sind trotz allem aus dem politischen Prozess nicht wegzudenken, gerade auch im Rahmen der Produktion und Ausgestaltung europäischer Politik in der Europäischen Union (EU). Auf EU-Ebene ist die Verwendung des Expertenbegriffs

* Emilia Korkea-aho, Päivi Leino-Sandberg (eds.), Law, Legal Expertise and EU Policy-Making, Cambridge: Cambridge University Press 2022, IX + 325 p., ISBN 978-1-108-83012-6