

## The Sociology of Law as an Empirical Theory of Validity

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**ABSTRACT** 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 a constitutive component 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.

**KEYWORDS** Durkheim, human rights, penal law, sociology of law, Weber

### Introduction: The Sociology of Law between General Social Theory and Application

I would like to begin the following essay with a preliminary remark. I am well aware of the fact that within the title that I have chosen for this essay there lurks the danger of a naturalistic fallacy. However, I am concerned not with the distinction between validity (*Geltung*) and facticity but rather with the distinction between various *sorts of validity* that reciprocally presuppose one another. From my point of view, the sociology of law is concerned not merely 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 center 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 that may come to mind. I shall confine myself to Weber

and Durkheim. The reason is simple. For both Weber and Durkheim, the sociology of law is principally an aspect of *general* social theory.

We can distinguish two conceptions in treating law sociologically: one views law either as *a*, or perhaps even *the*, precondition of the constitution of social life; or one views law as a particular institutional realm. In the first case, the sociology of law is part of general social theory; in the second case, it is a field of sociology that specifies and applies general social theory in view of a particular context. Whereas with the 'classical authors' the first conception prevailed, in the course of a century the second conception came to the foreground. This has resulted in the sociology of law becoming one of the numerous 'sociologies of' (*Bindestrichsoziologien*), or, in other words, a subdiscipline of sociology. At present, the first conception of law appears to be gaining ground again. Of course, both conceptions are not mutually exclusive; however, it does make a difference which of them is emphasized.

It is precisely for this reason that a review (*Rückbesinnung*) of the origins of the sociology of law in Durkheim and Weber is useful. I would like to introduce the comparison between these two authors with two theses. First, for both Durkheim and Weber, law is primarily a precondition of the constitution of social life that 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, the social theory of Durkheim and Weber, respectively, leads to a very different understanding of law.

I shall begin my comparison with a presentation of Durkheim's general position in four steps: (1) a positive science of the rules of conduct; (2) outline of a science of morals and rights; (3) the two laws concerning the development of penal law; and (4) 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: 5ff. and 205ff.). 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 also of various

peoples and their morals.<sup>1</sup> 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, certainly from the very beginning for Durkheim, morals (*Sitten*) and rights (*Recht*) were 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 center of this *science of morals and rights*, therefore, stands the comparative analysis of rules of conduct reinforced by sanctions. The comparisons are set up inter-culturally and inter-temporally. Already in Durkheim's opening lecture of his 'Cours de science sociale', which was held in the winter semester 1887–8 at the University of Bordeaux and which is to a certain extent the starting *and* constant reference point of his doctrine,<sup>2</sup> one finds the decisive designations concerning the object and method of this new science. Launched into the world by economists, then constituted by Comte, consolidated by Spencer, determined by Schäffle, and specialized by the economists and jurists (of the historical school), as Durkheim puts it, the object and method of this new science are to be defined along the following lines.

1. Every society possesses a certain number of *common ideas and sentiments* that 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* that 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 judgments 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 centered in the first place on self-interest and not on duty, must be placed in this context. Economics, just as the sociology of morals and law, is a *social science*.

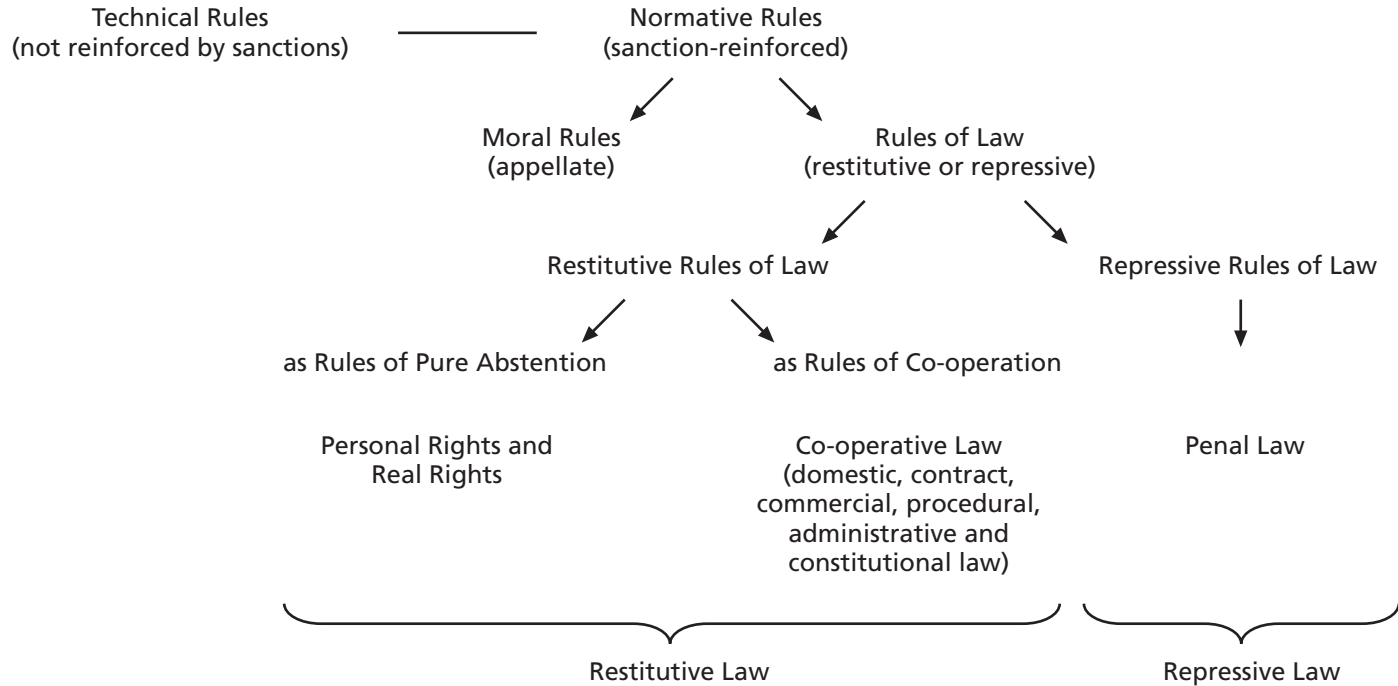
The focus of this science of morals and law is accordingly upon the sociological analysis of rules, particularly *rules of law* from a comparative perspective. Sociology is first of all a comparative sociology of law.

As a matter of fact, Durkheim's first substantial studies, in particular his famous investigation into the social (not economic) division of labor, are in essence analyses of a sociology of law. If later he means to say that at the beginning of social development everything was religion (which implies that a turn towards a sociology of religion occurs in his work), then in his early work it is said that at the beginning everything was law, and, more precisely, penal law, even if not yet formalized, codified and organized.<sup>3</sup> Sociology *as* sociology of law proceeds in this connection from the assumption that the development of law accompanies social development (correspondence thesis), and, furthermore, that law is a symbol (representation thesis) and, therefore, suitable to serve as an indicator for social conditions (scientific thesis). In addition it assumes that customs are secondary to law (hierarchy thesis) and it concerns itself, unlike economics, not with self-interested but rather with dutiful action, above all because collective life is an expression of obligations. However, whoever speaks of obligation, according to Durkheim (1988: 97), must at the same time speak of coercion (thesis of coercion). The decisive conclusion that is associated with this position therefore maintains: it is not true that an action offends the common conscience because it is criminal, but rather it is criminal because it offends the common conscience. The core of the common conscience, however, is formed by those ideas and sentiments congealed into maxims that are passed on from generation to generation and that are held as 'sacred'. Sociology therefore ultimately involves not only a sociology of law, but, more precisely, a *sociology of penal law*.

Durkheim's sociology accordingly commences with an analytical dissection of the concept of 'rule' and a classification of rules derived therefrom.<sup>4</sup> Important to him first of all is whether or not a rule 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) (see Figure 1).<sup>5</sup>

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

FIGURE 1. DURKHEIM'S TYPOLOGY OF RULES OF CONDUCT



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 that at its core is a consciousness of penal law. 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 (Figure 3). 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 labor, from which he wrested a 'moral' dimension. For he recognized that even the division of labor 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 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 co-operate voluntarily with others if one wants to increase one's gains – the co-operation 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 centered on 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 labor, 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 labor, 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, especially co-operative law 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.<sup>6</sup>

In his later writings, Durkheim would modify these all too simple theses that still informed his studies on the social division of labor 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 a development not only in relationship to restitutive law, but also *in itself*. (The same holds true of course also for restitutive law.) Penal law does actually regress with the increasing

FIGURE 2. DURKHEIM'S TYPOLOGY OF SOLIDARITIES

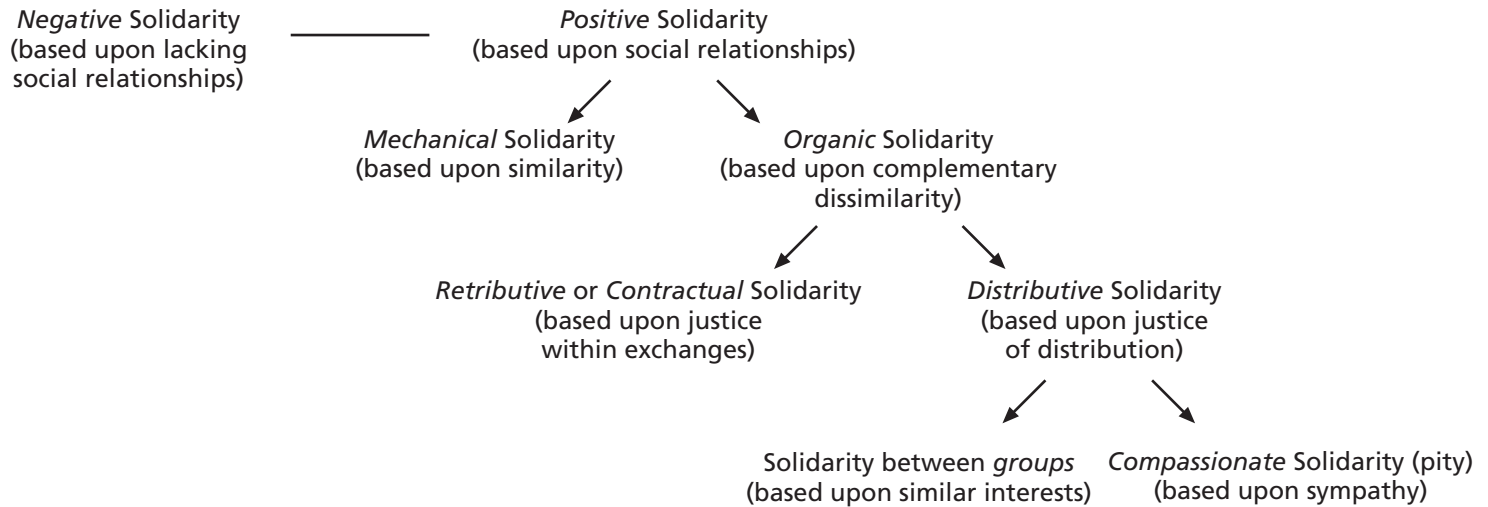
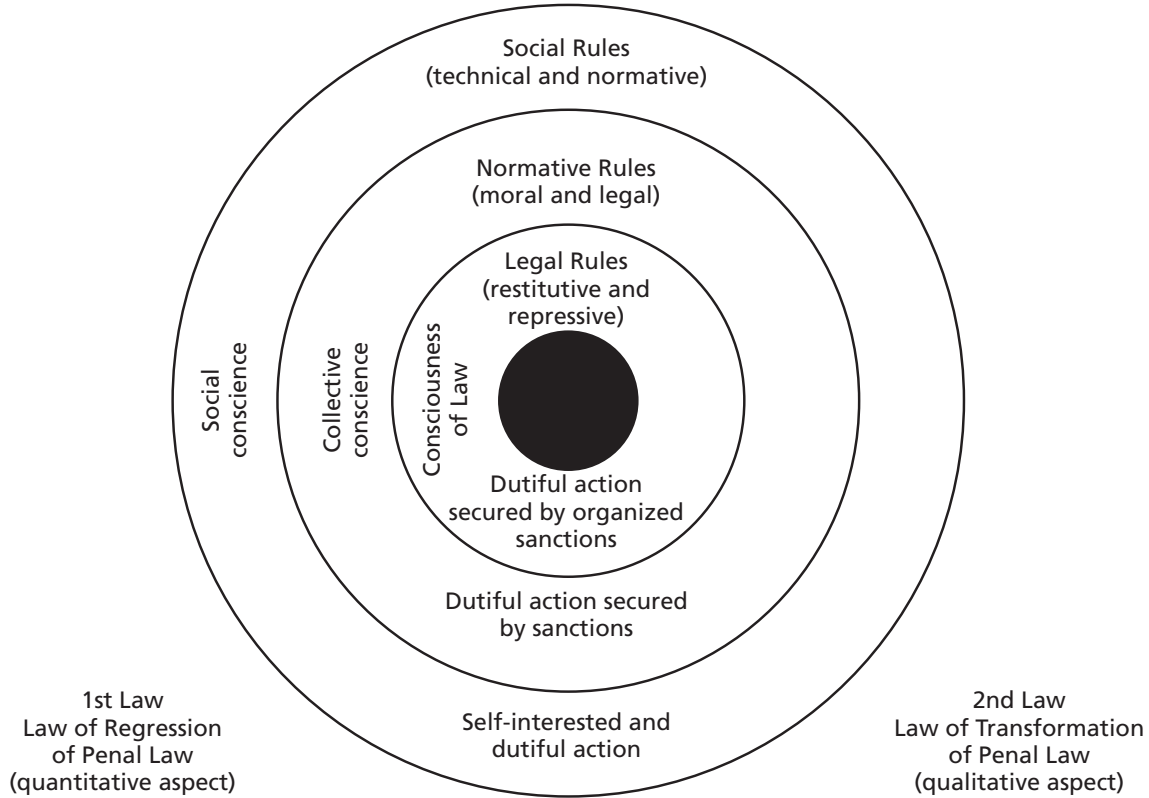


FIGURE 3. RANGE, INTENSITY AND SOLIDITY OF THE COMMON CONSCIENCE ACCORDING TO DURKHEIM





division of labor 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 labor. 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.<sup>7</sup> The law of *regression* states that the range of the repressive core shrinks with social development; that all social bonds that 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; that the social bonds that are due to the complementary dissimilarity gain cohesive force in comparison to those from similarity; and that the repressive core is still preserved, though in a new form. All this becomes especially apparent in the changing conception of punishment.

Durkheim’s view here is unusually modern. If one translates his analyses into contemporary terms, it could be said that the principle of retribution is sublimated into a principle of guilt, while the principle of prevention is enlarged through special prevention. Individualization here consists in the growing importance of the subjective component with respect to the prohibited action. Hence, modern penal law takes into account mistake of law (*Verbotsirrtum*), necessity as excuse (*entschuldigenden Notstand*), and lack of criminal capacity (*Schuldunfähigkeit*).

However, individualization also consists in the growing significance of the idea of re-socialization. General prevention, deterrence of the general public and the strengthening of a consciousness of law continue to exist, but they are complemented by special prevention, deterrence of the perpetrator from repeating his offense, and, above all, encouragement of his re-socialization. Bound up with individualization – from the cult of the group to the cult of the individual – is, therefore, at the same time a process of subjectivization and psychologization – from physical to psychical punishment. Michel Foucault later analyzed this occurrence in *Discipline and Punish* (1976), essentially as a successor of Durkheim, although with an entirely different objective.<sup>8</sup>

## 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 humankind, namely those rules that protect the group and those that 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.<sup>9</sup> The science of morals and rights describes from a comparative perspective how humanity's development of law culminates in human rights and human obligations. While human beings counted for nothing or at least little in simple societies, in complex societies they would count for almost everything, at least since the political revolution of the 18th century.

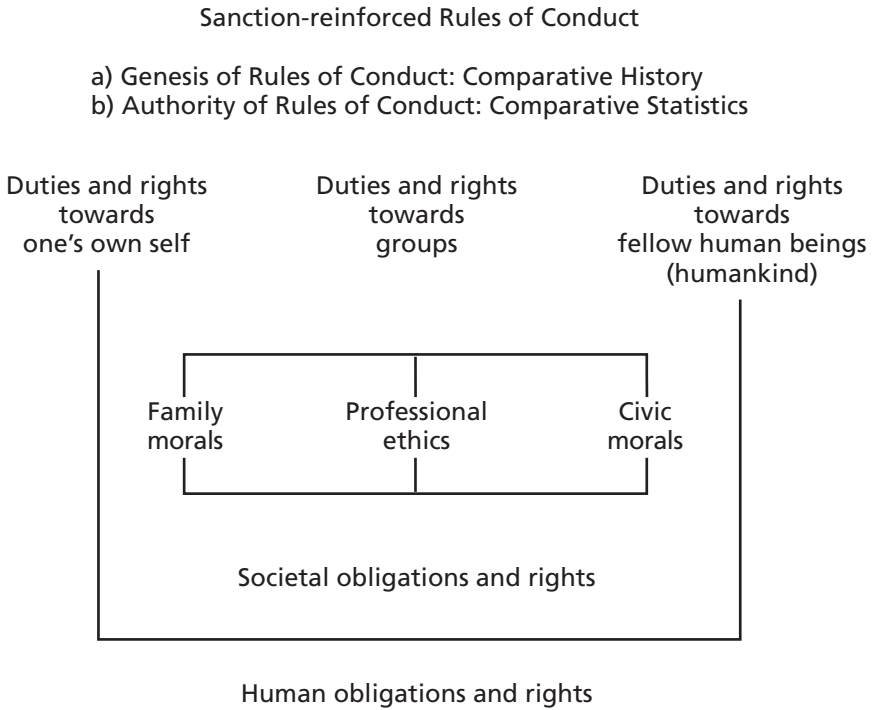
What Kant had posited a priori, namely that the human being is an end in itself, Durkheim develops historically. The human being as an 'owner with contractual capacity' is not only embedded within the concrete group life of a society based on the division of labor with its intersecting social circles, but is also always above any concrete group life. It is, indeed, not the concrete human being whom modern repressive law ultimately protects, but rather the ideal of the human being, the Individual, *la personne humaine*, that is to say, the humanity in him or her. In 'higher societies', rules that obligate the state to protect this Individual therefore also possess the highest authority. Of course, it should more precisely be said that they *should* possess it. Any statistical investigation in Durkheim's time or even today would show that things are in no way at an optimum in 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 labor 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 (Figure 4). These, however, are conceived by Durkheim as rules of penal law!

As has been already indicated, Durkheim, beginning in 1895, 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 thereby become 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 that is connected to an organized apparatus of sanctions. All this, however, then poses a

FIGURE 4. THE CONSTRUCTION OF THE SCIENCE OF MORALS AND RIGHTS



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.

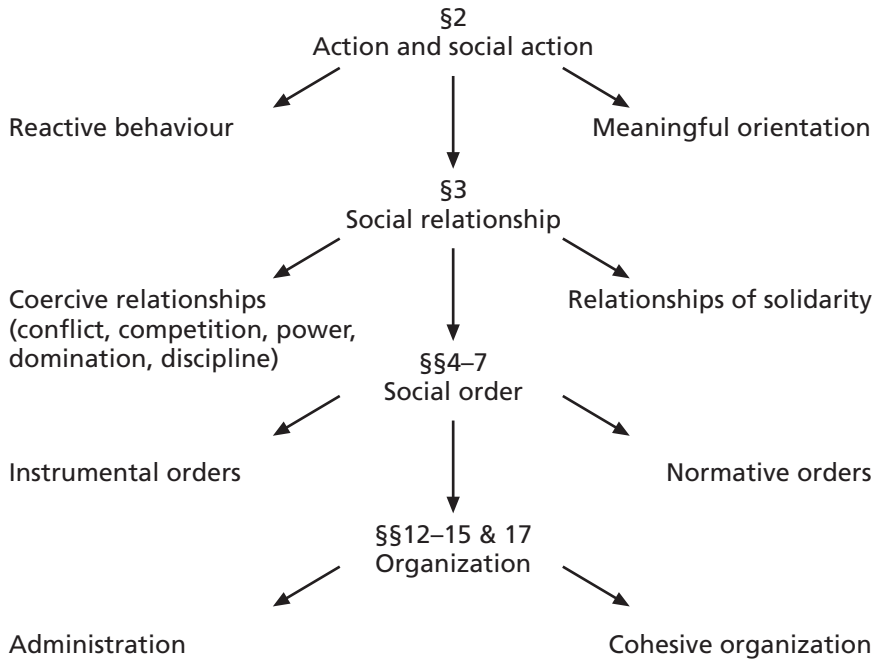
This is not the case in Max Weber, to whom I shall now turn, again considering his work in four steps: (1) an interpretive science of social action; (2) an outline of a typology of social relationships, orders and organizations; (3) formal and substantive rationalization of law; and (4) human rights as a regulative idea.

## 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*

FIGURE 5. ARCHITECTURE OF THE 'BASIC SOCIOLOGICAL TERMS' ACCORDING TO WEBER



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’ (1978: 4). Three claims stand out in this definition. First, sociology is an empirical science (*Erfahrungswissenschaft*) that, 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, that is, 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’ that stretch from action to social action, to social relationships, societal orders, and to organizations, accordingly displaying level-specific concepts that stand not in a genetic but rather in a *logical* sequence (Figure 5).

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 that was foreign to Durkheim. For Weber, action is related to meaning and meaning is incorporated into structures that 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

Weber's reflections on law are a constituent aspect of these basic concepts. In order to understand this correctly, one needs to become aware of two related contexts. The first concerns Weber's dispute with Rudolf Stammler, who in 1906 had come out with, in his own view, 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 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 title of 'Economy and Society' also on 'Economy and Law', first, on their 'relationship in principle' and, second, on the 'epochs up to the present'.<sup>10</sup>

Among the texts that were found after Weber's death in his literary remains, two correspond approximately to this table of contents: (1) '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; and (2) 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 (*Rechtswang*) in relationship to the economy. Thus, it is in fact centered 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, Stammerl 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 Weber himself arrive at these conceptual distinctions that 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 that 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* (Figure 6). 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 (*ordnungs-tauglich*). Thus, the kind of rule and its guarantee conditions the order that arises from it.

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 center stands the concept of legitimacy. Accordingly, in Section 5 of 'Basic Sociological Terms' he says:

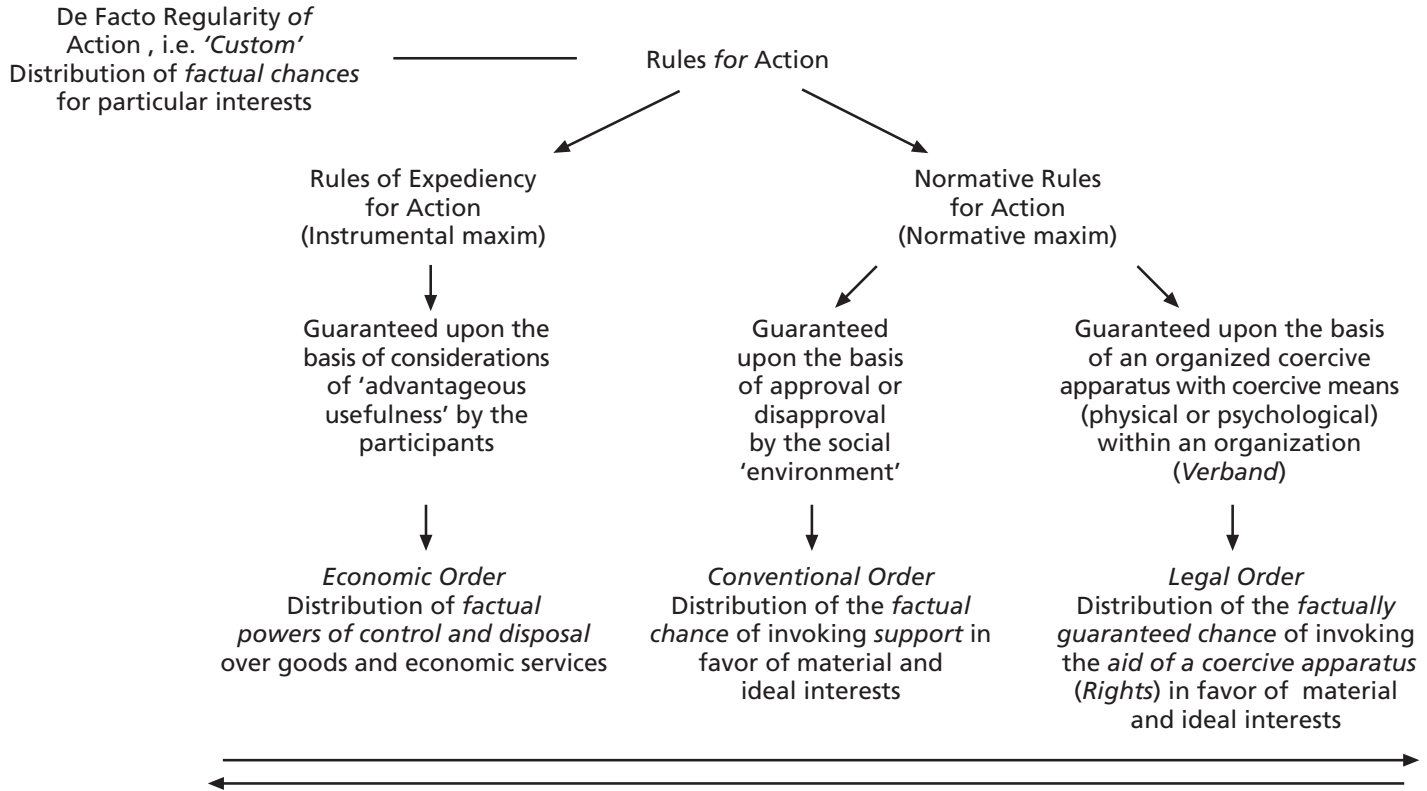
Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order. The probability that action will actually be so governed will be called the 'validity' (*Geltung*) of the order in question.

(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: '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' (1978: 31). This, however, is ultimately the case only for normative maxims.

Within these definitions are included: (1) both concepts of validity; (2) both concepts of regularity; (3) the distinction between an instrumental and a normative order; and (4) in regard to the normative order, the distinction between the conventional order and legal order. However, in connection with the

FIGURE 6. WEBER'S (EARLY) TYPOLOGY OF SOCIAL ORDERS



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 in the 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* (*Rechtsdogmatisk*), 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, correspond rights. Weber defines a right sociologically as the chance factually guaranteed to a person by virtue of the legal order ‘of invoking in favor of his ideal or material interests the aid of a “coercive apparatus” which is in special readiness for this purpose’ (1978: 315).<sup>11</sup> In turn, this right can be indirect – for example, a by-product of other rights – or direct, and as such either inherent or acquired.

Six points are important in connection with 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 graduation’ with ethics, convention and custom. There are usually several legal orders in a society that 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’ (Weber, 1972: 194)<sup>12</sup> – 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 that have become important from the perspective of the history of law and that fall under the heading 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.



The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is *calculable* in accordance with rational rules. On the other hand, the constant expansion of the market, which we shall get to know as an inherent tendency of the market consociation, has favored the monopolization and regulation of all 'legitimate' coercive power by *one* universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies.

(1978: 337)

In contrast to Durkheim, for Weber law is therefore 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. 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 here impossible to provide an account of 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 contemporary law is primarily the result of a process of *formal* rationalization in adjudication and lawfinding (*Rechtsfindung*) that produces, as a dialectical counter-movement, so to speak, the demand for a substantive rationalization of law on the part of the legally interested parties. The modern legal order not only exists in tension with other societal orders, but is also governed by an idea of law that 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 legal certainty (*Rechtssicherheit*) and expediency, on the other. Wherever law is formally rationalized, legal certainty and expediency inevitably take the lead. This becomes apparent, according to Weber, in the four principles that predominate throughout modern lawfinding. First, it is determined by a principle of subsumption according to which lawfinding is to consist in the application of an abstract legal proposition to a concrete state of affairs. The characteristics of the facts of the case must, in this connection, be general and unambiguous. Second, it is determined by a principle of construction according to which by means of legal logic a subsumption must be able to be obtained for every concrete state of affairs. Such means are at the same time rationally controlled and of an immanent legal nature. Third, it is determined by a principle of coherency according to which valid law is

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to be represented as a seamless system of legal propositions. This coherency is the result of a logical analysis of meaning and the conceptualization of legally relevant relationships of life. Fourth, it is finally determined by a principle of relevance according to which nothing may be considered as legally relevant that cannot be construed in legal terms. This refers to the difference between the facts of the case and the concrete state of affairs, and the 'irreality' of law (see especially Weber, 1972: 395ff.).

Weber treats in detail the powers that 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. As differentiated as all of this is – and from it one already sees the distance from Durkheim – what about the substantive rationalization of law? What about justice in this context of legal certainty and expediency?

## Human Rights as Regulative Idea

Weber, of course, also describes the counter-movements 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 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 that, as Hermann Heller once formulated it, can be understood as building principles of legal content with an ethical claim to validity.<sup>13</sup> To such building principles, which in the first place are culturally *bound*, there undoubtedly belong human rights, which Durkheim had shifted into the center of his attention to 'higher societies' and which Weber considered essential to the life of modern citizens. Kant's insight, for

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 certainty 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 whom we have here considered. 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 labor 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 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, there exists, disregarding occasional times of crisis, 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 proper sphere* (*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 that develops through structural coupling with other subsystems.<sup>14</sup> Second, Jürgen Habermas (1992) 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.

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 these two thinkers. Also, the role that is 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 adopting without reservation the autopoietic or linguistic-pragmatic turns in social theory.

*Translated by Steven Vaitkus*

## Notes

1. 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 that led him to Berlin and to Leipzig, from where there emerged two longer texts that 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 Émile Durkheim, *Über Deutschland. Texte aus den Jahren 1887 bis 1915* [1995]).

2. Durkheim, starting in 1890, regularly held the course 'Leçons de sociologie. Physique des moeurs 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. In retrospect Durkheim wrote in 1907:

I read Wundt in 1887, but it was only in 1895 that I obtained a clear sense of the prominent role played by religion in social life. In that year I found for the first time the way to tackle sociologically the study of religion. This was a revelation for me. The lecture of 1895 marks such a decisive turning point in the development of my thinking that all my previous investigations had to be once more gone over, so as to be brought into harmony with these new ideas. Wundt's *Ethik*, which was read eight years earlier, had nothing at all to do with this change in orientation. It rests totally upon the studies into the history of religion undertaken by me and in particular the reading of the works by Robertson Smith and his school.

(Durkheim, 1975: 404; see also Durkheim, 1995: 241)

4. 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 are 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: 84ff. and especially 93f.).
5. 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.
6. 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, about (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).
7. The relevant text can be found in Durkheim's *Journal sociologique* (1969: 245–73), carrying the title 'Deux lois de l'évolution pénale'.
8. For Foucault, it was a matter of rendering visible, behind the apparent humanization of punishment and its execution, the deep dehumanization which arises through the anonymization of punishment and through the reorientation of punishment towards psychological disciplining.
9. For a more extended analysis of this point, see 'Über Individualismus' in Schluchter (2000).
10. See in this regard the 'table of contents' (*Stoffverteilungsplan*) outlined by Max Weber for this collective from May 1910 printed in *Max Weber-Gesamtausgabe III/6* (1994: 766ff., especially 768).

11. Weber, by the way, later replaces the concept of 'coercive apparatus' (*Zwangsapparat*) employed in the older manuscripts with the concept of 'a staff engaged in enforcement' (*Erzwingungsstab*).
12. [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.]
13. See in this regard, also with reference to Hermann Heller and Max Weber, Schluchter (1998: 223ff.).
14. See Luhmann's *Das Recht der Gesellschaft* (1993) and also his most recent *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtslehre* (1999). Luhmann was already concerned with law before his autopoietic turn. See, for instance, his two-volume *Rechtssoziologie* (1972).

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