Series of the
Käte Hamburger Center for
Advanced Study in the Humanities
»Law as Culture«

Edited by Werner Gephart

Volume 20

Werner Gephart/
Daniel Witte (Eds.)

The Sacred and the Law: The Durkheimian Legacy

VITTORIO KLOSTERMANN
Frankfurt am Main · 2017

recht als kultur
käte hamburger kolleg
law as culture
center for advanced study

Bibliographische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliographie; detaillierte bibliographische Daten sind im Internet über *http://dnb.dnb.de* abrufbar.

1. Auflage 2017

Gedruckt auf alterungsbeständigem Papier ♾ ISO 9706
Satz: post scriptum, www.post-scriptum.biz
Umschlaggestaltung: Jörgen Rumberg, Bonn
Umschlagabbildung: Werner Gephart, Emile Durkheim (mit unterlegter Handschrift) II (Bleistiftpastell, 89 × 62 cm), 2000/2017.
Druck und Bindung: docupoint GmbH, Barleben
Printed in Germany
ISSN 2193-2964
ISBN 978-3-465-04294-5

Contents

IV. The Non-Contractual Elements of Contract

V. The Politics of Law and Religion

VI. In the Realm of Global Normativity

Werner Gephart / Daniel Witte

The Social, the Sacred and the Cult of Law: Some Introductory Remarks on the Durkheimian Legacy

Introduction

When the Käte Hamburger Center for Advanced Study »Law as Culture« was approved to come into existence by an international commission of experts, a high consensus was established that two founding figures of sociology would constitute main pillars for the house of legal cultures, namely Max Weber and Émile Durkheim. For what reason? Not because of their status as celebrity founding fathers, a term which always conceals the founding mothers, Louise and Marianne. The latter contributed enormously to Weber's writings with her fundamental study *Ehefrau und Mutter in der Rechtsentwicklung* (1907), leaving traces in Weber's so called sociology of law.[1] About the wonderful Louise, we have learned that, besides bringing an important mortgage into the household of chronically poor intellectuals, she also prepared and mailed the bundles of books which constituted the material corpus of the admirable *Année sociologique*.

In the *Structure of Social Action*, Talcott Parsons had proclaimed the death of Herbert Spencer and revived Weber and Durkheim in their convergence of a voluntaristic solution to the problem of order. We suggest to read the convergence thesis in a more trivial sense, namely in that both of them were inspired by the law. Their way of wedging the world into a net of concepts, the »Schraubstock des Begriffs« (l'étau conceptuel), and the intention to build sociological theory on the basis of legal terms and categories, gave way to what might be called a »birth of sociology out of the spirit of the law«.[2]

With regard to Weber, we had asked some years ago: How must we understand the role of law within the process of occidental rationalization as the main topic of Weber's comparative sociology? Isn't it religion that has to be regarded as the decisive switchman in light of Weber? If, however, law played a decisive, perhaps more hidden role in this explanatory game, how does Weber deal with contem-

1 Which is now also accessible as part of the historical-critical edition as Weber: Recht (MWG I/22-3), ed. by Werner Gephart and Siegfried Hermes.

2 For this general thesis see Gephart: Gesellschaftstheorie und Recht.

porary knowledge about the diversity of legal cultures – or do we sink with him into the sea of legal stories, from Mesopotamia to Israel, from Egypt to Greece to the Roman Empire and the Chinese civilization, Japanese receptiveness and Islamic ›judicioscapes‹? How is the ideal extraction of laws influenced by Islam, Judaism and Christianity related to the experiences of interference, hybridization and pluralization that define our agenda in the »global age«?

Similar questions may be posed to Durkheim. We know that his strength does not lay so much in the explanation of cultural differences, but in the examination of structural mechanisms and modes of producing solidarity. His concerns are *le lien social,* belief and unbelief in societal values, acceptance and rejection of the law, obligation and rights, inner tensions of normative orders and the problem to align the polymorphism of normativities with the polymorphic structures of society: a project of normative and social pluralism, and not one of harmony, as his image suggests.

But let us start with some basic observations, mostly humble reminders for those familiar with his work, before we give an overview of the present volume and then finally formulate some afterthoughts on why also the jurists and legal scholars may profit considerably from devoting themselves to reading the writings of Durkheim.

I. The Birth of Sociology out of the Spirit of the Law?

It appears to be a coincidence within the history of sociology – albeit one of far-reaching importance – that Émile Durkheim's unusual academic success began at the *faculté des lettres* and not at the *faculté de droit* in Bordeaux: In the opening lecture for the *Cours de science sociale*, Durkheim recalls the dispute over the correct placement of the lecture: »Quand ce cours a été créé, on c'est demandé si sa place n'était pas plutôt à l'Ecole du droit.«[3]

Durkheim remarks that the question of venue should ultimately play no role. However, he interprets the dispute as an expression of a changed understanding of legal education: »Mais ce que prouve ce scrupule c'est que les meilleurs esprits reconnaissent aujourd'hui qu'il est nécessaire pour l'étudiant en droit de ne pas s'enfermer dans des études de pure exégèse.«[4] And interpretation, conceived of as uncovering the legislative *will,* appears to Durkheim as a dangerous mystification of law. »C'est dans les entrailles même de la société que le droit s'élabore, et le législateur ne fait que consacrer un travail qui s'est fait sans lui.«[5] At the source

3 Durkheim: Cours de science sociale, p. 108.
4 Ibid.
5 Ibid., pp. 108 et seq.

of law stands society and not the legislator. Law emerges from social needs and condenses into a form of social life: »Il faut donc apprendre à l'étudiant comment le droit se forme sous la pression des besoins sociaux, comment il se fixe peu à peu, par quels degrés de cristallisation il passe successivement, comment il se transforme.«[6] The task of a *social science understanding of law*, he continues, lies in the development of the institutional history of family, property, and contract. Only then – according to Durkheim – does legal formalism lose its oracle-like character: Its reach does not stem from the dark sources of legislative will but from the »nature of reality« itself.

This brief passage already formulates a *program for the sociology of law* in 1887 that is intended to particularly address legal scholars and practitioners without taking the object of the law from their hands while being fully cognizant of the independence of sociological insight. It is quite interesting to compare this passage from 1887 with a statement on legal education written more than 20 years later, a time in which the formalism of legal education had still not been overcome. Instead of sociological investigation of law, Durkheim now recommends a rather traditional discipline: historical sciences. Even though he does consider it the proper role of sociology to take up this task, Durkheim – now writing at a time in which sociology had already been widely academically recognized in France – is self-confident enough to concede: »Malheureusement, la sociologie n'est pas encore assez avancée pour prendre une telle place dans l'enseignement.«[7]

For instance, the study of Roman law is recommended in order to impart the insights deemed necessary for young students of law: »Qu'on montre aux jeunes gens comment les institutions juridiques tiennent à des conditions sociales, variant avec ces conditions, sont solidaires des autres institutions, politiques, économiques, des idées morales, comment elles tiennent à la *structure* même des sociétés.«[8]

Émile Durkheim's sociological perspective on law lies between these poles of organic growth of law, linkage to political, moral, and economic phenomena as well as the conception of *law as a structuring structure* of social life. Yet as much as Durkheim insists on the helpfulness of jurisprudence for sociology for a variety of reasons, he does not seem to recognize the influence of legal thought on the development of *his own* way of sociological thinking.

Unlike Marx or Weber, Durkheim arrived at sociology coming from philosophy. He, however, was not granted a chair in Bordeaux due to a new philosophy of the social, but rather because of an intellectual travel report on *Science positive de la morale en Allemagne*.[9]

6 Ibid., p. 109.
7 Durkheim: Contribution à un débat.
8 Ibid.; emphasis added.
9 Durkheim: La science positive de la morale en Allemagne.

Closer study of this report reveals that it was not only the influence of the cameral scholars, clustered around famous economists such as Wagner, Schmoller, and Schäffle, but also outstanding authors from the normative disciplines, notably including Rudolf von Ihering, Wilhelm Wundt, and German legal ethnologist Albert Post, who shaped Durkheim's thought – not the great philosophers. The legal influence on Durkheim's sociology is thus conveyed in a double sense: firstly through the *German* tradition of legal scholarship and not directly through the French, and secondly from a perspective that was not based on seeking juridical insight, but on the search for a fundament of social science.[10] Émile Durkheim thereby draws on the sociological aspects of contemporary German legal scholarship in a way that did not succeed in Germany itself: He conceives law as a central *structure* of social life, but also – as later seen in the study on the *Division du travail social* (1893) – as a separate *method* of sociological research. This leads to the paradoxical situation in which Émile Durkheim remains methodologically more »legal« than the lawyer Max Weber admitted of himself, yet can only cover the specificities of *modern* law from the periphery.

II. The Constitution of Social Life as a Positive Sociology of the Law

1. Ambiguous encounters with German social science

Being introduced to the study of morals in Germany not only brought Durkheim his teaching position in Bordeaux, but also lastingly influenced his conception of the social. Confronted with the German influence on Émile Durkheim's thought, the author himself greatly downplayed the significance of his study trip. Elsewhere, we have already shown which memory gaps and errors Durkheim suffered from in the Déploige affair.[11] The extent to which Germany shaped Émile Durkheim's work,[12] however, is of lesser interest to us in this context. Rather, the object is to gain insight into the normative constitution of the social in his work. Here, it stands to reason that there was a positive influence of German »social science«.

10 More on a further motive of familiarity with jurisprudence as practiced in the Talmud later.

11 Cf. Émile Durkheim's letters to Simon Déploige that appeared in the *Revue néo-scolastique*, reprinted in: Durkheim: Textes I, pp. 401–405; on this, cf. Gephart: Soziologie im Aufbruch; Gephart: Voyages sociologiques.

12 For a fascinating account of the importance of this Germanic rhetoric in the critical phase of the Nouvelle Sorbonne, cf. Lepenies: Die drei Kulturen.

In the 1880s, French sociology had reached a dead end. The legacy of Auguste Comte had drifted off into the pseudo-religious wake of a sociological cult[13], and new forces such as Fouillé had become adherents of the unfruitful paradigm of organicism. While the name of sociology was certainly alive, what was missing was a productive spirit capable of reconciling the work of Comte with the difficult conditions of the Third Republic following the ignominious lost war. The glance at a Germany which had entered its heyday of scientific and academic development had led not only Célestin Bouglé[14], but also Theodule Ribot to German universities.[15] While – apart from Georg Simmel – sociology was not an issue in Germany, there was a broad movement to find a fundamentally new approach to the problem of the normative world. In Germany, utilitarianism had not found a firm foothold, and Kantianism did not lead to a revolution of the normative disciplines. Durkheim was therefore right in tracing the disciplinary backgrounds to a doctrine in Germany that would coalesce into sociology in his own work: *Volkswirtschaftslehre*, on the one hand, and the empirical sub-disciplines of legal studies, such as comparative law, on the other.

It is thus no surprise that Max Weber, on the other side, applied himself to sociology both as a lawyer *and* as an economist. However, Émile Durkheim was influenced particularly by those economic doctrines that Weber firmly rejected, namely those by Wagner and Schmoller.[16] In Durkheim's view, the decisive contribution of »Volkswirtschaftslehre« is the founding of *empirical moral studies*. The historical school of national economics broke with the tradition of immutable natural law: »Or la philosophie qui jusqu'à ces temps derniers régnait en Allemagne croyait pouvoir déduire de la nature de l'homme en général une morale immuable, valable pour tous les temps et pour tous les pays. C'est ce qu'on appelle encore la philosophie du droit naturel (*Naturrecht*).«[17] Durkheim thus interprets national economics as a *critique of natural law*.

Morals and economics are placed in a productive relationship with each other. Political economics cannot be reduced to a utilitarian theory of benefits – not even in the moral sense –, and morals can likewise not be reduced to ethics. The notion of *interpenetration* emphasized by Richard Münch[18] can be applied particularly well to Durkheim's early period, albeit only when viewed as the result

13 Wolf Lepenies has linked Comte's religious »turn« to the unhappy love affair with Clothilde de Vaux; cf. ibid. However, there was also a »culture« of returning to »cult« in France: Rousseau, Saint-Simon and Durkheim follow the same line as Comte.

14 Cf. Bouglé: Les sciences sociales en Allemagne; cf. also his book written under the pseudonym Jean Breton: Notes d'un étudiant français en Allemagne.

15 Cf. again Gephart: Soziologie im Aufbruch; cf. further the still informative study by Digeon: La crise allemande de la pensée française (1870–1914).

16 Anthony Giddens unfortunately missed this point; cf. Giddens: Weber and Durkheim.

17 Durkheim: La science positive de la morale en Allemagne, p. 279.

18 Cf. Münch: Theorie des Handelns.

of an appraisal of the school of national economics rejected by Weber. But how is the connection between morals and economics established?

According to Durkheim's interpretation, the link is the assumption that the social constitutes its own sphere of reality: »Pour eux [Schmoller et Wagner] au contraire, la société est un être véritable, qui sans doute n'est rien en dehors des individus qui le composent, mais qui n'en a pas moins sa nature propre et sa personnalité.«[19] The existence of economic activity specifically to satisfy these collective needs is explained by this emergence of the social. »La *Volkswirtschaft*, dit M. Wagner, est, au même titre que le peuple, un tout réel. Les économies privées (die Einzelwirtschaften) en sont je ne dirai pas les parties, mais les membres.«[20] Subsequently, however, »économie privée« becomes a methodological abstraction, whereas for the *Volkswirtschaft*: »… l'économie sociale … est la vraie réalité concrète …«[21]. This, in turn, reconciles national economics and morals: »L'une n'est plus enfermée dans la sphère toujours étroite des intérêts individuels, tandis que l'autre a ouvertes devant elle les perspectives presque indéfinies de l'idéal impersonnel.«[22] This mutual permeation of economics and morals gives rise to the question of how they could even be separated again. Durkheim asserts a division according to form and content, in which morals and law represent the obligatory form of the content of economic action: »Ce qui appartient en propre à la morale, c'est cette forme de l'obligation qui vient s'attacher à certaines *manières d'agir* et les marquer de son empreinte.«[23] The proximity of these formulations to the definition of *fait social* in *Règles* is striking. For the development of Durkheim's concept of law, however, the decisive factor is the transformation of habitual behavior to moral obligations – something he finds formulated well in Schmoller, albeit without providing more detail on how the leap from habit to duty occurs. The concept of increased selection and consolidation of human conduct is crucial and, departing from manners, crystalizes into morals and law: »Ainsi se forment les moeres, germe premier d'où sont nés successivement le droit et la morale; car la morale et le droit ne sont que des habitudes collectives, des manières constantes d'agir qui se trouvent être communies à toute une société. En d'autre terme, c'est comme une *cristallisation de la conduit humaine*.«[24]

Through the assumption of a real social organism that is the subject of morals and economics, the old dichotomy of *individualistic* and *collectivist* ethics thus disappears, and law is constituted as the consolidated form of *economic life*. We reencounter this conception of law in a part of Durkheim's work that is remote to

19 Durkheim: La science positive de la morale en Allemagne, p. 272.
20 Ibid., p. 273.
21 Ibid.
22 Ibid.
23 Ibid., p. 275; emphasis added.
24 Ibid.; emphasis added.

many interpreters, in which the material assumption of a solidification of action in law leads to the methodological conclusion of a *social science as sociology of law*: the sociology of family.[25]

2. *Le »fait social« comme »fait juridique«*

In his *Règles de la méthode sociologique* (1894/95)[26], Émile Durkheim framed the issue of constitution in the form of a manifesto. The title of this methodological work, which incorporated the experience gained from *De la division du travail social* (1893) and also influenced the methodological program of *Suicide* (1897), already expresses the *normative permeation* even of thought and science. Durkheim's mention of »rules« of the sociological method is certainly not just a titular allusion to Descartes[27], but speaks of his deep conviction that the social has a normative character. As we shall see, Durkheim's epistemological understanding follows his substantive analysis. With the shift to the paradigm of sociology of religion, Durkheim's thought later also took on a religious form. In *Les règles de la méthode sociologique*, it stayed legal.

The doctrine of the *»fait social«* continues the line of thought started in *Science positive de la morale* and *Introduction à la sociologie de la famille*. We therefore need to appraise this doctrine of the *»fait social«* that seems very familiar from the perspective of the entwinement between structural analysis of social life and the constitution of sociology of law.

Whereas the identification of the social in *Cours de science sociale* was influenced by an attitude of advertising with other faculties – including that of law –, the sociological manifesto *Règles* aims to assert the independence of sociology as a discipline. Compared to biological or psychological fields of study, Durkheim regarded sociology as covering a scope of phenomena distinct from the other *»sciences de la nature«*[28]. The characteristics of the *»fait social«*, however, also contain the elementary forms of law. Durkheim's introductory example already speaks to its normative permeation: »Quand je m'acquitte de ma tâche de frère, d'époux ou de citoyen, quand j'exécute les engagements que j'ai contractés, je remplis des devoirs qui sont définis, en dehors de moi et de mes actes, dans le droit et dans les mœurs.«[29] My actions as a brother, spouse, citizen or contracting party represent a fulfilment of obligations laid upon me from the *outside*. The trait of »exteriority« is thus to separate the social from the individual. This brief passage

25 This has been demonstrated in Gephart: Family Law as Culture, pp. 350 et seqq.
26 Durkheim: Les règles de la méthode sociologique.
27 Cf. Descartes: Règles pour la direction de l'esprit.
28 Durkheim: Les règles de la méthode sociologique, p. 5.
29 Ibid., p. 6.

both implies the existence of normative rules *outside* the individual as well as the negation of the constitution of contractual obligations from private party autonomy, i. e. the *will* of the contracting parties.

This phenomenon is not only »external« to the individual, but also »coercive«: »Non seulement ces types de conduit ou de pensée sont extérieurs à l'individu, mails ils sont doués d'une puissance impérative et coercitive en vertu de laquelle ils s'imposent à lui, qu'il le veuille ou non.«[30] Sociality thus takes place not just *outside* the individual – which stamps the individual as an »outsider« to society –, but also exerts a coercive influence: society as a »coercive institution«. Naturally, this strong wording should take account of the conceptual spectrum employed: »*impérative*«, »*coercition*«, »*contrainte*«.[31] Nevertheless, *law* again serves as a paradigm of social phenomena in the shape of restitutive and repressive *sanctions*.

»Si j'essaye de violer des règles du droit, elles réagissent contre moi de manière à empêcher mon acte s'il en est temps, ou à l'annuler et à le rétablir sous sa forme normale s'il est accompli et réparable, ou à me les faire expier s'il ne peut être réparé autrement.«[32]

If there is then a distinct class of phenomena characterized by »exteriority« and »coercion« and if these are to be regarded as »actions« and »conceptions« distinct from organic phenomena, then their »substrate« if not an individual – states Durkheim –, could only be »society«. From the methodologically declared necessity to assign sociology its own material scope follows – as Tenbruck rightly formulates in this regard – »die Geburt der Gesellschaft aus dem Geist der Soziologie«.[33] Compared to the work finished prior to the *Règles*, however, this is probably merely the result of the replacement of »*vie sociale*« with »*société*« as a key concept. Nevertheless, even *Règles* contains hints that the rigid concept of society becomes more *fluid* as seen in the »*courants sociaux*«, which are closer to the metaphor of life. This leads us to a third characteristic of the »*faits sociaux*«, namely their commonness *within* a social group. »Social« is a phenomenon not due to its *general* commonality, but due to its obligatory character: »… s'il est general, c'est parce qu'il est collectif (C'est-à-dire plus ou moins *obligatoire*), bien loin, qu'il soit collectif parce qu'il est général.«[34] The definition of the »*faits social*« with its super-individual character, its obligatory nature that carries sanctions and its generality is thus narrowed down to the basic elements of *law*.

***

30 Ibid.

31 This is neglected in Parsons' interpretation of Durkheim. As ingenious as Parsons' interpretation otherwise is, it is often noticeable how he only refers to Durkheim's classical works.

32 Ibid., p. 7.

33 Cf. Tenbruck: Emile Durkheim oder die Geburt der Gesellschaft aus dem Geist der Soziologie.

34 Durkheim: Les règles de la méthode sociologie, pp. 14 et seq.; emphasis added.

What are the consequences of this entwinement of law as a universalistic structure and method of social life for sociology of law? – The limits of this perspective are obvious. Legal analysis is necessarily regressive: its sociological quality depends on the complexity of the definition of law by which sociology – as legal theory – would be reduced to an analysis of the inner structure of law. This immanent limit to the legal-sociological claim towards universality raised by early Durkheim produces pressure from within the theory itself to expand the sociological perspective, ultimately leading up to a new claim towards universality: »Dans le principe tout est religieux.«

III. Religion as a Method, an Object and an Inspiration of Sociology

Since the humble beginnings in Bordeaux, where Durkheim still had to fight for a place in the *faculté des lettres* in order to simultaneously address the mighty faculty of law in his teachings, law became established as structure, method and causal factor of social life in the sense of a comprehensive paradigm. At the same time, the seed for a paradigm of sociology of religion that would eventually replace Durkheim's legal-sociological perspective had been sown. Here, too, »religion« is viewed as a mirror of society and *law and religion are thus interpreted as functionally equivalent cultural forms of social life*. Despite the conceptual overlaps that Durkheim's approach of an enlightenment of law from the perspective of sociology of religion implies, it must be considered particularly fruitful in how it allows for the structures of social life to be illuminated beyond the effect of distorting a daily phenomenon.

Durkheim's intent was to achieve objective insight, especially where it is guided by rules. Deriving the approach of this normativistic construction of social reality from his experience with the *Science positive de la morale en Allemagne*, however, would be too simplistic[35], as one would have to ask why this form of Durkheimian sociology did not develop in Germany in particular. Durkheim's conception of a closed and comprehensive normative system – unquestioningly taken to be free from any lacunae – cannot deny a typical influence by the society to which Durkheim was connected. It is French society, influenced by the values of the Revolution that produced the Napoleonic *codifications*.[36] We can become more familiar

35 As Durkheim insists in the instructive letter to the editor of the *Revue néo-scolastique*; reprinted in: Durkheim: Textes 1, pp. 402 et seqq.

36 Jean-Louis Halpérin (infra) demonstrates some of the elective affinities between Durkheim's concept of the non-contractual moments of contract and French legal culture of his time. The legal-cultural context is also mentioned in Röhl: Über außervertragliche Voraussetzungen des Vertrages.