SOCIOLOGICAL JURISPRUDENCE IN PRACTICE: HOW INTERDISCIPLINARITY CHANGES JUDICIAL DECISIONS

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The article discusses the potential of sociological jurisprudence in court practice and examines its effects in concrete cases. Current judicial decisions, selected from different European courts, will be scrutinized to determine whether alternative and socially adequate results can be reached when these decisions are confronted with sociological insights. In particular, the article deals with the problem of how the law reacts to social theory collisions, the issue of knowledge transfer from the social sciences to law, and the potential of social theory dealing with normative questions.

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I. THE PARADOX OF SOCIOLOGICAL JURISPRUDENCE

Sociological jurisprudence - a fusion of law and social sciences as its pioneers envisioned[1] - has turned out to be an impossible project. Logically speaking, it was an oxymoron; practically speaking, it was doomed to fail due to the law's epistemic autonomy. In its original version, sociological jurisprudence would have opened floodgates through which social knowledge flows into the law without restraint. Against that, a more sophisticated sociology of law demonstrates two things. The law's idiosyncracies close the floodgates definitively; at the same time the law is exposed to constant and legitimate critique from the social sciences.[2] Since law always makes assumptions about society's reality and simultaneously shapes society through its performative acts, it cannot avoid constantly and profoundly engaging with genuine social science issues. This creates a paradox. Sociological jurisprudence is both impossible and necessary. Legal practice, legal doctrine, and legal theory cannot avoid the question of how - despite this paradox - sociological insights, ie social theory constructs and empirical research results, profoundly affect legal decisions. But if a fusion of social science and law is excluded, how is sociological jurisprudence possible?

This article will not discuss law's autonomy/heteronomy abstractly to identify the productive potential of sociological jurisprudence, which has repeatedly been criticized as a false syncretism.[3] Instead, it examines what effects it has in concrete cases. Current judicial decisions, selected from different European courts, will be scrutinized to determine whether alternative and socially adequate results can be reached when these decisions are confronted with sociological insights.[4]

There are three difficult problems that sociological jurisprudence faces in view of its paradoxical situation:[5]

- Theory collisions: How should the law react to competing social theories providing contradictory analyses?

- Knowledge transfer: How can social sciences analyses be reconstructed in law, especially regarding the legal qualification of new social phenomena?

- Normativity of social theory: What is the potential of social theory dealing with normative questions?

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[1] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936); R. Pound, 'Scope and Purpose of Sociological Jurisprudence' 24 *Harvard Law Journal*, 591 (1910).

[2] N. Luhmann, 'Some Problems with Reflexive Law', in G. Teubner ed, *State, Law, Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milano: Giuffrè, 1985).

[3] *Locus classicus* is the Ehrlich/Kelsen debate, see M. Antonov, 'History Schism: The Debates between Hans Kelsen and Eugen Ehrlich' 5(1) *ICL Journal*, 5-21 (2011).

[4] The article relies on the extensive case analyses from the perspective of sociological jurispudence in B. Lomfeld ed, *Die Fälle der Gesellschaft: Eine neue Praxis soziologischer Jurisprudenz* (Tübingen: Mohr Siebeck, 2017).

[5] For a detailed but rather abstract discussion of these three problems, G. Teubner, 'Law and Social Theory: Three Problems' *Ancilla Juris*, 183 (2014).

II. FIRST PROBLEM: THEORY COLLISIONS

Any claims of monopoly on social theory made by one of the social science disciplines must be firmly rejected. This applies in particular to legal economics, which in recent years has explicitly claimed to become law's leading science, but it applies also to 'sociology at the gates of law', critical theories of law as politics, or moral philosophy's claims on legal normativity. It is impossible today to base law on a comprehensive theory of society from whatever discipline it is presented. Transversality – this is arguably the appropriate response to the rivalry between social theories. Transversality has been developed in response to a similar situation in philosophy struggling with the contemporary discourse plurality that followed the collapse of the grands recits.[6] In the legal cases, which will be discussed below, it becomes apparent that the law cannot be one-sidedly economized, politicized, sociologized, or moralized. Law must reject the totality claims of any theory but, at the same time, accept the inherent right of diverse coexisting social theories. Legal arguments should exploit the plurality of language games in formulating concepts, principles, norms, arguments, and decisions. In a transversal passage, the law chooses the interdisciplinary points of contact – on its own responsibility.

The transversal approach becomes relevant in a recent decision by the German Federal Court of Justice, which had to determine the legal qualification of the internet when compensation is demanded for a permanent blockage of internet access, and to define the concrete decision criteria.[7] A telecommunications company was unable to provide Internet access when the Internet was permanently interrupted after a change of tariffs.

In this case, the usual qualification as compensation for loss of use of economic goods needs to be rejected.[8] The prevailing economic perspective, which focuses solely on market value, is no longer adequate. Since the Internet has now become an 'existential living space', the legal determination of damage compensation must be changed to include social, cultural and aesthetic aspects. The 'value' of Internet access for users needs to be determined in a transversal passage through various social theories, which deal with the value category in different social contexts.[9] An economic perspective is not wrong, but it is far too one-sided. It reduces the Internet to a mere economic good and does not do justice to the multidimensionality of value involved. Instead of evaluating Internet blockage solely based on economic criteria, a sociologically informed analysis will demonstrate that the Internet is

[6] W. Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt: Suhrkamp, 1996); see also F. Guattari, 'Transdisciplinarity Must Become Transversality' 32(5-6) *Theory, Culture & Society*, 131-137 (2015).

[7] Bundesgerichtshof 24 January 2013 III ZR 98/12, 196 *Internetzugang BGHZ* 101.

[8] C. Gruber, 'Digitaler Lebensraum: BGH 24.01.2013 (Internetzugang)', in B. Lomfeld ed, n 4 above.

[9] For a recent discussion of value in different contexts, I. Feichtner and G. Gordon eds, *Constitutions of Value: Law, Governance, and Political Ecology* (Abingdon: Routledge, 2023).

more than an economic good but a social institution in which meaningful and technical communications are closely linked. Accordingly, different value criteria from various social contexts will apply: The 'distinctions directrices' are neither commercialization/non-commercialization, nor market-based predictability/non-calculability, nor luxury goods/basic economic goods. Instead, the Internet needs to be legally qualified as a polycontextural institution and a space for personal development.[10] While economics contributes only to a shallow understanding of the Internet's value, sociological-cultural analyses, which today are turning their attention to digital media, provide for a deeper analysis. If one takes private law seriously as society's constitution, one has to consider the broader social aspects of the information technology 'Internet'. First and foremost the significance of the Internet as a living space, ie, as the living and experiential world of the person, must be taken into account. This requires special protection of the information technology, which is of central importance for developing the human personality. This is nothing less than the psychophysical integrity of persons.

Legal guarantees are required to ensure people's free access to the Internet. With such guarantees of a certain sociotechnical minimum subsistence level, the law is able to act as a technology for the humanization of technology. This changes the concrete criteria for the legal decision as well as the legal qualification of damage compensation. An adequate compensation of the 'immaterial damage for infringement of the general personality right' replaces the dubious disguise as abstract compensation for the loss of an economic good.

There are other constellations where transversality will be pertinent, particularly when liability law has to deal with novel forms of network organization in business and society. Initially, economic and sociological analyses identify a fundamental organizational transformation in a parallel fashion. The transformation has inspired economics to investigate new forms of transaction and sociology to analyze new modes of cooperation in non-hierarchical forms of organization.[11] Their effects on private law have already been investigated in relation to network arrangements.[12] A network consists of a number of organizations that enter interrelated contracts, which are closely coordinated through vertical integration, without, in fact, ever creating a single integrated business entity such as a corporation or a partnership. The problem confronting the law is that neither corporate nor contract law fits the economic phenomenon of network organization. As a result, the law fails to address some of the conflicts generated by networks adequately.[13]

Both the individualistic perspective of contract as well as the aggregate

[10] C. Gruber, n 8 above.

[11] Eg S. Grundmann et al eds, *The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law* (Farnham: Ashgate, 2013).

[12] I. Hensel, 'When Gorillas Strike: Constitutional Protection of Non-Value Institutions in Labor Law' *Zeitschrift für Rechtssoziologie*, 42 (2023); G. Teubner, *Networks as Connected Contracts* (Oxford: Hart, 2011).

[13] H. Collins, *Introduction to Networks as Connected Contracts* (Oxford: Hart, 2011).

corporate perspective provide unsuitable legal concepts here. In this situation, economic transaction cost theory proves fruitful when it shows that rational actors choose network forms of business organization if they offer transaction cost advantages over both contractual or corporate structures. However, economic theory goes beyond this analysis and insists that the new networks are aimed exclusively at minimizing transaction costs; furthermore, it wants private governance to monopolize conflict regulation in the network and rejects interventions by state law as inefficient. At this point, the law must reject the economic interpretation. It is only in the transversal passage through other social theories that the complexities of networks become visible to the law, requiring a normative perspective that goes beyond transaction cost minimization. For the hybrid organization of networks, a double attribution is needed, ie a simultaneous commitment to the various individual goals and to the overarching project. Moreover, with a transversal orientation, the law takes up the impulses of economic, political, sociological, ethical and other theories side by side and institutionalizes the conflicts between different social rationalities. This implies the legal obligations of network members to adjust their behaviour to different contradictory logics of action. The law requires participants to consider several contradictory imperatives simultaneously, albeit with different emphases, more precisely, the contradictory requirements of economic profitability, scientific knowledge, productive standards and political orientation towards the common good.[14] After such a transversal passage through different social science disciplines, the law can more adequately constitutionalize the novel organizational forms. Moreover, the legally relevant network purpose, the legal definition of the member status, and the duties of members and organizational leadership can be determined in detail.

A good case in point is the 'Apollo' decision of the German Federal High Court.[15] The optical business Apollo had deployed the purchasing power of its franchising system to obtain a discount for the entire system from suppliers. But then, the franchisor Apollo again negotiated with the suppliers, securing the diversion of a differentiated discount to the franchisor. When this kickback practice was revealed, the franchisees commenced an action against Apollo to repay the differentiated discount. The Federal High Court decided against the plaintiff franchisees.

In the light of network theory, not only the justification but also the result of this decision must be criticized. The network centre that retains the major discount portion for itself is in breach of its duty of loyalty. This obligation requires 'double attribution' as a legal consequence of the network peculiarities described above. To whom in the net are operations, risks, losses and profits to be attributed: to individual members, to the net centre, or to the net as a whole? In contrast to corporate law, which generally prescribes collective attribution, franchising divides

[14] G. Teubner, n 12 above.

[15] Bundesgerichtshof 20 May 2003 KZR 19/02, *Neue Juristische Wochenschrift*, 2671 (1999).

attribution of gains and losses between the net centre, on the one hand, and net members, on the other. Thus, the discount should not automatically be apportioned to the net centre, but should initially be understood as taking the form of a networking advantage that accrues to the entire net, and should then be distributed amongst network members according to the equal treatment principle, and to the net centre in the light of equitable considerations. Thus, the Court's decision would need to be reversed.

Novel forms of network or swarm organization put also traditional categories of labour law under pressure. In the 'Crowdtree' case, the plaintiffs sought payment of minimum wage for work performed by the defendant, who operates a digital crowdsourcing platform in Germany. Crowdtree invited tenders for operational HITs (Human Intelligence Tasks) in the quality control of large volumes of data. The average hourly wage was lower than € 2-3 per hour. The plaintiffs wanted to enforce the applicability of the German minimum wage of € 8.50 per hour. They argued that the crowd workers were employees of the defendant. The defendant objected that it merely maintained independent contractual relationships with the crowdworkers. The court found in favor of the plaintiffs: The plaintiffs had to be paid € 8.50 until an effective system of collective power had been established.

The decision is sound, but the reasoning is lacking. According to social science analyses, crowdworkers are neither employees nor self-employed in the traditional sense. This hybrid form of employment requires new normative points of reference, which are not to be found in the law but in the crowd's social, swarm-like self-regulation processes.[16] The law must address these access and interaction conditions. The development of the collective dimension of labor law is a prerequisite for the social design of contract law.

Social science analyses observe that the coordination of crowd activities is characterized by affiliation and specific communication media.[17] Unlike networks, swarms cannot rely on stable structures of connectivity, but must constantly establish their connections through forms of interaction. Collectivity and knowledge are generated via feedback loops. Swarm intelligence thus allows flexible, spontaneous, unorganized problem solving. Because of this reactivity, swarms have no form or order but represent open process, movement, pure happening, and collectivity in actu. They exist only in relationality and in the sudden act of flowing together. Swarm denotes spontaneous collectivity.

This is where the idea of reflexive law comes in. According to this, law must 'primarily process - and redevelop - social knowledge about self-regulatory processes in different social contexts'.[18] As the platform operator, the defendant is neither the plaintiffs' employer nor are the platforms mere labor marketplaces. Rather,

[16] I. Hensel 'Arbeiten in der Crowd: US DC California 2015 (Otey v Crowdflower)', in B. Lomfeld, n 4 above.

[17] See N. Luhmann, 'Interaktion, Organisation, Gesellschaft', in Id, *Soziologische Aufklärung 2* (Opladen: Westdeutscher Verlag 1975), 9.

[18] R. Rogowski, *Reflexive Labour Law in the World Society* (Cheltenham: Elgar 2014).

they are intermediaries with a specific mediating role that entails certain social obligations. The courts are establishing increased duties of protection on the part of such intermediaries for the personal rights of their users, taking into account special digital communication conditions.[19] In addition to the regional minimum wage regulations and the minimum remuneration entitlement under Art 4 of the European Social Charter, the principles of good faith are used to determine the remuneration amount. This results in a total remuneration claim of € 8.50 gross per hour.[20]

When choosing between different social science theories, institutional approaches are to be preferred over purely individualistic ones. Balancing exclusively individual interests is still dominant in private law and methodological individualism prevalent in economics. Their reduction of collective phenomena to the actions of individual actors is simply inadequate. In contrast, the institutional approach is a hallmark of sociological jurisprudence. Of course, this approach also involves transversal thinking. Institutional approaches do not replace, but complement the individual view. Institutional thinking has transformed concepts of fundamental rights and competition law. Sociological jurisprudence enriches both by an 'institutional analysis':[21] hypotheses on the role of social institutions are tested empirically so that their inherent normativity can be determined more profoundly than is possible with purely legal methods.

Based on social science analyses, legal arguments about social institutions' normativity are particularly relevant for the internet. The Internet represents a new context for legal conflicts for which an institutional analysis can provide a deeper understanding. This demonstrates a case in which a lawyer denounced as 'right-wing filth' the statements made by another lawyer in a blog.[22] The German Constitutional Court tended to neglect the institutional dimension of fundamental rights. Instead of reflecting more closely on the changes brought about by the internet, the court reduces the conflict over free speech in blog communication to an individualistic bilateral conflict. In contrast, it is necessary to carefully examine the institutional traits of Internet communication, discuss the legal relevance of the technological conditions of blog communication and abandon the idea of a uniform public sphere in favor of its pluralization.[23] The result would thus have to deviate from the decision of the Constitutional Court both in result and reasoning.

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[19] Case 131/12 *Google Spain LC and Google Inc.* v *Agencia Española de Protección de Datos and Mario Costeja González*, Judgment of 13 May 2014, available at www.eur-lex.europa.eu ('Löschungsansprüche gegen Intermediäre'); Eur. Court H.R., *Delfi AS* v *Estonia*, Judgment of 16 June 2015, available at www.hudoc.echr.coe.it (Haftung für Inhalte Dritter'); Bundesgerichtshof, 1 July 2024, VI ZR 345/13 ('Anonymität der Nutzer von Bewertungssystemen').

[20] I. Hensel, n 16 above.

[21] P. Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969).

[22] Bundesverfassungsgericht 17 September 2012, BvR 2979/10, *Neue Juristische Wochenschrift*, 3712 (2012).

[23] T. Vesting, 'Digitale Entgrenzung: BVerfG 17.09.2012 (Rechtsradikal)', in B. Lomfeld, n 4 above.

The institutional approach has also proven its worth in other contexts, as for example in corporate law. In *Kirch* v *Deutsche Bank*, the supervisory board chairman, Breuer, had made an interview statement in which he doubted that the financial sector will continue to give credit to a corporate group in crisis.[24] In the context of contractual and tortious claims against the bank, a transversal passage through various sociological corporate theories will have to go beyond individualistic concepts of shareholder orientation and examine the pluralistic concept of stakeholder orientation and at the same time the concept of corporate social responsibility. As a result, the company needs to be protected as a social and discursive structuring of plural stakeholder interests such as company owners, management, employees, suppliers or cities and communities. From this institutionalist perspective, its 'right to restructuring' takes precedence over the bank manager's freedom of expression and justifies compensation of damages.[25]

III. SECOND PROBLEM: KNOWLEDGE TRANSFER

When the law decides on its contacts with social theories, it seems self-evident that their findings need to be adopted in law without distortion. However, it is somewhat surprising that precisely this self-evidence needs to be doubted. After all, a direct transfer of knowledge from social theories to law is an impossibility. Due to the inflexible autonomy of the legal system, a direct transfer fails. The difference between the binary legal code and the binary codes of other social systems establishes the autonomy of legal doctrine. Social sciences cannot prescribe norms nor do they establish binding legal principles. Here, the law's own contribution comes in.

For the third-party effect of fundamental rights, social theories do provide rich insights into the problems of private power, which opens perspectives for law's own contribution. In the one side, the interdependence of the disciplines forces a close interrelation between social theory and legal doctrine. On the other side, their mutual autonomy needs to be respected. Thus, a strict division of labor between two independent search processes and a close dependency on each other is required. Such a cooperation between the sociological analysis of fundamental rights and their legal interpretation as individual rights will require change in the judicial argument in the now famous 'Fraport' decision of the German Constitutional Court.[26] On the premises of the airport, a company under private law, protesters against deportation had distributed flyers. Instead of focusing on the extent to which the public sector is financially participating in the airport company under

[24] Oberlandesgericht München 14 December 2012, 5 U 2472/09, *Wertpapiermitteilungen*, 795 (2013).

[25] B. Lomfeld, 'Recht auf Restrukturierung: BGH 2013 (Kirch v Deutsche Bank)', in Id, n 4 above.

[26] Bundesverfassungsgericht 22 February 2011, 1 BvR 699/06, *BVerfGE* 128, 226.

corporate law, the court should have looked at sociological analyses of fundamental rights.[27] They see the protection of social differentiation against totalizing tendencies as the primary social role of fundamental rights. Accordingly, freedom of assembly and freedom of expression protect processes of political communication – such as protest actions in the Fraport case – from being displaced by an economic logic aimed exclusively at consumption and entertainment.

Law and social sciences will be intertwined even more closely when legal institutions are scrutinized, whether they are reacting sensitively to the problems of social phenomena. These search operations are referred to here as law's responsiveness.[28] Responsiveness can only be achieved before the forum internum of law itself. In a complex examination, the law opens itself to the irritations of social theories, but only under the condition that they can be used according to the law's own selection criteria. Law reconstructs these irritations internally in its own language. This reconstruction puts legal argumentation in a position to raise the question of social adequacy, ie the question of whether the legal decisions do justice to those aspects of the outside world which have been reconstructed internally.

This difficult tension between social theory and law is illustrated by a court decision on Google's search engine. The issue was whether its 'autocomplete' function infringed a user's personality rights.[29] When users enter their name, the search engine automatically displays additional terms relating to their person. An algorithm calculates the frequency of the search terms entered by all Google users and the content of the websites indexed by Google. For an appropriate legal decision, a sociological analysis would need to determine the institutional meaning of the auto-complete function. The protection of personal rights in digital communication requires a thorough institutional analysis of the specific role that search engines play in the Internet. Here, a threefold distinction is needed. The service of a search engine goes beyond the role of a mere 'conduit'. But this does not turn it into an 'editor', who makes editorial decisions about content. Rather, it can be compared to a 'curator' of words from different contexts who maintains the links between them in the digital communication space.[30]

This sociological analysis needs to be reconstructed in legal terms. In the division of labor between social science and law, legal doctrine determines two things: whether a norm violation can be found in the exercise of this social role and whether the violation can be attributed to the intermediary organization. The path-dependency of the doctrinal tradition decides how such a subtle 'translation' of social problems into legal issues takes place. A choice between the relevant legal

[27] L. Viellechner, 'Privatisierte Öffentlichkeit: BVerfG 22.02.2011 (Fraport)', in B. Lomfeld, n 4 above.

[28] *Locus classicus*: P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978).

[29] Bundesgerichtshof 14 May 2013, VI ZR 269/12, *Neue Juristische Wochenschrift*, 2348 (2013).

[30] D. Wielsch 'Haftung des Mediums: BGH 14.05.2013 (Google Autocomplete)', in B. Lomfeld, n 4 above.

doctrines – data protection, right of expression, offender liability, nuisance liability – needs to be made. It must be guided by the following question: which doctrine is most responsive to the social context? It turns out that personality right is the most suitable legal category for establishing liability for auto-complete procedures.[31] Personality rights create the intermediary's obligations to provide information. They oblige the intermediary to take active protective measures. On the one hand, they must not restrict the technological development of the medium, but on the other hand, they must also guarantee constitutional personality rights in the digital medium.

Law's responsiveness to social problems is especially pertinent in pre-contractual liability for breach of trust. In contrast to the previous use of reliance in law, sociological theories of trust provide a deeper understanding of reliance relationships.[32] They distinguish between personal reliance in a specific interaction and generalized reliance in role expectations of anonymous transactions.[33] This distinction becomes relevant on the case *J.P. Morgan Chase Bank et al* v *Berliner Verkehrsbetriebe (BVG)*.[34] BVG only realized their mistake about the risk profile of a transaction when it was brought to their attention by auditors. By this time, however, a large proportion of the loans in the portfolio had already defaulted as a result of the 2008 financial crisis. BVG now claims that J.P. Morgan and the law firm Clifford Chance had provided insufficient information about the risks involved in the transaction. In legal terms, the case raises the question of whether different requirements need to be developed for reliance in concrete interaction than for reliance in more abstract roles.

However, here again the sociological terms – role reliance and interaction reliance – cannot be used directly as legal concepts. They only become indirectly influential in law via a responsive legal conceptualization: which of several legal doctrines is most likely to be context-sensitive to trust that is generated in social relationships?[35] How do legal principles respond to the differences between role reliance and interaction reliance? Which legal norms should regulate different trust situations? More specifically: what are the legal criteria for legally protected trust in trustee liability arising from culpa in contrahendo and in the contract with

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[31] ibid

[32] N. Luhmann, 'Familiarity, Confidence and Trust', in D. Gambetta ed, *Trust: Making and Breaking Cooperative Relations* (Oxford: Blackwell, 1988); Id, *Trust and Power* (Winchester: Wiley, 1979).

[33] M. Renner, 'Anlagerisiken: High Court London 2014 (JP Morgan v BVG)', in B. Lomfeld, n 4 above.

[34] The case *J.P. Morgan Chase Bank et al* v *Berliner Verkehrsbetriebe (BVG)* has been brought before the High Court of Justice, Queen's Bench Division but settled by the parties. For the facts of the case, see Opening Submissions by the BVG available at https://tinyurl.com/ytazv69s (last visited 30 May 2025).

[35] G. Teubner, 'Expertise as Social Institution: Internalising Third Parties into the Contract', in D. Campbell et al eds, *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford: Hart, 2003).

protective effect for third parties? The following answer seem adequate: the factual conditions for reliance in precontractual liability differ from those in third-party protection contract. In the case of reliance liability, it depends on the person's reliability, ie on concretely related trust arising from determinable individual acts.[36] In contrast, third-party protection contractual liability requires a general reliance. The BVG relied on 'lawyers as sanctifiers,' the role expectations of which had been analyzed in sociological research.[37] This provides a basis for the legitimate expectation, based on the communication with Clifford Chance, that the law firm would review the contract also in the interest of BVG. The constellation of such a 'third-party legal opinion' internalizes externalities from certain contracts via liability. In this indirect way, the sociological view leads to a context-sensitive refinement of legal criteria.

In criminal law, the well-known 'Lebach' case shows that legal arguments once they are inspired by social theory can trigger drastic changes of legal perspectives. The German Constitutional Court had to judge a film made by a released prisoner which dealt with crime. The case concerned a conflict between the public's interest in information and the criminal law purpose of re-socialization.[38] Here a well-established insight from social theory becomes relevant for the purposes of punishment, which has not played a role to date. Inclusion through exclusion – this refers to an inescapable mechanism of social reproduction. Paradoxically, it enables social integration by excluding certain groups.[39] Normally, this is a completely harmless and trivial phenomenon, but it can also trigger a threatening, possibly even murderous dynamic. In history, this has been repeatedly evident in identitarian, even eugenic or genocidal policies. This is also due to the increasing importance of understanding human rights or the growing influence of anti-discrimination law. There exists a

> 'specific sensitivity that is taking root globally. It can be recognized in cases in which asymmetries of roles become fixed and are treated as irreversible by a reference to outside.'[40]

Contemporary societies are more sensitized to the destructive consequences of their basic reproductive mechanism than in the past. Only when the law takes note of this social phenomenon and its sometimes disastrous consequences can it react in a compensatory way, for example, with the legal principle of humanizing exclusion mechanisms. In criminal law, responsiveness to this fundamental social problem would require that the purposes of punishment are no longer given

[36] M. Renner, n 33 above.

[37] J. Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' 14(1) *Indiana Journal of Global Legal Studies*, 35 (2007).

[38] Bundesverfassungsgericht 5 June 1973, BvR 536/72, *BVerfGE* 35, 202.

[39] J. Bung 'Ausgrenzende Wiedereingliederung: BVerfG 05.06.1973 (Lebach)', in B. Lomfeld, n 4 above.

[40] N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 486-487.

equal consideration but that priority is given to resocialization, i.e., the reintegration of the excluded person. This priority needs to be reflected in the relation between the public interest in information and resocialization.

On the one hand, the priority argument strengthens the plausibility of the Constitutional Court's decision. A film that jeopardizes the reintegration of a released prisoner violates his fundamental right to social resocialization. On the other hand, however, the court has stopped halfway. The court made the scandalous argument that for an offender with homosexual tendencies, the 'relationship with a female partner could be a decisive factor for the success of his reintegration.' Although the court actually wants to counteract the stigmatization of a former offender, it introduces a new stigmatization. The court now discriminates against homosexuality, under the guise of protection against exclusion. However, if one takes seriously the sociological insight into the fatal dynamics of inclusion and exclusion unfolds its explosive power, making even the well-intentioned paternalism of the court appear as a mechanism of exclusion.

IV. THIRD PROBLEM: NORMATIVITY OF SOCIAL THEORIES?

Can social theories provide normative arguments? Normative orientations are transscientific issues that the social sciences cannot answer.[41] These orientations can only be gained from normativity developed outside science, on the one hand, from law's normativity and on the other hand, from the inherent normativity of social practices. Social practices generate their own abstractions in different social domains – 'practices of social reflection'. The role of social science analyses, in turn, is to uncover the emergence of such "practices of social reflection'.[42]

In the 'Caroline' rulings of the German Constitutional Court and the European Court of Justice, a difficult interrelationship emerges between legal and social normativity as a 'negotiated order' between law's regulation and society's self-organization. While social self-organization is usually perceived in law at best as a custom and is taken rather marginally into account within a balancing process, social theory analyses open up a different view of the relationship between social self-organization and legal rules.[43] Sociological theories of a 'social constitutionalism' become relevant.[44] A kind of 'collision law' is developing here between state law and social practices.[45] This normativity no longer allows state law to destroy the

[41] *Locus classicus:* A. M. Weinberg, 'Science and Trans-Science' 10 *Minerva*, 209 (1972).

[42] G. Teubner, n 5 above.

[43] R. Esposito, *Institution* (London: Wiley, 2022).

[44] D. Sciulli, 'Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Legality' 39(3) *British Journal of Sociology*, 377 (1988). On the debate G. Thompson, 'Review Essay: Socializing the Constitution?' 44(3) *Economy and Society*, 480 (2015).

[45] K-H. Ladeur, 'Öffentliche Privatheit: EGMR 24.06.2004 (Caroline von Monaco)', in B.

fabric of social norms. Rather, legal norms must be developed on the basis of the 'social practices of reflection' that emerge in various social domains. Discarding them is only indicated when social self-organization processes threaten to block themselves, or when essential interests of third parties are disregarded. In the Caroline case, these limits need to be respected by the courts. In particular, the courts must respect the cultural norms of the media public and formulate procedures of influencing, concretizing, and reinforcing the social norm-building process.[46]

In their 'judicial dialogue' (or 'war of judges'), the German Constitutional Court and the European Court of Justice dealt with the question of whether the European Central Bank has acted within its mandate by announcing the Outright Monetary Transactions (OMT), ie the purchase of government bonds on secondary markets. Here, the different normativities of law and social practices lead often to sharp, even ultimately insoluble conflicts.[47] The limits of the Central Bank's autonomy are in dispute here. Which normative orientation should prevail – the decisions of the courts, the economic expertise in the central bank, or national and European political processes?[48] Moreover, how should these conflicts be decided from a European perspective when the economic cultures of the nation states are hopelessly at odds on this issue? Arguably, the courts do not dispose of the competence for such highly technical issues while the central bank lacks the political legitimacy.[49] Only a 'cooperative problem-solving' in political negotiation processes has the necessary political legitimacy for resolving these difficult issues.[50] The irreconcilable 'diagonal' conflict between European monetary policy and national fiscal and economic policies should not be resolved by the judiciary in the case of monetary union. The German Constitutional Court should declare itself just as incompetent to decide on the constitution of Europe as the European Court of Justice. And the decisions should be concentrated on the multi-level system of European political processes.[51]

Due to the precarious relation between law and social self-organization, a uniform transnational legal regulation, often becomes impossible; a solution can only be found in a regional differentiation of the law. In the case of corporate codes of conduct that protect employee rights, environmental concerns, consumer interests, and fundamental rights, the question arises of whether they are only non-

Lomfeld, n 4 above.

[46] ibid

[47] Case 62/14 *Peter Gauweiler et al* v *Deutscher Bundestag*, Judgement of 16 June 2015, available at www.eur-lex.europa.eu; Bundesverfassungsgericht 14 January 2014 BvR 2728/13, *BVerfGE* 134, 366.

[48] S. Oeter, 'Conflict at the Interface of Economic Policy and Law: Cognitive Dissonance in the German Constitutional Court's OMT Case Reasoning', in T. Krieger et al eds, *Europe's Crisis: The Conflict-Theoretical Perspective* (Baden-Baden: Nomos, 2016) 197-220.

[49] C. Kreuder-Sonnen, 'Beyond Integration Theory: The (Anti-)constitutional Dimension of European Crisis Governance' 54 *Journal of Common Market Studies*, 1350-1366 (2016).

[50] C. Joerges, 'Kampf ums Geld: EuGH 16.06.2015 (OMT)', in B. Lomfeld, n 4 above.

[51] ibid

binding declarations under private law or whether the courts should make them legally binding.[52] There are serious differences between the various legal systems in the West regarding this issue. The differences cannot be explained exclusively in terms of legal doctrine, as the instruments available to the courts are largely comparable. Even the functional equivalence of different doctrines for similar socio-political problems cannot explain the divergence of results. Only the differences in social self-organization, which the theory of the varieties of capitalism has uncovered, make it empirically and normatively, plausible why different societal normativities require different legal solutions.[53] In the USA and Great Britain, it is strictly excluded that corporate codes are legally binding. The differences in their business culture explain why the legal systems of continental Europe are willing to declare corporate codes legally binding. Court decisions should therefore also be based on the plural normativities of legal orders and social practices. In this case, economic cultural processes, contradict each other in different economic cultures and lead to different court decisions.

However, recourse to social theories implies that the law not only draws on past social reflection practices but activates them for the future. The German Federal Court of Justice had to decide, whether Schufa is obliged to disclose which personal data it had stored and which probability values (score values) had been included in the information on creditworthiness.[54] Here, a conflict between economic, political and social science concerns arises. Economic arguments seek a rational scoring method that aims to minimize creditor risks. Political arguments aim for transparency in order to enable public discussion about criteria, to establish political legitimacy for the procedure, and to eliminate its illegitimate aspects. Empirical-analytical science is concerned with the validity of the methods used in the scoring instruments.

In this case, scoring can be characterized following Foucault and Agamben as a social disciplinary instrument that ultimately serves the self-discipline of individuals.[55]

If their theories are used to criticize court rulings, then there is a chance that public interest litigation will be successful. In an original interpretation as 'rupture-remedies' rights can be seen not merely as individual protection but from a collective-institutional perspective. Rupture-remedies are aimed at suspending the existing legal situation, subverting dominant interests and provoking self-reflection. It is not just a matter of right or wrong in individual cases; the question whether a credit report is correct or incorrect. Rather, it is a matter of initiating social debates – here, questioning the social role of social disciplinary instruments. Such an

[52] Beckers, 'Globale Verhaltenskodizes: US App 9th C 10.07.2009 (Doe v Wal-Mart)', in B. Lomfeld, n 4 above.

[53] P.A. Hall and D. Soskice eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2005).

[54] Bundesgerichtshof 28 January 2014 VI ZR 156/13, *Neue Juristische Wochenschrift*, 1235 (2014).

[55] P. Femia, 'Vertragsbeobachtende Verträge: BGH 28.01.2014 (Schufa-Scoring)', in B. Lomfeld, n 4 above.

interpretation deliberately does not provide a criterion what the institution of Schufa should look like, but calls for lifting the trade secret as a means of power neutralization. It will initiate a social process which exposes the disciplinary mechanisms of scoring to public debate. This would force Schufa to reveal the scoring process itself. The aim is to unleash social energies in which normativity develops without its content being predictable. Again, the normativity of law is sought to be aligned with the normativity of social practices of reflection, not only that law draws on past reflections, but that it itself initiates future processes of reflection.