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Social Differentiation, Inequality, and Diversity
in the Sociological Theory of Law –
An Outline of the German Debate
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1 Introduction

Both general sociology and the sociology of the law in particular have dealt with questions of social differentiation from their very beginning. The notion of social differentiation, therefore, is one of the central hallmarks of the discipline. Sociology has, however, developed a wide variety of theories and concepts around the idea of differentiation. Such concepts, as will be argued in this article, present themselves as being essentially contested insofar as they are built upon varying, often contradictory, theoretical fundamentals and therefore embody profoundly incongruous and often opposing perspectives. Some of them are connected with the notion of social inequality, others refer to the basic need for social integration, and others still focus on the interrelation of autonomous social fields or spheres. Moreover, these conceptual disparities, which will be the topic of this article, are based on deep-rooted theoretical commitments to concepts such as action, communication, rationality, practice, power, and order –, to mention only a few.

Against this background, the following considerations will give a brief account of sociological theories of differentiation and of the relevance of social inequalities and the semantics of ‘diversity’ with respect to the law. ‘Diversity’, as will be later demonstrated, challenges the identity of the law only in one very specific regard, namely insofar as it confronts it with multi-normativity and thereby with difficult questions of normative re-entry. This is due to the fact that ‘diversity’, in terms of cultural semantics – in contrast to inequality and differentiation as social-structural phenomena – tackles the law on normative ambiguity and vagueness, which raises difficulties with respect to positive law. Whether and to what extent the lessons learnt from the debate on legal pluralism may help in addressing diversity remains to be seen in future debate.

All the following accounts will be given from a limited perspective, namely from that of sociological theory as it has been developing in Germany since the late 19th century and, more specifically, from the perspective of the sociology of law in the German-speaking scholarly arena. Such limitation is justified by the aim of the workshop being to compare European and Latin-American legal thinking. Against this backdrop, the description will enable a comparison to be made between different national legal cultures, insofar as such might, in the best case, be helpful in terms of dealing with regional diversity in this respect.

Speaking about scientific theories from a scientific point of view means to engage in the discourse of reflective theories. The following analysis will focus on scientific concepts, discourses, and models of social differentiation in addition to inequality, and diversity with a particular interest in the law. Such interpretative patterns can be summarized under the general term 'reflective theories'. This is because they are scientific semantics, which reflect upon a specific societal field or sub-system. They observe societal activities through the lens of (social) science and offer a coherent description of the respective field. Such descriptions contribute significantly to the constitution of related social practices. Insofar as this assumption holds true, reflective theories and social practice lie on a continuum and mutually influence one another. Reflective theories do not determine practices, but they do, however, illuminate their social meaning and thus add an important aspect to their sociological understanding.

Every reflective theory will have to take into consideration the plurality of its subjects, i.e. the plurality of sociological theories of differentiation, inequality, and diversity in particular. Referring to the latter, diversity can be conceived of as an analytical as well as a normative term,¹ a duality rooted deeply in the condition of the sociology of law itself. The socio-legal field has been emerging from this distinction as a reflective theory, and it has been profoundly shaped by this distinction from the outset and through to contemporary debates. Any reflection on the sociology of law will, therefore, have to take this situation into account.

To a certain extent, the distinction between the empirical and normative perspective parallels the one between horizontal and vertical modes of social

1 DUVE (2013) 2.

differentiation,² although the spatial metaphor seems to be somewhat unspecific and partially misleading. Moreover, it refers to the character of the respective theory rather than to its subject area. Nevertheless, one could argue that normative theories focus on vertical differentiation, and on power and resource imbalances in addition to tensions between societal structures and individual subjects, whereas the empirical ones, in contrast, are more concerned with horizontal modes of differentiation, division of labour, different rationalities, social circles, and functional differences. The mere distinction between the two theoretical perspectives however neglects a second relevant dimension, namely conceptual orientation. In this dimension, social theories are structured according to their respective model of social order. In this respect, we can distinguish between theories of identity and theories of difference. The former are geared toward societal integrity being understood as a representation of a fundamental identity. The latter emphasize the leading role of differences in the formation of social order.

2 Four discourses of social differentiation

The suggestion, therefore, is to distinguish between different discourses of social differentiation according to two analytical dimensions, namely that of the theoretical perspective or mode of approach on the one hand and, on the other, the dimension of the particular model of social order taken by a scientific theory. Both dimensions together structure the field of reflective theories into four specific discourses. They form the ordering principle for the following argumentation. Needless to say, these discourses are described somewhat expansively as positions in the entire field of scientific theories.³ Being, as such, positions in a social field, they do not represent sharply delimited phenomena. Instead, there are overlapping zones between such positions and the semantic ‘bridges’ between them, which become visible as soon as one detects particular authors in social and socio-legal theory. In what follows, these discourses will nevertheless be presented in a more sharply contoured manner in order to describe ‘clear cases’ that are intended to support the readers’ understanding of the overall argument.

2 HILLEBRANDT (2001).

3 BOURDIEU (1987); BORA (2009); BORA/HAUSENDORF (2006, 2009).

	normative	empirical
model of social order		
identity	2 equality	1 integration
difference	3 alterity	4 differentiation

Figure: Theories of social Differentiation: Four-Discourses model of social science

In the first dimension, I suggest distinguishing between normative and empirical sciences. Both types of scientific discourse can produce either an identity or a difference model of social order. In the same way, both types of scientific discourse in the second dimension – the model of social order – can speak either from the perspective of empirical science (i. e. from a more external position of a scientific observer) or from a normative perspective (i. e. from a rather internal position of a participant in societal struggles, conflicts and evaluative controversies). As a result, we can distinguish between four discourses of differentiation, each of which having a particular form, namely integration, equality, alterity, or differentiation. Integration is the central concern of empirical sociology with a model of social order as identity. Equality is the centre of interest in normative sociology with an identity-oriented model of social order. Alterity, in turn, is the key concept of normative sociology connected with social order as difference, and finally, the fourth discourse arises from the combination of empirical sociology with a difference model of social order. The four discourses will form the organisational basis for the following analysis.

Before the details are explored, it should, however, be emphasized that the sociology of law in the German-speaking academic world does not refer systematically to *sociological theory* in general – systems theory and critical

theory being the only two exceptions – nor to concepts of social differentiation or diversity. It does refer to questions of inequality, but, even so, from a rather normative perspective, and it has, furthermore, not yet established an interest in the concept of diversity. It should, moreover, be noted at this point that there is no single or uniform sociology of law in Germany. Instead, we find a polyphony of voices dealing with different aspects of law from a sociological perspective.⁴ These perspectives are associated with the level of reflective theories and can be characterized primarily by their concept of interdisciplinarity, the relationship between operation and observation, system and environment, or, in other words, scientific theory and social practice. They are not principally defined in relation to a universal theory, i. e. to a sociological theory as a coherent and extensive (comprehensive, encompassing) system of descriptive and explanatory propositions about a well-defined subject area (society in our case). Textbooks on the sociology of law usually refer to sociological theory – if at all – as classical sociology, addressing, apart from Ehrlich and Geiger, mainly Marx, Durkheim, Weber, and Luhmann’s systems theory. The latter often serves as the only contemporary reference.⁵ Besides that, the textbooks regularly mention a number of middle-range approaches that have become relevant to criminal sociology and criminology.⁶ A number of sociological theorists are, to all intents and purposes, completely missing from the majority of text books, such as those of Bourdieu, Simmel, or Mannheim, for instance. The international discussion might perhaps prove to be somewhat different.⁷ The textbooks do not, therefore, usually refer to core elements of sociological theories, such as differentiation, Buckel’s and Fischer-Lescano’s book (2006) on new legal theories, for instance, contains only three rather marginal references to “differentiation” or “differential” in the entire work.

The concept of *social ‘differentiation’* is one of the theoretical ideas that have characterized sociological theory since its beginning, gaining theoretical knowledge of the structure of society.⁸ Schimank⁹ mentions five general

4 BORA (2016).

5 RAISER (2013); RÖHL (1987).

6 BAER (2011); STRUCK (2011).

7 Cf. GUIBENTIF (2010), although a stand-alone volume in the international debate and a monograph, it is not a textbook.

8 HILLEBRANDT (2001) 66.

9 SCHIMANK (1996) 274 ff.

characteristics of modern society: functional differentiation, growth, regulation, organisation, and individualisation, often described in a way such that differentiation and growth would produce social problems, whereas organisation and regulation would aim to limit these problems. In this scheme, individualisation is often understood as an unintentional consequence of differentiation, which gives rise to a strong opposition between individuals and societal structures. Taking these narratives into consideration, the following descriptions obviously do not present profoundly new insights, but rather they assemble the essence of a more or less consolidated development in sociological thinking over the last 150 years, as can be found in any textbook on sociological theory. The purpose of the description is to prepare the ground for a systematic account of the meaning and relevance of 'diversity' in the context of sociological theories of differentiation and inequality. The task is to identify certain patterns of a particular German scholarly culture – if such a tradition exists at all – and to call for aspects of relevance for the description and analysis of modern society. Theories of differentiation, as with most probably all sociological theories, are closely connected to 'great names' and classical texts.¹⁰ The following description will only indirectly follow such systematisation and will focus primarily on the four discursive formations described above, namely integration, equality, alterity, and differentiation (1–4), leading to a few remarks on law and diversity (5).

2.1 Integration

The first discourse represents sociology as an empirical science combined with a model of social order as identity. It can be identified in various theories of societal differentiation and their concern for the integration of society.

Sociology as an empirical science (*Erfahrungswissenschaft*) dealt with questions of social differentiation in the beginning mainly in the form of the division of labour, from whence it more or less directly raised the question of integration as a basic requirement resulting from differentiation. In many cases, the law has been seen as an important instrument for or as an aspect of social integration.

10 SCHIMANK (1996) 15 ff.

Emile Durkheim is probably the most prominent example for this first discourse combining empirical science and a model of social order as identity. The division of labour had already been addressed as a general principle of social differentiation and put into a historical perspective by Adam Smith and Herbert Spencer. While Spencer described a development from “incoherent homogeneity to coherent inhomogeneity”,¹¹ Durkheim transcends Spencer’s political liberalism by developing a strictly sociological concept of societal change, which is characterized by the two fundamental forms of social solidarity, namely mechanic and organic.¹² Social differentiation as division of labour develops from segmentary, barely differentiated to modern, highly differentiated forms. Differentiation is produced by social density and competition.¹³ Social integration, then, takes the form of solidarity, developing from mechanic to organic forms.¹⁴ Durkheim was perhaps more interested in integration than in differentiation.¹⁵ Deficits in integration are described as forms of anomy. Durkheim’s relevance to German sociology of law can be understood against this background. It lies mainly in the theory of anomy and in criminology, often relating to Merton and to questions of social integration, issues which are today strongly linked to diversity.¹⁶

It is noteworthy that, for Durkheim himself, the law plays only a secondary role in his concept of social integration – in contrast to a widespread narrative in the socio-legal literature. In his early text on moral science at German universities, Durkheim¹⁷ was influenced by Jhering’s model of jurisprudence as social science, starting with a primordial unity of religion, morality, and law, which would later be destroyed by social differentiation. In “Les règles de la méthode sociologique”,¹⁸ we find a normative construction of the basic social facts (*faits sociaux*).¹⁹ In these early texts, normativity is a basic structure of social life. The book on the division of labour, in

11 Cf. RÜSCHEMEYER (1985) 167.

12 DURKHEIM (1977 [1893]).

13 DURKHEIM (1977 [1893]) 330.

14 DURKHEIM (1977 [1893]).

15 DURKHEIM (1977 [1893]); TYRELL (1985).

16 HEITMEYER (2015).

17 DURKHEIM (1887).

18 DURKHEIM (1895).

19 GEIGER (1968) 19 criticized Durkheim’s “sociologism” and related approaches, for instance GUMPCOWICZ (1885).

contrast (Durkheim 1893), demonstrates the fundamental problem of Durkheim's theory, namely the difficulty of formulating a precise concept of the mechanisms of basic normativity, particularly the normative integration of society, and of describing such mechanisms in sociologically defined terms. Solidarity as a moral phenomenon is not directly measurable and observable. It can only be deduced from social symbols, among which the law is the most prominent.²⁰ The law, in and of itself, is no more than an indicator of social solidarity in Durkheim's theory. Although constructed drawing on the concept of solidarity, Durkheim's sociological theory, therefore, remains rather under-complex in terms of understanding of the main categories (segmentary and functional differentiation, repressive and substitutive sanctions). This is, in its nucleus, also Luhmann's critique of Durkheim's sociology.²¹ Like Henry Sumner Maine, as Luhmann argues, Durkheim also over-focuses on the social elasticity deriving from contractual forms. Moreover, as he wrote, does Durkheim not reconstruct the emergence of law and the phenomenon of ought in a sociologically convincing way? In contrast to a widespread account,²² one would not describe Durkheim as a genuine sociologist of law.²³

It is, therefore, no great surprise to see that, in Durkheim's later work, apart from solidarity – and perhaps even more important than this mechanism – various intermediary institutions and professions²⁴ have been taken into consideration as core integrative mechanisms of society. On a more general level, however, Durkheim's functional theory, in particular his methodological approach in functional analysis, has widely influenced sociological thinking, also in the field of sociology of law. His theory of social differentiation has been superseded by more complex concepts, as will be later argued.

Max Weber, in contrast to Durkheim, drafted a concept of differentiation that is characterized by a whole variety of forms and not only by the distinction of two leading ones. Western societies, as he claimed, are characterized by a specific type of rationality, which results in societal differentia-

20 DURKHEIM (1977 [1893]) 111.

21 LUHMANN (1972) 15–18.

22 RAISER (2013) 59–70; RÖHL (1987), § 5; BAER (2011) 40–41.

23 Comparable difficulties could be seen in the work of Ferdinand Tönnies.

24 DURKHEIM (1973 [1902]).

tion. Modern capitalism in economy, occidental rationality in science, arts, politics, and law are manifestations of rationality in this sense. Instrumental and value rationality are the two characteristics of the universal form. Different societal spheres, namely religion, economy, politics, aesthetics, erotism, and intellectualism²⁵ develop their respective forms of value rationality, thereby differentiating themselves from each other. They cannot be reconciled by religion²⁶ as had been the case in pre-modern societies. In modern society, in contrast, integration is guaranteed by legal power with a bureaucratic administration.²⁷ The rule of law, in other words, produces social integration as political integration in the form of rational administration, formal law and constitution²⁸ under the condition of a categorically differentiated social life. Weber's ambivalent attitude, on the other hand, with respect to the modern state and its rationality, has often been mentioned. The iron cage of formal law and administrative power was a lasting source of concern in his work.

What is less discussed is the fact that Weber, on a theoretical level, did not provide a very clear concept of law or of normativity in general. Although his sociology of law is undoubtedly a theory of internal legal rationalisation, Weber always described it as a consequence of external, technological, and economic processes of rationalisation. The long chapter VII on the sociology of law in "Wirtschaft und Gesellschaft"²⁹ demonstrates this fact in various aspects and with a plethora of empirical material. Additionally, the short paragraph on the sociology of law at the beginning of part two of the book (181–197) is rather instructive in this respect. That said, it clearly demarcates empirical and normative observation, thereby contrasting with Eugen Ehrlich and building a much stronger fundament for the sociology of law. On the other hand, the passage surprises with a very farsighted perspective on the sociology of law, describing law and economy as autonomous fields with mutual channels of influence depending on the respective internal operational mechanisms. The societal function of the law is described as producing the reliability of expectations (*Kalkulierbarkeit* in Weber's terms). These few remarks anticipate insights into the later development of sociology in

25 WEBER (1988 [1920]) 536–573.

26 WEBER (1988 [1920]) 541 f.

27 WEBER (1972 [1922]) 124.

28 MÜNCH (1995) 8.

29 WEBER (1972 [1922]) 387–513.

general and of the sociology of law in particular – especially in respect of the theory of differentiation as regards autonomous societal spheres.

However, a weak point in Weber's sociology – at least from the perspective of the sociology of law – is his definition of law, or, more precisely, lack of such. He invests much attention in the difference between compulsion and recognition theories. The connection between the law and a central apparatus of power, however, only refers to the possibility of law enforcement. It does not imply the factual exertion of power in every case, nor does it mean that compliant behaviour only occurs because of the possibility of coercion. Besides that, Weber refers to the normative character of the law (the "ought", *Sollenscharakter*), though without further clarifying the social foundations of normativity. Theodor Geiger (1964) and Niklas Luhmann (1972) developed such a theoretical fundament for the sociological theory of law. Moreover, Weber's frequently criticized concept of rationality, is very narrow, focusing mainly on instrumental rationality.³⁰ Habermas used this argument for the reconstruction of critical theory into a theory of communicative rationality, combined with a concept of differentiation, borrowed from Parsons's structural-functionalist theory of societal differentiation, as we shall see later.

All in all, Weber's relevance in the German sociology of law is still remarkable. After a significantly slow uptake, his work became rather prominent in Germany during the 1960s. His theory of differentiation and of rational authority, his concept of bureaucratic rationality including a high estimation of the rule of law with its dominance of formal principles according to his theory of rationalisation, have strongly influenced socio-legal discussions.³¹ Against this background, a certain critique of a presumed (or factual) re-materialisation of the law, especially in the context of the modern welfare state and developments in environmental and human-rights law, for example has also been formed by Weber's appraisal of formal rationality.

With respect to the aforementioned shortcomings in Weber's theory of law, namely the terminological and conceptual vagueness, Theodor Geiger (1964) preceded a relevant step. In his behavioural scientific approach, distancing himself from philosophical positions based on subjective intention-

30 HABERMAS (1981).

31 CHAZEL (2016); GEPHART (1993); TREIBER (2017); RÖHL (2018).

ality,³² he blazed the trail for a post-subjectivist sociology beyond action theories. Although tying Weber's position in the *Werturteilsstreit* to the notion of "practical value nihilism", Geiger nevertheless cuts back Weber's hermeneutic dimension so rooted in historicism and its liberal-arts (*geisteswissenschaftlich*) tradition. Geiger's book is the first systematic approach to a sociological theory of law. The behaviourist varnish covering the argumentation appears somewhat disturbing from today's point of view. Nevertheless, it cannot discount the theoretical value of Geiger's theory, which is surprisingly modern, if one takes a closer look. When addressing the origins of normativity, he points beyond the behaviouristic link of norm and sanction,³³ developing a perspective that would become more common much later after the linguistic turn in the social sciences: Firstly, normative force is a product of social force; social reality faces actors with the necessity of choosing between compliance and deviance with the consequence of a reaction from the social group (*Gruppenöffentlichkeit*).³⁴ Secondly, normative obligation is the consequence of social interaction; later in sociology, the term 'interaction' is replaced by 'communication'. Thirdly, normative force and obligation result from expectations; social interdependence manifests itself in the expectations of group members.³⁵ With these terminological and conceptual stipulations, Geiger laid the foundation for a modern sociology of law, even if he himself did not foresee later developments.

With respect to our central issue of differentiation, however, Geiger's theory remains completely underexposed. Social differentiation does not occur in a systematic way in the course of his argumentation. In a rather marginal manner, he writes about social milieux and develops a model of social order that is somehow built on the concept of groups.³⁶ In this respect, his position is quite similar to Eugen Ehrlich's social theory deeply rooted in social models of the 19th century with its basic concept of associations (*Verbände*), which Weber had already long left behind. To this extent, we can find faint traces of differentiation-theoretical reasoning in Geiger's work. Against such slight social differences, however, the idea of

32 GEIGER (1964) 371.

33 GEIGER (1964) 82 ff.

34 GEIGER (1964) 83.

35 GEIGER (1964).

36 GEIGER (1964) 128 ff.

a (normative) identity of society is given strong priority. This identity of society can be found in an overarching concept of law, defined by sanctions.³⁷ After all, this concept of law, grounded in behavioural regularity along with sanctions, bargains away the chance to analyse the social sources of norms.³⁸

A much stronger theory of differentiation, but with no more than a few fleeting sideglances at law, is connected with the name of Georg Simmel. Dealing with the process of individualisation, Simmel interpreted the idea of the modern individual as the result of the crossing of social circles.³⁹ A progressive number and distinctiveness of social roles, to which every person is attached, characterizes modern life. Differentiation processes are triggered by the mechanism of reduced effort (*Kraftersparnis*), producing evolutionary advantages.⁴⁰ The differentiated roles belong to respective social groups, or circles, as Simmel describes them. The circles to which a person belongs form a coordinate system. The more roles relevant to individuals, the less probable it is that they will suit any other person whom, in other words, these many circles encompass at any other single point.⁴¹ Against the background of such an advanced individualisation, however, Simmel – like Durkheim – stresses that individualisation is the basis of social integration. It enables persons to act responsibly with respect to generally accepted social norms. A person's individuality can be understood as the result of role differentiation on the one hand and, on the other, as a means for coping with problems of social integration resulting precisely from differentiation caused by individualisation.⁴² The first aspect is reflected in the idea of the crossing of social circles. The second leads to sociological theories of conflict that also became relevant to the sociology of law after 1945.⁴³ Differentiation and integration are thus balanced in an unstable equilibrium. Integration is conceived of as a conflation of differentiated phenomena on a higher level that can be the starting point for new differentiation.⁴⁴

37 POPITZ (1980).

38 LUHMANN (1972).

39 SIMMEL (1890); SIMMEL (1908) 305–340.

40 SIMMEL (1890) 258–259.

41 Cf. SIMMEL (1908) 312.

42 SCHIMANK (1996) 53.

43 DAHRENDORF (1958).

44 SIMMEL (1890) 283–285.

Talcott Parsons, in contrast to the aforementioned classical authors, formulated a theory of societal differentiation constructed as a whole from the perspective of integration. Parsons' theoretical achievement, as Werner Gephart argued, does not consist of a theory of differentiation with an element of counteracting integration, but rather of the idea of interpenetration, a mechanism covering the whole universe of social phenomena and building the normative pattern and basic empirical structure of modern society.⁴⁵ Parsons's theory of societal differentiation, against this backdrop, is primarily a theory of *normative integration via social inclusion*.⁴⁶

Parsons's work is characterized by three major phases, namely the voluntaristic theory of action, structural functionalism, and the theory of social evolution. For all these phases, the idea of a normative integration of society is the common denominator.

In "The Structure of social action" (1937), Parsons criticizes utilitarian positions and queries: "How is social order possible?", this in a voluntaristic theory of action in combination with a normativistic theory of social order. In concrete terms, the link between the two parts of theory is formed by the idea of "unit acts" within an "action frame of reference",⁴⁷ consisting of an actor, goals of action, the situation, and the norms and values of the act. This idea of value orientation is carried along in this second step of Parsons's theoretical path, the theory of structural functionalism. Together with Robert Bales and Edward Shils, Parsons designs the well known AGIL scheme, combining the two dimensions symbolic complexity and complexity of action, and consisting of four basic functions, namely adaptation, goal attainment, integration, and latent pattern maintenance.⁴⁸ The scheme serves in the beginning as an action frame of reference. It later works within a complex of mutually convoluted levels of social phenomena, such as the *conditio humana*, the action system, the social system, etc. The task of integration is attributed to a subsystem of society, namely the societal community. Its function consists of creating loyalty *vis-à-vis* society as a whole. Such a form of social bonds emerges if a uniform, coherent, and collective normative structure guarantees the integration of society. Integration, however, is

45 GEPHART (1993) 255.

46 MÜNCH (1995) 18 f.; see also BORA (1999), ch. 1.3.

47 PARSONS (1951) 3.

48 PARSONS et al. (1953).

not only a function within the AGIL scheme. It is also a balanced relationship between the four functions of the scheme⁴⁹ in the form of “double interchanges”, i. e. mutual dependence between the different systems delivered by symbolically generalized media of communication and cybernetic control hierarchies.⁵⁰

At the same time, the basic distinction between actor and situation is replaced with the one between system and environment.⁵¹ Society is one of these levels of interrelated systems that can be described in terms of evolution.⁵² Evolution, according to Parsons, consists of four basic mechanisms, namely differentiation, adaptive upgrading, inclusion, and value generalisation. Inclusion is an evolutionary mechanism embedded in the system of societal community. It makes for the involvement of new units, structures, and mechanisms in the normative framework of the community. Parsons refers principally to “citizenship”, i. e. the evolving system of civic rights during the English and American revolutions.⁵³ With increasing societal differentiation individuals and groups can no longer be integrated by traditional roles and distinctions. As a result, “differentiation demands the inclusion of previously excluded groups into the general system of society as soon as these groups have developed legitimate competences that contribute to the functioning of the system”.⁵⁴ The idea of *integration by inclusion* accordingly finds its genuine expression.

In this respect, Parsons as well as Durkheim are representing a theory of societal differentiation that is strongly shaped by the central concern over solidary, normative integration of society.⁵⁵ Weber, in contrast, focused on the formal rationality of modern law, when searching for an integrating mechanism in the world of differentiated value spheres. Both Weber and Parsons present, like Simmel, and Geiger, empirical theories comprising

49 SCHIMANK (1996) 103.

50 PARSONS/SMELSER (1956). At this point, Parsons in a certain way transcends the borders of a theory of normative integration. Like Simmel, he aims for an equilibrium of differentiated functions. Such an idea already comes close to models of social order as difference, as we shall see later.

51 PARSONS (1951).

52 PARSONS (1966).

53 PARSONS (1971) 92–94; see also MARSHALL (1964).

54 PARSONS (1966) 40, my translation from the German edition.

55 MÜNCH (1995) 18.

models of normative integration. They thus represent identity models of social order within the framework of an empirical sociological theory of the law.

Their relevance to contemporary sociology of law, however, is rather limited. Durkheim's theory triggers only more or less symbolic references in German sociology of law. Very few methodological traces can be found in this respect, whereas functionalist approaches today are mainly part of sociological systems theory. Weber, in contrast, has become more relevant in German sociology of law since 1945. His theories of value spheres, of rational authority, and the bureaucratic rationality, of the rule of law as dominant of formal principles according to his theory of rationalisation have influenced quite some generations of socio-legal scholars. Against this background can be detected a certain critique of a presumed (or factual) re-materialisation of the law, especially, for example, in the context of the modern welfare state and developments in environmental and human-rights law. Finally, Parsons's theory of the normative integration of society is still a rather vivid concept, perhaps the most influential in this part.⁵⁶ It has spread into common sense (*Zeitgeist*) in debates about inclusion, cohesion, and social integration, often without reference to the systematic problems in Parsons's theory (or to the theory at all). The work of Richard Münch must be mentioned here, however, as an outstanding and singular exception keeping alive Parsonian theory with a remarkable number of publications, some of them dedicated to law in particular.⁵⁷

2.2 Equality

The second discourse represents sociology as a normative theory combined with a model of social order as identity. Societal differentiation, in this respect, occurs, above all, as structural inequality.

While Parsons as an example of the first discourse already shows a connection and a transition between the empirical and the normative discourses on integration, the second discourse focuses entirely on a normative understanding of integration. It presupposes a model of society as identity and connects it to a normative impetus, often in combination with a theory of

56 DAMM (1976).

57 MÜNCH (1976, 1980, 1982, 1985, 1992, 1995).

universal history or of social evolution. This temporal dimension typically exposes a teleological moment, a presupposed final stage of historical development which delivers the frame of reference for the evaluation of contemporary society. These approaches are, therefore, also typically combined with concepts of justice as equality. Differentiated societies can be described as unequal in many instances. In this respect, theories of differentiation and theories of social inequality are equiprimordial.⁵⁸

After Kant and Max Weber, one could suspect it to be a categorical mistake to speak of normative sociological theory. Such an argument, however, would obviously dismiss the fact that sociological theory has largely consisted of normative analyses by claiming that the empirical study of societal phenomena could instantaneously lead to normative assertions about the justifiable shaping of society. In the Hegelian and Marxist tradition, this conviction was the common point of reference as well as in later theories such as the Frankfurt school, or in Bourdieu's understanding of new capitalism. All these approaches stand for the combination of a normative theory and a model of social identity.

Karl Marx's theory of society, in its nucleus, serves as the reference point for the normative discourse of societal identity. Therefore, despite its prominence, a very few and sketchy remarks may be appropriate in order to call to mind the basic structure of Marx's theory, its implications for the theory of differentiation, and its consequences for legal theory.

Marx's social theory is based on an economic analysis of *class structures* combined with a theory of social evolution and an early form of the sociology of knowledge framed as *Ideologiekritik*.⁵⁹ A sociological analysis of class relations, the ubiquitous conflict between the two social classes that are formed by the fundamental contradiction in the means of production, and the respective societal complements shapes the theory of societal differentiation.⁶⁰ In contrast to Durkheim and other differentiation theories, for Marx the class contradiction provokes a fundamental normative case for overcoming the economic disruption of society. The figure in which this argument is embedded, takes the form of historical materialism, a theory of social evolution claiming that the dialectic tension between the social

58 SCHIMANK (1996) 9.

59 MARX/ENGELS (1966).

60 MARX/ENGELS, MEW, vol. 23–25.

classes will inevitably be sublated in communist society. The class difference, in other words, has to be transformed into the harmonic identity of future society (“From each according to his ability, to each according to his needs”).⁶¹ Apart from his critique of political economy and the accompanying model of the class structure of society, a second distinction has become a hallmark of Marx’s concept of societal differentiation, namely the distinction between base and superstructure forming the core of his criticism of ideology. Like the fetish character of a commodity, which veils the effort of human labour creating the practical value of a product (*Gebrauchswert*) and puts forward the exchange value (*Tauschwert*) as a mere self-deceit in societal life, also on the level of self-description, the social reality of the economic system is hidden behind the ideological superstructure of the cultural and political system. The fundamental disparity of an economic base and social superstructure is one of the origins of social conflicts (MEW, vol. 13, 9).

With respect to law, Marx, admittedly, did not provide us with more than a few rather marginal comments, the most prominent of which is the critique of the law on wood theft in the “*Rheinische Zeitung*”.⁶² For Marx, the law belongs to the ideological sphere of the societal superstructure. This theoretical position involves the determination of the law by its environment, i. e. by society. The law only mirrors the structure of bourgeois society. It is a form of ideology veiling real class interests behind a formal terminological architecture. The positive law is only a formal cover over the materiality of class relations based on different modes of production. Equal rights in law disguise unequal relations of production and therefore represent inequality, as all forms of law (“Dies gleiche Recht ist ungleiches Recht für ungleiche Arbeit. [...] Es ist daher ein Recht der Ungleichheit, seinem Inhalt nach, wie alles Recht.”)⁶³ In a famous quote, Anatol France speaks of the equality of the law forbidding poor and rich people – equally – to sleep under bridges, to beg, and to steal bread (“... [die] majestätische Gleichheit des Gesetzes verbietet es Reichen wie Armen gleichermaßen, unter Brücken zu schlafen, auf den Straßen zu betteln und Brot zu stehlen”).⁶⁴

61 MARX/ENGELS, MEW, vol. 3, 35; MEW, vol. 19, 21.

62 MARX/ENGELS, MEW, vol. 1, 109–147.

63 MARX/ENGELS, MEW, vol. 19, 19.

64 FRANCE (2003 [1919]) 112.

This theoretical model pervades sociological theories of law, from early critical theory to the sociology of courts or critical legal studies. It left traces in general sociology, for instance in Foucault's analysis of micro-politics as well as in Pierre Bourdieu's term *capital* and his understanding of power as the main field structure and *illusio* as the ideology of field knowledge. Inequality was a central reference in Marx's work, just as it is in Pierre Bourdieu's sociology (for the following see Hillebrandt).⁶⁵ Bourdieu subscribes in many respects to Marx's ideas. He, however, expands the purely economic perspective that had marked Marx's work in favour of a "mysterious cross ratio"⁶⁶ between *habitus* and *field*. The habitus includes the durable and transferable systems of perception, evaluation, and action schemes in bodies. The fields demarcate the systems of objective relations and the practices emerging from this relationship (ibid.). Within the social topography of the fields, individual practices represent the mundane symbolic dimension of culture. Culture is the repertoire of action being applied as *symbolic capital* in the ongoing struggle for social positions and status.⁶⁷ Owing to the respective social classifications and evaluations being ascribed to the cultural practices, these individual practices are an immediate expression of *social inequality*. The individual condition of life is defined by the availability of *economic, cultural, and symbolic capital*. Lifestyles (*Lebensstile*), understood as the socio-cultural repertoire of action, and conditions of life (*Lebenslagen*) are thus interconnected and mutually dependent, both bound together by the concept of habitus in which the condition of life determines the lifestyle.⁶⁸ Similar to Marx's approach, in Bourdieu's thinking, social inequality as the dominant form of differentiation is also the result of a kind of societal basic structure. Bourdieu, however, in his earlier texts, does not aim to reconcile the differences. Instead, he draws a picture of a stable, balanced inequality.⁶⁹ Against this backdrop, he could perhaps also be interpreted as an example for the third discourse. However, in his later texts after 1990, he began to explore the role of the state as a mediator or regulator of the encompassing inequality and injustice. He also attempted to reflect the role

65 HILLEBRANDT (2001) 61–67.

66 BOURDIEU/WACQUANT (1996) 160, my translation.

67 HILLEBRANDT (2001) 63.

68 BOURDIEU (1987) 281.

69 HILLEBRANDT (2001) 66.

of civil society in this respect.⁷⁰ Moreover, he thought of “reflexive sociology” as an instrument by means of which the intellectual milieu could resist the overarching power of capitalist (neo-liberal) domination,⁷¹ which puts him, finally, within the position of the second discourse, pursuing a final identity behind the differentiation of lifestyles and conditions of life.

While Bourdieu has certainly provided general sociological theory with a modern and complex concept of societal differentiation, which has garnered major influence in German sociology over the last decades,⁷² he has left only faint traces with respect to the law. Pierre Guibentif⁷³ lists nine passages concerning the law in Bourdieu’s complete work, three of which address the law and / or the judiciary directly, the others dealing primarily with economics. One could, therefore, attest to a complete absence of the law from Bourdieu’s theory. Over this past decade, however, there has been an increasing interest in Bourdieu’s theory in socio-legal scholarly circles. Studies in constitutional sociology and the comparative analysis of legal cultures⁷⁴ as well as on the regulation of labour migration and homecare⁷⁵ can serve as examples. They are not primarily concerned with questions of differentiation, inequality, or the diversity of lifestyles, but rather profit from Bourdieu’s approach to cultural sociology in connection with the habitus-field theory.⁷⁶

Jürgen Habermas, like Bourdieu, takes strong interest in social inequalities, but, in contrast to the latter, with a pre-eminent role for the law, coming from a different starting point, which is more closely linked to Marx than Bourdieu’s theory. At the beginning of the 20th century, the social sciences had found themselves caught up in strong tensions between Marxist ideas and the neo-Kantianist position connected with the name of Max Weber. During the twenties and thirties, a number of scholars in the Marxist tradition, for instance, in early critical theory, attempted to counter the Weberian challenge by developing a sociological theory that encircled normative positions on the basis of empirical evidence. The political situation of

70 BOURDIEU (1993).

71 BOURDIEU/WACQUANT (1996) 231.

72 MÜLLER (1997); RECKWITZ (2003); NASSEHI (2004); HILLEBRANDT (2014).

73 GUIBENTIF (2010) 273, cf. BOURDIEU 1986.

74 WITTE/BUCHOLC (2017); GEPHART (1990).

75 KRETSCHMANN (2016).

76 Cf. KRETSCHMANN (2019) for an overview.

the time, however, confronted them with the empirical collapse of the Marxist idea of class consciousness that could not be upheld under the experiences of the late Weimar Republic and the Nazi regime.⁷⁷ Under these conditions, early critical theory lost ground and became, namely in Adorno's later writings, more an aesthetical and subjective critique of society.

In the 1960s and 1970s Habermas began to re-establish critical theory by arguing that the universal and "original" mode of social order, the integration of society, is normative – namely of moral quality – in its nucleus. During the 'linguistic turn', he developed together with Karl Otto Apel a procedural approach to a theory of justice under the name "discourse ethics". One problem of the philosophical version of this theory is its "decisionistic remainder", as Habermas⁷⁸ called it. The term indicates that a procedural theory can only provide for procedural principles, which may lead to justifications, but cannot provide for reasons to take part in procedures. This decision is beyond the range of "transcendental pragmatism" (*Transzendentalpragmatik*) of discourse theory, as Apel named his version. Habermas, therefore, stated in his "universal pragmatism" (*Universalpragmatik*) that the "original mode" of social integration empirically entails exactly those principles, which are constitutive for discourse ethics. If this were the case, the refusal to take part in discursive justification of norms would come to a performative contradiction: denial of the universal fundament of speech *and* socialisation by withdrawing from social life itself – an act that could not be carried out within a social context. This argument, which can be characterized as a type of social reductionism, requires a respective sociological theory to bridge the Weberian divide between facts and norms. It must prove for social integration's being empirically a moral phenomenon.

Ever since the Theory of Communicative Action (1981), Habermas has been trying to develop such a sociological theory on the basis of linguistic speech act theory. During the eighties, his thinking was still very much influenced by Hegelian-Marxist ideas of universal history and by a strong anti-institutionalist emphasis. Later, mainly under the influence of Bernhard Peters (1993) and Klaus Günther (1988), he tries to demonstrate the inherent rationality in the fundamentals of social integration and their connections to

77 Not by chance, at the same time, the, sociology of knowledge (MANNHEIM 1924/25) in a significant upturn replaced the Marxist *Ideologiekritik*.

78 HABERMAS (1983) 96–109.

constitutional institutions of modern society. In his book “Between Facts and Norms” (1992), the differentiation between “Life-World” (*Lebenswelt*) and “System”, which had already been constitutive for his earlier approach, gets an institutionalist interpretation. Still, life-world is the realm of rationality, the part of the world in which communicative action in its full sense can take place. Normative reasons can be found in this area. Life-world is the horizon and resource for every kind of normative claim that can be made in a communication. Habermas tries to show, that a specific type of interaction, called communicative action, is unavoidably and indissolubly linked to social life in the area of the life-world. Society, in its original mode, in other words, is characterized by (moral) identity, differentiation being a secondary and basically pathological phenomenon. The normative rationality of communicative action generates the morals that may be used in procedural ethics to examine normative validity claims.

There arises, however the question of how to relate the sphere of rationality to all other spheres of society, which are obviously not governed by all-encompassing normative rationality, the world of the social ‘systems’, as Habermas understands it. A central role in this theory of *differentiation* falls in particular to the *law*. Since the law forms a link between the life-world and the system, it provides the ‘systemic’ area with a certain facility to resonate with the rationality of the life-world. Through certain gateways – namely procedures of citizen participation in public decision making – the morals from the periphery of the life-world are smuggled into the centre of the legal-political system.⁷⁹ The public can indirectly ‘regulate’ the administrative complex of the legal-political system, namely through attempts to influence its self-regulation by moral arguments. In participatory procedures, it contributes to the *integration* of society. Integration, according to Habermas, stems from both democratic public and legally institutionalized decision making procedures and from the transport of the results of these procedures into the realm of administrative and political power by means of the law. Deliberative public in legal procedures serve as ‘sluices’ through which life-world-based rationality from the societal peripheries pours into the cen-

79 The centre-periphery distinction has also influenced SCIULLI (2010) and TEUBNER (2012). The development of Habermas’s theory is more complex with respect to the law. I do not discuss the rather puzzling distinction between law as a medium and an institution here; cf. HABERMAS (1981); BORA (1991).

tral circles of political and administrative power.⁸⁰ The promise of critical theory of society, in other words, is to bridge the gap between facts and norms and thereby to provide for an empirical foundation for normative reasoning. The advanced form of this theoretical undertaking can be found in Habermas's construction of the life-world and system, with the law as an institutional "sluice"⁸¹ between the two spheres. Life-world's interaction with its moral rationality is the "original mode" of socialisation.⁸² The law transfers the rationality of the peripheral life-world to the institutional (legal-political) 'centre' of society.⁸³ It thereby brings into being the normative integration of society as a whole.

The general idea in the theories of social differentiation in the second discourse, in summary, is the reconciliation of social differences and inequalities as the ultimate goal for theory (and societal practice). The role of the law in Marx's and Bourdieu's theories remains rather marginal. In contrast, Habermas attributes a central role to the law. In the theory of communicative action (1981), the law performed as a rather ambiguous, twofold phenomenon: as a medium of systemic integration, on the one hand, it is seen as an aspect of the colonisation of the life-world by the functional systems, and then as an institution, on the other hand, which, being a display of communicative rationality embedded in the life-world, represents the original mode of social integration. Such an idiosyncratic construct did not generate lasting resonance in sociological theory, this owing to its eclectic use of both sociological theory and empirical facts. Later, in "Between Facts and Norms" (1992), Habermas took a much more benevolent position with respect to the law. It was now addressed as the core instrument of legitimate power, of democratic decision making, and as the ultimate defence against an excessive flow of power from the centre of society toward the peripheral domains. Participatory procedures in legal decision-making procedures, as Habermas was deeply convinced, are the sluices, through which the communicative rationality of the life-world should penetrate from the societal peripheries to the centres of power and influence.

80 HABERMAS (1992) 187, 426, 428, 533, *passim*; HABERMAS (1996) 370.

81 PETERS (1993).

82 PETERS (1993) 230.

83 PETERS (1993) 327; HABERMAS (1992) 187.

The resonance of this discourse in the sociology of law was manifold. In the 1960s, Marxist theories rather prominently and widely acted as a general reference point, a kind of sociological common sense, often more as an aspect of a critical *Zeitgeist* than a systematic theoretical approach. American critical legal studies had later gained some relevance internationally but did not have a strong influence on the German debate.⁸⁴ Even so, some neo-Marxist approaches⁸⁵ connected with the names of Franz Neumann, Otto Kirchheimer, Nicos Poulantzas, and Andrea Maihofer, for instance, have been present in the socio-legal debates of the last decades. They criticized economic determinism⁸⁶ or traces still extant of class justice (*Klassenjustiz*) in post-war society.⁸⁷ These approaches, however, remained almost completely isolated from the broad sociological tradition of inequality research – unequal distribution of resources such as income, property, education, health, employment opportunities, etc.⁸⁸ – which, until this present time, has no explicit relation to sociological theories of law.

Habermas's position, on the other hand, generated widespread resonance in the social sciences and in the sociology of law⁸⁹ during the 1980s and 1990s, but has also raised a number of critical comments in the field of general sociology.⁹⁰ Later sociological studies dealing with the concept of deliberative public and the law have given cause to question both the empirical grounding and the theoretical position of Habermas's works,⁹¹ mainly by indicating that Habermas's presuppositions about the constitution of social order may be somewhat fragile and may lead to debatable results compared with theories preferring the aspect of social order to that of rationality.

84 FRANKENBERG (2006).

85 BUCKEL (2006).

86 MAIHOFFER (1992).

87 The interest in class justice subsequently gave way to more sophisticated concepts of professionalisation (cf. BORA 2001), which became prominent in general sociology but did not generate a lasting resonance in the sociology of law.

88 HRADIL (2001); BURZAN (2007); DAHRENDORF (1966); SCHWINN (2007).

89 EDER (1986, 1987); LADEUR (1986); SCHMIDT (1993).

90 THOMPSON/HELD (1982); THOMPSON (1983); WEISS (1983); ALEXANDER (1985); HONNETH/JOAS (1986); EDER (1988); LUHMANN (1993a); KNEER (1996); SAND (2008).

91 BORA (1991, 1994, 1999); HAUSENDORF/BORA (2006); BORA/HAUSENDORF (2010).

2.3 Alterity

In contrast to the first two, the third discourse introduces social order as basically grounded on difference. It represents sociology in a normative perspective combined with a model of social order as difference. *Alterity/otherness* and *diversity* may serve as keywords characterizing the third discourse.

This perspective has been taken by a number of philosophical and anthropological approaches, followed by some sociological theories, among which contemporary gender and diversity approaches are a rather recent and prominent development.

In philosophy and anthropology, the notion of *otherness* or *alterity* has become prominent in the tradition of Hegel, Husserl, Adorno, Lacan, and Derrida. The term indicates a specifically new concept of identity separate from the notion of the prevalence of identity over difference. Otherness/alterity means that identity is being constructed by difference, by the distinction or demarcation between entities.⁹² Difference, in this respect is the leading term in these concepts. *Otherness* emerges through distancing oneself from a presumed other easily defined by faults, mistakes, deficits of whatever kind. The ability to construct an entity's identity by the mechanism of *othering* depends on social power and, vice versa, creates the position to dominate others. In political philosophy, Castoriadis⁹³ spoke of radical alterity as an element of social creativity and novelty. In a similar way, Baudrillard⁹⁴ understood alterity as a valuable element of modern life.

In sociological theory, Zygmunt Bauman,⁹⁵ referring to Simmel's figure of the stranger, emphasized that Identities are constituted by differences. The ambivalence consists of the fact that the other constitutes identity on the one hand and, on the other, is symbolic of the dangerous and threatening that is excluded in xenophobia and antisemitism. In the sociology of knowledge, Foucault⁹⁶ identified the other as the figure symbolizing non-rationality (madness, deviance), thereby triggering a process of exclusion with the

92 WARF (2006) 345.

93 CASTORIADIS (1975).

94 BAUDRILLARD (1987); BAUDRILLARD/GUILLAUME (2008).

95 BAUMAN (1991).

96 FOUCAULT (1969).

means of imaginary representations – “knowledge of the Other” – in service to power and domination. Neither Bauman nor Foucault, however, was primarily interested in a theory of social differentiation. Bauman addressed the fundamental ambivalence of both social structure and semantics. Foucault was either preoccupied with the discursive construction of social order,⁹⁷ or with the genealogy of power and the archaeology of knowledge,⁹⁸ both lying beyond questions of social differentiation.⁹⁹ For lack of a distinct theory of societal differentiation, these approaches of alterity maintain a rather distant position with respect to sociological theory, similar to Adorno’s position in “Negative Dialektik”,¹⁰⁰ where he emphasized a sharp dissociation of the individual against societal overpowering.

A more explicit reference to the philosophical and anthropological roots of otherness/alterity can be found in contemporary feminist sociology. Alterity, as has been indicated above, in many respects is related to differences in race, gender, and ethnicity. Feminist sociology and gender theories relating to general sociology as well as to the sociology of law in their normative, critical appearance attach directly to the discourse of alterity. A prominent voice in this respect has been that of Simone de Beauvoir, who, in the introduction to “The second Sex”,¹⁰¹ presented the category of the other as a primordial social fact, a social construct being ubiquitous through space and time. For Beauvoir, otherness is a fundamental category of human thought. Judith Butler¹⁰² draws on this position with her gender approach in sociology. From a post-structuralist perspective, Donna Haraway combines gender theories with science and technology studies, claiming the importance of situated knowledge¹⁰³ and of “otherness, difference, and specificity”.¹⁰⁴

Legal theory, against such a background, broadly engages in discussions of gender inequalities under topics such as “feminist legal theory”, “feminist jurisprudence”, “legal gender studies”, “gender law”, and the like.¹⁰⁵ Differentia-

97 FOUCAULT (1977).

98 FOUCAULT (1973).

99 BORA (1999) 168–172.

100 ADORNO (1966).

101 BEAUVOIR (1968).

102 BUTLER (1990).

103 HARAWAY (1988).

104 HARAWAY (2003).

105 BERGER/PURTH (2017); BÜCHLER/COTTIER (2012); ELSUNI (2006); BAER (2011) 146–152.

tions between radical, liberal and other trends in feminist studies will not be discussed here in further detail. Generally speaking, feminist legal thinking was, in the beginning, concerned with inequity in the sense of the second discourse, aiming to overcome male domination. Gender quotas, affirmative action, constitutional rights, and specific protection for women were the central topics.¹⁰⁶ After these approaches had been exposed to a fundamental critique as being ‘essentialist’ difference-theoretical concepts, they came to the foreground,¹⁰⁷ for instance as analytics of power.¹⁰⁸ Postmodern feminist legal theory,¹⁰⁹ drawing on Butler, finally analyses social order as a construct, pointing to a reality beyond the binary concept of gender,¹¹⁰ and at gender, race, and intersectionality,¹¹¹ explicitly related to the difference-theoretical concept of alterity.¹¹²

Intersectionality leads directly to the concept of *diversity*. Like the aforementioned approaches in this discourse, the semantics of diversity has not to date led to a comprehensive sociological theory. It has, rather, to be understood as an expression of political attitudes, delivering a diffuse notion of mostly cultural distinctions. Bourdieu, in his earlier writings on habitus-field theory, had, as previously discussed, already described the diversity and variety of life styles and life conditions. Diversity is, in this respect, often thematised as cultural diversity.¹¹³

The term ‘culture’, on the one hand, is not without problems in sociological theory. Baecker¹¹⁴ describes culture as a second-order semantics, which – in contrast to politics, economy, or the law – provides society with alternatives to itself. In comparing ‘cultural’ differences, society can identify other forms of order and ways to overcome existing circumstances. Baecker also demonstrates the vagueness of the concept as a *tertium comparationis*, which does not yet have a precise definition despite all attempts to formulate

106 BERGER/PURTH (2017) 1.

107 ELSUNI (2006) 166–168; TÖNNIES (1993) 142.

108 MACKINNON (1989).

109 MAIHOFER (1995).

110 PLETT (2007).

111 CRENSHAW (1993).

112 KAPUR (2018).

113 DUVE (2013).

114 BAECKER (2000).

a cultural theory of society.¹¹⁵ Instead, it serves as an indicator of the surprised awareness of differences, the astonishment at unfamiliar practices elsewhere, i. e. in a different culture.

Diversity, on the other hand, is no more a precise term than culture. It is being used as having a broad variety of meanings and contexts, namely with reference to cultural and racial backgrounds, ethnicity, gender, sexual orientation, age, religion, and physical or mental handicaps. In all these dimensions, different degrees of social inclusion can be observed, raising questions about equality along the boundaries created by diversity. It appears, in the main, to be a fuzzy term, with both normative and empirical connotations.¹¹⁶ The origins of the semantics can be found in grass-roots movements of the 1960s, incorporating women's and civil rights movements, struggling for affirmative and easier access to education, work, and life chances. The term is widely used in a great variety of policy fields. No sociological theory, however, is explicitly related to the term 'diversity'. Diversity can become the subject of alterity-theories, as the example of intersectionality demonstrates. Against the background of social inequalities, it can in turn be related to legal questions.¹¹⁷

The discourse of alterity is a broad and practically influential discourse, closely connected with social struggles, but less resounding in sociological theory. Aspects of intersectionality and diversity point to secondary social distinctions beyond functional differentiation. In this way, they require a comprehensive social theory, providing for elaborate concepts of communication or action, of social structures, and of historical/social evolution, etc. In these respects, many of the approaches mentioned in this paragraph, implicitly or explicitly, refer to (neo-)Marxist concepts, with all their inherent theoretical problems. They do, however, not yet provide an elaborate sociological theory of alterity as a concept of social differentiation.

Moreover, the third discourse demonstrates that the combination of difference theory and the normative approach causes a certain amount of friction. In lack of conceptual bracing like the immanent evolutionary teleology in the second discourse, it is difficult for the approaches in the third discourse to emancipate themselves from the position of a political attitude and to

115 RECKWITZ (2000).

116 DUVE (2013).

117 DUVE (2013).

develop a coherent and comprehensive sociological theory. Bauman and Foucault, although both of them were important and influential sociological thinkers, did not provide for such a theory. Feminist approaches, despite their undeniable political and practical relevance, remain in the same position with regard to sociological theory, namely as a sociology 'engagé'.¹¹⁸

2.4 Differentiation

The fourth discourse represents sociological theory as empirical science combined with a model of social order as difference. It becomes manifest chiefly in sociological systems theory, the most famous and influential part of which is Niklas Luhmann's work. It is not possible here to report the history and the architecture of this theory in detail. Though the readers will be acquainted with the main features,¹¹⁹ it might nevertheless be appropriate to refer to the core aspects of Luhmann's theory. Its focus, in contrast to the aforementioned approaches, is on social differentiation. The question of social order is addressed via the instrument of the basic distinction between system and environment, leading to a sociological systems theory that focuses on autopoietic, self-constructing, self-regulating, and self-limiting systems, their basic elements consisting of communications, and their structures being communicated expectations.

Luhmann's work consists of a general and comprehensive theory of society. This theory contributes to the study of micro- as well as of macro-systems. It holds general relevance for all social systems because it is based on communication as the basic element that is structured equally in all kinds of social systems. Luhmann draws on Parsons's work with all its theoretical ambitions and systematic achievements, but without copying the hierarchic and norm-oriented architecture of Parsons's theory. Instead, Luhmann's sociological systems theory is characterized by a non-hierarchic model of autonomous – autopoietic – social systems that are not bound together by normative structures, but rather operate simultaneously according to their respective individual logic. The basic distinction – also giving reason to call the theory difference-oriented – is the distinction between system and envi-

118 The sociologist as a social engineer engagé can also be identified in other branches of the sociology of law, cf. BORA (2018).

119 LUHMANN (1984, 1997).

ronment. A system emerges wherever communications connect with each other by distinguishing themselves from an environment, irrespective of the question of which sort of elements can be found in the environment. This kind of distinction creates the autonomous operation of the system, its reproduction, and its demarcation, the three aspects being condensed by the term 'autopoiesis'. Luhmann, as is well known, distinguishes three types of social systems, namely interactions, organisations, and societal systems.

The differentiation of society is in Luhmann's work conceived of as *functional differentiation*. In contrast to other sociological theories, systems theory does not treat the question of social order as an issue of integration. It does not ask which elements society would be composed of, but rather it starts by asking which differences society would make use of in constituting itself. The form of societal differentiation is therefore the key to understanding particular manifestations of social order. From a historical point of view, Luhmann, in the main, distinguishes three forms, namely segmentary, stratified, and functionally differentiated societies. The latter is characterized by the formation of global systems of communication, each of which is ruled by a guiding code, such as truth, power, money, or law, for example. These functional systems use their binary codes so as to create order, i. e. differentiated order. They operate society-wide (universally) and they are each responsible for a (specific) function.

Differentiation being the central aspect of the theory, societal integration has to be understood as a subordinate concern. Functional systems create order as an order of inclusion. Inclusion, in contrast to integration, means a relationship between social systems and individuals, a specific form of observing humans in communications, namely by treating them as 'persons' and making them addressable in this way.¹²⁰ Integration, by contrast, describes the relationship between different social systems (for the following, cf. BORA 1999, 58–71). It requires only the co-evolution of structurally linked subsystems. They provide each other with output (*Leistung*). The integration of society does not rest upon a superordinate unity of society, but only on the autonomous operations of a whole variety of functional subsystems and their mutual observations. This concept does not provide a criterion for 'successful' integration, nor for any kind of preferential evolutionary devel-

120 See BORA (2016a) about responsivity as ultimate addressability.

opment. Luhmann's theory is therefore strictly non-normative in its core. Concepts such as inequality occur as secondary phenomena, based on the basic mechanisms of inclusion and exclusion. They can be observed as a societal semantics reflecting justice as a principle, reducing complexity in the system of law.¹²¹

Against this background, Niklas Luhmann's oeuvre is characterized by a long list of publications in the field of *sociology of law*. They range from – to mention only some milestones – legal theory in *Grundrechte als Institution* (1965), a general theory of procedure in *Legitimation durch Verfahren* (1969), theory of norms, and positivisation of law in *Rechtssoziologie* (1972), a critique of legal consequentialism in *Rechtssystem und Rechtsdogmatik* (1974), and systems theory of the law in *Das Recht der Gesellschaft* (1993) to the theory of form in *Die Rückgabe des zwölften Kamels* (2000). Apart from these volumes just mentioned, there is also an overwhelmingly large number of journal articles belongs to the broad variety of publications on the sociology of law, a small collection of which can be found in *Ausdifferenzierung des Rechts* (1981).

In this very rich literature, the *leitmotifs* and central thematic issues of Luhmann's socio-legal work can be summarized in at least five complexes:

(1) Firstly, Luhmann has always been concerned with *law as a functional subsystem of society*. Long before the autopoietic turn, this interest took the form of the theory of norms, which was later expanded and complemented by a general theory of society. The transition between these two phases is clearly marked by the last chapter, which was added to the second edition of "*Rechtssoziologie*" in 1983. The sociological theory of the law has always been widely characterized by the role of positive law in functionally differentiated society. Oriented toward the classical problems of the sociology of law (*Rechtssoziologie*), it has been marked out by the theory of evolution, in contrast to a more systems theoretical orientation since the 1980s.¹²² The theory of norms is the basis on which the law can be conceived of as a structure of society. Positive law and conditional programming are in the nucleus of the argumentation; they emerge as forms in functionally differentiated modernity. Finally, the book addresses the interrelation between law

121 LUHMANN (2013) ch. X, 245–249.

122 GUIBENTIF (2000) 230.

and social change, namely by a very categorical controversy with steering theories.

(2) Secondly, in many debates involving various aspects of jurisprudence and legal theory, from the early stages onward, Luhmann dealt with *theory of justice* from a sociological point of view, i. e. with the function of the semantics of justice. Gunther Teubner¹²³ picked up on this theme in a more normative way some years ago.

(3) Thirdly, Luhmann engaged critically in the debate over *legal consequentialism*. The orientation by consequences, he argued, interferes with the temporal structure of the law, which lies in stabilisation of expectations rather than in their adaptation.

(4) A fourth leitmotif is finally constituted by the question of *paradoxes* in the law and the structuring processes resulting from the law's reaction to paradoxes. This issue emerges relatively late in connection with form theory, although the basic idea had already been established much earlier, for example in Luhmann's contributions to legal theory and dogmatics.

(5) *Das Recht der Gesellschaft* (1993), finally, presents an additional aspect, namely a fundamental reference to the sociology of science. In the introduction, the argumentation refers to the implications of an imagined interdisciplinary dialogue between sociology and jurisprudence. The former as empirical science and the latter as normative science encounter each other primarily in a rather speechless way. However, they share a common interest in the scientific definition of their object. Today, as Luhmann argues, this question can only be formulated meaningfully as the search for the boundaries of the law.¹²⁴ If and insofar as they two sides could agree upon the observation by which the object itself – which is: the law itself – defines its boundaries, social systems theory would provide a conceptual framework for the dialogue because it is designed to theorize internal and external perspectives of self-describing systems and thereby provide an appropriate perspective (“*sachangemessene*” *Perspektive*).¹²⁵ The achievement of this perspective, as Luhmann argued, can be seen in the linkage between legal theory and theory of society, in other words, in a sociological reflection of the law (“*in einer gesellschaftstheoretischen Reflexion des Rechts*”).¹²⁶ This reflection is strictly

123 TEUBNER (2008).

124 LUHMANN (1993) 15.

125 LUHMANN (1993) 17.

126 LUHMANN (1993) 24.

and categorically non-normative.¹²⁷ It presupposes that the differentiation between norms and facts is an internal differentiation of the law, for which reason it cannot be applied by the reflective theory, i. e. the sociology of law.

In his posthumous book *Kontingenz und Recht*,¹²⁸ Luhmann presented the theoretical complement to the *Rechtssoziologie* from the standpoint of a sociological theory of legal thinking. What is of primary importance in this text for today's discussion is an aspect of the sociology of science, the epistemological approach in the broader sense, which demonstrates the potential of the theoretical concept and some missed opportunities in systems theory at the same time. Legal theory in this text is conceived of as intermediation between sociology on the one hand and theories of judicial decision making on the other. The general idea is to ascribe problems in decision making to systemic problems.

Being, however, complex and comprehensive, this theory comes to an epistemological shortcoming when addressing the performative limits of law vis-à-vis excessive societal complexity.¹²⁹ In cases of societal over-complexity, Luhmann argues, one can observe, a significant disengagement of legal theory with respect to questions of justice on the one hand and a tendency to externalize reflection to political planning. This interpretation is very illuminating as regards Luhmann's epistemological position. He appears to speak about the externalisation of problems to the environment in legal theory. However, if we take a closer look at legal theory, this might seem somewhat doubtful. Legal theory is strongly engaged in questions of social justice, of normativity in the subject area itself, and it takes part in debates on norm building, legislation, and legal policy – in other words, in all the issues which, according to Luhmann, are externalized to political planning. In this way, the empirical situation appears to contradict Luhmann's description to a certain degree.

This would perhaps be only a minor point if it did not have consequences for our epistemological question. If one asks, why Luhmann's argument takes such a quite surprising turn, an explanation for his framing of the issue could perhaps be found in the assumption that he hypostatizes his

127 LUHMANN (1993) 31.

128 LUHMANN (2013), originally written in 1973.

129 LUHMANN (2013) 263.

own epistemological model to legal theory.¹³⁰ If true, this would mean that he is talking more about his own legal theory than about contemporary trends in the discipline. Moreover, his underlying sociology of science, one could presume in addition, shapes his sociological theory of law, what with the sociology of science characterized by an asymmetric relationship between sociological observation and the reflective theories of the subject area. Accordingly, we find an asymmetric model in Luhmann's sociology of law, rather reluctant to adopt the problems of the environment – i. e. in the reflective theories of law – as problems relevant to sociological theory.

To summarize this point, one could say that one problem with Luhmann's sociology of law consists of the conceptual strategy of his sociology of science. The theory takes only the position of the scientific observation, which here, specifically, is the sociological observation, in contrast to the observation of the object, in other words, the law, or legal theory. Such a sociology of science could be called asymmetric in the sense that it presupposes a certain epistemological incline or gradient between sociological theory and the self-description of the object.¹³¹

Luhmann's sociology of law has received widespread attention and has been discussed intensively in both sociology and jurisprudence. It has sometimes provoked irritated reactions, often related to conceptual misinterpretations, one of which being the hypostatization of society, to mention just one example. A general focus on societal subsystems – which was not grounded in the systematic of the theory, nor had it been Luhmann's intention – often led to an over-generalisation of functional subsystems by less-informed readers. They took societal subsystems as the only message, even in

130 One might counter this argument with reference to the historical context of *Kontingenz und Recht*, claiming that legal theory – at least in jurisprudence – over many decades had been rather positivistic and abstinent from questions of justice, which had been delegated to practical philosophy. To this extent, one could argue, Luhmann had referred to the contemporary situation in 1973. I should, however, point to the prominent role that *Radbruch's Formula* played in German jurisprudence and legal practice after 1945, one of critical legal thinking, of deliberative approaches in theories of state and democracy in constitutional jurisdiction, to mention but a very few aspects. These examples serve to indicate, how strongly legal thinking has always been concerned with questions of justice. Luhmann's diagnosis of disengagement would therefore, appear to be much more due to his epistemological presuppositions than to the empirical situation in legal theory, even in historical respects.

131 BORA (2016b).

cases where Luhmann was clearly dealing with interaction systems or organisations. His article on communication about law in interactions¹³² was seemingly barely received. In a comparative mode, this also holds true for the over-stylisation of the term ‘autopoiesis’ in many readings, a perspective clearly criticized by Luhmann himself in an interview with Pierre Guibentif.¹³³

Apart from these obvious problems with the reception of a comprehensive and complex theory, the situation has improved since some of Luhmann’s works have been published in English. Moreover, a great number of scholars have adopted and developed the theory, among whom Gunther Teubner, Michael King, Christopher Thornhill, and Poul F. Kjaer may be named as prominent examples, along with the extraordinarily broad and fruitful adoption in Italian, French, Spanish, and in Latin-American academic circles connected with authors such as Marcelo Neves, Aldo Mascareño, Alberto Febbrajo, and Pierre Guibentif.

In the German-speaking world theorists of law such as Per Zumbansen, Marc Amstutz, Karl-Heinz Ladeur, Lars Vellechner, and Fay Kastner contributed to the sociological theory of law and of justice, taking inspiration from a systems-theoretical perspective. Beyond that, a number of empirical studies have been published in recent years, characterized by a rather strong theoretical orientation, which, in part, make use of Luhmann’s sociology of law, to some extents trying to develop it further.¹³⁴ Moreover, the issue of steering and shaping society that had been dismissed in Luhmann’s work has garnered broader attention.¹³⁵ Already in 1984, in a famous article on reflexive law, Gunther Teubner and Helmut Willke¹³⁶ had identified various mechanisms of regulation, such as reflection (observation of the system-environment difference and of the effects of the system’s operations), and context regulation (indirect steering). While, in this early article, the political system was in a certain way still regarded as the centre of society, in their later writings, both authors turned more strictly to the autopoietic concept.

132 LUHMANN (1981) 53–72.

133 GUIBENTIF (2000) 233.

134 BORA (1999); BORA/HAUSENDORF (2010); MÖLDERS (2011); MÖLDERS/SCHRAPE (2017); HECK (2016); KASTNER (2016); HILLER (2005); BONACKER (2003); BRODOCZ (2003).

135 BORA (2017).

136 TEUBNER/WILKE (1984).

Gunther Teubner broadly published about autopoietic law and about legal pluralism, referring to social practices as the source of positive law.¹³⁷ In this regard, he is a successor to Eugen Ehrlich, drawing deeply on the distinction between positive law and ‘living’ law. His version of sociological jurisprudence can, to a large extent, be understood against this background. In contrast to Ehrlich (and Geiger as well), Teubner focuses on societal differentiation as a core element of a sociological theory of law. In his works on sociological constitutionalism, the differentiation of societal regimes is the empirical basis for the identification of “constitutional fragments”. What makes his theory part of the discourse of differentiation is, essentially, his concept of reflection, which is closely linked with that of integration. Instead of putting integration at the centre of interest, as Parsons, for instance, did, Teubner searches out different aspects of *limitation* in the relationship between functional systems. Constitutional fragments are interpreted from this perspective as means of societal limitation of the affluent self-enforcement of functional systems. A second achievement of Teubner’s systems theory of the law consists of his attitude toward practice, which signifies a step beyond the epistemological shortcoming of systems theory, of its reluctance to deal with the role of the environment, to engage, in other words, in practical questions. Teubner deals with questions stemming from legal theory and triggering theoretical and conceptual innovations in sociological theory. As an example, his analysis of legal technologies in a complex and responsive interplay of sociological theory and legal dogmatic reflections may be mentioned.¹³⁸

Summarizing this section, one can say that, on the whole, Luhmann’s sociology of law has achieved the status of a broadly acknowledged, far-reaching and comprehensive sociological theory of law. It provides an approach to a sociologically informed legal theory, a sociological description of the internal mechanisms of the law, and also a sociological description of reflective theories in law (legal theories).

On the other hand, as I have attempted to indicate, it remained deficient in a certain sense with respect to its epistemological stance *vis-à-vis* the social environment of the theory – in other words, the practice. It is not an attempt to orient sociological theory toward legal problems, i. e. questions that arise

137 TEUBNER (1988, 1992, 1996, 1997, 1997a).

138 TEUBNER (2006, 2018).

in the environment of sociological theory. Although there are some points in the theory, where practical issues seem to be suited to trigger theoretical reflection in sociology, it, nevertheless, does not follow that path. Luhmann's work does not, after all, provide an epistemological model able to overcome the asymmetry in the sociology of science, as I have attempted to outline. It therefore offers less of a legally informed sociological theory or a reflective theory of law (legal theory) than a sociological observation of legal reflection.

At the same time, however, many systems theorists are trying to develop the theory further, only to mention the so-called critical systems theory,¹³⁹ trans-constitutionalism,¹⁴⁰ peripheral or semi-peripheral modernity,¹⁴¹ societal constitutionalism¹⁴² as a few examples. This rather broad movement also demonstrates a certain, perhaps widespread dissatisfaction with the theoretical status reached within Luhmann's work itself. Remarkably enough, this development has gone hand in hand with a significant institutional decline of the sociology of law in some countries over the last decades.¹⁴³ I shall not be further concerned with this institutional aspect. I should like instead to focus on the performance of systems theory with respect to law and diversity in the following section.

3 Law and diversity

The idea of 'diversity' points to a rather new topic in socio-legal discourse, as has already been mentioned above. Terminologically underdetermined, broader than differentiation or inequality, and simultaneously more specific, often focusing on a cultural dimension, the concept of diversity proves to be hardly comparable to any sociological theory as an analytical tool. It seems, rather, to belong in the political realm. Stemming from biology, the term originally means a multiplicity of biological species (biodiversity). Already in this context it bears a normative connotation. Diversity, as is implicitly insinuated, is preferable to homogeneity. The normative component

139 AMSTUTZ (2013); MÖLLER/SIRI (2016).

140 NEVES (2013).

141 GUIBENTIF (2014).

142 TEUBNER (2012); THORNHILL (2011, 2018); FEBBRAJO/CORSI (2016); CARVALHO (2016); HOLMES (2013).

143 BORA (2016b).

becomes more visible in the transferred figurative sense, standing for cultural heterogeneity. UNESCO, for instance, uses the term in this sense in connection with anti-discriminatory politics. In such contexts, diversity typically represents a demanding position, claiming normative inclusion. When looking from a sociological perspective for a causal relation between a possible inflation of the semantics of diversity on the one hand and functional differentiation on the other, one would perhaps think of the stellar career of concepts of subjectivity and subjective rights and their linkage with cultural diversification and societal differentiation.

These first impressions lead toward sociologically instructive problem formulations, if one disengages from the mundane use of the semantics in societal practice. The distant observation can help in treating the terminology not as an analytical category, but rather as cultivated semantics, a schematisation used by the communications in society, i. e. in the subject area of the sociological analysis. Against this backdrop, diversity as social semantics also represents, among other aspects, normative expectations, i. e. contractually stable expectations that can be attached to manifold and heterogeneous phenomena with the label of diversity. In this way, it is not diversity as a mere heterogeneity being a challenge for the law, but rather, in fact, the legally relevant normative heterogeneity, the multiplicity of normative claims, or, as Thomas Duve has called it, the *multi-normativity* of the world addressed by the law in its operation.¹⁴⁴

From a sociological perspective, two constellations of the law as dealing with multi-normativity can be distinguished: The first is the legal regulation of multiple normative phenomena standing for the routine operation of the law. The law decides cases, among which some with divergent normative claims can be found and subsumed under the general legal jurisdiction. In these instances, the law does not face systematic problems or particular challenges.

The second constellation, in contrast, can be characterized as a special challenge, insofar as it concerns competing normative systems and validity claims. One may, for instance, think of indigenous groups in Brazil applying the norm of infanticide in the case of twin births.¹⁴⁵ They are obviously following a compulsory norm in their community, be it a legal or a proto-

144 DUVE (2017).

145 NEVES (2013) 139 ff.

legal one. The positive law cannot simply regulate such cases in the mode of the aforementioned first constellation by deciding them according to the respective criminal codes because the question of the validity of the indigenous norms suggests itself. These norms claim to be relevant to the decision in the realm of positive law, and legal theory tends to acknowledge such claims.¹⁴⁶ In such cases, diversity does not simply mean cultural heterogeneity. It is instead an expression of political desire and normative aspiration. It represents a normative semantics transporting postulates of inclusion. The environment, the ‘other’, demands internal legal addressability. Diversity and distinctiveness are marked with normative coding. The legal observation of normative postulates in the context of social diversity triggers internal legal reflection. It drifts into a situation of normative validity competition, in which it addresses normative expectations in its environment that strongly compete against positive legal structures.

In this second constellation, we identify a form of normative re-entry. The distinction between law and non-law, between normatively expectable and unexpected re-enters the law via its environment and puts it to a strong communicative test. Its genuine distinction is called into question in its own language. The environment wants to have a say within the law, as it were. It claims communicative relevance.¹⁴⁷ Such a re-entry generally tends to disturb a system’s operations, thereby leading it to develop structural changes, or, in other words to learn. In this way, while the first constellation of legal regulation stands for structural stability, the second constellation of normative re-entry triggers structural change.

When asking for the significance of the suggested interpretation for the sociology of law, we can now refer to the four discourses of differentiation that have guided the analysis so far. How would they deal with the connection between diversity and law?

In the first discourse (“integration”) representing sociology as an empirical science combined with a model of social order as identity and a specific concern for the integration of society, multi-normativity does not occur as a particular aspect of theory or empirical observation. Insofar as the law serves

146 NEVES (2013) 139 ff.

147 The picture of the environment having a say, drawn by David Kaldewey, has a particular relevance with respect to the sociology of science: KALDEWEY (2013).

as the integrative mechanism of society, normative heterogeneity and competing normative claims have to be treated as objects of legal regulation.

The second discourse (“equality”), representing sociology as a normative theory combined with a model of social order as identity, and a special concern for structural inequality, would have to treat diversity in a very similar way. As far as it can be deduced from the structures of the discourse, multi-normativity is not the focus of interest, nor is the internal structure of the law. In its Marxist reading, the discourse results in social determinism, blinding itself to the possibility of heterogeneous normative worlds. Diversity would mainly occur as a question of inequality calling for justice as equality. In the Habermasian version, it is built upon the assumption of a basic normative identity of society.

The third discourse (“alterity”), representing sociology in a normative perspective combined with a model of social order as difference, would treat diversity as radical ‘otherness’ calling for regulated difference. In this way, it could be interpreted as a manifestation of the above-mentioned first constellation, the legal regulation of societal differences. A recent example can be found in the decision of the German Constitutional Court (*Bundesverfassungsgericht*) on intersexuality.¹⁴⁸ The case and the justification of the decision demonstrated an element of ambivalence between claiming difference and demanding equal treatment simultaneously, an ambivalence that had already been previously mentioned in gender theories and theories of ‘otherness’.¹⁴⁹ Against this backdrop, the third discourse also systematically underestimates the multi-normativity embedded in diversity.

The fourth discourse (“differentiation”) representing sociological theory as empirical science combined with a model of social order as difference appears principally in sociological systems theory. Its strategy is a typical socio-legal one, given its focus on the dependence of the law on its environment. At the same time, in contrast to other discourses, it takes the internal structures of the law and its autonomy into consideration. It thereby achieves external description and self-description simultaneously and integrates them into an empirical theory of law. The role of diversity in this discourse is rather prominent. The phenomenon of multi-normativity is self-evident for systems theory. It can be identified in the very foundations of the

148 Oct. 10th, 2017 – 1 BvR 2019/16.

149 TÖNNIES (1993).

sociology of law, namely Luhmann's sociology of norms,¹⁵⁰ where he put forward a general empirical theory of norms, built on the core concept of (communicated) expectation and thereby conceptually open to the phenomenon of multi-normativity.

With Luhmann's sociology of law, in other words, a sociological theory is available building on the assumption of a multiplicity of autonomously operating societal spheres or systems. They each produce their own normativities¹⁵¹ and thus create a basic multi-normativity. This constellation does not provide for trivial forms of dependence. The theory, therefore, combines internal and external perspectives and integrates systemic autonomy and system-environment relations. The complex of law and diversity is directly embedded in this constellation.

With respect to the relationship between system and environment, however, – as has already been suggested – the systems theoretical approach is open to further improvement. As regards the sociology of law, this relationship becomes visible in two forms: firstly, it concerns the epistemological level already discussed above. It calls, in other words, for conceptual strategies allowing for a more complex relation of science and practice within the architecture of the reflective theory. The point has been discussed above under the label of “the environment having a say within the law”. At this point, the theory seems to be open to significant diversification and enhancement in the future.¹⁵²

Secondly, the system-environment relationship concerns the subject level, where the law's influence on environment is at stake. Debates about the law as an instrument of societal steering and governance pervaded science and politics in the 1970s. In those days, Luhmann criticized – with convincing arguments – the whiff of naïveté in cybernetic concepts connected with judicial reforms based on “objective data”¹⁵³ and with ideas of “rational policy making” that had introduced a strong element of social engineering into the debate. In his critique, however, Luhmann always remained bound to the concepts of the 1970s. With respect to legislation, political planning, and societal steering – and implicitly societal norm building and learning

150 LUHMANN (1972).

151 BORA (2006, 2008, 2010).

152 BORA (2016b).

153 STREMPPEL (1988).

law – he more or less left his position unchanged despite theoretical and practical developments in the following decades.

On the one hand, however, since the 1970s, legal theory has made significant progress. Debates about private regimes, non-state and transnational law, emerging norm systems in the digital realm, and other phenomena have arisen. Multi-normativity, trans-constitutionalism, and multi-lateral norm formation¹⁵⁴ are much-debated issues. Legal theory and practice, in other words, do react in many ways to social change and to rearrangements in the relationship between law and its environment. In this process, the issue of exerting influence, of societal regulation, has also been the *idée directrice* in theories of law, regulation, and governance over the past decades, often hidden behind various scientific semantics, but always steering the debate.¹⁵⁵ Legal theory, therefore, has indeed adapted to changing empirical relations between the law and its environment.

The sociology of law, on the other hand, has admittedly not always been able to keep pace with these developments. The sociology of law, in close connection with aforementioned legal theories, has produced a number of innovations on the level of society and its functional subsystems, including a sociology of constitutions, that can be counted among the most innovative, creative, and sophisticated fields of sociology. Quite apart from that, however, the implications of multi-normativity remain unnoticed on the level of professions and organisations, for instance, although both fields are immediately linked with the systems-environment relations of the law. Professions are sociologically relevant with respect to the mediatory and conflict-resolving capacities of legal professions and their respective impact on extra-legal practice. In this way, and also with respect to organisations, the sociology of law is so far more or less exclusively concerned with research in courts and the judiciary (*Justizforschung*). Empirical data and theoretical concepts would, therefore, suggest a much broader and more sophisticated research programme with advanced concepts of steering and governance, innovations in reflexive law, and a stronger interest in the organisational world.

Such a socio-legal interest in organisations also illuminates the role of hybrid boundary organisations with respect to multi-normativity and the problem of normative re-entry. They often occur as intermediary institu-

154 WIELSCH (2019).

155 BORA (2014, 2015, 2017).

tions,¹⁵⁶ such as ethics councils ostensibly having the function of policy advisory bodies, but, on closer inspection, acting principally as constitutional councils. One could also mention self-regulatory bodies in various social contexts, such as science, education, or economy. Private standard setting, corporate codes of conduct, or private codifications on corporate social responsibility, as well as the wide field of social constitutions at the margins of the law could also be brought up in this respect.

Against this backdrop, the hypothesis is that such cases of regulated self-regulation or of reflexive governance must function for the law to externalize the problem of competing normative validity claims while simultaneously giving the environment influence on the law. Within the law, the mediating effect of the hybrid boundary organisations generates stability and variability at the same time. This is exactly because they are not (and cannot be) concerned with the deployment of dogmatics, such organisations inducing the production of new legal material – or at least some of their elements – generated from the plasticity of principles in their hybrid communications connected to a multiplicity – diversity – of social fields and their respective normativities. As a consequence, they enable learning processes in the law as a functional system.

These very few and rather coincidental examples can at least illuminate that diversity as a social semantics – manifesting a particular combination of demands for distinction and inclusion with legal addressability – with its aspects of multi-normativity keeps the reflection of the law discernible. In this continuous process, new distinctions and calls for inclusion can be expected, this in tandem with the law's capacity to treat multi-normativity with the instruments briefly described above and also with new tools emerging from a learning process triggered by the persisting irritation of re-entering competing validity claims.

4 Concluding remarks

The aim of the article was to give a brief account of the relevant sociological theories of differentiation, of the importance of social inequalities and of the semantics of 'diversity' with respect to the law. In doing so, the paper is intended to contribute to the comparison of European and Latin-American

156 BORA (2015).

legal thinking and to enable a relation of different national legal cultures. In pursuing this goal, four theoretical discourses of social differentiation have been used as an analytical tool. They have left their mark on sociological thinking in various manifestations for over a century. Conceptually, they are constituted by two dimensions, namely by their epistemological construction as either empirical or normative, and by their concept of the subject area of social order as either identity- or difference-oriented. The four discourses provide different approaches to the question of law and diversity in a twofold manner. Firstly, they offer various concepts of social differentiation and thereby of diversity. Secondly, they differ from each other in their respective ways of approaching the law and its relation to social differentiation.

With respect to these four discourses, the most complex and comprehensive description of the relationship between law and diversity can be found in the empirical theories of social differentiation – in other words, in the fourth discourse. In contemporary sociology, this perspective is most clearly epitomized by sociological systems theory. It provides a comprehensive, profound, and sophisticated sociological theory of the law, as, in contrast to its predecessors, it is capable of explaining the internal mechanisms of legal communication systems. Moreover, it is a genuine sociology of law focusing on the interrelations between the law and its environment. In doing so, as outlined above, it enables external observation and self-description at the same time integrating both perspectives in a coherent theoretical architecture.

Regarding the central theme of ‘diversity’, a semantics combining normative postulates for distinction and for inclusion, systems theory represents the only discourse, as I should argue, for which diversity is a deeply relevant systematic concern, insofar as it embodies the figure of multi-normativity triggering normative re-entry. The phenomenon of multi-normativity can be found at the sources of the theory, namely in its concept of norms. Luhmann’s sociology of law offers an empirical theory of norms which, as such, contains the possibility of multi-normativity. The same holds true for the figure of re-entry, which is central to the systems-theoretical fabric.

Being anything but a completed theory or a closed set of concepts, systems theory, however, has to be conceived of as an unfinished project open to future amendment. Two aspects have been highlighted in which the current state of the theory seems to be somewhat unsatisfactory. The first

concerns the epistemological position of the theory with respect to the relationship between sociological observation and the reflective theories of the subject area. The second can be found in a certain reluctance in systems theory to address phenomena of societal steering and governance, a hesitation that does not seem overly compelling with respect to the developments over these last decades.

What makes ‘diversity’ an important issue against such a background is the fact that it serves for more than keeping the law operating, as was argued above. Moreover, it has the potential to irritate socio-legal theories and to furnish them with social and conceptual complexity that will also certainly initiate further learning processes in the reflective theories of the law.

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