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Turning the State into a Household From Judicial Law to Administrative Law¹

Liesbeth Huppes-Cluysenaer

In his sociology of law Weber extensively describes the development of law from ancient times on till the Enlightenment – a period which will be called in this article the judicial state – and of law since the Enlightenment – a period which will be called the administrative state. Weber describes this development of law as a process of formalisation and rationalisation. He sees the resulting increase of formal rational law as undesirable yet in the long run unavoidable because of its functionality for economic growth.

This article investigates this claim. A core part of the argument will be based on an analysis of Weber's conception of the formal and rational character of law. It will be argued that his conception makes it impossible to arrive at a view which does justice to the rational character of law in the judicial state. This is especially problematic as Weber acknowledges how functional judicial law was for the achievement of legal certainty in interpersonal relations and how dysfunctional formal rational law.

It will be concluded that Weber situates the function of formal rational law indeed not in the achievement of legal certainty in interpersonal relations but in the representation of legal decisions as the expression of a legal order.² This representation of a legal order has just a political function, but is dysfunctional for interpersonal relations.

From the judicial to the administrative state

I borrow the concepts of the judicial state and the administrative state from Hans Kelsen's article (1941/1942) on the development of law as a social technique. In this article Kelsen has absorbed the sociology of law of Weber and the other sociologists who lived at the end of the nineteenth and the beginning of the twentieth century as part of a common knowledge about social facts. Kelsen offers therefore with this description a good starting point which I will amplify later on with more specific details from Weber's texts.

Kelsen's approach can be summarised as follows. Of the greatest importance for the development of the law is the process of centralisation. This proc-

¹ This article leans on a long lasting collaboration with G. Drosterij, who recently published his PhD-thesis: *Politics as Jurisdiction: A New Understanding of Public and Private in Political Theory*, 2008 (internal).

² See for representation Knecht (intra). His defence of this interpretation of Weber in the Weber group has convinced me.

ess is characterised by the surprising fact that the centralisation of the law-applying function *precedes* the centralisation of the law creating function. Long before special legislative organs came into existence, courts were established to apply the law to concrete cases. The law, thus applied, was customary law: law created by a specific method. The peculiarity of this method is that the applicable general legal norms are created by collaboration of all the individuals subject to the legal order. Customary law is thus a totally decentralised means of creating law, which had been for many centuries the only way of creating general legal norms. Specific to this type of law is that the judge is an autonomous organ, different from, and independent of, the parties in conflict.

The centralisation of the legislative function is characterised by Kelsen as a step forward in the technical development of law. In his eyes it is not the presence of a legislative organ which is an essential requisite for a state. It is the centralisation of the judicial and administrative, not the legislative function, which makes a primitive community a state.

In his age Kelsen observes a turn from the judicial to the administrative state. No longer only the courts are called upon to apply the laws but, to an increasing extent, the administrative authorities as well. The latter achieve their aims by compelling citizens by threat of a sanction to behave in a certain way.

This picture, sketched by Kelsen, makes it possible to formulate the central question of this article more specifically: if the legislative function is not an essential requisite for a state, why should the centralisation of the legislative function be seen as a step forward in the development of law? As will be shown in the next paragraphs, the same question pops up from Weber's description of the development of law as an increase of formal rational law.³

Weber's description of the judicial state

Weber describes the judicial state in terms which refer to the classical political theory of Aristotle. Aristotle greatly criticised Plato for understanding the state as a unity. In opposition to Plato he conceives of the state as an association, a partnership of families and clans⁴ or villages⁵. The quintessence of law is that it is a relation between more or less autonomous equals. The pacts of association between strong and equal parts make up the rule of law and this makes the state according to Aristotle completely different from a household in which 'the master must know how to direct the tasks which the slave must know how to execute'⁶.

According to Weber the judicial state had the structure of a power balance between status-groups. A status-group is a group of persons who are equal because of locality, birth, ethnicity, religion or the same occupation. These status-groups held public competences as private rights – as privileges. It is not

³ Willekens (intra) asks more or less the same question from the opposite angle taking the functionality of formal rational law at a interpersonal level for granted.

⁴ Pol. III 1280b30-40.

⁵ Pol. III 1252b30.

⁶ Pol. III 1255b35.

possible in such a situation to speak of public law, because elements of private law and public law are mixed. Weber compares the agreements between groups with the international treaties of his day. Within a status-group there was pure patrimonial power.⁷ A more unified state was generated when one group came into power which was capable of turning the autonomous *power* position of other groups into a *right* to autonomy.⁸ In the judicial state a person would normally belong to different associations of groups and would have the personal right to be treated in such an association according to the law of his group. This right made him in the judicial state a subject of law instead of a subject of power.⁹ Accordingly, when groups were incorporated in a state they kept their right to be treated according to the law of their group. This was the case both in Rome, and in most parts of Europe during the Middle Ages. The most important exception was England, where already in a very early period the king unified the law guaranteed by his power; creating this way a 'lex terrae'.

⁷ WuG (1972, for references to English-language editions, please consult the correspondence table elsewhere in this issue) pp. 414-5: 'Zwar – um bei den Beispielen zu bleiben – die Beamtenstellung entsprach in der Vergangenheit wesentlich weniger als jetzt einem freien Kontraktverhältnis als *causa*, ruhte vielmehr – wie wir später sehen werden – wesentlich mehr auf Unterwerfung unter eine ganz persönliche, familienartige Herrengewalt. Aber andere politische Akte, wie z. B. gerade die Bereitstellung von Mitteln für öffentliche Zwecke, aber auch zahlreiche andere Verwaltungsakte, waren unter den Verhältnissen des ständischen politischen Gebildes gar nichts anderes als Kontrakte zwischen den kraft ihrer subjektiven Rechte: Privilegien und Prärogativen als Glieder des politischen Verbandes zusammengeschlossenen Mächte: Fürsten und Ständen, und wurden auch rechtlich so aufgefaßt. Der Lehensnexus ist seinem innersten Wesen nach auf Kontrakten aufgebaut. Und wenn sich die Feststellungen geltenden Rechts, wie sie die *leges barbarorum* enthalten – 'Kodifikationen von Gesetzen' – nach unserer Terminologie –, oft als *Pactus* bezeichnen, so war auch dies durchaus ernst gemeint: ein wirklich 'neues' Recht konnte damals in der Tat nur durch freie Vereinbarung der Amtsgewalt mit den Dinggenossenschaften ins Leben treten'.

⁸ WuG (1972) p. 431: 'Die politische Anstalt hat freilich fast überall den Anspruch erhoben und meist durchgesetzt, daß diese Sonderrechte nur kraft ihrer Zulassung in Geltung bleiben und also auch nur soweit als sie es erlaubt. (...) Die Summe aller innerhalb eines gegebenen Gebiets oder Personenkreises geltenden Rechts war vielmehr in großen Bestandteilen durch autonome Usurpationen verschiedener gegeneinander selbständiger Einverständnissgemeinschaften oder vergesellschafteter Einungen geschaffen und fortgebildet, zwischen denen der stets erneut erforderliche Ausgleich entweder durch gegenseitige Kompromisse geschaffen oder durch die Macht überragender politischer oder kirchlicher Gewalten oktroyiert wurde'.

⁹ WuG (1972) pp.431-2: 'Auch das römische Recht war im Römerreich zunächst ein Recht der römischen Bürger und im Verkehr mit den zum Reich gehörigen, ihm unterworfenen Nichtbürgern kommt es teils nicht zur Anwendung. (...) Die Angehörigen des mittelalterlichen imperium dagegen hatten den positiven Anspruch, nach dem Recht des Stammes überall beurteilt zu werden, nach dem zu leben sie 'bekennen'(profiteri). Der Einzelne trägt diese Rechtskonfession mit sich herum. Das Recht ist nicht eine 'lex terrae' wie sie das englische Recht der Königsgenossen alsbald nach der normannischen Eroberung wurde – sondern ein Privileg eines Personenverbandes'.

In Rome a 'jus gentium' was generated alongside the 'jus civile' of the different groups. With the exception of specifically England and Scandinavia the reception of Roman law did the same job of unification in Europe which was carried out by the 'jus gentium' in the Roman Empire.

Weber explains how this acceptance took place. Until the fifteenth century the dissemination of Roman law was primarily an Italian business (of the glossators, ultramontani and postglossatores, EAHG), which influenced via the schooling of scientists at the Italian universities the rest of Europe. In this first period the new interest in and knowledge of Roman law imported only some logical elements into the practice of law. From the fifteenth century onwards more and more juridical professionals with a university schooling in Roman law entered the courts in Europe.

To be able to give Roman law practical application in the completely different setting of Europe it had to be stripped of its specific local characteristics of the classical period. This meant a stripping down of Roman – classical – law to its pure abstract form.¹⁰ This abstract Roman law came to be known as 'jus commune' (Gemeinrecht). Next to it, especially in the field of family law and the law of estates, local law stayed in force simultaneously.

The specific method (*usus modernus pandectarum*) of Roman law introduced the idea that what a jurist cannot think does not exist, or what cannot be reduced to a juridical question, cannot be brought into court. Although this idea was already inherent in Roman law, its tendency was heavily reinforced by the fact that with its dissemination a law was introduced which was not adapted to local problems and issues. The *content* of the 'jus commune' was therefore not at all of practical relevance to the citizens. The logical element made this 'jus commune' – qua content – an alienated type of law, with the result that the old medieval ritualistic forms of law were often – even in the field of commercial law – kept in use because of their effectiveness. 'Jus commune' was primarily

¹⁰ WuG (1972) pp. 491-2: 'Um überhaupt rezipiert werden zu können, mußten – wie namentlich Ehrlich mit Recht betont – die römischen Rechtsinstitute aller Reste nationaler Gebundenheit entkleidet und gänzlich in die Sphäre des logisch Abstrakten erhoben, das römische Recht zum 'logisch richtigen' Recht schlechthin verabsolutiert werden. (...) Vor allem aber gewann jetzt der Satz, daß was der Jurist nicht denken kann, auch rechtlich nicht existiert, wirklich praktische Bedeutung. Bei den antiken Juristen hatte, zufolge der historisch bedingten analytischen Natur des römischen Rechtsdenkens, die eigentlich konstruktive Fähigkeit wenn nicht gefehlt, so doch eine geringe Bedeutung gehabt. Jetzt, bei der Übertragung dieses Rechts auf ganz fremdartige, der Antike unbekannte Tatbestände trat die Aufgabe: den Tatbestand widerspruchsfrei juristisch zu 'konstruieren', fast allein herrschend in den Vordergrund und damit wurde die heute vorherrschende Auffassung des Rechts als eines in sich logisch widerspruchsfrei und lückenlos geschlossenen Komplexes von 'Normen', die es 'anzuwenden' gilt, allein maßgebend für das Rechtsdenken. Bei dieser spezifischen Art von Logisierung des Rechts waren aber keineswegs, wie bei der Tendenz zum formalen Rechts an sich, Bedürfnisse des Lebens, etwa der bürgerlichen Interessenten nach einem 'berechenbaren' Recht entscheidend beteiligt'.

of internal interest to the class of juridical professionals, which could keep its business limited to their own group by means of technical formalities.¹¹

It was not until the era of the fully developed 'enlightened despotism' that this logical 'jus commune' was overcome. Weber describes in very negative words the law which was created by the Prussian codification (1794): patriarchal, moralist in its care for social welfare, doing away with all juridical technicalities, striving for a pure substantive justice. By the use of simple language, the law was designed to instruct not only officials but also the laymen about their rights and duties. It was a top down model of law, in which only the codification was accepted as a legitimate source of law.

This view on law nullified all customary law.¹² The wish that the law should be simple and clear for the layman, in combination with a practice of thinking in terms of Roman law, produced a type of law which was very detailed and at the same time lacked legal clarity and conceptual preciseness. Notwithstanding the many deviations from Roman law and the German translation of Latin

¹¹ WuG (1972) p. 426: 'Daß so viele unserer spezifisch kapitalistischen Rechtsinstitute mittelalterlichen und nicht römischen Ursprungs sind – obwohl doch das römische Recht in logischer Hinsicht wesentlich stärker rationalisiert war als das mittelalterliche – hat zwar auch einige ökonomische, daneben aber verschiedene rein rechtstechnische Gründe. Die Denkformen des okzidentalen mittelalterlichen Rechts: seine Auffassung z. B. der Urkunde nicht rein logisch als eines rationalen Beweismittels, sondern rein anschaulich (ursprünglich magisch) als eines sinnlichen 'Trägers' von Rechten – eine Art von juristischem 'Animismus' – (...) diese 'Rückständigkeiten' der logischen und staatsanaltlichen Rechtsentwicklung gestatteten dem Geschäftsverkehr die Entwicklung eines weit größeren Reichtums von praktisch brauchbaren rechtstechnischen Schemata, als sie dem weit mehr logisch und technisch-politisch rationalisierten römischen Recht zugänglich waren.' p. 492: 'Sondern es waren interne Denkbedürfnisse der Rechtstheoretiker und der von ihnen geschulten Doktoren: einer typischen Aristokratie der literarischen 'Bildung' auf dem Gebiet des Rechts, von welchen jene Entwicklung getragen wurde'.

¹² WuG (1972) pp. 492-3: 'Dabei spielte zunächst der allgemeine Rationalismus der Bürokratie in ihrer selbstherrlichsten Entfaltung und ihrem naiven Besservissen die entscheidende Rolle. Die im Kern patriarchale politische Herrschaft hat den später zu erörternden Typus des Wohlfahrtsstaats angenommen und schreitet unbekümmert über das konkrete Wollen der Rechtsinteressenten ebenso wie über den Formalismus des geschulten juristischen Denkens hinweg. Dies fachmäßige Denken möchte sie am liebsten gänzlich unterdrücken. Denn das Recht soll seiner fachjuristischen Qualität entkleidet und so gestaltet werden, daß es nicht nur die Beamten, sondern vor allem auch die Untertanen über ihre Rechtslage ohne fremde Beihilfe erschöpfend *belehrt*. (...) Gerade umgekehrt wie im ständischen Kosmos 'subjektiver Rechte' ist das 'objektive Recht' hier vorwiegend ein Kosmos von Rechtspflichten: die Universalität der 'verdammten Pflicht und Schuldigkeit' ist die beherrschende Qualität der Rechtsordnung, deren hervorstechendes Merkmal ein systematischer Rationalismus nicht sowohl formaler, als vielmehr, wie in solchen Fällen immer, materialer Art bildet. Wo das material 'Vernünftige' gelten will, hat das bloß faktisch für Recht Gehaltene zu weichen. Daher vor allem das 'Gewohnheitsrecht'. Alle modernen Kodifikationen bis herab zum ersten Entwurf eines bürgerlichen Gesetzbuchs haben ihm den Krieg erklärt'.

terms, this law still stayed tightly knotted to Roman law. Despite its striving for explicitness, clarity was obscured by the fact that the code took as a point of departure the practical relations of life and thus frequently treated the same legal institution at different places in the code. The principle of *stare decisis* created unity, although the code itself did not. This principle developed in Prussia nearly as strongly as in England.

The Prussian code created a situation in which the academic discussion had no longer any practical value. Instead, a new type of scientific study of law (*Begriffsjurisprudenz*, EAHC) originated, which was oriented towards the true historical knowledge of either Roman law or local law. Hence, 'jus commune' itself was not studied any longer, but how Roman law had historically 'really' developed. Roman law lost its practical adequacy. The scientists who studied local law did not achieve practical and adequate knowledge, since they were primarily interested in the irrational (ritual and mythical) forms of local law. Only if economic interests were pressing – in commercial law – a more scientific system of codified law was reached.

Conceptual confusion of 'formal rational law'

The theoretical framework used by Weber in par. 4¹³ of his *Sociology of Law* for the description of the formal and rational qualities of law in the judicial stage consists of two axes: on the one hand the difference between empirical (inductive, from practice) and theoretical (deductive, from system), and, on the other hand, the difference between formal (process form) and substantial (process content). It is important to note, that this theoretical framework is different from the theoretical framework Weber works out in the last two pages of paragraph 1¹⁴ of the same chapter. The set of definitions of paragraph 1 is appropriate for the description of administrative law, but not for the description of the judicial law.¹⁵ I have put Weber's set of definitions in a scheme to illustrate his conceptual confusion (see below).

According to the framework exposed in par. 4 the development of law involves a process of formalisation and a process of rationalisation. Formalisation primarily takes place by the organisation of court-procedures. When a person can go to court just to tell his story and ask for justice, there is Kadi-justice¹⁶ according to Weber. Formalisation is reached when a person who wants to go to court is forced to analyse his case in the specific terms of a juridical framework. Such formalisation can (only) be reached through the obligation to have a professionally schooled person to act as representative at court or by way of the obligatory use of specific process forms for a presentation of a case in court. In the whole of Europe, including England, this formalisation was taking place,

¹³ WuG (1972) pp. 455-467.

¹⁴ WuG (1972) pp. 386-396.

¹⁵ There is an interesting parallel in Knecht (intra) 'To understand the open spaces in the lower part of the scheme, it is necessary to keep in mind that Weber has chosen for a conceptualisation in terms of command-obedience relations'. See also the related open space in the scheme of Droosterij (2007).

¹⁶ WuG (1972) p. 461.

and according to Weber, this development was one of the chief factors of economic growth.

A rationalisation of law takes place when the search for justice in individual cases can be deduced from a system of law. A system of law can, according to Weber, neither develop inductively from practice nor deductively from traditional unassailable sacred norms. Rationalisation is for Weber the combination of a deductive and inductive reasoning: it is the logical elaboration of cases and decisions, which play a role in the actual practice of law. Weber's concept of formal rational law is defined as the pure form of such a combination of deductive and inductive reasoning. Through the logical elaboration of cases and decisions the concepts which are used in the formulation of case-situations and decisions are analysed. This leads to a detailed insight into the relevant elements of the definition of these concepts. Out of these elements new abstract concepts then are formulated, which are generally applicable¹⁷. These abstract concepts can then be arranged into a system.

The problem of induction is, according to Weber, that professional practitioners are only interested in the development of schemes for contracts and claims, which are adequate for standardised use. They are oriented at techniques like, fictions and analogies, to be able to fit new cases in the same schemes or they act upon their own interests while playing with words and extending their meanings. These professional interests motivate them to resist rationalisation.¹⁸ The problem of deduction is the unassailability of the norms. This leads either to a systematic arrangement which is devoid of practical utility or to an application of the sacred truth to practical problems by re-interpretation of the norms instead of by systematic arrangement of legal concepts which refer to an empirically existing legal order.

Specific to Roman law is its high degree of formalisation, made possible through a very strict system of process instruction which formulates for judges under which conditions – judicial and factual – they have to accept or reject a claim as valid¹⁹. The use of the wrong process form would lead to a rejection of

¹⁷ Weber calls this formation of new concepts 'synthetisch-konstruktiv' in WuG (1972) p.395 and p. 463.

¹⁸ WuG (1972) pp. 456-7: 'Die Rechtspraxis erstrebte aber auch an sich nicht rationale Systematik, sondern die Schaffung von praktisch brauchbaren, an typisch wiederkehrenden Einzelbedürfnissen der Rechtsinteressenten orientierten Schemata von Kontrakten und Klagen. (...) Aus der ihr immanenten Entwicklungsmotiven geht ein rational systematisiertes Recht, oder auch nur in begrenztem Sinn eine Rationalisierung der Rechts überhaupt, nicht hervor. Denn die Begriffe, die sie bildete, waren an handfesten, greifbaren, der Alltagserfahrung anschaulich geläufigen und in diesem Sinn formalen Tatbeständen orientiert, welche sie tunlichst nach äußeren eindeutigen Merkmalen gegeneinander abgrenzten und durch die vorhin erwähnte Mittel nach Bedarf erweiterte. Nicht aber waren sie Allgemeinbegriffe, welche durch Abstraktion vom Anschaulichen, durch logische Sinndeutung, durch Generalisierung und Subsumtion gebildet und syllogistisch als Normen angewendet wurden (...) Eine rationale Rechtsschulung und Rechtstheorie aber entsteht aus diesem Zustand heraus an sich überhaupt nicht'.

¹⁹ WuG(1972) p. 463: 'Speziell die Zerlegung der prozessualen Fragestellung und damit auch des rechtsgeschäftlichen Formalismus in die logisch 'einfachsten'

the claim. Roman law arrives at clear process instruction via a precise analytic reasoning.

According to Weber, Roman law however missed a *systematic* character: it is at case-level substantive in a subjective sense. The systematic work of Gaius is typified by Weber as the best performance of systematisation to be found in Roman law. But the status of Gaius writings is compared by Weber with the status of a reader used by students, written by a teacher who had in his age no authority at all. On the whole, the writings of influential practitioners in Roman law are typified by Weber as collections of decisions with a very low grade of systematisation.

Notwithstanding the differences between countries concerning the measure of formalisation and abstractness of thought, the same pattern of formalisation and lack of systematisation is to be found in the whole of Europe (including England) until the end of the eighteenth century.

Weber describes Roman law simultaneously as rational because of a high grade of analytic reasoning in the development of process-instructions, and irrational, because of the low grade of systematic elaboration of case-decisions. This conceptual confusion appears also in the set of definitions given by Weber at the end of the first paragraph in his *Sociology of Law*. Putting Weber's conceptual confusion into a scheme can only be done by keeping in mind that the categories 'formal rational' (A) and 'formal irrational' (B) are not defined in a mutually exclusive way. Formal irrational law (B) refers to the way the process is organised and formal rational law (A) refers to the way justice is reached. If one takes B as point of departure, Roman law should be called formal rational (and substantial-irrational); if however one takes A as point of departure, Roman law should be called irrational, because it does not derive its decisions from a system of law. Weber clearly distinguishes between formal (procedural) irrational law and substantial (the content of decisions) irrational law, but the concept of formal rational law refers to the logical elaboration of decisions about procedural and substantive aspects of cases.²⁰ Formal irrational law

Tatbestände. Ein Prozeß nur über eine Frage, über dieselbe Frage nur ein Prozeß; ein Rechtsgeschäft nur über eine Sache, ein Versprechen nur über eine Leistung, daher nur einseitig usw.: die Zersetzung der plastischen Tatbestandskomplexe des Alltagslebens in lauter juristisch eindeutig qualifizierte Elementarakte ist in der Tat ganz unverkennbar die eine und methodisch überaus folgenreiche Tendenz gerade des alten Zivilrechts. (...) Diese Tendenz zur Analytik aber entspricht der ganz urwüchsigen Behandlung der rituellen Pflichten innerhalb der national-römischen Religion auf das genaueste'.

²⁰ WuG (1972) pp. 395-6: 'Irrational sind sie formell dann, wenn für die Ordnung von Rechtsschöpfung und Rechtsfindungsproblemen andere als verstandesmassig zu kontrollierende Mittel angewendet werden, z. B. die Einholung von Orakeln oder deren Surrogaten. Materiell sind sie irrational insoweit, als ganz konkrete Wertungen des Einzelfalls, seien sie ethische oder gefühlsmässige oder politische, für die Entscheidung maßgebend sind, nicht aber generelle Normen. 'Rationale' Rechtsschöpfung und Rechtsfindung können wieder in formelle oder in materieller Hinsicht rational sein. Formell mindestens relativ rational ist jedes formale Recht. 'Formal' aber ist ein Recht insoweit, als ausschließlich eindeutige generelle Tatbestandsmerkmale materiellrechtlich und prozessual beachtet werden. Dieser

means that non rational means like oracles have a decisive meaning for the *arrangement* of the creation of justice. Formal rational law is however conceptually developed as a subcategory of the rational ways of *creating and finding* law, by following the words of the law (strictly formal), by the logical elaboration of the meaning of the words of law (softly formal) or the deviation of formal characteristics by valuating other principles and goals (loss of formality).

Within this categorisation, law can be more or less formal according to the grade in which it admits substantial elements via a deviation from the words of the law, that is, by abstraction or by referring to goals. The less formal it becomes, the more substantial it is, but in both cases it remains rational. Roman law, which arranges conflicts of law into process forms by way of rational reasoning, thus *cannot* be placed in this scheme. Roman law could be called formal irrational and substantive-irrational. Yet at the same time Weber clearly typifies Roman law as being rational.²¹

Formalismus aber kann wieder doppelten Charakter haben. Entweder nämlich können die rechtlich relevanten Merkmale sinnlich anschaulichen Charakter besitzen. Das Haften an diesen äußerlichen Merkmalen: z. B. daß ein bestimmtes Wort gesprochen, eine Unterschrift gegeben, eine bestimmte ein-für allemal in ihrer Bedeutung feststehende symbolische Handlung vorgenommen ist, bedeutet die strengste Art des Rechtsformalismus. Oder die rechtlich relevanten Merkmale werden durch logische Sinndeutung erschlossen und danach feste Rechtsbegriffe in Gestalt streng abstrakter Regeln gebildet und angewendet. Bei dieser logischen Rationalität ist zwar die Strenge des anschaulichen Formalismus abgeschwächt, da die Eindeutigkeit des äußeren Merkmals schwindet. Aber der Gegensatz gegen die *materiale* Rationalität ist damit gesteigert. Denn diese letztere bedeutet ja gerade: daß Normen anderer qualitativer Dignität als logische Generalisierungen von abstrakten Sinndeutungen auf die Entscheidung von Rechtsproblemen Einfluß haben sollen: ethische Imperativen oder utilitaristische oder andere Zweckmäßigkeitsregeln oder politische Maximen, welche sowohl den Formalismus des äußeren Merkmals wie diejenigen der logischen Abstraktion durchbrechen. Eine spezifisch fachmäßige juristische Sublimierung des Rechts im heutigen Sinne ist aber nur möglich, soweit dieses formalen Charakter hat. Soweit der absolute Formalismus des sinnlichen Merkmals reicht, ist sie auf Kasuistik beschränkt. Erst die sinndeutende Abstraktion läßt die spezifisch systematische Aufgabe entstehen: die einzelnen anerkanntermaßen geltenden Rechtsregeln durch die Mittel der Logik zu einem in sich widerspruchsfreien Zusammenhang von abstrakten Rechtssätzen zusammenfügen und zu rationalisieren’.

²¹ WuG (1972) pp. 393-4: ‘(...) die Rechtsfindung nicht durch Anwendung von generellen Rechtsnormen auf den konkreten Fall, durch dessen Subsumtion unter die Norm also (...) ist bei aller irrationalen Rechtsfindung der Fall, welche, wie wir gesehen haben, die ursprüngliche Art der Rechtsfindung überhaupt darstellt und, wie wir noch sehen werden, die ganze Vergangenheit, außerhalb des Anwendungsgebiet des römischen Rechts teils gänzlich, teils mindestens in Rudimenten beherrscht hat’.

The logically muddled table of Weber's formal-substantial and rational-irrational dichotomies WuG 1972 (pp. 394-6)		
	A. Formal Law Rational Justice as law is substantially and procedurally based on well-founded rules, which are derived from the logical elaboration of legal rules	B. Formal Law Irrational Arrangement of the creation of justice based on unfounded procedures
1. Substantial Law Irrational Justice (Rechtsschöpfung und -findung) per case, based on expediency	Logically excluded in Weber, because A and 1 both refer to substantive law, the one calling it irrational and the other rational.	Role for mystical rituals; proto-judicial state
2. Substantial Law Rational Justice (Rechtsschöpfung und -findung) aligned to general goals (ethical, utilitarian, political)	Administrative state: Law is the middle between strict formal law and a loss of formality	Sacral law not excluded logically because B refers to ordering and 2 to substantive decisions.

The table shows this ambiguity. To create a scheme in which the rational character of Roman law could find its place, would require the insertion of the differentiation between process law and substantive law, but as Weber admits, the Romans did not make the difference between process form and process content in the same way as the modern theory of law does.²²

Rationalisation as an unavoidable tendency

From his description of law in the judicial state, it becomes clear that Weber has a high appreciation for the analytic quality of Roman law as process-instruction and a high appreciation of the standardised formal (even sometimes ritual²³) schemes for contracts which are developed on a local base. At the same time he is convinced that the increase of formal rational law is unavoidable, which will result in an increasing integration of all people in one compulsory institution, resting on legal equality. Weber describes this tendency as a rationalisation.²⁴ At the same time, however, Weber's description (above par. 1.) of

²² WuG (1972) p. 394: 'In der Tat scheidet daher die ältere römische Rechtssystematik Prozeßrecht und Privatrecht nicht in der Art wie wir'.

²³ See footnote 11.

²⁴ WuG (1972) p.382: 'Das zunehmende Eingreifen gesetzter Ordnungen aber ist für unsere Betrachtung nur ein besonders charakteristischer Bestandteil jenes Rationalisierungs- und Vergesellschaftungsprozesses, dessen fortschreitendes Umsichgreifen in allem Gemeinschaftshandeln wir auf allen Gebieten als wesentlichste Triebkraft der Entwicklung zu verfolgen haben werden'. (433): 'Die zunehmende Einordnung alle einzelnen Personen und Tatbestände in eine, heute wenigstens, prinzipiell auf formaler 'Rechtsgleichheit' beruhende Anstalt ist das Werk der beiden großen rationalisierenden Mächte: der Markterweiterung einerseits, der Bürokratisierung des Organhandelns der Einverständnissgemeinschaften anderseits'.

the different attempts to codify or systematise law leaves the impression of resulting either in a law without any practical relevance or in a law which misses technical quality.

According to Weber, the driving forces in the increase of formal rational law are three types of interests which were central in the transition from privileges to 'reglements': the interests of the king, of the public servants and of the bourgeois. The king wanted to favour and attach to himself the rich bourgeois as they served his fiscal and political interests. These bourgeois in their turn asked for enforceable objective norms which would guarantee their rights.²⁵ This did not always imply an increase of formal rational law, however. There is a type of political capitalism, like in the Mercantilist period (and again in Weber's own time) in which the monopolies of large-scale 'entrepreneurs' rested upon princely privileges which often enough infringed the existing rights of other groups.²⁶ The interests of the king and the public servants were simultaneously served by a unified law, because it made the public servants employable throughout the whole country. This suited the interests of the king, but at the same time heightened the career options of the public servants.²⁷

Every time Weber stresses the need for a calculable law for economic development, he gives as an example the guarantee for property and contract. Such a guarantee is primarily created by the possibility of going to an independent judge whose decision will be enforced. A codification of laws which prescribes the appropriate behaviour is not the means by which such a guarantee is achieved.²⁸

²⁵ WuG (1972) p.486: 'Dies ist namentlich der Fall, soweit es sich um die Beseitigung der Vorherrschaft ständischer Privilegien und ständischen Charakters der Rechtspflege und Verwaltung überhaupt handelt. Diesen gegenüber gingen ja die Interessen an steigender Rationalität und das heißt in diesem Fall: steigender Herrschaft formaler Rechtsgleichheit und objektiver formaler Normen mit der Machtsinteressen der Fürsten gegenüber den Privilegierten Hand in Hand. Das 'Reglement' an Stelle des 'Privilegs' dient beide.'

²⁶ WuG (1972) p.487: 'Der politisch und monopolistisch orientierte und selbst noch der frühmerkantilistische Kapitalismus kann so zum Interessenten an der Schaffung und Erhaltung der patriarchalen Fürstenmacht gegenüber Ständen und auch gegenüber dem bürgerlichen Gewerbestand werden, wie er es in der Zeit der Stuarts war und wie er es heute auf breiten Gebieten wieder zunehmend geworden ist und noch weiter werden wird.'

²⁷ WuG (1972) p. 487: 'Der Fürst will 'Ordnung'. Und er will 'Einheit' und Geschlossenheit seines Reichs. Und zwar auch aus einem Grunde, der sowohl technischen Bedürfnissen der Verwaltung wie persönlichen Interessen seiner Beamten entspringt: die unterschiedslose Verwertbarkeit im ganzen Gebiet seiner Herrschaft wird durch Rechtseinheit ermöglicht und ergibt erweiterte Karrierechancen.'

²⁸ WuG (1972) p.486: '(...) eine nach festen Verwaltungsreglement verfahrende Streitschlichtung bedeutet noch nicht das Bestehen garantierter 'subjektive Rechte' (...) bürgerliche Interessenten, welche ein eindeutiges, klares, irrationaler Verwaltungswillkür ebenso wie den irrationalen Störungen durch konkrete Privilegien entzogenes, vor allem die Rechtsverbindlichkeit von Kontrakten sicher garantie-

To Weber, the most important contribution of law to economic development is the creation of models or schemes for contracts. This contribution of law does not rest on the prescription and control of behaviour by enforcement, but on a general acceptance of such forms as functional. These forms will be generally accepted as relevant standardisations when they show how complex forms of cooperation can be executed in a way which treats the relevant interests of the different participants in an equal manner. This is a technical and cognitive function of law and it was, for example, in this respect that local law was more productive than the 'jus commune'.²⁹

There can be other interests in the unambiguous determination of unified law involved than the already mentioned interests of king, public servants and bourgeois. Revolutions or colonisations can lead to new codes, as well. Furthermore, the unification of law can also be reached by academic systematisation, instead of codification. To Weber, such different forms of unification are nothing more than a compilation of existing law, however, which only marginally decide political conflicts.³⁰

Although Weber makes thus several attempts to explain why the transition from the judicial state to the administrative state is a technical and rational improvement, in the end he fails to do so. Indeed, Weber even states explicitly that there is, theoretically speaking, no need for a guarantee by state-law (administrative law, EAHC) for any economic phenomenon.³¹ In all European countries, however, an seemingly inescapable increase in codified law can be observed. So, again, what is the explanation?

The nearest Weber comes to an explanation is by referring to a rationalisation of the economy. The fragmentation of traditions has weakened the moral

rendes und infolge alle dieser Eigenschaften *berechenbar* funktionierendes Recht verlangen müssen'.

²⁹ WuG (1972) p.426: 'Die rationalen rechtstechnischen Verkehrsschemata, welchen das Recht seine Garantie gewähren soll, müssen vielmehr ganz ebenso wie gewerblich-technische Manipulationen erst einmal 'erfunden' werden, um in den Dienst aktueller ökonomische Interessen treten zu können. Daher ist die spezifische rechtstechnische Eigenart einer Rechtsordnung, die Art der Denkformen, mit denen sie arbeitet, für die Chance, daß ein bestimmtes Rechtsinstitut in ihrer Mitte erfunden werde, von weit erheblicher Bedeutung, als man oft anzunehmen pflegt. Ökonomische Situationen gebären neue Rechtsformen nicht einfach automatisch aus sich, sondern enthalten nur eine Chance dafür, daß eine rechtstechnische Erfindung, wenn sie gemacht wird, auch Verbreitung finde'. See also footnote 11.

³⁰ WuG (1972) p.489: 'Auf anderem Weg als durch fürstliche Kodifikation pflegt 'Systematik' in das Recht nur durch didaktisch-literarische Produkte, namentlich durch 'Rechtbücher' hineingebracht zu werden, die dann nicht selten zu einem kanonischen, die Rechtspflege ebenso wie ein Gesetz beherrschenden Ansehen gelangen. Eine systematische Rechtsaufzeichnung pflegt aber in beiden Fällen zunächst nur als Zusammenstellung bereits geltenden Rechts zur Beseitigung entstandener Zweifel und Konflikte aufzutreten'.

³¹ WuG (1972) p.384: 'Die 'staatliche' Garantie der Rechte ist rein theoretisch betrachtet für keines grundlegende ökonomische Erscheinung unentbehrlich.

foundations on which the economic life was based in the judicial state. The new institutionalization of the market asks for a State monopoly of enforcement.³²

The social democratic view in Weber's days claimed to recognise only the validity of abstract laws to regulate such a monopoly. Weber explains however the dangers of such a claim to end all power: the power of private property and the power of personal authority. The market is according to this view the only force which is recognised. It is claimed that the economic laws are unavoidable³³. Weber despises the social democratic view in spite of the seemingly neutrality of the propagated ideas. It can lead to an increase of force in the form of discipline, enforced by law and executed by a small group.³⁴

Again, it seems that Weber's attempts to explain the tendency to centralisation and unification of law by its economic functionality are unsatisfactory. The reader is left with the question why formal rational law is needed. What will be the practical influence of such law apart from its positive effects on the careers of public servants?

³² WuG (1972) p.385: 'Soweit auch das eigene Interesse an der Vertragslegalität und die gemeinsamen Interessen der Besitzenden am gegenseitigen Besitzschutz reichen und so stark Konvention und Sitte den Einzelnen in gleichen Sinne auch heute noch bestimmen, so hat doch der Einfluß dieser Mächte infolge der Erschütterung der Tradition (...) auch außerordentlich an Bedeutung eingebüßt (...) Die universelle Herrschaft der Marktvergesellschaftung verlangt einerseits ein nach rationalen Regeln kalkulierbares Funktionieren des Rechts. Und andererseits begünstigt die Marktverbreitung, die wir als charakteristische Tendenz jener kennen lernen werden, kraft der ihr immanenten Konsequenzen die Monopolisierung und Reglementierung aller 'legitimen' Zwangsgewalt durch eine universalistische Zwangsanstalt, durch die Zersetzung aller partikulären, meist auf ökonomischen Monopolen ruhenden ständischen und anderen Zwangsgebilde'.

³³ Weber (1973) explains in 'Sinn der Wertfreiheit' that economic laws are not inescapable in the sense that they dictate behaviour, but only in the sense that given certain goals they dictate behaviour

³⁴ WuG (1972) pp.454-5: 'Eine (demokratisch) sozialistische Ordnung (im Sinne der heute gangbaren Ideologien) lehnt den Zwang nicht nur in der Form ab, wie er auf Grund des privaten Besitzes durch den Marktkampf geübt wird, sondern andererseits auch den direkten Zwang kraft rein persönlicher Autoritätsansprüche. Sie könnte nur die Geltung vereinbarter abstrakter Gesetze (...) kennen. Die Marktgemeinschaft ihrerseits kennt formalen Zwang kraft persönlicher Autorität formal ebenfalls nicht. Sie gebietet an seiner Stelle an sich heraus eine Zwangslage – und zwar diese prinzipiell unterschiedslos gegen Arbeiter und Unternehmer, Produzenten wie Konsumenten – in der ganz unpersönlicher Form der Unvermeidlichkeit, sich den rein ökonomischen 'Gesetzen' anzupassen. (...) Die Entleerung von allen normalen gefühlsmäßigen Inhalten autoritativer Beziehungen aber hindert dabei nicht, daß der autoritäre Charakter des Zwangs dennoch fortbesteht, und unter Umständen sich steigert. Je umfassender die Gebilde, deren Bestand in spezifischer Art auf 'Disziplin' ruht: die kapitalistischen gewerblichen Betriebe, anwachsen, desto rücksichtsloser kann unter Umständen autoritärer Zwang in ihnen geübt werden und desto kleiner wird der Kreis derjenigen, ihn deren Händen sich die Macht zusammenballt, Zwang dieser Art gegen andere zu üben und diese Macht sich durch Vermittlung der Rechtsordnung garantieren zu lassen.

These questions become even more pressing when one turns to Weber's description of law in sociological terms. Weber describes³⁵ how social regularities which generate from want and instinct will become in certain conditions the source for social norms or law. Their change follows from these same sources. Hence, a social morality is sketched by Weber as a functional set of norms which works without legal enforcement. The fact, for example, that partners in business favour their relation and want it to last, is one of the most important reasons for contract-partners to follow the requirements of this morality.³⁶ By referring to functional motives as central to behaviour, Weber replaces morality by utility. But if he is serious about this, why then did the fragmentation of traditions take place to which Weber refers as the main cause for the rationalisation of the modern economy.

To continue this paradox between, on the one hand, a natural and functional growth of social morality, and on the other, a perceived fragmentation of traditions, which makes codified law necessary, Weber states that law cannot prescribe social morality: either it follows the morality (and is more or less superfluous) or it has little chance to be implemented.³⁷ Even drastic forms of enforcement will not work if people oppose a certain regulation.

Nevertheless, Weber thinks that law *can* create social regularities.³⁸ He recognises, for example, the possibility to train people into docility and thinks that this kind of education pertaining to the codified law has actually increased. In contrast however Weber evaluates in the domain of economy the effect of codified law increasingly weaker. The reason for this is that the capacity to influence economic action is dependent on the market. People will not give up their chances for profit just to follow the law.³⁹

³⁵ WuG (1972) pp.374-381.

³⁶ WuG (1972) p.379: 'Denn der Tauschende kann sich z.B. beim Tausch auf das der Neigung zum Bruch des Versprechens entgegenwirkende egoistische Interesse des Gegenparts an der künftigen Fortsetzung von Tauschbeziehungen mit ihm verlassen'.

³⁷ WuG (1972) p. 374 : 'Der ökonomische Bedürfnisstand insbesondere, die Grundlage alles 'wirtschaft', ist in der umfassendsten Weise, durch bloße 'Sitte' bestimmt (...) und folglich auch alles Gemeinschaftshandeln, dass der Rechtszwang da, wo er aus einer 'Sitte'(z.B. durch Berufung auf das Übliche) eine 'Rechtspflicht' macht, ihrer Wirksamkeit oft fast nichts hinzufügt und, wo er sich gegen sie wendet, sehr oft in dem Versuch, das faktische Handeln zu beeinflussen, gescheitert ist'.

³⁸ WuG (1972) p. 382: 'Faktische Regelmäßigkeiten *des* Verhaltens ('Sitte') können, sahen wir, Quelle der Entstehung von regeln *für* das Verhalten ('Konvention', 'Recht') werden. Ebenso aber umgekehrt.'

³⁹ WuG (1972) pp. 383-4: 'Die Erziehung zur Fügsamkeit in das jeweils geltende Recht ist im allgemeinen mit steigender Befriedung stark gestiegen. Also müßte, scheint es, auch die Erzwingbarkeit des Wirtschaftshandeln prinzipiell gestiegen sein. *Trotzdem* aber ist gleichzeitig die Macht des Rechts über die Wirtschaft in vieler Hinsicht nicht stärker, sondern schwächer geworden, als sie es unter anderen Verhältnisse war. (...) Die Schranken des faktische Erfolgs des Rechtszwanges auf dem Gebiet der Wirtschaft ergeben sich vielmehr teils aus den Schranken des ökonomischen Könnens der Betroffenen (...)'.
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Weber believes that the need for codified law to create social regularities especially arises when changing conditions make real changes in social behaviour necessary. Generally, the inner motive to act according to social regularities incorporates inhibitions against change. Creative individuals who dare to act and think in new ways are therefore quite important. A general acceptance of these new ways of acting and thinking can be brought about with the help of the psychological techniques of empathy and inspiration. Such a general acceptance will, according to Weber, however only lead to an implementation of the proposed ideas and actions if these are functional in the existing conditions.⁴⁰

The conclusion can be that if there is an observable tendency to an increase of codified law and if there is a fragmentation of old traditions, these social phenomena must be functional within the theoretical framework of Weber. The fact that Weber cannot grasp this functionality and feels depressed by the picture of the future which the observed tendencies embody express a deep despair.

Tentative explanation of the tendency to rationalisation

Weber has given a lot of reasons why codified law will *not* work. Interestingly, Weber himself can be said to be his fiercest sceptic: unlike many of his later critics have stated, Weber is all but the straightforward rational formalist. He

⁴⁰ WuG (1972) p. 375: 'Daß die innere seelische 'Eingestelltheit' auf jene Regelmäßigkeiten fühlbare 'Hemmungen' gegen Neuerungen in sich schließt, – wie jeder das auch heute in seinem Alltag an sich erfahren kann – das, müssen wir annehmen, ist für den Glauben an jene 'Verbindlichkeit' eine sehr starke Stütze. Wir fragen bei diesem Anlaß: Wie entstehen in dieser Welt der Eingestelltheit auf das 'Regelmäßige' und das 'Geltende' irgendwelche 'Neuerungen'? Von außen her: durch Änderung der äußeren Lebensbedingungen, das ist kein Zweifel. Aber diese geben nicht die geringste Gewähr, daß nicht der Untergang des Lebens statt einer Neuordnung ihnen antwortet; und vor allem sind sie keineswegs die unentbehrliche, gerade bei vielen höchst weittragende Fällen von Neuordnungen nicht einmal eine mitwirkende Bedingung. Sondern nach allen Erfahrungen der Ethnologie scheint die wichtigste Quelle der Neuordnung der Einfluß von Individuen zu sein. (...) Wir sprechen hier nicht von der Art, wie die infolge ihrer 'Abnormalität' als 'neu' erscheinenden Erlebnisse entstehen, sondern von der Art ihrer Wirkung. Diese Einflüsse, welche die 'Trägheit' des Gewohnten überwinden, können auf verschiedene psychologische Weise vor sich gehen. Zwei Formen in ihrer, bei allen Übergängen, Gegensätzlichkeit terminologisch klar herausgehoben zu haben, ist das Verdienst von Hellpach. Die eine ist: plötzliche Erweckung der Vorstellung eines Handelns des Beeinfluften als eines 'gesollten' durch drastisch wirkende Mittel: 'Eingebung'. Die andere: Miterleben eigenen inneren Verhalten des Beeinflussenden durch die Beeinfluften: 'Einfühlung'. Die Art des durch diese Vermittlung entstehenden Handelns kann im Einzelfall die allerverschiedenste sein. Sehr häufig aber entsteht ein auf den Beeinflussenden und sein Erleben bezogenes massenhaftes 'Gemeinschaftshandeln', aus dem sich dann 'Einverständnisse' entsprechenden Inhalts entwickeln können. Sind sie den äußeren Lebensbedingungen 'angepaßt', so überdauern sie diese'.

has defended exactly those theses which again and again have been defended as critical theses *against* Weber.

If, however, it is true that law is mostly superfluous, if it is true that law is not functional for economic development, if it is true that the technicalities of codified law are especially good for lawyers and public servants, why then did the law-producing-machine get bigger and bigger? Weber observed this tendency and described it as a rationalisation. He tried but could not explain it however.

Could it be that the substantive element of Weber's conceptual confusion happens to be the explanatory factor of the tendency towards rationalisation? The thesis defended in the rest of this article is that the answer to this question is yes and that the substantive element in Weber's conceptual confusion is its *deterministic view*. Although Weber rejected the deterministic view of his predecessors and established in his scientific work the rich variety of social phenomena and the complexity of social life, he ultimately could not free himself from the deterministic, or mechanistic, view. Even contemporary social theorists⁴¹ have not been able to free themselves from the deterministic view, taking stable patterns of behaviour, and collective meaning that create stable expectations of behaviour, for granted. This is why, in spite of all the criticism on Weber's supposed defence of formal rational law, the law-producing machine is going on and on. As a theoretical framework the deterministic view necessarily pictures a future in which social life functions as a machine.

Non-deterministic conceptual view on law in the judicial state

In this paragraph, the description of a deterministic and non-deterministic understanding of judicial law as a form of natural law will establish a paradigmatic example of the two views.

Weber explains how the judicial law did not originate from the state, but was 'found' by judges following their own subjective substantive reasoning. The state instituted the law courts and organised their professional status either by the obligation of process representation or by the training of the public servants who were involved in the administering of cases.

As a discipline judicial law had the status of a theory. As Weber demonstrated, Roman law was not at all relevant for practical use. It merely introduced a method; a way of thinking. Just like any other theory it developed theoretical distinctions and created a conceptual framework, i.e., what a jurist cannot think does not exist. By comparing different possible problem situations, different types of problems were recognised with their defining characteristics and variety of phenomenal appearance. Just like in any other theory, one of the main problems of the discipline was how to prevent that the outcome of a solution of a problem was dictated by a dogmatic interpretation of the theoretical framework of the discipline. And like any other theory, the theory of law held that 'justice' (or for that matter 'truth') could only be approached by paying very careful attention to the individual characteristics of a case and by being

⁴¹ See Giddens (1991, in the introduction formulated as a paradoxical truth) and Habermas (1981).

prepared to distance oneself from the theoretical frame if it was clearly not appropriate.

Characteristic of a non-deterministic view on reality is that conceptual theoretical frames are understood as only rough approximations of reality. Therefore, the fact that a theoretical framing of a certain individual situation was not appropriate did not mean that it needed to be adjusted. It was believed that the individual characteristics of individual cases would play an unpredictable role at the level of decision-making and no role at all at the level of theory. When, for example, a case was theoretically framed in terms of 'neglect', this did not refer to a substantive rule, indicating which characteristics of the case would lead the judge to a yes or no⁴² answer. It only instructed the judge to frame his decision in terms of the presence or absence of neglect thereby focusing his attention in a certain direction. The judicial practice of decision-making was informed by the conviction that nobody would be able to envisage *all* the characteristics of an individual case-situation and establish in an unequivocal way which characteristics were decisive for the case. In the end, the judge could only know by intuition the individual traits of a case.

This theoretical attitude of judicial law played however a decisive role in the creation of a conceptual framework in terms of which problem situations could be conceptualised and brought to court. This framework had a political (or jurisdictional) meaning because it marked out which problems could be discussed – and consequently decided – in the law-courts. It marked out the division between law and politics. In this respect judicial law mirrors the political situation of the judicial state in which the focus is on the maintenance of a power balance between autonomous parts. The theory together with the practice constituted a 'natural law' in the Aristotelian meaning of the word.

Deterministic behavioural view on law in the administrative state

Legal positivism rejected natural law at the end of the eighteenth century and replaced it by positive law. Positive law introduced the concept of administrative law: law as prescriptions issued by state authority. While in the judicial state the content of the decision of the judge was only relevant for the parties in court, in positive law the state became a stakeholder in the content of law. This marked a fundamental turn from a conceptual, theoretical orientation in law to an instrumental, behavioural orientation: law as a means to prescribe and enforce behaviour, judged desirable by the state. For such a type of law it is necessary to develop a systematic view on the prescribed behaviour: to develop an order of law in a substantive sense, which marks out in an unequivocal way which characteristics of the case would have to lead the judge to a yes or no. This is the way Weber describes formal rational law.

It is important to note, that the general confusion in social theory generates from the fact that the concept of formal rational law applies in exactly the same way to social norms and legal norms. In social theory decisions (and actions)

⁴² See for the defence of such a substantive rule as formal rational law footnote 20.

are understood as normally being nothing other than the application of rules.⁴³ Recent social theory in this regard speaks in many cases of ‘informal rules’ or ‘tacit rules’ of which the decision maker is unaware. A study of a set of decisions or interviews with decision-makers about their reasons for decision will however reveal what general rules – either legal or social – they have been applying.

Although Weber clearly appreciated judicial law, his sociological understanding of human relations did not lead him to a revitalization of judicial law towards a more Aristotelian conception of natural law. Just like Kelsen, -and so many other theorists who have criticised Weber for his supposed ‘top down model’, Weber understood judicial law as the *application of social norms*. Weber defined social norms as functional social regularities which develop in society. Law is primarily only the codification of (a part of) such regularities.

An example of the same confusion was presented recently by John Hasnas (2008), who defends a ‘depoliticization of law’ by opposing judicial law against the idea of law issuing from state authority. Citing Todd Zywicki (2003)⁴⁴ Hasnas reveals that the common law doctrine of *stare decisis* is a late nineteenth-century development and that this represents a clear doctrinal and conceptual break with the prior history of the common law. He proceeds by stating that

Prior to the nineteenth century, the common law courts did not apply the doctrine of *stare decisis*; that is, they did not treat previous judicial decisions as binding legal authority for the cases before them. During most of the formative period of the common law, which lasted from the twelfth to the seventeenth century, there was no doctrine of precedent at all. (...) Further, when the doctrine of precedent did begin to develop, it was usually limited to procedural matters. The Year Books were mainly concerned with the details of process and pleading, and when private reports of cases became available in the late sixteenth and early seventeenth centuries, cases were mentioned chiefly to reinforce a newly emerging principle that in matters of procedure and pleading the common law courts would adhere to their custom – and in that sense, to their precedents (...) Moreover, the principle was largely confined to procedural matters, including matters of competence, and was probably related to

⁴³ See my publication (2003) *Informal law does not exist*. For the further elaboration however I am indebted to a very inspiring and intense debate in 2007-2008 with Niels van Manen, Damir Urem, Sietse Steenstra and André Hoekema.

⁴⁴ Zywicki states that ‘most modern lawyers and scholar conceive of the doctrine of *stare decisis* as a formative element of the common law and that this shows an a-historical understanding of the development of common law’. Weber (WuG (1972) p. 456 and p.406) can thus be called a-historical when he speaks of ‘an Präjudizien und Analogien gebundenes Behandlung des Rechts’ and ‘Noch Blackstone nennt die englischen Richter eine Art lebendes Orakel, und tatsächlich entspricht wenigstens die Rolle, welche die decisions als unentbehrliches und spezifische Form der Fleischwerdung des Common Law spielen, in diesen Sinn derjenigen des Orakels im alten Recht: ‘was vorher ungewiß war (die Existenz des Rechtsprinzips) ist nun (durch die Entscheidung) eine dauernde Regel geworden’. Nur wenn die Entscheidung offenbar ‘absurd’ oder ‘gegen Gottes Gebot’ ist, entbehrt sie des charismatischen Charakters und kann man also ohne gewahr von ihr abweichen.’

the necessity of maintaining lines of separation between the jurisdiction of the common law courts and that of the other types of courts.(...) in the absence of *stare decisis* judges were not, and did not regard themselves as, creating 'rules' of prospective application. To the extent that they were involved in deciding cases at all (much of the job of early common law judges was to ensure that the pleading properly specified the issues to be resolved and then turn the matter over to the jury who were expected to do substantial justice) their focus was retrospective, seeking a basis in past custom for resolving the instant dispute.

Hasnas then however falls back to a deterministic theoretical view on the development of social norms:

It evolves out of the effort of human beings to resolve interpersonal disputes in the absence of a centralised authority. The slow accretion of successful resolutions of individual disputes eventually produces recognizable rules of law of binding effect. Rules of law simply evolve out of jury's or other decision maker's intuitive sense of what is just in particular, concrete situations. Such rules, which reflect conventional notions of fairness, are precisely the ones most likely to facilitate peaceful interaction among citizens.

Just like Weber, Hasnas – in spite of his beautiful exposé of the individual nature of the old common law – holds fast to the belief that general norms can be derived from such an individual practice, because this practice already was not individual but just an application of general norms, which were oriented towards utility. This is how both Weber and his sociological critics with a 'bottom up' approach end up with a defence of the idea that people apply rules far beyond the realm of state authority and that it is a natural process of rationalisation that such social or informal norms are turned into law if they are successful.

The non-deterministic Aristotelian epistemology of judicial law

In the contemporary debate on epistemology, there are two opposing views: realism and constructivism. On the one hand, realists hold that *physical mechanisms* determine the way people act, while, on the other, constructivists hold that *social constructions* determine the way people represent their actions. Constructivists are non-deterministic in the sense that they reject the idea that actions are determined by general physical laws. If, however, there is no world other than the way it is represented the question is what difference it makes to talk about representations instead of actions. In this sense both realists and constructivists are deterministic. The non-deterministic view of Aristotle can be seen as a middle road between realism and constructivism.

Research into the specific nature of Aristotle's realism⁴⁵ is only relatively recently initiated D.W. Graham (1987) who has emphasised the great difference between the way Aristotle sketches the nature of concepts in his works on

⁴⁵ See for an extensive treatment of the individual realism of Aristotle E.A. Huppes-Cluysenaer (2007).

Logic, on the one hand, and in his *Metaphysics*, on the other.⁴⁶ While most authors still refer to Aristotle's works on Logic to witness how Aristotle's vision of the nature of concepts is consistent with the deterministic vision⁴⁷, Aristotle's *Metaphysics* shows us a completely different Darwinian picture in which the continuous nature of reality leads him to a theory of non-correspondence. Concepts – as treated in his works on Logics – do not tell us the reality of things, but the way we think and talk about them. According to Aristotle, it is not the case – as determinism assumes – that every individual of a species has the same general characteristics plus some individual characteristics. He holds that individuals differ in essence and that concepts do not correspond to some general element which is present in every individual.⁴⁸

Aristotle's view on concepts is partly constructive and partly realistic. He is a realist because he assumes that reality is full of regularities and that concepts refer to these regularities. When we therefore speak and think about reality, we necessarily do this in terms of these concepts. Aristotle is however at the same time a constructivist because he concludes that the regularities of nature have a very high grade of variability. Therefore, these regularities are only discernable in a rough sense, which means that concepts referring to them are always partly mistaken.⁴⁹

It can be said, therefore, that Aristotle is an individual-realist, since he rejects the idea of 'social facts', as propagated by constructivism. The individual nature of existence is its utmost quality, because it involves its high capacity for harmonious adjustment. Overemphasizing rational conceptualisations of reality is an irrational strategy which will lead to a lesser grade of harmonious or functional adjustment.

At the same time Aristotle is a sceptic, because he does not believe in the possibility of *knowing* the individuality of things: one cannot speak or write or think about it. The only way to reach the individual essence of things is by a situational assessment. Action which is too situational oriented will not be open for reflection, however. Reflection necessarily takes place in terms of general concepts which refer to regularities.

For Aristotle, the conception of truth is thus essentially plural: to know the nature of a thing one has to know the interplay of different regularities which together constitute its nature. One has to know the genus to which it belongs and the nature of the different variations within this genus, being the continuum on which species are discernable (formal cause), the specific background from which it stems (efficient cause), its individual characteristics (substantial cause) and what is functional for this specific exemplar in this specific environment (final cause). Importantly, there are gaps between these different kinds of knowledge which cannot be bridged because of their incommensurability. Al-

⁴⁶ See also Klaus Brinkmann (1996) Both authors do not turn however to an epistemological analysis of this discovery which explains how near Aristotle's vision comes to the vision of authors like Popper and Wittgenstein.

⁴⁷ See for example Patrick Glenn (2006).

⁴⁸ Weber holds on to the opposite in his definition of formal rational law.

⁴⁹ See for more or less the same notion Popper (1972) pp. 212-3) who refers to Peirce.

though action or decision-making has to take all these different aspects into account it cannot do so by integrating them into a unified conceptual framework. Deciding an individual case always asks for a non-conceptual intuition of the case's essence.⁵⁰

The Aristotelian vision forms the epistemological background for Roman law.⁵¹ In a certain sense the conceptualisation of human affairs does make sense: concepts refer to social regularities which can be experienced. Keeping track of social regularities can be described as holding on to a kind of 'middle'. Standardisation concentrates on aspects which are normally relevant and clarifies which questions have to be asked. This way law creates models and schemes. Individual cases, however, are in all cases where there is not just one goal which is unambiguously definable in general and observable terms – the result of the interplay of many regularities. The decision in individual cases relates therefore to an enormous variation of which the concepts give only a distanced and rough picture. There is thus little or no reason to change the conceptual framework as a result of case-experience. Roman law could offer a relevant conceptual framework in so many different situations over time.

The deterministic epistemology of administrative law

The main difference between the non deterministic Aristotelian view and the deterministic view is a shift of attention: from the individual nature of things to the general nature of things. At first – in what will be called the moral stage – it was held that the universe moves according to fixed laws, instituted by God. Later on – in what will be called the non-moral stage – the deistic belief in fixed laws was rejected and fixed laws were substituted by probabilistic laws. In both views the individual deviations are of minor importance. The epistemological background of this shift was elaborated by Kant, while Rousseau was the first to work out the consequences of this shift for the theory of the state. Rousseau's theory was however completed again by Kant.

The turn which led to the generation of experimental science is described by Kant in the introduction of his *Kritik der Reinen Vernunft*. Kant states here that when Gallilei, Torricelli and Stahl did their famous experiments all scientists saw a new light. They understood that man had to make hypotheses to be able to make progress in thought – to invite nature to answer his questions. Without such questions observations would remain meaningless. The scientist had to work out possible experiments with which he could test these hypotheses.

Kant wanted to make the same sort of progress in the field of metaphysics. It is this metaphysical turn – and not the generation of experimental science as

⁵⁰ Nic. Ethics, Book V, 1137a35-b24. This is why 'equity' is superior: 'So when the law states a general rule and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances'.

⁵¹ See for the relation between the Aristotelian view and contemporary law J.E. Soeharno (2005) and (2008).

such – which introduced the pragmatic view and gave it its enormous potential. Kant understood that the experimental sciences presupposed a *universal human* perspective from which questions could be asked and a pragmatic use of the results of science could be made. Kant took the clarification of such a universal perspective as the main task for metaphysics.

The need for such a universal human perspective had been already formulated by Rousseau (1988). The goal of his *Social Contract* is that *all persons unite to produce one body which substitutes the different persons and defends the persons and the goods of every participant*.⁵²

For the theoretical development of the concept of legitimacy it is of utmost importance to understand that for Rousseau the laws as consented to by parliament were only dispositions. Parliament could not be a representative of the people in the eyes of Rousseau, and was just a part of government. The abstract laws which had to bind government and generate legitimacy – the *volonté générale* – were propositions expressing the true conception of the necessary conditions for such a collective body.⁵³

The main political problems of this new conception of the state, are right from the start recognised and indicated by Rousseau: where will one find the lawgiver who expresses the universal and reasonable will of the people?⁵⁴ Kant (1988) solved the problem of how to discover the reasonable will – the *volonté générale* – of the people. He introduced the idea of the moral responsibility of every individual to place his individual striving for a good life within the framework of his understanding of the necessary conditions for a communal life in which everybody's freedom is respected. In this way, from the numerous actions of many individuals, a general conception of the reasonable will would slowly evolve. It would be possible to understand in the long run the true nature of men by looking at their actions from a historical perspective.

Kant thus turned metaphysics into a secular theory of political moralism. Not the private value of the good in a certain concrete empirical situation marked any longer action as of moral value, but an abstract generalised insight into the make-up of a free society.⁵⁵ The individual had to conceptualise the general norms of a free society and to subordinate his individual intuition about a good life to the general norms. To paraphrase what Weber said about the lawyer, Kant suggested that what the individual could not conceptualise within a general normative framework, had no moral value. Private intuitive experiences concerning a harmonious adaptation to situational aspects of the world had no longer any moral meaning. There is no longer a gap between theory and practice. There is no longer relevant individual knowledge.⁵⁶

⁵² Book I, chpt 6.

⁵³ The concept 'secondary law' of Hart (1961) comes near to Rousseau's concept of abstract law, but while Hart with the rules of recognition only indicates constitutional law, Rousseau refers to the totality of social-cultural norms.

⁵⁴ Book I, chpt 6.

⁵⁵ See for political moralism in general and for Rousseau and Kant in particular the analysis of G. Drosterij (2008) chpt 1 and chpt 7, par 5.

⁵⁶ Even Kant however was aware of the problematic nature of this abstract conception of the morally good. He explained how men would turn into benign sheep without

Legitimacy through formal rational law: the administrative state

Kant introduced the extremely influential idea that insight in the nature of legitimacy is logically created by deriving true general norms from the numerous actions of individuals. In these actions a general conception of the reasonable will of the people will slowly but steadily be expressed. This way it is possible to understand in the long run the true nature of men by looking at their actions from a historical perspective. As shown, this same ideal is expressed by Hasnas – and by many more ‘bottom up theorists’ for that matter. This same ideal is also expressed by Weber in his conceptualisation of formal rational law. What makes Weber so interesting, however, is that his writings *also* show the intuition that something is wrong with this concept – although Weber cannot get a grip on just what that is.

Weber praises the formal quality of the Napoleonic Code Civil.⁵⁷ He calls this code the third great world-law next to the common law and the ‘jus gentium’. It is, according to Weber, for the first time that a legislator made a law which exemplifies a connection between common sense and a States Raison and in which this States Raison gets its legitimacy from pure reason instead of power. Weber was at the same time aware of the fact that this Napoleonic legislation which seemed, according to him, to meet Bentham’s ideal of a rational goal oriented government, indeed only *seemed* to meet it.⁵⁸

Weber shows how substantive elements are a part of the Code Civil. He tells us that the Code is written in an expressive language due to its orientation towards customs, that this orientation went at the cost of formality and precision, that the code consists for an important part not of rules, but of conceptual relations and that the formal quality of this French code rests for a great deal upon the need to interpret it in relation to practical cases.

Weber also touches on the political nature of the Code Civil, when he states that the French Code is the expression of the human and civil rights which were laid down in the French and American constitutions. He explains this political element by the fact that every movement which seeks authority for its perspective on law – it may be the revolutionary Napoleonic Code, or the opposition of the Historical School against the Code – will defend its claims by the idea of natural law, *i.e.* law which is normally actually existent, recognised by the

their egoism. Men had to strive for a good life to give society its dynamic. This endeavour was however understood by Kant as sheer egoism, with a functional meaning but no moral meaning.

⁵⁷ WuG (1972) p.495: ‘(...) formellen Qualitäten, welche eine außerordentliche Durchsichtigkeit und präzise Verständlichkeit der Bestimmungen teils wirklich enthalten, teils vortäuschen.’

⁵⁸ WuG (1972) p.495: ‘Diese selbst aber ist der Ausdruck einer spezifischen Art von Rationalismus: des souveränen Bewußtseins, daß hier zum ersten Mal rein rational ein von allen historischen ‘Vorurteilen’ freies Gesetz, Bentham’s ideal entsprechend, geschaffen werde, welches (vermeintlich) seinen Inhalt nur von dem sublimierten gesunden Menschenverstand, in Verbindung mit der spezifischen Staatsräson der dem Genie, und nicht der Legitimität, ihre Macht verdankenden großen Nation empfängt.’

people as morally sound and logically implied in fundamental juridical concepts.

Weber thus clearly pictures the unity created by the Code – and by the *Begriffsjurisprudenz* of the Historical School – as representing a formal representation of a natural law. Although there is for Weber a difference between the rational natural law of the Code and the irrational romantic natural law of the Historical School, this difference is in his eyes only gradational. Both types of natural law derive their arguments from a belief in everlasting laws. These everlasting natural laws forbid in Weber's days, for example, the protection of labourers by positive law. Such a protection would mean a violation of the natural freedom of contract.⁵⁹

Weber depicts formal rational law as the result of a logical elaboration of decisions. This means that he takes the *Begriffsjurisprudenz* of the Historical School as a point of departure. The Historical School, in its opposition towards a codification, turned to the systematic elaboration of Roman law in its true historical shape. The Historical School thus defended more or less in the same way as the Napoleonic Code a purely rational idea of law, but developed a method of systematisation of law as a way to reach this ideal.⁶⁰

But what has the logical elaboration of decisions into a system of law to do with the creation of a unified human perspective? To answer this question one has to dig somewhat deeper into the systematic method of the *Begriffsjurisprudenz*.

⁵⁹ WuG (1972) pp.496-8: 'Ein naturrechtliches Axiom dieser Provenienz lag z.B. der Theorie der historischen Schule von der Präeminenz des 'Gewohnheitsrechts' – ein erst von ihr klar ausgebauter Begriff – zugrunde. Ganz ausdrücklich dann, wenn behauptet wurde: ein Gesetzgeber 'könne' durch Satzung den Geltungsbereich des Gewohnheitsrechts gar nicht rechtswirksam einschränken, vor allem dessen derogatorische Kraft gegenüber den Gesetzen nicht ausschließen. Denn man 'könne' dem geschichtlichen Werden nicht verbieten, daß es sich vollziehe. (...) Dem Irrationalismus dieser Axiome stehen nun die naturrechtlichen Axiome des Rechtsrationalismus kontradiktorisch gegenüber, und nur sie konnten Normen formaler Art überhaupt schaffen, so daß man unter Naturrecht a posteriori mit Recht nur sie zu verstehen pflegt. (...) Die naturrechtliche Legitimität positiven Rechts kann entweder mehr an formale Bedingungen geknüpft sein oder mehr an materiale. Der Unterschied ist graduell, den ein ganz rein formales Naturrecht kann es nicht geben: es würde ja mit den inhaltleeren ganz allgemeinen juristischen Begriffe zusammenfallen müssen. (...) Die 'Freiheitsrechte' sind der wesentliche Bestandteil eines solchen Naturrechts, und vor allem: die *Vertragsfreiheit*. (...) keine Satzung (kann EAHG) gültig die freie Verfügung des Einzelnen über seinen Besitz und seine Arbeitskraft beschränken. Zum Beispiel ist deshalb jeder gesetzliche 'Arbeiterschutz', also jedes Verbot bestimmter Inhalte des 'freien' Arbeitsvertrages, ein Eingriff in die Vertragsfreiheit (...) *Materialer* Maßstab aber für das, was naturrechtlich legitim ist, sind 'Natur' und 'Vernunft'. Beide und die aus ihnen ableitbaren Regeln: allgemeine Regeln des Geschehens und allgemein geltende Normen also, werden als zusammenfallend angesehen; die Erkenntnisse der menschlichen 'Vernunft' gelten als identisch mit der 'Natur der Sache': der 'Logik der Dinge', wie man das heute ausdrücken würde.'

⁶⁰ See also footnote 30 where Weber explains how codification often turns into a systematisation as well.

Moral stage of the administrative state

Kant propagated the great scientific innovation of his days for the development of metaphysics. He especially refers to the development of a new method of empirical description by scientists, like Lavoisier and Linnaeus.⁶¹ I will take Linnaeus as an example to explain how his discovery led to a shift towards a more general level of systematisation.

Since Aristotle the inductive logic per 'genus et differentia' was known, which made it impossible to produce systematic orderings. The problem of systematic ordering can be easily understood when the reader thinks of the problem he finds in ordering his bookcase – for instance shifting between ordering in categories and alphabetical order. This means that when he searches for a book, he has to look at several places. Old flower books have the same ordering as such a bookcase. They shift from alphabet, to habitat, to colour and form, to medicinal use, etc. Also for example the logical ordering of law which Grotius made in his 'Inleidinge'⁶² has this same problem of shifting. This is exactly what Weber refers to when he speaks of the poor classification of Roman law even by someone like Gaius.

Now, the great invention of Linnaeus was that he found one principle which formulated the only and true nature of every plant – its sexuality. This principle could thus be used to order all plants into one systematic whole.

Savigny and Puchta are the main representatives of the Historical School who developed the *Begriffsjurisprudenz*. They elaborated the way in which the inductive method of empirical description could be used in a normative and deductive field⁶³. In biology⁶⁴ the description starts with the observation of an object. In law the scientist starts with a question about a meaningful concept, for example 'is a marriage a contract'. By a collection of invented and real cases the juridical scientist visualises this abstract question. He then attempts to 'feel'⁶⁵ which characteristics play an important role in the cases and marks the resemblance or difference between a marriage and a contract. The 'feeling' is a kind of inner observation of the way these cases – understood as 'real' cases – struck the moral consciousness. This is what Weber calls 'Logische Sinndeutung'. By this method the different concepts can be defined by their substantively essential characteristics and can be systematically ordered according to their defining characteristics.

Savigny and Puchta called their method 'historical' and 'systematic'. In their opinion societies develop, generating in this process more elaborate and

⁶¹ Kant (1990) *Metaphysik der Sitten*, Vorrede.

⁶² Not all editions of Grotius' *Inleidinge tot de Hollandsche Rechts-geleerdheid* (1895) contain the 'tables' with the logical ordering I refer to.

⁶³ K. Larenz (1969) p.13 states that Von Savigny did not succeed in this explanation. 'Indessen ist es Savigny nicht gelungen, und darauf beruht, wie wir meinen, die tatsächlich geringe Wirkung seiner Methodenlehre, darzustellen, in welcher Weise der von ihm geforderte Übergang aus der 'Anschauung' des Instituts in der 'abstrakte Form der Regel' und aus dieser zurück zu der ursprünglichen Anschauung vor sich gehen kann.' I do not agree with Larenz.

⁶⁴ See also R. Von Jhering (1974) who speaks about *civilistischen Zoologen*.

⁶⁵ 'Herausfühlen'. See F.C. von Savigny (1948) p. 28.

technical ways of conceptualising human relations. This development is understood as a process of slow differentiation. Fundamentally all new and more technical conceptualisations are the implementation of one essential idea. This essential idea can be understood by every member of the society, while the more technical-juridical elaborations can only be understood by the specialist. The specialist clarifies by his systematic analysis how the technical juridical concepts are historically developed and how they are fundamentally connected to the general moral conscience of all members of the nation.

In Linnaeus' system all plants have a common 'folk' name referring to a common understanding and a scientific name referring to a phenomenon which is precisely defined by its place in the system. In the same way basic juridical concepts have a common understanding (by usage, juridical practice, moral-cultural, understanding, etc.) and a precise scientific definition indicating its place in the system.

Weber developed his concept of formal rational law in the same vein. It is the product of a systematisation in which a deductive (systematic) reasoning is combined with an inductive reasoning (historical). Just like Linnaeus, who used the principle of sexuality to bring an austere system in the worlds of plants, Savigny and Puchta used the concept of man as free and autonomous to bring an austere system in Roman law. By doing so, Savigny and Puchta gave this principle a descriptive value as is expressed in the term 'positive law'. They believe that in all the raw materials of law, which are posited over time by different authorities, one can find the true insight into the essential concept of law as enacted in real life. Thus the existing law was interpreted and selected as if it suited the ideas of the French Revolution and as if all men actually lived in a free and equal manner. This way the substantive civil law was represented as the true common morality growing out of the enacted reasonable wills of the people.

Non-moral stage of the administrative state

In the second half of the nineteenth century the findings of Darwin led to the rejection of the deistic determinism of the moral stage. In the new view, organic life changed as a result of the interaction of beings with their environment. This new view on reality heavily affected the concept of law.

Like many other social theorists of his time, Weber believed that the Kantian moral ethic (called *Gesinnungsethik* by him⁶⁶) had to be rejected and had to be replaced by a consequentialist-instrumentalist ethic (*Erfolgsethik*). The social conditions had no longer to be taken for granted – as ordained by God. People are necessarily influenced by their environment, so that better conditions in their environment will give them a capacity for self-realisation, something which till then was only within reach for a happy few.

The theory of law in the first half of the nineteenth century had been in a certain sense completely continuous with the theory of judicial law. Even in Weber's days the study of law consisted for a great deal in the study of Roman law. The new ideas of the French Revolution, the ideas of cultural and political

⁶⁶ Weber (1973).

unity were introduced at another – secondary - level and were embodied in the systematic treatment of this Roman law by the Historical School.

Consequently, the theory of law turned its critical attention towards the systematisation of law with the intent to induce the new – social-political – ideas into the conception of law. According to these new scientific theories, a system of law should no longer be understood in a dogmatic way, but as a dynamic whole of interdependencies. The empirical sciences would increasingly deliver corroborating knowledge about these interdependencies, making law thereby more rational and formal. ‘Rational’ in this context means ‘not moral’⁶⁷ and ‘formal’ means that the meaning of words is connected with observable facts⁶⁸. Formal rational law as an ideal type is thus for Weber empty and neutral.⁶⁹ Weber describes the change from dogmatic to organic or dynamic law as a social process within the profession of jurists. He shows how different developments, which at first sight are anti-formal and anti-rational, still feed a movement in the direction of more rationalisation and more formalisation.

The new social-political ideals, pleading for socialist conceptions of law are at first sight introducing far reaching substantive elements into law. But the vehement discussions between liberalist and socialist concepts of natural law at the same time impaired the idea of an absolute truth and promoted the search for formal means of legitimacy to make peace possible.⁷⁰ Because of the loss of belief in an absolute truth the judicial power developed a practical attitude in which the system of law was understood as a closed system without any metaphysical foundations. Systematic constructions which led to harmful politically contested consequences were done away with. Without its metaphysical foundation legal thought promoted at the one hand a sceptical attitude towards the validity of particular concepts, decisions and rules, but on the other to a general attitude of conformity. Without the belief in natural law, lawyers would have

⁶⁷ Peirce (1960) p. 282 ‘It will serve to show that almost every proposition of ontological metaphysics is either meaningless gibberish – one word being defined by other words, and they by still others, without any real conception ever be reached – or else is downright absurd; so that all such rubbish being swept away, what will remain of philosophy will be a series of problems capable of investigation by the observational methods of the true sciences’.

⁶⁸ Peirce (1960) p. 258) ‘I only desire to point out how impossible it is that we should have an idea in our minds which relates to anything but conceived sensible effects of things. Our idea of anything *is* our idea of its sensible effects’.

⁶⁹ See van Manen (intra) for the opposite position, although his further argument on relative natural law turns back to my view and Knecht (intra) for the same view.

⁷⁰ WuG, part 2, chpt 7, par. 7(500): ‘Alle Naturrechtsdogmen haben die Rechtsschöpfung ebenso wie die Rechtsfindung mehr oder minder erheblich beeinflusst. Sie haben die ökonomischen Bedingungen ihrer Entstehung teilweise beträchtlich überdauert und bildeten eine selbstständige Komponente der Rechtsentwicklung. Formal steigerten sie zunächst die Neigung zum logisch abstrakten Recht, überhaupt die Macht der Logik im Rechtsdenken.(...) Einen direkten Einfluß auf die Rechtsprechung haben aber diese materialen Naturrechtsdogmen nicht erlangen können, schon weil sie, ehe sie überhaupt dazu befähigt gewesen wären, schon wieder durch die zunehmend rasch arbeitende positivistische und relativistisch-evolutionistische Skepsis eben dieser Intellektuellenschichten zersetzt wurden.’

no choice than to defend the prevailing order set by those who were by law entitled to rule.

Weber describes several other tendencies in the contemporary development of law which are substantive and yet produce the sketched increase of formal rational law. The increase of formal rational law means a development in which legal thought frees itself from the old irrational, strictly formal procedures. It is substantive law that counts, with occasionally a strictly formal aspect to guarantee the calculability of the judicial decision.⁷¹ Such strictly formal procedures like cheques can be important. But at the same time other formal procedures become less strict as a result of economic interests.

For Weber especially the systematisation of substantive elements leads to an increase of formal rational law. By taking the free will of persons as decisive for its analysis, the theory of law has built a purely deductive logical system into which some individualistic and substantial elements are built. Further analysis by legal theory however brings to the fore how important mutual trust and loyalty are in economic dealings. This means that law has to take into ac-

⁷¹ WuG, part II, chpt 7, par. 8 (504-6); '(...) Für die Gütermarkts-Interessenten bedeutet die Rationalisierung und Systematisierung des Rechts, allgemein und unter dem Vorbehalt späterer Einschränkung gesprochen: zunehmende Berechenbarkeit des Funktionierens der Rechtspflege: eine der wichtigsten Vorbedingungen für ökonomische Dauerbetriebe, speziell solche kapitalistischer Arten welche ja der juristischen 'Verkehrssicherheit' bedürfen. Sondergeschäftsformen und Sonderprozeduren wie der Wechsel und der Wechselprozeß dienen diesem Bedürfnis nach rein *formaler* Eindeutigkeit der Rechtsgarantie. Auf der anderen Seite aber enthält nun die moderne (...) Rechtsentwicklung Tendenzen, welche eine Auflösung des Rechtsformalismus begünstigen. (...) Uns interessieren aber mehr die entsprechenden Tendenzen auf dem Gebiet des materiellen Rechts. Ein Teil von ihnen liegt auf dem Gebiet der internen Entwicklung des Rechtsdenkens. Seine zunehmende logische Sublimierung bedeutet ja überall den Ersatz des Haftens an äußerlich sinnfälligen formalen Merkmalen durch zunehmende logische Sinndeutung, sowohl bei den Rechtsnormen selbst, wie vor allem auch bei der Interpretation der Rechtsgeschäfte. Diese Sinndeutung beanspruchte in der gemeinrechtlichen Doktrin, den 'wirklichen Willen' der Parteien zur Geltung zu bringen (...) Darüber hinaus sucht sie nun aber durchweg (...) die Beziehungen der Parteien zueinander auch auf den 'inneren' Kern des Sichverhaltens: die 'Gesinnung'(bona fides, dolus), aufzubauen und knüpft also Rechtsfolgen an unformale Tatbestände. Große Teile des Güterverkehrs sind durchweg, bei primitiven ebenso wie bei technisch differenziertem Verkehr, nur auf Grund weitgehenden persönlichen Vertrauens auf die materiale Loyalität des Verhaltens andere möglich. Mit steigender Bedeutung des Güterverkehrs steigt daher in der Rechtspraxis das Bedürfnis nach Garantie für ein solches, der Natus der Sache nach nur unvollkommen formal zu umschreibendes Verhaltens. (...) 'Treu und Glaube' und die 'gute' Sitte des Verkehrs, in letzter Instanz also ethische Kategorien, entschieden nun über dasjenige, was die Parteien wollen dürften. Immerhin ist die Bezugnahme auf den 'guten' Verkehrsbrauch hier, der Sache nach, die Anerkennung der Durchschnittlauffassung der Interessenten, also eines generellen und sachlich-geschäftlichen Merkmals wesentlich faktischer Art, als des von Interessenten befugtermaßen durchschnittlich *erwarteten* und deshalb von der Justiz zu akzeptierenden Normalmaßstabs.'

count what people normally expect from each other as a standard for what they are allowed to will reasonably. What people normally expect will often be in conflict with what the logical legal construction allows them to expect, because their expectations will be oriented on the practical usefulness of things instead of keeping a logical system intact. The necessity for building in these elements makes the law less dogmatic.

When turning to Roman law, one will see that the notion of trust was often used to repair some of the extremely nasty consequences of legal thought. Weber explains however that this ethical minimum was no longer enough in his days. The labour movement demanded changes in law far more fundamental of character like the nullification of contracts which were based on exploitation. The incorporation of such changes into the legal system is in direct contradiction with the (liberal) moral conceptions which were at the root of the system as developed by the Historical School.⁷²

Another important tendency of anti-formal nature, which Weber describes, is the reaction of judges who do not like the idea of being automats, which - reacting mechanically on a certain input - produce a certain outcome. Legal thought has therefore produced numerous theories against this formal rational picture of judicial action, which basically all contain the rejection of a closed system and the idea that justice has to be found in cases. Even the theory is defended that just like speech is not the application of grammatical rules the finding of law cannot be the application of general norms.⁷³ All these anti-formal arguments seem to defend a case law system like the one in use in England.

The completely different nature of the practice of law in England has had however according to Weber no effect in general on economic relations. In countries like Canada where the formal rational system of France was in competition with the English system, the latter has even won predominance. For Weber the different social status of judges in England and Germany is in this respect decisive. He concludes that it is impossible to compare the German bureaucratically trained judiciary (the top of which is recruited selectively and dependent for individual careers on the rulers in charge) with their English or Swiss colleagues, leave alone with the American judges. When one takes away from the German judge his belief in the sacredness of the purely objective 'Rechtsformalismus' and instructs him to evaluate instead of this, the result of this will be without doubt totally different from that in those countries.

⁷² See on this van Manen (intra) and Schwitters (intra).

⁷³ WuG, part II, chpt 7, par.8 (506): 'Tatsächlich ist denn auch (...) die weitergehende Behauptung getreten: daß Rechtsfindung überhaupt prinzipiell nicht 'Anwendung' genereller Normen auf einen konkreten Tatbestand sei (oder doch nicht sein sollte) – so wenig der sprachliche Ausdruck 'Anwendung' grammatischer Regeln sei – daß vielmehr der 'Rechtssatz' das Sekundäre, durch Abstraktion aus den konkreten Entscheidungen gewonnene, diese aber, die Produkte der Juristentätigkeit, der eigentliche Sitz des 'geltenden Rechts' seien.'

Iron cage or absented landlordship? A defence for a formal rational law in the judicial sense.

Weber did not invent formal rational law, nor did he defend it. He analysed with the help of the categories of formal (ir)rational and substantial (ir)rational law the developments in society, especially in the theory of law. His deterministic theoretical frame made it however impossible for him to fully acknowledge the formal and rational quality of a non-deterministic conception of law.

Weber shows that the difference between a socialist judge and a liberalist judge will influence their decision but that still both decisions can be acceptable for all citizens *as law*. This acceptance is brought about by the fact that both types of judges have had a specialist training. This specialist training however according to Weber only suggests a method which creates objective judgments. Yet the training in different countries can create a belief in such objectivity and when this is achieved the system can function in a stable way.

The content of the law may be a codification of social norms of a moral nature, or it may be a highly technical instrumental law to force people to behave in a certain way to reach certain goals. At first sight one could reason that an instrumental law formulating which kind of bricks one has to use for certain buildings is extra-legal and has nothing to do with law. For Weber it is in both cases law, when the belief is existent that these commands are valid law.

There is no inherent quality of law according to positivists like Weber and Kelsen. This is why their view is purely formal. The only normative moment in law is situated on the secondary level: the level of Rousseau's legality⁷⁴. On this level also Weber situates his legitimacy by legality. Like also Kelsen⁷⁵ formulates it:

The acts by which the norms of a positive normative system are created are always facts manifested in the external world, perceptible to the senses. (...) To interpret the meaning of a fact as a norm is possible only under the condition that we presuppose another norm conferring upon this fact the quality of a norm-creating fact; but this other norm, in the last analysis, cannot be a positive norm.

While Kelsen proposes one basic norm, Hart (1961) formulates different secondary norms as rules of recognition. Rules of recognition are partly legal (constitutional law) and partly political as is stated by Kelsen and beautifully illustrated by the case-study of Prabhat (intra).⁷⁶

Weber's main concern is that positivism can only flourish when the political element is at rest. His addition to the theory of law is that this political element can only be at rest when the belief is upheld that the decisions on law are not important *qua* content but only *qua* representation. Thus understood Weber really works out a formal rational conception of law by his sceptic description of law as *not* important. This way also the formal rational nature of judicial law

⁷⁴ See Bonnie Honing (2007) p. 10 on Rousseau and Habermas.

⁷⁵ (1951) p. 648-9 and p. 658.

⁷⁶ See also Lembcke (intra) who elaborates this issue theoretically as an interplay between claim and obedience.

and administrative law have become comparable: in both types the content of the decision is rather irrelevant.

There is however a great difference between judicial law and administrative law. This becomes clear when one asks why Weber and Kelsen defend on the one hand the idea of law as a social technique⁷⁷, while, on the other, they seem to be not especially interested in the enforcement of these laws qua content. The answer is that Weber and Kelsen combine a formal rational conception of law with a sociological view which carries the belief that although different judges will take different decisions and although different officials will do different things in the long run only those decisions and actions will survive which are functional. The basic function of law is to institute and maintain peaceful procedures of conflict resolution. This sociological belief rests – as elaborated by van Manen (intra) – on the presumption that people have the same interests and the same rational choices.

In a certain sense it is of course true that people have the same interests and that these interests are the main explanation for the existence of social regularities. On the other hand this picture is far too rough and can not touch the level of interpersonal relations. The real quality of life rests in the details. To act with high quality asks for utmost concentration and focus; it asks for precision and knowledge of details, it asks above all for presence. To exercise a type of domination which is able to pay attention to details or honour the qualitative aspects of the ways the subordinated people do their jobs, asks for presence of the dominator. The more distanced a dominator is, the less he can steer adequately.⁷⁸

This is why it is important to discern between a household and a state. This does not mean that one has to go back to ancient times. It refers to the understanding that every organisation has to be conceived of parts which are more or less autonomous and that the prime function of law is to decide the quarrels which emerge between the parts.

⁷⁷ Kelsen (1941-1942) Weber (1973) *Erfolgsethik*.

⁷⁸ Urem (2008) describes the moral quality of presence in the classroom for teachers dealing with intercultural problems.

Two Concepts of Formal Rational Law Revised Table of the formal-substantial and rational-irrational dichotomies of Weber		
	Non Deterministic Rationality	Deterministic Rationality
	Conceptual	Behavioural
	Judicial law	Administrative Law
Substantial Law Theory of Law	Knowledge about interpersonal affairs and interests as the result of the analysis of case decisions	Knowledge about the rules which are operative in the functioning of a collective body as the result of system analysis or empirical research
Formal Law Practice of Law	Reconstruction of the existing power structure in terms of rights and duties; attempts to enlarge power are intruding into the power of others and lead to conflicts; creation of court procedures in case of conflict; enforcement of decisions.	Reconstruction of the collective body as a machine with its own formula of adaptation and growth; by being a part of the collective body each member accepts the formula and the rules which are produced accordingly; the rules prescribe the division of labour; enforcement can be restricted to cases of apparent egoistic behaviour.