CHAPTER V THE WORLD RELIGIONS AND THE LAW

SECTION 1: MAX WEBER'S SOCIOLOGY OF LAW

Basic Literature:

Weber, Max (2012) «R. Stammler's ‹overcoming› the materialist conception of history» in: *Collected Methodological Writings* London: Routledge pp 185-226

Weber, Max (1968) *Economy and Society* Chapter VIII (pp 635-900) New York: Bedminster

As Max Weber had not been given the time to complete his tour of the world religions and then to address the characterization of Western Christianity and culture in a final and concluding essay, our understanding of this characterization is limited to the dispersed remarks in *Economy and Society* and, of course, to *The Protestant Ethic.* It can be asked, though, what he might have written, and there are good reasons to suggest that he would probably have given particular attention to the singular development of Western law in comparison with the laws of other religious and cultural traditions. This development was the result of the separation of law and religion since the so-called Papal revolution.

Max Weber's sociology of law belongs to the least accessible and the least known parts of his oeuvre, particularly in the English speaking world. But, although he is today considered as one of the fathers of classical sociology, as a student he studied law and he wrote his two doctoral theses on questions of commercial law in the Middle Ages (1889)[113] and on the relationship between the law and the agrarian situation towards the end of the Roman Empire (1892)[114]. Besides these texts, there are also the two texts in Weber's *Economy and Society*: The chapter on the «Sociology of Law» in volume 2, and the text in volume 1 under the title «The Econo-

113 *The History of Commercial Partnerships in the Middle Ages* (transl. by L. Kaelber) 2003

114 The revised and enlarged version of 1909 was translated as *The Agrarian Sociology of Ancient Civilization* London, New Left Books 1976. It is the first major comparative work of Weber, treating Mesopotamia. Egypt, Israel, Greece, Hellenism and Rome.

my and the Social Norms». Both these texts were originally translated into English and published together by Max Rheinstein under the title *Max Weber on Law in Economy and Society* (Harvard U. Press 1954) and then later as parts of *Economy and Society.* It should be noted, however, that the text which both in the German version and in the English translation was previously called «Sociology of Law» has now (in MWG I /22-3) acquired the title «The developmental conditions of the law» (*Die Entwicklungsbedingungen des Rechts*), pointing to the possibility that it may perhaps not be interpreted as a sociological text at all, but rather as a universal history of law. Moreover, there are many comments and remarks on the law in other cultures or civilizations in Weber's essays on the various world religions and in his *General Economic History* (which, however, is merely a reproduction of course notes of Weber's students). Finally, there is the long article on «Stammler's «Overcoming» of the Materialist Conception of History» which will be considered shortly. Weber's study on Stammler will serve as the point of departure, for it is here that Weber tried to clarify his distinction between the law as a system of norms (the object of jurisprudence) and the law as an empirical order (the point of view of the sociology of law) - a distinction which is perhaps easier to make in the context of the European civil law tradition than with regard to the common law of England or North America.

Jurisprudence and the Sociology of Law

Legal rules may be studied from several different points of view. They may for instance be considered as norms or as facts. Max Weber uses the following example[115]: If I say that my digestion is regular, I may be stating the simple fact of nature that my digestion follows a certain temporal pattern. In this case, the norm is an abstraction of the regular natural process. But I can also come to feel the need to «regulate» my digestion by eliminating some disturbances, and then the norm becomes an ideal which one desires nature to conform to. The observed reality and the desired ideal may sometimes coincide, but conceptually they are different.

115 "R. Stammler's «overcoming» of the materialist conception of history" in: *Max Weber: Collected Methodological Writings.* (ed. H. H. Bruun & S. Whimster, London: Routedge 2012) p. 207

Before entering the sphere of law Weber tried to clarify the distinction between jurisprudence and the empirical or sociological analysis of law by an analysis of «the rules of the game». While he took as an example a game relatively little know outside Germany, the skat (ibid., p. 212 sqq.), it may be useful here to analyse a better know game, the football, in Weberian terms.

The rules of football are valid in the same way for the players as the rules of law are valid for the citizens of a state. The players accept these rules which determine how one should play correctly and who should be considered as a winner. If one wants, one can propose changes to these rules by addressing oneself to the International Football Association, perhaps in order to discuss the disastrous effect of the offside rule on teams which prefer an aggressive game, or in order to question the rule that the referee always has the last word. These are questions related to the politics of football. But as long as the rules are considered valid and in force, there are only questions of jurisprudence and questions of the interpretation of the rules, e.g., whether a given rule should be applied in the situation x or y or how the referee should decide if he wants to decide correctly. These are dogmatic questions.

The situation is completely different if one wants to explain a concrete football game. The rules of football are certainly a precondition of every game, although not the rules as interpreted by the jurists of football, but rather as conceptions or ideas which the players have of their content and of their importance. Weber calls these the maxims of the players. Moreover, the ideas which the players have of the rules are only one factor among others which influence their action. Other factors could be: their physical and psychological condition, their motivation, their level of intelligence and their fair play.

Finally, the rules of football are a precondition of what one might call the empirical knowledge of football, providing to those who are not familiar with the game the capacity to distinguish it from a game of rugby or field hockey. For those who are unfamiliar with football see only a bunch of adult men running here and there, pushing and shoving, and efforts to kick a ball in all directions. But if the observer has the impression that there is a certain probability or a chance that the actions of most players are influenced – at least to a certain degree and most of the time - by the rules of football, he will think that he actually sees a football game.

Thus, one can distinguish three levels of analysis:

1. The ideal norm, analysed by the jurists of football;
2. The maxims of the players which contribute, together with other factors, to the empirical event;
3. The rules as a means of knowledge which serve to analyse the empirical facts; this analysis may be intended for classification, causal analysis or other purposes.

If the rules are considered as facts – the level of sociological analysis –, then Weber maintains that one cannot pass from these facts to values or norms; if, however, the rules are considered as norms, jurisprudence cannot demonstrate the necessity of the existence of these norms, it can only ascertain their validity according to the patterns of juridical thought processes. Passing from the analysis of the rules of football to an analysis of society, it may be said that any sociological analysis, for instance a study about the relationship between economy and law, cannot be concerned with the ideal normative order but only with its empirical validity or the extent of the probability that certain maxims contribute to certain legally acceptable actions.

Incidentally, the distinction between the sociological analysis and the doctrinal analysis reappears in Weber's essay on the *Protestant Ethic*. A superficial reading of it might lead to the belief that he attributed this ethic to the dogma of predestination as formulated by Calvin. But this is not the case, for the logical consequence of the dogma that God has predestined us to hell or paradise would be fatalism, as Weber admitted himself (PE: 192). The social result, however, was just the opposite because of the introduction of the idea of proof by Protestant ministers. The maxims of the Protestants and their comportment were formed under the influence of the psychological sanctions which the religious context as a whole (sermons, social pressure, and mainly the possibility of proving to oneself one's status of grace) placed on them.

The Rationalisation of the Societal Spheres

As already mentioned, Rheinstein's translation of Weber's sociology of law introduced it into the English-speaking world. In his introduction, Rheinstein informed his readers that Weber's main problem is the relationship between modern legal thought and modern capitalism, although

he admitted that Weber never said so expressly.[116] In the subsequent English literature on the subject, this opinion has been repeated like a mantra.[117]

The present analysis will disregard the idea that the relationship between law and economics constitutes Weber's main interest. It rather starts from the equally well-established position that Weber's research after the early publication of the *Protestant Ethic* centered on his idea that Western culture as a whole may be characterized by a process of rationalisation and that Weber wanted to retrace this particular process also in the field of law. It will be seen that this process of rationalisation had no necessary connection with other social spheres, for instance the economy, but that it followed, at least at the level of the ideal legal norms, its inner logic.

Hubert Treiber[118] has suggested that Max Weber has described the process of the rationalisation of religion and of law in the Occident in very similar ways, although the rationalisation of religion has been described in more detailed fashion. Following Treiber's suggestion, the rationalisation of religion will here be used as a background for the analysis of the rationalisation of law.

The rationalisation of religion is defined by Weber by two related phenomena: systematisation and disenchantment. He wrote:

> «For the level of rationalisation a religion represents we use two primary yardsticks which are in many ways interrelated. One is the degree to which the religion has divested itself of magic, the other is the degree to which it has systematically unified the relations between God and the world and therewith its own ethical relationship to the world.» (RC: 226)

In conformity with this definition Weber explored several ideal-typical levels of religious rationalisation. The world of magic was for him an «enchanted garden» with spirits and beliefs in animism. Demons could be pacified and even dominated by magical acts. But there was no separation between this world and the «other world». The cosmos was monistic. Upon the arrival of cults of salvation the division between human beings and

116 Max Rheinstein 1954, p. L

117 Kronman 1983; *vide* also Trubek (1972: 746) who advanced the opinion that according to Weber a greater rationalisation of law produces a greater calculability of economic action - but who then believed to discover that this hypothesis encounters a problem in the case of England.

118 Hubert Treiber «Elective Affinities Between Max Weber's Sociology of Religion and Sociology of Law» (1985) 14 *Theory and Society,* p. 809 sqq.

that which was considered divine became more intense and the concept of god became more systematized. The gods became specialised and humans turned to them by means of sacrifices and prayers. The profession of priest came into existence, and these priests offered advice and became the specialists of the ceremonies of sacrifices and of prayers. They also received a specialised training. Ritual magic of the previous level was replaced by ethical commandments, pronounced by prophets. This led to a more methodical conduct of life. In opposing all casuistry, ethical prophecy led to practical rationality, for it systematised the norms and the style of life. The world was seen more and more as material which should be fashioned according to coherent interior norms. (RC: 235)

Finally, there were salvation religions with a now dualistic view of the world, assuming an abyss between this world and the world beyond. These religions completely systematised the concept of divinity and they completely eliminated all magic. In the Occident, this systematisation has been achieved by transcendental monotheism, while in the Orient one rather encounters cosmocentric concepts with an impersonal divinity.

The mention of different concepts of God or of the Divine leads to another way to conceive the rationalisation of religion. It is not about the level of rationalisation any more (from magic to salvation religions), but about different directions or orientations of rationalisation. One may encounter - in India or in Buddhism - a rationalisation of religious thought which produces an attitude of world rejection, or it might lead, as in Confucianism or Protestantism, to an attitude of world acceptance or even world domination. Moreover, to the different conceptions of the divine correspond different kinds of prophecies: exemplary prophecy which shows the path to salvation by personal example (Buddha or Gandhi), and emissary prophecy which requires obedience to ethical commandments (ancient Jewish prophets). In the Orient, the rationalisation of religious concepts leads humans to consider themselves as vessels filled by the divine presence, while in the Occident humans may see themselves as instruments used by a transcendent God to change the world. In the second case, the fundamental attitude is not contemplation but rather an ascetic life style, working within the orders of the world. A methodical conduct of life can thus result from different orientations of religious rationalisation. Be it world rejection as in Buddhism, world acceptance as in Confucianism, or world domination as in Calvinism, such an ethos is always the result of a set of ideas constructed as a rational and coherent whole.

The different orientations of religious rationalisation are closely related to the problem of theodicy. In the Occident, this problem is: If there is a transcendent God who has absolute power, how can his existence be reconciled with the imperfection and the suffering in the world? Elsewhere, where there is no transcendent all-powerful God, the problem is different, but in any case Weber believed that, to the extent that the disenchantment of the world increases, it becomes more difficult to find a rational and coherent solution to the problem of theodicy and that humans are confronted by irruptions of the irrational (FMW: 281). Weber saw three rational solutions to the problem of theodicy: the karman doctrine of India, Zoroastrian dualism and the Protestant predestination - whereas all other solutions were considered by him as compromises.

Weber attached also great importance to the study of the carriers of religion: priests and prophets. While magicians, shamans or sorcerers received a mostly empirical and applied formation so that their thinking was stereotyped, priests underwent a more rational formation and could develop a more coherent system of ideas. In order for this to happen, the clergy needed to be organised in a way which was independent of political influence. This was not the case in Antiquity or in China, but Indian brahmins, belonging to a separate category of castes, were relatively independent. Independence of the Church and of the clergy also developed in the Occident since the Investiture Struggle.

Rational thought, developed by the clergy of an independent church, generally does not find its support among peasants who everywhere have to adapt to the force of nature and prefer to find support in magic, but rather among craftsmen in the cities who depend on rational planification of their work and also among the bourgeoisie and rational bureaucracies. Calvinism corresponded well to the expectations of citizens involved in trade and commerce. It provided a rational solution to the problem of theodicy by making God inaccessible to human understanding. The doctrine of predestination eliminated the usefulness of good works for salvation and made salvation by magic, sacrifices or sacraments impossible. No human aid to achieve salvation was possible, and a cold individualism descended on a society which rejected the traditional religious ideal of brotherliness. The only option which remained for the individual who wanted to make certain that he was among the elected, was a methodical and ascetic - and in this sense rational - conduct of life within society. This methodical ethic which wanted to transform the world for the glory of God had, according ot Weber, an elective affinity with the spirit of capitalism. An

elective affinity, however, is different from a causal relationship. Weber did not say that the kind of rationalisation which was produced by Calvinism was the direct cause of capitalism.

> «Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the «world images» that have been created by ideas have, like switchmen, determined the tracks along which action has been pushed by the dynamics of interests» (FMW: 280)

Religion is an independent sphere having its own dynamics and following its own process of rationalization. The more it is rationalized, the more it enters into a conflict with other spheres of social life. The tension between the religious sphere and the economic sphere may serve as an example.

The most primitive forms of magic manipulation of spirits or gods were aimed at health problems or related to the wish of descendents or wealth. A tension between economics and religion did not exist. This was the case in the old (Vedic) Indian, Chinese and Jewish religions. But, to the extent that religions proceeded on the path of rationalisation, their relationship with economic considerations became more strained. According to Weber, rational economic activity is impersonal and oriented towards profit on a market.. Without estimating a price in monetary terms, a calculation of profit is not possible. If the capitalistic activity follows its own inner laws, the relationship with religion which is oriented towards brotherliness and against the holding on to money and the taking of interest, becomes difficult.

Thus, there are two autonomous spheres, regulated by their own internal rationalisation, and a deep conflict develops between them. There are only two rational solutions to this tension: the Calvinist ethic which renounces brotherliness, and mysticism which escapes from the world. Tensions also develop between the religious and the political sphere. On the level of the magical world view this problem did not exist, but with the arrival of salvation religions and a god of love, an abyss opened up between these religions and the bureaucratic state which fulfills its functions objectively *sine ira et studio* (without hate or enthusiasm), which follows its own inner laws and can only appear as a caricature of ethics.

Excursus on *Eigengesetzlichkeit*

In the analysis of the tensions between the religious and the economic and political spheres, the terms «own laws» and «inner laws» have been used

when reference was made to the evolution of these social spheres. The terms are approximate translations of a German term which may have been formulated by Weber himself[119] and which has been translated into English (and other languages) in the most diverse and incoherent ways. A well-known collection of some of Weber's essays, for instance, uses the following translations: «internal and lawful autonomy (FMW: 328), «inherent logic» (FMW: 341), «own immanent laws» (FMW: 331) and «peculiarity of its technique» (FMW: 147). The reader does not easily realise that he is referred to a term of terminological precision and significance.

As Conrad has shown, *Eigengesetzlichkeit* does not mean autonomy in the sense of the freedom or right to establish or change one's own laws. It rather refers to the necessity and/or obligation to follow the logically deductible internal laws of a social sphere, be it religious, political or economic, or the subjection of a social sphere to its inner logic. Machiavelli has demonstrated it with regard to the political sphere, rational capitalism does it in the economic sphere. Everywhere, according to Weber, rational thought in the sense of a need of inner logical coherence has power over man. The various systems of thought confiscate the empirical experience and mould it in their own way. Rational coherence is an independent motive of human thought and activity, and Weber sometimes referred to it in order to overcome monocausal sociological explanations. The notion of *Eigengesetzlichkeit* which Weber had developed in the context of his sociology of religion then seeped into his sociology of law.

The Rationalisation of the Law

The term *Eigengesetzlichkeit* can indeed be found in the German version of Weber's sociology of law, but the English reader cannot easily recognize it for it is translated by «a high degree of independence» (ES: 650) and by «intrinsic necessity» (ES: 885)[120]. One needs to read the German

119 Dieter Conrad «Max Weber's Conception of Hindu Dharma as a Paradigm» in: D. Kantowsky (ed.) *Recent Research on Max Weber's Studies of Hinduism.* London: Weltforum 1986. Conrad suggested that *Eigengesetzlichkeit* may be a translation of the Indian term *svadharma* (the dharma of particular castes or a discipline imposed on one's group). Weber only used it after the completion of his research on India.

120 The corresponding German passages can be found in WG: 392 & 506.

text in order to realize that Weber's concept has been obscured by the translation, a concept which Weber also hinted at when he wrote of «the intellectual needs of the legal theorists» (ES: 855) and of «the force of the purely logical legal doctrines» (ES: 789). In order to arrive at the stage where *Eigengesetzlichkeit* can develop, it was necessary that the law separated from religion and passed through several levels of progressive rationalisation. Just as in the case of religion, the rationalization of law can be characterized by disenchantment, generalization and systematization or, as Weber wrote, a body of law can be «rational» in several different senses: generalization (which often leads to casuistry), synthetic construction of «legal relations» and, in later stages, systematization (ES: 655).

Early law was irrational. There were trials by ordeal, magical concepts, oracles, and there was patriarchal authority within sibs and clans. A criminal act was a violation of a magical norm, i.e., a tabu, and the original procedure of mediation was determined by magical beliefs. Witnesses did not affirm that a «fact» was true, but confirmed the rightness of the party whom they assisted by exposing themselves to the divine wrath (ES: 811). Trials took place as forms of arbitration or conciliation between different groups or clans whereas within the clan the patriarch pronounced his decision according to customary law. The first rationalisation of customary law was the result of the delimitation of the powers of the patriarch by religious norms or by a political power above the clans. Where the clans remained strong, as in China, a rational law could not develop. At this level, there were no general norms but rather evaluations of each particular case, often related to the status of the person being judged as this determined the decision. In these cases Weber spoke of an irrational law from a substantive point of view and of qadi-justice. Surviving characteristics of this kind of law can be found even today, according to Weber, in «peoples' tribunals» as well as in the existence of lynching and of juries.

A certain formalisation has then been introduced by charismatic persons, for instance the Druids among the Gauls or the *rachimburgi,* charismatic «declarers» of the law, in German areas. Also, Roman law consultants offered advice (*responsa*) to judges, formulated as oracles. These law consultants were probably among the first legal professionals. The judges then formulated their sentence on the basis of a revelation or an oracle. This law was formal in the particular sense of an exterior formalism. In order to acquire something, for instance, one needed to touch it with one's hand (*mancipatio*). Weber wrote of an irrational law from a formal point of view when one applies in law making and law finding means which

cannot be controlled by the intellect (ES: 656). Today, the oath is a remnant of this kind of law.

But the historical movement advanced from traditional law and charismatic law formulations to the creation of rational law. While in earlier times the law was revolutionized from time to time by prophets — the Decalogue or Koranic law come to mind —, law became more formalized since the arrival of salvation religion and particularly of Christianity, and the revolutionary powers then lay in the tension between the different orientations which this formalized law adopted. What contributed to the formalization of (Occidental) law was, on the one hand, the refusal of the Church to have any relations with the State, and, on the other hand, its great religious and intellectual influence which tended to eliminate magic and the power of the clans and had created a systematized belief system. Roman law had distinguished between *fas* (religious law) and *ius* (legal obligations), a distinction which facilitated the creation of a secular rational law by the law specialists in Byzantium and Italy. Only later did the Church, in a compromise with the secular powers, accept and adopt the natural law of the Stoics, «the sum total of all those norms which are valid independently of, and superior to, any positive law... and provide legitimation for the binding force of positive law» (ES: 867).

In order to eliminate the revolutionary tendencies which are immanent in all natural law, the Church adopted the Roman interpretation of natural law which distinguished between absolute and relative natural law, thus considering political subordination and even slavery as facts of life which one can soften but not eliminate. The adoption of natural law led also to to the reception of Roman law which in turn served as a basis of canon law. Canon law did not combine, as the sacred law of other cultures, secular elements with sacred law. In any case, the separation of secular law and the law of the Church, affirmed since Pope Gregory VII, strengthened the development of canon law and the development of the rational bureaucracy of the Church which, in order to impose discipline, needed rational legal procedures; it eliminated the ordeals and, during the Inquisition, even developed a certain concept of proof. By analysing this development Weber showed that the formal side of modern law in Europe had its origin in Roman law while its concepts are largely inventions of the Middle Ages or of even more recent origin (mortgages; company shares etc.).

In contrast to this formal rationalisation of canon law and of secular law, the rulers of the *imperium,* as Weber called the State of this period, often preferred a more substantive rationalisation which took account of

the political and social necessities as well as of the material conditions and of any ethical concepts which purely formal rationality tends to ignore. But these exterior influences of the law were also systematized to the extent to which the centralized *imperium* developed a bureaucracy. Among the exterior ethical influences was the modern form of natural law (as opposed to the classical natural law which was the foundation of canon law): the idea that there are inviolable innate rights or natural human rights. This idea is the foundation of modern individualism and of the modern concept of the contract, the social contract as well as the contract between two individuals. The last (provisional) stage, however, was the formally rational law of the German Pandectists of the nineteenth century. On the whole, according to Weber,

> «the formal qualities of the law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceded to increasingly specialized juridical and logical rationality and systematization, passing through a stage of theocratically and patrimonially conditioned substantive and informal expediency. Finally they assume, at least from an external viewpoint, an increasingly logical sublimation and deductive rigor and develop an increasingly rational technique in procedure». (ES: 882).

This very short summary of Weber's very rich historical analyses may serve as the basis of a typology of law. Most commentators believe that Weber constructed a rather simple typology, based on two oppositions: 1. Is the creation or the discovery of law rational or irrational? And 2. Is it rational or irrational from a substantive or a formal point of view? By combining the different possibilities, one arrives at four types of law:

a) Irrational law from a substantive point of view. In this case decisions are made on the basis of immediate feelings about a concrete case without recourse to general norms; no distinction is made between legal and extralegal criteria. This is a kind of traditional law, sometimes characterized by Weber as qadi-justice. (with reference to Muslim judges).
b) Irrational law from a formal point of view. Here the judge formalises his sentence, but he does it on the basis of means which are not controllable by reason: oracles, ordeals, *responsa*. Weber also refers to revealed law.
c) Rational law from a substantive point of view. This refers to the creation of legal rules which do not result from simple logical generalisation but which are based on extra-juridical norms such as a sacred

book, an ideology (such as the Soviet legal system) or utilitarian considerations.

d) Rational law from a formal point of view. The judge arrives at his decision by means of the internal juridical logic and on the basis of abstract rules within the systematized legal code.

Without doubt, these are ideal types which one encounters only rarely in their pure form, for reality is generally more complex. But these types have a heuristic value which permits to discern in which direction (e.g.: more formal or more substantive?) a given legal system orients itself. It is nevertheless surprising to what extent Weber's interpreters have disagreed in the application of these ideal types. English common law may serve as an example. Rossi[121] affirmed that English common law is rational from a substantive point of view; Freund[122], on the other hand, considered it formally rational; Rheinstein[123] wrote that English common law approaches a law type which is irrational from a substantive point of view; and Kronman[124] arrived at the conclusion that English comon law is mixed: it is rational if compared to oracles, but irrational if compared to the systematised law of the Pandectists.

But there are also those who seem to save the situation. Treiber and Rheinstein have suggested that Weber's typology does not contain four but rather five categories for, quite in conformity with Weber's text (ES: 657), they subdivide formally rational law into two subcategories: either the legally relevant characteristics are of a tangible nature and are perceptible as sense data (external characteristics of facts, e.g, the execution of a signature), or they derive from a logical analysis of their meaning when fixed legal concepts have been formulated. Thus, there may be formally rational law which is casuistic and another kind of formally rational law which is constructed as a legal system. Both these kinds of formally rational law (the «external characteristics» variety and the systematic abstraction variety) diverge from laws characterized by substantive rationality

121 Pietro Rossi «Die Rationalisierung des Rechts und ihre Beziehung zur Wirtschaft» in: M. Rehbinder & K.P. Tieck (ed.) *Max Weber als Rechtssoziologe,* Berlin: Duncker & Humblot 1987, p. 52

122 Julien Freund «La rationalisation du droit selon Max Weber» *Archives de philosophie du droit* vol. 23 (1978), p. 69

123 M. Rheinstein *Max Weber on Law in Economy and Society* Harvard University Press 1954, p. L

124 A. Kronman *Max Weber* London: Edward Arnold 1983, p. 89

(ES: 657). Indeed, Weber's typology of law can be systematized by the following diagram.

	substantive	formal 1	formal 2
rational	norms drawn from outside the law; holy book, ideology	general tangible characteristics; casuistic law; English common law	norms obtained by logical analysis within a system of thought: Pandectists
irrational	evaluation without general norms; qadi justice	formalisation which cannot be controlled by reason; e.g. ordeal	

Even if one takes account of this more nuanced typology, it is necessary to add another precision which is tied to the difficulty of translating the German text into English. In the translation provided in *Economy and Society* (ES: 656) one finds the sentence «all formal law is, formally at least, relatively rational». But there are two different German words which have been translated by the English word «formal»: these words are 1) «formal» which may be translated by «characterized by the form or by formality», and 2) «formell» which might mean «in relation to the form or to formality».[125] In fact, the German sentence in question does not only distinguish between the formal side and the substantive side of law, but it also asserts that the creation or the discovery of a legal system can be characterized by the aspect of the system which is emphasized. Thus, a given legal system can be considered as formal if the formal aspects are dominating the substantive aspects.

In this way Weber arrives at three distinctions: The first distinction opposes qadi-justice, based on the unique situation of an individual case, to judgments based on norms and general principles. This is the distinction between rational and irrational law. The second distinction opposes a law which separates legal and extra-legal norms, to a law which blends ethical and legal norms. This is the distinction between formal and substantive

125 The German text reads: «Formell mindestens relativ rational ist jedes formale Recht.» W.G. p. 326

law. Finally, the third distinction opposes a law which attaches importance to empirical and tangible characteristics of factual situations, to another kind of law where juridical characteristics are underscored by logical interpretation within a legal system of thought. This is the opposition between two kinds of rationality within the realm of formal law.

Weber used this typology in order to answer the question as to why the purely logical construction of law was produced only in certain parts of the Occident, a logical construction which was the result of the transfer of Roman law into a new cultural environment. Weber described how Roman law was cleansed of all national characteristics and «elevated into the sphere of the logically abstract» (ES: 854), starting from the occasionally brilliant remarks of the Roman jurists and ending up in the creation of purely systematic categories such as «legal transaction» or «declaration of intention» and the proposition that what the jurist cannot conceive has no legal existence. Weber also showed that the consequences of purely logical constructions were often irrational with regard to the expectations of commercial interests and to the needs of ordinary life, and he particularly insisted on the fact that the internal rationalization of law, its *Eigengesetzlichkeit*, is always in conflict with those ideas which are related to substantive law and with non-juridical elements (ethical, religious or political) and which try to suggest solutions which appear more equitable or legitimate in a given historical context.

The Carriers of the Rationalization of Law

Among the phenomena which made the rationalization of law possible, there was writing and literacy. They made it possible to set down precedents and to reduce the irrational interpretation and decisions of legal questions. They also made it possible to produce codes like the Decalogue or the Twelve Tables, thus making the law more coherent. Just like the priests were the carriers of the rationalization of religion, legal experts were responsible for the rationalization of law.

> «From a theoretical point of view, the general development of law and procedure may be viewed as passing through the following stages: first, charismatic legal revelation through «law prophets»; second, empirical creation and finding of law by legal *honoratiores* (cautelary jurisprudence and adherence to precedent); imposition of law by secular or theocratic powers; fourth and finally, systematic elaboration of law by persons who have received their legal training in a learned and formally logic manner.» (ES: 882)

If one leaves aside the irrational charisma of legal prophets and the legal teaching in clerical schools which leads to a substantive rationalisation of law, it is possible to state that two kinds of juridical formation have shaped Western law. In England the teaching of law was traditionally offered by practicians, a technical training in the empirical sense of the term, while in Germany and France theoretical teaching was offered in the universities. English lawyers belonged to four inns of court and had to submit to strict corporate etiquette. Admission to the bar was a corporate monopoly. This was a craft-like specialization, based on a practically useful scheme of contracts and actions; no general concepts were formed by abstraction or by legal interpretation. In the purely empirical conduct of legal practice one moved from the particular to the particular and perhaps to analogies (ES: 787).

In continental Europe, because of the existence of a large number of princely courts and the decentralization of the administration of justice, a powerful guild or corporation of lawyers was not created. Lawyers received their education in universities. This was a learning of abstract norms of systematic character, stimulated by Roman law and removed from the daily needs of possible clients. The professors were theorists of law rather than practicians.

By opposing the English common law and the continental law Weber tried to show how the formal qualities of legal traditions can be influenced by the carriers of the law (*Trägerschichten*), i.e., by intrajuridical factors. On the European Continent the development of the law led to a logical systematization resulting from the intrinsic intellectual needs of the legal theorists formed in universities (ES: 855). In these intellectual needs of the doctors of law can be found the roots of the *Eigengesetzlichkeit* of continental European law.

Weber rejected the Marxist idea that the law is a reflection or the superstructure of the economy. No human activity and no sphere of social life, according to him, can be reduced to another. In other words, legal concepts are developed independently and may then sometimes be used in an economic context. Particularly in the Occident the law mostly resulted from interior conditions: the needs of the carriers of law as theorists and the political interests of the state which utilizes them. The theorists of law (priests, professors, legal advisors) and the political interests of the princes determined the orientation of the law (formal or substantive). It is also impossible to say, according to Weber, that the rationalisation of the law will

necessarily lead to economic rationalisation[126] and it is therefore not possible to agree with Rheinstein that in Weber's writings the categories of legal thought have «evidently» been conceived as parallels of the categories of economic behaviour.[127] Rather, Weber tried to show that the forms of thinking have a greater significance and independence than what is ordinarily believed. One can only say that the economic structures offer sometimes a chance for the legal concepts to spread once they have been invented.

The «England Problem»

1. In general, the English literature on Weber's sociology of law has reacted rather negatively to Weber's classification and interpretation of the common law. Assuming that Weber wanted to study the relationship between law and economics (or between modern legal systems and capitalism), or the contribution of juridical ideas to the rise of capitalism, and in the conviction that one of capitalism's major geographic origins must certainly be found in England, anglo-saxon authors arrived at the conclusion that Weber considered the English common law as inferior to continental law or continental law as superior to English law and that this is a major difficulty for his theory.[128] Berman bluntly stated that Weber's treatment of the English common law is ultimately flawed.[129] They have overlooked Weber's comment that, wherever the two kinds of administration of justice and of legal training had the opportunity to compete with one another,

126 In this context Weber mentioned the amateurish notion of the littérateurs that Roman law promoted the development of capitalism, for the character of legal institutions of modern capitalism were completely unknown under Roman law and are of medieval origin (shares, bonds, bills of exchange etc.), and, moreover, Roman law never took roots in England (PW: 149, footnote).

127 Rheinstein 1954: LVIII

128 For instance Martin Albrow «Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law», (1975) 8 British Journal of Law and Society 14 -31, p. 22 and Bryan Turner *For Max Weber; Essays on the Sociology of Fate.* London: Routledge & Kegan Paul 1981, p. 332

129 In: Stephen Turner *The Cambridge Companion to Weber* (2000: 230). It is perhaps noteworthy that continental writers do not seem to have addressed the so-called «England problem» at all.

for instance in Canada, the common law has come out on top (ES: 892). Moreover, several general comments can be made in this context:

1. As has been shown in the preceding pages, Weber distinguished between two kinds of formally rational law, the English and the continental law, and also clearly stated that modern capitalism prospers equally and manifests essentially identical economic traits under legal systems which differ considerably from each other. (ES: 890)

2. Terms like rationalisation and formally rational law are ideal types and not ideals. That they are not ideals becomes clear if one remembers Weber's ambivalent attitude with regard to the rationalization of economic life, the «iron cage» which makes the soul wither away. As ideal types, on the other hand, they are heuristic concepts which accentuate unilaterally certain aspects of reality in order to make it appear coherent. In reality, however, both continental and common law contain aspects which may not be very formal and rational.

3. The critics who point to the «England Problem» neglect the distinction which Weber made between a legal order and empirical regularity, the law as a system of thought and the sociology of law. Rationalisation on the level of the law as a legal system does not necessarily imply a rationalisation on the level of empirical events or behaviour and, conversely, a rationalisation on the empirical level or of the maxims of the «players» does not necessarily lead to a more rational legal system. It is possible that this distinction between the sociological and the juridical point of view can more easily be made with regard to the continental law based on codes than with regard to the common law with its greater capacity to adapt to changing values and its closer relationship with substantive law.[130] What Weber called the *Eigengesetzlichkeit* in the continental law systems would be much more difficult to find in the countries of the common law. This would also explain the explicit criticism of Albrow[131] who believes that

130 Quite justifiably Michel Coutu (1995, p. 163) has complained that certain commentators, writing about the «England problem», did not sufficiently distinguish between the empirical and the dogmatic validity of legal propositions. He even suggests that the rationality on the level of legal dogma has no direct connection to empirical legal and rational economic behaviour (ibid. p. 152). The lack of a clear distinction between legal dogma and empirical behaviour might explain H. Berman's and Charles Reid's surprising critique that Weber saw law, as he saw fortifications or a market, as a «fact» and that he failed to examine the values that are represented in law (Berman & Reid 2000, p. 237).

131 Martin Albrow 1975, p. 27

the distinction between the sociological and the juridical points of view is not well founded, and the implicit criticism of all those anglo-saxon authors (like Kronman) who simply ignore or neglect this contrast. The distinction between the two levels of the study of law makes also possible a comparison with a similar distinction in Weber's sociology of religion: the coherent and logical dogmatic teaching of the Calvinists was based on the ideas of a transcendent God and of predestination. But this dogma which logically would have led to fatalism does not explain the empirical economic behaviour of the Calvinists which was rather oriented by the idea of proof in the sermons and counselling of the Protestant ministers.

It is well known that according to Weber the capitalistic enterprise needs a calculable law on which it can rely «as if it were a machine». It needs a legal system which can guarantee contracts and investments, and this was particularly true in the early times of modern capitalism when the enterprise had to struggle against the hostility of previous kinds of law. What is less clear, however, is the meaning of the term «calculable law» in the discussions on the relationship between law and economy, for the notion of the predictability in law can have - as Coutu (1995) has alteady suggested - two meanings: 1. On the systematic level it can refer to the possibility to deduct a juristic consequence of a given norm by logical manipulations; and 2. on the empirical level it may suggest an adequate relationship between a maxim of behaviour and real behaviour or a real judgement. The first level is the dogmatic level, the second is the sociological level to which one refers when one says that the capitalistic economy needs a calculable law. According to Weber, this kind of calculability is just as well achieved by the common law which is formal and empirical and tied to precedent as by the systematic and logically coherent law of the Continent (ES: 855).

In England and elsewhere the economy needs clearly defined legal concepts which only a formal law can provide. The concept of legal personality and all forms of limited liability which developed out of the *commenda* and the *societas maris* were useful in this context. But modern society is foremost an individualistic and contractual society. Weber discussed the freedom of contract in some detail. Before the rise of modern capitalism there existed mainly the status contract which led to a complete juridical modification of a person's social position and created a personal relationship (for instance the relationship between lord and vassal). This type of contract, according to Weber, was tied to magical and religious concepts: one felt dependent on a supernatural power which threatened

those who acted contrary to the oath which concluded such a contract. The modern contract, on the other hand, called purposive contract by Weber, which in other times and places existed mainly to regulate relationships between clans or nations, became important after the decline of self-sufficient kin groups and the rise of the market economy. It contributes to the dissolution of traditional relationships between individuals and is based on impersonal relationships. It is of no importance whether modern contractual relationships are defined and supported by a formally systematic legal system or by the more empirical common law. Both types of law are part of an individualistic society which accepts the freedom of contract between individuals, and both are formal laws which guarantee the stability and predictability of procedure.

But there is a phenomenon in anglo-saxon countries which diminishes the formal character of the common law: the concept of reasonableness. Reason, which in the past was tied to religious concepts of an eternal order of nature, has turned into the «reasonable» adaptation to the laws of the country. According to Weber (ES: 870), the concept of «reasonable» contains the meaning of rational in the sense of practically useful, and it implies the idea that nature or reason do not want to lead to absurd consequences. These utilitarian ideas which clearly favorise commerce tend to show, according to Weber, that the common law is closer to the ideal type of substantive law than the continental civil law.

Retrospective Considerations

Modern law is separated from religion, but it has close ties with the political domain and the state. Substantively rational law has coexisted with the most diverse political structures: patrimonial kingdoms, the cities of the Middle Ages, the welfare state and the socialist state; it has also coexisted with the most diverse economic structures: non-capitalist economies, political, adventure, and colonial capitalism. Its principles may be diverse, but they have one characteristic in common: they are extra-juridical. This type of justice is rational in the sense of adherence to fixed substantive principles; its ideal type is the Solomonian judgement, or, as Weber wrote, Sancho Panza (in the novel Don Quixote) when he happened to be governor (ES: 845). English common law, although formally rational according to Weber, has a certain proximity to substantively rational law and has coexisted not only with modern capitalism in England, but also with adven-

turer capitalism and political capitalism in the colonies. Formally rational law in the systematized continental sense, on the other hand, must be associated with the modern state and with modern rational capitalism. It was born since the systematizing efforts under the emperor Justinian in the sixth century, developed after the reception of Roman law in the Middle Ages and flourished in the *code civil* in France and the school of the Pandectists in Germany.

There is, however, in Weber's opinion a tension between the ideal of justice as it exists in substantively rational law, and the ideal of legal security and calculability of formally rational law, and this to the extent that, as formal rationalization increases, substantive irrationality also grows.[132] Indeed, formal justice inevitably violates the ideals of substantive justice. There are efficiency, calculability and impersonality on the one hand, fraternity and personal relationships on the other, and Weber did not at all consider formal rational law in an optimistic way, but rather - to use a formulation of Julien Freund - as an expression of pessimism which organizes despair.

SECTION 2: LAW IN THE WORLD RELIGIONS

Basic Literature:

Weber, Max (1968) *Economy and Society* (Chapter VIII: sociology of law, pp 635-900) New York: Bedminster

Berman, Harold (1983) *Law and Revolution* Harvard University Press

What are the developmental conditions of the formally rational law of the Occident? Only a comparison with the laws of the other world religions

132 This has later been underscored by G. Radbruch (1980, p. 41), who had been a member of Weber's discussion circle in Heidelberg. He quoted from Bentham's panegyric about legal security: it makes foresight possible, the foundation of all planning, of all work and of all saving; it brings about that life is not only a sequence of events, but that it has continuity. But the tension between the ideal of justice and legal security (*Rechtssicherheit*) may lead, according to Radbruch, to a situation which can be characterized by the sentence *summum ius summa iniuria* (unconditionally and strictly applied law can in extreme cases lead to complete injustice).

will render them visible. While in Western countries since the Middle Ages the sacred law is separated from secular law, so that the secular law and the juridical order can follow their own inner logic and systematization, supported by their own carrier strata, one finds in the context of the other world religions a conglomerate of mostly non-differentiated religious and legal prescriptions and therefore non-formal types of law, a non-differentiation of administrative and legal procedures, and large areas of social life governed by customary law. These legal systems will be shortly considered here.

It should be clear that when we talk about the laws of the world religions, we do not consider complexes of ideas that are considered valid and can be analysed by legal scholars. Although such legal ideas may be important on another level, on the sociological level we are concerned with maxims which are adopted by legal actors and followed more or less consistently. As such they constitute a part of the exterior conditions which influence peoples' conduct of life and particularly their economic behaviour (as opposed to the interior conditions: the mentality or the spirit of the people). Weber also talked of the exterior form, as opposed to the interior spirit.[133]

133 W. Gephard believes that the talk about the law as a form makes no sense for there are levels of relevance of the influence of empirical legal orders (Gephard, W. *Gesellschaftstheorie und Recht* 1993, p. 503). Without a doubt, the empirical legal order is not a form in contrast to something else as a matter, as Weber himself wrote, but it is one of the external/exterior determinants of the behaviour of the acting human being (CMW : 220), in contrast to the «spirit» which motivates from the inside. With Kant, Weber thought that law is heteronomous and characterized by exterior force and constraints. It is true that Weber asked about the extent to which empirical legal orders are of causal importance for cultural phenomena and that he thought that for instance the facts that constitute the Sistine Madonna as a historical individual are irrelevant from a legal point of view (CMW : 221), but it remains that he considered empirical legal orders as relevant in regard to economic behaviour, even if it is true that not all the forms of social phenomena are as restraining as an iron-cage as it is possible to either adapt to it or to try to violate it.

1. The Laws in Non-Occidental Cultures

China

In China there was no class of jurists nor any specific legal training. Chinese law did not arise from any religious revelation but rather from the code of conduct of a secular aristocracy. The high officials, the mandarins, had received a classical education and, to the extent to which they were involved in jurisdiction, they did not pronounce their decisions according to formal rules, but they took account of the concrete situtation and of the quality of the people before them. A specialised officialdom was lacking because of the magical idea according to which the virtue of the emperor and of the officials (their classical education and the performance of the prescibed ceremonies) keeps everything in order.

In a patrimonial state such as China the administration of justice can be rational in the sense of obeying firm principles, but this is not a rationality resulting from a formally precise and systematic construction of norms and thus is not calculable. It rather is of a substantive kind which is based on political or ethical principles. In fact, patrimonial law is imbued with substantive norms, and general administration and legal administration cannot be distinguished (ES: 844). Criteria of reasonableness, expediency and favor prevail, and Weber here used the concept of qadi-justice (RC: 102).

The power of the sibs in China was unbroken, and personal rather than formal legal relationships continued to dominate. The villages were largely self-administered according to local custom, based on the concept of piety (x*iao*) and with the help of informal dispute settlements within the sibs or clans. In fact, the clans were the most important source of private law and their agreement was often necessary in the case of a transfer of property. There was thus a relative absence of formal legal processes and the development of a private legal profession was discouraged as disruptive of the cosmic order. Moreover, among the ordinary Chinese there was a predisposition on grounds of expense, uncertainty and risk not to set off the rather brutal offical legal machinery.[134]

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134 The relative absence of formal legal processes in traditional China was well described by Fei, Hsiao-tung in *From the Soil. The Foundations of Chinese Society* (transl. By G. Hamilton & Wang Zheng, U. of California Press 1992). He described a society in which considerations of order, and not laws and individual

The cities, because of the lack of the legal concept of corporation (RC: 91), were unable to show any autonomous legal development[135]. In official law, the cities existed only as organizations for enforcing the family liabilities for taxes and other charges (ES: 726). Commercial questions were hardly mentioned in the imperial codes and were mostly regulated by the associations of craftsmen and merchants.[136] In case of arbitration, neither party might be granted an outright victory because of considerations of «face».

Formal calculable law did not exist, even with regard to property. Weber noted the possibility that a man who sold his house to another might return after some time and demand to be admitted as a non-paying tenant because he had since become poor (GEH: 342). Because of this lack of calculability Weber spoke of the irrationality of Chinese justice, related to patrimonial factors and the desire to preserve the honour and the «face» of all parties. On the whole, a rationally calculable functioning of administration and jurisdiction which is necessary for commercial capitalism did not exist, although politically determined capitalism quite often did flourish (RC: 103).

Even the Constitution of 1982 is different from the Occidental «rule of law» model; it does not assume that the State should control every activity and in this regard it is similar to the old Confucian division of legal activity between informal social justice and the official imperial code. Law is studied as a branch of administration and mediation and compromise are used by the state itself.[137]

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rights predominate – and where order means that each person must uphold the moral obligations of his ties with others. *Ke ji fu li* (subdue the self and follow the rites) is an old Chinese proverb, and Confucius wrote : what is necessary is to cause people to have no litigation (Analects, book 12, chapter 13). Fei further wrote that any litigation was considered shameful because it indicated a lack of proper education (ibid. 103), and the people who file cases in the courts of the modern judicial system are the same people recognized in the country side as being morally corrupt.

135 According to Karl Bünger, also the concept of limited company did not exist in China until quite recently because it limits the principle that debts must be paid. Even in modern times Chinese judges had difficulties with this concept.
(Karl Bünger «Das chinesische Rechtssystem und das Prinzip der Rechtsstaatlichkeit» in W. Schluchter, *Max Webers Studie über Konfuzianismus und Taoismus* Frankfurt a.M. 1983.)

136 S. van der Sprenkel, *Legal Institutions in Manchu China*. London 1977, p. 89

137 *Vide* Menski 2000 : 530

India

Weber believed that in classical India all law was, according to Hindu doctrine, contained in the sacred books called the dharmasutras and dharmashastras, redacted by the priests (brahmins)[138], whereas profane (customary) law was limited to the particular laws of certain professions and castes. These profane laws of the guilds and castes were not rationalized or systematized as they were not influenced by any intellectual or professional carriers (priests or others); in fact, there was no legal profession.

The means of coercion was the exclusion from the guild or caste. Proofs were sometimes formal, but irrational (magical ordeals), and often non-formal (hierocratically influenced). A disappointed creditor had magical procedures at his disposal: he would seat himself in front of the debtor's house and starve himself to death, thus compelling his sib to revenge him against the debtor. (ES: 678).

Because of the doctrine of karma (which derived one's place in the hierarchical system of castes from actions in previous lives), the juxtaposition of different ethics, even sharply contrasting with each other, did not pose a problem; moreover, society was ideally divided into four hereditary categories: the brahmins (priests), ksatriyas (political representatives), vaishyas (pursuing commerce and agriculture) and shudras (servants), each category having its own dharma (religious duty, obligation). The dharma of the ksatriyas, for instance, was quite Machiavellian: in the epic Mahabharata, Arjuna must kill his relatives in battle to fulfill his dharma.

But there was no place for the development of any kind of superior normative order, like the natural law concept in the Occident (RI: 144) which might have initiated a rationalization of the law[139]; there were diverse

138 These sacred «law books», concerned with the position of status groups and practical problems of life (ES: 792), did, however, not contain law in the modern Occidental sense of the term, but rather rules of guidance which were not binding and served as residual sources of law when no customary rules could be found. One might talk of a co-existence of local customary practice and the textual model. In the *Manavadharmashastra* (Manu 8. 41) one reads that a king who knows the sacred law (dharma) must inquire into the customary laws (caritra) of castes, districts, guilds and families and thus settle the peculiar law of each. *Vide* Menski, Werner *Hindu Law Beyond Tradition and Modernity*, Oxford University Press 2003, Chapter 3. *Vide* also Lingat (1967 : 197 sqq.).

139 Scholars of India have questioned this ; they contend that, although there may be a difference in the material content, the *dharma* is a kind of natural law or an ide-

ethics and customary laws, but there was no universal or absolute law. And there was no legally constructed state which might have provided legal guarantees for economic activities, for the all-pervading dharma doctrine did not provide an incentive for legal rationalization. There were royal edicts, but the king did not make law but was supposed to enforce the respective dharma and customary laws of the various groups. If from time to time a capitalistic development seemed to blossom, this was due to the power of the guilds and other groups which organized the use of arbiters and private tribunals. Nevertheless, credit relationships normally existed only among sib-members, and joint liability of partners was lacking as any law of corporations was rather undeveloped (RI: 52).

Weber did not mention the complicated development of Indian law after the arrival of the East India Company, for instance the ruling of the governor Warren Hastings in 1772 that in all suits regarding inheritance, caste and religious usages the laws of the Koran with respect to Muslims and the laws of the dharmashastras with respect to the Hindus should be adhered to, assuming that Hindu law can be found in books despite the crucial rôle of custom. Even in the apparently westernized Constitution of India – which remains remote for most rural Indians – many of the legal postulates of the old customary system (particularly with regard to personal laws) could not be legislated away. This Constitution of 1950 even specifies (III, 13, 3 a) that law includes custom having in the territory of India the force of law, and it also contains an article on fundamental duties (51 A), relating to the promotion of harmony and compassion and reminding the reader of the edicts of the emperor Ashoka. In fact, even Gandhi's stance against Western individualism and human rights was based on such legal postulates.

Buddhist Countries and Japan

Although Weber mentioned the legislative influence of Buddhist ethics in Southeast Asia (e.g. the protection of slaves), he also stated that a holy «law» as an object of particular learning could not develop because of

al law (Dumont, 1966, p. 333) or at least a functional equivalent of natural law. Decisive is its critical distance from customary law, royal edicts and practiced jurisprudence (Dieter Conrad *Zwischen den Traditionen* Stuttgart : Fritz Steiner 1999, p. 360).

Buddhist ritual formalism and its ethic of conviction. These all too short comments need to be expanded on the basis of more recent research related to Thailand or Siam.

The Code of the Great Seals of 1805 consisted of a body of general rules, derived from the Siamese *dhammasattam*, a sacred and immutable code, first assumed to have been compiled under the legendary king Mahasammata (the great elected), and of royal ordinances which were not sacred and could be repealed. Royal ordinances could become permanent laws and part of the Code not because they emanated from kings, but only to the extent to which they were considered as illustrations or derivations of the eternal sacred law; they drew their authority from their conformity with the *dhammasattam* and merely supplemented it. Generally, though, the orders or proclamations of a ruler were only valid during his reign but could be reaffimed by his successor. Thus, the king was thought to be an upholder of cosmic law, he could give orders but not make law. Therefore, Siamese law was not considered as arbitrarily created by human authority or as the product of a legislative process. The calculability of the functioning of the legal process and legal security, so important for the development of modern capitalism, were in no way guaranteed.

Moreover, there were also what might be called autonomous legal domains: wide areas of unwritten customs of inveterate character, relating to family, commercial relationships and to the Order of the Buddhist monks (sangha). On the whole, according to Lingat[140], there was no place in Siam for what we call modern law before the kings Mongkut and Chulalongkorn in the nineteenth century introduced Western – influenced legal codes.

Weber also treated Japan in his section on Buddhism, and it is true that Buddhism had, together with Confucianism, a strong influence on Japanese legal principles and unofficial law already since the Constitution of 604, formulated under crown prince Shotoku, which mentioned the Buddha, the Dharma and the Sangha. Nevertheless, more recent authors[141] have insisted on the antilegal mentality of the Japanese and that Japanese law has largely been customary law, and Masaji Chiba has called Japan a Shinto society, pointing to the buraku spirit and the «community constitution» of local communities as well as to the prevalence of conciliation and

140 ‚Robert Lingat «Evolution of the Conception of Law in Burma and Siam», 38.1 *The Journal of the Siam Society* (1950), p. 26.

141 D. F. Henderson *Conciliation and Japanese Law* Seattle 1965

mediation, for «the notion that a justice measured by universal standards can exist independent of the will of the disputants is alien to the Japanese»[142]. Since the Meiji reforms there exists an interrelation and interaction between received Western laws (Prussian and, since the end of World War II, American law) and indigenous law.

Islam

Islamic law, Weber wrote, is a law of jurists which is a necessary condition of formalization and rationalization, although it is not a sufficient condition. The Koran may not be a code of law, but it contains sacred legal postulates, whereas human law is considered to be of an inferior kind, acceptable only if it is in accordance with Allah's will.[143] The independent interpretation of Koran and hadith (collection of the prophet's sayings) was not seen as permissible after the «closing of the gates of ijtihad» in the tenth century, as prophetic legal capacity was now only attributed to the founders of the four orthodox law schools, and the consensus (ijma) of jurists became the basis of validity of any law.

Whereas in the Christian tradition and in canonical law the concept of the Pope's infallibility *ex cathedra* and the Church Councils were able to initiate adaptations and systematizations of the law, this was not possible, even in unavoidable cases, in the Islamic and particularly in the Shia tradition, except for the price of unsystematic casuistry and trickery[144], as Weber said. Systematic law making with formal concepts was impossible, because the holy law could not be disregarded, nor could it be adapted to new situations which arose in practice. The assumption of the absolute correctness of the holy law (sharia) rendered impossible the formal element of occidental law which attributes a potential of rationalization and

142 Quoted from M. Chiba, *Asian Indigenous Law*. London 1986, p. 335

143 Since Shafi (9th century legal scholar) a common methodology of interpretation has largely been accepted by all legal schools and the sources of law are seen in a hierarchical order: Koran, hadith (example of the prophet), consensus (of the community and of legal scholars) and analogical reasoning. This hierarchical view made the complete separation of sacred and secular law impossible.

144 To evade the sharia ban on interest (riba), the creditor, instead of lending the capital with interest, would buy something from the debtor for the exact amount of the capital payable in cash, and then resell it to him for a price amounting to the capital plus the interest, payable at a future date.

of legality to the correct procedure. In Islam, the law is aimed at substantive justice or principles which is opposed to Weber's concept of formal rational law.

With regard to commercial activities, the concepts of corporation and of juristic person[145] (the business corporation, but, in fact, the concept of corporation in the Occident also extends to cities. guilds, universities etc.) were lacking, concepts which were of major importance for the capitalistic development of the Occident, but lacking were also the conceptual preconditions which allow the construction of a secular state as an «Anstalt» which is separated from religious life.[146] On the contrary, the arbitrariness and unpredictability of the patrimonial rulers had the effect of strengthening the influence of sacred law, for instance by the immobilization of property in the form of *waqfs* to religious institutions which provided revenues to the founder and were protected against seizure by secular authorities (ES: 1096)[147]. Although Weber did not mention it, the Islamic rulers have always had the right to make administrative regulations and to set up the so-called mazalim courts which applied the rulers' regulations and even custom as long as they remained under the ambit of the sharia.

Official scholars, the mufti, gave authoritative legal opinions to the judges (qadi), but, like oracles, these opinions were given without any statement of rational reasons and thus increased the irrationality of the sacred law (ES: 821). The qadis (judges), on the other hand, interpreted the Koranic and hadith provisions largely as matters of personal discretion. Weber's term qadi-justice which he applied also to other legal traditions has its origin here. [148] In the Shiite tradition (particularly in Persia) the ju-

145 This point is based on J. Schacht *An Introduction to Islamic Law.* Oxford 1964, p.155, whose analysis largely follows in Weber's footsteps. Moreover, while Weber mentioned only in passing the prohibition of interest taking in Islam (ES: 583), - and not only of usury, as the English translation suggests -, Schacht is more explicit and also describes the various devices used in evading this prohibition (ibidem p. 78).

146 The state in Weberian terms: By means of agreed upon or imposed statutes rationally ordered institution (Anstalt), if for the enforcement of this order an apparatus for legal coercion exists.

147 Madrasas (Islamic colleges) were founded as charitable trusts under the law of *waqf* ; the founder could appoint himself as head, and nothing inimical to the spirit of Islam was allowed to be taught there. In this way, of cause, the sciences did not gain any institutional autonomy.

148 The Islamic tradition has also inspired Weber to formulate another concept: sultanism (arbitrary exercise of patrimonial power).

risdiction of individual judges does not even seem to have been clearly fixed, for the parties could choose from among a number of judges from competing schools. (ES: 823)

Thus it was the religiously determined organization of the Islamic patrimonial states and the weakness of all legal guarantees of the patrimonial justice system which impeded a capitalistic development.

Today, at least in some countries, the closed doors of ijtihad may be slightly ajar as the so-called neo-ijtihad movement demands more independent judgement to adapt to the modern world.

Jewish Law

The positive law of Israel was created through *berith* with Jahwe and it was not impossible that it might be changed again, for it was not an eternal order like the dharma in India. The Torah and the interpretative holy tradition were considered as a norm in all areas of life. Like in Islam, the norm applied to coreligionists only, but, unlike the situation in Islam, the carriers of this legal tradition were not a dominating class or group but rather a pariah people. Commerce with outsiders was partially governed by relaxed ethical norms although the Jews tried to adapt themselves to the legal norms obtaining in their social and political environment.

In the pre-Christian centuries there developed the scholarly treatment of legal questions and the legal technique of consulting jurists (interpreters of the Torah) in Jerusalem and Babylon under an exilarch whose jurisdiction was officially recognized by the Parthian and later by the Islamic rulers, for the Jews enjoyed judicial autonomy and communal leaders imposed internal discipline and prevented Jews from resorting to non-Jewish courts. Only after the extinction of the office of the exilarch in the tenth century Western Judaism freed itself from the Eastern influence and from what Weber called the speculative and dialectical treatment of the Torah (ES: 825).

To obey the law was now all that mattered whereas magic was cast aside. But, besides the elimination of magic Weber pointed to the degree of systematization as a criterion for rationalization. Logically coherent systematization (ES: 828), though, was prevented by the technical nature

of Jewish legal interpretation (AJ: 414) [149] based on common sense and concrete casuistry while there was no opportunity for genuinly constructive rational thought and the formation of rational concepts as practiced by the Roman jurists. No distinction was made between legal and ethical or religious norms.

Weber considered it improbable that some legal instruments or techniques of capitalistic commerce were invented by the Jews or that they found in Jewish sacred law an appropriate context for their development. Restrictions on interest taking according to Deuteronomium 23, 21 were, in case of commercial credits, circumvented by the formation of a contract between bank and credit-taker (isqa) which interpreted the interest as a kind of profit-sharing. Contracts entered into for a lawful purpose were recognized and enforced even if a transgression was committed in drawing them up (e.g. written on a Sabbath), for the freedom of stipulation was assumed. It was thought that the Torah did not establish civil norms as *ius cogens* but rather as dependent on the will of the parties to the transaction, a *ius dispositivum*. [150]

To obey God's laws was the duty of Israel and of every Jew. But, as Guttmann who interpreted Weber's work on ancient Judaism, pointed out[151], the Jews in their pariah situation did not feel responsible for the existing economic and political order where they lived (tax farming, slavery, political capitalism) and adapted to it to the extent that their laws and rituals permitted it. In this they were different from the Puritans who wanted to subject the world to God's domination. Therefore, the rational development of Jewish law was limited although the observation of the law and not ritual was the highest legal and religious duty.

149 *Vide* : Deuteronomium 4, 2 as well as the Talmud : Shabbat 63 a («a verse cannot depart from its plain meaning») and Sanhedrin 86 a (the necessity to consider the total context).

150 Menachem Elon «Law, Jewish» in: *Dictionary of the Middle Ages* vol. 7, p. 489

151 Julius Guttmann «Max Webers Soziologie des antiken Judentums» in: W. Schluchter *Max Webers Studie über das antike Judentum.* Frankfurt a. M. 1981, p. 326

The Law within Russian Orthodoxy

Before the Revolution of 1917 there existed in Russia customary law, the legal codes imposed by the respective rulers, ecclesistical law and in the past the law of the city republics. Customary law was followed by the largest part of the population, the peasantry; it regulated mainly questions of property and of peace and order in the family and the *mir* (peasant commune).

The main legal codes, starting with the *Russkaia Pravda* (eleventh century), then the the *Sudebnik* (1497), the *Sobornoe Ulozhenie* (1649) and the *Polnoe Sobranie Zakonov* in the nineteenth century were imposed from above by the patrimonial rulers and often contained at least some foreign (Byzantian, Western) ideas. The application of these codes in daily life may be characterized by three observations: 1. Judicial procedures often involved «God's justice», i.e. the judicial duel (supervised by state officials) and ordeals (water and iron). While in the West the Lateran Council (1215) had eliminated the ordeal from court procedure, Russia retained it well into Muscovite times and thus retained a formally irrational procedure. 2. As has been mentioned by many scholars[152], although the law codes, e.g. the *Sudebnik,* paid particular attention to bribery, they were unable to eradicate it; in fact, justice often was but another name for the generation of income for the officials involved. 3. The law codes were occasionally supplemented or partially modified by decrees (*ukaz*) of the rulers which might be incoherent and modified again by subsequent decrees, particularly since Peter the Great, as the tsars were not tied by their own decrees. All this, of course, did not contribute to the formation of a calculable rational legal system.

With regard to legal concepts directly affecting economic life, Weber pointed out that Russian law recognized liturgical collective liability and the corresponding collective rights of the compulsory organizations (of the village commune, *mir*, and of craftsmen, *artel,* and merchant guilds), but

152 Daniel Kaiser *The Growth of Law in Medieval Russia.* Princeton University Press 1980, p. 121 and Leroy-Beaulieu *L'Empire des Tsars et les Russes* Paris: Robert Laffont 1990, p. 659

that it did not know of the rational concept of the corporation as it was developed in the Occident (ES: 726) [153]

The government also created merchant guilds with liturgical responsibilities. In all cases of liturgical responsibility the hard-working members shared duties with the lazy ones – and this did not stimulate hard work.

Property was generally tied to services so that allodial property was largely absent. Moreover, there was no tradition of contractual agreements as it had been implanted in the Occident by feudalism. More generally it may be said that the idea of (commercial) contract can only flourish where the culture is ready for it. This was not the case in Russia, as Procaccia has shown on the basis of a comparison of Russian and Western iconography: there was no individualism in Russia, Eastern Orthodoxy had only contempt for worldly riches while in the West wealth was worthy of aspiration, and there was no tradition of empirical enquiry based on experience in Russia.[154] Interest taking, though, was permitted already since the *Russkaia Pravda.*[155]

The population of the city republics of Novgorod and Pskov, governed by their own *veche* (general assembly) before their privileges were eliminated by the tsar Ivan III, lived by customary law and the *Russkaia Pravda,* but Hanseatic tradesmen in Novgorod had their own court with territorial immunity and their own law, the Skra.[156] Disputes between the native Russian population and the foreigners were the moving force behind ever new regulations.

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153 Thomas Owen *The Corporation under Russian Law 1800-1917.* Cambridge U. Press 1991 describes the restrictive policies in Russia with regard to the received law of corporations in order to saveguard the essence of the Russian autocracy.

154 Procaccia (2007) opposes Russia's «icon society» (the Orthodox icon as a window to the Russian spirit) to the Western contract society. There was, according to him, no individualism in Russia as the art of portraiture never materialized there ; and there was no empirical enquiry as there existed no illusion of perspective on a two-dimensional surface as in Western Renaissance painting, but rather a reverse perspective in Rublev's *Holy Trinity* in which the depicted event is shown as happening outside of the laws of human existence.

155 Weber pointed out that in periods of natural economy the Christian Church condoned the taking of interest and that the persecution of usurious lending arose only with the incipient development of actual capitalist instruments. What was involved, according to him, was the struggle in principle between ethical rationalization and the process of rationalization in the domain of economics (ES: 584).

156 Feldbrugge *Law in Medieval Russia.* Leiden: Martinus Nijhoff 2009

Ecclesiastical (canon) law governed clerics and lay persons residing on church property as well as matrimonial law. This law was written law and it required written documentation. As such, it was able to influence some areas of secular law (inheritance, testimony) where documentary proof was required for evidentiary puposes. But it was not able to initiate a more general shift towards more rational modes of proof as in Occidental jurisprudence.

In Russia there was no scholarly interest in law before at least the seventeenth century, and then it was based on Byzantine law and particularly the Ecloga[157] rather than on Roman law. A formally rational law was not developed because Orthodox canon law remained stifled under Russia's caesaro-papistic rule. According to Weber, the patrimonial codifications of the nineteenth century before the liberation of the serfs constituted largely the status law of the small privileged strata and left untouched the peasantry (ES: 858).

2. Canon Law

The Christian emperors of Constantinople, characterized by Weber as caesaro-papistic, convoked the general church councils and they confirmed the decisions of these councils which then became part of the canon law. In the novella 131 the emperor Justinian also decreed that the canons of the previous ecumenical councils should have the status of law and thus be incorporated into the legal order of the state. This meant that holy canons might be abolished by imperial decrees[158] and that in any case state laws were applicable within the Church concerning all questions in regard to which no canon law had been passed. No clear independent canon law development could take place[159], at least in regard to the exterior or adminis-

157 D. Kaiser *The Growth of the Law in Medieval Russia.* Princeton U. Press 1980, p. 173

158 W. Hartmann & K. Pennington (ed.) *The History of Byzantine and Eastern Canon Law to 1500.* Washington: Catholic University of America Press 2012, p. 128

159 In the ninth century the Patriarch Photios in the Eisagoge tried to at least relatively separate the duties of the *imperium* and of the *sacerdotium* (considering the *politeia* as the body and the church as the form), but these finally remained, in the view of the Eastern Church, two principles (*archai* according to Leo Diaconus, a Byzantine historian) and not two powers (*potestates*) as was later claimed during

trative aspects of church life (Constantine was, according to Eusebius, the overseer of exterior church matters[160]); no law schools, even of the Islamic sort, existed, and it is not surprising that many collections of church laws came to be called nomocanons, an expression of the fusion of imperial and church laws, as they contained both imperial and canon laws. Eastern canon law, according to Weber, remained unchanging and without influence on economic life.

But important changes took place after the Schism between the Eastern and the Western Church and in the course of the Investiture Struggle and the Papal Revolution. Gratian, in his Decretum (Concordia discordantium canonum, 1140 A.D.) which distinguished between divine law, (Stoic) natural law, ecclesiastical laws, secular laws, and customs, on this basis created a hierarchized and systematized body of ideas and laid the foundation of Western canon law which differed significantly from the canon law of the East. It implied the idea that customs must yield to natural law so that custom lost its sanctity.[161] Moreover, a clear dualism between secular and canon law developed, avoiding all hybrid structures as they exist in other sacred law traditions. In the medieval universities the teaching of secular law and canon law was separated.

The jurists did not concern themselves with *responsa* as elsewhere, but with conciliar resolutions and Papal decretals (and even created such sources by deliberate forgery: the Donation of Constantine and the Pseudo-Isidorian Decretals). Canon lawyers created the term positive law (laid down by human law makers, distinct from divine law and natural law). Legislation was thus produced by rational enactment and inconvenient previous regulations (as in the case of usury) could even be set aside *ratione temporum habita* (because of the circumstances of the time). A decisive factor was the unique organization of the Catholic Church as a rational compulsory institution (*Anstalt*) with rationally defined bureaucratic offices (ES: 828)[162].

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the Investiture Struggle in the West.. The Leo Diaconus text can be found in B. G. Niebuhr (ed.) 1828 : 101 sq.

160 It is true, though, that there has been some debate about the Greek expression επίσκοπος των εκτός regarding the question whether it refers to matters or people.

161 Berman (1983) p. 145

162 The Church included elements of the concept of *Anstalt* into the older concept of corporation. The concept of corporation in Roman law implied the separation of collective and individual property (ES: 715); the concept of *Anstalt* (often trans-

But, as Weber mentioned (ES: 830), the theoretical claim to an all-embracing substantive regulation of the entire conduct of life which all systems of theocratic law share had few effects in the Occident because canon law had a serious secular competitor in Roman law since the «rediscovery» of Justinian's Digests.

Weber believed that the practical impact of canon law on commercial law was minimal, and there was indeed a strong opposition against all claims of the canon lawyers to settle secular affairs. With regard to legal contributions Weber wrote that the canonist concept of corporation opened the way to the concept of the state as a legal institution. But the canon law's main influence on secular law lay in the field of procedure and proof, in particular by an inquisition operating ex officio which tried to establish the true facts of a case. Procedure was now considered as part of natural law, and not of custom or positive law. In his Dictatus Papae (1075) the pope Gregory VII had declared that no one should dare to condemn one who appeals to his apostolic chair. But, as it was clear that an appeal from a decision of an ordeal (considered to be a judgement of God) was impossible, it followed logically that the old system of irrational proof by hot iron and water could not be used any longer and only proof based on evidence became acceptible.[163] Since the Fourth Lateran Council (1215) written records of proceedings had to be kept in ecclesiastical courts and clerics were not allowed to participate in ordeals.

3. European Secular Law

Roman Law

When the Pandects (Digests) of the Roman emperor Justinian had been «rediscovered» in the eleventh century, the reception of Roman law created a profession of jurists who graduated from universities like Bologna and were employed throughout Europe. Already in Rome a secular literary stratum of legal advisors had developed a secular law (*ius* as opposed to

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lated as institution), a legal concept developed much later, implies that it can act legally only though its organs, that its members have no influence on its management (ES: 707) and that it is bound by formal rational law.

163 K. Pennington «Due Process, Community and the Prince in the evolution of the ordo iudiciarius» in: *Rivista Internazionale di Diritto Comune* vol. 9 (1998), p. 12

fas), and as there was no sacred law with any binding force and the mind was unencumbered by any theological or ethical concerns, as Weber wrote (ES: 854), the purely logical elements of legal thinking had increased.

The formal and logical qualities of Roman law brought it to supremacy in Europe [164] with the help of the Bologna-trained jurists and legal glossators[165] - except in England where there existed already a national system of legal training – while the substantive Roman law incited little interest. In fact, all specific legal concepts of modern capitalism (shares, bill of exchange, commercial company, land register, mortgage etc.) originated in the Middle Ages and not in Rome.

Natural Law

Natural law, according to Max Weber, is the sum total of all those norms which are valid independently of, and superior to, all positive law, and which provide the very legitimation for the binding force of any positive law (ES: 867). It is, Weber continued, the only consistent type of legitimacy of a legal order which remains once religious revelation and the sacredness of tradition have lost their force. The *lex naturae* (natural law) was a creation of Stoic philosophers. It was taken over by Christianity not in its original form (a golden age and a blissful state of equality of all human beings), but in its relative interpretation for the purpose of constructing a bridge between its own ethics and the norms of the world: political subordination, the diversity of status and even slavery had to be accepted, according to relative natural law theory, as facts of life after the Fall and as remedies for men's viciousness. As such, natural law was a cultural and not an ethical value.[166]

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164 The prevalence of formal legal thinking even led to the theological idea that the relationship between God and man is a legally definable relationship and that salvation is settled by a legal process (Anselm) (ES: 553).

165 Weber's view has been complemented by Breuer's observation that Roman law left more scope to the individual than the laws of other advanced civilizations (in China the individual was «hors la loi»), and a connection between individuals needed to be found on a formal level (Stefan Breuer «Imperium und Rechtsordnung in China und Rom» in: S. Breuer & H. Treiber (eds.) *Zur Rechtssoziologie Max Webers*. Opladen 1984, p.110)

166 Weber spoke of cultural ideals which the individual wants to realize, as opposed to ethical duties which he ought to fulfill (CMW : 104).

Modern natural law theory stems from ideas indigenous to England that every member of the community has certain inherent natural rights (the rights of the barons in the Magna Carta, the rights of every human being in the seventeenth and eighteenth century). It led to the social contract theories of the seventeenth and eighteenth century, according to which society is the result of the decisions of autonomous individuals and as such artificially constructed. On the other hand, it was also influenced by certain Puritan sects. Jellinek, whom Weber mentioned approvingly, had shown this with regard to religious freedom in the Virginia Bill of Rights where he found the idea that inalienable innate rights of the individual have a religious and not a political origin.[167] In any case, Weber insisted that only the Occident has known «natural law» and with it the complete elimination of personal laws and of the ancient maxim that special law prevails over general law (ES: 883).

Natural law can be either formal or substantive. In its formal version it had individualistic aspects and led to the principle of freedom of contract and the full development of the concept of property on the basis of contractual transactions. The substantive version was introduced by socialist theory and social welfare legislation which justified the acquisition of wealth by one's own labour only.

The «just price» of labour was one of the more important natural law elements of economic doctrine. Weber described how the labour value price corresponding to the subsistence principle was gradually replaced by the competitive price, considered as the «natural price» in the same measure as the market economy progressed. Among the Puritans and throughout the whole puritanically influenced Anglo-Saxon world this principle became dominant whereas the price which did not rest on competition in a free market (but was based on social welfare considerations) was considered «unnatural» (ES: 872/3).

Depending on the concept of nature and the concept of law, the most contrasting interpretations of natural law have been advanced. Nevertheless, Weber believed that many axioms of natural law have been discredited and lost their capacity to provide the metaphysical basis of legal systems as legal positivism advances irresistibly. Its continued significance lies in the fact that natural law dogmas have strengthened the tendency to-

167 Georg Jellinek *Die Erklärung der Menschen- und Bürgerrechte.* München: Duncker & Humblot 1895 p. 57

wards logically abstract law or the power of logic in legal thinking (ES: 873/4).

Continental European Law

By the end of the Middle Ages the courts in continental Europe had adopted the canonical judicial procedure based on Roman law (*ordo iudiciarius*). Moreover, Roman legal concepts were cleansed of all national associations and made more abstract; purely systematic categories such as «legal transaction» were created. Law was not taught by observing the actions of legal practitioners (judges) or by studying particular cases (as it was done in the English inns of court), but by professional teachers who expounded on rules of law contained in authoritative texts. These teachers considered it as their task to construe legal situations in a logically impeccable way and to see in law a logically consistent and gapless complex of norms (ES: 855). Thus, the logical systematization and *Eigengesetzlichkeit*[168] of the law was the consequence of the intrinsic intellectual needs of the legal theorists and not always in step with the practical conditions of life and commercial interests. The law was now thought to be continually transformable and devoid of all sacredness of content. The school of the Pandectists in the nineteenth century around Carl von Savigny was characteristic of this tendency in continental European jurisprudence.

The practical need for a calculable law, Weber wrote, did not play any considerable rôle, for this need may be gratified as well by a formal empirical case law as in England where the judges are bound by precedents and thus by calculable schemata (PW: 148); nevertheless, the rationalization and systematization of the law and the increasing calculability of the legal process constituted one of the most important conditions for the existence of economic enterprise which cannot do without legal security (ES: 883).

But, on the other hand, there have been anti-formalistic tendencies and a movement against the methodology of the Pandectists. The enlightened despotism and patrimonialism of the eighteenth century led to more substantive justice (e.g. Prussia's *Allgemeines Landrecht*), even though the

168 ES: 885 translates: «intrinsic necessities of logically consistent formal legal thinking».

formal qualities of the Roman law tradition can account for the fact that the patrimonial justice elements of continental Europe did not lead to the path of patrimonial administration as elsewhere so that the law retained its juristically formal character (ES: 853). Later, postulates of human dignity, good morals and *bona fides* as well as the idea of the welfare state led to more substantive justice, challenging juristic formalism so that – in nineteenth century Germany – systematization and codification could only be achieved in special fields with special interests, e.g. commercial law and the law of negotiable instruments (ES: 858). Nevertheless, the cultural significance of formal rational law was for Weber beyond any doubt.

Some legal concepts which were developed in the Middle Ages became unique to the Occident. In Florence and other medieval business-oriented cities the old identity of household and workshop/office and their solidary responsibility fell apart; fraternal relationships were replaced by business relationships and contracts, and business partners were not necessarily household members any more. Moreover, business activites were performed in a separate enterprise. This may at the beginning have happened in ad-hoc groupings for long-distance trade like the *commenda*[169], but soon it became more permanent. Crucial was the separation of household and business not only on a spacial level but also for accounting and legal purposes, and the development of a corresponding body of laws such as commercial register, separate property of the firm, appropriate bankruptsy laws.[170] In its most rational form this meant the complete separation of the legal sphere of the household members from the separately constituted legal sphere of the business entity, its legal personality (ES: 707), and led to the development of the concepts of limited liability and to joint stock corporations in Germany and the corresponding legal constructions elsewhere.

The codification of a rational law system and its administration by trained officials was related to and dependent on the development of the modern institutional state (*Anstaltsstaat*) (ES: 653). Until modern times it

169 In the Middle Ages, the *commenda* was an undertaking in which a person made commercial use of the goods of another person, and at that other person's risk, in exchange for a share of the profit (HCP : 65).

170 ES: 379; In this context, Weber pointed to the fact that in China the joint liability of the family stood behind the debts of the individual, and that laws on a separate property of the firm seem to be absent. Credit was until recently dependent on the kinship group (ES: 380).

has been known only in the Occident and it can be characterized by what has been called a double monopolization: 1. The monopolization of law and law-making by the state and the elimination of all non-state and non-positive law and 2. the monopolization of the legitimate use of physical force in the enforcement of the legal order.

The first monopolization had as a consequence that all local bodies of law as well as the laws of personally limited application which are seen as different from the body of rational law claiming universal validity were put on the defensive. Where reason wants to reign, Weber wrote, all law which has for its existence no other justification than the fact that it exists, especially customary law, must disappear or will at least be regarded as inferior.[171] Perhaps not surprisingly, Weber wrote of the half-mystical concept of customary law and did not consider it very useful (ES: 319). All modern codifications have been at war with customary law (ES: 856). Elsewhere Weber wrote that modern economic life has destroyed all status-determined associations which used to be the carriers of law, and has led to the monopolization of one universalist coercive institution (ES: 337).

In Germany, the modern institutional state was called a *Rechtsstaat* (a state ruled by law) where the political authority made the laws and was bound by them. The basic form and source of law was now legislation rather than custom or precedent or equity; the positivist tendencies in nineteenth century continental Europe (Weber's Europe) did not presuppose a fundamental law which is derived from a source outside or above the state so that law in the large sense (*Recht, droit, ius, pravo*) was identified with law in a narrower sense (*Gesetz, loi, lex, zakon*). [172]

The fundamental characteristics of bureaucratic administration under formally legal domination were a. continuous rule-bound conduct of official business, b. the establishment of spheres of competence, c. the principle of hierarchy, d. specialized training, e. the separation of ownership

171 Since Weber's time this tendency seems to have spread even to international law. Weber had considered international law as an expression of a common culture (RI : 145), but in a quarrel between Thailand and Cambodia, both of common Buddhist traditions and customs, the International Court of Justice neglected to take account of them. *Vide* Buss 2010.

172 Harold Berman «The Rule of Law and the Law-Based State» in: W.E. Butler (ed) *Russian Legal Theory* 1996, p. 451

from the means of production, f. no appropriation of positions and g. written records (ES: 217).

The situation in the common law countries to which we shall now turn was slightly different because the rule of law there implied that the basic principles of justice (Magna Carta, Bill of Rights, due process, civil liberties in America) may not be infringed by the law making authorities. It was also different, to a degree, because the continental *Anstaltsstaat* became rather a quasi-Anstalt in England as the state had no legal personality (only the Crown had it), and this permitted a stronger position for the individual than on the Continent.[173]

English Common Law

The kind of legal trainig which English lawyers and judges received in the Inns of Couts produced, according ot Weber, a formalistic treatment of the law, preoccupied with precedents and analogies (ES: 787). English law finding is not, traditionally, like that on the European continent, the application of legal propositions logically derived from statutory texts. No systematic and comprehensive treatment of the law has taken place; rather, as Weber said, a practically useful scheme of contracts and actions was aimed at. Weber considered the common law as formal, but also as an essentially empirical art based on external criteria where one can still observe the charismatic character of law finding (ES: 890), and he explained that no general concepts were formed by abstraction or by logical interpretation of meaning. In a purely empirical way, he wrote, the practitioner of common law always moves from the particular to the particular.

Weber distinguished two kinds of formal law. The relevant charcteristics of a legal question may be of a tangible nature, i.e., perceptible as sense data, or they may be formulated through the logical analysis of meaning and legal concepts in the form of highly abstract rules (ES: 657). This makes the difference between the English common law and European continental law.

In passing, Weber also mentioned the quite patriarchal and highly irrational jurisdiction of the justices of the peace, a kind of qadi-justice quite

173 Siegfried Hermes has described Weber's view of the Anstaltsstaat in England in much more detail (S. Hermes ««Staatsbildung durch Rechtsbildung» in : Anter/Breuer *Max Webers Staatssoziologie* Nomos : Baden-Baden 2007).

unknown on the Continent (ES: 891), and the legal dualism, produced by the co-existence of common law and Equity in the Court of Chancery.[174]

Equity as well as the concept of reasonableness moved the English law tradition closer to the side of substantive law.

A Retrospective View of European Secular Law

As has been seen, Weber considered modern European secular law as formally rational. This formal rationality has two versions: Continental law which systematizes and English common law which works on a empirical basis. Formal rational law is enforced by the state as *Anstaltsstaat* (again in two slightly different versions), a universalist coercive institution which represses all other kinds of law, in particular customary law. Formal rational justice was for Weber (who in this matter quoted approvingly another legal scholar, R. v. Jhering - ASS: 480) the enemy of arbitrariness and the twin sister of liberty, it was a framework to regulate formally free people.

This modern secular law, influenced by natural law ideas, has an affinity to individualism in contractual relations. Before the rise of the modern capitalistic society there existed mainly the status contract which created personal relationships and produced a complete legal modification of status or social position of the persons involved (e.g. in the feudal contract). But to the extent that parental groupings declined and the economic system became more market oriented, the purposive contract (which in the past mainly described the relationships between clans or nations) has become acceptable in vast areas of social life. It contributes to the dissolution of traditional relationships for the purpose of economic exchange and assumes the existence of formally rational law.

While in the English Middle Ages legally binding private contracting had been possible only in circumscribed circumstances which were recognized by a writ (a form of action), modern purposive contracts trace their life in England to Slade's Case (1602) and on the European continent

174 Weber considered Equity as substantive rational justice, similar to Solomonian judgements or judgements by Sancho Panza when he happened to be governor (ES: 845). In sixteenth century England it was argued, based on Aristotle, that the nature of the equitable is a correction of law where it is defective owing to its universality. *Vide* J. H. Baker *An Introduction to English Legal History.* London 1971, p.42.

around the same time to Leonardus Lessius who stated that a promise has a binding force. Only since then the parties were free to formulate their agreements as they wished and they did not any more depend for their validity on a simultaneous exchange. Quite in line with the *Zeitgeist,* Adam Smith in his *The Wealth of Nations* (1776) wrote that self-interest generates social welfare, and the state and the courts were willing to protect private agreements (contracts) so that the whole market economy was now based on commercial contracts entered into by individual interests.

The rationalisation of occidental law has been a formal rationalisation which does not guarantee a correspondent substantive rationalisation. Frequent eruptions of substantive considerations and demands, however, produce an increasing tension between legality and legitimacy or between efficacy, calculability and impersonality on the one hand, and personal relations, fraternity and equality on the other. Max Weber did not look at the rationalisation of law and rationalisation in general in an optimistic way but rather saw it as an expression of the organization of despair.

4. Coda on Modern Comparative Law

While in the last hundred and fifty years occidental law, sometimes in its more formal version and at other times with more substantive elements, has been adopted in most Asian countries, it has by no means simply replaced the traditional Asian laws. Western legal positivism is often considered to have a reductionist perspective which excludes the deeper structures of the law (legal culture, language, religion, custom). Quite often, therefore, traditional Asian law functions to undermine provisions of the newly introduced Constitutions that attempt to separate the State from religion and tradition; it supplements, modifies and undermines State law, thus becoming what has been called unofficial law. This is why Masaji Chiba (1986) distinguishes even in modern Asian countries between 1. official law (which may contain religious law, e.g. Islamic or Hindu law, and also the traditional laws of family and guilds insofar as officially sanctioned), 2. unofficial law which is not officially sanctioned but accepted in practice by general consensus and often studied as customary law, and 3. traditional legal postulates (sacred truths, national philosophies) which found or justify official or unofficial law.

All this has produced new orientations in historical comparisons since the advent of globalization. Not single societies or cultures, but their rela-

tionships, borrowings, or adaptations to each other, or the clashes between them, have often become the subject matter of the comparative sociology of law for far from creating uniformity worldwide, the reception of Western laws has led to a complex pluralization and hybridization of legal systems all over the world.[175] The idea of multiple modernities[176] which asserts that modernity and Westernization are not identical and which distinguishes between ideological and institutional premises has become a powerful tool of understanding. Weber perhaps anticipated these ideas by his distinction between spirit and form and by his suggestion that societies which have been unable to create capitalism or its spirit may well be able to adopt its (legal and administrative) system from the outside. This is perhaps what Schluchter[177] has called Weber's second thesis. While the first thesis relates to the development of modern occidental rationalism out of its own historical sources, the second thesis is concerned with the possibilities and difficulties of its spreading throughout the world.[178]

175 Werner Menski *Comparative Law in a Global Context* London 2000, chapter 1. An example can be found in the work of R. Sakrani (2009) who describes the hybrid legal structure in Tunesia where the formal character of occidental law collides with the lack of formality of Muslim law and where there are even differences with regard to the concept of contract (2009 : 201). Only good faith and the belief in the essential identity of the human spirit may be able to hold this together (2009 : 204).

176 Of particular importance in this context is the work of S.N. Eisenstadt, e.g. his article published in 2000.

177 Schluchter 2006 : 316.

178 Weber wrote that the Chinese may more easily adopt modern capitalism than the Japanese (RC:248) and the Japanese more easily than the Hindus (RI:325).