

## Max Weber and Eugen Ehrlich: On the Janus-headed Construction of Weber's Ideal Type in the Sociology of Law\*

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### Abstract

This article shows how Weber uses the postulates of what is known as 'conceptual jurisprudence' (Begriffsjurisprudenz) to build the structure of ideal-typical concepts presented at the conclusion of Part 1 of his Sociology of Law. Conceptual jurisprudence also furnishes Weber with the stock of concepts he draws on for the categories he employs to denote those technical elements of legal practice and those thought processes which serve to foster the rationalization of (private) law. By elevating the 'ideal' of conceptual jurisprudence to a methodology, while, in his critical assessment of the School of Free Law (Sociology of Law, Part 8), simultaneously idealizing this ideal, Weber falls victim to that very 'confusion' of ideal-typical concept formation and value judgment that he himself had so emphatically warned against (in his Objectivity essay).

Keywords: Eugen Ehrlich, ideal type, Max Weber, postulates of 'Begriffsjurisprudenz', School of Free Law (Freirechtsschule), value judgment.

### I

Although Max Weber was not, strictly speaking, the inventor of the 'ideal type', this aid to the understanding of complex situations and relationships in society is closely linked with his name (WL: 191).<sup>1</sup>

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1. Here Weber says of the 'ideal type': '[It] is formed by the one-sided exaggeration of one or several points of view and by the synthesis of a great many diffusely and discretely existing component phenomena which are sometimes more and sometimes less present and occasionally absent, which are in accordance with those one-sidedly emphasised viewpoints, and which are arranged into an internally consistent thought-image. This thought-image is an abstract construct which in its conceptual purity...is not to be found in reality anywhere in the empirical world...'

In relation to the problems associated with this thought-construct, the intention of this article is to pursue, on the basis of Weber's Sociology of Law, the question of whether the very ideal type made use of in that work is not a Janus-headed construction that fails to maintain the distinction between the formation of an ideal-typical concept and the arrival at a personal value judgment. Such a case may be argued in terms of a confrontation between Max Weber and Eugen Ehrlich. They were antagonists in the debate in progress at the time regarding the 'School of Free Law', which pleaded for judges to be emancipated from the shackles of enacted law. Indeed, Weber's remarks in the final chapter of Part 8 of his Sociology of Law are practically an open invitation to undertake such a confrontation. Furthermore, with regard to the construction of the ideal type that Weber uses to delineate the development he calls the process of the rationalization of law, there are two further aspects that need to be taken into account. First, the theoretical framework of reference of the Sociology of Law replicates the depiction of the process of the rationalization of religion, that is, in both cases Weber makes use of different levels of development ('stages') arranged in order of their degree of rationality (Rehbinder 1985: 482, 484; 1987: 140f.). Secondly, with regard to the framework of ideal-typically constructed concepts with the aid of which the level of rationalization of law achieved in any given case can be 'determined', it is useful to take note of the often overlooked remark in the 'Categories' essay by which Weber explicitly draws attention, even if in a somewhat different context, to the juristic origins of the terms he uses.<sup>2</sup>

(translation partly from Burger 1976: 159). A comment of Weber's in a letter to Heinrich Rickert points to Georg Jellinek's methodology of type construction in his *Allgemeine Staatslehre* (Jellinek 1960: 25f.), as a source. For the details cf. Anter (1996: 22f.). However, if one accepts the indications given by Honigsheim, who like Anter points out that Jellinek's conception of the 'ideal type' differs from Weber's definition, then another possible source, in addition to Jellinek, is Sigwart's *Logik* (1911: 653ff.). Cf. Honigsheim (1985: 178f.). With regard to the evidence concerning Sigwart, see also Treiber (1997: 427ff.). Jacobsen (1999: 84ff.), on the other hand, has drawn attention to the importance of Friedrich Albert Lange with regard to this topic.

2. WL: 440: 'It is however the unavoidable fate of all sociology that in considering the real action which everywhere shows constant transitions between the 'typical' cases it very often has to make use of the legal expressions, which are sharply defined because they rest upon the syllogistic interpretation of norms, in order then to impose upon them its own meaning, which is fundamentally different from the legal one'. See, in particular, Gephart (1990).

## II

Initial evidence for the parallelism that is asserted here between the explanatory models made use of in the Sociology of Law and the Sociology of Religion respectively can be found in the fact that Weber worked on the core elements of both between 1911 and 1913, that is, in close temporal proximity to each other. Furthermore, both rationalization processes can, according to Weber, be characterized in terms of two interlinked processes: on the one hand, one of increasing 'disenchantment' or 'demagification', and on the other, one of the increasing systematization of interrelationships of meaning. As in the Sociology of Religion, so also in the Sociology of Law, stages and directions in the rationalization process can be identified, each of the thus identifiable stages being initially classified by the degree of 'disenchantment', in the sense of the rejection of magical elements (e.g. ordeals and oracles), and by the degree of systematization arrived at. It is possible to speak of a 'minimal programme of evolutionary theory' (Seyfarth 1973: 361), realized to the most thoroughgoing extent in the religious rationalization process. An 'internal compulsion to rationalize' is identifiable to which the various solutions to the theodicy problem are subjected.

We are dealing here with a theory of the inherent logic of ideas, or more precisely of 'actualized' ideas (Schluchter), so that external political and/or economic conditions are always involved as well. But among the conditions which exert a decisive influence on the opportunities for 'actualization' is also the 'particular character' of propagating strata (*Trägerschichten*). It is to these that Weber attributes, in the case of religion, the thinking through of theodicy constructions to their logical ends, and, in the case of law, the direction in which the formal qualities of law develop, or are able to develop.<sup>3</sup> In the Sociology of Law, this 'particular character' relates especially to the 'prevailing type of legal education, i.e., the mode of training of the practitioners of the law' that exists in each case (WuG: 455f./ES: 784ff.). It is expressed in the ideal-typical distinction between the empirical teaching of law (in England) and its rational (theoretical)

3. From a historical point of view this is by no means a development that shows a linear progression; Weber (WuG: 456/ES: 776) expressly emphasizes that law cannot necessarily 'be rationalized...in the direction of the development of its "juristic qualities"'. See also Weber's remark (GASW: 517) that he does not regard these 'cultural stages' as anything more than a means of conceptual presentation.

teaching at universities (on the continent).<sup>4</sup> In addition to these ‘intra-juristic conditions’, to which Weber ascribes a particularly high value as explanatory factors (WuG: 456/ES: 776), ‘extrajuristic conditions’ also play a part—to the extent that Weber particularly emphasizes the relationships between the respective propagating strata and (above all) the dominant structures in the field of public order, that is, political conditions (Treiber 1984: 43; 1985: 936). An especially high value as explanatory factors is ascribed to those structures in which specific areas of tension build up.<sup>5</sup> According to Weber they possess a relatively high inherent innovative potential to further progressive rationalization. By contrast, whatever economic factors are identifiable in each case play more of a subordinate role (WuG: 456/ES: 776), often only in the form of parallelisms that Weber claims between, for example, the field of economics and that of law.<sup>6</sup>

As a consequence of both the logic of their structure and the rationalization tendencies inherent in them, after a certain level of rationality has been attained, both rationalization processes are characterized, by a tendency to display a reversion in the direction of the irrational.<sup>7</sup> The religious rationalization process experiences this reversion primarily as a consequence of scientific thinking, once this has freed itself from the clutches of theology. Where rational science has consistently pressed ahead with the ‘disenchantment’ of the world, religion as a whole is ‘increasingly displaced from the realm of the rational into the irrational, and indeed, appears as the epitome of irrational or anti-rational suprapersonal power’.<sup>8</sup>

As far as the legal rationalization process is concerned, Weber observes, as a direct contemporary witness, the renewed manifestation (as a result of the progressive democratization of government and society) of the tension between formal, rational law (formal legality) and material justice.<sup>9</sup> The demand for this arose predominantly from

4. WuG: 456ff./ES: 784ff. (Types of Legal Thought). With regard to the ‘English problem’ and its solution cf. Treiber (1984: 41ff.; 1985: 835ff.).

5. Cf. the tension between secular and ecclesiastical authorities in the occident.

6. E.g. in the form that *modern* capitalism requires formal, rational law.

7. WuG: 509/ES: 889: ‘To the extent that they [all variants of...the rejection of that purely logical system of law] do not themselves have a rationalistic character, they are a flight into the irrational and as such a consequence of the increasing rationalization of legal technique. In that respect they are a parallel to the irrationalization of religion.’

8. GARS I: 564; MWG I/19: 512 (‘Intermediate Reflection’) and GARS I: 253; MWG I/19: 102 (‘Introduction’).

9. WuG: 507, 507-13/ES: 886-900.

intellectuals or from underprivileged classes which despite their low organizational ability had succeeded in uniting to form mass organizations capable of pursuing their objectives. This tension, which according to Weber is also contributed to by the 'legal ideologists' who appeal to the 'doctrine of free law' (WuG: 507/ES: 886), also manifests itself for Weber as a tension between the rule of law (predictability) and equality before the law on the one hand and material justice on the other. To this extent it reflects the conflict of interests between the bourgeois classes, which as the administrators of permanent organizations in politics (the civil service) and economics (businesses) are dependent upon the rule of law and its predictability, and the unpropertied lower classes together with those who plead their cause.

All of this together promotes, according to Weber, a tendency for the strict legal formalism that had already been achieved to dissolve and give way to a re-materialization. The observable 'irrational variants', which stem from the 'rejection of that purely logical systematization of the law as it had been developed by Pandectist learning', are in Weber's view (WuG: 509/ES: 889) the consequence of the scientific rationalization' of law and legal technique carried away by its own impetus. H. Rottleuthner (1987: 25) has summed up the divergent positions of Max Weber and Eugen Ehrlich in the following overstatement:

*'The pandektistische Begriffsjurisprudenz and the consistency of abstract rules of a legal system, both of which have been considered as the (jeopardized) climax of the occidental development of law by Weber, have become the target of criticism by the Freirechtler Eugen Ehrlich: The codified legal order is incomplete, the decision making on the individual case is not a logical deduction but a creative act'.*

As Ehrlich puts it: In this act of free jurisdiction the judge, insofar as the law does not provide him any orientation, finds his bearings, among others, in the handed down conceptions of justice and the normative guidelines of 'living law' effective in society. Hence, Ehrlich views the sociology of law as an indispensable auxiliary science of legal practice because the former is perceived as the 'true jurisprudence' and therefore has to cover the 'living law'. Weber, however, sees the 'free law movement' (Freirechtsbewegung) as an attempt to compensate for the loss of power and prestige academic and practising lawyers had suffered from due to the codification of private law.<sup>10</sup> Weber

10. Cf., among others, Meder (2005: 353): 'Whereas the lawyer still took an active and creative part in the jurisprudence during the age of Pandektistik, now, out of a sudden, he has merely turned into an interpreter of a law he has to succumb

stands up vehemently for legal formalism (Rechtsformalismus) that does not only limit the judge's scope for law adjudication<sup>11</sup> but also guarantees law the necessary autonomy. If that seems rather strange to us today, we should keep in mind that more recent research is in favour of the idea of the 'free law movement'. But it should be noted that its 'claim for freeing the situation of law adjudication from old-fashioned ties to systematically reflected values of law and legal terms, did indeed contribute, albeit *involuntarily*, to the judges later infamous role during the time of NS-rule (Behrends)'.<sup>12</sup>

### III

Weber's assertion concerning the re-materialization of law only makes sense if the structure of ideal-typical concepts with the aid of which he 'determines' the level of formal qualities of law that has been reached in any given case is accepted. The following section considers the relevant passages at the end of Part 1 of the Sociology of Law. It is initially guided by the plausible assumption that Weber, being trained in law, made use of terminological distinctions that were readily familiar to him and his fellow lawyers. This creates difficulties for present-day readers of his Sociology of Law, who are drawn first and foremost from the social sciences camp, to understand his line of thought. This applies above all to the fundamental distinction between 'procedural' (*formell*) and 'substantive' (*materiell*).<sup>13</sup> This relates to the distinction, familiar at that time, between the forms of legal procedure (the lawsuit, the trial) on the one hand and 'substantive law' on the other.<sup>14</sup> It should be noted

to without being given any chance for any personal and individual prior statement (Bucher) [cf. Bucher 1966: 264ff.].

11. Today, everyone would agree that judicial work is 'partly law-constructive'. Geiger (1964: 242ff.) has already highlighted that point.

12. Emphasis mine, refer to Meder (2005: 355). Cf. Behrends (1989); also Rütters (1988) who discusses the 'more moderate sister' (Meder) of the 'free law movement', the *Interessenjurisprudenz*.

13. Compare, for example, the corresponding suggestions in Schluchter (1979: 129ff.; 1998: 190ff.), Gephart (1993: 519ff.), Quensel (1997), and Kronman (1983: 76ff.). Kronman's fourfold classification of lawmaking and adjudication does not take into consideration Weber's fundamental distinction between procedural (*formell*) and substantive (*materiell*). Even Swedberg (1998: 91) does not take into consideration this fundamental distinction.

14. On this point, cf. Schluchter's (1998: 190) remark that the 'relatively unambiguous definition of irrational and rational...is not matched by any similarly unambiguous definition of the terms procedural and substantive'.

here that the German terms *formell* and *materiell* are not in themselves immediately and unambiguously recognizable to non-lawyers as legal terms in the way the English equivalents 'procedural' and 'substantive' are. The fact that Weber associates the two terms with the meanings just explained is made clear by his remark that 'the distinction between rules of law to be applied in the process of law-finding, and rules regarding that process itself, has not always been drawn as clearly as that which is drawn today between substantive and procedural law' (WuG: 395/ES: 654). The connection he makes between the Roman 'actio' and the English 'writ' also emphasizes the meanings he is seeking to express with the contrastive terms 'procedural' (*formell*) and 'substantive' (*materiell*) (Peter: 1957), when Weber declares that neither early Roman law nor English law made a distinction between procedural and private law (WuG: 395/ES: 654). One might also mention here a parallel passage in Ehrlich's *Grundlegung der Soziologie des Rechts* (1913), which gives weight to the supposition that Weber knew this work. Ehrlich declares that

as in Rome...so also in England procedural law [was] at the same time substantive law. Every type of claim had its own form of proceedings, and the substantive legal basis for the claim was determined by the procedural law. Just as Roman substantive law was for the most part a law of individual actions, so it was in England too (1967: 221).<sup>15</sup>

Other passages also support the conclusion that Weber must have known Ehrlich's *Grundlegung*. For example, he took from Ehrlich (1966: 51; 1967: 237) (whom he mentions twice by name in the 'Sociology of Law', though without any precise bibliographical reference)<sup>16</sup> not only the example where he refers to Canada in order

15. Even if Ehrlich here characterizes both English and Roman law as being law of *actiones*, he by no means overlooks the distinctions, as is shown by his treatise on legal logic published in 1917 (see also 1966: 9, 37). Ehrlich (1966: 25ff.) also draws attention to the fact that with the development of general types of proceedings (e.g. in Rome through the *legis actio sacramento*, in England through trespass) the way had been prepared for 'the separation of substantive law from procedure' (1966: 26). Ehrlich (1966: 54ff.) also goes in some considerable detail into the important role of canon law in this development. In this connection Windscheid's monograph *Die actio des römischen Civilrechts vom Standpunkt des heutigen Rechts*, which appeared in 1856, is worthy of attention, since it lays the foundations for the modern concept of the claim in substantive law, which represents 'a stricter distinction between substantive law and procedural law'. Cf. also Coing (1989: 275).

16. WuG: 441/ES: 753; WuG: 492/ES: 854. The contexts in each case also point to passages from *Grundlegung der Soziologie des Rechts*. The fact that Weber must at least have been aware of this book of Ehrlich's is indicated by the crushing, lengthy

to demonstrate the superiority of Anglo-American law (WuG: 511/ES: 892), but also the argument, so important for the pre-eminent significance of 'intra-juridic conditions' (WuG: 456/ES: 776), that legal techniques first have to be invented, 'just like the railway engine' (Ehrlich 1967: 328f.). Weber (WuG: 446/ES: 761) can say with Ehrlich (1967: 29) that the lawsuit is 'the oldest type of "legal transaction"' ['das älteste Rechtsgeschäft'], or alternatively, that the oldest law is procedural law. And with regard to Table 1 reproduced below, which relates to adjudication based on 'irrational modes of proof', the use of which appears to be 'a component of a substantive legal claim or even identical with it' (WuG: 395/ES: 654; WuG: 446ff./ES: 761ff.).

If we therefore agree to associate the contrasting terms 'procedural' and 'substantive' with the meanings set out above, which appears appropriate not least in view of Weber's remark about the 'distinction between the *Richtsteige*<sup>17</sup> on the one hand and the law books on the other', and follow the distinguishing criteria laid down by Weber, the result is Table 1 and Table 2 with the fundamental distinction between irrational and rational lawmaking and lawfinding as set out below. The two tables include all possible combinations<sup>18</sup> Weber's distinguishing criteria suggest.

First, Table 1: Following Weber, 'irrational' lawmaking and lawfinding may be *irrational* either in a *procedural* (formell) or a *substantive* (materiell) way:

[L]awmaking and lawfinding...are formally irrational (formell irrational) when one applies in lawmaking or lawfinding means which cannot be controlled by the intellect, for instance when recourse is

(37 pages) review of Ehrlich's work that Kelsen wrote in *Archiv* (vol. 39, 1915) and the subsequent controversy between Kelsen and Ehrlich in *Archiv* (Kelsen's final word in vol. 42, 1916/17). Kelsen follows Max Weber's line to the extent that he reproaches Ehrlich not only for his confusing and contradictory terminological definitions, but also and above all for a hopeless 'confusion of the two meanings of the legal rule: namely what is and what should be', i.e. accuses him of not maintaining the distinction between law as a rule of actual occurrence and law as a norm. Conversely, Ehrlich was aware of Weber to the extent that he discussed the latter's dissertation *Zur Geschichte der Handelsgesellschaften im Mittelalter* (1889) in *Grünhuts Zeitschrift* 18 (1891: 198). Weber's *Sociology of Law* did not appear until 1922, after Weber's death, as part of *Grundriss der Sozialökonomik. III. Abteilung, Wirtschaft und Gesellschaft*. 1922 was also the year in which Ehrlich died.

17. WuG: 395/ES: 654 (modified). With regard to the term '*Richtsteige*' see *Handwörterbuch zur Deutschen Rechtsgeschichte*, IV, cols. 1061-64. Cf. Rheinstein's definition: 'a book containing advice as to how to initiate and prosecute a lawsuit' (ES: 666, n. 43).

18. As Weber puts it: 'the simplest possible type situations' (WuG: 396/ES: 656).



had to oracles or substitutes therefor. They are substantively irrational (materiell irrational) on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional or political basis rather than by general norms (WuG: 396/ES: 656).

Table 1. *Irrational Lawmaking and Lawfinding*

<i>procedural</i> (lawsuit/trial) (formell)	<i>substantive</i> (substantive law) (materiell)
means are applied which cannot be controlled by the intellect (WuG: 396/ES: 656) magical formalism (WG: 291)	evaluation of the concrete factors of the particular case (WuG: 396/ES: 656) irrationality of the individual, case, lack of consistency in decisions (WuG: 447f./ES: 762f.)
<i>irrational</i>	
<i>strictly formal procedure</i> ; irrational character of the technique of decision (Entscheidungsmittel) (WuG: 447/ES: 762)	<i>non-formal law</i>

With this fundamental distinction between the procedural and the substantive, Weber's ideal-typification of rational law will be presented. According to Weber, 'rational' lawmaking and lawfinding may be *rational* either in a *procedural* (formell) or a *substantive* (materiell) way:

All *formal law* is, in its *procedural* aspects, at least *relatively rational*. Law, however, is '*formal*' to the extent that, in both *substantive* and *procedural* matters, only unambiguous general characteristics of the facts of the case are taken into account (emphases added). This formalism is based either on the fact that the 'legally relevant characteristics are of a tangible nature, i.e., ...are perceptible as sense data', or on the fact that they are 'disclosed through the logical analysis of meaning and... accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied'. *Material rationality* exists where 'the decision of legal problems is influenced by norms different from those obtained through logical generalisation of abstract interpretations of meaning...ethical imperatives, utilitarian or other expediential rules or political maxims...' Only formal law can be developed in the direction of a higher level of rationality with the aid of particular legal techniques (WuG: 395f./ES: 656f.): developed either into casuistry, or else into systematisation (WuG: 397/ES: 657) through the 'integration

of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and above all, at least in theory, gapless system of rules... (WuG: 396/ES: 656).

It is the characterizations of precisely this systemization that unmistakably correspond to the postulates of conceptual jurisprudence (*konstruktive Jurisprudenz, Begriffsjurisprudenz*).<sup>19</sup> This provides the following table of rational types of lawmaking and lawfinding.

Table 2. *Rational Lawmaking and Lawfinding*

	<i>procedural</i> (lawsuit/trial) (formell)	<i>substantive</i> (substantive law) (materiell)
<i>formal*</i> (formal)	all <i>formal</i> law is, in its procedural aspects, at least relatively rational' (WuG: 396/ES: 656); rationalisation of the trial procedure (WG: 290f.); strictly calculable legal proceedings (GARS I: 437).	In <i>formal law</i> there are two possibilities: <i>casuistry</i> : the legally relevant characteristics are perceptible as sense data (WuG: 396f./ES: 657). - perceptible legal formalism <i>system</i> : the legally relevant characteristics are disclosed through the logical analysis of meaning (WuG: 396/ES: 656f.) - <i>logical rationality</i> rematerialisation possible (WuG: 509/ES: 889; WuG: 505ff./ES: 883ff.).
<i>rational</i>		
<i>material</i> (material)	e.g. the 'rational but specifically material technique of inquisitorial procedure' (WuG: 481/ES: 830, modified); e.g. the 'patriarchal system of justice ...rational in the sense of adherence to fixed principles...in the sense of the pursuit of material principles' (WuG: 486/ES: 844, modified) - the 'ideal image of this rational practice of law is the "khadi justice" of the "Solomonian judgment" ' (WuG: 486/ES: 845).	non-formal law: 'ethical imperatives, utilitarian or other expediential rules, political maxims' (WuG: 397/ES: 656); - <i>material</i> and non-formal (expediential) <i>rationality</i> (WuG: 504/ES: 882).

\* 'Law, however, is "formal" to the extent that, in both *substantive* and *procedural* matters, only unambiguous general characteristics of the facts of the case are taken into account' (WuG: 396/ES: 656f.; emphasis added). Thus, here too, Weber explicitly makes the terminological distinction that is essential to his argument. Table 2 helps to understand the German phrase: 'Formell mindestens relativ rational ist jedes formale Recht' (WuG: 396) – 'All formal (formal) law is, formally (formell) at least, relatively rational' (ES: 656).

19. WuG: 396f./ES: 656f. (modified).

These two systematic tables<sup>20</sup> give Weber a yardstick against which he is able to determine 'the extent and the nature of the rationality of the law' (WuG: 395/ES: 655). It is obvious that, in the field of substantive law, an enhancement of the level of rationality is achieved through a process whereby formal law is applied with the aid of certain 'technical legal solution[s]' (in the meaning in which the term is used in WuG: 424)<sup>21</sup> or particular 'thought processes' (WuG: 395f./ES: 655; WuG: 455f./ES: 775f.). By distinguishing between different levels of development according to the 'sequence of the stages of rationalization' (WuG: 505/ES: 882), Weber produces 'theoretically constructed stages of rationalization' (WuG: 504f./ES: 882f.). The 'highest' stage historically realized in the western world, is characterized by the 'logical sublimation and deductive rigour of the law', that is, possesses the quality of a system (WuG: 505/ES: 882). In contrast to 'casuistry', the 'system' represents the highest degree of methodological and logical rationality (WuG: 504f./ES: 882f.). Thus, within the ideal-typical construct of the scale of stages of development, it also serves to designate a peak point which also enables modern developments in the legal system to be 'graded', if not in some cases even 'downgraded', in terms of the terminological framework developed by Weber for the classification of different manifestations of legal development. On the basis of this

20. If we take Weber at his word, these constitute a classification, since he assumes unambiguously distinguishable demarcation criteria in the sense of an 'either-or' relationship. The Weber literature, however, refers to it as a typology – into which, of course, the classification could easily be converted.

21. WuG: 424/ES: 706: 'The technical legal solution...was found in the concept of the juristic person. From a legal standpoint the term is a tautology, since the very concept of person is necessarily a juristic one. When a child *en ventre de sa mère* is regarded as a bearer of rights and obligations just as a full citizen while a slave is not, both these rules are technical means of achieving certain effects. In this sense the determination of legal personality is just as artificial as the legal definition of "thing" – i.e., it is decided exclusively in accordance with expediently selected juristic criteria.' Jhering, in *Geist des römischen Rechts* (I, 1953, §3; II, 1954, 2, §§37-41), sets out a doctrine of legal methodology as a 'theory of legal technique' with the three 'fundamental operations' of 'juristic analysis', 'logical concentration' and 'juristic construction'. See also Losano (1970) and Gagnér (1993). The value that Weber ascribes to legal technique is shown by his essay "'Römisches" und "deutsches Recht"' (1895), where he explains that it was because of its greater technical perfection that Roman law was adopted, and that its application had decisive effects because it was 'the more perfect law in terms of its technical legal apparatus'. And just as 'advances in technology...initially benefit the economically stronger', this was also the case with law: 'what is true of tools also applies to the law'.

framework Weber attaches the label 'non-formal law' to the calls made upon legislative bodies to provide for material justice—to the extent that they are indeed incorporated into statutes ('lawmaking') (see Table 2, column 'substantive', line 'rational/material'). He also sees himself justified in classifying a judicial system, which follows the doctrine of free law and undertakes 'concrete evaluations' in the matter under dispute, that is, in the *particular case*, as 'non-formal' or 'irrational law finding' (WuG: 507/ES: 886; see Table 1; also Table 2, column: 'procedural'; line: 'rational/material').

A closer look at those categories which Weber uses to denote the 'technical apparatus of legal practice' or 'thought processes' with the aid of which the rationalization of (private) law is fostered in the field of substantive law (WuG: 395f./ES: 655f.) reveals that Weber is borrowing from the stock of concepts deriving from the field of conceptual jurisprudence (*konstruktive Jurisprudenz, Begriffsjurisprudenz*). There is nothing new in referencing the importance of conceptual jurisprudence to Weber,<sup>22</sup> even though the Weber experts among the social scientists have hardly taken heed of it. What is new is to point out which individual representatives of this tendency Weber draws upon. Above all it is Jhering<sup>23</sup> and Levin Goldschmidt,<sup>24</sup> who was Weber's supervisor when he took his doctorate and who himself repeatedly invokes Jhering, who are to be regarded as sources of Weber's in this respect.<sup>25</sup> Although Weber, on the one hand, advocates an inductive procedure (in the sense of 'gaining "legal propositions" from particular cases by means of analysis'), on the other hand, he too sees the 'system' as being built up out of legal propositions. Thus, he takes over the system idea propagated by conceptual jurisprudence and uses its postulates in his ideal-typical construct as a yardstick for a body of law that is highly developed in the directions of formalization and rationalization (WuG: 396f./ES: 656f.). Even if Weber points out that the relationship between system and casuistry, that is, between the 'logical analysis of meaning' and the use of tangible sense-data characteristics,<sup>26</sup> is one of tension, so that

22. See Rehbinder (1985: 482; 1987: 88). See also Loos (1970: 106ff.; 1982: 88).

23. Cf., inter alia, Jhering (1953/I: §3; 1954/II: §§37-41).

24. Cf., inter alia, Goldschmidt (1973: I, part B 304f.; 1862). See also Quensel and Treiber (2002: 116f.).

25. For the detailed references cf. Quensel and Treiber (2002: 114ff.).

26. Clear examples of such casuistry are to be found in Lévi-Strauss (1981: 79f.), though his remark that these are 'logical systems' could be misinterpreted. He does, however, share with Weber the opinion that casuistry constructed in this way deserves the label 'rational'.

in the course of the history of legal development it has often enough been the case 'that "the system" has predominantly been [merely] an external scheme for the ordering of legal data'<sup>27</sup> and has been of only minor significance in the 'analytical derivation of legal propositions' and in the 'construction of legal relationships',<sup>28</sup> these remarks of Weber's nevertheless indicate his close familiarity with the discussion of the controversy over legal methodology being conducted by lawyers at that time.<sup>29</sup>

Thus, there can be no doubt that Weber is working with the stock of terminology familiar to him from his student days (Marra 1989; 1992; Schiera 1987), and that he had been acquainted since that time with the kind of doctrine of legal methodology and mental training that was the ideal of the school of conceptual jurisprudence. It is their postulates that he applies to the ideal-typical construction devised in the concluding passages of the first part of his 'Sociology of Law',<sup>30</sup> and it is their terminology that he uses to demonstrate the opportunities for rationalization immanent in legal thinking. To this extent, therefore, it is indeed the case that in the 'Sociology of

27. WuG: 396/ES: 656. Weber's reference to the treatment of the Roman law principle that a lease is terminated by the sale of land belongs in this context—a principle which, according to Weber (WuG: 459/ES: 789), only a 'blind desire for logical consistency' had sought to make part of the German Civil Code. See also Falk (1989: 111ff.), and Jüttner (1960).

28. A vivid example of what the protagonists of conceptual jurisprudence understood by 'the construction of legal relationships' is given by Herberger (1984), even if one needs to be aware that the terms concerned are not used in a uniform manner.

29. Weber was able to obtain, as it were, firsthand information on the aims of the 'free law movement', since G. Radbruch, who frequented Max Weber's house in Heidelberg, had been a friend of H. Kantorowicz since his student days with Liszt in Berlin. As he describes in his autobiography, 'the ideas had been expressed [in Berlin at that time] which then found expression in the polemic *Der Kampf um die Rechtswissenschaft*'. Cf. Radbruch (1961: 70ff.). On the same subject, and in relation to a meeting of leading proponents of free law at Radbruch's house in Heidelberg at the end of July 1910, see Foulkes (1968: 233f.), the son of E. Fuchs. See also Rehbinder (1986: 22, n. 52). Radbruch himself had described the most important concerns of the School of Free Law as early as 1906, in a contribution to the periodical *Archiv* (1906), at the same time combining it with a critique of traditional legal methodology (i.e. of conceptual jurisprudence). In *Archiv* (1912) Kelsen deals critically with Kantorowicz and his article 'Rechtswissenschaft und Soziologie', published in 1911, and thus also with the 'free law movement'.

30. It is also from these that the 'primacy of logic' in the ideal type is derived. It is no coincidence that in the 'Objectivity' essay Weber speaks of an 'ideal image that is free of self-contradictions' (WL: 191, 197f.).

Law' – but not only there<sup>31</sup> – the 'ideal' of conceptual jurisprudence is consistently and deliberately elevated to a methodology.

This is a legitimate method of proceeding; no immediate objections can be raised against it. It fulfils all the requirements that Weber lays down for the construction of an ideal type in his 'Objectivity' essay (WL: 191). This applies even with regard to the characteristic of 'the gaplessness of the legal order' so caricatured by the School of Free Law. Weber himself declares that the ideal type is an abstract construction which 'in [its] conceptual purity...is not to be found in reality anywhere in the empirical world' (WL: 191).

Weber deals with prominent representatives of the School of Free Law – especially Ehrlich and Kantorowicz – in a very critical manner. He characterizes one of their chief demands, namely that 'the "law" the judge applies should be given such new content, not contained in any legislation, as might be of significance in each particular adjudication' (Meder 2005: 348), as being 'non-formal, even irrational law-finding'. But even then he does not infringe the basic rule with regard to ideal-typical representation, which requires that 'the idea of the "ideal" in the sense of what should be...is to be carefully distinguished from these thought pictures which are "ideal" in a purely logical sense' (WL: 192). However, there are already indications that this rule is about to be violated when the lawfinding (dis)qualified in this way is equated with 'khadi justice', and this in turn is contrasted, as the other possible type of lawfinding, with 'formal justice', with the additional remark that Jhering had said of the latter: 'Form is the enemy of arbitrariness, the twin sister of liberty'.<sup>32</sup> In this, Weber starts to take sides, since precisely those postulates of conceptual jurisprudence that had been subjected to massive criticism by the School of Free Law – the most important buzzwords are 'conceptual arithmetic' (Ehrlich 1967: 261ff.), the fiction of the systematic coherence of the law (Ehrlich 1967: 267ff.; Rehbinder 1986: 88ff.) and the resulting need for 'legal construction'<sup>33</sup> – appear to him to be *values* that are worthy of being defended. Already in the year 1909,

31. See also the *Protestant Ethic*, where Weber also makes use of the ideal of conceptual jurisprudence. Cf. Treiber (1997).

32. Weber (GASS: 480). The reason why Weber makes use of the quotation from Jhering may be that since the publication of his book *Scherz und Ernst in der Jurisprudenz* Jhering had been upheld by the proponents of free law as their chief witness against conceptual jurisprudence. In this respect see Rückert (2004, 2005).

33. Ehrlich (1967a: 150ff.). Also Ehrlich (1967b: 194f.): 'All lawfinding, even when it appears to consist merely of the application of law, [is] of necessity creative'.

Weber's polemic directed at the chemist Wilhelm Ostwald, who had been awarded the Nobel Prize in the same year, indicates his high regard for conceptual jurisprudence, particularly since astounding parallels are to be found to Rudolf Sohm's article justifying conceptual jurisprudence<sup>34</sup> which also appeared in 1909:

Ostwald fails to recognise...the true nature of juristic concept formation, which inquires (as has recently been expounded in by far the best manner by Jellinek)...whether...the elements determined by the legal rule are correct, and it makes very good practical sense...if in so doing it shows a...tendency to follow a formal procedure and generally assigns the task of extending legal rules to 'new' situations to the legislator, and not to the judge: 'Form is the enemy of arbitrariness, the twin sister of liberty'. But whether a situation is 'new' in a legal sense can never be determined from scientific considerations alone, but first and foremost from the *overall* context of the *legal* rules that are indisputably applicable in each case, the bringing together of which into a system of thought that is free of self-contradictions is one of the most pre-eminent tasks of jurisprudence (WL: 419f.).

According to this, it is the postulates of conceptual jurisprudence which, as Weber is deeply convinced, guarantee the 'formalism of the law' and thus a 'formal justice', which is characterized by the 'juristic precision' of the work of the bureaucratic state-appointed judge (WuG: 512/ES: 893f.). The contrast here referred to between the 'subsumption machine' and the 'judicial king' (Ogorek 1986) also points to the importance of conceptual jurisprudence as a model, since it is solely the 'legal techniques' ascribed to it by Weber that help to guarantee the possession of that pearl of great price, 'formal legality'.<sup>35</sup> On the one hand, elevating the 'ideal' of con-

34. Sohm (1909: cols. 1020, 1024): 'The learned judge is not there to make law. He is there to apply the law that is in force, using his academic knowledge of the law. Our jurisprudence has become academically determined jurisprudence. And so it should be. That is precisely what was demanded of it, so that jurisprudence should be a calculable, constant, secure jurisprudence, which protects commerce and places it on firm foundations... "Sociologically" correct law cannot be derived either from "science" or from "commerce", but only from the mastery which conceptual jurisprudence gives us over the content of the existing law.'

35. In this connection, Weber's discussion of Lotmar's *Der Arbeitsvertrag* is particularly illuminating. Weber (1902) adopts an ambivalent attitude towards Lotmar. His 'compensatory legal ethic', which betrays a socio-political position, would, according to Weber, were it to be introduced 'into the field of legal practice', lead to 'foundation-shaking changes in the whole character of our legal system', and in particular to the 'elimination of its *formalistic* basis'. This would, at the same time, mean a 'shift to khadi justice' (Weber 1902: 725). But on the other hand, the fact that Lotmar

ceptual jurisprudence to a methodology, while, on the other hand, simultaneously idealizing this ideal, Weber (in his *Sociology of Law*) falls victim to that 'confusion' of ideal-typical concept formation and value judgment that he himself had so emphatically warned against (WL: 199f.). That is to say: the 'objective' finding, arrived at with the aid of ideal-typical concept formation, that the doctrine of free law is 'non-formal', indeed 'irrational' lawfinding can scarcely be distinguished from the subjective value judgment that the postulates asserted by conceptual jurisprudence are superior. By a sleight of hand, they become binding, model 'norm maxims' ('Norm-Maximen'), compliance with which can alone ensure that formal legality prevails (WL: 334f.).

Weber himself attributes this susceptibility of the ideal type to the kind of confusion just discussed in his ideal-typical representation of the Christianity of the Middle Ages. So that all that is required to apply this example to our purposes is to replace 'Christianity' with 'the traditional doctrine of legal methodology':

[Ideal-typical representations] 'regularly claim to be, or unconsciously are, ideal types not only in the *logical*, but also in the *practical* sense: types to serve as *ideal models* which...contain what *Christianity*, in the view of the person representing it, *should* be, what for him is the 'essence' of it, being that about it that is of permanent value... In this sense, the 'ideas' are however of course no longer purely logical aids, no longer concepts which reality can be *measured* against and compared with, but ideals, in relation to which it is subjected to value judgment' (WL: 199; Christianity, emphasis added).

pleads for a strict legal positivism and, like his academic teacher Brinz, insists on the 'strict distinction between jurisprudence (legal dogmatism) and legal policy' earns him Weber's approval in words which have apparently already become a linguistic formula for him: 'Anyone who...seeks in the formalism of legal conceptualisation that is expressed therein the cause of the much lamented unsocial character of prevailing private law or existing legal practice, is barking up the wrong tree. What are required are not non-formal "positive" concepts, but suitable specialised legal rules and unbiased, binding jurisprudence that adheres strictly to the rule and thus also to the form—the twin-sister of freedom' (Weber 1902: 725). The concluding sentence of his discussion of Lotmar in particular is quite unambiguous: the way in which Lotmar has addressed the problem, he says, must 'be regarded as being as original as it is felicitous, *precisely because* it allows the old methodology of juristic work to prevail in a field which has been neglected up until now' (Weber 1902: 734).

Both Lotmar and Weber insist on the strict subjection of judges to the law, for the reason, among others, that both fear that the fact that judges belong to higher strata of society could, if 'free lawfinding' were to be applied, lead to a kind of 'class justice' (a form of 'khadi justice'). Cf. also Reh binder (1999), and Weber (1902: 725).



Equally unambiguous is Weber's conclusion: 'what we have is the declaration of a personal position and not ideal-typical concept formation' (WL: 199). For this too, Weber (WL: 199) immediately has an explanation to hand: the danger of such 'confusion' exists when an academic (in Weber: a historian) begins 'to develop his "view"' of a particular phenomenon (in Weber: a personality or a historical period). This arises out of his need to extract the criteria for his judgment 'from the material', that is, to allow the 'idea' in the sense of the *ideal* to grow out of the 'idea' in the sense of the 'ideal *type*', a need that is nourished by the desire not only to 'understand a phenomenon on its own terms', but at the same time 'also to want to "evaluate"' it (WL: 199). Through these remarks, Weber himself helps us to realize why it is that, in the final chapter of his *Sociology of Law*, impersonal exposition gives way to personal position — 'Erkenntnis' becomes 'Bekanntnis'.

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