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The Rationalities of Law between Formalism, Empiricism and Rematerialisation

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Review of Hubert Treiber, *Reading Max Weber's Sociology of Law*, trans. by Matthew Philpotts. (Oxford University Press, 2020), 195 pp. (hbk) ISBN 9780198837329. £80.

Recently, at least three books (to our knowledge) have appeared in English on Max Weber's Sociology of Law,[1] following the publication in 2011 of the definitive version of the work, combining two parts of the monumental treatise *Economy and Society*, as volume I/22-3 of the *Max Weber Gesamtausgabe*.[2] The most recent work, published in 2020, is by Hubert Treiber, Professor Emeritus at the Faculty of Law of the Gottfried Wilhelm Leibniz University in Hanover. Informed by an encyclopaedic knowledge not only of Max Weber's work but also of a large body of relevant legal, social and historical literature (especially in German), Hubert Treiber's book offers clear and simple keys to understanding the *Sociology of Law*, structuring the presentation around the stages of development of law identified, as an ideal-typical stylisation, by the sociologist.

Introductory Section

In *Reading Max Weber's Sociology of Law*, the author devotes an introductory section (pp. 1-38, including chapters 1 and 2) to the following issues: the dating of the *Sociology of Law*, some necessary terminological clarifications, and Weber's aims. Volume I/22-3 of the *MWG* brings together the two texts of *Economy and Society* that deal in

1. In addition to Treiber, *see* Werner Gephart, *Law, Culture and Society: Max Weber's Comparative Cultural Sociology of Law* (Frankfurt, Vittorio Klostermann, 2015); Michel Coutu, *Max Weber's Interpretive Sociology of Law* (London, Routledge, 2018).
2. Max Weber, *Wirtschaft und Gesellschaft: Recht*, *Max Weber-Gesamtausgabe, Bd* I/22-3 (Tübingen, Mohr Siebeck, 2010).

depth with the relationship between law and other spheres of activity: the section entitled 'Die Wirtschaft und die Ordnungen', which is largely devoted to the refutation of Rudolf Stammler's theses[3] on the relationship between economy and law, and the long chapter of *Economy and Society* (generally referred to as 'Sociology of Law') analysing the rationalisation of law.[4] The precise dating of the various texts that make up the posthumous work *Economy and Society* is a challenge in itself and has given rise to much controversy. Based on the work of Wolfgang Schluchter,[5] Werner Gephart and Siegfried Hermes, and on his own exceptional knowledge of Weber's work, Treiber links the two major texts on law, given the terminology used, to the publication of the 1913 *Logos* article 'On Some Categories of Comprehensive Sociology'.[6] The completion of the text on the sociology of law (the second text) would therefore date from early to mid-1913.

Concerning the terminology used by Weber, Treiber underlines the distinction between sociological and legal conceptions of law, implying respectively an empirical or normative search for 'validity'. The author insists on the particular meaning of the notion of 'order' in Weber, i.e, a complex of representations and maxims of conduct orienting the behaviour of actors, whose stability is all the more assured when there is a strong belief in legitimacy. As for the sociological definition of law, which is distinguished from pure convention (the effectiveness

3. Max Weber, 'Rudolf Stammler "Overcoming' of the Materialist Conception of History' and 'Addendum to the Essay on Rudolf Stammler "Overcoming" of the Materialist Conception of History', in Hans Henrik Bruun and Sam Whimster (eds.), *Max Weber: Collected Methodological Writings* (London, Routledge, 2012), pp. 185-240. Translation by H.H. Bruun of Max Weber, 'R. Stammlers "Überwindung" der materialistischen Geschichtsauffassung' and 'Nachtrag zu dem Aufsatz über R. Stammlers "Überwindung" der materialistischen Geschichtsauffassung', *Gesammelte Aufsätze zur Wissenschaftslehre (*Tübingen, J.C.B. Mohr [Paul Siebeck], 1988), pp. 291-383.

For an overview of the social philosophy of R. Stammler, see Michel Coutu, 'Stammler, Rudolf', in: M. Sellers, S. Kirste (eds.) *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, Dordrecht, 2020). https://doi.org/10.1007/978-94-007-6730-0_798-1

4. Max Weber, *Wirtschaft und Gesellschaft: Recht, op.cit*., pp. 191-247, 274-639. Translation by Max Rheinstein: Max Weber, *Economy and Society*, edited Guenther Roth, Claus Wittich, (Berkeley, University of California Press, 1978); 'The Economy and Social Norms', pp. 301-337; 'Sociology of Law', pp. 641-899.

5. See Wolfgang Schluchter, 'Enstehungsgeschichte', in *Max Weber: Wirtschaft und Gesellschaft. Entstehungsgeschichte und Dokumente, Max Weber-Gesamtausgabe, Bd* I/24 (Tübingen, Mohr Siebeck, 2009), pp. 1-133.

6. Max Weber, 'Über einige Kategorien der verstehenden Soziologie' (1913), in *Gesammelte Aufsätze zur Wissenschaftslehre, op.cit*, pp. 403-450. Translation by H.H. Brunn, 'On Some Categories of Interpretive Sociology', in *Max Weber: Collected Methodological Writings, op. cit*., pp. 273-300.

of which can however be formidable) by the presence of an apparatus of constraint, one must first guard against the error of assimilating Weber to a theory of coercion, particularly in view of the importance attributed to legitimacy (in the sociological sense). The notion of order is linked to a set of social relations endowed with a certain stability, the grouping (*Verband*), which can be either a voluntary association (*Verein*) or an institution (*Anstalt*): it is quite wrong, contrary to the common prejudice, given the plurality of groupings likely to produce legal rules, to assimilate Weber to a statist vision of law. For Treiber, Weber was 'an early representative of legal pluralism, if not in fact its progenitor, even if some in this theoretical school wrongly attributed to him a 'statist' definition of law' (p. 21).

The second chapter deals with the objectives of Weber's *Sociology of Law*. It is necessary to go beyond the impression of heterogeneity that emerges from a first look at the work. The concept of the rationalisation of law is the main thread. Treiber notes the elements which, for Weber, testify to the rationality of law. Firstly, generalisation, i.e., the reduction of the reasons for the decision to one or more legal principles or propositions (*Rechtssätze*). Generalisation involves analytical work (identifying legally significant elements) and possibly synthetic work (grouping these elements into abstract legal propositions or, alternatively, in the form of a casuistry). Secondly, when it is based on a high degree of logical sublimation, generalisation leads to systematisation. This implies the coherence of all legal propositions, as a system of norms (theoretically) free of gaps. The historical reference to Pandectism—a point to which we will return below—becomes evident in Weber, as a standard for measuring the highest degree of legal rationality. However, as Treiber points out, taking up Otto Kahn-Freund's formula, the fiction of the logical closure of law is opposed to the fiction of its historical continuity claimed by the common law.[7]

On the basis of these elements (generalisation, analysis, synthesis, systematisation), Weber establishes ideal types of the rationality of law, usually presented by commentators of the *Sociology of Law* as a quadrant based on the oppositional pairs formal/material and rational/irrational. This completely ignores Weber's distinction (though not always fully coherently) between the German language opposition *formal/material* and the dichotomy *formell/materiell*. By discarding these distinctions,

7. Otto Kahn-Freund, 'Einleitung', in Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion: ein Beitrag zur Kritik des bürgerlichen Rechts* (Stuttgart, G. Fischer, 1965), pp. 1-44. Translation: 'Introduction' to Karl Renner, *The Institutions of Private Law and their Social Functions* (New Brunswick, Transaction Publishers, 2010), pp. 1-43.

some translations render incomprehensible (or inadequate) the typology forged by Weber, which, according to Hubert Treiber, is based on the opposition between the procedural and the substantial in the *formell/materiell* pair.

Part Two: The Rationalisation of Law (Stages of Development)

In the *Sociology of Law*, Weber identifies four stages of development of law with regard to its rationalisation: 1) the charismatic revelation of law; 2) the discovery of law by legal notables; 3) the imposition of law by theocratic authorities and the princely imperium; 4) the logical coherence of law by academic lawyers. Treiber, in the main part of his text (pp. 38-169), systematically takes up these four phases, which greatly clarifies Weber's approach by bringing it back to basics. As for the first stage, Treiber writes, Weber is stingy with details, not defining (unlike his sociology of religions) what is meant by 'prophet of law'. One might think that Weber is mainly aiming at magical prophetism, referring to the holders of a charisma based on magic authorising them to 'say the law' in the context of communities where tradition is sacralised and hinders in principle any legal innovation. However, Treiber directs his attention instead to ethical prophecy, that carried by Moses or Mohammed, for example. For the author, the latter represents the clearest historical illustration of a charismatic revelation of law through prophetism (even if, on the other hand, the number of surahs specifically dealing with legal norms in the Koran remains limited).[8]

The second stage of the rationalisation of law is marked by its progressive professionalisation, under the aegis of specialised bearers whom Weber calls *Rechtshonoratioren* (legal notables) whose training is empirical in nature and whose interests are practical, linked to the expectations of those involved in the market. Hubert Treiber compares the historical development of two major bodies of law, namely Roman law and common law. In Rome, the law was initially dominated by the precepts of ritual religion, which was also marked by magical

8. H. Treiber cites here, among others: Mathias Rohe, *Das islamische Recht: Geschichte und Gegenwart* (Munich, CH Beck, 2011); Ignaz Goldziher, 'Die Religion des Islam' in Paul Hinneberg (ed.), *Die orientalischen Religionen (Die Kultur der Gegenwart. Ihre Entwicklung und ihre Ziele*. Teil 1, Abt. 3, 1; Berlin/Leipzig, Teubner, 1906), pp. 87-135; Wolfgang Schluchter, *Max Webers Sicht des Islam. Interpretation und Kritik* (Frankfurt, Suhrkamp, 1987). See in English: Mathias Rohe, *Islamic law in Past and Present* (Leiden, Brill, 2014); Ignaz Goldziher, *Mohammed and Islam* (Piscataway NJ, Gorgias Press, 2009); Wolfgang Schluchter, 'Hindrances to Modernity: Max Weber on Islam', in Toby E. Huff and Wolfgang Schluchter (eds.), *Max Weber and Islam* (Transaction Publishers, 1999), pp. 53-137.

elements that imposed a highly formalistic procedure (the unmistakable pronouncement of stereotyped formulas), which was in itself irrational. Referring to Eugen Ehrlich (undoubtedly a source of inspiration for Weber)[9], but also to the work of contemporary specialists such as Waldstein/Rainer, Kaser and Peter,[10] Treiber shows that this procedural formalism ultimately favoured the rationalisation of law, by resulting in the adoption of forms of action (*actio legis*) developing an analytical approach. From a substantive point of view, procedure and legal matter are intertwined, so that the entire content of law is broken down into individual forms of action.

The parallel with the system of writs in English law is striking. As Kahn-Freund points out, in both cases the analytical approach leads to a strong casuistry, resistant to definitions of general scope.[11] Paradoxically, the structure and methodology of classical Roman law are closer to common law than to continental European law, even though it is based on the scholarly reception of the former.[12] Following Treiber, Weber also understands English law only in broad strokes, considering almost en bloc the vast period from the establishment of the royal courts under Henry II (1154–89) to the procedural and judicial reform of the 19th century. It is not the detailed history of the common law (and of equity) that interests him, but its reconstruction in the

9. Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Berlin, Duncker & Humblot, 1913). English transl. by Walter L. Moll, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge, Harvard University Press, 1936).

10. See Wolfgang Waldstein and Johannes Michael Rainer, *Römische Rechtsgeschichte* (Munich, C.H. Beck, 2014); Max Kaser, *Römische Rechtsgeschichte* (Göttingen, Vandenhoeck & Ruprecht, 1993); Hans Peter, *Actio und Writ. Eine vergleichende Darstellung römischer und englischer Rechtsbehelfe* (Tübingen, Mohr, 1957) (authors cited by H. Treiber). In English one may read Max Kaser and Rolf Dannenbring, *Roman Private Law* (Durban, Butterworths, 1968).

11. Otto Kahn-Freund, 'Einleitung', *loc.cit.*, p. 11.

12. On the reception of Roman law in continental Europe since the Middle Ages, Treiber cites in particular: Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen, Vandenhoeck & Ruprecht, 1967); Wolfgang Sellert, 'Zur Rezeption des römischen und kanonischen Rechts in Deutschland von den Anfängen bis zum Beginn der frühen Neuzeit: Überblick, Diskussionsstand und Ergebnisse', in H. Boockmann et al., *Recht und Verfassung im Übergang vom Mittelalter zur Neuzeit* (Göttingen, Vandenhoeck & Ruprecht, 1998), pp. 115-66; *idem*, 'Rechtsbildung in Deutschland im Zeitalter der Rezeption', in Jörg Wolff et al. (eds.), *Studien zur Kultur-und Rechtsgeschichte* (Mönchengladbach, Forum Verlag, 2005), pp. 181-203; Peter Stein, *Römisches Recht und Europa. Die Geschichte einer Rechtskultur* (Frankfurt, Fischer, 1996); Hermann Lange and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter, vol. II Die Kommentatoren* (Munich, C.H. Beck, 1997). See in English: Franz Wieacker, *A History of Private Law in Europe: with Particular Reference to Germany* (Oxford, Clarendon Press, 1995); Peter Stein, *Roman Law in European History* (Cambridge, Cambridge University Press, 1999).

form of ideal types, in order to assess its specificity with regard to the rationalisation of law. Finally, beyond the (relative) parallel between writs and *actiones*, Weber focuses above all on the relationship of English law to the legal empiricism that is characteristic of it, both from the point of view of the learning and practice of law. The centralisation of the royal justice system, itself the result of political factors specific to the Norman administration, favoured in return the regrouping in London of the activity of legal practitioners, in the form of a closed association imposing, in particular to block any competition from the universities, a purely practical training of the candidates to the legal profession, governed by the Inns of Court.

Drawing on a vast body of literature,[13] Treiber highlights the gradual reflexivity of English law in relation to market participants (landowners and merchants), who were often irritated by the initial rigidity of procedural forms. The pressure of economic interests led English jurists (including magistrates) to infuse the common law with a certain flexibility, for example in matters of trespass or assumpsit. Supplementing Weber's discussion in this respect, Treiber considers in particular the evolution of legal rules relating to the central category of contract, where the original formalism (requirement of a solemn writing) gives way to informal forms of agreement, albeit in the absence of any general contractual theory. The increased use of the procedure of equity applied by the Chancelery also forces the common law courts to be innovative, as their own interests are at stake. These interests (court fees as a basis for income) are also the source of competition between the common law royal courts, given the lack of jurisdictional delimitation.

The third stage of rationalisation of the legal sphere for Weber concerns the granting of law by princely and theocratic powers. With regard to the latter, Treiber contrasts two systems of sacred law largely carried by specialised jurists, namely Muslim law and canon law. Muslim law quickly encountered obstacles to formal rationalisation, both for intrinsic reasons—the sacredness of tradition limiting the possibilities of innovation—and for political factors (the absolutism of domination, the lack of autonomy of the eastern city, etc.).[14] On the

13. See Harold J. Berman, *Law and Revolution. The Formation of the Legal Western Tradition,* Cambridge (Harvard University Press, 1983); J.H. Baker, *An Introduction to English Legal History* (Oxford, Oxford University Press, 2007); R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge, Cambridge University Press, 1988); T.F.T. Plucknett, *A Concise History of the Common Law* (Boston, Little, Brown and Co., 1956).

14. Treiber here cites Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: ihre Entwicklung in Mekka bis zur Mitte des 2./8. Jahrhunderts* (Stuttgart, F. Steiner, 1991); English transl.: *The Origins of Islamic Jurisprudence: Meccan Fiqh Before the Classical*

other hand, canon law clearly favoured formal rationality, rejecting the irrational modes of proof permeating medieval law and submitting to rationally adopted norms (conciliar resolutions, decretals, etc.) given the administrative centralisation of the Church, which, moreover, benefited from a normative autonomy that was normally unquestioned and extended to the whole of Christendom, in the face of princely powers.[15]

The role played by the princely *imperium* in the rationalisation of law illustrates in this respect the close interweaving of political and legal factors and in particular the decisive importance of the type of administrative apparatus supporting the prince in the exercise of domination. A distinction must be made between the administration of notables (*e.g.* the gentry in England), which is inexpensive, numerically limited and able to function without much aspiration to the rationality of law, and the bureaucratic administration, which originally arose from the need to maintain a standing army and the fiscal means that this implies, and which on the contrary calls for such rationalisation. As Treiber points out, in the absence of an autonomous economic sphere where bourgeois interests also favour legal rationality, the princely imperium aspires to a material rationalisation of law. It is therefore the combination of the two elements, bureaucratic and bourgeois, that appears more conducive to the development of a formally rational law: '... the driving force for a formal rationalization of the law was the coincidence of princely and bourgeois interests, especially as the 'private economic rationalism of the bourgeois strata' correlates with the 'utilitarian rationalism of administration by public officials' (p. 136).

Treiber then returns to Weber's analysis of codifications. Two codifications in particular can be compared: the Prussian *Allgemeine Landrecht* (1794), a monument to the welfare state, and the Napoleonic *Civil Code* (1802), a product of modern natural law of revolutionary essence. The Prussian codification was also influenced by natural law in

Schools (Leiden, Brill, 2002); Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, Cambridge University Press, 2005); Joseph Schacht, 'Zur soziologischen Betrachtung des islamischen Rechts', *Der Islam; Zeitschrift für Geschichte und Kultur des Islamischen Orients* 22 (1935): 207. See from the latter author, in English: Joseph Schacht, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1993).

15. See, among others, Peter Landau, 'Der Einfluß des kanonischen Rechts auf die europäische Rechtskultur', in *Idem*, *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter* (Badenweiler, Wissenschaftlicher Verlag Bachmann 2013), pp. 233-53; *idem*, *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien*, in *ibldem*, 2013, pp. 255-84 (cited by H. Treiber). From Peter Landau, see in English: 'The Development of Law', in D. Luscombe and J. Riley-Smith (eds.), *The New Cambridge Medieval History* (Cambridge, Cambridge University Press, 2004), pp. 113-47.

its search for a rational coherence of existing law, but it reflected above all the concerns of the princely patrimonial administration, which were oriented towards a substantive and not a formal rationalisation of legal norms.[16] The French *Civil Code* is strongly distinguished by the desire, in principle at least, to establish a new law free of preconceptions forged by history: 'For Weber, it is, above all, a "child of the revolution", influenced both by the Enlightenment and belief in reason and by thinking based on natural law' (p. 141). The attachment to liberal individualism and freedom of contract in the *Civil Code* reflects the triumph of the demands of the bourgeois classes, whereas the *Allgemeine Landrecht* reflects the characteristics of the 'estates' society (*Ständestaat*), the product of late feudalism.

Finally, the fourth stage of rationalisation of law is carried out by academic lawyers. Treiber focuses his attention, on the one hand, on the proximity of Weber's ideal type to the dominant position of Pandectism in the legal sphere in 19th century Germany, and on the other hand, on the sociologist's critical analysis of the tendencies towards the 'rematerialisation' of contemporary law.

Weber equates the formal rationality of law in its fullness with the characteristic elements claimed by the science of the Pandects, in particular completeness, logical closure, systematicity, etc. Treiber, in a particularly enlightening way, analyses in this respect the unified system of legal propositions elaborated by Georg F. Puchta, member of the Romanist wing of the Historical School of Law.[17] Puchta's system is presented as a rigorously coherent set of legal propositions relating to a first principle, according to which 'all law is the application of the

16. Cf. Gerhard Dilcher, 'Die janusköpfige Kodifikation. Das preußiche Allgemeine Landrecht (1794) und die europäische Rechtsgeschichte', *Zeitschrift für europäisches Privatrecht* 2.3 (1994): 446-69 (cited by H. Treiber).

17. Treiber cites mainly, from Puchta, the *Lehrbuch der Pandekten, Leipzig, Verlag von Johann Ambrosius Barth, 1838. His analysis is also based on* Hans-Peter Haferkamp, *Georg Friedrich Puchta und die 'Begriffsjurisprudenz'* (Frankfurt, Klostermann, 2004); *idem*, 'Recht als System bei Georg Friedrich Puchta', in Jörg Wolff *et al.* (eds.), *Studien zur Kultur-und Rechtsgeschichte* 1, *op.cit.*, pp. 261-75; *idem,* 'Methode und Rechtslehre bei Georg Friedrich Puchta', in J. Rückert (ed.), *Methodik des Zivilrechts-von Savigny bis Teubner* (Baden-Baden, Nomos, 2012), pp. 73-96; Christoph-Eric Mecke, *Begriff und System des Rechts bei Georg Friedrich Puchta,* Göttingen, Vandenhoeck & Ruprecht, 2009. In English, see: H.P. Haferkamp, '"Needs"—Pandectists Between Norm and Reality', in Y. Morigiwa, M. Stolleis and J.L. Halperin (eds.), *Interpretation of Law in the Age of Enlightenment* (Law and Philosophy Library, vol 95), Dordrecht. Springer, 2011, pp. 107-21; Christoph-Eric Mecke, 'Puchta's and Jhering's Contributions to the Current Theory of Legal Science', *Archiv für Rechts-und Sozialphilosophie* 95.4 (2009): 540-62.

will directed towards an object'.[18] For example, according to Treiber, property consists of the subjection of a thing to the individual will, either in whole or in part (*ius in re*). Puchta asserts that this is a fundamental logical difference, whereas historically observed differences, such as the special features of emphyteusis, servitudes, etc., are secondary. The fundamental logical differences (for example, to continue the discussion, between real and personal servitudes) are brought together by Puchta in a historicist perspective, by classification of types and species. But the lawyer is always able, by not limiting himself to the fundamental differences logically derived from his first principle, to make room in his system for contingent but practically valid legal propositions. As Treiber writes: 'Although Weber's comments might suggest as much, Puchta's system is in no way characterized by a remoteness from everyday life'… 'Measured against Weber's ideal-typical construction of "logically clear, internally consistent, and, at least in theory, gapless system", the "logical sublimation of the system" in Puchta's work proves to be, to some extent, "underdeveloped"' (p.155).

This apparent overvaluation of formal rationality by the proponents of Pandectism is matched by Weber's rejection of the anti-formal tendencies manifested in contemporary law. Weber had of course witnessed the strong criticism of the so-called 'jurisprudence of concepts',[19] starting with Jhering. Although he sometimes acknowledged the accuracy of some of these criticisms (e.g., the claim that there are no loopholes), he nevertheless equated the tendencies towards rematerialisation of law with a flight into the irrational. Beyond the class interests at stake, there is also the aspiration of professional lawyers to a more creative role which still existed in Pandectism, but seems to have disappeared since the adoption of the *BGB* (German Civil Code), which would confine them to a purely technical role of law enforcement. For Treiber, in doing so, Weber does not escape the danger against which he himself often warned: that of a certain confusion between the ideal-typical construction and reality, and the practical, partisan stance that is likely to result from it.

18. *Cf.* Georg F. Puchta, *Lehrbuch der Pandekten, op.cit*., pp. 48ff.

19. The term, which is pejorative, was coined by opponents of the Pandectism. *Cf.* Hans-Peter Haferkamp, 'Die sogenannte Begriffsjurisprudenz im 19. Jahrhundert—"reines" Recht?', dans O. Depenheuer (ed.), *Reinheit des Rechts : Kategorisches Pinzip oder regulative Idee?* (Wiesbaden, Verlag für Sozialwissenschaften, 2010), pp. 79-99.

Overall considerations

The following elements of Treiber's book stand out as evidence not only of the author's great erudition, but also of the fundamental contributions he makes to the study of Max Weber's Sociology of Law: the empirical rationality of law; the pseudo 'English problem'; the idealisation of Pandectism, often associated in Weber's work with the most accomplished formal legal rationality; and finally, the pluralist dimension of law. Let us take up these elements in a specific way:

The empirical rationality of law. By empirical rationality, we mean the effectiveness of legal propositions as regards practical activity. Weber's attention is focused here, in our opinion in the pursuit of a refutation of Stammler's over-hasty judgements, on the relationship between law and economy. The formal rationality of law is by no means for Weber a guarantee of its empirical validity. On the contrary, when the formal logical sublimation of law reaches a high degree in a given historical context, a distance is inevitably created from the concrete activity of the actors: indeed, as Weber's account shows, such a rationalisation largely meets the needs of a layer of intellectual lawyers for doctrinal coherence and systematisation, and not the concrete expectations of those involved in the market, who are essentially looking for practical solutions. Weber highlights this aspect in relation to the late systematisation of Roman law under Justinian, and even more so in relation to the logical sublimation achieved by Pandectism in 19th century Germany.

This does not mean, on the contrary, that a law of an 'empirical' type, such as the cautelary jurisprudence in Rome or the common law in England, corresponds *ipso facto* to the expectations of the actors of the economic system and is immediately in line with their needs. 'Empirical' refers here to the type of training (by practical apprenticeship) and professional activity (drafting of legal acts, mastery of procedural forms) characteristic, to varying degrees, of classical Roman law and common law, and not to the degree of effectiveness of the law in relation to the economy. Indeed, the *Sociology of Law* makes it possible to identify many of the discrepancies that arise between these two spheres of activity, even when it comes to law with a strong empirical component. For example, one has to take into account the interests of the professional legal lawyer: common law practitioners were strongly concerned with the operational closure of their corporation, reinforced, as we have mentioned, by the granting of royal privilege. The esoteric character of the common law contributed greatly to the closure of the legal profession to the outside world, relying on knowledge that was not easily accessible and was

nourished by procedural, conceptual and linguistic archaisms (to the point of maintaining for a time a specific language, 'Law French'), the mastery of which required a long apprenticeship. At the same time, Weber points out, cautelary jurisprudence and English law are above all at the service of the economically privileged classes that form their clientele: thus, the common lawyer must mobilise all this esoteric knowledge to the best of his ability in order to serve the immediate interests of his clients, a concern that remains in principle secondary to the academic theorists who dominate European continental law.

The 'England problem'. Treiber spends little time on this issue (cf. pp. 97-99), to which he has, however, previously devoted more elaborate developments.[20] The 'England problem', which has been much discussed by commentators of the *Sociology of Law*, was formulated in 1972 by David Trubek.[21] It can be stated as follows: Weber is said to have defended the thesis that a high degree of formal legal rationality—which is found above all in continental European law—is a condition for the emergence of modern (industrial) capitalism. However, industrial capitalism first appeared in England, where the law obviously has a much lower degree of formal rationality. This paradox illustrates the weakness of Weber's thesis, which, although he was aware of the problem, never managed to resolve it adequately. For Treiber, in line with the views of other specialists in the *Sociology of Law*, the interrogation in fact reflects Trubek's own questioning and in no way that of Weber, who—it suffices to refer here to his critique of Stammler—never posed such an equivalence between the rationalisation of law and that of the economy. Treiber concludes as follows: 'From Weber's point of view, there is nothing to add, even if, from Trubek's perspective, the task raised by his question, 'to analyse the role of the law in the origins of capitalism', seems to 'still be a long way from being solved'' (p. 99).

Adherence to legal formalism. Weber posits a quasi-identity, as Treiber points out, between the logical claims of Pandectism (such as systematicity and absence of gaps) and the components of the ideal type of 'formal rationality' of law. This overlap is furthermore coupled, as the last chapter

20. Hubert Treiber,'"Elective affinities" between Weber's Sociology of Religion and Sociology of Law', *Theory and Society* 14.6 (1985): 809-61, 835ff.; *idem*, 'Insights into Weber's Sociology of Law', in Knut Papendorf, Stefan Machura and Kristian Andenaes (eds.), *Understanding Law in Society, Developments in Socio-legal Studies* (Berlin/Wien/Zürich, Lit Verlag, 2011), pp. 21-79.

21. David M. Trubek, 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review* (1972): 720-53.

of the *Sociology of Law* attests, with a firm adherence to legal formalism, which Weber sees as threatened by the rematerializing tendencies of contemporary law. Weber frequently relies on Jhering's aphorism, according to which 'being the sworn enemy of arbitrariness, form is the twin sister of freedom'. [22] However, this defence of legal formalism against the Free Law School and other legal realist currents was denounced early on, for example by Philipp Heck, as being based on an illusory and otherwise outdated view of the interpretation and application of law.[23]

Hubert Treiber's contribution appears crucial here, as he provides the methodological tools necessary for a precise evaluation of Weber's positions. Rather than confining himself to generalities, Treiber provides an illuminating analysis of Pandectist theory in Puchta, as we have mentioned. This analysis reveals a certain distance between Puchta's conception and the ideal type of formal rationality of law, especially from the point of view of the logical sublimation in the Pandects, which Weber too quickly describes as to some extent indifferent to the empirical effectiveness of law. This, in our opinion, provides the methodological basis for differentiating between the historical manifestation, which serves as the basis for Weber's approach, and the ideal type, which never appears as a pure form in legal practice. Once the ideal type is better circumscribed, the second step, in our view, would require giving full weight to Weber's remark that, in the context of a bureaucratised justice system such as the German judiciary, relinquishing the belief in legal formalism is likely to have negative effects for the underprivileged classes.[24] In passing, let us emphasise the importance of the expression

22. *Cf.* Max Weber, 'Diskussionrede zu dem Vortrag von H. Kantorowicz, "Rechtswissenschaft und Soziologie"', in *Gesammelte Aufsätze zur Soziologie und Sozialpolitik* (Tübingen J.C.B. Mohr, 1988), pp. 476-83, p.480.

23. See Philipp Heck, *The Formation of Concepts and the Jurisprudence of Interests* (1932), transl. by M.N. Schoch, *The Jurisprudence of Interests* (Cambridge, Harvard University Press, 1948), pp. 99-256 (103): ' It should be noted that Max Weber was a teacher of German law before he changed to the field of economics. The way of thinking described by him as prevalent among lawyers can no longer be considered to be prevalent today, at least in the field of private law. But his description is apt at showing younger colleagues the ideals in which the older generation has grown up. It is significant that a scholar of Max Weber's comprehensive knowledge should describe this ideal as predominant as late as 1920'.

24. 'A bureaucratized judiciary, which is planfully recruited in the higher ranks from among the personnel of the career service of the prosecutor's office and which is completely dependent on the politically ruling powers for advancement, cannot be set alongside the Swiss or English judiciary, event less the (Federal) judges in the United States. If one take away from such judges their belief in the sacredness of the purely objective legal formalism and directs the simply to balance interests, the result will be very different from those legal systems to which we have just referred' (Max Weber, *Economy and Society*, *op. cit*, pp. 893-94).

'belief in formalism', which means that these are *representations*, which may be far remoted from the facts, but which nonetheless may to a degree guide the conduct of actors. In any case, we know that one of the characteristics of formalism, the idea of an axiologically neutral judgement, was discarded in favour of the acceptance of the role of values in the work of the judiciary under the Weimar Republic.

There is a rich experimental ground here, which may confirm Weber's warning. According to Kahn-Freund,[25] the Weimar judiciary so abandoned its claim to axiological neutrality and recognised the role of values in judgement, which was nevertheless supposed to duplicate the social consensus: labour law was then closely aligned with the objectives pursued by the state, to the detriment of employees' expectations.

The plurality of law. As we have seen, Hubert Treiber rightly emphasises Weber's proximity to what is known as legal pluralism, even though some proponents of this current have stubbornly described his sociology as being concerned only with state law. It is worth noting that Weber uses the same term as Ehrlich to describe non-state law, namely '*ausserstaaliches Recht*'.[26] Anyone who is familiar with the passages in Weber's *Economy and Society* on the relationship between the legal and economic orders will recognise this sociological observation of a plural law. As a matter of fact, the *Sociology of Law* itself pays more attention to the links between political authority (including theocratic authority) and the legal sphere. However, two developments seem to us to be very important for a sociological theory of the plurality of law. Firstly, the long chapter 2 on the forms of creation of subjective rights highlights, as Treiber rightly points out, the key role of the grouping (*Verband*), in the form of association or institution, in the autonomous production of living law. Secondly, at the beginning of Chapter 8 on modern law, Weber deals with 'legal particularities', i.e., the development of autonomous spheres of regulation and practice of law within the state. The latter is often constructed in a monolithic way by the proponents of pluralism, which does not correspond at all to the differentiation dynamics of contemporary law when understood sociologically.

In conclusion, we should emphasise Hubert Treiber's major contribution to the understanding of Max Weber's *Sociology of Law*. This contribution is evident in the high quality of the sources analysed with great care, the soundness of the judgement supported by a thorough

25. O. Kahn-Freund, 'The Changing Function of Labour Law', in *Labour Law and Politics in the Weimar Republic* (Oxford, Basil Blackwell, 1981), p. 162.
26. Max Weber, *Wirtschaft und Gesellschaft: Recht*, *op. cit.*, p. 202.

knowledge of Weberian sociology, as well as the precision and clarity of the presentation. Of course, in *Reading Max Weber's Sociology of Law*, the author only delivers some of the knowledge he has accumulated over the years in this very difficult area of Weberian studies. In order to have a more complete vision, it is necessary to take into account other essential contributions of this vast production, concerning the foundations and methodological procedures of Weberian sociology of law,[27] its relationship to the sociology of religions,[28] the pluralist conception of law,[29] the extent of its reception[30] and the importance of political factors.[31] Even if the author does not synthesize all these works, *Reading Max Weber's* will be an essential study for anyone who wants to better understand the central notion of the rationalisation of law in Max Weber.

27. Hubert Treiber, 'Max Weber and Eugen Ehrlich: On the Janus-headed Construction of Weber's Ideal Type in the Sociology of Law', *Max Weber Studies* (2008): 225-46; Bernhard K. Quensel and Hubert Treiber, 'Das Ideal konstruktiver Jurisprudenz als Methode: Zur logischen Struktur von Max Webers Idealtypik', *Rechtstheorie* 33 (2002): 91; Hubert Treiber, 'Max Weber, Johannes von Kries and the Kinetic Theory of Gases', *Max Weber Studies* (2015): 47-68.

28. *Idem*, '"Elective affinities" between Weber's sociology of religion and sociology of law', *Theory and Society* 14.6 (1985): 809-61.

29. *Idem*, 'The Dependence of the Concept of Law upon Cognitive Interest', *The Journal of Legal Pluralism and Unofficial Law* 44.66 (2012): 1-47.

30. *Idem*, 'La place de Max Weber dans la sociologie du droit allemande contemporaine', *Droit et société* 9 (1988): 211.

31. *Idem*, 'La "sociologie de la domination" de Max Weber à la lumière de publications récentes', *Revue française de sociologie* 46.4 (2005): 871-82; *idem*, 'État moderne et bureaucratie moderne chez Max Weber', *Trivium. Revue franco-allemande de sciences humaines et sociales-Deutsch-französische Zeitschrift für Geistes-und Sozialwissenschaften* 7 (2010) https://doi.org/10.4000/trivium.3831