AGAINST ROMANTICISM: MAX WEBER AND THE HISTORICAL SCHOOL OF LAW

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INTRODUCTION

In writing about Max Weber's sociology of law, Albrow has claimed, as recently as 1975, that Weber's influence has been slight (Albrow, 1975). It can be argued, however, that since then the heightened interest amongst Western scholars in Weber's general sociology has been paralleled by a keen interest in his sociology of law. This is perhaps especially so amongst critical and Marxist legal scholars, particularly with regard to the understanding of domination in advanced capitalist societies and their consequent interest in those concepts intimately linked in Weber's work: authority, legitimacy, bureaucracy and the rationalization of social life. It is also the case that some more traditional legal scholars, recognizing a crisis in the contemporary legal order, have looked to Weber's work, amongst others, for aid in their search for the historical roots of that crisis, and thus some perception of a way forward out of it. In these circumstances, it is worth looking more closely at the background of the development of Weber's legal thought. For even the development of genius is only partly a matter of *generatis spontanea*. Like the work of all

scholars, that of Weber came about within a quite definite intellectual context and I submit that the German historical school of law was an important part of this — more important than is generally presumed.

In the first part of the article an attempt is made to sketch the salient features of this intellectual context. In the second part, Weber's reaction to it will be discussed: It will be seen that, in this mainly negative response, a very important aspect of his work came to the fore, that is his "individualism" both on the level of methodology and that of ethics. It will also be seen that where Weber came closest to a general "philosophy of history", viz. in his account of rationalization, he departed radically from the tenets of the historical school. It is important then to have more information concerning the point at which, and the circumstances in which, this departure took place.

The German Historical School of Jurisprudence

The study of law in 19th Century Germany was dominated by the historical school and this made its influence felt in virtually all humanistic disciplines. Lord Acton, who knew the German scene very well, once pointed out that it was this school which constituted the "strongest agency" in the historical orientation of these disciplines. (Acton 1908: 347). And Franz Schnabel, in a comparison of the historical and philosophical strivings in 19th Century German universities, stated that "the century belonged totally to the historical school of law" (Schnabel, 1950 III: 63).

I believe that the lack of attention given to Weber's legal academic background has been due, *inter alia* to the fact that, in his early methodological essays, he nowhere took an explicit stand in relation to past or present representatives of this school. He wrote the first of these essays, on request, for an economic 'Festschrift' (though he was too late to have it included there), in the period that he identified himself as an economist. Hence the external circumstances were not conducive to clear comments on the tenets of the historical school of law. Yet such comments can be found, in Weber's work, but they are, with few exceptions, implicit rather than explicit, and a matter of general approach rather than concrete facts. In order to make this clear I would like to attempt a sketch of those main tenets of the historical school of law which have a particular relevance for Weber's work even if only in a negative sense.

The historical school of law, however intensively academic it ultimately became, did not originate within a purely academic context. On the contrary, the controversy which led to its birth had a great deal to do with purely practical needs. The political fragmentation of Germany had been conducive to the growth of a strange hotchpotch of princely decrees, provincial rights and local privileges. Elements from German, Roman and canonical law had blended together in an inextricable whole. "The science of law", says Schnabel, "could no longer manage the accumulated materials and linked the positive laws together in interminable compendia". Eighteenth century legal scholars, confronted with this unwieldy heritage from the past, had made a continuous effort to create a civil code with the help of the principles of natural law. The jurisprudence based on natural law was, however, rather useless in the practical administration of justice. Its typical procedure, namely to deduce general rules from "first principles", was too abstract for the purposes of daily life. Hence a great many isolated cases were cited in the law

codes. Frederick the Great wrote, on the draft which the Chancellor Carmer put in front of him in 1765, the ill-tempered comment that "it was, however, very thick". (Schnabel, 1950 III: 49ff).

It was in the time of national fervour engendered by the war against Napoleon that Thibaut, a Heidelberg law scholar of great fame, wrote a pamphlet pleading the desirability and possibility of a general law code for Germany. Roman law was in decline and, anyway, foreign to Germany; Germanic law was full of anomalies, and so rich in local variations that nobody could really master it. The newly composed French law codes were rather superficial and touched on ideas which could be much more adequately expressed, so Thibaut believed, with the concepts of German jurisprudence. In short, Thibaut asserted that the time had come for German statesmen and professional jurists to create a new national law code. (Gooch, 1913: 48ff).

It could be said that the answer to this pamphlet laid the foundation for that huge intellectual edifice which we know as the German historical school of law. It came from Savigny, the man who would, via his chair in the newly founded University of Berlin and his later political positions, exert enormous influence in the field. Savigny argued that law couldn't have its origins in mere legislation by the state. "All law" he said "originates . . . as a customary law, that is first through custom and popular beliefs, and next through jurisprudence, thus everywhere through inner and silently operating forces, rather than the arbitrary will of a law giver," (quoted in Tonnies, 1908: 8). He was supported here by the doctrines of romanticism on the organic nature and origination of language, custom and law. Law was regarded as developing continuously; like language and other aspects of culture, and as a following in its growth the laws of its "inner necessity". Jurisprudence was seen as a product of the Folk Mind ("*Volksgeist*") which could only flourish when it remained in contact with this original source of law. In accordance with this, Savigny saw jurists, who emerged as a professional group in a process of diversification of activities of the Folk, in their attempts at condification as mere representatives of the Folk Mind. (Schnabel, 1950 III: 55-56).

In Stahl's famous text book on the history of the philosophy of law the doctrines of the historical school were summarised as follows:

> The essence of the historical school of laws consists of a certain view on the origin of law. Law is only one aspect of the whole life of a people, inseparably connected with its other aspects and activities such as language, customs, art. Therefore it originates, just as these other things, not in conscious consideration and selection, but in an inherent meaning and usage, by the consciousness of its necessity . . . The fundamental doctrines of the historical school of law are accordingly: the connection of law with the Folk and Folk-consciousness ("Volksbewusstsein"), its originally non-reflective genesis, the demand for continuity in its further creation (Quoted in Menger 1883: 206 n94).

Savigny's convictions were by no means idiosyncratic (see d'Entreves 1970: 97) — in fact his arguments against Thibaut found so much response that the latter's plan for a general German civil code was shelved for two generations. The philosophy behind Savigny's convictions can be found in Burke and that much more

metaphysical thinker, Schelling. Central to Schelling's view of things was the concept of "development" and, drawing on Kant and Schiller, he talked of a reconciliation between spirit and sensuality, between nature and freedom in a developmental process. In this scheme of thought the rationalism of the French revolutionaries was pictured as the great opposing force which should be eradicated to its very foundations in the mathematical — mechanical philosophy of nature. Schelling claimed that nature should not be measured and causally explained. One should search for the meaning and significance of the singular phenomenon in the purposeful system of the whole. Since this system was purposeful, nature should be explained teleologically in its process of transformation from "objective reason" in the material things, to its self consciousness in the organism. Schelling believed that if the whole mechanical causal way of looking at nature was abandoned, the social expressions of rationalism, such as individualism and utilitarianism, would also disappear. Development in the realm of culture should also be grasped by pure intuition, by the understanding of meaning — thus by the art of hermeneutics rather than mechanical reasoning. Schelling broached themes here which would prove to be basic to the German humanistic disciplines with their entrenched distinction between "explanation" and "understanding" ("*verstehen*"). The difference with Hegel's dialectical reason is clear and Troeltsch has rightly argued that, in this sense, it is Schelling rather than Hegel who provided the philosophical underpinning of German historical endeavours (Troeltsch, 1922: 287-290 and Windelband, 1928: 504-505).

Development and the organic whole were also the key concepts in Savigny's approach to law. Instead of the cold application of logic, as in natural law, law should be traced in its historical development and understood in its organic relations to other aspects of culture. These convictions, so eloquently defended by Savigny, were at the basis of a research program which, before long, made history the predominant humanistic discipline in 19th Century Germany and German historians the most respected teachers and writers in the field.

Savigny himself concentrated, in the first place, on Roman law which he wanted to restore to its pristine glory. This ambition seemed to be rather at odds with the general views he professed on the origin of law and its nature as part of an organic whole. After all, Roman law could hardly be regarded as a native product from German soil. Even Savigny's powers of persuasion and his prestige as a teacher were not enough to keep this simple fact out of sight. Ultimately it led to the breach in the historical school of law between the Germanistic and the Romanistic wings — though the scholarly preoccupation with Germanic law had started much earlier (see Von Amira I: 186).

The breach was personified in Jacob Grimm, warm admirer and one time personal friend of Savigny. Grimm had adopted Savigny's principles and views on the nature of law whole heartedly and adhered to these in his own celebrated work on German Legal Antiquities. To compose this work he had, over long years, lovingly collected legal usages as authentic expressions of the Folk Mind. Yet in the introduction to the book, Grimm made clear why the Romanistic and Germanistic school had to part ways. We cannot now, he said, assess the full value of Germanic law because its evolution has been disturbed by the introduction of Christianity and Roman law. In comparison Roman law has attained its full development and who

would deny its superiority? But it lacks one thing: it is not a native product of our soil and cannot really satisfy us because it is, in essential traits, at odds with our way of thinking. It does not clarify our history and is not clarified by it. Also, in its practical application it has not been of great advantage to us. England, Sweden and Norway did without it, kept their native laws and are not in mental development inferior to us. In central Germany, said Grimm, where the peasant is no longer aware of his customary law, he is also more limited and participates less in communal life (Grimm, 1965: XVII-XVIII).

Savigny had already, in his answer to Thibaut, taken a stand against such views. Roman law could not be regarded as an alien body any more in Germany, he claimed. It had been integrated and interwoven with Germanic law centuries ago and it was exactly in this process that we saw the operation of the Folk Mind. Savigny also denied what seemed to be obvious *viz* that Roman law itself could hardly be regarded as a product of the Folk Mind, because the great legislators could easily be identified. "Objections of this nature are really empty and groundless" he said "because they presume things to be fortuitous and arbitrary which without inner necessity could not have come about or would not have remained" (quoted in Schnabel 1954 III: 64).

Yet, Savigny's personal influence could not prevent his interpretation of the state of affairs being ignored, at least in the long run. If Jacob Grimm still respectfully adhered to Savigny's general approach and just made a modest plea for the separate place of Germanic law, in Georg Beseler (later one of Weber's teachers), this body of law found a far more aggressive advocate. Beseler saw in the reception of Roman law a sort of national misfortune. It was he who coined the terms "Folk law" and "Lawyers law" and connected this alleged antithesis with centuries old complaints, from Luther onwards, about the monopolization and exploitation of the law by lawyers. Beseler reproached Savigny for having included the origination of the science of law and the genesis of a category of professional jurists in his so-called organic development. Our law, said Beseler, is not our own. It has been imported by lawyers from abroad and it is only valued by them. Accordingly it would be the task of the Germanic branch of the historical school of law to unearth the really indigenous law of the country and the genuinely Germanic institutions (Schnabel; 1950 III: 67).

The rupture between "Romanists" and "Germanists" can, to a certain extent also be explained sociologically. Roman law was, in the first place, urban law which clearly expressed the freedom of the individual and the land. But Germany, on the right side of the Rhine, hardly knew these freedoms. Remarkably enough, Savigny was not aware of this connection between Roman law and certain judicial needs and necessities created by urbanization, a money economy and commercial exchange. But Theodor Mommsen, the last of the great 'Romanists' (and one of Weber's teachers) emphatically drew attention to it; "In the 19th Century we have arrived at a point where a natural development of the law would yet have coincided with that of 'Roman law" (Schnabel 1950; III: 68).

The struggle between "Germanists" and "Romanists" focussed on one point specifically — the question of German "sodality" (*Genossenschaft*) versus Roman "domination" (*Herrschaft*). This matter has been of great importance in German historiography and in one of the main controversies between nineteenth

century German and French historians (see de Blecourt, 1929). It has also played an important role in the formation of German political ideals and is now still of influence in some communist countries, thanks to Marx' reading of the "Germanist" Von Maurer (Brand, 1974).

Von Maurer's theory on the development of sodality has an evolutionary perspective. According to him one sees in the transition from nomadic life to cattle grazing the emergence of a sodality form of social organization, with land being possessed in common (Von Maurer, 1854: 5). Agricultural fields, house and farmyard gradually became private possession, but forest and meadow, roads and water remained common property (ibid: 9).

Von Maurer had very definite opinions on the cause of this growth of private property. This happened, he said, under the influence of Roman law. "Ideas on private property have spread further and further among the Germanic peoples under the influence of Roman law" (ibid: 98). Von Maurer believed that this came about with the development of royal authority, hence only since the period of frequent wars with the Romans and the migration of peoples (ibid: 332). There was, he said, a real difference between the "March — and field sodality and public authority", but changes in the latter had also strongly influenced the former (ibid: 334).

Karl Haff had drawn attention to Von Maurer's influence on Von Gierke, the greatest German authority regarding the body of law relating to the sodality (Haff, 1926: 279). Von Gierke built up, in an impressive feat of historical scholarship, a theory of law which was intended to elucidate the juridical nature of a great variety of relations between human beings. The term "sodality" had to serve here as a collective noun for all kinds of collectivities with common goals. In Roman law there was a sharp conceptual distinction between the rights of the association ("*universitas*") and that of the single member. This distinction was not found in German law in which members of associations were considered to form one corporate body (Korperschaft), which used its property as something which was neither entirely its own nor altogether alien. Gierke deemed the greater vagueness of German law on this point an advantage, since it expressed more strongly the share of the individual in the fortunes of associations. He made a systematic distinction between collectivities with an authority structure (*Ueber — und Unterordnung*) and those with the fellowship-ties of sodalities (*Gleichordnung*) and judged the latter structural form to be typically germanic.

The fictional corporate personality of Roman-canonical law is transformed into a real person in Gierke's "organic theory". "We consider," said Von Gierke, "the social whole, just as we do the individual organism, as a living thing and subsume this . . . under the generic notion of living beings" (Thieme 1964: 766). The development of the sodality was not a matter of contract but the result of a "creative collective deed". Hence Gierke was of the opinion that he had discovered, in the sodality, a typically germanic institution — an institution which was closely related to traditional land law and the principal of autonomous administration, by and for the people. Politically these principles could be applied in various ways. They could serve for the restoration of feudal powers as well as for the protection of newly developing popular forces. But they did not fit in with the new economic relations and the doctrine of the sovereign state. "The Romanists did not hesitate," says Schnabel, "to make use of this advantage." (Schnabel 1950: III 68).

This conflict between the two schools of law acquired in the course of the 19th century a strongly emotional-political character. The "Germanists" regarded Roman law as the expression of a cold and egotistical individualism, whereas German law had allegedly a warm community character. Gierke considered the various forms of the German *Genossenschaft* to be the most beautiful manifestation of the "German spirit of comradeship".

This alleged contrast was continuously invoked by political groups who wanted to maintain a patriarchal social structure or create a new community on a racial or national socialist base. The Nazis even suggested that Roman law was, in some unspecified way, an expression of the "Jewish spirit". Rheinstein has drawn attention to the fact that the replacement of Roman law by true German law constituted a point (article 19) in the program of the National-Socialist Party (Weber 1954: 183 n.238).

It should be pointed out that it has often been asserted that the historical school of law derived its views on the state from political romanticism, as this was represented in early 19th century Germany by the Swiss theorist Von Haller and by Muller. But this statement amounts to a blotting out of important historical differences. The political romantics made no distinction, in principle, between the organic whole of society and the state, whereas the historical school of law did. So wrote Adam Muller in the 1830's: "The state is the totality of human affairs, their relation in a living whole . . . the essence of the state should be seen in the solution of contradictory things: the state is the intermediating agency between clergy and commerce, nobility and bouregoisie, man and woman, youth and old age" (Muller, 1931: 36, 236). For Von Haller "civil" or political society is but the highest grade of "natural" society. In his case too the important difference with the historical school remains that, to him, the state rather than the Folk Mind was the ultimate source of law. Human society is characterized by inequality rather than equality and consists of a multitude of a-symmetrical relationships of control and subjection. Government authority is therefore merely the name for an "ensemble of superiorities" (Dunning, 1922: 197).

The political romantics claimed to be against natural law, as did the historical school of law, but its objections were rather different from those of Savigny and his disciples. Muller held that the *jus divinum* was the source of all positive law and that divine laws were the criterion for the legality of all earthly law. The *jus divinum* could be found in the sayings of Christ and the apostles, of which the interpretation had been laid down in the traditions of the Roman Catholic church. This *jus divinum* was called, in spite of Muller's protests, the natural law of the contra revolution (Dombrowsky, 1909: 398-399).

For Savigny the state could never be a source of law — its task was merely the codification and preservation of law. The ultimate source of law remained the Folk Mind as this found expression in its latter day representatives — the professional jurists. Gierke's theory of the *Genossenschaft* allowed for a more precise conceptualization of the relation between the individual and the state, within the context of the general convictions of the historical school. The *Genossenschaft* had authority over its members because it had not a fictional but a real personality which, naturally, dominated its organic parts. To exert authority was not a privilege

of the state. The individual was not just an atom versus an all powerful state, which natural law made of him, but a living member of a long chain of social organisms. Granted these were, ultimately, dominated by the state, but they confronted the state as formations with their own rights (Jellinek, 1911: 349-350).

Weber's Reaction To The German Historical School of Jurisprudence

What now was Weber's position towards this historical school of law, its struggle against natural law, and the conflict between "Romanists" and "Germanists"? The first point which can be made here is that Weber rejected without hesitation the romantic-metaphysical approach to the question of the emergence of legal norms. "The Historical School of Jurisprudence tended to accept the hypothesis that evolutionary impulses of a "folk spirit" are produced by a hypostatized supra-individual organic entity . . . Scientifically, however, this conception leads nowhere" (Weber 1968 a: II 754). Weber's resistance against "explanations" of this nature is not only found in his sociology of law. The analysis of historical transformations of whatever kind always implied to him an account of the role of the human agents involved. Such "spooks" in history as "folk minds", were to him a characteristic part of the historical inventory of romanticism. He spoke of the "irrationalism of such axioms" as those of romanticism which regard the *Volksgeist* as the only natural, and thus the only legitimate source from which law and culture can emanate. Such axioms also considered that all "genuine" law must have grown up "organically" and must be based directly upon the sense of justice, in contrast to "artificial", *ie* purposefully enacted law (Weber 1968 a: II 867).

In 1895 Weber published an article which clarified his views on these matters. In this rather polemical piece he stated that Roman law was a "social-political scapegoat" in Germany, and it was believed widely and in all seriousness, that the acceptance of this type of law constituted one of the main causes for the social calamities of the present and that the "social question" could be solved by a return to German law (Baumgarten 1964: 433-434). It should be noted that, as Hintze has remarked, there is a strong emphasis on the Roman law element in Weber's own sociology: "It is remarkable and very characteristic for Weber's view of social and political situations that he strongly emphasizes the element . . . of domination and de-emphasizes that of solidarity in associations" (Hintze, 1964).

The criticism of the Germanists and the Romanists is a little more substantive when, in a letter to the philosopher Count Herman Keyserling, who had been extolling the "historical sense" of the Germans, Weber wrote:

> A historical sense means to-day for your audience (and certainly against *your* intentions) just too much this relativistic acceptance of given powers, which now has become much more dangerous to life and the capacity for energetic action than any abstractions ever could be. On the latter, at least, reality will impinge with promptness and certainty. But now the principle of 'one should be more obedient to God than to Man' (this really creative element in the development of the West) has gone forever, there is no similar force working against the overpowering inclination to accept this 'best of all possible worlds' (Baumgarten 1964: 429).

Friedrich Tenbruck calls it a "shameful fact" that people keep repeating that it was one of Weber's merits that he demolished the concept of 'Folk Mind' of the romantic school. According to Tenbruck, in Weber's time this and other romantic concepts had long since had their demise. I believe that Tenbruck overstates his case here. First, Treitschke, one of Weber's teachers, had frequently used the concept. Secondly, Weber makes the point of telling us that one cannot do anything with the concept — hardly information which needs to be given concerning notions which had been demolished long ago (Tenbruck 1959: 620 n.17). But also, and more importantly, it was in opposition to concepts such as these that Weber first developed his notion that social life, and especially social change, should be analysed in terms of the attitudes and action of individual social agents rather than hypostatized supre-individual entities. I have elsewhere emphasized the link between these methodological considerations and Weber's deepest convictions concerning the ethical responsibility of the individual (Brand, 1979).

Weber's methodological individualism is already apparent in his early work. His first work was his doctoral dissertation which appeared in 1889. It was written under supervision of Goldschmidt and Gneist and it appeared under the title *Zur Geschichte der Handelsgesellschaften im Mittelalter* (On the History of the Trading Companies in the Middle Ages).[1]

Weber posed the following problem in this work: How and in which social formations and developments did certain modern commercial forms, especially the partnership firm, come about? He noted that common economic responsibility was originally the affair of the medieval household as a family and work community. Shop, workshop and dwelling were still found together in a single unit and thus only fell apart in a further process of economic development. It is interesting to note that Weber described the creation of new legal forms for these economic developments, as a process of more or less ad hoc application of juridical forms construed in an abstract fashion by professional lawyers trained in Roman law. These jurists insisted that the transactions would be clearly recorded and the degree of liability explicitly defined. They gave the partnership a legal personality, pushed through the custom that contracts would be charged to the accounts of all partners and that the partnership would deal with third parties under its own name, *ie* the name of the firm. In this way the old foundations of liability, the common household, the common "*stacio*", "*bottega*", "*taberna*" lost their significance in commercial exchange (Weber, 1924: 434-435 *et passim*).

There is in this dissertation a clear notion that law was autonomous to some degree *ie* that jurists applied formal juridical forms to the changing economic structure. There is no expression of "Folk consciousness" here in accordance with some "inner necessity", but individual action in different economic circumstances.

Weber's higher doctorate thesis ("Habilitation") was entitled: *Die Roemische Agrargeschichte in ihrer Bedeutung für das Staats — und Privatrecht* 1891 (Roman Agrarian History in its Significance for Constitutional and Private Law). He wrote this thesis under supervision of a historian, Meitzen, who had been working mainly on questions of the original settlement patterns and landlaw among the agrarian population of Germanic countries. What intrigued Weber especially in Meitzen's work was how the latter had analysed the interrelations of the various elements of the settlements and how he had tried to establish the more or less constant character

of some of these interrelations. Knowledge of this would enable historians to operate in a "constructive" fashion in new inquiries of this nature by extrapolating, in the form of hypotheses, from the known elements to the unknown ones. This was the procedure Weber followed in his own study of Roman settlement patterns and agrarian law. He concluded the original coexistence of different types of property ownership from the various systems of property designation. Weber's main question was how did the so-called "*ager privatus*" come about. It was he concluded, the plebeians who discovered in this form of private land-ownership the means for their own social and political emancipation from the patricians. This development had far reaching juridical consequences. Weber said:

> It has created the concept of private property, or rather applied it to land possession which, though an artificial product of a policy guided by interests, has dominated and still dominates the thoughts of jurisprudence . . . because of the refinement of its logical elaboration (Weber, 1924: 117-118).

Although Weber seeks to find constant inter-relationships, the source of the change of land tenure was that the plebeians sought emancipation from the patricians. Jurists took up the concept created by these interests, and applied their own formal legal rationality, thus coming up with formulations which would affect later forms of land ownership. The jurists' action is interpreted as their attempt to integrate the new calculation of the relationship between land ownership and land use in the legal system.

Weber's summary of the development of law remains in accordance with the general views expressed in his early legal historical works:

> 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, i.e., law creation, cautelary jurisprudence and adherence to precedent; third, imposition of law by secular or theocratic powers; fourth and finally, systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner. From this perspective, 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 relevation, they proceed to increasingly specialized juridical and logical rationality and systematization, sometimes passing through the detour of theocratically or patrimonially conditioned substantive and informal expedience. Finally, they assume, at least from an external viewpoint, an increasingly logical sublimation and deductive rigor and develop an increasingly rational technique in procedure (Weber 1968 a:II 882).

Weber emphasized that these stages could not be found everywhere and, also, that they were not always found in this sequence. His main concern was the construction of a clear type of development. Characteristic for the West according to him, was the development of the "deductive stringency of law", of "conceptual jurisprudence" (*Begriffsjurisprudenz*; a term that comes from Rudolf Jhering who attacked this phenomenon in *Scherz und Ernst in der Jurisprudenz* (1885) (Winckelmann 1976: III, 120).[2]

Weber saw, here too, the Janus-face which according to him all phenomena of rationalization had. He pointed out that the "logic of jurisprudence," the juridical "construction of facts" on the basis of formal rules, must inevitably lead to results which are often deeply disappointing to interested parties. The logic of jurisprudence implied the point of view that things which could not be conceived of on the basis of its general principles did, in fact, not exist. Parties were interested in the economic, utilitarian meaning of a legal proposition, but from the point of view of legal logic this meaning was irrational. Weber gave an example here. German jurisprudence could not, on the basis of the existing concept of larceny, conceive of the larceny of electric power. Franz von Liszt spoke in this context of "criminal law as the magna charta of the criminal" (Winckelmann 1976: III 213), but Weber pointed out that we were not confronted here with a special form of juridical foolishness, but with the discrepancy between the immanent logic of formal — legal thought, and the orientation of parties towards the economic effect of nations. A "lawyers' law," said Weber, could never "be brought into conformity with lay expectations unless it totally renounces that formal character which is immanent in it." (Weber 1968 a: II 885). It was also in these terms that Weber looked at the struggle between "Roman" and "German" law. There was, according to him, no doubt that certain modern forms of law were at odds with popular conceptions. But often this was not a matter of the 'Roman' character of the law, but of the increasingly formal approach of modern jurists to problems of the law.

According to Weber, it was this radical process of rationalization which led, with the inevitability of fate, to irrationalities, to an "irrational conduct of life". It should not be thought that Weber believed the increasing pressure of material rationality on legal formalism would remove such "irrational conduct". His remarks on this point should have a special interest for Australians. One can find them in his review of a now forgotten book on the labour contract. He warned its author that, contrary to the latter's expectations, the German courts would hardly be able to deal with industrial relations without changing their entire character. Instead of administering justice on the basis of legal formalism they would have to switch to a sort of "khadi justice". The problem of the basic wage, said Weber, could not be solved via the administration of justice. Where this would be tried, courts would immediately be dragged into the class struggle. Their composition and political colour would become an object of the political struggle for power. The introduction of social-ethical considerations into the administration of justice, said Weber, might in isolated instances serve the interests of the working class. But nothing is more certain, given the social environment of our professional jurists, that in the long run they would serve totally different interests (Baumgarten 1964: 440-441).

The point of these comments is, of course, that material rationality is only rational for those who happen to strive for the ends which determine legal considerations. Where 'rational' becomes synonymous with "reasonable" the question immediately arises: reasonable to whom? Hence we encounter either formal rationality, which puts the body of law and its inner logic above the interests of parties, or material rationality, which serves the interests of some and not of others. There does not seem to be an escape from the horns of this dilemma.

Weber's thought is here, as elsewhere, dialectical. Formal and material rationality might be regarded as opposites, yet they were inextricably bound up together. Their relation found its basis in:

> the intrinsic necessities of legal thought. Its growing logical sublimation has meant everywhere the displacement of dependence on externally tangible formal characteristics by an increasingly logical interpretation of *meaning* in relation to the legal norms themselves, as well as in relation to legal transactions. In the doctrine of the continental 'common law' this interpretation claimed that it would give effect to the 'real' intentions of the parties: *in precisely this manner it introduced an individualizing and relatively substantive factor into legal formalism* (Weber 1968a: II p 884, emphasis added).

Rationalization in the economy too led with the same ineluctable necessity to the irrational. For instance, the rational pursuit of gain, purely for the sake of gain, was actually irrational. Here too there was a tendency for means to become ends in themselves — in the same way as this happened to "conceptual jurisprudence" on the basis of its immanent logic. There was a paradoxical inversion of the relation between "means" and "ends". Means became ends and lost the goal of rationality, originally issuing from their orientation towards the needs of Man. This inversion was characteristic for modern society in which all kinds of institutionalized activities were so rationalized that they threatened to imprison Man, who created them in the first place, in an 'iron cage' of 'servitude'. Weber himself saw the resemblance between his own views on this point and those of Marx. After a discussion of socialist views on the separation of labour and the means of production he remarked: "This now is what socialism sees as the 'domination of men by things', that is of ends by means". (Lowith 1932: 85-86).

There is another paradoxical twist to this whole process of rationalization which Weber has pointed out. With the increasing rationalization of techniques and social organization their rational basis becomes less and less transparent to those who are directly concerned. This also holds for the law which, though everybody is supposed to know it, has become totally obscure to the layman.

Weber did not, however, reject rationalization as entirely and wholeheartedly as Marx did alienation. One of Weber's main concerns was the fate of "personality" in the modern world. It was this preoccupation which informed his sociology and constituted its connecting theme. Essential for "personality," thought Weber, was a constant orientation to certain "ultimate" values — an orientation which was expressed in the rational and methodical conduct of life. This ideal of the personality, which for its realization actually depends on rationalization (because it presupposes a conscious and appropriate choice of means) collides with the products of rationalization, the disciplined and disciplining bureaucracies. It collides, too, with codified law and the institutionalized procedures of its administration. For the West, so Weber seemed to say, there is no escape from these dynamics. There is no such thing as indubitable hierarchy of values on the basis of which the paradoxical consequences of rationalization could be circumvented or removed. Final peace here could only be the peace of the grave when Man would be, finally and for good, dominated by the products of his own rationalizing activities.

Weber's dark forebodings on this point, his fears about an increasing "sinification" and "ossification" of society, seem to leave little room for optimism. Yet he was inclined to live with this perspective and to emphasize that, in spite of these dark perspectives, we should live up to the requirements of the day — humanly as well as professionally. And this, so he said in his last public speech to students, "is plain and simple, if each finds and obeys the daemon which holds the thread of his very life" (Weber 1968: 613). Weber's main quarrel with the historical school of jurisprudence then was that, in accordance with its views on the "inner necessity" of certain historical developments, it was inclined to the "relativistic acceptance of given powers" and the denial of individual responsibility. His resistance against historicism here is not dissimilar to that of Nietzche. As is clear from his comments to Keyseling (see above) he too saw, as Nietzsche did, the dangers of historicism "to life and the capacity for energetic action". In this sense then Weber's implicit and explicit comments on the historical school constituted another "tract against the times" — Weber would have been the first to recognize the irony of the fact that his anti-historicism can yet only be understood within the context of these times. It is certainly not the least important aspect of his greatness that he could recognize the power of history even there where he sought to escape from it.

Endnotes

1. This title is not, in a strict sense, the title of Weber's dissertation. He put the work as a whole before the faculty but the actual dissertation was only part of this and had the title *Entwickelung des Solidarhaftprinzips und des Sondervermogens der offenen Handelsgesellschaft aus den Haushalts — und den Gewerbegemeinschaften in den Italienischen stadten.* (Cf. Tellegen, 1968:12).
2. I should emphasize here that the Anglo-American development of law is, according to Weber, not altogether parallel to that on the continent. Rationalisation, in Weber's sense, is far more a continental phenomenon. Speaking about the situation in England he said:

   . . . the degree of legal rationality is essentially lower, than, and of a type different from, that of continental Europe. Up to the recent past, and at any rate up to the time of Austin, there was practically no English legal science which would have merited the name of "learning" in the Continental sense. This fact alone would have sufficed to render any such codification as was desired by Bentham practically impossible. But it is also this feature which has been responsible for the "practical" adaptability of English law and its "practical" character from the standpoint of the public (Weber 1968a:II 890).

   Thus Weber did not believe that capitalism in itself led to rationalization in law. Obviously English capitalism had made very little difference on this point:

   . . . the essential similarity of the capitalist development on the Continent and in England has not been able to eliminate the sharp contrasts between the two types of legal systems. Nor is there any visible tendency towards a transformation of the English legal system in the direction of the Continental under the impetus of the capitalist economy. On the contrary, wherever the two kinds of administration of justice and of legal training have had the opportunity to compete with one another as for instance in Canada, the Common Law way has come out on top and has overcome the Continental alternative rather quickly. We may thus conclude that capitalism has not been a decisive factor in the promotion of that form of rationalisation of the law which has been peculiar to the Continental West ever since the rise of Romanist studies in the medieval universities (Weber 1968a:II 892).

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