SOCIETÀMUTAMENTOPOLITICA
RIVISTA ITALIANA DI SOCIOLOGIA



**Citation:** H. Treiber (2019) On Weber's Types of Empirical and Scientifico-theoretical Legal Training, and his Partiality for 'Logic'. Società*Mutamento*Politica 10(20): 57-71. doi: 10.13128/smp-11046



**Data Availability Statement:** All relevant data are within the paper and its Supporting Information files.

**Competing Interests:** The Author(s) declare(s) no conflict of interest.

# On Weber's Types of Empirical and Scientifico-theoretical Legal Training, and his Partiality for 'Logic'*

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*In loving memory of my late wife Ulrike*

**Abstract.** Weber uses the term 'logical' with striking frequency: as a typical attribute of what is 'rational', but also in the definition of legal arrangements, where the 'legally relevant components' that characterise a legal relationship are ordered in a 'manner which is itself logically free from contradiction'. Logic or logically significant characteristics are all features of the theoretical and academic doctrine of law, which stands as a contrasting type to the artisanal-empirical doctrine of the law of practitioners (represented by Roman and English law respectively). In this way logic or what is logical is an important sign of the difference between these two fundamental types of legal doctrine. Above all, logic and the logical play an outstanding role in Weber's definition of a legal 'system' in the sense of 'an assembly of all the legal propositions established by analysis in such a way that, taken all together, they form a system of rules that is itself logically free from contradiction and seamless in principle'. In this definition of 'system' Weber makes use of the postulates of so-called conceptual jurisprudence, something that did not exist in fact, but which originally signified a deliberate caricature (or criticism) of the science of the Pandects, of which Georg Friedrich Puchta (1798-1846) stood as the representative. He was selected because Rudolf von Jhering had Puchta mainly in mind when he framed the polemical idea of conceptual jurisprudence. Puchta was also singled out because he spoke, inter alia, of a 'genealogy of concepts', which encouraged the ascription of systemic qualities to his system of private law. Yet Weber omitted to test Puchta's 'system' according to his own ideal-typical criterion of a system that 'logically free from contradiction' and 'seamless in principle'. This deficiency will be remedied here.

**Keywords**. Weber, Puchta, Jhering, logic, logical, theoretical and academic doctrine of law vs. artisanal-empirical doctrine of the law of practitioners, legal 'system', rational, rationalisation, conceptual jurisprudence, Pandect science.

* The unanimous editorial staff would like to thank Professor Hubert Treiber, Emeritus in the Juristische Fakultät in Hanover, for having participated once again with an important essay in this twentieth issue that celebrates, in a sense, the attainment of majority by our journal. In particular, it should be remembered that Professor Treiber was co-curator of the issue *1864-2014 - Max Weber: a Contemporary Sociologist* (No. 9, 2014), which is to be included among the most successful issues. Five years later, Professor Treiber publishes on S*MP* the fruit of his complex and original reflection on Weber's sociology of law, which appears in the «Max Weber Studies» (July 2019) and we are grateful to Professor Sam Whimster, editor of MWS, for having authorized S*MP* to be published.

## PREFATORY REMARKS

I wish to focus in the following on those features of Weber's writings that give a real sense of his mode of argument, and of the way in which he used concepts - as for example in his presentation of Roman Law. I also wish to show how recent research in legal history has revealed particular inconsistencies in his thinking (especially as regards the way in which his concept of system is 'bound up' with logic). In so doing I will be highly selective, emphasising those aspects that have not previously been examined in other studies of Weber's legal sociology[1].

For an appreciation of how formal law has developed towards rational law it is useful to make use of Weber's four theoretical stages of development, something which to my knowledge has never been attempted. These stages run as follows: 'from the charismatic revelation of law and legal decision-making by "legal prophets" [stage 1]; to the empirical creation of law and legal decision-making by legal *notables* (the creation of cautelary jurisprudence and case law) [stage 2]; on to the imposition of law by secular and theocratic powers [stage 3]; and finally to the systematic development of legal norms and the administration of law by those who are legally *educated* and formally trained in legal literature and formal logic (specialised lawyers) [stage 4]'[2]. Here we should note Schluchter's observation (1991/II: 418) that 'an ordering in terms of stages and epochs … does not correspond to the actual course of historical events. Nor does it allow any exact historical period to be identified. Nevertheless, it is related to the sequence of historical events and approximate dating'. It should be further noted that Weber extended the genetic perspective outlined here by adding a typological perspective. The genetic approach, constructed with ideal-typical developmental stages, is oriented to the 'general development of (formal) law and legal procedure' subject to 'intrajuristic' and 'extrajuristic' conditions; hence to the composition of those social groups and strata (Trägerschichten) who administer the law and to their training, including their conceptualisation of legal process and their application of legal technique[3], as well as prevailing relationships of power (as such, a more complex factor). The wielding of administrative powers (*imperium*) has an independent significance, and is not limited exclusively to one developmental stage (it is invoked especially where the rationalisation of procedure and process is concerned).

Together, the four theoretical stages of development cannot simply be fitted into a two-by-two table, since the typological perspective includes both contrasting pairs – *formell*/procedural (lawsuit, trial): *materiell*/substantive and *formal*/formal: *material*/material - and is directed to the formal qualities of the law[4]. Both imply a deeper investigation of Weber's remarks on 'the nature of legal rationality' (= a typology of law) and on 'the degree of rationality of the law'. I deal with this in more detail in my book on Weber's sociology of law; here I will examine briefly only the conceptual distinction of 'analytical' from 'synthetic-constructive' work. This is because, for one thing, Weber makes use of this distinction mainly in his treatment of Roman law, and for another, 'synthetic work' relates to the construction of legal institutions (Rechtsinstitute) and legal relationships (Rechtsverhältnisse). As to legal relationship the characteristic 'legally relevant elements' of a legal institute can be ordered in a manner that is 'without logical contradiction'; and the latter is clearly often used by Weber to characterise what is 'rational'. This is true of a late product of the 'logical systematisation' of law, as in 'the connection of all legal principles derived from analysis in such a way that they form a logically coherent system of rules, free of logical contradiction and in principle without gap' (MWG I/22-3: 303, 305). The characteristics that Weber employs together with logic,

[1] As regards working with and on Weber, I hope that I can claim to have made a virtue of necessity (as a non-legal member of a Law Faculty offering an optional course). I used the opportunities so presented to ask for clarification on legal matters, especially those related to legal history. This was also the case with the book on which this essay is based, *Max Webers Rechtssoziologie – eine Einladung zur Lektüre* (Wiesbaden: Harrassowitz 2017), for which Joachim Rückert (Frankfurt) and Hans-Peter Haferkamp (Cologne) patiently answered all my questions. The latter was especially helpful in regard to Puchta. In respect of the history of law, I was fortunate to be invited to contribute to the *Festschrift für Sten Gagnér*, edited by Maximiliane Kriechbaum, 1996 ('Die "rückwärtsgewandte" Expertenreform – Innenansichten zur grossen Strafrechtsreform der 1950er Jahre', 229-273); and also in being asked by Michael Stolleis to join the multi-disciplinary working group 'Naturgesetz und Rechtsgesetz'. See Lorraine Daston, Michael Stolleis (eds.), *Natural Law and Laws of Nature in Early Modern Europe. Jurisprudence, Theology, Moral and Natural Philosophy*, 2008 ('The Approach to a Physical Concept of Law in the Early Modern Period: A Comparison between Matthias Bernegger and Richard Cumberland', 163-182). See also Gerd Graßhoff, Hubert Treiber, *Naturgesetz und Naturrechtsdenken im 17. Jahrhundert*, 2002. Stefan Breuer (Hamburg) and Peter Ghosh (Oxford) have also critically reviewed the present essay, for which I here thank them. I would like to thank Keith Tribe for the translation.

[2] MWG I/22-3: 617ff.

[3] Weber understands legal technique to be a typical way of thinking characteristic of a specific legal order. A 'document' can therefore be either a) an intuitively accessible and manifest 'bearer' of law (a kind of 'legal animism'); or b), purely logically, as a rational item of evidence (MWG I/22-3: 346f.).

[4] Here Weber benefits from his legal training. See the overview in Whimster 2017: 275. For detailed information on Weber's legal training see Marra 1988, 1989, 1992. To Weber's concept of law in comparison with other legal theorists (Eugen Ehrlich, Theodor Geiger, John Griffiths, Heinrich Popitz, Franz von Benda-Beckmann) see Treiber 2012.

or employs logically, are all attributes of a scientifico-theoretical doctrine of law, a type standing in contrast to the artisanal and empirical doctrine of law used by practitioners (represented by Roman and English Law). Here one begins to sense that there is an important logical difference between these basic types of legal doctrine (as argued by Winkler 2014: 120ff.); and that this is consequently related to a similarly basic problematic that at this point can only be noted. In his identification of 'system' Weber employs postulates drawn from a conceptual jurisprudence that has really never existed, and which is better viewed as a wilful exaggeration of Pandect science This means that the excessive critique of Pandect science that has come to be called conceptual jurisprudence is a purely imaginary construct that Weber has adopted for his ideal-typical construction of the modern system. We therefore need to review the results of recent legal historical research into nineteenth-century Pandect science.

Central to my discussion is the fundamental typological contrast between the artisanal and empirical doctrine of practitioners (employing Roman and English law), and 'modern university-based rational legal training' (employing the reception of Roman law and Pandect science). As elaborated in my book of Weber's sociology of law, this involves primarily stages 2 and 3 (the reception process, supplemented by a necessarily brief contrast of juridical law and that of imperium (Amtsrecht) on the one hand; and on the other of popular law ("Volksrecht" = dinggenossenschaftliche Rechtspflege), as well as stage 4 (Pandect science).

I will not here deal in any detail with the first stage, the charismatic revelation of law by 'legal prophets', nor with the third stage in which law is imposed by *secular and theocratic powers*. As regards the first stage, it can be said Weber introduces the concept of legal prophets without elaboration and almost in passing in §3 of his sociology of law (MWG I/22-3: 463); comparable statements in § 5 on Judaic Holy Law (MWG I/22-3: 536f.) are relatively vague (a conclusion with which E. Otto (2002: 133f.), agrees). The demand for legal certainty subsequent to social conflict, seeking the commitment of law to a written text 'by prophets, or trusted representatives assuming the form of prophets (Aisymnets)' - among the latter Weber included Moses, whom he considered to have in all likelihood to have been 'a historical figure' (MWG I/22-2: 182) – was likewise only mentioned in passing in the sociology of law (MWG I/22-3: 570f.). Ultimately Mohammed is a clear example of this first developmental stage, since his charismatic revelation of law took the form of 'a general norm', as well as the form of the 'revelation of a purely individual decision that was in the prevailing circumstances correct.' (MWG I/22-3: 446).

## THE EMPIRICAL LEGAL DOCTRINE OF PRACTITIONERS

In the second stage of the creation and exercise of law Weber deals with Roman and English law. In so doing he follows the view taken in the contemporary literature of comparative and historical law that there is an elective affinity between the two legal orders, even if there are significant differences. Weber was mainly interested in what they share in common: that in both cases law was derived from legal practice, and so above all took account of the interests of the legal parties involved. Besides that, this created flexibility regarding technical fictions, analogies and procedural reform. Although I deal with both legal forms, the emphasis is on Roman law, partly because Weber saw here the beginnings and developments of legal rationalisation, along with limitations presented to this process. For this, following his early paragraphs he developed a detailed conceptual armoury made use of later, applying explanatory figures such as the significance of legal education and the impact of bureaucratisation for the systematisation of law. Also important was that the codification during the reign of Justinian formed the substance for the reception of Roman law, and 'selected the quite unique collection of the Pandects in the world from the admittedly only relatively rational systematised products of extremely precise Roman legal thinking of Respondents and their students' (MWG I/22-3: 505). At the fourth stage this was turned by legal science into a 'system' that Weber treated as possessing 'methodological and logical rationality'.

The mode of argument regarding the empirical doctrine of law is clearly marked out in the case of Roman law (cautelary jurisprudence is a notable example), so that here already what is 'logical' or even 'Logic' are repeatedly brought into play. Weber considered the most important feature of Roman law to be its 'analytical character', breaking down processual tasks into the 'logically "simplest" factors' (MWG I/22-3: 499) He thought that this was owed to Roman 'religio', in which the 'conceptual, abstract and thoroughly analytical distinction of divine competences of the sacred numina (deities)' was exemplary (MWG 22-3: 499f./ES: 797)

Typical of both Roman and English law are the reforms to judicial process promoted by the 'commercial needs of civil society', which he treats as a step on the path to rationalisation since they remove 'a formalism that had magical origins.' In Rome this led to formulary procedure (Formularprozess) whose procedure was governed by edict (MWG I/22-3: 557). During the period of the Middle Republic (from about 250 BC onwards) it

was customary to appoint a consilium of (at first honorary) legal specialists to draft jurisdictional edicts (as guidance for the conduct of trials by the Praetor, who was a lay person). The activity of these jurists came to be called cautelary jurisprudence. Weber used this to demonstrate both the major impediments to, as well as the early forms of, subsequent rationalisation (making generous use of the concepts of 'the rational' and 'rationalisation'). Rationalisation was obstructed in both Rome and England by 'practical and usable frameworks for contracts and actions created by the typical and recurring individual needs of legal parties' (MWG I/22-3: 480), features typical of the everyday conduct of legal practice and formulation of legal doctrine. Actual legal practice typically 'moves from particular to another', and 'never seeks to move from the particular to general principles, so that particular decisions can be subsequently deduced from these general principles' (MWG I/22-3: 481/ES: 787). Cautelary jurisprudence makes use of no 'general concepts developed by abstraction from what is apparent and empirical', but instead employs concepts related to 'palpable, solid matters of fact arising in the everyday world, and so in this sense formal matters of fact' (MWG I/22-3: 480f.: 'sensible and evident formalism').

A certain degree of flexibility in the law was brought about by technical fictions and analogies. When there was a need to adapt to new economic circumstances the fixation on a word leads that 'the word (…) is turned around and around, interpreted, and stretched' (ES: 787) in order to get a 'transformation in the meaning of prevailing law' (see MWG I/22-3: 481, 506), the digression on 'stages on the lengthy path to contract law in England' provides 'exemplary material'). In such circumstances no kind of 'rational systematic order' based on the 'logical construal of meaning' is to be expected; the best one can hope for are 'superficial efforts at systematisation' creating some order in legal material, a consequence of a legal education still in its early stages, an explanatory figure that was important for Weber.

In his sociology of rulership Weber writes that during the Roman Republic (509 BC to 27 BC) the 'decisive shift in legal thinking towards rationalism was made possible by the technical form of procedural instruction, making use of legal concepts whose formulation derived from Praetorian edicts' (MWG I/22-4: 192f.). Even here, where the jurisdictional edict cited 'purely factual matters' (*actiones in factum*), Weber thought that the interpretation and extension of wording assumed a 'rigorously formal-legal character', leading him to conclude that in this way 'constructive and logical legal work' achieved the very peak 'of which it was capable based upon purely analytical methods' (MWG I/22-3: 506). This was he thought primarily the outcome of consistent and professional advice by jurisconsults (Konsulenten). Law that was made adaptable through procedural guidance and counsel he considered rational; and here the sense in which rational is used can be linked to the fact that any adaptation was not the work of lay persons (such as the Praetor or the judge), but of persons trained in the law. All the same, this law was only a relatively rational law, because 'more than is sometimes supposed, Roman law well into the Empire not only lacked a synthetic-constructive character, but also a rational and systematic one' (MWG I/22-3: 501).

Even while Weber emphasised the 'analytical character' of Roman legal thought, he did on the other think that it limited 'any constructive synthetic power in its dealing with concrete legal institutes' (MWG I/22-3: 499). He saw opportunities for escape from the constraints of cautelary jurisprudence imposed by the practical and empirical conduct of the law (once more) in the specialist training of those dealing with the law. For some of them, if not all he noted, their institutional distance from legal practice would achieve the same effect. Weber considered that the responding jurists (respondierende Juristen) had 'detached themselves from the methods of the older cautelary jurisprudence through increasingly logical finesse of their legal thinking' (MWG I/22-3: 502, 503), not least because in the later phases of the Republic they enjoyed the advantage of specialist training. It was not however until the imperial era, via the privilege of *ius respondendi* granted by Augustus, that 'one section of those with standing as legal counsel' advanced into 'a position in which they were officially responsible for the conduct of the legal process' (MWG I/22-3: 501). Once in this position, and *removed from daily practice*, these lawyers had the opportunity to distance themselves from thinking instilled by the routine activity of legal counsel, and also had according to Weber an 'optimal opportunity of formulating a rigorously abstract conceptual framework' (MWG I/22-3: 501). During the imperial period Weber noted the 'increasingly abstract character of the legal conception' as an additional factor alongside the predominant 'analytical approach' (MWG I/22-3: 505)[5]. As a consequence of the nonetheless 'relatively secondary status of theoretical training as compared with legal practice' Weber detected a marked increase in the abstraction of legal thinking that, on the one hand,

[5] Schulz (2003: 28) attributes to the final century of the Republic a greater inclination to abstraction than that of the Classical period, while the post-Classical Byzantine era was by contrast characterised by a much greater tendency to abstraction.

achieved 'the collecting together of a wide variety of heterogeneous issues under one category'[6], while at the same time the constructive capacity to 'develop abstract legal concepts' declined. One seeks therefore in vain for conceptual abstractions such as legal capacity (Rechtsfähigkeit), or legal transaction (Rechtsgeschäft) (see Kaser 1993: 174).

As regards the systematic structure of ancient Roman law, Weber detected only a modest degree of progress towards rationalisation during the reign of Justinian (MWG I/22-3: 504). It was the 'Byzantine bureaucracy' that had pushed the prevailing legal practice towards systematisation, accepting the resulting reduction in 'the formal rigour of legal thinking' (MWG I/22-3: 501). Without going into any detail [see here the digression on 'Legal historical sketches on the teaching of law and on personal bureaucracy' (Eich 2005: 58-66)], it must be recalled that Weber always made use of two explanatory figures when considering any attempt to introduce a degree of systematisation, or when evaluating its achievement. The first involved the function of didactic texts for legal education, about which opinions differ[7]; the second was the systematisation brought about by bureaucracy (including the bureaucratisation of legal decision-making). Wherever there is bureaucracy there is 'pressure for the unification and systematisation of law' (MWG I/22-3: 569), and there are officials who are continually busy with the tasks set them, tasks that require specialised training for their completion. Since Weber wrote hardly anything about the bureaucracy of imperial Rome, we refer to the study of Eich (2005). He draws upon the model of proto-bureaucratic administration provided by the early modern state, an ideal type of 'personal bureaucracy' with certain key characteristics: a standing army, the development of a new financial administration involving new kinds of functional agents, together with bureaucratic organisational principles that in part already existed. The ideal type makes it possible to say that under Augustus the first beginnings, or early stages, of a 'personal bureaucracy' can be recognised, although it was only under the Severan dynasty (193-235 AD) that one can really speak of this becoming truly established.

Nor is Weber's approach to English Law and its development directly related to a given sequence of historical events. He has in view a lengthy period: from the Norman Conquest (1066) onwards, more specifically from the reign of Henry II (1154-1189) up to the nineteenth century reforms to the court system and the law of procedure (1833, 1852, 1873). Within this chronological framework Weber lays emphasis upon two points. The first concerns the legal remedy of the writ system[8], persistently, if not consistently, seeking to draw comparisons with the *actiones* of Roman law. The writ system implies that attention is paid to the emergent royal courts, which in the course of their establishment involved processes of centralisation and specialisation. To this first point there also belongs the emergence of the legal profession of attorneyship, linked to their practical and empirical legal training, sketched as ideal types in § 4 of the sociology of law. The reforms introduced by Henry II and his successors favoured a '(relatively) rational evidential procedure' and exemplify very clearly how Weber employs the concept of *imperium* in the sense of 'a concrete legal "quality"', to be understood here as a power of command legitimated personally and substantively ('ex officio'). The second point concerns the comparison between English law (empirical

[6] As an example of a technique taken directly from Roman Law rather than developed through the construction of abstract legal concepts Weber selects the category *locatio* (MWG I/22-3: 504) which came into use in connection with the formfreie contracts arising from the increase in commercial transactions (Waldstein, Rainer 2014: 64). Joseph Schacht (1982: 21) has pointed to an interesting parallel in Islamic Law, which in the comparable contract of ijāra makes use of the same technique, 'the collecting together of a wide variety of heterogeneous issues under one category' (ijāra; locatio): 'the juridical construction of the contract of ijāra in which, following the model of the Roman locatio conductio [l.c.], the three originally separate transactions of kirā' (corresponding to l.c. rei), ijāra proper (corresponding to l.c. operarum), and ju'l (corresponding to l.c. operis) were combined' (Schacht 1982: 21). See also Bhala (2011: 561f.), who writes: 'As the Romans did, the fukahā' and ulema [religious and legal scholars] combined these three transactions into a single contractual category.'

[7] So for example, while Flume (1962: 26) calls the *Institutiones* introduced as a training manual by Gaius in the second century AD a 'legal textbook', Weber sees it as a 'modern compendium for crammers' (MWG I/22-3: 501). Kaser and Knütel (2005: 26f.) emphasise on the other hand that the *Institutiones* of Gaius 'organised into *personae* (Book 1), *res* (Books 2 and 3) and *actiones* (parts of civil process, Book 4) offers 'a system clearly dominated by substantive logical principles suitable for the classroom'. But then Stagl (2016: 601) argues that: 'The teaching of law in the "didactic system" of Roman Law divided up legal material more or less in the same way as done today: General Part (Allgemeiner Teil) and Foundations, law of obligation, Process, Property Law, Family Law, Law of Inheritance. (…) The actual organisation of the didactic system resulted from didactic constraints, and not at all from any so-called thinking linked to forms of legal actions (of legis actiones)'.

[8] See Berman (1983: 446ff.) and Baker 2007. See Kahn-Freund (1965: 18f.) for the thinking involved in legal remedies. Peter (1957: 51) makes a clear distinction between *actio* and writ: 'The word "action" means (…) an action, in legal language where a plaintiff in an action calls upon the protection of the praetor or the judge. "Writ" on the other hand is written, in the language of the law the will of the king expressed in writing, when qualified with "original" then a royal decree for court judgement regarding the claim made by the plaintiff.' In this respect Peter sees some affinity between writ and the 'instruction for adjudication (Judikationsbefehl) made by the praetor to the judge.' For further aspects of and differences between *actio* and writ see Peter (1957: 52.). Also MWG I/22-3: 452.

training in the law) and continental law (rational training in the law). In this comparison it is the significance of extrajuristic conditions (especially power relations) that plays a major part for the divergent development of both legal systems. I will not deal here with the different constructions of corporation law in England and in Germany, and the opposing development of associations (Verbände) in both countries together with the differing political frameworks for both bodies of law; to which also the special features of English urban organisation (Städtewesen) also belong.

By the later years of Henry II's reign there were already around 75 different writs (Peter 1957: 20), and in the course of the thirteenth century their number increased. The invention of new writs was on the one hand suited to the strengthening of the crown; while on the other, they were despite this also 'the most important instrument for the continued internal development of common law, refining the rudimentary form that it had originally taken and adapting law to changing economic circumstances' (Peter 1957: 67f.). It was the 'practical needs of legal parties' that led to the invention of new writs, or to the drafting of 'templates for contracts and legal formulae that possessed sufficient elasticity' (MWG I/22-3: 481). From the later thirteenth century onwards the new profession of lawyers, and of judges recruited from among their number, joined to create new frameworks for actions through the 'extension of wording', or by extensive interpretation through analogy or technical fictions. The need to select the right writ when facing a confrontation in court resulted in English lawyers focussing very strongly upon issues of demarcation, as had their Roman predecessors. This made it 'impossible for them to make judgements about the problems thrown up by the numerous events in life simply on the basis of points of substantive law, this limiting their ability to develop, from the legal material with which they dealt, a system that was organised in terms of a rational point of view' (Peter 1957: 61f.).

My treatment of the artisanal and empirical nature of legal training differs from previous accounts by virtue of the lengthy sketch provided regarding the development of English contract law up to the case of Slade in 1602. The purpose of this is, first of all, to provide greater clarity (especially for nor non-legal persons) about the nature of Weber's discussion of the artisanal and empirical character of English law, with its tendency to favour analogy and technical fiction. Weber was of course a trained lawyer with wide-ranging knowledge of legal history, but we need to be able to evaluate his reading of legal history. Secondly, it will in this way be possible for England at least, to settle at least in outline something that Weber suggested in § 2 of his sociology of law, but did not pursue: 'how contractual obligation had developed out of the personal responsibility for delicts' and 'how the delictual fault as a cause of action gave rise to the obligation ex contractu' (MWG I/22-3: 324; ES: 677). How else can meaning be derived from the following statement of Weber's other than as a digression in the history of legal doctrine: 'From the thirteenth century the practice of lawyers and the judicial decisions made by Royal courts in England determined the failure to fulfil a growing number of contracts as a trespass, creating legal protection for them by means of writ of assumpsit (...)'[9]. Weber remarks at this point only that English lawyers had 'developed from the tort of trespass the grounds for action of numerous contracts that differed very greatly from each other' by 'forcibly consolidating what was legally quite heterogeneous so that legal compulsion might be gained by the back door' (MWG I/22-3: 506f.). Especially important for Weber was the indication that ancient law could not have known the 'idea of contractual obligation', but had instead recognised 'obligations for entitlement and rights of claim … as claims *ex delicto*' (MWG I/22-3: 320ff.). To this extent 'Contractual obligations were first constructed like torts, and were still in medieval England connected formally to fictive torts' (MWG I/22-3: 290, 289). Weber does not go into the issues of demarcation associated with this construction, issues that were intensified given that there were no prospects at all of choosing between two forms of action. These demarcation issues can for example be seen in the strategies pursued by plaintiffs in trials, as for instance if 'a breach of contract is treated as though it were deception' (Weidt 2008: 19); and especially in the differing judgements the court of common pleas and the court of King's bench handed down in comparable cases. Hidden behind the differing judicial decision-making of the two Royal courts was however a 'competition over competences' (Weidt) that indicates the existence of differing workloads and hence financial interests [for instance, fees (Sportelgebühren)]. Weber blamed this interest in fees for the competition over competences conducted by differing courts (MWG I/22-4: 292f.).

Various factors played a role in the gradual acceptance of the claims made according to the law of obligations ('contract law') between the twelfth and the seventeenth centuries. One of these was the inflexibility of the writ system and the difficulty of making any change to it, due to the restricted domain for the application of a catalogue of fixed plaintiff claims. Another was the material inclination of the legal parties (plaintiff

[9] MWG I/22-3: 332; for the whole context see Scholz-Fröhling (2002).

and defendant) – dictated by their given circumstances; and most of all the rising number of claims that, given the rigidity of the writ system, challenged the creativity of the lawyers and judges involved. They responded by following their own financial interests [in questions of jurisdiction, court business, court fees, perks (Sportelgebühren)][10], all of which promoted creativity. The judges of the King's Bench and the Exchequer, for example, 'who lived on their court fees, and the lawyers who were not permitted to appear in the Court of Common Pleas', were in this way prompted to 'develop from the fifteenth century a series of fictions and devious means' that allowed 'the two Courts with less business [the King's Bench and the Court of Exchequer], *without a formal original writ* of Chancery, also to hear cases in Common Law that really belonged to the Court of Common Pleas' (Peter 1957: 76). Under these circumstances there was no prospect of any systematic penetration of thinking related to legal material based upon case law, given that prevailing legal thinking was dominated by the writ system and 'procedural law'[11].

## 'RENDERING THE LIFE OF THE LAW SCIENTIFIC' (WIEACKER): THE RECEPTION OF ROMAN LAW AND THE PANDECT SCIENCE

Given the duration of the reception of Roman law, Weber's treatment of this unique and momentous process is relatively brief, limited to a few pages (MWG I/22-3: 578-85). He focussed primarily on the early history, and on the later developments of the nineteenth century. This is because, for one thing, he was interested in the new stratum of legal notables that the reception had created, trained in the classroom and not in practice, and qualified by the award of a university doctorate (MWG I/22-3: 581). He was also very much interested in the efforts made during the nineteenth century to apply a 'logical systematisation of the law' by Pandect science. Wieacker described the reception process as the 'Verwissenschaftlichung des Rechtslebens' (1967: 131)[12], the 'scientisation of prevailing law' comparable to the process of the rationalisation of the law, stripping it of all its magic and subjecting it to an ever-increasing degree of systematisation (MWG I/22-3: 582). Central here was quite clearly the prospect of subjecting the law to a theoretical transformation brought about by 'the revolutionary alteration of those responsible for legal process' (Wieacker)[13], associated with the chance of a gradual 'logicisation of legal process' (Logisierung des Rechts), which stood in (a possibly overdrawn) contrast with the previous artisanal and empirical grounding of legal doctrine. The onset of the reception process was therefore marked by the emergence of a new set of university-trained legal specialists, ideal-typically the opposite of English lawyers who had been trained in practice. Weber was especially interested in the connection between 'modern, rational legal training in universities' (MWG I/22-3: 304) and the capacity to embark upon a 'specialised legal sublimation of the law as understood today', in which process Weber saw the preconditions for a *genuine* systematisation of legal matters (MWG I/22-3: 304f.), something that he thought that the nineteenth century efforts at creating a Pandect science actively sought to bring about. He did however concede that both the Romantic and the Germanist branches of German legal science had ultimately failed in their attempt to create 'a purely logical and novel systematisation of ancient law', presenting a 'rigorously formal juridical sublimation of the (legal) institutes that did not derive from Roman law' (MWG I/22-3: 589f.).

While Weber did focus upon a 'new stratum of legal notables' (MWG I/22-3: 581), he did not study the emergence of universities, nor did he examine the significance of the School of Law in the University of Bologna for the reception process. Instead, he sketched features of the reception process that served the rationality of the law – especially the increasing 'degree of abstraction of legal institutes themselves', something that occurred because 'Roman legal institutes dissolved any remnants of national connection and translated the law into the sphere of logical abstraction, Roman law becoming 'properly logical' law and so gaining an absolute status'[14] wherever there was 'no connection to divine law, and no theological or materially ethical interests' that were

[10] On the significance of administrative fees (in the sense of Sportelgebühren) see MWG I/22-3: 482. Also MWG I/22-4: 190ff.; 'Sporteln' was the term used since medieval times for the fees arising from administrative procedure (see MWG I/17: 172, fn. 11).

[11] Weidt (2008: 9) points out that writs constituted 'the prevailing law', continuing on to cite Maitland's (*System of Writs*: 90, 101) as follows: '"He who knows what cases can be brought within each formula knows the law of England. The body of law has a skeleton and that skeleton is the system of writs." But the skeleton lacks the solidity lent by a spine. Neither the emergence of individual actions, nor their interaction, had a coherent foundation, either materially or conceptually. Instead, individual actions were promoted by pressure of contemporary circumstance. They had no systematic character, and existed, in their isolation as legal islands mostly unconnected in the sea of life'. And this was the view of a continental lawyer trained in a university!

[12] For critiques of Wieacker see Dilcher (2010), Landau (2010), and Winkler (2014).

[13] Dilcher (2010: 249).

[14] MWG I/22-3: 582. Weber is here relying on Ehrlich (1967/1913: 244, 248), as he indicates himself.

opposed to it[15]. He placed greatest weight on the construction of 'purely systematic categories' (for example, legal transactions), and above all on the enhanced significance of '(synthetic) constructive capacities'. The fact that scholarly law had always been capably of practical application was a major source of support, as exemplified by those who followed on from the Glossators: commentators whose legal counsel (*consilia*) was in demand and who sought to render 'Roman Law [useful] for the rapidly developing cities of contemporary upper Italy'[16]. Making Roman Law useful demanded 'constructive capacities', described by Ehrlich as follows:

> *It was possible to distort a legal concept of Roman law to such a degree that it now fitted quite alien structures; and it was possible to bring together diverse elements of Roman law in such a way that the resulting norms for decision corresponded to what was needed in practice; it was possible through interpretation to distort Roman decisional norms to such an extent that they provided the desired outcome* (Ehrlich 1967/1913: 249).

However, the principal feature of the reception process was that it did not turn on 'the *material* conditions of Roman law'. 'Civil legal interests' were anything but interested in this, since the 'institutes of medieval commercial law and of municipal landholding' seemed much more suited to their purposes (MWG I/22-3: 580/ES: 853). More directly linked to their interests was instead the reception of 'the general formal qualities of Roman law', a perspective to which Weber always lent emphasis – as in his contribution on '"Roman" and "German" Law' for the periodical *Christliche Welt*, where he refers to Roman law as a '*body of law that is more complete, legally and technically*' (MWG I/4-1: 528). Appropriation of Roman law for practical needs was most marked in the work of Italian notaries, who played 'a very decisive part in the reception of Roman law in their notarial documents'; until there was a definite stratum of legally-trained judges in Italy 'politically-powerful notables' were the most significant element[17]. Weber considered the Italian notaries 'who interpreted Roman law as commercial law (Verkehrsrecht)' to be 'one of the most significant oldest strata of legal notables who were interested and directly participated in the creation of the usus modernus[18] of Roman law'[19]. Weber attributed the 'formal qualities of Roman law', the 'formal training of lawyers' in general, and 'increasing legal specialisation in the practice of law' to a 'legal rationalism originating in the university', which also created the 'princely codification of early modernity' (MWG I/22-3: 580). The university-trained lawyers who represented this development increasingly found employment in 'the secular world of administration and legal practice'[20].

If § 6 of the sociology of law is read with the eyes of Dilcher (2010) and Wieacker (1967) then we find a perspective that makes sense of how Weber deals with both *imperium* and Amtsrecht (authoritarian power) in the context of the reception of Roman law. In the very first sentence of this paragraph he sees the 'older folk administration of justice' (*dinggenossenschaftliche Justiz*) as suffering major inroads from the direction of *imperium* (MWG I/22-3: 552). Dilcher sees two different dimensions to Wieacker's linkage of 'scientisation' to rationalisation that we can use here, since they provide insight into the connection that Weber bluntly makes in § 6 between issues that seem to be too heterogenous at first glance. This therefore makes clear what reception has to do with judicial law (Juristenrecht), and judicial law with imperium respectively authoritarian power (Amtsrecht). According to Dilcher, Wieacker 'detaches the rationalisation of judicial decision-making from its embedment in everyday life, and places it in the mentally-constructed context of "autonomous legal matters", and of a rule deduced from this' (Dilcher 2010: 237). A statutory and rational legal order replaces 'ad hoc decisions based on tradition and the legal spirit of the community (Rechtsbewußtsein), or of their most prominent members'[21], represented according to Weber by 'the administration of justice by the folk assembly' (MWG I/22-3: 560/ES: 843, 470ff., 287f.). Dilcher treats the other, extrajuristic dimension of scientisation by contrast as being relationships 'supported not only by a stratum of legal scholars separated from the wider public, but also by virtue of

[15] MWG I/22-3: 581, 545. By referring to these conditions Weber indicates that the 'nature and degree of the rationalisation of law' depends upon a range of other factors that he reduces to three major influences: 1) differing political power relationships; 2) the relative power of theocratic and secular powers; 3) differences in the structure of those notables, responsible strata (Trägerschichten), who played an important part in legal developments, differences that themselves were dependent upon political constellations – MWG I/22-3: 618f.

[16] Sellert (2005: 188); Sellert (1998).

[17] MWG I/22-3: 492f. On the treatment of documents see MWG I/22-3: 336ff., and MWG III/6: 371.

[18] Usus modernus pandectarum 'is commonly used to denote an epoch of legal history, beginning in the sixteenth century and ending with the codification of natural law, in which ius commune (Gemeine Recht) became the basis of legal doctrine and jurisdiction, by exchange of Italian legal science (mos italicus), on the basis of Roman and Canon Law, which was gradually received in Germany since the thirteenth century' (HRG, vol. V: Sp. 628-636, 628).

[19] MWG I/22-3: 493/ES: 793; MWG I/22-3: 582ff. Also MWG I/17: 186f., and fn. 39.

[20] Sellert (2005: 191); MWG I/22-3: 578f., 583f.

[21] Dilcher (1978: 96). Dilcher also emphasises the role played by the medieval city with its tendency to the modernisation or rationalisation of the existing body of law.

the social and political assignation of this stratum to the designs and plans of those with political power, the sovereign rulers.' This also addresses the contrast that interested Weber between juridical law[22] and imperium on the one hand, and 'popular law' [(= 'the administration of justice by the folk assembly'/'dinggenossenschaftliche Rechtspflege' (ES: 775)] on the other.

Weber treats this process of 'law finding by the folk assembly' (dinggenossenschaftliche Rechtsfindung) (MWG I/22-3: 552, 470ff./ES: 774) as an example of 'popular law' (*Volksrecht*) (MWG I/22-3: 443f.) and so contrasts it to a reception process that is driven onward by the scientisation of rational, or more rational, law (juridical law) as well as by the 'creative will of the political rulers, the princes' (Dilcher 2010: 237). Besides the part played by juridical law and imperium, the development of municipal jurisdiction in the course of the thirteenth century also contributed to the displacement, or destruction, of features of 'the older folk administration of justice' (Weitzel 2006: 352). Jürgen Weitzel's work is the key reference for Weber's presentation of these latter forms, and the criticisms made of it, in particular his extensive two-volume study *Dinggenossenschaft und Recht. Untersuchungen zum Rechtsverständnis im fränkisch-deutschen Mittelalter* (1985, espec. vol. I: 71ff.). According to Weitzel (1985/I: 72), Weber links actions of the folk assembly (dinggenossenschaftliches Handeln) to two phenomena that are not always easy to distinguish from each other (1985/I: 371, fn. 74): on the one hand, the pathbreaking 'form of the medieval division of powers' (1985/I: 370f.; MWG I/22-3: 295ff.); on the other, what Weber also calls a 'division of powers' - the division of labour between (supposedly) charismatically-endowed individual judges and 'community participation' in the form of '*Umstand*'[23] - here Weber also uses the concept of 'law finding by the folk assembly' (ES: 774), or 'administration of justice by the folk assembly' (ES: 775). This last term (*dinggenossenschaftlichen Justiz*) is misleading according to Weitzel (1985/I: 76) since it is a nineteenth-century legal term and so limited to the understanding of the court prevailing in this period, 'in which judicial decision-making was considered to belong to governmental powers.' He takes the view that no useful understanding can follow from the adoption of this concept with regard to the established organisation of the Dingverfassung, in which 'rulers and the folk assembly, authoritarian legal coercion and judicial decision-making by members of the folk assembly (Rechtsgenossen), join in the conduct of the law'[24].

The division of powers between judge and folk assembly (Dinggenossenschaft) that we have already raised crosses with the distinction of legal coercion and judicial findings, and this becomes complicated in Weber because he defines 'law-finding by the folk assembly' (ES: 774) as the 'condition' in which 'the members of the folk assembly do participate in decision-making, but do not have full control of the decision made. Instead, they are in a position to either accept or reject the decision proposed by the charismatic or official bearer of legal knowledge, influencing it only by particular means of direct criticism' like the 'Urteilsschelte'[25] (MWG I/22-3: 473/ES: 774). Weitzel draws attention to the way in which, as a result, the original division of powers between judge and folk assembly shifts towards a relationship between 'the decision-making "authority of legal charisma" and the associated ratifying competence of the "Umstand", which itself represents the local organisation of "Ding- und Wehrgemeinde"' (Weitzel 2003: 369/ES: 775; Weitzel 1985/I: 82f., 108). Weber believes that this definition provides greater precision, and gives Weitzel the opportunity to show that Weber's conceptual distinctions – between the 'charisma of legal decision-making' and the 'acclamation of "Umstand"' (MWG I/2: 470), as well as between ' procedural jurists' law ' (formelles Juristichenrecht) and 'substantive people's law' (materielle Volksrecht) (MWG I/22-3: 473/ES: 774; MWG I/22-3, 444f.) – takes on a momentum of its own dominated by the *leading idea* of the 'nature and tendency of the rationalisation of law' and so ignores historical events and circumstances. It is a historical fact that there was in general during the time of the Franks no such thing as 'the charismatic quality of the person pronouncing judgement'[26]. Instead the defini-

[22] The term 'juridical law' is a broad one – as the 'extensive participation of experts familiar with and trained in the law, devoting themselves to this end on an increasingly "professional" basis as lawyers and judges' - this 'rendered the vast mass of law created in this way as "juridical law" (Juristenrecht)' (MWG I/22-3: 443f.).

[23] For the expression 'Umstand' see MWG I/22-3: 466. See also the Handwörterbuch zur Deutschen Rechtsgeschichte (HRG), vol. V: Spalte 437-442, 437: '"Umstand" signifies those persons who are bystanders, outside the limits of the court, excluded from the place at which proceedings took place (Gerichtsstätte). Those "Urteilsfinder" who sat on the bench (Rachinbürgen, Schöffen) were not part of this group.'

[24] For this and the previous quotation see Dilcher (2006: 619).

[25] 'Whosoever is dissatisfied with the judgement made can appeal (anfechten) or object (schelten) to it" (Brunner-Schwerin: 473) (…). Appealing against or objecting to a judgment are thus closely related in medieval sources, for an objection creates a counter-judgement. … The questions raised by an objection to a judgement were, and are, extraordinarily controversial' (HRG, vol. V, 1. Aufl.: Sp. 619-622, 619f.).

[26] Although it can be said that 'during the High and Late Medieval periods some lay judges (Schöffen) and councils (Ratsgremien) gained a kind of charisma' - Weitzel 1985/I: 82f., and fn. 94; 108f. 'Schöffen' (= beisitzende Urteilsfinder") are defined as 'participating adjudicators who (…) perform the legal function of mediating between the parties and through their judgement creating order. (…). Use of the term in the

tion, together with its elaborations, served on the one hand the 'emergence of a capacity to make decisions independently of all legal prophecy and charismatic legal instruction (Rechtsweisung)' (Weitzel 1985/I: 108); on the other, 'the maintenance of the *formalistic* character of early medieval law and legal decision-making' (MWG I/22-3: 471, 514), together with tendencies developed through authoritarian powers that reinforced the tendency to the material rationalisation of law. This is exemplified by the use of *imperium* in § 6 (MWG I/22-3: 471). Regarding the expression of the definition introduced above of 'an equal involvement of "Umstand" in charismatically-infused legal decision-making', Weber argues that 'the participation of the folk assembly as an "Umstand" largely preserved the formal character of the law and of legal decision-making', since they were the ultimate product of revelations made by legal authorities, and which were addressed to those 'whom it purports to dominate rather than to serve'[27]. Of course, these charismatically gifted legal elders saw that they had to prove themselves by their own power of persuasion, as would anyone subject to the coercion of 'true charisma'. It took the feeling of approval, of being in the right, and the everyday experience of the participants of the folk assembly that provided support for charismatically-endowed authority (ES: 774). For Weber, 'law shaped in this way was also *procedurally* judicial law, since without specific legal knowledge it could not assume the form of a rational rule. But it was at the same time *substantively* "popular law" (materiell gesehen: Volksrecht)' (MWG I/22-3: 473/ES: 774).

The fourth stage, the administration of law by those who are legally *educated*, 'university trained' specialists, involves a number of inconsistencies. Weber developed an ideal-typical account of the way in which private law was developed in nineteenth-century universities by Pandect science resulting in overstatements that emphasised the importance of logic. Legal principles were constructed analytically from individual cases (logically 'highly-sublimated legal principles'); from these principles legal institutes were built; and then from these institutes legal relationships 'synthesised'. Even when defining what a legal relationship Weber fell back on logic, making the legal orderliness of the elements constituting a legal institute a defining characteristic of a logically and internally coherent entity (MWG I/22-3: 302). 'Analytically-derived legal principles' were systematised in such a fashion that they formed a 'logically coherent system of rules, free of logical contradiction and in principle without gap that above all implied that all conceivable facts of the case could be logically subsumed to one of its norms' (MWG I/22-3: 303). We should note that Weber's *ideal-typical* overstatement of a 'system' makes use of the postulates that have been attributed to a so-called conceptual jurisprudence (Begriffsjurisprudenz) since the time of Jhering. There is some sense in the assumption that Weber made use of features ascribed to conceptual jurisprudence in his ideal-typical construct; this ideal-typical construct preserved him from using the conceptual jurisprudence as an appropriate label for a highly rational and systematised law[28], which is a caricature of Pandect science and that insofar never existed in fact (Henkel 2004). The first inconsistency arises from the fact that Weber appears to be partisan in his analysis of the Free Law School, in that he presents the formal qualities that are supposedly guaranteed by conceptual jurisprudence as worth defending. It is difficult to decide how far in so doing he unconditionally supports those postulates of conceptual jurisprudence that have been subject to major criticism from the Free Law School[29] because of his ambivalent stance. There is here also an echo of the critique Weber directed to Wilhelm Ostwald's '"Energetische" Grundlagen der Kulturwissenschaft'[30] in which the degree to which Weber valued conceptual jurisprudence can be recognised. Weber was deeply convinced that the postulates attributed to conceptual jurisprudence guaranteed 'legal formalism', and so the 'formal justice' that is the hallmark of 'the legal precision of the work', itself typical for the judge as bureaucratic official (MWG I/22-3: 638/ES: 894). The contrast alluded to here between 'automatic subsumption' (Subsumtionsautomat) and the 'sovereign judge' (Richterkönig)[31] also points to the exemplary nature of conceptual jurisprudence, because the 'legal techniques' that Weber attributes to it solely function to guarantee the higher good of 'formal legality'[32].

Another inconsistency is that Weber ascribes to the legal work of a formally-trained lawyer a 'high degree of

Franconian Empire gradually increased during the eighth century, displacing the existing usage of rachineburgius (Rachinbürgen)' (HRG, vol. IV: Sp.1463-1469, 1463).

[27] MWG I/22-3: 473/ES: 774; decision-making in respect of the law by the folk assembly had 'a rigorously formal law of evidence' (MWG I/22-3: 514).

[28] The formulation in MWG I/22-3: 305 would be more exact if it concerned to Pandect science.

[29] Ehrlich (1967/1913: 261) has talked of 'legal mathematics'; another important accusation relates to the fiction of the closure of the legal system and the consequent requirement for legal construction.

[30] Published 1909 in the *Archiv für Sozialwissenschaft und Sozialpolitik*, see now: MWG I/12:173f.

[31] MWG I/22-3: 624f.; MWG I/22-4: 195 where the contrast between the two types is softened.

[32] See also Weber's review of Philipp Lotmar, *Der Arbeitsvertrag*, Bd. 1 (MWG I/8: 37-60).

logico-methodological rationality' and systematic character without, as might have been anticipated, measuring the product of these lawyers by this standard. The following will seek to do this, considering how close or distant Weber might be in his ideal-typical construction (that makes use of the usual postulates of conceptual jurisprudence) to the system presented by G. F. Puchta[33]. To do this we need to outline the features of Puchta's system. Puchta was selected because Jhering had Puchta mainly in mind when he framed the polemical idea of conceptual jurisprudence, even though the first volume of his 'Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung' (The Spirit of Roman Law in the various stages of its development) was dedicated to Puchta.

Bound up with Puchta's concept of system is the requirement that 'individual legal principles (Rechtssätze) be deduced from a higher general concept (oberster Grundsatz)'. More exactly: that it be deliberately connected to this latter concept. This highest principle runs as follows: 'All law is a relation of the will to an object'[34]. Hence it is the variety of objects that leads to the differentiation of the system, since the legal will is treated as a constant. Puchta's legal system has five such objects, to which he seeks to order 'all rights of private subjects' (Haferkamp 2005: 262f.):

> *1) Things; 2) actions; 3) persons, that is, a) persons external to us, b) 'persons who have existed externally to us, yet have been replaced by us, and c) law concerning the own person'*[35].

Preceding this differentiated system of private law was a general part (Allgemeiner Teil), both of which from 1832 were described as the First and the Second books of a series and which had to be 'harmonically connected to the remaining system' (Haferkamp 2004: 267ff.). Puchta argued that 'all of Pandect law had to be ordered according to "principles" and "consequences",' being systematised on this basis (Haferkamp 2004: 276). This requirement can be linked to Kant's view[36] that rational science was characterised by a 'connection of causes and consequences'[37]. Puchta**,** like many of his contemporaries, proceeded from the assumption that the law itself manifests a particular structure or 'nature' (an 'inner system') that can be understood as essentially *organic*. The consistent derivation of the system of law from a (higher) concept of law (oberster Grundsatz)[38] upon which Puchta then embarked – the system he set about building – was not capable of capturing the inner connectedness of the legal organism (Haferkamp 2004: 446), but was only capable of representing it from one particular perspective (that of the highest principle: von einem obersten Grundsatz) (Haferkamp 2005: 264; 2004: 287). The peculiar 'inner structure' of the law and its representation do not match up – the demands of scholarship and the 'inner structure' of the law are in tension (Haferkamp 2004: 446, 467f.).

As regards the concept of system, Puchta's account of the law of property (the first object) demonstrated in exemplary fashion how the 'subordination of a thing to the will of an individual' led to the law of property. 'This subordination could be complete (total subordination: property); or partial and then involve a right to a thing (*ius in re*). Law regarding the latter (*iura in re*) could involve subordination through use (Benutzung), as a servitude (servitutes, *emphyteusis*, *superficies*), or its sales value, (right of lien, Pfandrecht)'[39]. The two possibilities of rights to (property, iura in re), as well as the fundamental distinction 'between a will oriented either to "use" or to sales value (right of lien)' are according to Puchta 'basic differences' (Grundverschiedenheiten) that follow 'logically from the supreme principle'. The further subdivision into servitudes, emphyteusis, superficies are by contrast 'other differences' (sonstige Verschiedenheiten)[40] that relate to historical circumstances. The servitudes are in turn subdivided into servitutes personarum (personal servitudes) and servitutes rerum (real servitudes), a form of distinction that recurs in Puchta as a 'subdivision of subjects' (Haferkamp 2004: 393).

As can be seen from Puchta's doctrine of servitudes (with which I do not deal here), he later found it necessary to demonstrate affinities, even in the case of currently valid law, which according to the conceptual specifications of 1829 were 'other differences' (sonstige Verschiedenheiten), that 'could not be rigourously deduced from the original higher principle (oberster

[33] There are some excellent studies of Puchta: Haferkamp (2004); Henkel (2004); Mecke (2009). Of great importance is the fact that Puchta talked (ambiguously) of a 'genealogy of concepts' ('Genealogie der Begriffe').

[34] Haferkamp (2012: 81); Haferkamp (2005: 262f.); Haferkamp (2004: 266f.).

[35] Haferkamp (2004: 267) citing Puchta, 'Zu welcher Classe von Rechten gehört der Besitz', *Rheinisches Museum* 3 (1829): 248; Haferkamp 2016: 362f. Haferkamp (2005: 263) also cites the usual characterisation: 'This initially involved law of property**,** law of obligation, large parts of family law, and law of inheritance. The only new element was Puchta's law concerning the own person, to which he assigned law of possession'.

[36] Kant, *Metaphysische Anfangsgründe der Naturwissenschaft*, Vorrede AA 4: 467ff.; cited as in Haferkamp (2004: 276).

[37] Haferkamp (2004: 276), referring to Schröder (1979: 150ff.).

[38] Haferkamp (2004: 279) points out that Puchta's requirement that 'the entirety of positive law be brought together under one principle and consistently derived from it' corresponded to the notion of system prevailing in the later eighteenth and early nineteenth centuries.

[39] See on all of this Haferkamp (2005: 264).

[40] Haferkamp 2004: 212f. (Puchta *Pandekten*, 2nd edition 1844: 64 note a).

Grundsatz)' (Haferkamp 2004: 413ff.; Mecke 2009: 697, 695).. The entire construction of this arranged 'architecture' of solid connections (Haferkamp 2005: 265) presents a 'systematic classification of laws as an "organism of genus and species"' (Mecke 2009: 696, 697). Keeping with a system of positive legal principles organised around a higher principle and conceived in terms of genus and species, then it seems clear that one could 'derive any one concept through all the interconnections involved and pursue it up and down through the structure'[41]. Puchta coined for this the notion of a 'genealogy of concepts' ('Genealogie der Begriffe'), and his critics characterised it as a 'conceptual pyramid', using this to then accuse him of adherence to 'formal and conceptual' thinking[42]. Puchta made clear what he had in mind, using servitudes as an example:

> *If we consider the individual right to cross a piece of land which the owner of one piece of land has granted to the owner of a neighbouring piece of land, then the task of the lawyer is in part to identify the place of this right in a system of legal relations, while also identifying the origin of this right up to the higher concept of the law itself; and he must be able to move from this higher concept down to the individual right whose nature is only then, and by this process of deduction, defined. It is a right, that is, power over an object; a right to a thing, thus being part of the special nature of these laws; a right to a thing belonging to another, so a partial subordination of this thing; the aspect from which the thing is subordinated is that of usage, it belongs to the genus of rights of use of things; the usage is for a particular subject which the right exceeds, and so this is a right of servitude; for a piece of land, hence a Präsidialservitut; for this need of a piece of land, an access servitude (Wegservitut). I call this a genealogy of concepts (Genealogie der Begriffe)*[43].

Puchta intended his ‚system' to reorganise, or reclassify, positive law from the 'highest principle' in such a manner that a limited number of ‚basic differences' (Grundverschiedenheiten) (Mecke 2009: 687ff., 700ff., 702) can be developed from the ‚highest principle' (oberster Grundsatz), provided that this is founded through a legal provision; so that Puchta's system of rights is a system of legal principles organised according to one especially strict perspective' (Haferkamp 2012: 84). There are also ‚other differences' (sonstige Verschiedenheiten) that cannot be deduced ‚with logical necessity' (Puchta), but which nonetheless, as his treatment of servitudes demonstrates, can be attached to the systematic classification by invoking 'principles' of reliable source and the 'consequences' that follow from them. Because of this a coherent, ‚complete and hierarchically ordered' system is an impossibility[44]; besides which 'from 1837 Puchta detached whole groups of legal principles (Rechtssatzgruppen) from his system and called them juridicial customary law (Juristengewohnheitsrecht)' (Haferkamp 2005: 273). Haferkamp emphasises that these connections could not be made in syllogistic form; Mecke talks of ‚lawyers' logic' (Juristenlogik) that made use of 'plausible inferences', that according to Ogorek develop into 'rational argumentation with its grounds' (Mecke 2009: 772; Ogorek 1986: 218f., fn. 83). Seen in this light Haferkamp suggests that Puchta's Pandects are 'more „positive", true to the sources, while also being more logical, more rigorously systematic as the presentation of the Pandects by his contemporaries' (Haferkamp 2004: 420, 470). It could also be said that they were 'more logical' and more rigorously systematic than all the systems of those developmental stages of Weber with which we began. While Weber's remarks might suggest it, Puchta's system is not at all 'unrealistic' (lebensfremd), even if he did not include in his exclusive system of subjective rights important legal institutes that met contemporary commercial needs (Mecke 2009: 846, 811ff., 819ff.). Measured against Weber's system of 'a logically coherent system of rules, free of logical contradiction and in principle without gap'[45], Puchta's 'logical sublimation of system' seems rather 'underdeveloped'. But this does not match up with Weber's statement that Pandect science had created what made the usual legal work of his time stand out: that it had achieved the 'greatest degree of logico-methodological rationality' (MWG I/22-3: 305), especially since this judgement made use of the postulates that placed the combat concept conceptual jurisprudence at his disposal.

Weber attributed to the legal work of formally-trained lawyers the 'greatest degree of logico-methodological rationality' and 'system' without, as might have been expected, demonstrating the actually-existing level of rationality by using his ideal-typical standard as a yardstick. It seems that, with the theoretical construction of the fourth developmental stage, the high degree of rationality specific to it results from theoretical reflec-

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[41] Mecke 2009: 588 (Puchta *Cursus* I (1841): §§ 33, 101).

[42] Mecke 2009: 592: '(...) the simple use of the expression "genealogy of concepts" does not amount to the idea that concepts are ordered pyramidally, as deducible logically one from another.'

[43] Haferkamp 2012: 80 (Puchta *Cursus* I (1841): §§ 33, 101).

[44] Haferkamp 2008: 468; Haferkamp 2012: 85; Mecke 2009: 687ff., 700ff., 845 (concluding summary).

[45] MWG I/22-3: 303; Weber recognised that the 'idea of coherent and complete law' had been heavily criticised, and the comparison of a judge with an automatic decision-making machine indignantly rejected; but he considered this indignation to be understandable 'because some tendency towards this type is one consequence of the bureaucratisation of the law' (MWG I/22-4: 195).

tion, and in this manner creates plausibility for the affinity of a universal 'market sociation' and 'the functioning of the law according to rational and calculable rules' (MWG I/22-3: 247).

That the especially high degree of the rationality of the law is owed to theoretical thinking is ultimately indebted to what Weber called the 'logicisation of the law'. Using this concept, which he took more or less as a given, Weber demonstrated a process that he attributed first to the reception of Roman law, and then to Pandect science (MWG I/22-3: 582f., 589; also Winkler 2014: 122f.). What that might be all about is revealed by the change of track of the early nineteenth century that is associated with the name Savigny: 'he made science the source of law, so that the university professor became the shaper of the law, training practitioners and pressing into their hands the Pandect textbook as a guide' (Dilcher, Kern 1984: 36). It is more than plausible that in Germany the rise of formulated legal rules (MWG I/22-3: 630f.) associated with the promulgation of the Bürgerliches Gesetzbuch (BGB) sidelined lawyers working in universities. These scholars in the field of law consequently suffered a loss of power and prestige. They ceased being 'responsible joint builders of the law' and mutated into 'interpreters of laws to which they had at first to subordinate themselves, without taking any position of their own (Bucher)' (Meder 2005: 353).

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