

From law to social science and back again - the first step

Remarks on the juristic origin of some Weberian concepts

Péter Cserne

I. Introduction

In the last decades, "Weber Studies"¹ has grown to a genuine big industry of the academia. The number of books, monographs and dissertations written on or explicitly related to Weber's person and/or work increases by hundreds every year. This applies to almost every discipline in the social sciences and humanities, and characterises not only the German and English speaking world but Spain, Italy and Japan too. The approaches present in these works are diverse as well, ranging from the bio-bibliographical to the reconstructive and the analytic.² If one is not completely sceptical about the (material) rationality of the work in social sciences, he has to acknowledge that this enduring interest is, at least to a certain extent, due to the inherent values of Weber's work – even if the quality of the interpretations is rather fluctuating.³

In what follows I shall expose the question of the legal origin of certain Weberian categories and ideas, and make some remarks in general on the possible effects of Weber being a jurist on his sociological work. This problematic, yet not fully appreciated in the secondary literature on Weber, can be considered as a small step or episode in the history of ideas (*Ideengeschichte*). But with two further steps we can arrive to a new perspective on Weber's oeuvre showing, to put it in a metaphor, a "way from law to social science and back again". The second step is to offer a rational choice reading of the Weberian sociological method and the third is to follow this method in the understanding of law, or more modestly, asking for the possibility of a

¹ From 2001 on, an excellent journal has been published in England under this title, see <http://www.maxweberstudies.org>

² Alan Sica's recently published bibliography: *Max Weber A Comprehensive Bibliography* (New Brunswick, NJ: Transaction Publ. 2004) lists 4888 items in English.

³ Cf. Dirk Käsler 'Besprechungessay – Neue Schriften zur Max Weber-Forschung' *Kölner Zeitschrift für Soziologie und Sozialpolitik* 55 (2003) 1, 136-147.

methodologically sound sociological jurisprudence. I shall endeavour these two steps, both falling in the domain of analytical social theory, elsewhere.⁴

Whatever the importance and prospects of this larger project might be, the first step, the topic of this paper, should be justified in itself. Now, *if* it is interesting to investigate the intellectual sources of a scholar – it is neither in order to prove that everything or the most part in what he wrote had originated from somebody else, nor oppositely to show that nothing in his work has traces back in the past, he is a brand original genius. To measure the ratio of copy, plagiarism or common parlance to own creative contribution is a problem of moderate interest in itself. What may make it important to take a closer look on a scholar's intellectual sources is, in general that through the knowledge about the original context, the sources of his key concepts and terminology, we hope to better understand the argument of the (possibly 'classical', and usually timely remote) author.

The further use of *this* knowledge, in turn, can be the subject of another much more complicated discussion about the usefulness or otherwise of the arguments raised in past discussions. Concerning this question, I shall not take side in general. Instead, I reformulate it for our concrete case. Why should it be of any interest that Weber was a lawyer by training? Either to know more about his life or because this fact had left some important but yet highly unappreciated traces throughout his complete *oeuvre*. Thus, as I see, both historical and rational reconstruction can be appropriate methods to deal with facts about and arguments of past thinkers, at least in Weberology. To go on with this (not genuinely Weberian) methodological pluralism, I even concede that beside these two, there may be other, possibly more complicated ways of reading Weber in social science and philosophy.

In the following I shall remain with the historical approach and concentrate on the influence of two eminent jurists, Rudolf Jhering and Georg Jellinek on Weber. There are, of course, several other links from contemporary legal scholarship to Weberian sociology that are not discussed here. Some of them are widely known. Thus

⁴ For the first attempts in this direction, see my 'The Normativity of Law in Law and Economics' *German Working Papers in Law and Economics* Volume 2004, Paper 35 (<http://www.bepress.com/gwp/default/vol2004/iss1/art35>) and its more jurisprudential Hungarian version (with more but still only cursory references to Weber): *A racionális döntések elméletének helye a jogelméletben* [How to Use Rational Choice Theory in Legal Theory?] (presentation at the yearly

Weber has explicitly borrowed his theory of causal explanation (together with the key terms 'objective possibility' and 'adequate causality') from theories in German criminal and civil law of his age, notably from works of the physiologist von Kries and the legal scholars Merkel, Rümelin, Liepmann and Radbruch.⁵ His notion of charisma and several further ideas are adapted from Rudolph Sohm's work on Church law.⁶ Equally well-known is that he criticised intensely and repeatedly the socio-legal work of Rudolf Stammler and got a largely negative inspiration from Stammler's *Economy and the Law* for his understanding of rule-following and his methodology in general.⁷

The structure of the paper is the following. First, I shortly overview the role law and legal science have played in Weber's professional and non-academic life (II), then discuss the influence that Rudolf Jhering's socio-legal theory, formulated in his *Law as a Means to an End* possibly had on Weber (III), and finally give a short comparison of some key features of Georg Jellinek's and Weber's work (IV). Section V concludes.

II. Law and legal science in Weber's biography

Weber began his carrier as a law student in the summer semester of 1882 at Heidelberg.⁸ After three semesters, that is, at the end of the academic year 1882-83, he moved to Strassburg, for one year of military service, following which he enrolled in Berlin for two semesters of Roman and German law. During March and April 1885, he returned to Strassburg for his first military exercise. For the winter semester of 1885-86 he prepared for his state examinations, which he passed in May 1886. In the early

Hungarian national conference on legal and political theory in Győr in September 2004, to be published in 2005).

⁵ See Max Weber 'Kritische Studien auf dem Gebiet der kulturwissenschaftlichen Logik' (1906), in English: 'The Logic of the Cultural Sciences' in *The Methodology of the Social Sciences* translated and edited by E. A. Shils and H. A. Finch (New York: Free Press 1949), 164-188.

⁶ See, e. g. Thomas Kroll 'Max Webers Idealtypus der charismatischen Herrschaft und die zeitgenössische Charisma-Debatte' in Edith Hanke und Wolfgang J. Mommsen (Hrsg.) *Max Webers Herrschaftssoziologie* (Tübingen: J.C. B: Mohr 2001), 47-72.

⁷ See Max Weber *Critique of Stammler* ed. and with an introduction by Guy Oakes (New York: Free Press 1977).

⁸ H. H. Gerth and C. Wright Mills 'Introduction. The Man and his Work' in Max Weber *Essays in Sociology*, translated, edited and with an introduction by H. H. Gerth and C. Wright Mills (New York: Oxford University Press 1946), 9. On Weber's student years, early legal publications and his legal views, see e.g. Realino Marra *Dalla comunità al diritto moderno La formazione giuridica di Max Weber 1882 - 1889* (Torino: Giappichelli 1992) [MultiVersum 1], Realino Marra *La libertà degli ultimi uomini Studi sul pensiero giuridico e politico di Max Weber* (Torino: Giappichelli 1995).

eighties, Weber was a diligent student of law, in the lecture rooms of the eminent lawyers of the time. Among them, he admired Gneist, whose lectures directed his attention to current political problems.

After having concluded his studies, Weber moved back into his parent's home and took up service in the law courts of Berlin as an unpaid court clerk. He worked for about six years as a lawyer but in his letters he often complained about the dullness of mechanical legal work ("öde Juristerei"). At the same time, he nurtured serious ambitions for an academic career and continued his studies at the University of Berlin. He wrote his doctorate (PhD thesis) on the legal history of medieval trading companies (1889). In 1890 he passed his second examination in law. He received his habilitation in Berlin for commercial, German and Roman law for a treatise on the history of Roman agrarian institutions (1891). The modest title actually covers a sociological, economic and cultural analysis of ancient society, a theme to which Weber repeatedly returned. He began to work as an assistant of L. Goldschmidt, later actually replaced his seriously ill professor in giving lectures.

Then, his career in legal science suddenly finished. As Max Rheinstein summarises: "Weber, successfully engaged in the teaching of commercial law and legal history at the University of Berlin, made a fateful decision when, in 1894, he accepted the call to a newly created chair of economics at the University of Freiburg. Apparently, the nascent science of economics appeared more challenging to him than legal theory. But the facts that Weber had been trained to be a lawyer and had taught law to regular law students were to leave their mark on all his future work. When he found it necessary in his investigations of the workings of society to consider the law and its functions, he did so with the sure touch of the trained expert."⁹

In this respect, we can speak of Weber's personal transformation from lawyer to social scientist. He began a legal academic carrier at the end of an era when law was at the top of scientific hierarchy.¹⁰ After nation-building through law had been finished in

⁹ Max Rheinstein 'Introduction' in *Max Weber on Law in Economy and Society*, ed. with introd. and annotations by Max Rheinstein. Translation by Edward Shils and Max Rheinstein (Cambridge, Mass.: Harvard Univ. Press 1954), xxxiii [20th century legal philosophy series VI.]

¹⁰ The unofficial ranking of the different disciplines within (social) science has been always in a constant change. Still, on the long run we can observe that law was much less appreciated in the 20th century than before. See Talcott Parsons 'Law as an Intellectual Stepchild' in H. M. Johnson (ed.) *Social System and Legal Process* (San Francisco 1977), 11-58, Werner Gephart *Gesellschaftstheorie und Recht* (Frankfurt: Suhrkamp 1993), Introduction.

Germany, economics became more central, both politically and for the law itself. This is the wider context and one of Weber's motives for change of discipline, as it is clearly expressed in the famous inaugural lecture (*Akademische Antrittsrede*) he held in Freiburg in 1895. Being a committed German nationalist, he considered that the national purposes can be served better on the stage of economic policy than in jurisprudence. Important legal issues culminate in questions of economics.¹¹ Of course, as Rheinstein has remarked, Weber continuously made use of his legal competence as well, e.g. in his writings on the stock exchange as an expert in a governmental advisory committee.

A further, less well-known continuous link to law can be also found in Weber's non-academic writings. It came almost naturally from his belligerent character that he was involved in lawsuits (and duels) several times during his life. The latest volume of his letters published in *Max Weber Gesamtausgabe* (Vol. II/8 of his *Complete Works*, letters dating from 1913 and 1914) can serve as a witness for the variety and intensity of his non-academic legal activity. "Weber's extra-curricular activities in this period could be sub-titled 'Weber as lawyer'. Weber liked being a lawyer and writing legal dispositions. He liked analysing the inherent complexities of legal claims, he relished formulating a standpoint on which legal claims could be successfully pursued, and he loved the interaction with lawyers and the legal process itself. His legal summaries are some of his best and clearest writings (once one has grasped the context). [...] There is a good case for arguing that the extent of his legal activity functions as a displacement activity for the pressures of the 'Grundriss' and his own emergent sociology that was struggling to 'out itself' from the confines of political economy."¹² Undoubtedly his legal

¹¹ Weber added: "One of our most ingenious theorists was so full of his own importance that he thought he could characterise jurisprudence as a 'handmaiden of national economics'. One thing is certainly true: the economic way of looking at things has penetrated into jurisprudence itself, so that even in its innermost sanctum, the manuals of the Pandect Jurists, the spectre of economic thinking is beginning to stir. In the verdicts of the courts one quite frequently finds so-called 'economic considerations' being cited once the limit of legal concepts has been reached. In short, to adopt a half-reproachful phrase of a legal colleague, we economists have 'come into fashion'." See Max Weber 'The Nation State and Economic Policy. Inaugural Lecture' in *Political Writings*, ed. Peter Lassman (Cambridge: Cambridge University Press 1994), 17-18. [Cambridge texts in the history of political thought]

¹² Whimster refers here to Weber being the chief editor of the monumental handbook in political economy and that his own contributions to the handbook comprise the oldest chapters of his fragmentary *opus magnum*, now known as *Economy and Society*, which were the first documents of his new sociological method. Weber got also involved, *inter alia*, in copyright disputes related to the *Grundriß der Sozialökonomik*.

work, especially his pro bono work for Frieda Gross,¹³ delayed the appearance of finished manuscripts from his hand, but there is a commonality of intellectual style involved. A lawyerly style was his dominant mode of expression. This did not exclude multiple sub-dominant styles that were allowed to exist alongside the forensic, heuristic style - indeed were in some ways protected by that style. [...] This volume of the letters gives us a portrait of Weber the lawyer as never before."¹⁴

Thus these activities were not mere curiosities of his private life but closely linked to his sociological work. As we shall see in the next section, Weber was a lawyer not only by training and in his style but as a social thinker as well.

III. Legal concepts and teleological social theory transformed

Weber's sociology of law has been analysed extensively in the literature¹⁵ but this seems to have acted as a barrier against the exploration of a further question. Trained as a lawyer, in which ways and to what extent did Weber draw upon an existing vocabulary of legal scholarship and how did he adapt from it, more or less implicitly a large number of conceptual and methodological tools for his sociology? Inspired by Stephen Turner and Regis Factor's illuminating and sometimes provocative book on this question,¹⁶ I will give a selective overview of the juristic origin of Weber's way of thinking in general and of some of his sociological notions.

Turner and Factor distinguish three elements ("transformations") in Weber's way from law to social science. The first, personal one (from lawyer to social scientist) has

¹³ A young unmarried mother whom Weber met in an anarchist community in Ascona. Weber helped her in family disputes and lawsuits in several ways.

¹⁴ Sam Whimster 'Review' [of *MWG II/8. Briefe 1913-1914* (Tübingen: Mohr 2003)] *Max Weber Studies* 4 (January 2004) 1, 109-119, quotes: 116-118.

¹⁵ See, e. g. *Max Weber als Rechtssoziologe*, Hrsg. M. Rehbinder und K. P. Tieck (Berlin: Duncker und Humblot 1987), A. T. Kronman *Max Weber* (Stanford: Stanford University Press 1983)

¹⁶ See Turner, Stephen – Factor, Regis A. *Max Weber The Lawyer as Social Thinker* (London: Routledge 1994). Turner and Factor not only offer a detailed and multi-faceted exposition of this argument but critically analyse Weber's methodology itself. Throughout this section, I shall strongly but selectively rely on their work, while on some points implicitly deviating from their standpoint. Apparently independently from Turner and Factor, the German sociologist Werner Gephart has also written extensively on the legal origin of some Weberian concepts, see Werner Gephart 'Juristische Ursprünge in der Begriffswelt Max Webers - oder wie man den juristischen Ausdrücken einen soziologischen Sinn unterschiebt' *Rechtshistorisches Journal* 9 (1990), 343-362, *Gesellschaftstheorie und Recht Das Recht im soziologischen Diskurs der Moderne* (Frankfurt: Suhrkamp 1993), 'Juridische Grundlagen der Herrschaftslehre Max Webers' in Edith Hanke und Wolfgang J. Mommsen (Hrsg.) *Max Webers Herrschaftssoziologie* (Tübingen: J.C.B. Mohr 2001), 73-98.

been already discussed. The second refers to the way Weber transformed legal concepts to sociological concepts. And the third, apparently in contradiction with the former is that he self-consciously and systematically undermined and repudiated the social theory of his time in order to replace it with his own sociology. We shall see both transformations in turn.

With regard to the transformation of concepts, it should not be surprising that the categories of Weber's sociology are related to the intellectual context of legal thinking and theory in which he was educated and which was then the discipline at the top of the academic hierarchy. For instance, in *Economy and Society* his references to the literature of law and legal history far exceed the references to other disciplines numerically. However, these roots are invisible for historical reasons, partly because in late 19th century Germany the socially oriented philosophy of law collapsed into legal positivism. Thus, many of Weber's basic concepts are misunderstood as his idiosyncratic thoughts, while they are sophisticated products of a developed tradition. This is the case with 'objective possibility' and 'adequate cause', mentioned above. Another example of this "scholarly myopia"¹⁷ is that the widespread definition of the state (monopoly on the use of force in a geographic area) is often attributed to Weber while it is a variant of the definition originating from Jhering.¹⁸

Rudolf von Jhering's *Interessenjurisprudenz* can be taken, in some sense, as a summation of 19th century German legal theory and his ideas had served as a reference point not only for Weber but had far reaching influence, e.g. on Durkheim and Beard's *Economic Interpretation of the Constitution* as well.¹⁹

¹⁷ Turner – Factor, op. cit., 7.

¹⁸ Jhering's definition says: "The State is the only competent as well as the sole owner of social coercive force – the right to coerce forms the *absolute monopoly* of the State. Every association that wishes to realise its claims upon its members by means of mechanical coercion is dependent upon the cooperation of the State, and the State has it in its power to fix the conditions under which it will grant such aid." Jhering *Law as a Means to an End*, translated by Isaac Husik (Boston: Boston Book Company 1913), 238 [Modern legal philosophy series vol. V.]. Weber's definition: "A political institutional organisation (politischer Anstaltsbetrieb) will be called a state to the extent that an administrative staff can successfully exercise a *monopoly of legitimate* physical force in the execution of its orders." Weber 'Basic Sociological Concepts', op. cit., 356. The definition given by Jellinek is also close to these. Weber's notion still differs from both of the others as it adds the feature of legitimacy to the monopoly of physical force.

¹⁹ Turner – Factor, op. cit., 180 n.5.

The main idea of Jhering's major work *Der Zweck im Recht* (*The Element of Purpose in Law*)²⁰ is easily summarised. The purpose of law is to provide a resolution of fundamental conflicts of interest. As laws are compromises that serve practical interests, the right method of analysing and interpreting laws is in terms of the interests they are designed to accommodate. Thus, in one sense, Jhering's work is jurisprudential, serving as a means to aid judges in their work of finding the law's answer in specific cases.

In another sense, Jhering turned this reasoning into a full-fledged normative philosophy of law in the form of a theory of society. Law is a conceptual universe, which is changing in time. Jhering, in considering himself a "philosophical naturalist" was seeking to bring into light underlying universal ideas of this conceptual domain, i.e. to discover the purposive order in law through a historical reconstruction of its evolution. This theory, furthermore, is directly linked to political philosophy. Jhering was the most prominent German admirer and critic of Benthamite utilitarianism. He sought to correct Bentham's theory by identifying a supra-individual or "social" interest in addition to the individual interests of utilitarianism, which he considered insufficient to account, on their own, for legal order. In this way, he suggested an answer to the problem of what holds social institutions or "society" in place where they conflict with the immediate interests of members of society. As we shall see, Weber deliberately avoided to offer a general solution to this problem. Still he used and transformed Jhering's insights extensively.

For instance, the early sections of Jhering's *Der Zweck im Recht* (*The Purpose in Law*) and the first chapter of Weber's *Economy and Society* (Basic Sociological Concepts; here Weber refers to Jhering twice)²¹ have a very similar character and structure, both starting with a characterisation of human action. Weber freely used Jhering's concepts in the construction of his own parallel concepts. The similarities in content are also sometimes striking (e. g. in their respective passages on 'vocation' and the life *for* or *from* politics,²² or the interrelated definition of 'state' and 'church') but

²⁰ The English translation of the 1877 German edition of the first volume was published under the title *Law as a Means to an End*, translated by Isaac Husik (Boston: Boston Book Company 1913) [Modern legal philosophy series vol. V.]

²¹ 'Basic Sociological Concepts', translated by Keith Tribe, in *The Essential Weber A reader*, ed. Sam Whimster (London: Routledge 2004), 311-358. References on p. 334, 337.

²² Turner – Factor, op.cit., 52-53.

equally systematic and revealing are the differences. Instead of reproducing the lengthy analysis of Turner and Factor, I only refer to the notion of action which is fundamental in both Jhering and Weber.

As all social theorists of the time, they had to confront in their theory of action with the problem of cause and purpose, physical world vs. human world, material causality vs. teleology. In a Neo-Kantian manner, Jhering stated the categorical dependence of physical movement on causes (law of causality), and the categorical dependence of will on purpose (law of purpose). Thus he accounted for action in teleological terms ("no action, without purpose"²³). However, he extended the notion of acting beyond actions for conscious reasons, e. g. to include the case of habit. Namely, in his view habitual action is also action with a purpose, but the purpose is hidden. Jhering thus was willing and able to loosen the standards by which intentions and purposes are attributed to the action. Conforming to the teleological or functional character of his analysis, he could attribute, based on his notion on the larger social ends he thought he could discern in legal evolution, some "real" (in the sense of objective) interests and motives to the agents.

On the basis of apparently purposive behaviour, Jhering attributed or imputed a purpose to the behaviour of animals. Weber, in contrast "considered such imputations of purpose to be epistemically unwarranted anthropomorphisation."²⁴ In explaining animal behaviour, but also the different types of non-meaningful human conduct, such as traditional action, crowd situations, etc. Weber extended considerably the domain of the biological or causal, claiming that completely meaningful action is only a limiting case. The universe of human conduct is for him a mixture of the understandable, the non-understandable, and the semi-understandable. What is still certain, is that his definition of sociology, based on the notion of meaningful social action,²⁵ rules out by construction the imputation of underlying purposes, or questions about the true nature of society.

²³ Jhering, op. cit., 2.

²⁴ Turner – Factor, op. cit., 33.

²⁵ "Sociology [...] shall mean here: a science which seeks interpretative understanding (deutend verstehen) of social action, and thereby will causally explain its course and effects. By 'action' is meant human behaviour linked to a subjective *meaning* (Sinn) on the part of the actor or actors concerned [...]. Such behaviour is 'social' action where the meaning intended by actor or actors is related to the behaviour of *others*, and conduct so oriented." Weber 'Basic Sociological Concepts', op. cit. 312.

While Jhering believed that there was a common core of human wants, and history is a quest for the fulfilment of these wants through the creation of social institutions, such as the law and the recognition of new legal rights,²⁶ Weber's sociology made it impossible, by design, to account for social institutions in terms of a hidden design.

The third transformation thus consists in Weber's laborious emancipation from prior social and political theory by proposition of concepts of morality, the state, and interest that had no telic implications. Weber radically, self-consciously and systematically undermined teleological social theory of his time, together with its standard explanatory devices and ideas such as collectivities, social forces, human nature and common human *telos*, developmental principles, an overarching evolutionary process, and he provided instead a thoroughly anti-teleological sociology.²⁷ He rejected all appeals to teleology and to the explanatory power of collective forces.

As noted above, while Jhering and all his contemporary fellow theorists suggested a certain solution to the problem of what holds social institutions in place where they conflict with the immediate interests of individuals, Weber was virtually alone among sociologists of his age who voluntarily avoided to offer a solution to this problem. He also avoided to solve the problem of ultimate human nature or the ultimate foundation of state and law. As for the latter, Jhering attempted to explain legal validity in terms of a social theory of the evolution of the law as an instrument for the realisation of interests. Rudolf Stammler criticised Jhering's explanation on the grounds that the concept of legal validity could not be derived from the concept of interests. The concept of legal validity is (simply, formally) presupposed by legal science. For different reasons, Weber rejected both of these explanations. As a substitute, he offered an account for the binding force of law by constructing "an intelligible causal historical narrative involving belief in the legitimacy-claims of rulers"²⁸ and tried to show that this historical narrative is valid as an explanation.

²⁶ This is the core problematic he deals with in his *Der Kampf ums Recht* (The Struggle for Right). Here he offered a theory about the dynamic interaction of given laws and changing interests, formulated as right claims. This theory could serve as a framework to better understand critical legal studies or feminist jurisprudence.

²⁷ Turner – Factor, op. cit., ix, 1, 10.

²⁸ Turner – Factor, op. cit., 12.

Interestingly, as Turner and Factor suggest, Weber's explanatory method that he used in these narratives is also rooted in legal science. His conception of the historical individual, though framed in Rickert's language and fits to Heidelberg Neo-Kantianism, is rooted more deeply in the historically prior problem of the legal abstraction that is at the core of the Roman law tradition. As Turner and Factor argue, Rickert did not add much to what was already at least implicit in what Weber derived from the jurists, especially Jhering. Weber got influences from law scholars before Rickertian neo-Kantianism became his discursive vehicle. He was deeply influenced by other legal thinkers, especially Gustav Radbruch and Emil Lask as well, whose writings on legal abstractions are echoed in his methodological writings. And these Weberian writings, more generally and maybe unconsciously reflect and transform to social science some "meta-legal ideas, such as the idea of the law as a scheme of clarified ideal-typical definitions that self-consciously diverged from reality."²⁹

Having said all this, we have to be cautious not to treat Jhering as a single model or orienting point for Weber. Part of the similarity between them simply indicates that they were speaking a common language. Weber carried with him in the elaboration of his 'sociology' a rather general attitude of the lawyer, including the importance of classification to lawyers (so as to render matters susceptible of proof and amenable to decision). To be more, much of German scholarship in fields other than jurisprudence such as political economy and philosophy possessed this common form of exposition, organising the text around the analysis of basic concepts. It is also true that for several complicated historical reasons much of what would count elsewhere as political and social theory was expressed in Germany in the medium of jurisprudence.

IV. Jellinek and Weber

With regard to Jellinek's influence on Weber we are in a seemingly easy situation, as Weber himself summarised the main lessons he had drawn from Jellinek's legal works in a speech shortly after his friend's death.³⁰ Thus Weber praised Jellinek especially for

²⁹ Turner – Factor, op. cit., 1.

³⁰"In diesem Kreise heute hat von ihm ja nicht als Gelehrten die Rede zu sein. Nur darf gerade ich vielleicht erwähnen, wie sehr zu dem, was mir das Schicksal überhaupt vergönnte zu leisten, wesentlichste Anregungen mir gerade aus seinen grossen Arbeiten kamen. Um nur einige Einzelheiten zu

three achievements that inspired him. The first inspiration, for methodological problems, he received from Jellinek's separation of naturalistic and dogmatic thinking in *System of Subjective Public Rights*. Secondly, the concept of a 'social' theory of the state helped Weber to make clear the task of sociology. And thirdly, Jellinek's reference to the religious influences at the genesis of "human rights" (Weber, quite characteristically uses quotation marks here³¹) inspired him to search for the effects of religion and the religious sphere in other domains previously not analysed in this respect.

Thus, beyond the well-known personal links there are some substantive common points in their respective views on science, politics, law and state that are worth mentioning here.³²

What was not mentioned by Weber in the speech quoted above is the influence that Jellinek's concept of 'empirical type' has had on him. This concept more or less corresponds to Weber's 'ideal type', even though as for its logical construction, the Weberian 'ideal type' is not derived in an inductive way from empirical cases. What is interesting here is that the quite misleading *name* of the Weberian 'ideal type' is possibly the result of a mistake on Weber's part who confounded the names of the two types, 'empirical' and 'ideal', reading it in the 1900 edition of Jellinek's *Allgemeine Staatslehre*.

berühren: die Scheidung naturalistischen und dogmatischen Denkens im "System der subjektiven öffentlichen Rechte" für methodische Probleme, die Prägung des Begriffs der "sozialen Staatslehre" für die Klärung der verschwimmenden Aufgaben der Soziologie, der Nachweis religiöser Einflüsse in der Genesis der "Menschenrechte" für die Untersuchung der Tragweite des Religiösen überhaupt auf Gebieten, wo man sie zunächst nicht sucht." 'Gedenkrede Max Webers auf Georg Jellinek bei der Hochzeit von dessen Tochter Frau Dr. Dora Busch am 21.3.1911' in *Max Weber zum Gedächtnis* Materialien und Dokumente zur Bewertung von Werk und Persönlichkeit, Hrsg. René König, Johannes Winckelmann (Köln und Opladen: Westdeutscher Verlag 1963), 13-17 [Kölner Zeitschrift für Soziologie und Sozialpsychologie Sonderheft 7], quote on p. 15.

³¹ It can be often found in his side remarks, e.g. about "extreme, rationalistic fanaticism (involving, for instance, 'human rights')." - §1. 'Basic Sociological Concepts', trans. Keith Tribe, in *The Essential Weber* A reader, ed. Sam Whimster (London: Routledge 2004), 313. For a recent overview of Weber's ideas about human rights see Hans Joas 'Max Weber und die Entstehung der Menschenrechte. Eine Studie über kulturelle Innovation' in Albert, Gert – Bienfalt, Agathe – Sigmund, Steffen – Wendt, Claus (Hrsg.) *Das Weber-Paradigma* (Tübingen: J. C. B. Mohr 2003), 252-270.

³² In the following, my analysis of Jellinek's texts is rather sketchy, without any ambition to comprehensiveness or finality. Compared to Professor Péteri, I am definitely a much less sophisticated reader and *connoisseur* of Jellinek's oeuvre. On both the personal and intellectual relationship of Weber and Jellinek see B. Nelson 'Max Weber, Ernst Troeltsch and Georg Jellinek as comparative historical sociologists' *Sociological Analysis* 36 (1975), 229-240, G. Hübinger 'Staatstheorie und Politik als Wissenschaft im Kaiserreich: Georg Jellinek, Otto Hintze und Max Weber' in *Politik, Philosophie, Praxis* Festschrift für Wilhelm Hennis, Hrsg. Hans Maier u. a. (Stuttgart 1998), 143-161, Stefan Breuer *Georg Jellinek und Max Weber* Von der sozialen zur soziologischen Staatslehre (Baden-Baden: Nomos 1999) [Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie 25], Andreas Anter 'Max Weber und Georg Jellinek. Wissenschaftliche Beziehung, Affinitäten und Divergenzen' in *Georg*

As the Weberian meaning of the term 'ideal type' became popular, Jellinek, quite characteristically, in the second edition attached a note to his explanation, commenting on Weber's use of the term. What is certain is that there was no precise understanding of the concept extant at the time Jellinek and Weber wrote.³³

Jellinek and Weber have some clear similarities in their respective views on the methodology of the theory of the state. They both reject the juristic method as the only and single proper way to approach the state as an object of research. According to Jellinek, the lawyer can comprehend from the state with his method only what is of legal nature. He famously separated social and legal theory of the state (*soziale Staatslehre* and *Staatsrechtslehre*), as two parts of the theoretical sciences of the state (*theoretische Staatswissenschaften*) which are again in strict contrast to applied or practical science of the state (*angewendete* or *praktische Staatslehre* or *Politik*), concerned with valuations from a teleological viewpoint. This 'methodological dualism' within the theoretical sciences of the state is accepted by Weber as well,³⁴ but as we shall see, he supplemented it with the concept of empirical validity.

Jellinek, as well as Weber considered politics as a necessarily value-laden domain. They acknowledged the legitimacy of political evaluations and both claimed for the self-reflection and self-discipline of scholars in this regard. However, they confronted with the question of value judgement from a different personal perspective.³⁵ Weber was engaged in political debates throughout his career, passionately taking side in important (and less important) political questions. Jellinek, however, took distance from political judgements, in no sense considering political involvement as an existential challenge. Weber had doubts on his friend's political *Urteilkraft*. Even if on rare occasions, he took side, he tried to transform and present his opinion as a legal statement.

The dualism of legal and sociological approaches is, firstly, against the monopoly claims of jurists and secondly, against a holistic and organic view of the state. This view was especially widespread in contemporary sociology, as in Spencer,

Jellinek Beiträge zu Leben und Werk, Hrsg. Stanley L. Paulson, Martin Schulte (Tübingen: J.C.B. Mohr 2000), 67-86 [Beiträge zur Rechtsgeschichte des 20. Jahrhunderts 27]

³³ In a letter to H. Rickert on June 16, 1904 Weber wrote that he had named his concept if 'ideal type' (recently used in his 1904 'Objectivity' essay) after Jellinek's term. See Anter, op. cit., 77-79, esp. n. 66., cf. Turner – Factor, op. cit., 188-189, n. 3.

³⁴ Max Weber *Wirtschaft und Gesellschaft*, 5. Aufl. Hrsg. J. Winckelmann (Tübingen: Mohr 1985), 181

Comte or Durkheim. In general, German lawyers and economists took distance from this sort of organic sociology of the *state*. But they did it rather by referring to the *Volk* and *Volksgeist* and thus remained *within* the organic thought system: in their view not the state but society should be considered as organism.³⁶

Jellinek rejected the organic metaphors equally for the study of society and the theory of the state. He argued that society is not an organism because it lacks both clear boundaries and internal unity. In contrast, the state has both clear limits and internal unity, but the state is not the result of some natural development but of a voluntaristic and conscious creation and modification.

Weber also rejected the ideas of the historical school of economics related to *Volksgeist*.³⁷ As it became clear above, he refuted the naive reification of concepts, the anthropomorphic interpretation of collective phenomena. His sociology is, in this way a 'Dekompositionswissenschaft'³⁸, attempting at the reduction of collective concepts in terms of individual action.³⁹ To be sure, this reduction was not always consequent.

In the course of the analysis, both Jellinek and Weber were mainly interested in the structure of collective social phenomena (Ordnungen) as well as their types and compatibility. According to Jellinek, there are connections (Verbindungen) among individuals which can be either consciously generated (organised) or unorganised (lacking the unity). Now, the state is one of these social forms. Sociology is not concerned with an *a priori* concept of the state, rather it has to define the state as a system of groups, and each of these groups is the object of a special sub-discipline. Weber consequently avoided to use the concept of society or the social. His research focus was not on the social whole as such but on the different sorts of communities and structural forms, and (at least in *Economy and Society*) on their relation to the economy.

³⁵ Anter, op. cit., 71.

³⁶ Breuer, op. cit., 13.

³⁷ Max Weber *Gesammelte Aufsätze zur Wissenschaftslehre*, Hrsg. J. Winckelmann, 4. Aufl. (Tübingen: Mohr 1973), 10. In English, see *Roscher und Knies The Logical Problems of Historical Economics*, translated by Guy Oakes (New York: Free Press 1975)

³⁸ Breuer, op. cit. 6.

³⁹ On Weber's methodological individualism, see his famous letter to Robert Liefmann on March 9th, 1920: "Wenn ich jetzt nun einmal Soziologe bin (laut meiner Anstellungskunde), dann wesentlich deshalb, um den immer noch spukenden Betrieb, der mit Kollektivbegriffen arbeitet, eine Ende zu machen, Mit anderen Worten: Auch Soziologie kann nur durch Ausgehen vom Handeln des oder der, weniger, oder, vieler, einzelnen, strikt "individualistisch" in der Methode also, betrieben werden." Cited in H. H. Bruun *Science, Values and Politics in Max Weber's Methodology* (Copenhagen: Munksgaard 1972), 38 n. 3.

As Breuer stresses, the disaggregation of the society into materially heterogeneous domains (Lebensordnungen), so characteristic for Weber, has been influenced much more by Jellinek than by Spencer, Durkheim or even Tönnies and Simmel.⁴⁰

Briefly, for Jellinek the project of the social theory of the state could be entitled as 'Der Staat und die gesellschaftlichen Gruppen' (The state and the social groups) while Weber's sociology of the state is embedded in his larger project which is called 'Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte' (The economy and the social orders and powers). As Weber himself stressed, he got inspired in his sociological work from Jellinek's social theory of state. He first treated systematically the state from a sociological point of view in the context of his work around the above mentioned *Grundriss der Sozialökonomik*. His last university lectures in the summer semester of 1920 were again about 'Allgemeine Staatslehre und Politik (Staatssoziologie)' (General theory of the state and politics. Sociology of the state). If he succeeded here in this subject in going further than his older friend and colleague (as he arguably did) then it seems natural that in comparison to Weber's *Staatssoziologie*, Jellinek's work is deficient, at least as a contribution to political sociology. In the following, I should illustrate this difference in a brief way.

Weber in his 1920 university lectures dealt with a very large range of topics in political sociology. But he not only had a wider perspective but was stricter than Jellinek in separating legal and sociological theory, the normative and the empirical spheres. True, Jellinek also treated questions as parliament, democracy, etc. in his theory but within the legal part, while always drawing back to the factual, historical and political (Sein) without, however, developing a theory about these problems or treating them systematically (scientifically) at all.

This can be seen clearly in his analysis of state forms (monarchy and republic). For Jellinek, the monarchy belonged to the factual sphere, while the republic, allegedly, to the legal, being artificially constructed. But the sub-types of both were again treated factually, related to the empirical and historical domain. What is most evident from all this, is that Jellinek has not had adequate methodological tools to handle these empirical and social facts. His social theory of the state is a very small jump after a long run.⁴¹ Jellinek could not turn his program, formulated in the opening chapter of *Allgemeine*

⁴⁰ Breuer, op. cit. 13.

Staatslehre into reality. Thus, he was not able to show the limits of the legal approach in the theory of state (namely that the sovereignty of the state cannot be legally justified as long as other powers beside the state are more powerful than the ruler), mainly because he left the analysis of these other social organisations to different specialised subdisciplines (i.e. outside the theory of state).

As noted above, Jellinek left the analysis of legitimacy and the institutional consequences of ideas on legitimacy to the practical-evaluative sphere of politics. For Jellinek it was inconceivable how to speak about justifying reasons and state goals other than evaluatively, thus he let a large part of the subject matter to slip out of his state theory to political teleology. Weber, by making difference between value-relatedness and value neutrality, was able to handle the question of legitimacy within his theory in terms of empirical validity, i.e. as actors' beliefs of legitimacy.⁴²

In sum, even if programmatically Jellinek strove for a social theory of the state, he could not (or finally did not want to) separate himself from the traditions of his juristic discipline, according to which even the sociologically relevant problems are included in the legal theory of the state (*Staatsrechtlehre*) and treated normatively i.e. dogmatically, rather than sociologically. Weber, on the other hand, as we have seen above, wrote as a sociologist who emancipated himself both from legal dogmatics and teleological social theory.

V. Conclusion

In this paper I have concentrated on the historical reconstruction of the juristic background of the Weberian oeuvre, referring only occasionally to other approaches. Still, let me mention an example of the possible non-antiquarian benefits from the scrutiny on Weber as a lawyer. Recently, some German scholars have reread Weber's writings in order to reconstruct from them a "Weber paradigm" for social sciences.⁴³

⁴¹ Breuer, op. cit. 16. "Das ist für einen so weiten Anlauf dann doch ein etwas sehr kurzer Sprung."

⁴² "Wertende *Menschen* als *Objekte* der Betrachtung haben wir natürlich vor uns, - aber *wir* sind *nicht* genötigt, zu werten!" – wrote Max Weber in a letter to Heinrich Rickert on April 26th, 1920. Cited in H. H. Bruun Science, Values and Politics in Max Weber's Methodology (Copenhagen: Munksgaard 1972), 28 n. 14.

⁴³ Albert, Gert – Bienfalt, Agathe – Sigmund, Steffen – Wendt, Claus (Hrsg.) *Das Weber-Paradigma* (Tübingen: J. C. B. Mohr 2003).

They have found, *inter alia*, highly relevant insights for a methodological individualistic approach to rule-following. This rediscovery has made clear that a now critically important theoretical problem, that of the binding nature (obligatoriness, normativity) of law has had a close analogy (or more precisely, an earlier formulation in a different terminology) at the last turn of century.

As we have seen above, Weber had worked out his account for the binding force and interrelation of moral custom (*Sitte*) and law in opposition to such teleological-functional theories as Jhering's and Tönnies'. Now, Weber's explanation of the problem is interesting not only in itself but it offers valuable insights for current research too. Especially important is how he highlighted the genealogically necessary and analytically important "jump" from the unreflective to the reflective i.e. conscious phase in norm-following. To note, rational choice theory in accord with Weber, rejects teleological-functional interpretation of macro-sociological phenomena. In the explanation it relies basically on game theory and the paradigm of unintended consequences. More precisely, rational choice theorists frequently turn to such game theoretical models (often evolutionary ones) which suppose much less individual rationality than the standard rational choice models. The evolutionary game theoretic accounts for normativity, some of them explicitly relying on biological, psychological and anthropological findings⁴⁴ (e.g. on findings about food-sharing norms in early human groups in the interpretation of the notion of fairness⁴⁵), again have to explain, *inter alia* this jump of normativity to the conscious level which offers a clear linkage to Weber's insights. The complete historical and rational reconstruction of Weber's answer to the problem of the normativity of law and the nature of morality is, however, beyond the scope of *this* paper.

⁴⁴ See, e.g. Runciman, W. G. (ed.) *The Origin of Human Social Institutions* (Oxford: The British Academy – Oxford University Press 2001) [Proceedings of the British Academy 110]

⁴⁵ Binmore, Ken *Game Theory and the Social Contract I-II*. (Cambridge, Mass.: MIT Press 1994-1998)

A jogtól a társadalomtudományig és vissza. Első lépés
Megjegyzések néhány weberi fogalom jogász eredetéről
(tartalmi összefoglalás)

A tanulmány egy hosszabb gondolatmenet első lépése, amely egészében három összefüggő témát ölel fel: (1) Hogyan nőtt ki Weber szociológiai munkásságában a korabeli jogtudomány fogalmaiból és kritikájából egy módszertani individualista (cselekvéseméleti megalapozású) nem-teleologikus társadalomtudomány? (2) Mennyiben előfutára Weber megértő szociológiája a racionális döntések elméletének? (3) Hogyan lehetséges egy weberi alapokra és a racionális döntések elméletére épülő szociológiai jogelmélet?

Az első kérdésre összpontosítva a következő megállapításokat tehetjük. Weber, egyrészt, az 1890-es években pályamódosítást hajtott végre: a jogtudományt előbb a közgazdaságtannal, majd a szociológiával váltotta fel. Másrészt, számos kulcsfogalmat és gondolkodási sémát merített a XIX. század végének német jogtudományából, amelyeket később beépített szociológiai elméletébe. Ezt olykor kifejezetten hangsúlyozva tette, például az adekvát kauzalitás elméletének adaptálásakor, máshol inkább kimondatlanul. Fontos vonatkoztatási pontként szolgált számára Jhering jogelmélete. Sokban támaszkodott Jellinek államtani munkásságára is, akinek az állam társadalomtanára irányuló ígéretét a maga államszociológiájában teljesítette be. Harmadrészt, korának kollektív fogalmakat használó, objektív teleológiára hivatkozó, jogászias társadalomelméleteit kritizálta és kívánta felváltani a megértő szociológia módszertani individualista paradigmájával.