Max Weber’s Interpretive Sociology of Law

Michel Coutu
Table of contents

Introduction

I. Methodological foundations 3
   The starting point: Max Weber's critique of Stammler 3
   The ideal-typical method 4
   Rationality as a fundamental category of Weberian sociology 5

II. Rationalisation of law 5
   Normative coherence of law 5
   Empirical validity 6
   Legitimacy 6

III. Weberian sociology and contemporary law: some key aspects 7
   Sociology of law and jurisprudence 7
   Legal pluralism 8
   Substantive rationalisation of law 9

PART I
Methodological foundations 11

I. The starting point: Max Weber's critique of Stammler 13
   1. Rudolf Stammler's concept of social life, the economy and the law 15
      1.1 Social monism 17
      1.2 The social ideal 18
      1.3 Just law 19
   2. The importance of the critique of Stammler for Weber 19
      2.1 The formal preconditions of knowledge 19
      2.2 The problem of causality in the social sciences 21
      2.3 The interplay of law and the economy 22
Contents

3. How accurate is Weber's methodological critique of Stammler? Karl Diehl's and Hugo Sinzheimer's assessments 26

II The ideal-typical method 30
1. John R. Commons' critique of the ideal type 31
2. Talcott Parsons and the Weberian ideal type 37
   2.1 Modern capitalism: contrasting Sombart's and Weber's analysis 37
   2.2 The ideal-typical method in light of the theory of action 40
   2.3 Analytical sociology and Weber's 'unsystematic' theorising 42
3. Synthesis 47

III Rationality as a fundamental category of Weberian sociology 50
1. Rationality and modernity 50
   1.1 Epistemological presuppositions 51
   1.2 Levels of rationality analysis 54
2. Rationality and sociology of religion 57
   2.1 Logical consistency of religious representations 58
   2.2 Rationalisation of the religious sphere and empirical activity: religion and the economy 64
   2.3 Ethical rationalisation and methodical command of conduct 66
3. Rationality and sociology of law 69
   3.1 Weber's conceptualisation of legal rationality: introductory comments 70
      3.1.1 The formal/formelle distinction 70
      3.1.2 Formal-rational law 72
      3.1.3 Substantive law 74
      3.1.4 Irrational law 76
   3.2 The dimensions of rationality in the sociology of law 78
      3.2.1 Consistency in representations 78
      3.2.2 Empirical activity: the influence of law on the economy 81
      3.2.3 Methodical ethos of conduct and legitimacy 82
PART II
Rationalisation of law

IV Logical coherence

1. The antinomy of form and substance 87
   1.1 The formal rationality of law 87
   1.2 The substantive rationality of law 91
      1.2.1 Princely and theocratic laws 91
      1.2.2 Substantive rationality in contemporary Western law 93

2. Factors affecting the logical ordering of law 97
   2.1 Factors internal to the legal sphere 97
      2.1.1 Developmental logic of legal representations 97
      2.1.2 Specialised carriers of rationalisation: legal professionals 100
   2.2 External factors 106
      2.2.1 Political authority 106
      2.2.2 Economy and the law 111

V Empirical validity

1. Weber, institutional economics and the law 116
   1.1 American institutional economics: John R. Commons 116
   1.2 The German school of ‘social law’: Karl Diehl 121

2. The ‘England problem’: legal formalism and the emergence of capitalism 131
   2.1 Rationality and calculability of economic action 132
      2.1.1 Formal rationality of monetary calculation 132
      2.1.2 Substantive conditions of monetary calculability 133
   2.2 Legal preconditions of economic formal rationalisation 134
      2.2.1 Legal foreseeability 134
         2.2.1.1 Regarding the sphere of specialised economic activity 135
         2.2.1.2 Regarding the general structure of the legal order 139
      2.2.2 Extension of freedoms and individual rights 141
   2.3 Continental law, common law and legal foreseeability 144
      2.3.1 The theoretical framework: the autonomous logic of rationalisation of value spheres 144
2.3.2 The historical perspective: the reception of Roman law as antecedent to the 'England problem' 147
2.3.3 The elements of foreseeability in the common law and in Continental law 151

VI Legitimacy 157
1. The demise of natural law 159
   1.1 The critical theory of knowledge 161
   1.2 The differentiation of spheres of action 162
2. The rational-formal legitimacy of law and the state 167
   2.1 Obedience as opposed to docility 167
   2.2 Features of legal-rational domination 168
   2.3 Identity of law and the state 170
   2.4 Limits of legal domination in its bureaucratic form 172
3. Decisionism and legitimacy 174
   3.1 Decision, ethics of conviction and the imperative of responsibility 175
   3.2 Carl Schmitt's concept of decision: a logical extension of Weberian themes? 181

PART III Weberian sociology and contemporary law: some key aspects 189

VII Sociology of law and jurisprudence 191
1. Two heterogenous spheres of knowledge: the controversy with Hermann Kantorowicz 192
2. Three bridges between sociology of law and jurisprudence 199
   2.1 The social facts of law 199
   2.2 The logic of social research 205
   2.3 The ideal types of rational action 208

VIII Legal pluralism 214
1. Three proponents of legal pluralism: Eugen Ehrlich, Georges Gurvitch and Gunther Teubner 216
   1.1 Eugen Ehrlich: the legal sociology of non-state associations 216
   1.2 Georges Gurvitch: the emancipatory potential of social law 221
1.3 Gunther Teubner: the plural legal rationalities of social systems 228

2. Max Weber’s contribution to legal pluralism 234
   2.1 Max Weber and legal pluralism: an overview 234
   2.2 State and non-state law 236
   2.3 The legal constraint 238
   2.4 The definition of law 239
   2.5 The opposition between the ‘is’ (Sein) and the ‘ought’ (Sollen) of law 240

IX Substantive rationalisation of law 242
   1. The too-many faces of substantively rational law 242
      1.1 Formal jurisprudence 244
      1.2 Instrumental jurisprudence 246
      1.3 Jurisprudence of values 248
   2. The global rationalisation of contemporary law: transnational collective human rights 250

Conclusion 263
References 271
Name index 291
Subject index 295