

IS COMMON LAW IRRATIONAL? THE WEBERIAN 'ENGLAND PROBLEM' REVISITED

*Emmanuel Melissaris, Lecturer in Law, School of Law, Keele University**

Introduction: The Suspect Eccentricity of Lord Denning

“In summertime village cricket is a delight to everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in the County of Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good clubhouse for the players and seats for the onlookers. The village team plays there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket, but now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket field. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.”¹

Readers with some knowledge of English jurisprudence will not find it surprising that the above is an extract from one of Lord Denning's judgements, as it is typical, in its extraordinariness, of a man who has gone

* For their extremely helpful comments, suggestions and ideas I am grateful to George Pavlakos, Neil Duxbury and Lieve Gies.

¹ *Miller v Jackson* [1977] 3 WLR 20, CA.

down in juristic history and the consciousness of thousands of undergraduate law students as a *sui generis* judge, who didn't hesitate to exercise his discretion even when there was clearly no room for any. But was Lord Denning really an exception? Is it the case that his rulings are so fundamentally different to those of other English judges or is there something inherent in English and, indeed, all common law that makes possible the justification of decisions in the manner of Lord Denning in *Miller v Jackson*?

It is commonly held that common law relies a lot more heavily on the judge, on rhetoric and *ad hoc law-making* rather than backward looking *law-application*. Civil law, on the other hand, is understood as being the embodiment of rationality and the rule of law. At least this is how Max Weber described the difference. In applying a set of rationality tests, he came to the conclusion that common law with its reliance on the personality of the judge and the lack of codified legislation, is marked by a lower degree of rationality than civil law. However, in denying common law the degree of rationality and, subsequently, the systematicity that he reserved for civil law, Weber was led to a dead-end. Having already correlated the rise of capitalism with the existence of formal rational legal systems, he found himself unable to explain the emergence of capitalism in England. In this paper, I offer a new approach to the Weberian 'England problem' by reconsidering the degree of rationality of common law. First, I give a brief exposition of the Weberian typology of legal systems and focus specifically on how the concept of rationality determines this classification. I also try and unpack the Weberian notion of rationality by bringing to the surface some of its necessary entailments. Then I go on to examine how the substantive irrationality that Weber diagnosed in the English legal system has been explained by various analysts of his work, namely Kronman, Trubek, Ewing and Murphy. I shall then go on to ask whether the claim that English law is substantively irrational could ever be sustained and, if so, whether it can still be sustained today. I argue that what should be taken more seriously is that legal practice is an argumentative practice. Every instance of argumentation is directed towards an audience. Using an idea of Perelman, which was adopted and furthered by Habermas, I shall argue that argumentation in law is addressed to an idealised universal audience. But in order for a judge to purport to convince this universal audience, she must appeal to universal, abstract principles, the existence of which Weber questioned in common law. I shall then consider a sociological objection, namely that this universal audience remains precisely this: an idealisation. I shall argue that with recent developments in the area of the law, broadly conceived, the universal audience is actualised to a much higher degree than in the past so as to facilitate the universalisability of judicial decision-making.

A Reminder of What The 'England Problem' Is

Before returning to Lord Denning and his civil law colleagues, let me remind the reader what exactly the typology of legal systems and the England problem consist in. In the part of *Economy and Society*² entitled *Sociology of Law (Rechtssoziologie)* Weber offers a conceptual framework for the

² M. Weber, *Economy and Society*, (1968) Bedminster Press New York.

understanding of the legal phenomenon as well as a typology of legal systems, which he intends as a methodological tool for the study of the development of the laws and also its connection with the rise of capitalism. At a first stage he sets out to define the law in contrast to other competing normative or regulative orders. He locates the decisive criterion in the organised and legitimate enforcement of rules:

An order will be called law, if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.³

There are some obvious problems with this definition of the law as the monopolisation of physical force. Firstly, there is the famous Hartian rebuttal of Austinian legal metaphysics:⁴ not all law prescribes sanctions and, moreover, not all threats of sanctions presuppose an obligation.⁵ Secondly, on an empirical level the law is simply not the only regulatory order supported by an intricate enforcement mechanism. In fact, since Weber's definition of the law refers to psychological as well as physical force, it is wide enough to include any religious order with an ecclesiastic institution and hierarchy. Indeed, Weber rejected the threat of sanctions as well as the groundedness of the law on a social practice or any other empirically identifiable fact as the decisive and sociologically relevant criterion for conceptualising the legal. What he did place particular emphasis on was both purposive behaviour that is motivated by a normative commitment to legal rules as well as the fact that the law was *administered* by a specialised and dedicated staff. As Kronman points out,⁶ the presence of a specialised staff has a substantive significance as well, which marks the separation of the law from other normative phenomena. According to Weber, legal officials must have been vested with the authority of enforcing legal rules with other legal rules. This, firstly, precludes the possibility of anyone, who acts as self-appointed law enforcer being able to claim that she acts from within the law and, secondly, that the law develops as a closed system that reproduces and legitimates its operations from within its own pedigree. This understanding of the law clearly runs the risk of being over-inclusive and, at the same time, too narrow. However, it is useful as a heuristic device, in order for us to form a *prima facie* agreement of what we mean when we talk about law and legal systems.

A second pivotal point in the analysis of the legal phenomenon is the concept of authority. Authority in general is understood as the form of power exercised by a person over another with reference to a principle, which is accepted as binding by the person on the receiving end of this power relation. Despite this uniform conceptual basis, authority is manifested in various ways:

³ *Ibid*, p.34.

⁴ Austin's jurisprudence (J. Austin, *The province of jurisprudence determined* (1995, first edition 1832) edited by W.E. Rumble ed., Cambridge University Press) moves along similar lines as Weber's, although they also differ in very important methodological and substantive respects.

⁵ H.L.A. Hart, *The Concept of Law*, (2nd ed., 1994) with a Postscript edited by P.A. Bulloch and J. Raz, Oxford Clarendon Press.

⁶ A. Kronman, *Max Weber*, (1983), Edward Arnold, p.30

According to the kind of legitimacy which is claimed, the type of obedience, the kind of administrative staff developed to guarantee it, and the mode of exercising authority, will all differ fundamentally. Equally fundamental is the variation in effect. Hence, it is useful to classify the types of domination according to the kind of claim to legitimacy typically made by each.⁷

Weber distinguishes between three kinds of authority: Traditional authority is based on age-old, established and tacitly accepted rules. Legal-rational authority rests on the belief in the legitimacy of enacted rules. Charismatic authority is related to the exceptional qualities or achievements of the particular person, who finds him/herself in a position of power.⁸

Weber goes on to form a typology of legal systems, which is based on that understanding of the law and revolves around the distinction between the three separate types of authority. The four categories he proposes result from the combination of two fundamental attributes of legal systems or the lack thereof: formality and rationality. When it comes to what exactly formality and rationality refer to, Weber is not very enlightening. Formality, which is contradistinguished to substantiveness, seems to refer to the degree, to which decision-making is an instance of deductive reasoning, in the course of which the particular facts of a case are classified under general rules and principles. The degree of formality of a legal system accounts for its systemic closure, both in the sense of the existence of a set of rules particular to the system, and the existence of a congruent complex of agents and organisations enacting, applying and enforcing legal rules.

The notion of rationality, which is the crux of much of Weber's work, is equally obscure as has been noted rather disparagingly by a number of commentators.⁹ Weber shows some inconsistency in his use of rationality. There have been various attempts at unpacking the Weberian notion of rationality,¹⁰ of which I shall mention two that will prove especially useful in the second part of this article. Kronman¹¹ singles out four possible candidates for the meaning of rationality in Weber's work: (1) rule-governed, (2) systematic, (3) based upon the logical interpretation of meaning and (4) connoting control by the intellect. It is true that the ambiguity of the meaning of rationality causes some problems especially with regard to the

⁷ M. Weber, *Economy and Society*, Vol.1, p.213.

⁸ *Ibid*, pp.215 ff.

⁹ Kronman reproaches Weber of using it in a "careless fashion" (A.T. Kronman, *Max Weber*, p.73). Lukes calls it "irredeemably opaque and shifting" (S. Lukes, "Some Problems about Rationality" in *Rationality* (B. Wilson ed., 1971, New York Harper and Row), p.207.

¹⁰ See indicatively: J. Weiss, *Max Webers Grundlegung der Soziologie*, (1975) Frankfurt: UTB; G. Roth and W. Schluchter, *Max Weber's Vision of History: Ethics and Method*, (1979) University of California Press; A. Swidler, "The Concept of Rationality in the work of Max Weber", (1973) 43 *Sociological Inquiry* 35; U. Vogel, "Einige Überlegungen zum Begriff der Rationalität bei Max Weber", (1973) 25 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 532; S. Kalberg, "Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History", (1980) 85 *The American Journal of Sociology* 1145.

¹¹ A.T. Kronman, *Max Weber*, pp.72-95. See also D.M.Trubek, "Reconstructing Max Weber's Sociology of Law", (1984-1985) 37 *Stanford Law Review* 919.

differentiation between rational and irrational types of legal systems. However, as Kronman points out, it is usually possible to ascertain which content Weber ascribes the term rationality from the context of the occurrence of the term. Moreover, none of these possible meanings of rationality contradict each other. To that extent, they can be seen as aspects of the same, uniform concept of legal rationality: a legal system is rational, when it is based on rules, which are systematically coherent and lend themselves to interpretation, that is a mediation between the human intellect and crude facts in physical world. Eisen¹² offers a similar but more detailed systematisation of the content of rationality as extracted from various instances of employment of the term and not only from the context of the Sociology of Law. Rationality, Eisen concludes, is used as a marker for six component elements: 1) *purpose*; 2) *calculability*, referring to the appropriateness of means for the achievement of given ends; 3) *control*, connoting guidedness by a free will; 4) *logical coherence*; 5) *universality*, which refers to abstractness, in the sense of the validity of propositions irrespective of the empirical particularities of particular cases; 6) *systematicity*. The Weberian notion of rationality is central in this paper. In the next part I shall reconsider the Weberian notion of rationality, following the way Kronman and Eisen have unpacked it, and emphasise some of its necessary entailments, which should be taken seriously. I will then argue that sizing up common law to that re-visited notion of rationality will provide a solution to the England problem.

Let me unpack this a little further. The requirements of rationality have some necessary, intertwined entailments, the importance of which will be revealed later on in this paper, when I revisit the kind of rationality employed in the law.

1. The rule-governedness requirement of rationality entails that rational decision-making cannot be guided by personal preferences. Rules have a necessary social texture and, therefore, every instance of rule-following presupposes that there is a social background, against which decisions are testable. Personal preferences or desires cannot be projected onto that social plane. This is an analytical truth that holds both for individuals and, all the more so, in instances of public decision-making.

2. Since personal preferences cannot determine rule-governed decision-making and, as Weber insists, rationality also consists in the use of reason and the 'logical interpretation of meaning', the intentions of public officials are irrelevant in discerning the meaning of their decisions and the rules that these are either grounded in or give rise to.

3. Following on from the previous two points, when public officials produce a legal decision based on rules, they always attach to their decision two necessary claims, either implicitly or explicitly. Firstly, they claim their decision to fall into place in the system of rules, principles and previous decisions that form part of the legal system. Secondly, they raise a claim to universality, even if only in the weaker sense of their decision holding for everyone at all times under unchanging circumstances. Of course, those

¹² A. Eisen, "The Meanings and Confusions of Weberian 'Rationality'" (1978) 29 *The British Journal of Sociology* 57.

circumstances will at times narrow down and at others expand the constituency of people, for whom the decision will be relevant and binding. For instance, some commercial law decisions hold only for a certain class of people, for instance merchants. What is important, though, is that, all things being equal, the decision cannot create a rule that holds for certain merchants but not others.

4. The rules and principles that guide decision-making, especially instances of public decision-making, must be promulgated in the sense that they must be accessible and cognizable by all. This requirement leaves out of the realm of rationality practices such as *khadi* justice or other instances of decision-making that is based on divine revelation. Cognizability, though, does not presuppose the written word. Consolidation of rules in specific texts is not a conceptual prerequisite of the cognizability of the law, not least because it has been shown and accepted almost universally that exhaustive textuality cannot guarantee gaplessness in the law.

5. Finally, stemming from the supremacy of reason that Weber seems to consider as a requirement of rationality, it follows that a rational decision can only be one made on the grounds of the weightiest reason. It is simply not rational to act on the less strong grounds and ignore the more compelling ones. This is true of both theoretical and practical reasoning. In order for one to bring about a result, *Zweckrationalität* dictates that one must employ the most effective means. Similarly, when one engages in moral or, indeed, legal reasoning *Wertrationalität*¹³ dictates that one must act on the most forceful reason available that will guarantee the rightness of one's action.

The combinations of formality and rationality gives rise to four types of legal systems. Assuming that most readers will be familiar with it, allow me to give only a very brief summary of the Weberian ideal legal types:¹⁴

a) *Formal irrational* legal systems rely on universalisable rules and principles. However, the source of these rules is not testable by the human intellect. Oracular justice belongs to this category.

b) In *substantive irrational* systems, decisions are made on particular grounds, related to the specific circumstances of the case. Moreover, there are no a priori, general, universalisable rules guiding decision-making.

c) *Formal rational* is based on the use of general rules and it also displays a high degree of systemic differentiation.

d) *Substantive rational* decision-making consists in invoking general criteria, which are extra-legal, that is they are drawn from other regulatory orders such as religion, politics, morality. It cannot be overemphasised that classifying specific historical legal systems under one of these ideal types will not always be unproblematic. There are bound to be crossovers and exceptions, which, though, will not alter the fundamental fact that they have some predominant characteristics, which make them recognisable in terms of their degree of formalisation and rationality.

¹³ For goal and value-rationality in Weber's work, see: S.P. Turner and R.A. Factor, *Max Weber and the dispute over reason and value: A Study in Philosophy, Ethics and Politics*, (1984) Routledge and Kegan Paul.

¹⁴ M. Weber, *Economy and Society*, Vol.2, pp.654-658.

According to Weber, it is civil law legal systems that fit the bill of formal rationality:

Present day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, *i.e.* those which have been produced through the legal science of the Pandectists' Civil Law, proceeds from the following five postulates: *viz*, first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally relevant; and fifth, that every social action of human beings must always be visualised as either an "application" or "execution" of legal propositions or an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.¹⁵

Roman law and its rightful heirs, that is the legal systems that resulted from the great revolutions and codifications of the 18th and 19th centuries, meet all the criteria of formal rationality set by Weber. The law forms a systemically closed and self-sufficient system, in the sense that decision-making can rely solely on legal resources without having to take recourse to other normative orders. Legal rules and principles are abstract, generalisable and universalisable thus facilitating the classification of facts under legal categories and, subsequently, making possible their legal evaluation and making the law gapless and perfectly symmetrical to the social reality that it is called to regulate. There can be no social instance that cannot be translated in the language of the law. As a result of the rule of abstract and ubiquitous law, the judge is dissociated from her decisions. Rules do all the work, so to speak, and the personality of the judge, her predispositions, her background, her personal opinion on the issue she has to decide, her world-theory, are immaterial and have no bearing whatsoever on the case. To put it in Weberian terminology, civil law systems are based on legal rational authority and do not rely on the charisma of the judge.

So, is common law excluded from the cohort of legal systems that are formal rational, such as the Pandectists' laws and current civil law systems? The comparison of common law to the ideal type of formal rational legal systems soon ceases to be a comparison of an empirical reality to an ideal and becomes a comparison between two empirical realities, namely common law and civil law. However, the outcome of the comparison remains the same: common law does indeed suffer from a rationality deficit for a number of reasons. To start with, it didn't develop in an academic environment but rather as a craft in professional schools.

¹⁵ *Ibid.*, pp.657-658.

Even today, and in spite of all influences by the ever more rigorous demands for academic training, English legal thought is essentially an empirical art.¹⁶

Furthermore, despite the increasing importance of statutory law as well as the influence of discourses on principles, Anglo-American law still by and large revolves around the figure of the judge. The judgment is her own creation, as she is expected to employ her skills and talents, in order to reach the right result. Weber thinks it no coincidence that most pragmatist movements in jurisprudence have arisen in common law systems as a reaction against the formalistic tendencies in common law, which consist in the introduction of increasingly more general rules and abstract principles.

Weber goes on to list more reasons why he considers common law to be found wanting in rationality in comparison to civil law systems such as the extensive reliance on juries and the patriarchal attitude of the judiciary:

Alongside all this we find the still quite patriarchal, summary and highly irrational jurisdiction of the justices of the peace. They deal with the petty causes of everyday life and, as can be readily seen in Mendelssohn's description, they represent a kind of khadi justice which is quite unknown in Germany.¹⁷

And he concludes in what I hold to be the crux of his argument concerning the rationality deficit of common law:

"Quite definitely, English law-finding is not, like that of the Continent, "application" of "legal propositions" logically derived from statutory texts."¹⁸

This point has long reaching consequences. The, allegedly, particularistic and substantive, in the Weberian sense, character of English law undermines not only its rationality but also its very systematicity. For Weber, a prerequisite of a legal system is its organisation around abstract rules and principles, under which the specific facts of the cases at hand can be classified. *Ad hoc* decision-making, which is grounded on the 'sense data' of cases and motivated by the passions, desires or values of the judge cannot be the basis of a coherent system. Legal decisions must be able to be pitched at the level of abstraction of universal legal principles that will cohere and be consistent with each other so as to form a gapless system of norms, which will accommodate all possible combinations of facts.

Weber's overall goal was to give an evolutionary sociological theory. His sociology of law falls under that broader scheme and aims at proving a connection between the rise of capitalism and the emergence of formal rational legal systems. In a nutshell, the argument goes as follows: The market, which is permeated by its own rational rules and processes, can only develop in an environment of certainty and predictability. This environment is provided by a formal rational law, as we have described it so far. Since civil law is all about rules and principles known in advance, the application

¹⁶ *Ibid.*, p.890. Clearly, it is not the case any longer that the law as an academic discipline is atrophic.

¹⁷ M. Weber, *Economy and Society*, Vol.2, p.891.

¹⁸ *Ibid.*

of which will yield predictable results, it would provide the perfect context for the rise of capitalism.

And, indeed, it did. Or, at least, it is the case that in most cases capitalism and formal legal rationality went part and parcel. With one notable and persistent exception: England. The empirical application of Weber's thesis on the connection of capitalism with formal legal rationality stumbles on the case of English capitalism, which did develop and, in fact, to a greater extent and with greater consistency. However, it did not do so in an environment of formal legal rationality. Not only did the common law not give way to a civil law model but it persistently and effectively rebuffed all attempts to codification and, hence, rationalisation.

Weber himself diagnosed this historical discrepancy and tried to address it. Firstly, he singles out some aspects of common law that do display signs of formalism such as the stereotyped writ system, upon which common law pleading is based. Secondly, he places a lot of weight in the way the legal profession developed in England. The dual role of English lawyers as both solicitors and financial advisors meant that their interests lay more in the protection and advancement of the interests of their business clients than with the creation of a formal rational legal order. Finally, the fact that law in England was understood and developed as an empirical craft rather than as an academic discipline meant that lawyers never lost sight of the interests of their clients. Trubek¹⁹ points out that what Weber persistently sought in English law was an element of calculability, which would bring it closer to civil law systems. The significance of this point will be revealed in the next part of this paper, in which I shall argue that Weber employed a rather narrow and restrictive understanding of rationality.

The options are numbered and rather straightforward: either capitalism developed in spite of a substantive irrational law, which necessarily raises questions as to the rightness of Weber's conceptual connection between the rise of capitalism and formal rational law; or capitalism developed *because* of the substantive irrational common law, which again refutes the groundwork of Weberian sociology of law; or English law is not *really* substantive irrational. Most analysts of Weber's sociology of law are not convinced by the way he addresses the English problem.²⁰ They find it is rather casuistic and inconsistent with the rest of his work. Hunt accuses him of displaying a historicism atypical for him.²¹ Kronman points out that, even if one accepts that capitalism can develop *despite* a substantive irrational legal system by emphasising the formalist elements of common law, there is no consistent way of reconciling Weberian sociology with the thesis that

¹⁹ See D.M. Trubek, "Max Weber and the Rise of Capitalism", (1972), *Wisconsin Law Review* 720 for an account of how Weber struggled with the problem.

²⁰ For a critique of Weber as a legal historian see J. Getzler, "Law, History, and the Social Sciences: Intellectual Traditions of Late Nineteenth – and Early Twentieth – Century Europe" (2003) in *Law and History: Current Legal Issues 2003* Vol. 6, Oxford University Press, pp.215-263.

²¹ A. Hunt, "Max Weber's Sociology of Law" (1978) in *The Sociological Movement in Law* (Hunt ed.), London, Macmillan.

English capitalism developed *because* of the substantive irrationality of common law, which Weber himself suggests at various points.²²

Ewing²³ comes to Weber's defence by opting for the last of the possible solutions to the English problem, namely that English law is not substantive irrational at all. She argues that Weber's critics are mistaken in focusing on the juridical sense of the typology of legal thought. The focal point should be shifted towards the sociological aspect of the legal system. She concedes that Weber himself allows the confusion to arise by insisting on referring to types of *legal thought*. However, she maintains that this problem can be redressed in such a way that the England problem vanishes and the soundness of Weber's conceptual sociology is restored.

“But if one is concerned not with legal thought but with empirical validity, then Weber quite clearly set out the historical conditions that in England gave birth to a legal system that was particularly well suited to the demands of the bourgeoisie for guaranteed rights and formal justice, the characteristics that distinguish a bourgeois, or liberal, legal system from all those that preceded it.”²⁴

Looking at the English legal system as a whole, its formal rational character is unmistakable and therefore it creates those conditions of certainty and predictability that facilitate the rise of capitalism based on free and predictable market transactions.

It is debatable whether Ewing's argument suffices to rescue Weber's treatment of the English problem, that is whether looking at the English legal system in a sociological light makes irrelevant its formal, juridical substantive irrationality. Firstly, there is Weber's text to reckon with. He consistently speaks of types of legal thought and not types of legal structures, organisations and the like. Secondly, even if one goes beyond hagiographic exegesis, how is it possible to have a sociologically formal rational system, which is based on a type of decision-making that is casuistic and relies on substantive, ad hoc reasoning?

Murphy²⁵ seems to take these issues on board and tries to tackle the problems rising from the Weberian typology of legal thought and the classification of common law as substantive irrational. He argues that Weber placed too much emphasis on legal doctrine and its place in legal education thus underestimating the importance of adjudication and obscuring the ways, in which technologies and discursive practices in the law actually have developed and determined legal thought. He therefore finds Weber's attempt “to provide a grid for understanding the decisive characteristics of adjudication, of conflict resolution and of decision-making, all at the same time”²⁶ less than satisfactory. Instead, he suggests that we pay closer

²² A.T. Kronman, *Max Weber*, p.123.

²³ S.Ewing, “Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law”, (1987), 21 *Law and Society Review* 487.

²⁴ *Ibid.*, p.499.

²⁵ T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Clarendon Oxford, 1997).

²⁶ T. Murphy, *The Oldest Social Science?*, p.61.

attention to all these technologies and practices that constitute the “conditions of possibility” of modern law. Without purporting to provide an exhaustive list or, indeed, one that coheres historically, he singles out five such technologies and practices, namely: a) *public speaking* as not “one of the frills worn by power” but as the “very aggregate of power”²⁷ b) *rhetoric*: The Glossators were working up lecture materials. Writers of *summae* were preparing textbooks. What was being learnt by students with those aids was the art of disputing. This is unsurprising, perhaps, in a world in which all questions of authority tend to be turned into questions of jurisdiction. { . . . } And, inescapably, questions of jurisdiction meant questions of law and fuelled the articulation of both substantive and procedural rules, which served as emblems, however futile or Canute-like, of who was in charge”;²⁸ c) *the organisation of courts*; d) *writing and print* and the subsequent standardisation and decontextualisation of meaning; e) more recently, the development and expansion of *computers and information technology*, with, among other things, the implicit potential for the formalisation of the decision-making process.

3. Common Law and Discursive Rationality

It is now time to ask whether the claim that common law is substantively irrational could be sustained at all at the time that it was made. Whatever the answer to that question may be, we shall then have to ask whether the thesis is sustainable *today*. I believe that the path opened by Murphy is a very promising one to follow. I shall take on board his suggestion that adjudication should be taken more seriously, when exploring the kind and degree of rationality of a legal system. The trial is the culmination of legal practice in that it is the instance, in which the need to reason practically becomes more pressing than in any other occasion. Still, though, adjudication and the claims raised by judges or, indeed, all the involved parties in its course, is nothing but a starting point, albeit a fundamental one. It serves to observe which reasons are employed and how. With this as a point of departure, we can then turn to the surrounding conditions in the legal system that interact with this kind of rationality and how it affects it. So, unlike Murphy who focuses primarily on the sociological background factors that facilitates the modernisation of the law, I prefer to focus on the conceptual aspect of the law that allowed for all these sociological factors to have an impact in the first place.

Before I proceed, it is necessary to come clear about an assumption that will weave through my analysis from this point forward and cannot be defended in this context but needs to be outlined all the same: I consider the purpose of the law to be the delivery of justice. I take this thesis to be, firstly, at least empirically true, to the extent that all legal systems claim to be aiming at resolving disputes but also organising social co-existence and co-operation not only effectively but also justly. This is also the expectation that the people have from their laws. If a legal system ever openly purported to be permanently and unqualifiedly unjust or to be concerned not with the question of justice but merely with questions of efficiency and expediency, it

²⁷ *Ibid.*, p.64.

²⁸ *Ibid.*, pp.65-66.

would simply not be tolerated by people. But this empirical aspect of the question reveals, I think, an analytical truth as well. A judge passing a decision does not simply decide on the grounds of a means-ends calculation. She always vests her judgment with a further claim to rightness, that is a claim to have delivered a just result. In other words, considerations of efficiency and expediency cannot trump considerations of substantive correctness in the law.²⁹ Therefore, to the extent that law is about *justice*, the reasons that are employed in legal reasoning cannot be merely instrumental but they have to be fully practical. In other words, as is the case in moral reasoning so is it in legal reasoning, that the notion of Reason, of the Kantian *Vernünftigkeit* cannot be fragmented so as to divorce *rationality* from *reasonableness*. Instrumental rationality is or ought to be always put to the test of reasonableness and, if it fails that test, it should be amended appropriately. Of course, the law, as indeed any other human endeavour, is directed towards a purpose. But the way, in which this purpose is to be achieved, is always subject to the test of rightness through the procedure of universalisation. I believe that this is not an altogether unwarranted assumption to make, when discussing the place of the law in Weber's work. Weber's methodology is by and large neo-Kantian, to the extent that he builds upon the idea that knowledge is based on *a priori* categories. However, in a neo-Kantian vein, he contextualises these necessary presuppositions and accepts that they can be culture-specific.³⁰ However, this does not mean that the category of the *law* can be bound to a community's conception of the ends that its members want to achieve collectively but is rather connected to a collective conception of the right. This is indeed what all the cases of laws that Weber surveys in *Economy and Society*. They all converge to the normative commitment of the people to legal rules in the light of justice.

Let me now go on and ask whether the claim that common law is substantively irrational could ever and can still be sustained. My point of departure is that legal practice is argumentative.³¹ When reasoning in law,

²⁹ This assumption clearly points towards Kantian directions and echoes, partially, Dworkin's distinction between policy and principle (R. Dworkin, *Taking Rights Seriously*, 1977, Duckworth).

³⁰ For the neo-Kantian undertones in Weber's work as well as the affinities of his legal sociology with von Ihering's legal theory see: S. P. Turner and R. A. Factor, *Max Weber: The Lawyer as Social Thinker*, (1994) Routledge.

³¹ This thesis has been put forth by various theorists over the last few years. This is how Dworkin puts it: "Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible – because senseless – without a law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims".(emphasis in the original). R. Dworkin, *Law's Empire*, (1986) Fontana, p.13. See also O. M. Fiss, Foreword: "The Forms of Justice", (1979) 93/1 *Harvard Law Review* 1; O. M. Fiss, "Reason in all its Splendor", (1990) 56 *Brooklyn Law Review* 789. Robert Alexy has produced the most cogent account of the law as a discursive practice in R. Alexy, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*, (translated from

judges as well as all the parties involved in a specific case, purport to *convince* an audience about the rightness of their positions and not demonstrate some kind of direct correspondence of the facts of a case to the relevant rule, whichever its source may be. Even if one accepts that deductive reasoning is possible, at least in some cases, in the law, one must still accept that the agent engaging in this deductive reasoning purports to defend the soundness of that reasoning. There is an implicit linguistic distinction here that needs to be voiced more clearly. I said that the parties try to *convince* an audience and not simply *persuade* them. The distinction is drawn by Kant and adopted by Perelman.³² To *convince* someone entails reference to reasons beyond self-interest or the specific circumstances of her existence, whereas to *persuade* her, means to invoke reasons that are valid for her but not necessarily for other rational beings. In view of the unity of reason in all morally relevant practical dilemmas, it must be accepted that what is at play in legal argumentation is an attempt at *convincing* one's audience instead of rather *persuading* it. One (the parties, the judge, the jury) is trying to reach a decision that will be universalisable and valid for all rational human beings.

Recognising the argumentative character of the law has at least two significant implications. Firstly, since legal practice is conceptually connected to the purpose of convincing a certain audience about the rightness and appropriateness of a set of reasons in a specific, real context, it can be differentiated from practices that entail rule following and application but do not involve argumentation. Thus many of the practices that Weber describes as legal would probably not pass this threshold test of discursiveness. For instance, it is very difficult to see how the type of "legal" thought that is guided by charismatic authority, such as khadi justice, can be compared to legal practices such as the common law. The crucial difference is that the former does not aim at *convincing* but it is based on an unquestioned and unqualified *conviction* concerning the divine provenance of rules, the rightness of which is presupposed. It is therefore not a different *variety* of law, the formal irrational kind, but probably a completely different normative phenomenon to legal systems such as civil or common law ones. Therefore, perhaps the Weberian typology ought to be rethought in the light of a more careful conceptualisation of the law.

A second implication of the discursive nature of the law has to do with the kind of rationality employed in law and its limits. It is true that, very often, reason is finite. We simply find ourselves split between two options that do not seem to differ in any relevant respect. How are we supposed to decide in such cases? Things get even more difficult when it is public officials, who are required to make a decision. Some would argue that, in such cases, those public officials cannot but be motivated by their personal preferences, desires

German by R. Adler and D.N. MacCormick, 1989), Oxford Clarendon Press. Alexy's legal theory is rooted in Jürgen Habermas' theory of general practical discourse. See indicatively: J. Habermas, *Between Facts and Norms*, (1996) Polity Press; J. Habermas, *Justification and Application*, (1995) Polity Press.

³² C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (1969), University of Notre Dame Press, p.28.

or emotions.³³ Others argue that the appeal to reason can be suspended and the dispute at hand can be resolved randomly.³⁴ This, the thesis goes, is still a rational enterprise, to the extent that it minimises the economic and emotional cost of the case. These lines of argument share a fundamental shortcoming, namely what Hart has termed “disappointed absolutism”: they expect reason to yield accurate and correct results at all times, so that we can be certain that we have not committed an error. This aspiration, however, is based on a wrong premise, namely that it is possible in most cases to arrive at unquestionably and diachronically right decisions. Therefore, it is only in a minority of cases that we will have to resort to sortition or our personal preferences. But, in fact, it rarely, if ever, is possible to be certain about the absolute correctness of one’s decisions. At best, we can say that we have reached the best decision possible under the circumstances, following the most compelling reasons at our disposal at the time. And in a public forum of practical reasoning, the most compelling reasons are those that would convince any rational being. So, if we take seriously the argumentative character of the law, there is no need to suspend reason but simply emphasise its discursiveness and, of course, allow for the possibility of falsification of our decisions in the future and create those conditions that will make possible the departure from those decisions, if a weightier reason appears.

So, the reconceptualisation of legal rationality as *discursive* deals with the objection that reason meets its limits sooner or later and therefore has to be suspended in one way or another. However, there is a stronger objection that still needs to be dealt with, namely that even discursive rationality meets its limits in the law, simply because the law and, especially the law sanctioned and enforced by the state, is *not discursive enough*. This critique does indeed pose serious problems to legal theories that portray the law as a crucible, which can accommodate all communicative inputs, as a ‘forum of principle’, which will result in the right answer. The law cannot achieve this high a degree of discursiveness. On the contrary, it silences some discourses that it tries to regulate and disenfranchises social groups that develop their own way of understanding the law. Clearly, this critique is much more difficult to reckon with. But it does not have to be dealt with in this context, because it is not directed against the crux of the argument in this paper, namely that legal rationality is *discursive* but rather questions the inclusiveness of the law and demands the repoliticisation of the latter. The argument from the *finiteness of the discursiveness* of the law does not necessarily imply a thesis concerning the argumentative/discursive *nature* of the latter.

A question has been left hanging. If the law is indeed an instance of discourse and argumentation, who exactly is the audience? Those who argue that rationality in the law meets its limits and is therefore either suspended or focuses on outcome rather than procedure, seem to presuppose that the addressees of argumentation in the law are the parties directly or indirectly affected by the decision. If they are kept happy, then the law has succeeded. But, if the law is conceptualised as a discursive venture and the claims to

³³ Legal realists would fall under this category but also those versions of positivism that admit the finiteness of positive law and its meaning.

³⁴ For an argument as to how judicial decision-making can be equally rational, when it happens at random, see N. Duxbury, *Random Justice; On Lotteries and Legal Decision-Making* (1999) OUP.

rightness raised in legal reasoning are context-neutral, then the audience is much wider than the parties involved in the case. Let me use here an idea put forth by Perelman,³⁵ which was adopted and furthered by Habermas.³⁶ When arguing from within the law, the speaker purports to be able to convince a *universal audience* comprising all rational beings under conditions of free discourse. Using as a point of departure the shared faculty of reason, that is the ability to reflect about the conditions of our existence, anyone engaging in legal argumentation attaches a universal claim to truth and rightness to his or her arguments. Even if one subscribes to Weber's neo-Kantian perception of the law, the audience of legal argumentation is universal in the sense that it comprises all those who share the presupposition of what counts as law. Therefore, even if we temper the thesis that the claims raised in law are universal, it will still have to be accepted that arguments will have to be pitched to such a level of abstraction that will be intelligible and acceptable *qua legal* by the specific community.

The argument has been pieced together now. On a conceptual level, in order for it to be shown that common law is substantively irrational in the Weberian sense, it does not suffice to show that judges often appeal to their personal preferences, that legal education has developed in an empirical manner or that the doctrine of *stare decisis* does not inscribe and consolidate rules and principles in the same empirically identifiable way as the big codifications of civil law system. What needs to be proven is that common law is not a *discursive, argumentative* venture with everything that this denial entails. I do not think that this thesis could ever be sustained. Judges in common law do bring forth reasons in the form of arguments and, as Murphy points out, engage in rhetoric. Thus their purpose is to convince not only the parties in a legal dispute as to the rightness of their decision but also the idealisation that is the universal audience, which is actualised, at least to a certain extent, with institutions such as the doctrine of *stare decisis* and the system of appeals. Courts purport to be able to convince with the power of their arguments *any higher or future court* faced with the same or a factually similar case. Thus they attach claims that reach a lot farther than the confines of the specific case. Even when this is not done consciously and explicitly, when asked to justify her decision any common law judge would have to reconstruct her arguments as having universal validity. Even the adversarial system that Weber interpreted as a hindrance to the rationalisation of common law, will be understood as yet another factor revealing and fulfilling the discursive character of common law. And it is upon the universality of those arguments, upon their defensibility *in abstracto*, that provide the bedrock, upon which the systematicity of common law is built. Those principles might not be inscribed but they are still present in common law.

And this flexibility of common law is of paramount significance. As I showed when analysing the Weberian notion of rationality, rational decision-making requires more than simply systemic integrity. A rational decision

³⁵ C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (1969), University of Notre Dame Press; C. Perelman, *The Idea of Justice and the Problem of Argument*, (1963) Routledge and Kegan Paul.

³⁶ J. Habermas, "Was heißt Universalpragmatik?", in Habermas, *Vorstudien und Ergänzungen zur Theorie des Kommunikativen Handelns*, (1995) Suhrkamp.

can only be one that is grounded on the most compelling reason available. It is only thus that the paradox of knowingly doing the wrong thing and the ensuing self-contradiction of admitting the wrongness of a purposefully committed act can be avoided. Clearly, acting on the basis of the best possible reason will sometimes mean that one will have to go beyond a formal set of pre-given rules. Much as such a system may provide *prima facie* reasons for action, these reasons must always remain defeasible.³⁷ Again, much as systemic integrity needs to be maintained, this cannot be done against the demands of rationality.³⁸ To put it very simply, it is not rational for one, even a judge who is *prima facie* bound to a certain extent by pre-existing formal rules, to decide against her better judgement, when, of course, this judgement passes the tests of universalisability. In that respect, not only is common law not substantive irrational but, in fact, it can even be argued that it enjoys a higher degree of rationality than civil law. The method and form of judicial decision-making in common law lends it a flexibility that facilitates the weighing of reasons stemming from the existence of formal rules as well as extra-systemic³⁹ reasons to a much greater degree than in civil law.

So, perhaps, the problem that Weber diagnosed is not conceptual but merely sociological. Maybe common law judges were indeed addressing a universal audience but that universal audience was simply not actualised to a sufficient degree.⁴⁰ Let us accept for the sake of the argument that the doctrine of stare decisis and the appellate system do not provide enough guarantees that judicial decisions were reconstructed and defended against a backdrop of general legal principles.⁴¹ Let also accept that the judiciary was not under close enough scrutiny in the public sphere, that judges occupied a small niche impenetrable by anyone outwith it. Is this still the case today? Can it still be argued on a sociological level that common law is irrational, because of the lack of certain conditions that will facilitate the actualisation of the

³⁷ For a comprehensive account of the notion of defeasibility, which was of course introduced in contemporary legal theory by H.L.A. Hart in legal reasoning see H. Prakken and G. Sartor, *The Three Faces of Defeasibility in the Law*, (2004), 17 *Ratio Juris* 118.

³⁸ One could argue that it cannot go against the requirements of substantive rightness either but this is a different story. For the performative contradiction at play, when a judge pronounces her decision to be morally wrong see R. Alexy, *A theory of legal argumentation: the theory of rational discourse as theory of legal justification*, (translated from German by R. Adler and D.N. MacCormick, 1989), Oxford Clarendon Press.

³⁹ It should be clarified at this point that these reasons that are not bound to formal legal rules are only *prima facie* extra-systemic. However, whether and how they become part of the legal system is a wholly different debate.

⁴⁰ Lord Denning lends himself as an excellent example again. It was suggested to me by Neil Duxbury that the way Denning single-handedly developed the “deserted wife’s equity” shows how important a part personal preferences and convictions play in common law adjudication. Here are a few relevant cases heard by Denning: *Cooke v Head* [1972]CA 1 WLR 518; *Hussey v Palmer* [1972]CA 1 WLR 1286; *Binion v Evans* [1972] CA Ch 359; *Eves v Eves* [1975]CA 1 WLR 1338; *Greasley v Cooke* [1980] CA 1 WLR 1306.

⁴¹ For the need of explicit justification in judicial decision-making, see D. Hellman, “The Importance of Appearing Principled”, (1995) 37 *Arizona Law Review*, p.1107.

universal audience. In what follows I shall take on board some of Murphy's insights, projecting them to contemporary reality and also adding to them. The list should by no means be taken as closed or conclusive. At best, it is tentative, suggestive and rather impressionistic. My aim is to single out some *prima facie* important developments in law, broadly conceived, that reveal the discursive character of judicial practice as well as the tendency to optimise the potential opened up by this inherent discursiveness.

Law and the media: The proliferation of traditional media as well as the emergence of new ones (the Internet, digital television, mobile phone technology) in combination with the growing demand for increasing accountability of all public officials, including judges, seems to have resulted to judicial practice being scrutinised by the wider public to a greater degree than ever. Legal material is readily available on the Internet. It doesn't take more than a simple search in order to find full details of any case as well as the theoretical debate underpinning it. Discussions about cases raising controversial or emotive issues⁴² nowadays do not only take place in the courtroom or the House of Commons. They are dispersed throughout the public sphere and become topics of discussion in various social contexts with the debate revolving not only around the facts of the case but also around the reasons for and the correctness of the decision, without that meaning that all the informational input in such debates is always accurate, well-informed or correct.⁴³ Not only are the details of cases reported but debates over significant legal theoretical problems get more air-time than ever. The significance of this relatively recent phenomenon lies not only in that it makes judges more accountable but it also makes the latter conscious of the actual widening of the audience that they address. Various objections could be raised here. First, one could object that this expansion of the audience simply means that the judges will feel the need to appear principled without actually endorsing the reasons that they put forth. I don't really see how this can be a viable objection, because what it describes is the desirable: that judges put aside their personal preferences in order to decide in a principled manner. Second, it could be argued that, in being too conscious of the popular response to their judgments, judges will only be trying to please their audience instead of applying principles and rules and striving to deliver justice.⁴⁴ This would be a valid objection, if there were no other tiers of

⁴² When this article was in its final stages various such cases hit the headlines: assisted suicide, treatment of neonates with severe health problems, the right of householders to defend their property against burglars and others.

⁴³ It was brought to my attention by Lieve Gies that in the Netherlands some judges are specially designated *press-judges*, whose job is to be the link between the media and the judiciary. The rationale behind the institution is to improve the image of judges by explaining to the wider public what exactly it is that they do and how.

⁴⁴ Again a topical example that explicitly shows that legal discourse concerns principles and defends that character of the law against populism: H. Kennedy, "For Blair there is no such thing as legal principle", *The Guardian*, 27 November 2004. Baroness Kennedy concludes with the following telling paragraph: "However, just law matters. It is the mortar that fills the gaps between nations, people and communities, creating a social bond without which the quality of our lives would be greatly undermined. If we fritter away the principles that underpin law, if we pick them out of the crannies of our political and social architecture,

scrutiny of judicial decisions. But, in reality, there are numerous levels of inspection of judicial decision-making both in the public sphere but also in domestic legal orders and, more importantly, in supranational ones, to which we now turn.

Supranational legal orders: The specialised legal audience that judges must address now is not exhausted in appellate or future courts. The proliferation and expansion of supranational legal orders organising their own courts, means that domestic decisions must be defensible in those higher, international jurisdictions in the light of the principles that lend those supranational orders coherence and also make possible communication between domestic ones. In the UK, visualising this new audience has certainly become easier after the introduction of the Human Rights Act 1998.

Legal Education: Legal education in the UK has of course long become an academic subject. University Law Schools operate rather differently from practitioners' schools. Whether legal academics take a doctrinal/positivistic approach to the law and legal education and see their task as *descriptive* or whether they take a more radically critical standpoint, they go about interpreting and assessing legal decisions in the light of a more or less shared understanding that the concept of the law extends beyond its textuality. I do not want to suggest that what judges decide on the basis of what law lecturers or law journal editors will think of them, but it is important to see how academia and judicial practice have come to closer contact thus facilitating the attainment of the discursiveness of the law to a greater extent than in the past.

My main aim in this paper has been to show that the rationality of common law, which Weber questioned in his typology of systems of legal thought, can be restored if we take seriously the discursive, argumentative character of common law. Like all in all instances of argumentation, the appeal to the universal audience guarantees the emergence of a set of legal principles, which provide the bedrock for a coherent, consistent and discursively rational legal system. Moreover, I showed, albeit in a tentative manner, that the sociological conditions are today more ripe than ever for the actualisation to the greater possible extent of this universal audience. Although it was not possible to raise the issue in this context, I believe that on this basis of this reconceptualisation of the rationality of common law the correlation of the latter with the emergence of capitalism in England can be explained more convincingly. But this clearly requires a separate, careful conceptual and sociological enquiry.

restoration will be impossible. The US supreme court justice, Louis Brandeis, got it right 75 years ago: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." "