

T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA TOPLULUĐU ENSTİTÜSÜ
AB HUKUKU ANABİLİM DALI

A WEBERIAN LOOK AT
THE LEGITIMACY DEFICIT OF THE EUROPEAN
UNION

Doktora Tezi

MELİKE AKKARACA KÖSE

İstanbul, 2007

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Danışman: DOÇ.DR. AHMET ULVİ TÜRKBAĞ

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ABSTRACT

The work focuses on Weberian theoretical approach to modernity and liberalism and applies its findings to the quest of a supranational order for legitimacy. Its main claim is that the Union, despite to the fact that it shows many characteristics of an entity of beyond modernity, still suffers from the dilemmas of modernity and liberalism which have extensively been shown by Max Weber and its legitimacy deficit is to be evaluated in that dilemmatic context. This perspective shows us that the domination relation between authority and subject has not changed much but only developed more in favor of authority and at the expense of layman at our age and especially in the context of the European Union; this is so despite to, in some cases due to, complex and anarchic nature of the supra-national politics.

Keywords: Max Weber, legitimacy, European Union

ÖZ

Bu çalışma modernite ve liberalizmi Weber teorisi çerçevesinde ele alarak bulgularını ulusüstü bir otoritenin meşruiyet arayışına uygulamaya çalışır. Temel iddia, modernitenin ötesine geçen bir çok özelliği içinde barındırsa bile Avrupa Birliği'nin hala Max Weber tarafından ayrıntılarıyla gösterilen modernitenin ikilemlerinin etkisi altında olduğu ve meşruiyet açığının bu çelişkili çerçevede değerlendirilmesi gerektiğidir. Bu perspektif bize çağımızda ve özellikle Avrupa Birliği'nde iktidar ve süje arasındaki tahakküm ilişkilerinin çok fazla değişmediğini hatta sıradan insan aleyhine ve iktidar lehine geliştiğini göstermektedir; ulus-üstü iktidar kompleks ve anarşik doğasına rağmen ve hatta bazı durumlarda bu doğası nedeniyle güçlenmektedir.

Anahtar Kelimeler: Max Weber, meşruiyet, Avrupa Birliği

PREFACE

Writing a PhD dissertation in some respects is a period that you are all alone. You spend days and months with your books and computer. On the other hand, a PhD can never be a work of only one person. This dissertation could have never been written without people to whom I am grateful for their candid support and invaluable help. I like to render my thanks to my supervisor Assoc. Prof. Dr. Ahmet Ulvi Türkbağ, the committee members Prof.Dr. Niyazi Öktem and Prof. Dr. Cemal Bali Akal, for their generous academic support and contributions in this work. I am indebted to Assoc. Prof. Dr. Ülkü Demirdöğen and Assoc. Prof. Dr. Mensur Akgün, and my colleagues at Istanbul Kultur University for their unconditional trust and for all their efforts to prepare the most suitable conditions for such an academic work. My beloved husband with his patience and tender, my family with their assurance and love, and my friends with their understanding are the people who gave me strength and faith necessary to go through in this long and thorny way. I dedicate this dissertation to my father who may be a layman but never an ordinary one.

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ABBREVIATIONS

CFSP	Common Foreign and Security Policy
COREPER	the Committee of Permanent Representatives
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
EEC	European Economic Community
EMS	European Monetary System
EMU	European Monetary Union
EP	European Parliament
EU	European Union
IGC	Inter-Governmental Conference
MEP	Member of the European Parliament
SEA	Single European Act
TEU	Treaty on the European Union
TOA	Treaty of Amsterdam
WEU	West European Union

INTRODUCTION

This dissertation aims to grasp the legitimacy question of a supranational authority, the European Union, by utilizing and tailoring the thoughts of Max Weber to our time. This aim, which seems simple and ordinary at first glance, contains a number of sub-claims and presumptions inside. First of all, adopting a Weberian approach to the European Union may seem anachronistic and even 'useless'. The European Union which is generally seen as a phenomenon that exceeds the borders of the modernity in many senses by re-defining and overriding its core concepts such as nation-state, sovereignty, government and even modern law is the fashionable topic of the contemporary social, political and legal theories. On the other hand, although accepted as one of the most influential theorists of modernity, Weber has already has been a source to many new and influential theories such as Parsons's, Luhmann's, Habermas's, and even to some post-modernist approaches. He is conceived as important but a 'bygone' scholar of modernity for our age. A work on Weber and the European Union challenges the conventional wisdom by two implicit presumptions and claims. First, the idea that the European Union does not fit and can not be comprehended by modern categories and conceptions is challenged. Secondly, the idea that Weber's theory is unfit and outdated for explaining contemporary social and political questions is refuted.

Accordingly, this dissertation has two underlying claims understandable just by reading its title. First, the European Union, despite to the fact that it shows many characteristics of an entity of beyond modernity, is still under the influence of the factors and impasses of the modern paradigms. Secondly, the explanative power and the provisions of Weber's theory go much beyond its own age and illuminate our time. To those two, the presumption that there are parallels between the beginning of this century and the end of it may be added. Both periods show characteristics of a transition period: the first one is transition to modernity and the second one is transition to post-modernity. However, for both, it cannot be said that modernity or post-modernity has launched itself absolutely on the social and political life.

With this last assumption, one more point should be clarified. The first claim does not mean that the European Union is a political entity which resembles or evolves to a 'nation-state'. Nor it is denied that hierarchical/pyramidal structures and conceptions of the modernity has gradually been converted to networks and centre-

plurality by and within the Union¹, at least in part. What is to be understood from the former claim is that the domination relation between authority and subject has not changed much but only developed more in favor of authority and at the expense of layman at our age and especially in the context of the European Union; this is so despite to, in some cases due to, complex and anarchic nature of the supra-national politics. More restriction of political, and even individual, autonomy, does not, at least only, result from the peculiarity of the way that the Union exercises its authority and powers. More significantly, it is because of the aggravated negative influences of modern impasses both in scale and depth. Thus, it is exactly that point where and why Weberian theory may help us to understand the place of ordinary people in a supranational order and in front of a supra-authority; and how the legitimacy question of the EU may be situated and evaluated in the context of modernity problematic.

Interlinked to that but concerning the second claim, Weber's theory attempts to understand the imposed situation and the active role of individual in an increasingly rational modern life. He takes the life as a whole so that he does not restrict himself to the social and cultural life but includes economic, legal, political and religious aspects of life. Therefore his explanations cover many different facets of modernity in various areas of life. Disenchantment with religiously and traditionally dominating ideas and systems together with growing formal rationality and outspreading instrumental approach led by capitalism and science has brought seemingly an expansion in individual freedom. However, the other side of the coin was indicating a restriction in the freedom of choice of individual. What happened was that one domination type has been replaced with the other. The promises of the new domination for equality and freedom have resulted with the formalization of these values. While people get free from the taboos, religious convictions, traditional pressures, discriminative applications of traditional authorities, limitative influences of the customs and conventions, the new structures and orders brought new and more implicit limitations on his freedom of choice and his decisions. Punishment for resisters to adapt to the modern orders would

¹ The plurality of centers and non-hierarchical complexity of politics may be perceived as something negative or positive in terms of freedom and democracy. For that, one may compare the radical difference between the conceptions of Foucaultian concept of 'governmentality'. Please see Chris Rumford, *The European Union: A Political Sociology*, Blackwell Publishing, 2002 and Michael Hardt and Antonio Negri, *Empire*, London: Harvard University Press, 2001. Although both of the books share the idea that the classical modern theories such as Weberian one are no more suitable to understand the center-less conditions of the authority, the changes led by the new conditions on the authority-individual relations are evaluated in opposite ways.

come as a logical conclusion of system's formal rationality, as if it is a natural event. Additionally, the value-freedom and plurality owed their existence to having lost their firm bases such as tradition and the God- namely with disenchantment. Unfortunately, the new God of the Enlightenment, namely human reason, was helpless about the value-choices. It was becoming more and more difficult for individuals to believe in something and to find a deeper meaning for their ordinary lives. The modernity came with existential crises.

It is these dilemmas of modernity which I believe that stay unsolved and augmented. The Union and its member states are not free from them and in that sense the burden of modernity is there, over the legitimacy question and existential crises of the Union with its full weight. And that's partly how Weber relates to the Union. Secondly, Weber's theory analyses the rise of capitalism as an economic system and liberalism as a system of thought and the influence of those on the other life-spheres extensively. That's why I argue that Weberian theory has the power to explain the difficulties that the European Union, starting as a liberal economic project, encountered while establishing a political area with its own society and specific-legitimacy.

Lastly, this work is not the first text which applies Weber's approach to the contemporary questions² and the idea that the Union still suffers from the ambiguities of modernity has been already spelled. For example, Martin Albrow is one of the authors who apply Weber's theory of rationalization to contemporary conditions and he claims that 'Weber's theory of rationalization has enormous relevance to contemporary conditions and has even proved prophetic'.³ Scott Lash also finds Weberian theory directly linked to contemporary social theory and therefore relevant for twentieth century law and politics.⁴ Similarly Richard Wellen asserts that the aim of his work is to

² See also Stephen M. Feldman, 'An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law', *Law and Social Inquiry*, No.16, 1991, pp.205-248, which is an analysis of contemporary American constitutional theory and adjudication. Steven Pfaff uses Weberian theory of charismatic leadership onto Post-Communist transitions. See Steven Pfaff, 'Nationalism, Charisma, and Plebiscitary Leadership: The Problem of Democratization in Max Weber's Political Sociology', *Sociological Inquiry*, Vol.72, No.1, Winter 2002, pp. 81-107

³ Martin Albrow, 'The Application of the Weberian Concept of Rationalization to Contemporary Conditions', in *Max Weber, Rationality and Modernity*, Scott Lash and Sam Whimster (Eds.), London: Allen&Unwin, 1987, p.164. However, Martin Albrow, in a later work, claims that our epoch is beyond modernity and shows the difference between the modern age and the global age. *The Global Age: State and Society Beyond Modernity*, Cornwall: Polity Press, 1996

⁴ Scott Lash, 'Modernity or Modernism? Weber and Contemporary Social Theory', in *Max Weber, Rationality and Modernity*, Scott Lash and Sam Whimster (Eds.), London: Allen&Unwin, 1987, pp. 355-377. Lash separates

show 'how the challenges Max Weber posed might help us better understand what is actually at stake in contemporary criticisms of liberalism'⁵. For the latter idea, Prof. Weiler writes that:

'Early at the end of the century, the European Union can be seen as replicating, in reality or in the subjective perception of individuals and societies, some of these very same features; it has come to symbolize, unjustly perhaps, the epitome of bureaucratization and, likewise, the epitome of centralization. One of the most visible policies, the Common Agricultural Policy, has had historically the purpose of "rationalizing" farm holdings which, in effect, meant urbanization. The single market, with its emphasis on competitiveness and the transnational movement of goods can be perceived as a latter-day thrust at the increased commodification of values (consider how the logic of the Community forces a topic such as abortion to be treated as "service") and depersonalization of, this time, the national market. The very transnationalism of the Community, which earlier on was celebrated as a reinvention of the Enlightenment idealism is just that: universal, rational, transcendent: wholly modernist.... That the Union has ceased to be a vehicle for its foundational ideals and has thus become a contingent being and experience removed from a normative framework just gives a fashionable "post-modernist" twist to modernist anxiety.'⁶

The claim that the legitimacy deficit the Union has to face is not a phenomenon specific to this *sui generis* supranational polity may be supported not only by locating the problem in its historical context with modernity but also in its global/local context. The Union is not the only polity in crises. But it is the only one with this scale and this form. It is not only the Union but also the nation-states are in a crisis of legitimacy and democracy. Paradoxically, the EU as an element of globalization is one of the factors which aggravate the democratic crises of the member states. On the other hand, it is the Union where these crises make themselves much more evident comparing to the nation-states for a number of reasons. Its scale and form which contain a diversity of cultures and a plurality of political methods and layers just deepen its legitimacy and democracy deficit. Comparing to the nation-states, the Union is a polity in radical transformation from an economic integration to a political union; neither its objective nor its *raison d'être* is settled down clearly. Additionally, there is no social or political consensus yet on its general objectives, values and even on its form and reasons of existence. What is even more problematic for the Union is the question of what kind of democratic procedure is acceptable, legitimate and feasible for reaching a consensus on those

modernism from modernity: modernity belongs to the Renaissance and Enlightenment whereas modernism belongs to the late nineteenth century and early twentieth century. Weber belongs together with Habermas, Foucault and Daniel Bell to the latter understanding.

⁵ Richard Wellen, *Dilemmas in Liberal Democratic Thought Since Max Weber*, New York: Peter Lang Pub., 1996, p.1

⁶ J.H.H. Weiler, 'Fin-de-Siecle Europe: do the new clothes have an Emperor?', in *The Constitution of Europe*, Cambridge: Cambridge University Press, 2002, pp.260-261

undetermined polity elements. In any terms, whatever long-term objectives or common policies which Union will adopt, it needs the support of people for their applicability.

I would like to sum up my arguments defending the approach and the aim adopted by this thesis. Although the nation-state has transformed under globalizing influences, the relations between people and authorities which have been shaped by modern conditions of life, by modern practical and theoretical rationality, still may be understood by making use of the modern dilemmas that Weber shows us in depths in his writings. Secondly, the transformation of authority-subject relations within the context of the modern state may be traced more easily if we know the original defects of this relation. Thirdly, neither the democracy nor legitimacy question of the European Union is independent from the Member States which it is composed of. Fourthly, as I underlined before, I advocate that the crises of the Union should be located into its external and historical context, in this sense neither theoretically nor practically it is independent from the context of modernity. Despite to all *postmodern* elements surrounding us and being found within the Union, we are at an age that postmodern and modern coexist together. Fifthly, Weber is both one of the most important theorist and *critique* of modernity, a factor which places him in between modernity and post modernity.

Maybe the last question I have to answer is that why I did not establish my theory on Habermas instead of Weber. It is true that there are many similar points that Weberian and Habermasian theories share. Habermas also points out the weaknesses and dangers of modernity, in particular of capitalism and bureaucracy. Yet in many ways, especially in his last works he is much more cooperative, affirmative and optimistic with the current dominant system. His communicative rationality as a theoretical tool allegedly coincides with the current practices at the democracies and at the Union in the appearance of deliberative model of democracy. This idealistic conception of reality seems to me, as the failure of the Constitutional Treaty shows, unconvincing, or, too optimistic – let alone that from the perspective of ordinary people and me, deliberative model is too elitist. It does not mean that Habermas has no place in that work. On the contrary. In the chapters about Weber with his critiques and in the chapters about the Union with his deliberative theory Habermas is not neglected at all

although this will not be satisfactory for one who expects to understand Habermas in its full strength.

Coming to the methodology assumed in this work, it needs more explanation how Weber's theory will be used while analyzing the Union as a case study. In overall, Weber's importance for the Union lies at that he shows us the problems and dilemmas which occur at social and political life when economic liberalism combine with modern mass democracies in the context of positivism and rationalism . Weber puts a light on the understanding of authority and individual at our age. Yet, it does not mean that I follow Weber without questioning or criticizing him. On the contrary, the first part of this thesis is both an analytic and a critique of Weberian approach. Although he himself was hypercritical of modernity and enlightenment, he was still a part of it in his way of thinking. Let us look at the question of legitimacy. Weber mainly conceives legitimacy on the basis of authoritarian claims not through the beliefs of people. One main reason of it is that ordinary people- masses- have no chance or role at politics, according to him. It cannot be. It should not be. He is also very pessimist about the future of values and substantive rationality. Politics is mainly a field of interest-conflicts. And only a charismatic leader who would address to the emotions (not minds) of the masses could change this situation. The masses are a real danger for a polity with their irrationality. His conception of politics is an elitist one. First, this was his observation about the reality. And secondly there was no other reasonable alternative under the modern conditions and with such irrationality of people. This approach is not only defect of Weberian theory but also defect of the modern political paradigm. That's why we can understand the gaps in theory and reality through him.

The reasons for re-interpreting Weberian theory in the first large part of this thesis are based first of all on the fact that there are many versions of his theory as interpreted by different authors. Some of these works only take a few of his original writings and make an evaluation of his theory as a whole. Or they only focus on the some parts of it by neglecting the other parts. Even if some works do not have these deficits for the aim of this thesis, the comments and conceptions of him are so diverge from each other that it is very difficult to decide objectively which one is the more 'correct' reading of him. Admittedly, this incoherency between the secondary works on his thoughts also results from the ambiguity of his writings. At some parts, it becomes

very thorny to decide whether he praises the modernity and rationality or degrades them. Actually he makes both of them and it is the modernity which is ambiguous in his eyes. It does not mean that mine is 'the right' reading of Weber. First of all, my reading is, as all readings are, also selective. Secondly, there are explicit opponents of a coherent and structured understanding of his theory. Creating a systematic whole and meaning from his writings is, according to them, artificial since these writings are not only as content but even at their compilation as a book unsystematic.

The choice for covering most of his thoughts instead of focusing only on the legitimacy and political writings is linked to some substantive concerns. The legitimacy as a topic and concept cannot be studied in isolation from the rationality conception and modernity analysis in over all of Weber. The individual and masses in politics may only be understood properly if their situation in other life spheres is also studied and understood. Questions about legitimacy and authority may not be thought independent from the loss of meaning and of freedom thesis of Weber. Ordinary people in politics are the individuals of the modernity surrounded by the iron cage of rationality. In short, legitimacy problem is not only a problem of politics but a part of a larger problem linked to society and individual. In another perspective, 'political' covers every area of the life. Lastly, it might not be very healthy to focus on the legitimacy problem of the Union without evaluating and re-defining it from Weberian perspective and to be able to do that, much larger theoretical context is needed.

I have already underlined that Weber, despite to his disapproval of many consequences of modernity, and his theory is modernist, rationalist and positivist. This disadvantage turns into an advantage if consciousness about this fact is not lost. What separates Weber from other similar theorists may be his straightforwardness and honesty about the presumptions of modernity and rationality, e.g. even 'the objectivity in social sciences' is a sign of this honesty. This honesty even more facilitates to benefit from this disadvantage. Modern paradigms of which I claimed, the EU is still under influence may be traced not only at the approaches of the politicians and officials to the EU but also among the academicians. It may be found not only at the way how the Community evolved and developed under the leadership of those groups but also at the solutions proposed by them for the 'problems' this supranational entity encountered on the way such as 'democracy and legitimacy'. For me, more specifically how they

conceive the ordinary people and what role they ‘confer’ in politics and at law-making. Weberian modernism together with his anti-modernism becomes a useful tool to clarify the real reasons of European dilemmas. Just to give some examples for the possibility of that, it would be enough to look at the top-down elitist approach of the Union until 2000, the proposal for a charismatic leadership for the Union, information gap in the public about the Union, the demagogic experiences with the Member State leaders in presentation of the Union (so-called Brussels).

Concerning methodology, last point I like to explain is the disciplinary question. In the thesis, a multidisciplinary approach is adopted. The work follows a path in between legal sociology, legal- political philosophy and sociology general. In this sense, it refutes the modernist rigid separation between the subject-areas. Specialization in a particular discipline and a ‘pure theory’ are mottos of positivism and modernism, which make the science and the theory blind at some spots. However, I am also aware of the terminological danger of this path, which we may call linguistic problem between the areas of study. This linguistic problem may become a threat of ambiguity of meaning for the concepts used and for the all thesis. I attempted to evade from this threat in two ways. The first is that I stick into definitions of Weber for some concepts and secondly I made explanations for the concepts that I used independently.

Before drawing the skeleton of the thesis, I just like to add something about the originals I used. Unfortunately, I had to make my research with the English translations of German writings of Weber. Therefore I gave short information at some footnotes on the discussions between translators for the translation of some important Weberian terms. I also tried to compare the contexts at which Weber uses the same term and different definitions he provides in order to carry the discussion from the level of translation to the level of meaning.

This work is composed of two main blocks. The first part focuses on Weber’s sociology and divided in itself according to the Weberian category of life-spheres. First section of the first part is an introduction to Weberian sociology. In addition to his methodological approach, the main concepts of his sociology are defined and explained. It especially focuses on the concept of rationality which is the core concept of his theory

and analyses the types of rational actions and their possible hybrid forms.⁷ In the same section, the concept of life spheres as Weberian system approach is evaluated together with system rationalities which are qualitatively different from action rationality. The process of rationalization, in other words, how the world orders autonomously and independently develop, is studied together with disenchantment process. Therefore, this first section examines the transformation of religious sphere and its influence on the rationalization of life and other life orders. With the secularization of religiously ordered life, independent life orders become more and more autonomous and fall into an enduring conflict with religious and ethical rationality. In this sense, the section covers not only the main concepts but also the occurrence of the main themes of Weberian thought such as modernity and rationality.

The second section focuses on economic sphere. Perception of capitalism by Weber and its relations with self-interested instrumental rationality is extensively discussed. Formal system rationality of economic sphere is compared with the substantive rationality of socialism. The religious origins of capitalism in the West and the relation of capitalist spirit with protestant ethics are summarized. The section ends with a discussion of capitalist system in relation to individuals. It is concluded that although Weber finds the capitalism suitable to utilitarian human nature, he still thinks that economic system's rationality does not let any other kind of choice or concern to survive, except instrumental action.

The third section of the first part focuses on political sphere. Main political concepts such as state, power, domination, authority, validity and legitimacy are defined and studied in details. Especially the relations and distinctions between obedience, validity and legitimacy in Weber's thinking are analyzed especially to grasp better the concept of legitimacy. The possible bases of the legitimacy of an authority and their meanings both for the authorities and subjects are discussed. The section lastly concentrates on the authority types and the relations between rulers and subjects in different types of domination. Lastly, the concept of legitimacy is re-evaluated in the light of the whole section and possibility of hybrid bases of legitimacy is underlined. A

⁷ This thesis does not deal with the historical context and theoretical background which Weberian theory is based on. This has already been done by Emel Öztürk Karagöz in its full details. See *Max Weber'de Anlayış Sosyolojisi ve Din Olgusu*, Istanbul: Derin Yay., 2003

much discussed missing category, value-rational authority, is the last subject of the section. An inquiry for the reasons why Weber takes the value-rationality authority out of the category is followed by the possible meanings of value-rational authority in Weberian theory.

The fourth section is on legal sphere. The concept of law and its difference from customs and conventions according to Weberian theory are examined. Modern law as a rational formal system is studied extensively. Formal and substantive rationalizations of law and its evolvement into a modern system are investigated both historically and with factor-analysis in Weberian perspective. At this section, the conception of natural law by Weber is very significant in order to understand both the value-rational bases of legitimacy of modern law and their following disintegration. The conflict between formal rationality and substantive rationality at the sphere of law is another significant topic for the aims of the thesis. Formal freedom, equality and justice are defined separately from their substantive meanings. Anomalies in formal legal rationality as a still-valid discussion is explained as Weber theory perceives it. Lastly, the limited role of ordinary people in front of the formal legal rationality is considered together with Weber's ideas about the laymen and masses. The role of ordinary people in creation of legal norms is only studied from the perspective of formation of social norms.

Mass democracies and ethics of politics are the subjects of the last section of the first part. This section starts with the definition of direct democracy and its inescapable transformation into aristocracies. Meaning of democratic legitimacy which originates from charismatic authority is inquired. Democracy changes radically and loses its original meaning with mass modern states so that Weber calls mass democracies as 'hybrid forms of administration'. In representative mass democracies, neither elections nor parliament and political parties are able to rescue democracy to turn into bureaucratic domination. The uncompromising togetherness of bureaucracy and democracy is detailed by the specific characteristics of bureaucracy. The democracy model of Max Weber which is proposed for the modern societies, plebiscitary democracy, is analyzed with the help of Weber's political writings. The perception of masses as threat to democracy even for this model is striking as a sign of strong elitism. The section lastly reviews the ethics of politics in Weberian thought. Ethics of politics is

located in the general understanding of Weberian ethics. Mainly two types of ethics, ethics of conviction and responsibility, are compared by using Kantian ethics a yardstick. More specifically, ethics of the political leader indicates to an ethic which is a combination of purpose rationality with values and with a feeling of responsibility for choices. Weber's solution for loss of value and meaning in political life is nationalism. The concept of nationalism as an 'objective' value and the intellectual and historical reasons for this Weberian choice are explained in details.

The second part of the thesis is the application of Weber's theory on the Union's legitimacy deficit. In general, a chronological approach is assumed in this part. From the establishment of the European Community until the constitutional crises, the development of the Union is followed stage by stage. For each stage, the main relevant theories which try to define the supranational entity are shortly introduced. Apart from this, the sections aim to conceive each step of the Union and the relevant theories with a Weberian look. The ideas and objectives of main actors from administrative and political sphere as well as from the intellectual strata are evaluated on the basis of conclusions arrived at the first part about the sociology of Weber. Specifically, each stage of development for the Union refers to a specific conception of legitimacy and a, successful or unsuccessful, search for a particular legitimacy base. Accordingly each theory included in this part is also analyzed according to its legitimacy definition for the Union, together with the critiques against considered theory. This part ends with a general Weberian analysis of legitimacy deficit of the Union, using Weberian categories for the legitimacy bases. Lastly, Habermasian theory, and deliberative model of democracy and identity is briefly explained by a special emphasis on its differences and similarities with the Weberian one.

Accordingly, the second part of the thesis starts with the establishment of the European Communities as a liberal economic project. The dominant instrumental rationality of this entity is considered as the source of new autonomous supranational spheres with their formal rationalities. The ordo-liberal theory is analyzed as explanatory for this first stage of the Community. Accordingly, the legitimacy bases of the Community are formal and market-based efficiency and success. The second stage starts with the Single Market Act and refers to an increase in supranationality and in authority of the Community. Regulatory model as the theory of this stage is studied and

reviewed. The legitimacy bases of this stage are administrative and technocratic rationality. The third stage is starts with the Maastricht Treaty and refers to the radical step at the political sphere. Transforming from the Community to the Union aggravates the legitimacy deficit of the Union. The legitimacy in crises becomes even more apparent with the referenda for ratification of the draft Treaty. The proposals for more legitimate governance cover a wide range of theories but the section especially puts an emphasis on the question of identity and deliberative supranationalism. The proposed bases of legitimacy range from democratic legitimacy to a common identity. With the Treaty of Nice, the fourth stage of the Union starts. This section examines the efforts of the Union for last seven years in order to repair the lost connection between the supranational authority and the people it regulates. The characteristic of this stage is its special focus on greater political participation and stronger democracy. This stage is marked with writing a charter of fundamental rights and a constitutional text for the Union. Not only the content of these texts but also the method by which they have been prepared- 'the convention'- is seen as having legitimizing power for the Union and its objectives. From the perspective of Habermasian theory, an active public sphere and a common civil identity are perceived as the missing bases of legitimacy. This part ends with evaluation of the new legitimizing tools and theories with possible weak points of them in theory and in practice.

PART I: EXPLORING WEBER

I. UNDERSTANDING WEBER

‘In fact, writing on Max Weber’s scholarly achievements reminds one of ‘shooting at a moving target’.⁸

Weber contributes to social theory trying to understand society and individual under modern conditions, with his special emphasis on modern capitalism, religion and rationality. Especially the concept of rationality in Weber has attracted attention of many social theorists. ‘It is rationalization, not capitalism per se which for Weber lies at the root of the modern world order and the reasons for this are to be found in various peculiarities of the West. Capitalism is but one theatre among others in which the drama of rationality is played out.’⁹ Due to theoretical centrality of the concept, I claim that how someone understands and interprets Weber in overall is largely determined in the light of how one understands its meaning in Weberian theory. Therefore I will begin my inquiry to his theory by exploring the meaning(s) given to “rationality” by him.

Many authors have claimed that it is difficult to find one rationality definition all through Weber’s works but many.¹⁰ My main claim in this section is that not a variety of meanings Weber refers by the term of rationality but how he classifies the rationality into different types, in the context of social action, matters more in order to comprehend the rest of his works. For Weber, only two ideal-types of social actions are rational among four, and rational action is divided into two forms from the beginning, as value-rational and instrumental rational. The common element between two forms of rationality is a subjective one, which is conscious, deliberate and systematic attitude adopted by the actor towards the social action, in terms of means or ends, or both. On the other hand, as ideal-types, these rational actions are found in empirical world, frequently in quite hybrid forms.

What is most significant for the aims of this section is that instrumentally rational action may have mainly two and reciprocally exclusive types of ends. One of

⁸ Ilse Dronberger, *The Political Thought of Max Weber: In Quest of Statesmanship*, London: Meredith Corporation, 1972, preface, p.vii

⁹ Derek Sayer, *Capitalism and Modernity: An Excursus on Marx and Weber*, London: Routledge, 2001, p.134.

¹⁰ See Arnold Eisen, ‘The Meanings and Confusions of Weberian ‘Rationality’, *British Journal of Sociology*, Vol.29, Number.1, March 1978, pp.57-70. See also, Walter L. Wallace, ‘Rationality, Human Nature, and Society in Weber’s Theory’, *Theory and Sociology*, Vol.19, No.2, April 1990, 199-223, especially pp.199-201

them is utilitarian ends in terms of self-interest and the other is value-rational ends in terms of conscious beliefs.¹¹ In the latter form, instrumental rationality may be used at the service of value-rational ends for deciding about the means to be used. If it is understood that Weber uses the term of social action not only as one concrete act in time and space but also a series of acts with an end, it will be easier to understand that hybrid form of instrumental-value rational action.¹²

Since there is a certain tension between instrumental rationality and value rationality, the hybrid form of actions are observed in a scale with certain degrees of mixture. The main tension between two forms of rationality arises from the basic difference between them, which is the calculation of the results and the possible following effects of the planned action. Instrumental rationality does not only compare the means in terms of efficiency but also the ends according to their secondary results and success potential. On the other hand, value-rationality rejects to discuss or compare the ends analytically and critically. In the hybrid form, as the motive approaches toward the instrumental rationality, even the value-rational ends are evaluated.

I.I Basics of Weberian Sociology

For Weber, sociology as a science finds the source of its objectivity in subjectivity and the source of 'social' in individual. Social action, the subject-matter of sociology, is an action only if the acting individual attaches a subjective meaning to his behavior and social only if this *subjective* meaning takes account of the behavior of others. Weber admits, from the beginning, the limits of objectivity for sociology as an empirical science of action (ES, p.4)¹³. The subjective meaning that sociology attempts to objectify is not an objectively correct or metaphysically true meaning. In this sense,

¹¹ Walter L. Wallace in 'Rationality, Human Nature, and Society in Weber's Theory' does not consider any difference between these rationalities. He argues that they only differ in the origin of the value or end which they seek means (p.200). I refuse this argument for several reasons that I will explain in the following sections. Yet, my main reason to refute his argument is that value-rationality in its pure form does not compare the ends and very rarely compares the means. Additionally, value-rationality uses again some values to choose the means, not some standards like effectiveness. (Wallace, p.211)

¹² L.M. Lachmann, *The Legacy of Max Weber*, Berkeley: The Glendessary Press, 1971, pp.17-47, makes a similar evaluation about Weber's method of interpretation and reconstructs Weber's theory so that he shows that the meaning of the action lays in the plans of the actors. The notion of 'purpose' may be changed with the notion of the 'plan'. The plan is the coherent design behind the observable action in which the various purposes as well as the means employed are bound together (p. 20). Weber himself defines value-rational action as *the consistently planned orientation of its detailed course to ... values*.

¹³ Max Weber, *Economy and Society*, G.Roth & C. Wittich (Eds.), Berkeley: University of California Press, 1978 (ES)

social action always carries an implicit reference to consciousness and intention of the actor.

The thick borders, drawn by the limited definition of social action, around sociology narrow considerably the area which a sociologist could understand, interpret and explain. Additionally, in practice it is not very easy to put the line between the reactive behavior and meaningful action. *A very considerable part of all sociologically relevant behavior ...is marginal between the two* (ES, pp.4-5). Additional difficulty sociology that encounters is rarity of the cases in which individual is in full consciousness of the subjective meaning of his action. Only occasionally the subjective meaning of the action, whether rational or irrational, brought clearly into consciousness. But sociologist *may reason as if action actually proceeded on the basis of clearly self-conscious meaning* (ES, pp.21-22). At the end, sociology attributes a hypothetical meaning to social actions through pure ideal-types.¹⁴

Weber classifies the social action according to the motive that leads individual to that action and we have 4 types of action accordingly:

(1) *Instrumentally rational (zweckrational), that is determined by expectations as to the behavior of objects in the environment or of other human beings; these expectations are used as 'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends;*

(2) *Value-rational (wertrational), that is determined by a conscious belief in the values for its own sake of some ethical, aesthetic, religious or other form of behavior, independently of its prospects of success;*

¹⁴ 'For Weber, the ideal type was the chief instrument of causal analysis in society...it is obtained by a process of abstraction and must therefore be relatively empty of content when compared to reality...The ideal type is essentially a measuring rod. When we use an ideal type we stand at a distance from reality, but for precisely this reason are able to gain knowledge of it: 'By indicating magnitude of approximation of an historical phenomenon to one or several of our concepts we can order this phenomena.' In other words, the ideal type serves the purpose of ordering concrete phenomena in terms of their distance from it (Lachmann, pp.26-27). Tracy B. Strong, in 'Weber and Freud: vocation and self-acknowledgement', *Canadian Journal of Sociology*, Vol.10, No.4, 1985, 391-409, makes an interesting assessment of ideal-types from psychoanalytical perspective (see. pp.396-398). 'The ideal type functions both to make a world available to us and to let us know what can be done in and with that world...knowledge based on ideal types is for Weber objective in the sense that it orders the world such that we can see ourselves as we are- as the source of our meaning. It further reminds us that it is *our necessary human burden and gift* to make sense: the more sense we know ourselves to make, the more human we can acknowledge ourselves to be.' (Strong, p.397)

(3) *Affectual (especially emotional) that is determined by the actor's specific affects and feeling states;*

(4) *Traditional, that is determined by ingrained habituation.* (ES, pp.24-25)

This classification may be read as a hierarchical scale going from rationality to irrationality. According to Weber, it is easier to comprehend and interpret rational types of social actions than the irrational types. Purely traditional behavior is a marginal case between reactive behavior and meaningful action. It is indeed often on the other side (ES, p.25). It is very often almost automatic reaction to habitual stimuli. In this sense, it is both unconscious and irrational. Affectual actions are 'irrational conducts' that grow out of emotional reactions such as anxiety, anger, ambition, envy, and so on (ES, p.6). For Weber, affectually determined actions are derived from irrational motives (ES, p.9). We are able to understand the subjective meaning of such actions if we're susceptible to these reactions or emphatically we may reach an emotional understanding and intellectual interpretation about the meaning, to a certain extent (ES, p.6).

Concerning value-rational actions, they are *clearly self-conscious formulation of the ultimate values governing the action* but they also *often cannot be understood completely* (ES, pp.25, 5). Weber states, *the more radically they differ from our own ultimate values, the more difficult it is for us to understand them empathically* (ES, pp. 5-6). According to Weber we may have a purely intellectual understanding of those values. It seems that "purely intellectual understanding" means not to share the subjective state of value-rational person and not to adopt a common attitude towards these values. Therefore we are not able to understand the subjective meaning-complex thoroughly through purely intellectual understanding. This may be called "subjective rationality" in the sense that it is conscious and rational but only for the individual himself, but not universally accepted. Therefore it lacks of the objectivity necessary for full scientific comprehension. As Brubaker states, subjective rationality depends on clarity and self-consciousness of the actor's inner orientation, objective rationality on the extent to which action measures up to an objective standard.¹⁵

¹⁵ 'Judgments of objective rationality, Weber argues, are possible only from a technical point of view- only when the problem is to determine the most rational means to precisely specified end.' Rogers Brubaker, *The Limits of Rationality: An Essay on the Social and Moral Thought of Max Weber*, London: George Allen&Unwin, 1984, p.5.

Lastly we have instrumentally rational actions. We have a perfectly clear understanding of what a person doing when he tries to achieve certain ends by choosing appropriate means on the basis of the facts of the situation.¹⁶ But why do we understand instrumentally rational actions more clearly than the others? Weber gives us two vague reasons: because experience has accustomed us to interpret them and because it contains a logical train of reasoning according to “*our accepted modes of thinking*”. Instrumentally rational actions are as rational and clear as mathematical theorems. This is especially true for understanding of the choice of means in instrumentally rational actions (ES, p.5).

Here the phrase ‘our accepted norms of thinking’ is important. By this phrase could we reach to the conclusion that for Weber’s rationality is context and time-bound? Or again it carries its objective existence just because it is subjectively shared by most of the people? A similar statement by Weber may be read in the definition of a motive: *A motive is a complex of subjective meaning which seems to the actor himself or to the observer an adequate ground for the conduct in the question* (ES, p.11). Whether it is adequate or correct is decided upon according to *our habitual modes of thought and feeling*. This kind of adequacy resembles to the correct solution of an arithmetical problem according to *our current norms of calculation or thinking*. The conclusions we may reach from these quotations are numerous but we may at least conclude these two: objectivity in social sciences depends on how much it is shared subjectively and, rationality, even the formal one, is time and place-bound.

Yet, it is still the formal/instrumental rationality, which is used by science due to its certain degree of objectivity comparing to value-rationality¹⁷. Weber admits that objectivity in sociology is something not similar to positive sciences but always something approximate and unverifiable. Additionally, although he suggests a rationalistic method for sociology, *it certainly does not involve a belief in the actual*

¹⁶ Anthony T. Kronmann, *Max Weber*, London: Edward Arnold Pub., 1983, p.23, explains the instrumental action as follows: ‘For an activity to be purposive one as Weber uses that term, it is not enough that it have an end in this very general sense. An activity is purposive, according to Weber, only when the person engaged in it has in his mind an idea of the end toward which the activity is directed and when he is guided, in his conduct, by his ideational anticipation of the end and by a rule or method for attaining it.’

¹⁷ Similarly Peter Breiner, *Max Weber & Democratic Politics*, Ithaca: Cornell University Press, 1996, p. 113, calls value-rationality subjective rationality and instrumental rationality objective rationality. For Weber, things are never rational or irrational in themselves: They are rational or irrational in relation to something and from a particular perspective. Even objective rationality is meaningful in relation to the calculability of the consequences.

dominance of rational elements in human life. If objective explanation is most easy with instrumental rationality, we may try to understand the rest by constructing our model on instrumental rationality. The rest will be deviations, which is the contrary of real life. But Weber tells us that this method not a positive valuation of rationality. (ES, p.18) In conclusion, social action is the central subject matter with the yardstick called instrumental rationality because it provides the science of sociology with the status of objectivity.

I.II Value-rational and Instrumentally-Rational Actions

At first look, it seems that main difference between instrumental rationality and value-rationality is the nature of their working mechanisms. Value rationality has a static and fixed nature, whereas instrumental rationality is flexible and dynamic. An actor whose conduct is determined by an instrumental motive calculates and acts according to (his subjective understanding of) the conditions of the reality surrounding him. Therefore he may choose among a variety of ends and means. While choosing some of them, he uses the criterion of the probability of success and takes into account the possible afterwards effects of the action. The probability and afterward effect calculation again depends on the how one grasps and interprets the reality and on his subjective expectation about the others' behaviors.

On the other hand, value rationality is not condition-contingent. It is based on a belief, though self-conscious one, which does not change according to context or success expectations. This mechanism creates a static core. Source of the value may be religious, ethical or aesthetic etc. A result ulterior to it is not taken into account. Weber states that value rational action is motivated by *unconditional demands*. It is not something occurs very frequently, but only to a relatively slight extent. Actually, *the meaning of the conduct does not lie in the achievement of some goal ulterior to it, but in engaging in the specific type of behavior for its own sake.* (BCS, p.60)¹⁸

¹⁸ Max Weber, *Basic Concepts in Sociology*, H.P. Secher (Trans.), New York; the Citadel Press, 1962 (BCS). Wallace claims that no action can be an end in itself in Weber's eyes. Duty, honor, beauty are the ends of value-rational action. 'Rationality, human nature, and society in Weber's theory', p. 203 To me, such an interpretation is not compatible to Weber's theory and to his own statements. Personal understanding of duty, honor or ethics is what makes an action valuable in itself. They are the meaning of the conduct, not an ulterior end to it. Actually, the claim of Wallace above is not independent from his claim on Weber's rationality definition. According to him, rationality in Weber means *consciously rule bound comparison and choice among alternative means to a given end* – thereby Wallace attempts to prove that value-rationality is rational since it involves the choice of the action which is allegedly

There are two important questions: What makes the value rational action rational while it is based on a belief? And is it enough that something is self-conscious to be rational? While Weber explains traditional and affectual social action, he urges us that when they're upheld in a degree of consciousness, they're on the road of rationality. On the other hand he emphasizes for value rationality that *clearly self-conscious formulation of the ultimate values and the consistently planned orientation of its detailed course to these values.*¹⁹ Concerning instrumental rationality, the vital question is according to which criterion the ultimate ends of instrumental rationality are determined? Value rationality is clear in this sense because the values determine the ultimate ends or even the valued action itself is the ultimate end but when the action is instrumental, it should be instrumental to something else. Actually Weber very precisely explains the answer.

One important passage in *Economy and Society* gives us the key for the rest of the book. (ES, p.26) *Action is instrumentally rational when the end, the means and the secondary results are all rationally taken into account and weighed.* Instrumental rationality has a variety of criteria to determine the end or and the means; success, the possible means, importance, expectations from external environment, the secondary consequences of the action and so on. So many factors are compared and rationally calculated. Still instrumental rationality needs an ultimate standard (motive) beside these empty formulas. There are two main ways to determine the ends. One is to weigh and compare the ends and even their consequences in a value-rational manner. The

a means to the value-end. p.206 However this definition fits to neither instrumental rationality nor value-rationality. This is definition of what Weber calls technical rationality. Additionally Wallace does not differentiate between the criteria of the means/ends selection and the ultimate end. (see p. 208) It is true that the ultimate end is a determinant of the criteria but still they are not the same things. In its pure form, the ultimate motive of instrumental rationality is self-interest. To achieve results suitable to the self-interest serves as a criterion of success in the choice of means and even of the ends. On the other hand, value-rationality in its pure form does not taken into account the criterion of success or the secondary results (the costs of the action). In this sense it is very close to 'categorical imperative' of Kant. While explaining personal self-interest as innate human feature, his equalization of the 'ideas' with learned values (p.209) only increases the ambiguity of ideal interests as a term. In overall, Wallace does not seem to have understood the ethical difference between two types of rationality. He entirely neglects the possible hybrid form which may combine these rational approaches.

¹⁹ Kronmann argues that Weber's value theory conceives a person's values to be established through the exercise of a creative faculty (the will) distinct from the power of rational insight. (Kronmann, 28) Yet, how can Weber talk about value-rational action if it is totally distinct from the rational understanding? Richard Wellen, *Dilemmas in Liberal Political Thought since Max Weber*, New York: Peter Lang Publishing Inc., 1999, p.45, argues that value rational action may therefore be viewed as "irrational" from the standpoint of action oriented toward success, but not from its own standards which may be developed in a systematic and consistent way. Anthony Giddens, *Politics, Sociology, and Social Theory*, Oxford: Polity Press, 1995, p.41, interprets the types of social action in a liberal context. Instrumental-rational and value-rational actions are the examples of freedom of choice. Traditional and affectual actions are propelled by irrational forces. 'This position which Weber adopts in these respects, then, refuses to identify 'free will' with the irrational.'

other is purely utilitarian way. *'The decision between competing and conflicting ends and results may in turn be determined by a consideration of absolute values: in that case, such conduct is goal oriented only in respect to the choice of means.* Or competing ends may be considered subjective wants which will be arranged according to an order of priority as prescribed by the principle of "marginal utility". Weber defines absolute goal-oriented action as pure expediency, without any reference to basic values. (BCS, pp.61, 62)

First type is a kind of hybrid form of rational attitude, which determines the ends in value rational manner and the means in instrumentally rational manner. But the difficulty lies at the definition of value rational. If value rational is something static and is firmly fixed by the belief, how is it possible to compare the ends by value rationality? It seems as if value rationality itself becomes an instrument of instrumental rationality, by causing an explicit clash with Kantian ethics. For now, we postpone the discussion of this point until the section ? on the ethics of responsibility. The second type, which is pure type of rationality, refers to utilitarian approach. Different ends are simply subjective wants and they are ordered according to their relative urgency. So satisfaction of them is the main aim.

Weber states that *from the latter point of view* (Instrumental rationality) *however value-rationality is always irrational.* Weber states two related reasons: absolutism of value rationality and omission of secondary results of the action. The more the value is elevated to the status of absolute value, the less the actor is influenced by the considerations of the consequences of his action. Still pure orientation to success and satisfaction without fundamental values is empirically a very rare case. What Weber advocates seems a value-balanced instrumental rationality.²⁰ Value rationality is not possible without instrumental rationality or only possible when you just obey one act-command, otherwise you should always select a means to reach the valued end. On the other hand instrumental rationality is possible without value-rationality, only when it

²⁰ Jürgen Habermas, *The Theory of Communicative Action*, trans. by Thomas McCarthy, Oxford: Polity Press, 1997, p. 172, lays down four sub-types of rational action in Weber's theory. Instrumentally rational action is only the rational choice of means for given ends (a kind of technical choice). Purposive-rational action refers to the pure form of what we translate as instrumental rationality. There are also value-rational actions. Lastly he also mentions a hybrid form which is a combination of purposive-rational and value-rational action.

takes the self-interest as sole motive. In short, as ideal types, all of these types are very rarely found purely but in hybrid forms.²¹

I.III Life Spheres: Individual Rationality versus System Rationality

Now, I want to reflect on another important categorization about “rationality” in Weberian theory. Weber uses the term of rationality for both individuals and the life orders such as economy, religion and law, without marking any difference. The problem about creating a category such as system rationality arises from the sociological approach of Weber by which he takes the economy, law and other domains or structures as special types of social relationships (“of individuals”) and called them associative relations²², and refuses to leave his individual motive-based pre-assumption²³. Yet, as I have examined in the previous section, objectivity of sociological facts arises from the subjective-sharing in large, meaning that who create the objective and impersonal rationalities of the spheres are again the persons with their shared-subjective rationalities.²⁴ But once the system is created and institutionalized, then system itself leads people to act in a particular way of subjective orientation. Below, I will try to explore Weber’s theory of life-spheres and their place in his rationalization theory.

A life sphere may be defined as ‘a distinct realm of activity which has its own inherent dignity, and in which certain values, norms, and obligations are immanent.’²⁵ Weber, in his essay called “Religious Rejections of the World and Their Directions”, explains “life orders” as conceptual tools for his theory of religion. He urges us that these value spheres are not as rationally consistent in reality as they are in theory. In this sense, they are also “ideal-types” as many others used by Weber. Still, Weber insists that these life orders with a set of values *can* appear in reality and already have appeared

²¹ See Bradley E. Starr, ‘The Structure of Max Weber’s Ethics of Responsibility’, *Journal of Religious Ethics*, Vol.27, No.3, Fall 1999, 407-434, pp. 411-412 for different possible combinations of two rationalities in the hybrid form.

²² See Weber, ES, pp.40-41

²³ “This account of social action, despite its seeming emphasis on reciprocally shared meanings of social actors, rests on what appears to be a thoroughgoing methodological individualism...Rejecting the intelligibility of collectivities acting meaningfully, Weber insists that expressions such as state, nation or family are nothing more than the outcome of the social actions of individuals...They [collective concepts] signify those social relations arising from, but ultimately controlling, reciprocally intended individual conduct.” Breiner, *op.cit.*, p. 33

²⁴ Brubaker contends a kind of opposite view. According to him, value-spheres are not created by individuals, they exist independently of and prior to the individuals who participate in them. (p. 72) However, such an interpretation may not give an answer to how they are formed and it is contrary to Weber’s approach which finds the objective reality in its subjective origins.

²⁵ Brubaker, *op. cit.*, p.69

in the history. (RRW, p.324)²⁶ He also adds that *the theoretically constructed types of conflicting “life orders” are merely intended to show that at certain points such and such internal conflicts are possible and “adequate”*. (RRW, p.323)

Rationalization of religions has been considered by Weber as the primary process both entailing the separation of different social areas (life orders) from each other and diminishing the dominance of religion over them.²⁷ At the same time, religious sphere has been rationalized more as a reaction to losing its power facing other autonomously rationalizing life spheres. The result has been the disenchantment of the world in the sense of a rise in the consciousness about the different sets of values and about the tensions between them.

Wilhelm Hennis claims a parallel view about the life spheres and about their inner rationality apart from the individual rationality of social action. According to him, central question for Weber is how it is possible for the subjective personality to live a coherent life composed of the objective and impersonal life orders. So, he claims, Weber traces the rationalization process also in the objective logics of each of the life orders of modernity.²⁸ Breiner also agrees to Hennis but with a slightly different approach. For Breiner, rationality of life-spheres helps us to identify an objective account of rationalization in Weber and a subjective and contingent one.²⁹

Similarly, for Wellen, the plurality of value-spheres in Weber has significance from the point of view of liberalism. His interpretation actually summarizes the idea of

²⁶ Max Weber, *Religious Rejections of the World and their Directions* (RRW). Nevertheless, with his ingenious approach and theoretical skills, Weber also shows us the hidden link between the methodological meaning of life-orders and its power to have implications over the real life. Without denying its technical role, this theoretical attitude has a power over man just because it is a rational product and brings about a logical or teleological consistency. Here, the reality that the tool tries to explain and the tool itself share a common feature: rational consistency. As we will see below, life-orders, especially religious ones, may be considered as the closed and consistent systems that are created by rationalization attempts by intellectuals. In the same way, life-orders as simply conceptual tools of Weber are products created by an intellectual with *the imperative of consistency*. (RRW, 324)

²⁷ See Nicholas Gane, *Max Weber and Postmodern Theory*, Palgrave, 2002, p. 31

²⁸ In this sense, approaches of Tenbruck and Hennis coincide. Hennis claims, the tension between the human person and the orders of life arise from the independent rationality of the orders which imposes a life style on people and which has a formative power over ‘personality’. Tenbruck only puts the emphasis on the rationality of the orders, while Hennis considers the results of dominating modern rationality over modern men. Similarity becomes very apparent at following sentences of Hennis: “‘To lead one’s life’, to have the possibility of doing so, always implies that some degree of freedom is left for the conduct of one’s life. Complete rationality annihilates this free space. A completely rationalized order gives no chance for *Lebensführung* in the sense defined by Weber.’ Wilhelm Hennis, *Max Weber: Essays in Reconstruction*, *Max Weber’s Theme: ‘Personality and Life Orders’* (pp.62-205) London: Allen&Unwin Ltd., 1988, p.71-72; p. 100; Friedrich H.Tenbruck, ‘The problem of thematic unity in the works of Max Weber’, *British Journal of Sociology*, Vol.31, No.3, Sep.1980, pp. 316-351

²⁹ Breiner, op.cit., p.14

rationality for life orders: 'life orders are structured around different values and these values, in turn, structure basic commitments and orientations to life in incompatible ways'.³⁰ These life spheres such as politics, religion, law, science, economy, also represent different and competing standpoints for rationalizing life so that rationalization will not always take the same form. This is what Weber often refers as the 'ethical irrationality of the world' and it provides the fundamentals of his epistemology.³¹

I.III.1 Rationalization of Life-Spheres

Before dealing with the concept of the "life sphere" in a comprehensive way, I will focus on the concept of rationalization, which Weber uses for religion, economy, art and similar domains. According to Habermas, Weber designates as rationalization 'every expansion of empirical knowledge, of predictive capacity, of instrumental and organizational mastery of empirical processes'; and also 'the growing autonomy of law and morality, that is, the detachment of moral-practical insights, of ethical and legal doctrines, of basic principles, of maxims and decision rules, from the world views in which they were first embedded'.³² The former aspect of rationalization refers to the diffusion of purposive-rational³³ action orientations, above all in economic and administrative spheres of life and the institutionalization of purposive rational action. The latter refers to religious rationalization and the process of disenchantment, which precedes the Occidental rationalism.³⁴

In fact, rationalization as a process shows certain similarities with the rational social action. In other words, most of the standards what make a social action and a life sphere rational are common. These standards may be listed as consciousness, systematization, consistency, and conceptualization.³⁵ While rational social action is oriented or motivated through a conscious and systematic deliberation of the individual,

³⁰ Wellen, *op.cit.*, p.31

³¹ Anthony Giddens, *Politics, Sociology, and Social Theory*, Oxford: Polity Press, 1995, p.42

³² Jürgen Habermas, *op.cit.*, pp. 159, 162

³³ Habermas differentiates between instrumental rationality and purposive rationality. Instrumental rationality is concerned only with the means and their application. Purposive rationality deals both with means and ends (choices). *Communication*, p. 172

³⁴ *Ibid.* pp. 166-167

³⁵ Rationalization in Weber refers to 'systematicity, consistency, method; whether as a cast of mind or as the principle on which the organizations are structured, it implies the exclusion of arbitrariness and above all of what he refers to as magic'. Rationality amounts to the calculated application of rules. Derek Sayer, *op.cit.*, p.114. For a more detailed analysis of rationalization, see Ann Swidler, 'The Concept of Rationality in the Work of Max Weber', *Sociological Inquiry*, No. 43, Vol.1, 35-42, esp. pp.36-37

rationalization of a life sphere refers to something more theoretical, to **the systematization of ideas**. Habermas calls this the rationalization of worldviews- ‘cognitive, normative, and expressive problems can be systematically detached and developed in accord with their inner logics’. It is a kind of theoretical mastery of reality.³⁶ But, rationality of a life order would mean more than its intellectual systematization, or conscious sublimation by integrating discrete elements around some more abstract principle which relates them³⁷. It is the ordering and integrating the discrete elements (whatever it means, applications, procedures, organizations or methods) regulating **the conduct of life** so that the rational actions are maximized and become internally consistent³⁸. All the individuals who take actions in the concerned sphere, under the influence of again a group of people who has an authority over them, contribute to rationalization of the conduct in that sphere (practical rationalization). Intellectual systematization is accomplished by the priests, scientists or others depending on the sphere (conceptual rationalization).³⁹

Weber explains these two types of rationalism in the following way: *We have to remind ourselves in advance “rationalism” may mean very different things. It means one thing if we think of the kind of rationalization the systematic thinker performs on the image of the world: an increasing theoretical mastery of reality by means of increasingly precise and abstract concepts. Rationalism means another thing if we think of the methodological attainment of a definitely given and practical end by means of an increasingly precise calculation of adequate means. These types of rationalism are very different, in spite of the fact that ultimately they belong inseparately together.* (SPWR, p. 293)⁴⁰

In the passage above, there are some ideas that could enlighten our discussion about the rationalization of different life-spheres. First of all, it is written general enough to encompass different orders with different ends including the very diverse

³⁶ Habermas, *op. cit.*, p. 168

³⁷ Wellen, *op. cit.*, p.33

³⁸ Swidler, *op. cit.*, 36

³⁹ Stephen Kalberg, ‘Max Weber’s Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History’, *American Journal of Sociology*, Vol. 85, No.5, 1980, 1145-1179, defines theoretical (intellectual) rationality as a conscious mastery of reality through the construction of increasingly precise abstract concepts rather than through action.(p.1152) Yet I do not agree to his definition of practical rationality which is every way of life that views and judges worldly activity in relation to the individual’s purely pragmatic and egoistic interests. (p.1151). Egoism is not an inalienable component of practical rationalism.

⁴⁰ Max Weber, *the Social Psychology of the World Religions* (SPWR).

ones like religion and economy. Therefore neither conceptual nor practical rationalization is restricted to instrumental rationality and to any utilitarian references.⁴¹ Secondly, in the last sentence we learn that these two types of rationalism actually linked to each other. Hence they influence each other reciprocally. Indeed, Weber claims in another context that every theoretical construction has a practical effect because of its rationality and high consistency. Therefore it may easily be assumed that the conceptual rationalizations have certain positive effects on practical life conducts. In turn, practical rationalization would facilitate the consistent conceptualizations of the reality.

However if these standards are valid for all rationalization processes, how can it be explained those rationality clashes between different life orders? First of all, the common standards above I tried to list belong to the form of rationality, not to its substance. Weber states that *furthermore, each one of these fields [economic life, technique, scientific research, military training, law and administration means] may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another. Hence rationalizations of the most varied character have existed in various departments of life and in all areas of culture.* (PESC, p.26)⁴² Rationalization here is instrumental for an end. Every sphere has its own ends, utilitarian, value-based, or non-value based. Therefore, the substances of rationalization differ from each other due to the diverse ends and values for each life sphere⁴³. The process that Weber explains is not as complex as it looks at first glance.

⁴¹ See Swidler, *op. cit.*, p. 35. Difference between rationalism and rationality, as Swidler claims (p.36), is not between the orientation to immediate goals and arrangement of the goals within a system of meanings and values. Rationalism is only a term for Weber that indicates the rational attitude to life.

⁴² Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, Talcott Parson (trans.), New York: Charles Scribner's Sons, 1958 (PESC)

⁴³ Habermas interprets Weber's value-spheres from a different perspective. He claims that when Weber speaks of 'ultimate points of view' from which life can be rationalized, Weber does not always refer to cultural values but sometimes to "abstract ideas" such as truth and success in the cognitive sphere of value (science and economy); justice, normative rightness in general in the moral-practical sphere of value (law and ethics); beauty and authenticity in the expressive sphere of value (art). Each sphere carry one universal validity claim and these ideas (or validity aspects) should not be confused with material values, the particular contents of individual spheres of value. Habermas p.177,183 These are neo-Kantian conception of three emergent domains of reason in the modern world: namely theoretical reason, practical reason and aesthetic-expressive reason. Austin Harrington, 'Value-Spheres or 'Validity-Spheres'? Weber, Habermas and Modernity', *Max Weber Studies*, Vol. 1, No.1, 2000, pp.84-103. Habermas explains the difference as follows: the aspects of validity are decisive for the inner logics of value-spheres and are decisive for the formal rationalization of social sub-systems corresponding to those value-spheres. The validity claims form a system, which lays claim to a universal validity binding on all "civilized men", despite to the fact that it first appeared in the form of Occidental rationalism. On the other hand, material values, the particular contents of individual spheres of value, develop in historical configurations within a sphere of life. They are historically contingent and particular, not universal. Habermas pp. 183-184 He also claims that the conflict is not between these universal aspects of

Rationalization is what makes orders autonomous from each other: they are closed systems but only in the sense of having consistent and linked order elements. Since they are shaped according to the specific ends and values through rationalization, the clashes between them result from the substantive part of their rationalization, not the “formal” part.⁴⁴

Kalberg explains value rationalization as an enhancement in comprehensiveness and inner unity. ‘Inner unity is rationalized according to the degree to which the values within a given substantive rationality, however comprehensive or limited it may be, are ordered and systematized. As rationalization proceeds, these values come to stand in a relation of consistency not only to one another but also hierarchically under an ultimate value.’⁴⁵ However, formal rationality and substantive rationality, the categories of rationality of the orders, is to be distinguished from the categories in the discussion above, although there is an undeniable connection between them. The difference may be better understood by focusing on the conflict of spheres, especially conflict of religious sphere with other value spheres.

validity. ‘the differentiation of scientific, legal, and artistic enterprises, in which cultural knowledge is developed under one or another of these universal aspects of validity, also need in no way provoke a conflict among irreconcilable orders of life. These cultural systems of action stand between the cultural spheres of value to which they have direct reference and those social systems of action that, like the economy and the state, crystallize around particular values, such as wealth, power, health and the like. It is only with this institutionalization of different value matters that competitive relations among ultimately irrational action orientations come into play.’ Pp. pp.249-250 Habermas argues that Weber confuses value contents with validity claims. However, his criticism can not be applied to the sphere of economy since Habermas takes it as a social system. I argue that this confusion is even more apparent if we take it as a life-order. For, at this order Weber insists to define the economic order with the particular values of capitalism thereby denies the possibility of a socialist economic order even at the conceptual level. For criticism of Habermas’s argument against Weber in this particular aspect see Austin Harrington, ‘Value-Spheres or ‘Validity-Spheres’? Weber, Habermas and Modernity’ . Particularly his question about the distinction between ‘societal’ and ‘cultural’ levels of rationalization is remarkable. ‘What permits Habermas to distinguish in this rather legislative fashion between certain supposedly deep-seated structures and other merely superficial features?’ p.93

⁴⁴ This is what Habermas calls ‘the formal organization of symbol systems.’ Thus the rationalized worldviews satisfy to a greater degree the requirements of formal-operational thought. Pp. 174-175 In other words, ‘the abstract standards of value, that is, the formal points of view from which Weber investigates the rationality of salvation religions, lie at a different level than these value contents. The former counts as universal. All ethics of conviction (absolute ethics) owe their penetrating, systematizing power to a type of principled reasoning. And this establishes the dimension in which worldviews can be more or less rationalized ethically.’ P. 183 Habermas Habermas argues that Weber’s position is universalist as to fundamental societal structures. There is a distinction between fundamental societal structures and cultural contents and to hold a universalist position does not mean to deny the plurality of cultures. What is asserted here is that ‘every culture must share *certain formal properties* of the modern understanding of the world, if it is at all to attain a certain degree of conscious awareness or sublimation. Austin Harrington, p.91

⁴⁵ Stephen Kalberg, *Max Weber’s Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, American Journal of Sociology, Vol. 85, No.5, 1980, 1145-1179, p. 1166

I.III.2 Conflict of Value Spheres: Religion as starting point

The concept of “life sphere” occurs generally in the writings of Weber on religion. For me, this is not a coincidence for many reasons. Therefore, it may be better to begin with a short summary of the ideas developed in these texts, to clarify the formal and substantive rationality of life orders and the clashes between them.

His main assumption in the sociology of religion is that most of the religions historically have lived in an acute and *permanent state of tension in relation to the world and its orders*. (RRW, 328) Religions have been transformed into the religions of salvation with an orientation to inward sacred values as means, thereby developed from ritualism to religious absolutism and ethics. The rational transformation of the religious ethics only enhanced the tension between religion and other orders. On the other hand, other life spheres were also getting rationalized in different directions. *Indeed, the further the rationalization and sublimation of the external and internal possession of – in the widest sense- ‘things worldly’ has progressed, the stronger has the tension on the part of religion become*. (RRW, p.328)

The quotation above gives hints about the dynamic reciprocal relations between the life orders. On the one hand, there is an unpreventable rise of self-interested instrumental rationality through economic and political developments and in turn, a rise in social consciousness and awareness due to the dissolution of traditional patterns of life. On the other hand, by the changes in the other areas of life, not only the dominance of religion weakens over the daily life but also the values of religion encounter with an almost opposite type of rationality *focused on worldly things*. As a result religion progresses into a conceptually rational ethical system. However, rationalization of religion indicates two following results: development of value-rationality in the sense of consciousness of religious ethics and transformation of religious value-rationality from absolute value-actions (value inherent in the action itself) into flexible value-ends (actions directed to a value).⁴⁶ This especially results

⁴⁶ Ritualistic ethics and legal ethics tend to stereotype conventional and legal norms by making them sacred. Law is elevated into level of sacred law and legal obligations are regarded as obligations of virtue. This situation changes with the transition to a religious ethic of conviction. At that stage, ethical norms are systematized and internalized. Ethics of conviction does not recognize any sacred law, but only sacred conviction that may sanction different maxims of conduct in different situations. In that sense religious ethic of conviction is a system of principles. Still adherence to unconditional principles in no way excludes their flexible application. Wolfgang Schluchter, *Paradoxes of Modernity: Culture and Conduct in the Theory of Max Weber*, Trans. By Neil Solomon, Stanford: Stanford

from the internalization of ethical values. It should not be thought that such an internalization of the religion solves the problem. On the contrary it enhances the situation.

For the purposes of this section, one of the most critical statements made by Weber is as follows: *The general result of the modern form of thoroughly rationalizing the conception of the world and of the way of life, theoretically and practically, in a purposive manner, has been that religion has been shifted into the realm of the irrational. This has been the more the case the further the purposive type of rationalization has progressed, if one takes the standpoint of an intellectual articulation of an image of the world.* (SPWR, p. 281) Concerning the conception of the world, rationalization of religion has begun with the idea of salvation when *it expressed a systematic and rationalized 'image of the world' and represented a stand in the face of the world.* It was work of the intellectuals to find an answer to the demand that *the world order in its totality is, could, and should somehow be a meaningful 'cosmos'.* This was the basis of religious rationalism. The efforts of intellectual strata were *to rationalize the image of the world as being a cosmos governed by impersonal rules.* (SPWR, pp280-281)

If conceptual rationalization belongs to the intellectual strata, *the tendency towards a practical rationalism in conduct is common to all civic strata.* Weber underlines and repeats the characteristics of instrumental rationality for practical rationalism dominated by civic strata: *it is based upon technological or economic calculations and upon the mastery of nature and of man, however primitive the means at their disposal.* This practical rationalization led to an ethical and rational regulation of life by collaborating with the *technological and economic rationalism.* (SPWR, p.284)

As studied in the previous section, instrumental rationality is not necessarily utilitarian. Therefore, purposive rationality in this context is a systematic and comparative attitude for the selection of appropriate means and, even of the ends, whatever the ends are, whether values or material interests or any other aim. With an

University Press, 1996, pp. 71-72. Additionally, an adherent of this ethic takes on only a single responsibility, that is, the convictional value of his action. (p.88)

oversimplification, it serves to the ends. Here what we observe in the rationalizations of religions is development of a hybrid form with instrumental and value-rationality under the heading of purposive rationality. For instance, Weber states that *in general, all kinds of practical ethics that are systematically and unambiguously oriented to fixed goals of salvation are 'rational,' partly in the same sense as formal method is rational, and partly in the sense that they distinguish between 'valid' norms and what is empirically given.* (SPWR, p.294) Rational as a formal method is a 'systematic orientation' to a given set of ends and a clear separation of what is normative and empirical.

Now, if we sum up, life orders are various spheres of values which went through a process of rationalization; conceptual-formal rationalization by the efforts of intellectual strata, in terms of the conception of world and practical-instrumental rationalization by the efforts of civic strata and with the actions of people in the system, in terms of the conduct of life. Yet, the starting points for these rationalization processes were the values and ends specific to each sphere. In Weber's words, *one may rationalize life from fundamentally different basic points of view and in very different directions and the history of rationalism shows a development which by no means follows parallel lines in the various departments of life* (PESC, p.78)

Although varying according to the order, at least for the religious sphere, rationalization led to two interconnected results: created an increase in the consciousness about the set of values belonging to that sphere and thus increased the tensions in the substantial meaning among the rationalized spheres by strengthening their autonomy from each other.⁴⁷ Weber explains this process as follows: *For the rationalization and the conscious sublimation of man's relations to the various spheres of values, external and internal, as well as religious and secular, have then pressed towards making conscious the internal and lawful autonomy of the individual spheres; thereby letting them drift into those tensions which remain hidden to the originally naïve relation with the external worlds. This results quite generally from the development of inner- and other-worldly values towards rationality, towards conscious endeavor, and towards sublimation by knowledge.* (RRW, p. 328)

⁴⁷ 'In the process, not only do the "inner logics" of the cognitive, expressive, and moral elements of culture come into consciousness but also the tension between these spheres grows along with their differentiation.' Habermas, *op. cit.*, p.164

On the other hand, at the level of individual, it is a problem of value-rationality as individual's awareness increases about his situation located in between these orders and about the fact that at every point he has to make choice about his actions and to search a meaning for his life. In short, the degree of heterogeneity among value-orientations tends to increase as religious world-views are eroded by the progress of science, leaving individuals to create value orientations on their own.⁴⁸

I.III.3 Levels of Rationality and Individuals

Let me start with bare definitions of formal and substantive rationality in Weber's theory. Formal rationality is the method dominantly used in a life order since it is the most effective and the most 'correct way' to reach to the given ends of the order. Formal rationality is system-specific and finds its meaning only in a particular system. Its objectivity may be measured only within the system according to the consequences it produces. Despite to that fact, it seems isolated from special preferences and values. Formal rationality is irrational from the point of view of substantive rationality. It retains a close connection with instrumental rationality at the level of individuals. On the other hand, substantive rationality belongs to the sphere of values and of ethics but only may be valid for systems not for individuals. Here 'not simply a single value ... a value postulate implies entire clusters of values that vary in comprehensiveness, internal consistency, and content.'⁴⁹ An order may be based and developed on substantive rationality, yet such an order would always suffer from formal irrationalities. Substantive rationality is subjective and its 'correctness' or 'rightness' may not be measured by an objective tool such as success or efficiency. It is itself a subjective tool to evaluate the orders. It finds its meaning in the beliefs of individuals. Therefore it maintains a close connection with value rationality at the level of individuals.⁵⁰

The conflict between life spheres in most of the texts written by Weber is illustrated by conflicts between formal rationality and substantive rationality. This has initiated a discussion in the literature on Weber and has been interpreted as the indicator of two distinct levels of conflict, which may at the end, be reduced to an irrational

⁴⁸ Brubaker, *op. cit.*, P. 69

⁴⁹ Stephen Kalberg, *op. cit.*, p.1155

⁵⁰ Walter L. Wallace, in 'Rationality, human nature, and society in Weber's theory', pp. 211-215 puts the formal and substantive rationality in a group of six psychological behaviors. To me, it is unacceptable since they are system-specific rationalities, i.e. a system but not an individual may be formally rational.

choice between rationalities -although Weber was never been explicit enough on that matter: ‘Whether it is a choice between formal and substantive rationality or between Zweck- and Wertrationalitat or between conflicting maxims of Wertrationalitat, this choice cannot itself be a rational one, for it is precisely criteria of rationality that must be chosen.’⁵¹

Brubaker claims that ‘still tensions between formal and substantive rationality, between Zweck- and Wertrationalitat, between value-drained worldly tasks and the pursuit of ultimate values *mean the same thing for the individual* as tensions between conflicting standards of substantive rationality, between conflicting maxims of Wertrationalitat, between conflicting ultimate values. Both types of tensions- the former driving from the special nature of modern economic and political structures, the latter from an increasing awareness of the incommensurability of ultimate value standpoints- force the individual who wishes to consciously guide his life to choose between competing definitions of rationality’.⁵² Habermas actually asks the same question; whether the problem is the differentiation of the inner logics of the value spheres or becoming of some value spheres predominant at the expense of others. His answer is: ‘We must at least regard it as an empirical question, whether the tensions among the ever more rationalized spheres of life go back in fact to an incompatibility of abstract standards of value and aspects of validity, or rather to a partial and therefore imbalanced rationalization- for example to the fact that the capitalist economy and modern administration expand at the expense of other domains of life that are structurally disposed to moral-practical and expressive forms of rationality and squeeze them into forms of economic and administrative rationality.’⁵³

Although the distinctions in the original theory of Weber are more blurred, Habermas presents a more delicate schema for analytical purposes. He distinguishes the cultural spheres of value which contain cultural elements from the cultural systems of action which are cultural institutions with validity claims such as the scientific enterprise (universities and academies) and the legal systems (with specialized juridical training and scientific jurisprudence). He also separates the capitalist economy, the

⁵¹ Brubaker, *op. cit.*, p.87

⁵² *Ibid.*

⁵³ Habermas, *op. cit.*, p. 183

modern state and the nuclear family as the central systems of action that establish the structure of society.⁵⁴

In this discussion, Breiner's approach seems to be most plausible to me and my reading comes closest to his methodological reading. Breiner argues that Weber's theory is based on a dichotomy between 'subjectively rooted objectivity and an agentless objectivity'. The academic discussion on whether 'Weber has uniform developmental theory of the methodical rationalization of all spheres of life or whether he in fact was concerned with the way individuals can find an orderly direction for their lives in each distinctive life sphere' also results from this Weber's theoretical dichotomy. The discussion revolves around 'the multiple forms of rationalization of conduct in different areas, and of different areas', and a universal evolutionary theory of rationalization.⁵⁵

For me, Breiner's reading needs to be more clarified. Objective and subjective approaches of Weber to rationalization and rationality may be traced at three levels. First level is objective and universal 'individual' level. That is a general account of rational social action based largely on our inherent tendency to order our actions into methodical conduct, on the tendency of human beings to instrumentally rational action. This level is directly connected to universal evolutionary theory of rationalization, so to 'most general' level. That is explained by Breiner as follows: 'Weber at various moments portrays the rationalization process as objective and inexorable. Agents unknowingly play into it because the rational process of methodically fitting means to ends is an unavoidable feature of human agency whatever other purposes it sets for itself'- the claim of Western culture to universality is in large part based on having raised this feature of agency to a fundamental cultural value.⁵⁶ Here objectivity and universalism of Weberian theory reach its highest apex. What corresponds to agent-based instrumental rationality is system-based formal rationality. In this sense universal

⁵⁴ *ibid.*, pp.165-166. By such a distinction, Habermas is able to explain the tensions between value-spheres with a deeper insight. An actor may adopt basic attitudes which are contrary to each other in relation to the same domain of reality. For example, in relation to society he may not only a norm-conformative (moral-practical) attitude but an objectivating (cognitive-instrumental) one as well. 'These possibilities of "switching over" are characteristics of the degrees of freedom of a decentred understanding of the world. But these same degrees of freedom can be a source of conflict as soon as different cultural value spheres simultaneously penetrate the same institutional domains, so that rationalization processes of different types compete with one another in the same place.' (pp. 244-245) Also see supranote 19

⁵⁵ Breiner, *op. cit.*, pp.10-11

⁵⁶ Breiner, *op. cit.*, p. 14

feature of modernization is ever-formal rationalization. The contingent and situation-bound element here is that not all cultures in the world go through the modernization process- at least not at the similar periods, not at a similar pace and not for all life-spheres. Weber tries to explain this by some historical factors which coincidentally come together and create a deriving force for Western World – in Breiner’s words, by speaking of causes impinging on social life.

The other is life-spheres level. Here, objective and subjective approaches converge since each sphere’s rationality is distinctive and specific to itself, while each sphere’s rationality has the feature of an agentless objectivity due to its relative independence from the subjective agents’ rationality or social conduct. In short, they represent a number of system-logics. Their specific and relatively subject-independent logics compel the individual to adopt a certain kind of conduct, in order to adapt himself to the dominant conditions, since the system logic determines which kind of action (and which kind of means and ends) would lead to which kind of consequences. This is I think what Breiner suggests while arguing that Weber claims to provide an objective account of the consequences of any social action and what Hennis suggests by arguing that different life orders are so objectified that the subject can only attain personality by living up to their personal demands.⁵⁷ At this level, subjective element seems to be the multiplicity of values, which provide Weber with specific accounts of the way in which rationality is embodied within variety of social orders in Western culture. Each social order goes through a rationalization process according to its own core fundamental values.

However, the other aspect of ambiguity originating from ‘subjectively rooted objectivity and an agentless objectivity’ is to be solved still. As I mentioned in the beginning of this section, a life-sphere’s objective rationality arise from the subjective-sharing in large, meaning that who create the objective and impersonal rationalities of the spheres are again the persons with their shared-subjective rationalities. Weber’s theory indicates that at one point subjectively rooted objectivity of the social order

⁵⁷ *ibid.*, pp.16, 12. Hennis claims that Weber’s central question is the cultural problems of man. These are ‘the problems arising from the insertion of man (Mensch), a being capable of social action, into social constellations that in their turn mould these persons, develop their capacities, or alternatively deform them to the extent of ‘parcellizing the soul’. Wilhelm Hennis in *Max Weber, Rationality and Modernity*, by Scott Lash&Sam Whimster (Eds.), London: Allen&Unwin, 1987, p.52

converts into an agentless objectivity. This may be explained by that the density of instrumental conduct at one social area leads to rise of formal rationality and to systematization at the end. However this may be argued only after accepting the first presumption, that the instrumentally rational conduct is an inherent human tendency. After the transition to agentless objectivity, the individual choice for instrumental action turns into imposition of the order. The ambiguity lies at one of the methodological arguments of Weber, which is that in no way his theory suggests that rational action is the most dominant form of action in the real life- but his theory implies the contrary. Additionally, as Breiner underlines, Weber recurrently emphasizes the plurality of causes and a variety of contingent logics at work both on the subjective agent's conscious activity and in constituting any social relation.

According to me, the influences of other arguments developed by Weber, namely 'universal evolutionary theory of rationalization' and 'universal instrumentally rational action at individual level' may be at the root of this ambiguity about life-spheres. So I largely agree to Breiner: Weber consciously plays with both positions.⁵⁸ At most general level, conflict is reduced to a universal conflict between system's formal rationality and ethics (religious or others- Weber calls this substantive rationality); at individual level, to subjective conflict between instrumental rationality and values (value-rationality). Brubaker has adopted a similar interpretation in his book: 'the purely formal objective of maximizing the calculability of action' is in perpetual tension with substantive rationality.⁵⁹ In consequence, Hennis rightly questions: How it might be possible for the subjective personality to develop and live an ethically coherent life given the objective and impersonal life orders to which the subject must adapt him/herself.⁶⁰

⁵⁸ Breiner also argues that the ideal-types as sociological typologies do not intend to describe reality but are constructed from a value-laden perspective to explain some social events by attributing them meanings. He criticizes Weber by using inevitable one-sided typological construct to demonstrate his chosen values and goals to the only feasible ones compared to their competitors. 'Weber will often be able to reject goals that he disagrees with as if his judgment was based on incontestable practical standards.' (pp. 9-10)

⁵⁹ Brubaker, *op. cit.*, p.4

⁶⁰ It is not only its rational autonomy that renders a life order immune from ethical domination. It also holds out to those persons bound up within it the possibility of an ethicization of their condition of location in this order. Every position adopted out of ethical principles becomes mere declamation. Hennis, *Max Weber: Essays in Reconstruction*, p. 98. See also Stephen Kalberg, 'Max Weber's Types of Rationality', pp.1173-1179. Suppression of value-oriented action by formal rationalization of many spheres condemned the unified personality who is autonomous and free individual with his guiding ultimate values to become a *historical subject*.

Gane attempts to solve this dilemma by a postmodernist approach. The progressive differentiation of culture is explained in Weber's theory with emancipation of life-orders (such as politics, economics, legal etc.) from a binding religious narrative. They autonomously develop their inner logic and give rise to a proliferation of worldly beliefs and values. 'And with this, a new form of absolute polytheism is born, for religion itself is reduced to one life-order among many, meaning that there no longer exists an overreaching (transcendental) viewpoint from which the world can either be understood or legitimated...' However, modernization also refers to an opposite development: the over-reaching de-differentiation of values within each modern life-order and in turn, the increasing homogenization of all cultural forms in terms of becoming instrumentally rational orders of calculable action- a process, which science contributes despite, or maybe because, it restricts its epistemological area to the empirical realm.⁶¹

However, there is another reason that makes Weberian life-spheres ambiguous; the blurred connection between formal and substantive rationality. It seems that different rationalization processes has brought a similar consequence for most of the social orders: the rise of formal rationality and the decline of substantive rationality. This is especially true for economics and law. It is not very clear how a process which starts with some fundamental values distinguishing it from the others have ended with annihilating them and despite to this fact, Weber still argues about different value-spheres and their conflict. Additionally, Weber seems to suggest that what converts a life-sphere to a real system is its well-built formal rationality. In any case, the birth of impersonal and objective life-spheres is dependent on their formally rationalization, a process which assimilates the substantive rationality. Breiner attempts to explain this ambiguity by claiming that formal rationality is also sphere-specific due to initial sphere-values: 'In modernity not only do the different value spheres such as religion, science, economics, politics and aesthetics conflict with another, but the variety of instrumental logics necessary to achieve the values of each sphere converge and collide with each other as well'.⁶²

⁶¹ Gane, *op. cit.*, p. 29. See also pp. 28, 39, 40

⁶² Breiner, *op. cit.*, p.15

This view is in direct conflict with Brubaker's view since he defines the formal rationality as maximum calculability, a generalized means that indiscriminately facilitates the purposeful pursuit of all substantive ends. What Breiner suggests is that each modern life-sphere has a set of specific ends that shape its formal rationality. Here Brubaker's definition for formal rationality is not very plausible since Weber himself argues that formal rationality is suitable to serve not to any and every ends. Brubaker also accepts the tension between formal rationality with some substantive ends, for example in the sphere of economy.⁶³

At the end, the problem occurs more between the formal rationality and substantive rationality than between the different instrumental logics of the systems. It is tension between 'ultimate value commitments and the requirements of successful economic and political action, requirements that are alien to all questions of ultimate value.'⁶⁴ Demands based on some values may not be satisfied by the formal rationality since values cannot be measured with some objective standards. Values and even their meaning cannot be objectively determined and ranked. Formal rationality can only accomplish what is possible but cannot answer what should be done. Any substantive rationalization effort would result at the end, with another type of substantive irrationality from another value-based point of view. In short, no real 'justice' is possible since it is not possible to define it and to know the objective means to reach it. Yet, Weber's formal rationality is not as formal as he intended either. 'Formal rationality is a value-neutral concept, but the formal rationality of the modern social and economic order is not neutral with respect to the values and interests of different social groups. Maximum formal rationality favors economically powerful groups...'⁶⁵ According to me, we should also take into account the fact that what defines and shapes the instrumentally rational action at individual level is the formal rationality of the system. Because the ultimate end of the system determine what the success is and only the formal rationality define what the conditions for success are.

Here lingering question is whether the ends determine the means or the means determine the ends in formally rational systems. First of all, in the modern life

⁶³ *ibid.*, pp. 37-38

⁶⁴ *ibid.*, p. 85

⁶⁵ *ibid.*, p. 42

orders such as politics and economy, the ultimate ends are non-value (or non-ethical) ends. After disenchantment of the world, these orders have been rationalized around the aims such as profit-making, power-gaining, and self-interest. Weber's unspoken observation is the dominance of utilitarian approach on the social life in the guise of formal rationality. However dilemma of formal rationality is the contradiction that the most efficient means for given system ends constraints the ends that the system may be oriented.⁶⁶ Formal rationality is incompatible with any kind of substantive rationality or any kind of ethics.⁶⁷ Yet, what we have to question is whether formal rationality really deserves its name. Weber explains us that formal rationality is formal and objective since it puts a distance to any subjective value choice or to any particular situation with its specific conditions. Additionally, formal rationality is impersonal and calculable. However, if an ultimate end is value-free, is it necessarily objective? In other words, is not an ultimate choice not to choose any ethical standing an ethical choice on the fundamental basis? When this kind of ethical choice of non-ethical is applied to a system, it results in many examples of substantive irrationality, as also Weber submits. In addition to these, most of the modern life orders have developed into a utilitarian approach especially under the influence of capitalism. In this respect, market economy and power politics may also be interpreted as examples of ethics of conviction adopted by a utilitarian approach, especially when the ulterior consequences of these choices have been taken into account. But last question or critique may be directed to Weber's fallacy: he derives from 'empirical is' a 'cannot be done', and from there a 'should not be done'. He interprets the formal rationality of occidental world, which is a product of contingent historical conditions, as a rule for social systems not to attempt to adopt any substantive criteria since it may damage the development that is reached by the Western civilization in terms of rationalization.

⁶⁶ Weber urges us that rationalization, like the pursuit of profit, has become almost an end in itself in the modern capitalist West, and an extensive and dominating aspect of our lives. A, p. 96 He emphasizes increasing narrowness of modern culture, in which rational means such as monetary exchange and bureaucratic organization cease to be viewed as the most efficient basis for pursuing certain ends and are turned into inwards to become goals in their own right. Nigel Dodd, *Social Theory and Modernity*, Cambridge: Polity Press, 1996, pp. 37-38. Stephen M. Feldman, 'An interpretation of Max Weber's Theory of Law', *Law and Social Inquiry*, Vol. 16, No. 2, Spring, 1991, 205-248, cited in P. 215 fn. 44: Weber writes: 'All this [capitalism] is seen by socialism as the 'domination of people by thing,' in other words, the domination of the end (the supply of needs) by the means.'

⁶⁷ For a brief list of conflicts between formal rationality and substantive rationality see Roslyn Wallach Bologh, 'Max Weber and the Dilemma of Rationality', in *Max Weber's Political Sociology*, R.M.Glassman & V. Murvar (eds.), Westport: Greenwood Press, 1984, pp. 175-185

I.IV Religious Sphere

In his study of history of religions, Weber especially stresses on the interaction of changing economic conditions with the transforming religions. *The magical and religious forces, and the ethical ideas of duty based upon them, have in the past always been among the most important formative influences on the conduct of life.* Economic rationalism encounters with an inner and outer resistance due to spiritual obstacles since its development is dependent mostly upon *the ability and disposition of human beings to adopt certain types of practical rational conduct of life.* (PESC, pp. 26-27)

However, Weber is very careful not to put one-factor dependent and simple causal explanations for social events. He reminds us ‘*no economic ethic has ever been determined solely by religion*’ (SPWR, p.268). Apt to his multi-factor approach, religion is only one of the determinants of the economic ethic. And additionally, *the religiously determined way of life is itself profoundly influenced by economic and political factors operating within given geographical, political, social, and national boundaries.* (SPWR, p.268) Weber admits that each religion is a historical individuality with a highly complex nature. His explanations are limited to what is typically important in the historical realizations of the religious ethics and so, take into account only related aspects of religions. Because his main aim, he declares, is to explain *the connection of religions with the great contrasts of the economic mentalities.* (SPWR, p.292) He attempts to understand how and which features of religions are related to the economic rationalism. By economic rationalism he intends the occidental type that has become dominant in the Occidental civic life since the 16th and 17th centuries. (SPWR, p. 293)

In short by keeping in mind that religion is not always and not only the decisive factor in transformation of the Occidental world into modern, capitalist and rational life style and that religion nowhere creates certain economic conditions unless other factors are not present in the existing relationships (ES, p.577); below, I try to explain Weber’s dialectical, or multi-dimensional, approach to the religion-economy relation: on the one hand the features and the transformation of religions that facilitate the birth of modern capitalism and rationalization of life in overall and on the other hand the tension that occurs most obviously between the religion and the economy.

I.IV.1 Religion in Transformation

First of all, it should be reminded that for Weber, rationality of religions is not a phenomenon of the last centuries. Even in the primitive forms of religions such as magical forms, we may find a kind of rationalized symbolism. (ES, pp.406-407) Especially in its earliest manifestations, *religiously or magically motivated behavior is relatively rational behavior* in the sense that it follows the rules of experience for everyday purposive conduct, because the ends of religious actions were predominantly economic in the beginning- although causality used was fallacious and irrational from the modern standpoint. (ES, p.400) But, in general religions evolved in such a direction that *this original, practical and calculating but primitive rationalism recessed.*⁶⁸ (ES, p.424)

However, recession of primitive rationalism in the religions has been accompanied with the rise of another kind of rationalization in religions. This is *ever-broadening rational systematization of the god concept*. So the link between religious behavior and *the purely external advantages of everyday economic success* is cut gradually and at the end *other worldly non-economic goals come to represent what is distinctive in religious behavior*. Weber defines this as irrationalization of the goal of religious behavior. (ES, p. 424)

During history, rationalization of metaphysical views and of religious life and rise of religious ethics require an independent and professionally trained priesthood, permanently occupied with the cult. And independent status and power is needed for the priesthood, otherwise religious rationalization is either fragmentary or entirely missing. In addition to these factors, the prophets and the laity (the non-priestly devotees of the cult) are necessary.⁶⁹ Significance of priesthood comes especially from the “doctrine”. It refers to the development of rational system of religious concepts and to the

⁶⁸ Brubaker, after categorizing rationality as subjective and objective, defines the subjective rationality as the means perceived by the subject adequate to reach to the ends and objective one as proven scientifically to be adequate. Weber calls magical conduct subjectively rational for ‘magical practices are often carried out in the belief that they will contribute to the realization of certain consciously pursued ends’ (p. 54). Schluchter, in *Paradoxes of Modernity*, claims that a magical ethic is not an ethic in the strict sense of the word since magic carries utilitarian motives as technique based on subjective means-ends relationship (p.70).

⁶⁹ See Pierre Bourdieu, ‘Legitimation and Structured Interests in Weber’s Sociology of Religion’, in *Max Weber, Rationality and Modernity*, Scott Lash&Sam Whimster (eds.), London: Allen&Unwin, 1987, 119-136, pp. 122-123.

development of a systematic and distinctively religious ethic⁷⁰ based on a consistent and stable doctrine. (ES, pp.425-27)

Yet, when belief in spirits became rationalized into belief in gods, the magical ethic of the spirit underwent a transformation too. Violation of divinely appointed norms would displease ethically the god who had these norms under his special care. This idea forms a religious ethics out of the magical prescriptions ... *transgression against the will of god is an ethical sin which burdens the conscience quite apart from its direct results. Evils befalling the individual are divinely appointed inflictions and the consequences of sin, from which the individual hopes to be freed by 'piety' (behavior acceptable to god) which will bring the individual salvation.* Religious ethics of salvation causes the sublimation of piety as the enduring basis of a specific conduct of life by virtue of the continuous motivation it engenders. (ES, pp.437-38)

In these earlier stages of religions of salvation, Weber reminds us, the religion generally has ritualistic or legalistic form. It keeps a kind of powerful domination over the life of people. In a way, it adopts already existing conventions and turns them into divine commandments and raises them into the rank of sanctity so that once alterable conventions of the society become the absolute religious rules eternally valid for everybody and every case. Thereby, *the religion exercises a stereotyping effect on the entire realm of legal institutions and social conventions... The law is sacred law. The dominance of law that has been stereotyped by religion constitutes one of the most significant limitations on the rationalization of the legal order and hence also on the rationalization of the economy.* (ES, p.577)⁷¹

On the other hand, the prophets play a very decisive role in the rational conceptualization of salvation. Prophetic revelations present *a unified view of the world derived from a consciously integrated meaningful attitude toward life.* The life of man and the world gain a certain systematic meaning so that man must orient his conduct in

⁷⁰ For Weber, the development of religious ethics has two origins. One of them is purely magical norms of conduct. The rationalization of taboos leads ultimately to a system of norms. The second origin is obedience to the religious law in order to win the god's favor, as a method of influencing supra-natural powers. (ES 432-433)

⁷¹ Yet, even at this stage, sometimes an opposite development may occur, depending on the existence of other, especially economic, factors. The needs of economic life cause reinterpretation, omission and even practical elimination of the sacred commands and injunctions. Since existing religious norms are generally silent or ambivalent for the new problems and practices, it becomes more and more unpredictable whether one norm will be valid for any practical matter, in spite of its unalterableness. (ES 576-78)

an integrally meaningful manner, if he wants to deserve the salvation. In Schluchter's words, 'there is a linkage of at least all ethical norms, because now they are all directed to the religious goal of salvation, an ultimate, internally consistent religious value axiom that serves as *a common point of reference*.'⁷² Weber reminds us that the structure of this meaning may be various and may not be as systematic and coherent as it purports. On the contrary, it may bring different heterogeneous motives together under a unity without any logical consistency. Yet what matters more is that it is still *an effort to systematize all the manifestations of life that is to organize practical behavior into a direction of life-regardless of the form it may assume in any individual case*.⁷³ Weber finds such a conception of World as a cosmos ordered meaningfully in its totality, inherently problematic since the conflict between empirical reality and such systematization produces *the strongest tensions in man's inner life as well as in his external relationships to the world*. (ES, pp.450-451)

Rationalizations of religions into ethics of salvation and cosmically coherent world-views created many dilemmas that could hardly be explained within the newly-developed religious logics.⁷⁴ The first and main problem that arose was the incompatibility of a perfect and just god with an imperfect and unjust world created and ruled by Him. (ES, p.519) There was too much suffering and injustice in this world. The people who follow the religious ethics strictly were generally the ones who suffer the most.

Weber defined this difficulty that caused even more rationalization of religions as follows: *The need for an ethical interpretation of the meaning of the distribution of fortunes among men increased with the growing rationality of conceptions of the world. As the religious and ethical reflections upon the world were increasingly rationalized and primitive and magical notions were eliminated, the theodicy of suffering encountered increasing difficulties. Individually undeserved woe was all too frequent;*

⁷² Schluchter, *op. cit.*, p. 72

⁷³ Ethics of salvation is oriented to inward sacred values and it is based on principles and is universalistic. Habermas finds this kind of ethic very compatible with positivist understanding of law since norms are counted as mere conventions that can be considered hypothetically and enacted positively. (p. 162-163)

⁷⁴ Wolfgang Schluchter, in 'Weber's Sociology of Rationalism and Typology of Religious Rejections of the World', in *Max Weber, Rationality and Modernity*, Scott Lash & Sam Whimster (eds.), London: Allen & Unwin, 1987, p.94, states for ethics of salvation: 'The more they follow the demand for consistency, the greater the likelihood that their principles will come into conflict with the realities of life or with other principles. This conflict, in turn, will lead to compromises or to the combination of elements that contradict each other.'

not 'good' but 'bad' men succeeded. (SPWR, p.275) To this, it has been added by developing capitalism, a great injustice in economic terms.

Different religions tried to find different solutions for this problem of theodicy. Some of them may be listed as belief in a future revolution in this world; belief in the rebirth, in the universal day of judgment, in retribution of justice and injustice, etc. (ES, pp.520-522)⁷⁵ This constitutes another milestone in the history of religion. But its significance for Weber comes from another fact that the quest for salvation, whatever its form, has a potential to produce certain consequences for practical behavior in the world.⁷⁶ *It is most likely to acquire such a positive orientation to mundane affairs as the result of a conduct of life which is distinctively determined by religion and given coherence by some central meaning or positive goal. In other words, a quest for salvation in any religious group has the strongest chance of exerting practical influences when there has arisen, out of religious motivations, a systematization of practical conduct resulting from an orientation to certain integral values.* (ES, p.528) Of course, the main concern of Weber was still economic behavior, on which the influence may be exerted by *the religious systematization of the conduct of life.*⁷⁷

Weber gives us a categorization of salvation ethics in the quest of creating and maintaining the coherence of religion with the existing world, without losing its conviction. The salvation ethics may propose a pattern of life that *remain[s] altogether oriented to this world, or it may focus on the world beyond, at least in*

⁷⁵ For Bourdieu, a coherent vision of the world and human existence is actually also an attempt to provide the privileged religious strata with *justifications of their existence* in its specific form, that is, their existence as *occupants of a determinate social position*. This is also applicable to the laity. They not only need religious salvation but also a meaningful explanation for their particular position in the social structure ('Legitimation and Structured Interests in Weber's Sociology of Religion', pp. 123-124). Same model is applied by Weber on the status of political authorities through legitimacy claims. Bourdieu also links the issue to religious legitimacy. 'Competition for religious power owes its specificity ...to the fact that what is at stake is the *monopoly of the legitimate exercise of the power to modify, in a deep and lasting fashion, the practice and world-view of lay people*, by imposing on and inculcating in them a particular *religious habitus* (p. 126). At the end, religious power is only the product of a *transaction* between religious agents and lay people in which the systems of interests peculiar to each category of religious agents and to each category of lay people have to find satisfaction' (p. 129).

⁷⁶ (see also SPWR, p. 286) Salvation religions that develop the dualism between God and the world in sharp contrasts satisfy the conditions for an ethical rationalization since such a sharp dualism shifts the believer's search for salvation into a perspective from which the world can be devalued and objectivated solely from the abstract viewpoint of a religious testing. However, Weber needs a second step: an active mode of life turned toward the world. So he selects the inner-worldly asceticism which actively aims at mastering the devalued and objectivated world (SPWR, pp.206-207).

⁷⁷ Weber, as usual, is very careful not to offer a definite cause-and-result proposition. He adds that *finally, religious motivations, especially the hope of salvation, need not necessarily exert any influence at all upon the manner of the conduct of life, particularly the manner of economic conduct. Yet they may do so to a very considerable extent* (ES 528).

part...(ES, p.528) Salvation religions⁷⁸ may be grouped as **this-worldly** and **other worldly**. **This-worldly** salvation ethics promise the success, wealth and happiness in the existing world –without any expectation in regard to another world- in return for the fulfillment of personal religious obligations.⁷⁹(ES, pp.526-527) On the other hand, any this-worldly salvation ethics carry inherently a tendency to transform into a hope for the world beyond since generally those alive at present wouldn't be able to see the salvation during their life time. **Other-worldly** salvation *may essentially mean freedom from the physical, psychological and social sufferings of terrestrial life*. Or it may focus on the inevitable imperfection of the individual, or may aim liberation from the senseless transitoriness of life.

Additionally, Weber uses two opposite typologies to explain different attitudes of religions toward salvation. One of them is **asceticism** and the other is **mysticism**. Asceticism entails an active ethical behavior performed in the awareness that god directs this behavior, i.e. the actor is an instrument of god. It is characterized by a methodical procedure for achieving religious salvation. Asceticism may be divided into two: **World-rejecting**⁸⁰ and **Inner-worldly**. According to world-rejecting one, since the world is full of temptations and of utilitarian conventional virtues, the real salvation requires a formal withdrawal from the world (from all social relations, worldly goods, from political, economic, artistic and erotic activities). On the contrary for inner-worldly-one, salvation requires participation within the institutions of the world but in opposition to them, on the basis of the religious individual's piety and his qualifications as the elect instrument of god. Now the world becomes the individual's responsibility with an obligation to transform it in accordance with his ascetic ideals.

Mysticism may be divided into two again: mysticism as **flight from the world** and **inner-worldly** mysticism. Mysticism may be defined as the contemplative possession of the holy. It intends a state of possession, not action and the individual is

⁷⁸ For a much more detailed analysis of Weberian sociology of religion, please see Emel Öztürk Karagöz, *Max Weber'de Anlayış Sosyolojisi ve Din Olgusu*, İstanbul: Derin Yayınları, 2003.

⁷⁹ One of the examples is Protestant ascetic groups. Even the wealth becomes a certification of the state of grace, when acquired in a systematic and legal fashion- although it never becomes a religious goal in itself. The religions like Islam and Judaism also include political salvation in the sense of redemption from oppression and suffering or of world dominion, and of social and religious prestige.

⁸⁰ Schluchter, in 'Max Weber's Sociology of Rationalism', clarifies that the term 'world-rejecting' is replaced in 'Intermediate Reflections' by the term other-worldly or world flight since both asceticism and contemplation are world-rejecting means of salvation (pp.106-107)

not a tool but a vessel of the divine. Action in the world must thus appear as endangering the absolutely irrational and other-worldly religious state. (RRW, p.325) Flight from the world entails inactivity and even the cessation of thought. It is the absolute minimization of all outer and inner activity. (ES, p.545) World-fleeing mysticism is associated a considerable degree of systematically rationalized life pattern but now the rationalization is only an instrument attaining the goal of contemplation and a negative type consisting in the avoidance of interruptions caused by nature or society. (ES, p.546)

Mysticism takes the form of inner worldly mysticism, if it does not draw the conclusion that he should flee from the world, but like the inner worldly ascetic remain in the orders of the world. (RRW, pp.325-26) But the difference persists, maybe not externally but at least internally between mysticism and asceticism: mystic principle is that the creature must be silent so that God may speak. He is in the world and externally accommodates into its orders but only in order to gain a certainty of his state of graced. Typical attitude is specifically broken humility, a minimization of action and a sort of religious incognito existence in the world. He proves himself against the world against his action in the world. Asceticism proves itself through that action.

These typologies are important for two reasons. First of all they help Weber to explain why capitalism and rationalization developed first in the Occidental world. Christianity and Judaism, but especially protestant sects, are the examples of inner-worldly asceticism. But at the same time, protestant sects emphasize this-worldly salvation.⁸¹ So it has the best compatibility with modern rational and capitalist conditions. Secondly, they are important because they are ideal types used also for exploring the particular conflicts of different religious ethics with other world-orders.

Inner-worldly asceticism has better adaptability to the increasing purposive rationality in practical life and to a world divided into a variety of life-spheres, due to several reasons. The ascetic has a sort of happy closure of the mind regarding any question about the meaning of the world.⁸² He must not worry about such questions

⁸¹ Weber investigates the religious foundations of the rational conduct of life in the ideas of Calvinists, Pietists, Methodists, and the sects that arose from the Anabaptist movements. Habermas, *op. cit.*, p. 164

⁸² On contrary, mystic is concerned about the meaning of world directly but for him it cannot be in a rational form because it is a unity beyond all empirical reality. In mysticism, salvation manifests itself not in any sort of activity but

since the total framework of world is not his responsibility but his god's. He is man of vocation but he does not inquire about the meaning of his actual practice of vocation within the whole world. For ascetic the certainty of salvation always demonstrates itself in rational action integrated as to end and means and governed by principles and rules⁸³. Therefore, the pattern of life that is advised already contains instrumental rationality. It also demands practical rationalism in the sense of the maximization of a methodical systematization of life-conduct and the rational reorganization of the worldly arrangements.⁸⁴ Thirdly, again linked to the method of salvation, since *the order of the world in which the ascetic is situated becomes for him a vocation which he must fulfill rationally...it becomes his vocation to engage in economic activity which is faithful to rationalized ethical requirements and which conforms to strict legality*. Fourthly, rationalism in this attitude is not limited to rational systematization of the conduct, but covers the rejection of everything that is ethically irrational, esthetic or dependent on emotional reactions to the world and its institutions. (ES, pp.543-544, 547-548, 550-551; SPWR, pp.289-290)

I.IV.2 The Stage of Enduring Conflict

Despite the facilitating and positive characteristics of the protestant ethics, the stage that has been reached in the history of religion may be called "enduring conflict". The characteristics of this stage are internalization, individualization, devaluation of this world and being more and more other-worldly (in the sense of being more "irrational"). First of all, the weak explanations of salvation ethics for ever-existing suffering and injustice in this world led the religions to progress step by step towards ever-increasing de-valuation of the world (RRW, p.353). From the perspective of *a divine meaning of existence*, the world has seemed fragmentary and devalued. (RRW, p.357) With

in a subjective condition. It is a quest for capturing ultimate and completely irrational meaning through mystic experience.

⁸³ *The world as a creation of god, whose power comes to expression in it despite its creatureliness, provides the only medium through which one's unique religious charisma may prove itself by means of rational ethical conduct, so that one may become and remain certain of one's own state of grace.* (ES 543) Protestant solution to theodicy was the idea that God has fixed the fate of the World and all men from the beginning of time and it is a sin to question or try to influence God's designs. However this was a very brutal solution in terms of its psychological effects. Therefore 'it was forced to invent...the ...doctrine of proof as the antidote to the totally rationalized doctrine of predestination.' The believers thereby are oriented to prove themselves among the elect by this-worldly success. Swidler, *op. cit.*, p.37

⁸⁴ In this respect, Sayer underlines disciplinary influence of these ethics on the subjects in submitting them to the political power. 'Weber's disciplined subject is the moral ground upon which modern forms of power are constructed, and, conversely, these in turn, come to regulate what subjectivity is permitted to comprise....a novel relation between the subject and power, within which what is now demanded of the former is an internalization of the ideological lineaments of the latter, so that they become the governing norms of conduct, core components of personal identity.' Sayer, *op. cit.*, p. 128

insolvable conflicts with separate spheres, the religions of salvation became more other-worldly. The more is the external rationalization of the world, the stronger the religious reaction is. The process is reciprocal: *not only theoretical thought disenchanting the world led to this course but also the very attempt of religious ethics practically and ethically to rationalize the world.* (RRW, p.357)

The other important aspect is internalization. The religion of salvation transforms into an ethic based on inner religious faith. Internalization of religion for the individual means elastic maxims of conduct, those are flexible enough to adapt into different situations. This is a greater tension than the one occurred between sacred laws and changing conditions of the society. *The inherent conflict between the religious postulate and the reality of the world does not diminish, but rather increases.* Now it is not only the religion which is internalized but the problems resulting from such a rationalization of the religion are internalized in an intensified way in the individual.

As we mentioned before the religious need of the individual comes from the endeavor of finding a meaning to the life and the world in its totality. However, as the social relationships and of their substantive contents becomes more and more systematic and rational, this endeavor of the individual becomes harder since he is situated in *the struggles of particular autonomous spheres of life against the requirements of religion.* This may be taken as a simple definition of what Weber calls disenchantment of the world. (ES, p. 578) Although the religion keeps giving an answer to such a demand, by organizing the world into a systematic, rational cosmos, it cannot succeed to create the same effect as in previous. (ES, pp.578-79)

Giddens links Weber's methodological sein/sollen division to his conception of rationalization and finds the ethical irrationality of the world at the basis of Weber's theory on rationalization of religion: 'The ethical irrationality of the world is a major element in the conceptions underlying in his studies of the 'world religions', and in his analysis of the specific path of development taken by rationalization in the West. According to Weber's standpoint, there can never be a rational solution to the competing ethical standards which exist; all civilizations thus face the problem of 'making sense' of the 'irrationality' of the world. Religious theodicy provides a solution

to this problem, and the need to ‘make sense of the senseless’ is a main psychological impetus towards the rationalization of systems of religious beliefs.’⁸⁵

I.IV.3 Religiously Ordered Life and Other Life Orders

In this section, we will try to explain the conflicts between the religious sphere and the others. We will claim that not only different set of values are in conflict but also it is a struggle between values and interests, between ethics and power-relations, between system paradigms of close personal relations and of impersonal rules. Lastly, especially for the spheres like eroticism, it may become a tension between rationality and irrationality, which leads individuals to flight into the realm of irrationality from the cage of rationalism. *[T]he conflict [is] between the rational claim and reality, between the rational ethic and the partly rational and partly irrational values. With every construction of the specific nature of each special sphere existing in the world, this conflict has seemed to come to the forever more sharply and more insolubly.* (RRW, p.357)

I.IV.3.1 Religion and Economic Sphere

Weber finds four main conflicting areas between religious and economic sphere. First of them is the tension between the principle of charity and the main capitalist postulate of profit-making. Second tension is between the religious ethics dominating personal relations and the impersonal structure of modern economics. The third tension comes from the religious prohibition of usury; and the fourth one is between religion’s negative attitude towards wealth and the capitalist accumulation of wealth. There are three points not to be neglected while focusing on this problematic relation: first is that none of these conflict points change the claim of Weber that protestant ethics constitutes the spirit of capitalism- in a way it gives us another example for dialectic approach of Weber. Second is that the transformation of religions into religions of salvation prepares the necessary background for intensifying these tensions. Third is that utilitarian or purely instrumental method of capitalism seems to be the main source of incoherency between two different value-spheres.

⁸⁵ Giddens, *Politics, Sociology, and Social Theory*, p. 43

Weber again adopts his socio-historical approach for this subject. He underlines one point from the beginning, that is, reciprocal assistance and solidarity has existed long before prophetic religions. It was there already in the “associations of neighbors⁸⁶” as an ancient economic ethic of conduct. For these associations, there is moral dualism, as in-group and out-group morality. *For in-group morality the principled obligation to give brotherly support⁸⁷ in distress has existed.* (RRW, p.329) But prophecy created a new social community where the religion became the religion of congregations and ethics of neighborhood turned into ethics of religious brotherhood. Now the obligation of assistance is not only towards the blood-brother or fellow clan or tribe-member but towards all believers, or as Weber calls, *brethren of the faith*. Thereby the prophetic religion has developed a religious ethic of brotherliness. (ES, p.580; RRW, p.329)

This development may not be thought independent from the idea of salvation and, so, from the ethical rationalization. The principle behind the ethical command to assist to the comrade in faith was *the suffering common to all believers*, no matter whether suffering actually existed or a constant threat. Weber interprets the transition from the ethics of neighborhood to the ethics of brotherliness as rationalization process of salvation religions in terms of value-rationality. As the religions, for the aim of salvation, raise more and more imperatives concerning assistance to sufferer, they are *sublimated into an ethic of absolute ends*. As we see, these are absolute commands. As we may remember from the first chapter, value-rationality takes the ends as absolute for the action. It is rational because it is conscious and deliberate in respect to the individual who is taking the action. Therefore this process is called rationalization of salvation religions by Weber, not only because it is a systematization of religion directed to one end, but also because it becomes an area of value rationality for the individuals, or so-called “value-sphere”. (RRW, p.330)

The religion of brotherliness, background of which may be summarized as above, *has always clashed with the orders and values of this world... The split has usually become wider the more the values of the world have been rationalized and*

⁸⁶ By association of neighbors, Weber implies the community of villagers, members of the sib, the guild, the clans and so on- all kind of closed and relatively small groups.

⁸⁷ These were the obligations of the wealthy and the noble: *to loan, free of charge, goods for the use of property-less, to give credit free of interest, and to extend liberal hospitality and support.*(RRW 329)

sublimated in terms of their own laws. (RRW, p.330) One of them is economic order. One of the conflict points is about usury. Religious rejection of usury originally comes from the principle of assistance to the fellows and for the religions of congregation the taking of usury from brothers is a serious breach of the ethics. Yet, this is not the only link. Prohibition of usury is a product of the attitude of religions toward the imperatives of rational profit-making. One of the reasons for this negative attitude, Weber states, is that economic rationalization of a barter economy weakens the tradition and thereby the authority of the sacred law supported by it. Therefore the pursuit of money is religiously suspect.(ES, pp.583-84)

Actually, in over all, it is the rationalities of orders that conflict. Mainly, the world of modern capitalist economy and a religious ethic of brotherliness are incompatible: the rationality of economic domain is in struggle with the ethical rationality, since the impersonality of economic order is specifically opposed to the brotherliness of religion. (RRW, p.331) As Weber claims: *it is above all the impersonal and economically rationalized (but for this very reason ethically irrational) character of purely commercial relationships that evokes the suspicion ...of ethical religions.* (ES, pp.584-85) The purely personal relationship of man to man may be ethically regulated since these are based on *individual wills* of the participants. The religious ethics can control and create obligations for these kinds of relationships. Only in such personal structures, the virtue of charity may be manifested.

On the other hand, the economic sphere is the realm of impersonal relationships. Its impersonal character increases by its economical rationalization. A rational economy is a functional organization oriented to money prices which originate in the interest-struggles of men in the market (RRW, p.331). The conflictive and self-interest-oriented characteristic of economic sphere is already against the imperatives of religious ethics. In addition to that, money is the most abstract and “impersonal” element that exists in human life.

The salvation religions are against the profit economy with all rational methods of salvation. The warnings against attachment to money and goods have been almost pushed to the height of tabooing goods and money. (MIE, ES, pp.636-637; RRW, p.332)

Of course, the impersonality or *depersonalization* comes from the rationalization specific to economic sphere, which is a *universe of instrumentally rational activities*. In this universe, *there is no possibility, in practice or even in principle of any caritative regulation* (ES, p.585). Because the world of capitalism that follows its own rules (disobedience to them means economic failure or ruin) independently from the persons gives no support for any charitable orientation. But still main problem is not that particular individuals cannot resist against the economic system to keep their virtue of charity, due to their weaknesses. It is a problem of “meaning”: the claims of religious charity lose their meaning altogether, in front of a universe with impersonal structures and based on instrumental rationality and self-interest. Weber tries to show us that institutions and conceptions in a system take their meanings from the totality and interrelation of different system elements so that something very meaningful from the religious perspective seems ridiculous from capitalist perspective.⁸⁸

I.IV.3.2 Religion and Political Sphere

The brotherly ethic of salvation regimes is in sharp tension with the political orders of the world. These problems arise from the structure, the specific rules and characteristics of politics. It is also concerned, as economic sphere is, with interest struggles, conflict, power-games. It is as impersonal as economic sphere. Its specific ends are power and domination and its specific tools are violence and wars. The instrumental rationality is the decisive rationality of politics. (RRW, pp.333-340; ES, pp.590-601) Additionally, *in contrast to economics, politics may come into direct competition with religious ethics at decisive points*. (RRW, p.335)

The basic demands for brotherliness again produce conflict and tensions between rationalities of these spheres. The first problem has occurred with the universalist religions transcending the borders of political units like locality, tribes and polities and when the religions have gained an equal status with the political associations. Not only the use of violence, but also the wars between the brothers of

⁸⁸ Weber reminds us that ultimately no genuine religion of salvation has overcome the tension between their religiosity and a rational economy. There have been only two consistent avenues: Puritanism and mysticism. Yet Puritanism, according to Weber, is no longer a genuine religion of salvation, because it is no more a religion of brotherliness. (RRW 332-333)

religion or the children of God (more generally) are against the religious ethics. The second problem results from the “state” itself as a political unit. “*Reasons of state*” ...*follow their own external and internal laws*. The state’s absolute end is to regulate the distribution of **power** externally and internally. It has to appeal to the naked violence and coercion as means to achieve these ends both in its foreign policy against the outsiders and in the face of its internal enemies. The use of violent means is central characteristic of every “political association”, for Weber. He states that *it is only this very appeal to violence that constitutes a political association in our terminology*. (RRW, pp.332-34)

There appear conflicts between religion and politics in many aspects: in terms of ends, in terms of means and in terms of meaning or mentality in overall. First, the absolute end of politics is power from which the perspective of any universalistic religion of salvation is meaningless. Secondly the use of violence and naked force as means is not something acceptable to religious ethics, especially because they depend ultimately upon power relations, not even on ethical “right”.⁸⁹ Weber gives us insights about how he conceives the politics while explaining why the religious ethics developed into a rejection of violence. The universal experience about the politics is that *violence breeds violence, that social and economic power interest may combine with idealistic reforms and even with revolutionary movements, and that the employment of violence against some particular injustice produces as its ultimate result the victory, not of the greater justice, but of the greater power or cleverness...*(ES, p.592)

Additionally, any ethical rationalization of a political right to use violence may seem to any religious rationalization only *an aping of ethics*. Yet, at the same time, the wars are the places where the religion and politics coincide⁹⁰ as well as directly confront each other.⁹¹ (ES, p.592; RRW, pp.334-335)

⁸⁹ The factors that favor the development of a religious ethic to renounce all violence is explained by Weber in detail in *Economic and Society* (pp. 591-593)

⁹⁰ Weber does not mean to deny the wars of religion. But he considers them the products of failed attempt of salvation religions to dissolve the tension with the politics, except the ones by Puritanism and mysticism. The examples are holy wars of Christianity, Calvinism and Islamism.

⁹¹ War creates a pathos and a sentiment of community. War thereby makes for an unconditionally devoted and sacrificial community among the combatants and releases an active mass combination and love for those who are in need. But more importantly, the war creates a special and consecrated meaning of death in war. Death on the battle field, different from death in ordinary life is dying “for something”. The death gains almost a mystical meaning in competition to its religious references. *The brotherliness of a group of men bound together in war must appear*

Third reason of conflict is the depersonalization of the politics especially in the bureaucratic states through a pragmatic approach. *The bureaucratic state apparatus, and the rational homo politicus integrated into the state, manage affairs, including the punishment of evil, when they discharge business in the most ideal sense, according to rational rules of the state order.* Political depersonalization comes from its matter of factness. The actions are oriented according to an inescapable objective pragmatism applied for the “reasons of state” without regard to the person. It is a kind of instrumental rationality, which is valid for actions. First of all it is not emotional at all; *the political man acts ...without hate and therefore without love.* Substantive moralization that requires personal and unique evaluation of each case is lacking in the domination apparatus of depersonalized state. There are standards determined by the absolute end of the state, not by the values. (ES, pp. 600-601; RRW, pp.333-335,339) Additionally, the instrumental rationality is very explicit in the following definition of Weber: *political activity is oriented to average human qualities, to compromises, to craft and to the employment of to other ethically suspect devices and people, and thereby oriented to relativization of all goals.*(ES, p.593) As we may remember, relativity and comparability of the goals and the selection of efficient tools without regarding their ethical implications are the main characteristics of instrumental rationality.

Weber makes an enlightening and inspiring explanation to us in his work “Religious Rejections of the World”. The main conflict between ethics and, political and economic spheres is the conflict of value-rationality and instrumental rationality. The rationalities are so different from each other that even it is not possible to answer to the very first question about action without falling into a dilemma: *Where, in the individual case, can the ethical value of an act be determined? In terms of success, or in terms of some intrinsic value of the act per se?* The question is reasonably linked to the discussion we explained in the first chapter. Value-rationality does not take into account the results of the action but only the intrinsic value of action. In religions, the responsibility for the effects of action may easily pass on to God. Yet, *the actors own conduct and not the lawful autonomy of the world, is condemned as irrational, in its*

devalued in such brotherly religions. It must be seen as a mere reflection of the technically sophisticated brutality of the struggle. (RRW 335-336)

effects. This may lead to religious ethics to an extreme position where it rejects purposive-rational action per se and hence, all action in terms of means-ends relations...(RRW, p.339)

It seems that only good conciliation of these pure types of value-rationality and instrumental rationality is found by Protestant ethics. This is the hybrid form that we examined in detail in the first chapter.⁹² It is “ascetic” vocational ethics what Weber finds already lost in capitalist economy although originally was there, and what he proposes for politics and science. It is the only way that value and instrumental rationality come together for a stronger rationality.

I.IV.3.3 Religious Ethics and Irrationality: Sexuality and Art

Weber observes a flight into irrationality by the individual from the rationality of politics and economics, into apolitical emotionalism from the objectification of power structure and rationalization of coercion. (ES, p.601) The main areas into which the individual escape are esthetic and erotic spheres. Weber traces the *tension between the religious ethic and “this-worldly” life forces, whose character is essentially non-rational or basically anti-rational.* (RRW, p.341)

Religion and art were intimately related in the beginning⁹³. Concerning esthetic sphere, the evolution of the inherent logic of art increased the tension with religion. The religions of salvation have focused on the meaning, the form of actions is not relevant for them and even is devalued as contingent. Art was compatible with the religion as far as it keeps its attachment to meaning and only to this. However, with the development of intellectualism and the rationalization of life which means conscious discovery of uniquely esthetic values, art has become *a cosmos of more and more consciously grasped independent values which exist in their own right. Art takes over the function of a this-worldly salvation...It provides a salvation from the routines of everyday life, and especially from the increasing pressures of theoretical and practical rationalism.* (RRW, p.342) Now, a direct competition occurs between two spheres. (ES, p.608; RRW, pp.341-342)

⁹² For a similar view see Habermas, *The Theory of Communicative Action*, p. 173

⁹³ For more detail, see ES, p. 607

Art now proposes an inner-worldly and irrational salvation instead of religious salvation methods. But of course, from the religious point of view, it was only irresponsible indulgence, secret lovelessness and escape from moral responsibility. Art proposes, as well, a set of rules for conduct, in competition to the ethics of conduct. Esthetics of conduct replaces the judgments of reprehensible with the judgments 'in poor taste' and brings subjectivity and relativity into the core of human life. In any way, the esthetic attitude does not and cannot support an ethic of fraternalism which has a clearly anti-esthetic orientation. (ES, p.608)

Weber defines the sexual love as *the greatest irrational force of life*. Actually, from the beginning, all religions of salvation have hostility toward sexuality⁹⁴. As in the other spheres, the tension is increased by the independent and interlinked evolutions of the both spheres and by the rationalization of life patterns in overall. On the side of sexuality, the evolution occurred as *sublimation into "eroticism"*. The reasons for the direction it takes are various. First of all, at the level of peasant, the sexual act is an everyday occurrence; and for primitive people, it contains nothing unusual. *The naïve naturalism of sex* is in the routine of living. The sublimation of sexuality *into a consciously cultivated, and hence, a non-routinized sphere* is directly linked with the economic conditions and the conventions effected by these conditions. On the other hand, the religions of salvation while opposing to the rationalizations of political and economic spheres, it was at the same time trying to reply the conflict and competition with the sexual sphere. All these conditions by combining with the religious opposition create more and more restrictions on sexuality and unattached it from the routine of life. (RRW, pp.343-345; ES, p.602-607)

In general, *the reason and significance of this evolution, however, involve the universal rationalization and intellectualization of culture*, the rationalization of the conditions of life and at the end, occurrence of a new and progressively rationalized life

⁹⁴ Weber states that *what concerns us in this religious hostility to sexuality is ...the meaning which is attributed to sex*. He adds that from the mystical perspective, sexuality is what man shares with the animals and for the quest of salvation, man should resist to this most powerful salvation. From the perspective of asceticism, *rational ascetic alertness, self control, and methodological planning of life are threatened the most by the peculiar irrationality of sexual act, which is ultimately and uniquely unsusceptible to rational organization*. These two motivations have frequently operated together to produce hostility toward sexuality in particular religions. (ES 602-604)

pattern. There was no more, simple peasant existence⁹⁵. Under these conditions, the sexuality is non-routinized and evolves into a kind of salvation **from rationalization** as eroticism, as it happened in art. In the erotic sphere, the modern individual *knows himself to be freed from the cold skeleton hands of rational orders, just as completely as from the banality of everyday routine.* (ES, pp.606-607; RRW, p. 347)

When the eroticism becomes a salvation from rationalism, it becomes an actual and powerful rival of religion of salvations⁹⁶. First of all, it turns into an autonomous sphere that *becomes the basis of idiosyncratic sensations, hence generates its own values and transcends everyday life.* The rationalization of sexuality into eroticism lies in the fact, among others, that it becomes a conscious enjoyment although in a sublimated way. Yet, Weber warns us that is only rationalization of a sphere into irrationality: *Nevertheless, indeed because of this elevation, eroticism appeared to be like a gate into the most irrational and thereby real kernel of life, as compared with the mechanisms of rationalization.* (RRW, pp.344-347; ES, p. 607)

I.IV.4.4 Religious Ethics and Scientific Rationality

Although comparing to artistic and erotic spheres, intellectual and ethical spheres are in the same camp of rationality, still the self-conscious tension of religion is the greatest with the intellectual sphere. Again we have to be careful to understand the dialectic explanation of Weber about this relation, since religion is more compatible with the empirical research and natural sciences than philosophy that leads to

⁹⁵ *The total being of man has now been alienated from the organic cycle of peasant life; life has been increasingly enriched in cultural content, whether this content is evaluated as intellectually or otherwise supra- individual. All this has worked, through the estrangement of life-value from that which is merely naturally given, toward a further enhancement of the special position of eroticism (RRW 344-345).*

⁹⁶ There are many reasons why the religion and eroticism are in such opposite polars, especially in the intellectualist cultures of modern ages. First of all, eroticism, and specifically extramarital sexual life, seems to the vocational specialist type of man - who is drawn into *rational everyday life and completely emancipated from the cycle of old, simple and organic existence of the peasant-* like the only tie which still linked him with the natural fountain of all life. Secondly, eroticism competes with the religion in terms of salvations since *a tremendous value emphasis on the specific sensation of an inner-worldly salvation from rationalization thus resulted. A joyous triumph over rationality corresponded in its radicalism with the unavoidable and equally rejection by an ethics of any kind of other.* The tension increased between spheres, where the sexual sphere systematically puts a higher value on erotic sensation by reinterpreting and glorifying all the pure animality of relation- in a way giving it a new meaning other than the religion gives. Thirdly, it purports to replace religious brotherly love by offering a direct fusion of souls of one to the other. As if it is a sacrament, eroticism turns into a communion felt like a complete unification. With its irrationality and incommunicability, the experience is the having of the mystic. *This is not only due to the intensity of the lover's experience but to the immediacy of the possessed reality.* Any ethic of religious brotherhood is radically opposed to all these: since it is a fake substitute of the devotion to God and to its ethically rational order, since erotic relation is and must remain attached to brutality, and concerned with jealousy, the will to possession and coercion of the souls, since the passionate character of eroticism is undignified loss of self-control and ass the loss of orientation towards rationality and wisdom of norms or mystic godliness. (RRW 346-349)

skepticism. The conflict between religion and intellectual knowledge again is based on the quest of meaning of world and *on the unavoidable disparity among ultimate forms of the images of the world*. The scientific knowledge explains the world with causal relations and it disenchant the world and its meaning with empirical proofs. Therefore it invalidates all ethical inner or other worldly questions of religion. Thereby it increasingly *pushes religion from the rational to irrational realm*. However all these observations should be read by not omitting the collaboration and intimate relation of religion with rational intellectualism.⁹⁷ (RRW, pp.350-352)

The tension arises from partly the methods of grasping the world's meaning. Religion claims that it directly grasps this meaning by virtue of a charisma of illumination. Additionally it asserts that the nature and meaning of religious knowledge is entirely different from the accomplishments of intellect. By this way it defends himself against the attack of self-sufficient intellect. The devaluation of this world and the emphasis on the futility of worldly things by religion arrives to the ethical rejection of the empirical world- as we may remember from the previous sections. The culture of rational modern life is refuted by the religion, just for this same reason. Religious guilt becomes *the integral part of all culture and of all conduct in a civilized world. And thereby the ultimate values which this world offered have seemed burdened with the greatest guilt*. (RRW, p.354)⁹⁸

While Weber explains the opposition between the cosmos of natural causality and the postulated cosmos of ethical, compensatory causality, he seems as if he leaves aside his look from different point of views of spheres but gives his final personal remarks about the modern culture and the position of individual within this context. Problem with the modern culture and intellectual knowledge is that they hardly find or create a new meaning for the disenchanted world, at least as strong as the religion succeeded once. The main issue of science is that it seems *unable to answer with*

⁹⁷ For detailed explanations of Weber for this collaboration please see RRW 352-356

⁹⁸ It is worth to add Weber's comment on the civilized world from the perspective of religious ethics: *Wherever the external order of the social community has turned into the culture community of the state it obviously could be maintained only by brutal force, which was concerned with justice only nominally and occasionally and in any case only so far as reasons of state have permitted. This force has inevitably bred new deeds of violence against external and internal enemies; in addition, it has bred dishonest pretext for such deeds. Hence it has signified an overt, or what must appear worse, a pharisaically veiled, absence of love. The routinized economic cosmos, and thus the rationally highest form of the provision of material goods which is indispensable for all worldly culture, has been a structure to which the absence of love is attached from the very root. All forms of activity in the structured world has appeared to be entangled in the same guilt*. (RRW 355)

certainty the question of its own ultimate presuppositions. But still science claims to represent the only possible form of a reasoned view of the world.⁹⁹ The science and intellectualism creates its own aristocracy on the criterion of possessing the rational culture, independently from ethical standards. Though, still worldly man regards this possession of culture as the highest good. It may be claimed that Weber asserts that science creates its own ethics and value-sphere, in a way totally autonomous from religious ethics. Yet, what science cannot succeed isn't only not to avoid the burden of ethical guilt from the religious perspective. More than this, scientific progress erodes all traditional values that gave human beings a sense of the meaning of their lives, but cannot put something in its place.¹⁰⁰ Even if it is judged in its own standards, it fails in providing a meaning to man: it is **senseless**. (RRW, pp.354-355)

Even if we take the inner worldly perfection of self of a man of culture as the ultimate value of the intellectual sphere, it is still meaningless. It is meaningless from religious view, since it entails a senseless death; life ending with a senseless death does not make any sense. Weber attempts to explain the dilemma of civilized man of culture with the relativity and infinity of choices without any absolute and fixed standard. Before modern ages, peasants or lords or warriors were 'satiated with' life mainly for two reasons. The men of those times had the feeling of fulfilling a cycle of their existence since more than this was beyond their reach and beyond their awareness. They enjoyed the *naïve unambiguity of the substance of their lives*. Yet, modern man may become only *weary of life* because as the culture and cultural values progress, differentiate and multiply indefinitely, the goal of self-perfection gets more remote to the man and because it is not possible to make an articulated selection of cultural values so that to have only 'essential' in culture due to lack of a definitive criterion of such a judgment that will guarantee a meaningful end at the time of death. In turn, culture creates its own vicious cycle since it signifies *man's emancipation from the organically*

⁹⁹ Yet modern science does not provide a solution to the ethical irrationality of the world. Giddens states: 'There is no way in which scientific rationalism can provide a validation of one ethical ideal compared to another. The unending conflict of divergent ethical systems can never be resolved by the growth of rational knowledge', Giddens, *Politics, Sociology and Social Theory*, p. 42. Ralph Schroeder, in 'Disenchantment and its discontents: Weberian perspectives on science and technology', *The Sociological Review*, vol. 43, no. 3, 1995, 227-250, p.232, finds the origins of 'meaningless' science for Weber in his neo-Kantian approach. What Weber means in this Kantian context is 'the presuppositions of the natural or cultural sciences are empty, they can never be given any content by the scientific world-view itself.' In the same way, Kant's synthetic a priori categories are necessary for knowledge but in themselves they are meaningless.

¹⁰⁰ See Ralph Schroeder, *Max Weber and the Sociology of Culture*, London: Sage Productions, 1992, p. 130

prescribed cycle of natural life. For this very reason culture's every step forward seems condemned to lead to an ever more devastating senselessness, especially while the cultural advancement brings more and more self-contradictory and mutually antagonistic ends. (RRW, pp.356-357)

II. ECONOMIC SPHERE

From the beginning, some points are to be clarified about market economy from Weber's perspective. First of all, according to Weber, capitalism is not a phenomenon of merely modern times or of the Western world. On the contrary, capitalist enterprise often existed elsewhere and there had been profit-seeking organizations throughout the history. Secondly, differing from Marxist point of view, capitalism in modern times is a product of a variety of contingent factors: one of which is religious ethics, namely protestant ethics and the other is the modern legal system.¹⁰¹ Therefore, Weber explores, in a way, value-rational origins of capitalism. In protestant ethics, it bears a strong moral sense. Profit is perceived as the rightful reward for devotion to work and success implies a proof of approval of God. However, thirdly, by time, the pursuit of profit has become an end in itself, from the point of view of capitalist. Now, the relentless pursuit of profit has become the distinctive aspect of modern societies. It is a competition between modern enterprises in an endless cycle to outgrow the others.¹⁰² Fourthly, the pursuit of profit, which is devoid of any ethical value, is not even a utilitarian approach. Individuals falsely believe that to earn more money and to make more profit is to their interests although these could be only tools for their self-interests. Let's try to analyze the relation between interest, rationality and market economy from Weber's perspective.

II.I Capitalism and Instrumental Rationality

For Weber, capitalism is the most fateful force of our modern life. He defines capitalism as *the pursuit of profit and forever renewed benefit, by rational capitalistic enterprise*. (PESC, p.17) The definition has two specific elements. First of them is that capitalism is not identical with greed of gaining more money (which is emotional) but with **profit-making**. Secondly, Weber's focus is on specifically enterprises, not on labors or households. The end of capitalist economic action is profit and when the economic action is rational, it is *adjusted to calculations in terms of capital* since through calculations of capital in money terms the entrepreneur may estimate *probable*

¹⁰¹ 'Weber explains the institutionalization of purposive rational action first by way of the Protestant vocational culture and subsequently by the way of modern legal system. Because they embody post-traditional legal and moral representations, both of these make possible a societal rationalization in the sense of an expansion of the legitimate orders of purposive rational action.' Habermas, *op. cit.*, p. 221

¹⁰² Johan A. Hughes, Peter J.Martin& W.W. Sharrock, *Understanding Classical Sociology: Marx, Weber, Durkheim*, London: Sage Publications, 1996, p.95

profitableness of any choice of action. It means that for the end of more profit, capital calculation provides the actor with a precise tool to compare the actions and their results in terms of loss and profit before taking a decision. Very apparently, here Weber qualifies capitalist action as **instrumentally rational action**. (PESC, pp.17-19, ES, p.63)

More specific explanations on economic action may be found on chapter II of Society and Economy. There, Weber defines rational economic action as instrumentally rational action towards economic ends through peaceful exercise for the control over resources. That requires deliberate planning. (ES, p.63) However it should not be forgotten that instrumental rationality itself cannot be an economic action without ends, especially without economic ends. Without economic ends, it may only be called *economically oriented action*. Without any end, it may be called *technical action*. This comes from the difference between technology and economy. *The “technique” of an action refers to the means employed as opposed to the meaning or end to which the action is, in the last analysis oriented*. (ES, p.65) Technical action accepts the end as beyond question and ignores other wants.¹⁰³

II.II Formal and Substantive Rationality of Economic Sphere

Main component that makes an action economic action is its ends. It seems that for Weber the only basic economic end is profit. He defines profit-making as an activity *which is oriented to opportunities for seeking new powers of control over goods on a single occasion, repeatedly, or continuously* (ES, p.90). However, even the profit-making activity which is the main feature of capitalist market is oriented to something. It is a means for seeking new **powers** of control in the market. Profit-making in part is also oriented to itself, to the new opportunities for profit-making. It seems like a circular activity for having a more powerful position in the market for more profit-making (ES, pp. 90-91). There is *a formal rational tool* peculiar to rational economic profit-making:

¹⁰³ To be able to understand this distinction Weber makes, we have to re-evaluate the concept of action. It seems that for Weber, social action may have another meaning than being one isolated meaningful and conscious behavior. It may mean a series of concrete acts systematically oriented towards an end. Therefore Weber underlines that *the ultimate meaning of a concrete act may, seen in the total context of action, be of a “technical” order*. This act of technique concerns the choice of means. So a concrete act may have only a meaning as a means chosen to reach an end. Thereby it constitutes a small component of an action, with its technical function. This technical choice reaches the highest level of rationality in scientific knowledge. What Weber emphasizes is that a technical question accepts the given end without questioning and ignores the other wants or possible ends. On the contrary, the economic point of view takes into account the ends and compares them in terms of costs and benefits. (ES, pp. 65- 66)

“capital accounting”. The aim of capital accounting is *the valuation and verification of opportunities for profit and of success of profit-making activity*. (ES, p.91)

Formal rationality of economic sphere refers to quantitative calculation or accounting in a system of economic activity. For example, the provision for needs may be expressed in numerical, calculable terms, and is so expressed. However, formal rationality can not answer to the question of distribution. It may only calculate what occurs in reality or may be a technical means as mentioned above for a given end (such as profit making). Although economic calculations are formally rational whatever the technical form they take, they have a higher degree of rationality in money terms than they have in other terms. (ES, p. 85) Yet there is another kind of rationality applicable to economic sphere: **substantive rationality**. Substantive rationality uses another criterion that does not belong to economic order. So, it is not rationality of economic system but of some other orders. Substantive rationality is concerned with provisioning of different groups with the goods not as a result of economic actions (not with the invisible hand of market) but *by economically oriented social action*. It uses the scales of ultimate values whether they be ethical, political, utilitarian, hedonistic, feudal, egalitarian or whatever, to measure the results of the **formally rational** economic action. Substantive rationality not only ignores the formal rationality sometimes it may find purely formal rationality hostile to its own ends. (ES, pp. 85-86)

In the previous section, we tried to show that capital calculations are the basis of instrumental rationality of economic activity. Capital accounting orients each operation of a profit-making enterprise provided that it is rational. Weber calls all the quantitative calculations of economic activity as the formal rationality. This rationality reaches to its highest degree in modern capitalism with capital accounting and modern book-keeping in monetary terms. Therefore there is a strong link and even an overlapping between the instrumental rationality and the formal rationality of economic sphere. Additionally Weber states that substantive analysis uses the scales of “value rationality” or “substantive goal-rationality”. Now for us, it is easier to understand for us why there is a potential of conflict between formal and substantive rationality.

Formal rationality seems like an “original” component of instrumental rationality, whereas “value-rationality” is inseparable part of substantive rationality.¹⁰⁴

Yet, we have to be very careful at this point. One example for substantive rationality is the socialist and communist standards. From the socialist point of view, values like social justice and equality are not only criteria for evaluation of the results, spirit or instruments of economic activity, they are also the value-ends. Therefore they also make calculations, meaning that they also use formal rationality for these ends. Since they reject the market economy and its instruments, and find the calculation in monetary terms *as fundamentally inimical to their respective ultimate ends*, they do their calculations in kind (not in money). Weber explicitly states where a planned economy that regulates the market according to a substantive order is radically carried out it must further accept the inevitable reduction in formal, calculative rationality¹⁰⁵ which would result from the elimination of money and capital accounting due to the difficulties to find quantitative standards other than money and prices and to determine them objectively and correctly. So the calculations of substantive rationality are less precise and less accurate. Now, substantive rationality uses a formal instrument to reach its value-ends yet this hybrid form of rationality suffers from the incompatibility of value-rationality with instrumental logic and irrationalities resulting from that. On the other hand, formal rationality of the market economy is the highest since *from a purely technical point of view, money is the most perfect means of economic calculation and of orienting economic activity*¹⁰⁶. (ES, pp.100-106, 86)

Yet, the comparative degrees of formal rationality and its capability of adaptation to different systems raise a fundamental question about its claimed objectivity. The tool used by market economy is capital accounting. Capital accounting is a means for making more profit. Capital is already defined by Weber as the money value of the means of profit-making available to the enterprise. Calculation in money is

¹⁰⁴ Sayer, *op. cit.*, p.96

¹⁰⁵ Wolfgang J. Mommsen, *The Age of Bureaucracy*, Oxford: Basil Blackwell, 1974, p.65, argues that the concept of ‘formal rationality’ is identical with the principle of maximization of efficiency although Weber himself never put it like this explicitly.

¹⁰⁶ Sayer argues that economically formal rationality is ‘the extent of quantitative calculation or accounting’ involved in economic action. Substantive rationality is ‘the degree to which a given group of persons is or could be adequately provided with goods’ (p.96). Here substantive rationality as in the spheres of law, and politics carries the characteristic of ‘being specific to person’, in a way of being personal, which hinders objective application impersonally. On the other hand, Weber claims that what make modern capitalism formally rational are not its ends but the unprecedented extent to which the actions of economic agents are calculated.

oriented to profit-making, while *calculation in kind is in its essence oriented to consumption, the satisfaction of wants*. (ES, p.101) Yet, as we mentioned before, Weber claims, accounting in kind suffers from formidable problems *which are incapable of the objective solution*. It is not only objectivity but rationality itself at stake for any planned economies. Weber urges us that we cannot speak of a rational “planned economy” so long as we have no instrument for elaborating a rational plan¹⁰⁷. Weber seems to claim that only rational and objective economic system is capitalism, because of its highest formal rationality.¹⁰⁸ Even, it is the only economic system because the category of economic action is limited to the actions that are based on “goal-oriented” rational calculation with the technically most adequate available methods. (ES, pp.101-103)

As Shellef also argues, Weber presents the rationality of the Western capitalist world as a true rationality, and others are value-laden.¹⁰⁹ It would be too much to argue that he separated the rationality into two only in order to emphasize the uniqueness of the West and of capitalism, especially in front of his harsh criticism against the formal rationality and his emphasis on the need to reintegrate the values into social life. As Mommsen claims, the ideal-type of market economy given in *Economy and Society* is by no means identical with the form of capitalism which Weber was personally in favor of. On the contrary he attempted to display both the formal irrationalities and the more unpleasant and inhuman features of real face capitalism of his time.¹¹⁰ Still these do not prevent him to argue that the only rational economy is market economy. ‘What makes aspects of Weber’s work open to question is that he is least self-critical in those areas of

¹⁰⁷ As Mommsen stated in *The Age of Bureaucracy*, Oxford: Basil Blackwell, 1974, pp. 64-65, the identification of socialism with planned economies did not originally belong to Marxist socialism. Yet, Weber considered a planned economy to be the only realistic form in which the idea of socialism could be put into practice at all, under the impact of the Russian experience and of the debates in Germany about the governmental control of the economy for the realization of socialist ideas.

¹⁰⁸ Nigel Dodd rightly questions the epistemological status of formal rationality as Weber defines it. ‘Is formal rationality a culturally and historically grounded world view? Or is it purely abstract framework which has no cultural underpinnings?’ He goes on by asking whether formal rationality is equal to economic calculation for Weber. If it is so, Weber might be suggesting that economic values will take precedence in modern society. Additionally, if the spread of formal rationality indicates the erosion of values, the process of disenchantment would mean the decline of tradition. ‘In turn this implies that all normative judgments must now come under the scrutiny of reason, and would therefore explain why the process of rationalization is meant to have such an unsettling or alienating effect on modern culture’ (pp. 51-52).

¹⁰⁹ Leon Shaskolsky, *Social Cohesion and Legal Coercion*, Amsterdam: Rodopi, 1997, pp.20-21

¹¹⁰ Mommsen, *op. cit.*, pp. 66-67

his sociology which have a direct bearing on the controversy between capitalism and socialism'.¹¹¹

It is very doubtful that formal rationality is really as "formal" as Weber claims. The form of formal rationality is, if not determined solely, influenced in great deal by the ends of the system. There is no "pure" formality in that sense.¹¹² A planned economy uses the calculation in kind because of its ultimate values like social justice and its ends like want-satisfaction. A market economy uses calculation in money since the end is profitability. Additionally, there are very **substantive** side-effects of formal rationality specific to the market economy. Every form of rational calculation is oriented to expectations of prices and their changes. The price changes occur in the market as a result of the conflict of interests in bargaining and competition and of the resolution of these conflicts. *They thus result from power constellations.* (ES, p.108) Therefore *capital accounting in its formally most rational shape thus presupposes the battle of man with man.* (ES, p.93) In this battle, the ability of persons on the side of demand increases with possession of money and of persons on the side of supply with a favorable situation to produce. In this sense, money is primarily a weapon in the struggle and prices are expressions of the struggle. (ES, p.108)

In this context, Weber admits that the formal-rationality oriented to profit-making and war-like competition of the market is associated with a system of domination: domination of the appropriators of the means of production over the others. In that sense he rejects some basic assumptions of theory of marginal utility. It is not the consumers that would affect what will be produced and at which price since their demand is largely directed by the powerful suppliers of the market. At most, what will

¹¹¹ David Beetham, *Max Weber and the Theory of Modern Politics*, Oxford: George Allen & Unwin, 1974, p.254

¹¹² Shellef in the same way draws our attention to the unwillingness of Weber to accept that capitalism has no monopoly on value-free rationality and western legal order's formality is part of substantive considerations of the capitalist system (pp.21, 38). Here, the core question is whether capitalism is really a value-free system and its formal rationality is only a technical tool. I guess the answer is no. Since without any end, formal rationality is meaningless. Capitalism also has some ends. These ends should be given some value so that they are chosen as the ends. In this sense, Herbert Marcuse, *Negations: Essays in Critical Theory*, Boston: Beacon Press, 1969, p.136, is right in questioning the limits of formal rationality and alleging that formal rationality is not so 'formal'. Surely, as Mommsen warns us, Weber himself already distinguishes between substantive rationality and formal rationality and finds the formal rationality of capital accounting substantively irrational (p.68). However, the capitalism's ends are also arbitrarily chosen, not more valuable or more objective than any other value. In this sense, the capitalist formal rationality is most efficient only relatively to the end, which is profitability in the context of market economy. Therefore, Marcuse argument about that the technical and technological development is not equal to formal rationality but it is only a tool that can be used also for other substantive ends should not be neglected. In other words, even efficiency may be re-defined according to the value-ends or may be balance with other priorities which may be called 'more rational' from another perspective.

be produced may sometimes be determined by a specific income group which has the purchasing power. On the other hand, other group in the market, namely labor, is only formally free due to its extremely weak position within this power conflict and submits to the enterprises. (ES, pp.92-94) ¹¹³

These conditions show us *the ultimate limitation, inherent in its very structure, of the rationality of monetary economic calculation.* (ES, p.108) Formal rationality in no way includes any question of distribution of wealth or goods or utilities, since this is the area of substantive rationality. Only if the formal rationality is combined with an analysis of distribution of income, then it may tell us something about real want satisfaction. (ES, pp.105, 109-110) At the end, Weber admits that deficiency of formal rationality necessitates some substantive tools although it is difficult for them to coincide. He concedes that *if the standard used is that of provision of a certain minimum of subsistence for the maximum size of population, the experience of the last few decades would seem to show that formal and substantive rationality coincide to a relatively high degree.* (ES, pp.108-109)

There, we reach to the irrationalities of market economy. Of course, these are irrational from the substantive point of view. First of them has been already mentioned above: the real provision of people with the goods and wealth they need. The other is linked to the labor. *The fact that the maximum of formal rationality in capital accounting is possible only where the workers are subjected to domination by entrepreneurs is a further specific element of substantive irrationality in the modern economic order.* (ES, pp.110,138) Another example comes from the “outside” interests. Weber, in several places, repeats that the budget of household or personal wealth should keep separate from the capital of the enterprise both in theory and in practice. Whenever they are mixed in one way or another or whenever people with short-term profit interests intervene in the management of enterprise affect irrationally the long-term profitability. This is another example of substantive irrationality of market economy (ES, pp.98, 139-140) However what should not be forgotten is that it is not only the

¹¹³ ‘Persons must be present who are not only legally in the position but are also economically compelled, to sell their labor on the market without restriction.... Rationalist capitalistic calculation is possible only on the basis of free labor; only where in consequence of the existence of workers who in formal sense voluntarily, but actually under the compulsion of the whip of hunger, offer themselves, the costs of products may be unambiguously determined by agreement in advance.’ (Quotation from Max Weber, *General Economics History*, Collier: Newyork, 1966, p.209 in Derek Sayer)

market economy which has irrational peculiarities. In our previous paragraphs, we have seen that primarily planned and socialist economies were having **formal** irrationalities. It may be concluded with Weber words: *this fundamental and in the last analysis unavoidable element of irrationality in economic systems is one of the important sources of all “social” problems, above all of all problems of socialism.* (ES, p.111)¹¹⁴

II.III Rationality of Market Economy and Self-Interest

Weber qualifies the economic action as the instrumentally rational action motivated by self-interest. Even it is the specific characteristics of market economy that want satisfaction results from action oriented advantages in exchange on the basis of self-interest. (ES, p.109) The rationality of the actors in the market economy for Weber is based on, in an instrumentally rational way, consciously-pursued economical self-interest. (ES, p.30) Above we have tried to show that for Weber, only self-interested activities towards profit-making are economic activities and only a system composed of free actors acting in such a way (adopting an instrumental rationality which is formal rationality of capital accounting for an end with a motivation of self-interest) is an economic system. This is what Weber calls capitalism. There were several reasons like the lack of formal rationality and objectivity that makes any other type of order like socialism is not economic but only a non-economic, but economically oriented system. Actually Weber’s claim is more than that.

He also admits one of the main postulates of capitalism: human-beings are self-interested in their nature. Therefore an economic system based on free market is the most suitable one to the nature of human beings. For Weber, all economic activity in a market economy is undertaken and carried through by individuals acting to provide for their own ideal or material interests. In an economic system organized on a socialist basis, there would be no fundamental difference in this respect. (ES, p.202)¹¹⁵ As far as the socialist system is governed by a dictatorship, by an autocratic determination from above it may keep this fact hidden. Yet, once a right of co-determination given to the population, interest conflicts would occur, first, on the decision-making procedures,

¹¹⁴ According to Mommsen, irrationality results from the fundamental contradiction between ‘formal’ and ‘substantive’ rationality. It is Weber’s key argument against the feasibility of socialist systems (p. 69). Yet, I argue that Weber also diagnoses similar irrationalities in market economy. But he has no doubt about its feasibility. Why is there a priority of formal rationality ?

¹¹⁵ See also Mommsen, *op. cit.*, p. 69

then on the extent of savings. But most importantly, *in socialism, too, the individual will under this condition ask first whether to him, personally, the rations allotted and the work assigned, as compared with other possibilities, appear to conform with his own interests.* (ES, p.203) Weber seems to claim that when an individual have a certain extent of self-autonomy and freedom, self-interest is *the criterion by which he would orient his behavior.* And violent power struggles would normally result from the conflicting interests.¹¹⁶ Additionally Weber admits that economic action which is oriented on purely ideological grounds to the other interests of **others** does exist, but rarely. So, value-rational economic action is possible but has a very rare occurrence because, Weber claims, *it is even more certain that the mass of men do not act in this way, and it is an induction from experience that they cannot do so and never will.* (ES, p.203)

However, we will claim that what Weber means not “self-interest” but “perceived self-interest” since it is still possible to find many passages, especially in “*Protestant Ethic*” that it is a false or even obligatory utilitarianism in a way that reminds the Marxist term “false-consciousness”. Weber maintains that the spirit of modern capitalism is based on an idea of duty of the individual toward the increase of

¹¹⁶ Mommsen explains the choice of Weber for capitalism as follows: it guarantees a maximum degree of social dynamism and mobility in respect both of the creativity of the free entrepreneur and of the incomes of the employees. Of course for the latter group to enjoy a fair bargaining position, adequate social legislation is required (p. 70). In a parallel way, Beetham explains Weber’s conception of society as follows: ...struggle and conflict form a central and permanent feature of social life- struggle between groups, classes, nations as well as the conflict between differing values’ (p. 41). Such a conception of society ruled out that range of ideals for mankind in which peace and happiness formed a substantial part; such ideals could be illusory, because they were based on a false conception of reality. This conflict is something to be positively welcomed because it fosters the qualities of independence that Weber regarded as desirable. For Weber highest values could only be developed through conflict (p.42). Yet, such an approach can not conceal the value-selection behind. ‘Weber was, as he himself frequently asserted, a ‘self-conscious’ or ‘class-conscious’ bourgeois. The values already considered – national, liberal, elitist- were, in the character of their emphasis, bourgeois values, and form an obvious contrast to the collectivist, egalitarian ideals of socialism to which Weber remained opposed throughout his life’ (p. 55). For an opposite but a careful reading of Weber, see Wilhelm Hennis, ‘Voluntarism and Judgment: Max Weber’s Political Views in the Context of his Work’, in *Max Weber: Essays in Reconstruction*, pp. 165-197. Hennis claims that Weber never regarded capitalism as desirable and never made the liberal economy a matter of faith. ‘It was ‘fate’, unavoidable; the socialist command economy was no acceptable alternative.’ He did not believe in scientific ‘progress’ in the sense of a deeper apprehension of the truth. Freedom of information and of press only brought the stereotyping of opinion. Freedom of belief had religious, rather than liberal, roots and religious indifference did not appear to him to be a cultural value (pp.168-170). The belief in progress was needed only in intellectualized and disenchanting world of the nineteenth century (p.173). He did not believe in the liberal optimistic postulate that the conflict of ideals is soluble through compromise, parliamentary discussions or rational discourse. ‘Tragic’ liberalism or ‘pessimistic’ liberalism is a contradiction in terms. *If one accepts that, then Weber was not a Liberal* (p.174). Hennis especially criticizes the view that competition and conflict are something valuable to Weber. What liberals called peaceful competition was the struggle of man against man for Weber. All humans had the right to pursue their own interests. However this was not a matter of law but primarily a kind of natural law of the social from which he had doubted anything positive may result (p.176).

his capital, which is assumed as an end in itself (PESC, p.51) Weber adds that *in fact summum bonum of this ethic, the earning of more and more money, combined with the strict avoidance of all spontaneous enjoyment of life, is above all completely devoid of any eudemonistic, not to say hedonistic, admixture. It is thought of so purely as an end in itself, that from the point of view of the happiness of, or utility to, the single individual, it appears entirely transcendental and absolutely irrational.* (PESC 53)

It might be claimed that since Weber finds the origins of capitalism in protestant ethics and since the protestant ethics (see the section ? p. ? for details) requires an ascetic attitude which forbids to take pleasure from the worldly things¹¹⁷, this is no more valid for modern capitalism although was true for its early stages. Yet, this claim has to be refused. Although protestant ethics, or any other religious ethics are dominant in the lives of very few people of modern ages, for Weber the spirit of capitalism is still with us as the dominant mentality. Actually, *man is dominated by the making of money, by acquisition as the ultimate purpose of his life. Economic acquisition is no longer subordinated to man as the means for the satisfaction of his material needs.* This is leading principle of capitalism and it is very irrational from a naive point of view. This leading idea is of course not linked anymore to a duty of calling but is *most characteristic of the social ethic of capitalistic culture, and is in a sense the fundamental basis of it.* (PESC, p.53)

It seems that main problem with this social ethic is that it totally neglects that money and wealth are only means for utilitarian or any other purposes but that they turn into ultimate ends. When it is seen from *the view-point of personal happiness*, this sort

¹¹⁷ Habermas points out a sentence at the Protestant ethic and the Spirit of Capitalism and he questions the irrational element at the Protestant ethic which is presented by Weber in several cases as an exemplary form of complex rational action. The sentence is : *'It will be our task to find out whose intellectual child the particular concrete form of rational thought was, from which the idea of a calling and the devotion to labour in the calling has grown, which is, as we have seen, so irrational from the standpoint of purely eudemonistic self-interest, but which has been and still is one of the most characteristic elements of our capitalistic culture. We are here particularly interested in the origin of precisely the irrational element which lies in this, as in every conception of a calling.'* Weber grounds his ethics of vocation and ethics of responsibility on this complex type of rationality of Protestant ethics. In that way, he presents implicitly a claim with universal validity concerning ethics and rationality. If Protestant ethics nevertheless bears irrational motives, then it would mean that all his universal claims of rational ethics also bear irrational features. At least this is Habermas' argument (p. 184-185). On the other hand, if we accept the sentence quoted above only with its first and simple meaning. It fits very easily to Weber's ethical theory since Protestant ethics is regarded irrational only from utilitarian point of view. Concerning internal consistency as a mode of life, we may just argue that capitalist economy also works on a pseudo interest. Individuals at least will be conscious that it is not for their self-interest but due to their dedication to their vocations.

of life *where a man exists for the sake of his business, instead of the reverse* is very irrational. (PESC, p.70) Attention should be paid that Weber does not refute his own view about self-interested human nature, he claims that capitalist culture and economic action actually does not work for the self-interests of the individuals. He upholds that *a man does not "by nature" wish to earn more and more money, but simply to live as he is accustomed to live and to earn as much as is necessary for that purpose.*(PESC, p.60)

But if there is no more a religiously ethical basis for the sense of duty to work and to be successful and if it is not really to the interest of the actors to earn more money but especially to make more profit, why and how does the capitalist spirit continue to exist? First and main reason seems that the system creates its own rationality, once the wheels start to work. Weber explains this mechanism of market in the following way: economic rationality creates regularities and uniformities of social actions even incomparable to what any normative system or structure could create. This is the product of self-interested instrumental rationality, as mentioned in the first section, of subjectively shared objectivity of instrumental rationality. He claims that *the more strictly rational (zweckrational) their action is, the more will they tend to react similarly to the same situation.* (ES, p.30)¹¹⁸ Even here Weber emphasizes the subjectivity of self interest: the ends are selected by the actors according to **what they conceive** to be their own typical economic interests.

Whenever economic sphere occurs as an autonomous sphere with its own independent rules, structures and rationality at the end of a rationalization process (PESC, p.68), system rationality overrides the personal rationality of the individuals.¹¹⁹ Weber tells us that *the capitalism of today educates and selects the economic subjects which it needs through a process of economic survival of the fittest.* (PESC, pp.54-55) This educational process comes basically from the risk that an individual has to take if

¹¹⁸ Weber puts such rationality as a polar anti-thesis of every sort of unthinking acquiescence in customary ways as well as of devotion to norms consciously accepted as absolute values. (30) Although this type of deliberate adaptation to situations in terms of self-interest is a very significant aspect of "rationalization" of action, in no way it is the only direction it may take. There are many possible meanings of the concept of rationalization. For example, development of self-interested instrumental rationality may proceed in the direction of value rationalization (Wertrationalisierung) meaning a deliberate formulation of ultimate values (a process that we mentioned in the previous section). A negative direction it may take is rejection of any belief in absolute or emotional values. (ES, p. 30)

¹¹⁹ 'Rationality promised mastery of the world but has come back to master the self, shaping it to its own demands through the pressure of material needs and social order, no longer "needing" a unique spirit or ethos to support its functioning, undermining and eliminating the original preconditions that allowed innovation and empowerment of the self through self-mastery'. Harvey Goldman, *Politics, Death and the Devil: Self and Power in Max Weber and Thomas Mann*, Berkeley: University of California Press, 1992, p. 12

he does not adapt to the economic system. Those who do not follow the suit had to go out of business. (PESC, pp. 68) Once the system is totally autonomous, it does no more necessitate the conscious acceptance of maxims of capitalist culture by the individuals. *The capitalistic economy of the present day is an immense cosmos into which the individual is born, and which presents itself to him, at least as an individual, as an unalterable order of things in which he must live. It forces the individual, in so far as he is involved in the system of market relationships, to conform to capitalistic rules of action.* Additionally this is valid for all the actors of economic system including laborers and customers as well as the manufacturers. (PESC, p.54)¹²⁰ It may be claimed that economic action is still **formally** utilitarian, in terms of providing minimum survival and existence for the actors. The other result of obligatory education of capitalism is the enduring feeling of obligation to work. (PESC, p.54) The meaning of the restless activity of work for the individuals who are never satisfied with what they have is that *business with its continuous work has become a necessary part of their lives.* (PESC, p.70)

Actually what Weber alleges in *Society and Economy* is not fundamentally different from his views summarized above. He insists that the objective interests of rational management of a business enterprise and the personal interests of the individuals who control it are by no means identical and are often opposed. (ES, p. 98) Thereby, the private wealth and the means of production, the private income and the profit of business should be always kept separate if the success of the enterprise is desired. It is not only the manufacturers or entrepreneurs whose self-interest is not directly served by the economic activity, also the entire working class is in the same situation. Their economic activity to work based on their self-interest is *substantively heteronomously*¹²¹ *determined.* They are free only in a formally way. *The unequal distribution of wealth and particularly of capital goods forces the non-owning group to*

¹²⁰ The manufacturer who in the long run acts counter to these norms, will just as inevitably be eliminated from the economic scene as the worker who cannot or will not adapt himself to them will be thrown into the streets without a job (PESC 54-55)

¹²¹ 'subject to external controls and impositions'

comply with the authority of others in order to obtain any return at all for the utilities they can offer on the market (ES, p.109-110)¹²²

¹²² Weber gives us a list of motivating elements for the economic activity, only few of these elements may be linked to self-interest. For people without any substantial property, the motivation is the risk of going entirely without provisions. For wealthy people, it is ambition or the self-interest in increase in the income. For entrepreneurs, it is the risk to the individual's own capital and own opportunities of profit. For all groups there is one common element of motivation, which is valuation of the work they do as a "calling" or for workers, not even that, as a mode of life. (ES 110)

III. POLITICAL SPHERE

Weber adopts a state-centered approach to politics and takes the state as the most developed and significant political unit. His approach may easily be defined as 'realpolitik' since his key concepts for politics are power, conflict, interest, violence and war. He never neglects the relation between economics and politics and highlights their reciprocal influences on each other. Similar to economics, Weber attempts to understand the rise of rationality in the area of politics in the modern occidental world. He finds it in the rational structure and rationally-working mechanisms of states. Politics is a sphere of instrumental rationality, rather than of value-rationality and this instrumental rationality is mostly represented by the bureaucratic apparatus of state, which serves to the ends of states with its technical, formal and technocratic rationality. On the other hand, according to Weber, not only states but all political actors act with instrumental rationality. Their end is to have more power to be used for ideal and material interests. In this sense, politics is an arena of power-conflicts. For these reasons, Weber has certain doubts about party politics, interest groups and parliament in terms of value-rationality. The instrumental rationality that is dominant over politics prevents to find common solutions for the problems concerning whole nation. Actually, in the desert of instrumental rationality of politics, what is needed is a hybrid form of instrumental and value rationality and Weber finds the missing values in nationalism. However, the political structures like parties or parliaments are unable to provide **what is missing**. Weber finds the solution in a leader who takes the politics as vocation and who has **an ethic of responsibility**. So, parties and parliament become only tools that will educate, raise and elect a leader having these characteristics. Weber makes his choice for charismatic leadership due to his distrust in democracy and masses of people in overall. His suspicion becomes very apparent at his approach to the relation between the rulers and ruled. It is enough to explore his definitions of dominancy, authority, obedience and legitimacy in order to understand that.

III.I State: A Compulsory Organization of Legitimate Violence

In order to comprehend Weber's conceptualization of state¹²³, first it is to be located within his sociological methodology as a social collectivity. Weber states that all social collectivities such as state *must be treated as solely the resultants and modes of organization of the particular acts of individual persons, since these alone can be treated as agents in a course of subjectively understandable action.* (ES, p.13) However Weber admits that concepts referring to social collectivities have to be used by sociology, in spite of the confusion arising due to several meanings given to them by other study areas. These concepts are important for sociology also because they correspond to a meaning in the minds of individual partly as of something actually existing, partly as something of **normative authority**. *Actors thus in part orient their action to them, and in this role such ideas have a powerful, often a decisive, causal influence on the course of action of real individuals.* (ES, p.14) For example, individuals orient their actions according to their belief that the state exists or should exist in modern age although the state is only a complex of social interaction of the individual persons from the sociological point of view.

Weber qualifies the state as a compulsory political organization. Sociologically, an organization is a social relationship within which the actions of the parties to the relationship are regulated. Its regulations are enforced by specific individuals, namely a chief and, possibly an administrative staff. A person or persons in authority is concerned with carrying into effect the order governing the organization. Administrative staff is oriented to realizing the organization's order and to directing the actions of the members accordingly. The action that is directed to enforcement of the order in this way is a specific characteristic of an organization. Weber admits that orders may be consensual or imposed. However, an order is always imposed as far as *it does not originate from a voluntary personal agreement of all the individuals concerned.* In this sense, Weber adds, even the "majority rule" is imposition so that minority has to submit. An organization imposing its order, rather than having authority over voluntary members is a *compulsory organization or association*. In conclusion, by his definition

¹²³ See Karl Dusza, 'Max Weber's Conception of the State', *International Journal of Politics, Culture and Society*, Vol.3, No.1, Fall 1989, 71-105. In his excellent article, Dusza explains the concept of state in Weber's theory by placing in different intellectual traditions concerning the State and studies it in full detail.

of state, Weber rejects any possibility that a state, even a democratic state, may be established on a voluntary agreement¹²⁴.

For Weber, a ruling organization is political when *its existence and order is continuously safeguarded within a given territorial area by the threat and application of physical force on the part of administrative staff*. On the other hand, state is a compulsory political organization, the most significant characteristic of which is its successful claim to *the monopoly of legitimate use of physical force in the enforcement of order*. (ES, pp.48-54)¹²⁵ The state refers to a relation between the rulers and ruled, between people who have authority and people whose actions are regulated by those people who hold the authoritative power. The action-regulative rules are enforced on the ruled by specifically the means of violence, either by only threat or by their actual usage. In Weber's words, *state is a relation of men dominating men, a relation supported by means of legitimate (i.e. considered legitimate) violence*. (PAV, p.78)¹²⁶ That the state has the monopoly of legitimate use of physical force to impose its order means that even if there is other organizations that use physical force, their actions are not regarded as legitimate. Therefore a political organization owes its status of being state to the monopoly of legitimacy for violence.

Weber tells us that if an organization is compulsory (or voluntary), it has necessarily *rationality established rules*. These rules, Weber emphasizes, are rationally established whenever and wherever an order is imposed. It may be concluded that an organization innately contains rationality. Weber maintains that *association occurs whenever an agreement is made in a purpose rational manner, even though its extent and meaning may vary greatly*. (ES 1379) Weber considers an organization rational since it fits into the means-ends scheme. A closer look reveals that the picture of state fits into instrumental rationality model. The ultimate end of state, (or of the chief(s) of state), is to impose an order whatever its substance, their basic means is the physical

¹²⁴ In this way, he rejects the presumptions of social contract theories of the Enlightenment.

¹²⁵ A ruling organization is political insofar as its existence and order is continuously safeguarded within a given territorial area by the threat and application of physical force on the part of administrative staff. A compulsory political organization with continuous operations will be called a state insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order. Social action, especially organized action will be spoken of as politically oriented if it aims at exerting influence on the government of a political organization; especially at the appropriation, expropriation, redistribution or allocation of the powers of government. (ES, p.54)

¹²⁶ Max Weber, The Politics as Vocation (PAV).

force. Efficiency of the means, or in other words continuity of the order, is largely dependent on the monopoly of physical force and that is enhanced by ensuring that the subjects consider this monopoly justified and by justifying it with the rules or aims of order, either formally or substantively. From this point of view, existence of state is primarily dependent on force. (see PAV, p.78)

Weber gives us a formal definition of state since he rejects defining the state in terms of the end to which its actions are oriented. The reason is that “*there is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to those associations which are designated as political ones...*” (PAV, p.77) Therefore, political character of an organization may only be defined in terms of means specific to it: that is the use of force. Yet he adds that physical force is, under certain circumstances, elevated into an end in itself. (ES, p.55) Once again the means determine the ends and even are transformed into ends. Once again, formal rationality becomes dominant over substantive rationality.¹²⁷

When we turn to our attention to the individuals, we may observe that formal rationality corresponds to instrumental rationality at the level of social actions. Politics means *striving to share power or striving to influence the distribution of power, either among states or among groups within a state.* (PAV, p.78) In any case, either power considered the main means to reach the other ends or power for its own sake become the determining motive in political action.

For Weber, the state has reached its full development only in modern times. Weber abstains to define the modern state according to its value-related features since these are subject to change so he gives a list of its formal characteristics: a) it possesses an administrative and legal order subject to change by legislation 2) it has an administrative staff whose actions are controlled by regulations 3) it has jurisdiction and binding authority over its territory 4) the use of force is regarded as legitimate so far as it is either permitted by state or prescribed by it. (ES, p.56) On the other hand, basic

¹²⁷ Weber explains it as follows: the universal experience about the politics is that *violence breeds violence, that social and economic power interest may combine with idealistic reforms and even with revolutionary movements, and that the employment of violence against some particular injustice produces as its ultimate result the victory, not of the greater justice, but of the greater power or cleverness...*(ES, p.592)

functions of the state are the enactment of law, protection of personal safety and public order (police), protection of vested rights, social and cultural services (various branches of administration), armed protection of territory (military administration)(ES, p.905). All these functions are ordered rationally in the state structure.

Yet, purely formal definition of state by sociology does not mean that substantive rationality is also missing as an empirical fact. Every state has a value system ordering the matters. One of the important conditions to be a political community is that community constitutes more than “an economic group”, meaning that *it possesses value systems ordering matters other than the directly economic disposition of goods and services.* (ES, p.902) The content of the values is irrelevant (robbery-directed, welfare-based, constitutional, cultural). Such a value system is needed for regulating *more generally the interrelations of the inhabitants of the territory.* It would not be wrong to assume that the value-system of a state stands for the political or legal principles to which the regulations are oriented.

The other important characteristic of modern state at the same time strengthens its formal rationality by completing the establishment of an impersonal system: *the ‘separation’ of the administrative staff, of the administrative officials, and of the workers from the material means of administrative organization is completed.* (PAV, p.82) Here, the workers are indicating also to economic development of modern state since occurrence of modern state as Occidental phenomenon is closely connected to capitalistic development in the West, in the view of Weber. Development of state is parallel to differentiation of economic conditions, maturing of market interest and spread of pacification and expansion of the market. These interests protected by the state are the basis of modern state. (ES, pp.908-09)

III.II Power and Domination

Now let’s turn our attention to two other definitions of Weber: power and domination. According to Weber, power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests. Domination (authoritarian power of command) is the probability that a command with a given specific content will be obeyed by a given group of persons. Weber urges us that a *ruling organization exists*

insofar as its members are subject to domination by virtue of the established order. (ES, p.53) It seems that an established order inherently carries domination in its nature. Actually we understand that domination in the nature of an established order, especially of a rational one results from its administrative group. *If it possesses an administrative staff, an organization is always to some degree based on domination...In general an effectively ruling organization is also an administrative one...*(ES, p.54)

Yet, domination over people does not result only from administrative organization. Actually, Weber claims that rational establishment has a certain influence on the mind of people, especially when this is combined with coercive means. *A permanent and institutionalized consociation whose coercive means are both drastic and effective but which also create the possibility of a rationally casuistic order for their application* ensures the recognition of the state by the subjects. (ES, p.903) It may be claimed, Weber asserts that a rationally casuistic and institutionalized order has a socio-psychological influence on individuals that creates and strengthens its recognized authority. Here, Weber may be referring to a certain type of legitimacy resulting from legal order.¹²⁸

Domination of the state is a situation in which the manifested will (command) of the ruler or rulers is meant to influence the conduct of one or more others (the ruled) and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of command the maxim of their conduct for its own sake. This definition makes the relation between domination and obedience more explicit. (ES, p.946) Yet, this does not mean that obeying subject has internalized the maxim of command so that he acts according to maxim. Generally, for the case of political organizations, it is on the contrary. In another passage where Weber defines obedience, he may again be misleading since he insists that in the case of obedience, *the content of the command may be taken to have become the basis of action for its own sake.* But he adds immediately that *it refers only to the formal obligation, without regard to the actor's own attitude to the value or lack of value of the content of the command as such.* (ES, p.215)

¹²⁸ Weber states that *only the state* has developed a system of casuistic rules, which is called "legal order", in order to exercise coercion. It refers to the legal authority to which that particular "legitimacy" is imputed (ES 904).

Subjective validity, in other words, whether the subjects find content of a command right or just in accordance with their substantive evaluations does not matter at all and it is not generally the case for political communities. The main reason of obedience results from the probability of coercion, at first hand. Weber maintains that *for the political community, even more than other institutionally organized communities, is so constituted that it imposes obligations on the individual members which many of them fulfill only because they are aware of the probability of physical coercion backing up such obligations.* The breadths of the coercion of course facilitate obedience since the actions of political community include coercion through jeopardy and destruction of life and freedom of movement. (ES, p.903) Weber's theory has much to say about legitimacy, which we will deal soon, yet even the legitimacy itself at the end owes much to coercion. Weber mentions the prestige that political associations enjoy, arising from the belief of its members in legitimacy of social action ordered by them. Yet, even this prestige is *particularly powerful where, and in so far as, social action comprises physical coercion, including the power to dispose over life and death. It is on this prestige that the consensus on the specific legitimacy of action is founded.* (ES, pp.903-04) This situation does not change according to the types of regimes. The domination is inescapable when there is a political order. *The fact that the chief and his administrative staff often appear formally as servants or agents of those they rule naturally does nothing whatever to disprove the quality of dominance.* Weber adds that this is valid for almost all cases, including democracies since dominance means assured power to issue commands and a certain minimum of it is necessary for every case. (ES, p.215)

III.III Validity and Legitimacy of an Order: Command and Obedience

Thoughts of Weber on validity and legitimacy contain some circularity. Below, I try to show them and their underlying reasons. His definitions of validity and legitimacy are circular and in some way they constitute a tautology. What make the picture he draws hard to grasp are his plural perspectives, shifting in the texts all the time. The subjective point of view of individual, objective point of view of the scientist or any other person over all society, perspective of ruler and of ruled are all

intermingled in the text without any categorization, sometimes leading the reader to find Weber's ideas contradictory.

Weber connects strictly validity and legitimacy of an order. An order may regulate the social actions of individuals through their belief in the existence of a legitimate order. The validity is a question of probability and depends on how much the action will really be guided by such a belief. The validity of an order is something more than the uniformity of social actions motivated by self-interest. It involves a sense of duty on the side of the subject, although in varying degrees. The sense of duty towards the order means that the rules of the order become the maxims of action to which the conduct is oriented. Weber seems as if he underlines the subjective internalization of obligations created by the order. Yet, we will see that he does not- I have to mark that this definition of sense of duty overlaps with his definition of domination and obedience and there he urged us that this was only a formal obligation, not necessitating a given-value to the content of command.¹²⁹

He admits that sense of obligation as motivation in the direction of action may occur only approximately or on the average. Those motives to obey or to regulate the conduct in accordance with the order are numerous and sense of duty is only one of them. From the view of individual, if this maxim-motivation is among the other motives of the action, the order is valid. If, at least some actors regard the order to be binding, this increases the probability of actions conforming to the order. Weber finds even the cases of disobedience demonstrating the validity of the order since the thief has to act surreptitiously because the order is recognized valid in his society and he cannot violate it openly without punishment.¹³⁰ For sociology it is possible that even contradictory orders are valid at the same time. Here validity gains so large meaning that a person who fights a duel follows that code of honor but at the same time insofar as he keeps it secret or conversely gives himself to the police it means that he takes account of the criminal law. This shows the validity of the order although individual in the example violates it for the sake of a contradictory ethic-normative maxim. But he hides it

¹²⁹ See ES, p. 215. For Weber, sense of obligation has nothing to do with value rationality of the commands.

¹³⁰ 'To a sociologist, even illegal behavior constitutes a legal phenomenon. So long as a thief alters his behavior (for example, by concealing his activity) because he believes he is violating rules that others consider binding and are prepared to enforce, his conduct is casually influenced by their normative commitment to the rules in question'. Kronmann, *op. cit.*, p. 13.

because he knows that the other order is still valid in general- objectively, even not subjectively. If his motive is only to escape from punishment, how it is possible to claim that his action is guided by his belief in the existence of legitimate order? It is possible because it is enough that individual believes that an order exists and it is **not required** to believe that such an order **should exist**. Weber claims that when the evasion of order becomes the rule we may still talk about the validity although in limited degree and only in extreme cases not at all. (ES, pp.31 -33)

These explanations of Weber about validity of order need clarification in many ways. We shall begin by distinguishing two perspectives flowing beneath them. Weber actually talks about validity from two perspectives, objective and subjective, without distinguishing them clearly. The validity as probability refers to a probability of actions of how many individuals will be guided how much by such a belief. There it is objective validity and objective, determinable, legitimacy. On the other hand, the subjective validity is again still a probability since it refers to in which degree the actions of one individual will be guided by the belief in the existence of a legitimate order. Yet this is trickier than it seems since the subjective validity of an order for the individual is influenced in wide extent by the totality of others' subjective attitudes to the order, so, by the objective validity of the order. The resulting social reality is different at the end from a simple sum of subjective attitudes.

Weber had made such a distinction clear in his first drafts for Economy and Society. His explanations in this first draft are very illuminating for the meaning of legitimacy of an order. He uses the terms of subjective and objective while explaining 'consensus'. He defines consensus as the case *when expectations as to the behavior of others are realistic because of the objective probability that the others will accept those expectations as valid for themselves even though no explicit agreement was made. The reasons for such a behavior on the part of others are irrelevant for the concept.* (ES, p.1378) As mentioned in the discussion above, objectivity results from the subjective attitudes and creates a reality effective on the subjective attitudes. Additionally the objective social reality and objective validity is irrelevant of the subjective reasons for the validity.

Weber goes on to explain the objective social reality, and he mentions that objective social reality for consensus refers to the *actual degree of consensus in the sense of calculable probabilities*. He urges us this should not be confused with subjective reliance of the individual on objective reality. In other words, the subjective aspect of consensus comprises the individual and his belief in the objective existence of consensus. We may still think that these are concerned with consensus and not relevant for the validity discussion on the order. Yet, Weber states that *in the same way, the empirical validity of an agreed upon order must not be confused with the subjective expectation that others will abide by its intended meaning*. (ES, p. 1378)

Now we may turn our attention to the relation between subjective and objective realities. Weber alleges that there is *a relationship of intelligible adequate causation obtains between average objective validity (as understood in terms of 'objective possibility') and average subjective possibility*. It is not only one way relation such as the objective probability increases the subjective obedience. In turn, the subjective attitude also affects the degree and unambiguousness of the empirical validity. Now, the degree of validity is important since the fact that some individuals violate the order deliberately does not make an order invalid. The contrary may be the case: *As the thief (in the example used earlier) orients his action to the legal order by concealment, so a disobedient person may agree on the facts of power by resorting to subterfuge*. The fact that the thief feels the need to conceal its action demonstrates the objective validity of the order.

The question about the meaning of validity subjectively cannot be postponed anymore. The examples given by Weber almost empty the legitimacy from meaning that he tries to connect to validity. The subjective validity in the cases of disobedience is restricted to the fear of punishment due to the objective validity of the order. *Fear of dire consequences may bring about adaptation to the normal meaning of oppressive rule; it may also lead to personally undesirable but formally 'free' agreement*. (ES, p.1378)

Now, I think that it is easier to understand Weber's puzzle of validity, if we look at it from the perspective of obedience. He classifies people in an order according to the motives of their action. First of all, the validity of an order has a minimum

requirement to exist: at least some people in the order follow the rules of order and regulate their actions because of sense of duty, beside the other motives of obedience influencing them. Some people could obey because of fear of consequences of disobedience due to the objective validity of order (meaning, due to the fact that some people find the order valid and that they are willing to apply its rules including the rules of punishment). There are, of course some other people who obey because of self-interest, habits or ideal motives and so on. And there are some people who disobey but who either try to conceal their violating acts or submit themselves and confess their faults to the authorities. Even this disobedience case shows that these people find the order valid, not because of sense of duty but because of their belief in the objective validity of the order. It means that not because of their belief in that order should exist but because of their belief in that the order exists.¹³¹ There Weber easily frees himself from the burden of legitimacy and the result becomes a circle of validity: order is valid because people believe that some people believe in the validity of the order.¹³² There is no more a question of why.

Yet, we do not mean that Weber altogether neglects the question of legitimacy. The strongest basis of validity is belief in legitimacy. However the nuance in definition creates ambiguous conclusions. It is the probability of actions that are oriented by not the belief in the legitimacy of order but by the belief in the existence of a legitimate order. This is not a coincidence since an individual may not believe in the legitimacy of order but believe in the existence of an order that is regarded legitimate by some other members of the order. Then, a certain minimum degree of validity would be enough for the existence of an order. Of course, for such a minimum, it is necessary that *the order is held by at least part of the actors to define a model or to be binding*. This would naturally increase the probability that action will in fact conform to it, often very considerable degree. (ES, p.31)

But what kind of relation do we have between subjective attitudes and objective validity of the order? It seems that people who have no sense of duty since they do not find the order valid because of some legitimate grounds are influenced by

¹³¹ Kronmann gives a very good example of such situation, please see pp.12-13 in Kronmann.

¹³² 'Hence a valid order is a meaningful part of a social relationship when at least some people regard the order as binding and when others take this into account in their actions whatever "other sources of conformity" may also exist.' Wellen, *op. cit.*, pp.47-48.

the objective validity in the sense that at least they find it binding for other reasons. As we could understand from the examples Weber himself gives, one of the main reason could be that the belief in applicability of enforcement measures of the order because of existing objective validity. Yet, there is always a possibility here to exist a fake sense of objective validity in the society since at the end it is based on the subjective belief in the others' subjective beliefs. As we will see, then the minimum requirement may be limited to the enforcers of the order and only to them.

But of course the circularity about validity is not limited to the interplay between subjective and objective validities. Actually we find circularity and even a tautology in the definition of validity itself. Let's remember validity definition once again: the probability that action will be governed and guided by the belief in the existence of a legitimate order. (ES, p.31) Our next question, in the name of clarifying validity, shall be what legitimacy is. Legitimacy, Weber states, is the grounds of validity; in other words why people believe that the order is valid and binding. Then to find an order legitimate is almost equal to finding an order valid for some particular reasons. The belief in legitimacy is the belief in the validity of order because there are the ultimate grounds of validity. Now, let's write the definition of validity again: the validity of an order is the probability of the actions that are governed by the belief in validity of an order for some particular reasons.¹³³ Or, even with Weber's own words: *it is only the probability of orientation to the subjective belief in the validity of an order which constitutes the valid order itself.* (ES, p.33) This sentence contains both of the circularities: between objective and subjective validity and between legitimacy and validity.

III.III.1 Motives of Obedience and Idea of Legitimacy

My aim is not to deny value-rational connotations of legitimacy in Weber's theory. First let us consider the motives of obedience in order to understand how the belief in legitimacy (or in validity) increases the probability of obedient actions. One significant point is to comprehend that the belief in legitimacy itself is not a motive of action for Weber. It has only a mirror image as a motive, which is **the sense of duty** or

¹³³ 'For Weber, a legitimate order can be sociologically intelligible only on the basis of the probable effects of empirical beliefs...rather than on the basis of the rational justifiability of its moral principles.' Wellen, *op. cit.*, p. 9.

as **feeling of obligation or as an ideal motive**. The belief in legitimacy of an order only shapes the attitude of the subject towards the order in overall and therefore the rules of order or the commands of the authority guides and orients his actions so that time to time it does not even create a mirror motive but only as **an idea of order validity**¹³⁴ it gives a direction to the actions beside the direct motives of the action. In addition to all these, the motives determining the action are partly dependent upon the types of legitimation of domination, as we will see in the next section.

Weber considers obedience from two perspectives: from the perspective of the rulers and of the ruled. On the side of the subjects, they can orient their actions regularly in accordance with the rules or commands of the order for a variety of diverse reasons: *all the way from simple habituation to the most purely rational calculation of advantage*. (ES, p.212) The motivation behind the obedient action may be the ruled's own conviction of its propriety, or his own sense of duty, or fear, or 'dull' custom, or a desire to obtain some benefit for himself. (ES, p.947) From the perspective of the ruler, *the command may have achieved its effect upon the ruled either through empathy or through inspiration or through persuasion by rational agreement or through some combination of these three principal types of influence of one person over another*. In the former, Weber lists the subjective motives to obey for the ruled; in the latter he refers to the means to create the motives of obedience by the ruler.

Still all these motives do not guarantee the stability of an order and the strength of its validity. Weber admits that there are orders that are submitted only because of habitual motives or of pure expediency, yet they are less stable than the order *which*

¹³⁴ Actually legitimacy and stability of orders depend on the satisfaction of material and ideal interests. 'Interests can be satisfied through norms of social intercourse in the long run only if they are connected with ideas that serve to provide reasons for them; and ideas in turn cannot establish themselves empirically if they are not connected with interests that supply them with power.' In Weber's theory, life orders integrate both ideas and interests in such a way that they organize legitimate opportunities for satisfying material and ideal interests. This is necessary for the sufficient chance that the norms in question will be followed on the average. 'Interests have to be tied to ideas if the institutions in which they are expressed are to be lasting; for only through ideas can an order of life acquire legitimacy.' (see Habermas, *op. cit.*, pp. 188-189) Recognition of an order as binding rests directly on ideas that harbor a potential for grounding and justification. Habermas accepts Weber's distinction between empirical and normative validity but he rightly criticizes him to ignore the 'intellectual' link between these two realms: 'ideas of the validity of norms' are supported with reasons and can thus also be influenced by the intellectual treatment of internal relations of meaning, by what Weber calls "intellectualization". The stability of legitimate orders depends on, among other things, the fact of recognition of normative validity claims...the systematization and elaboration of worldviews carried on by intellectuals has empirical consequences' (pp. 190-191). In my view, Weber's legitimacy theory already contains the role of ideas in itself, although, into a large extent, implicitly.

enjoys the prestige of being considered binding, or ...of legitimacy (ES, p.31)¹³⁵ He emphasizes the minimum validity requirement for the domination: *every genuine form of domination implies a minimum of voluntary compliance, that is an interest (based on ulterior motives or genuine acceptance) in obedience.* (ES, p.212) Either value-rational motives or sense of obligation is still needed at least for some members. The reason is that none of the motives based on custom and personal advantage and even of affectual or ideal motives of solidarity *form a sufficiently reliable basis for a given domination.* (ES, p.213)

If we remember our discussion about consensus above, what Weber attempts to underline is to assure the consensus in the society on the validity of order. He states that *almost every association tends to create consensual action beyond the realm of its rational purposes* (ES, p.1379) For that, a further element is needed: *the belief in legitimacy.* Experience shows that every system attempts to establish and to cultivate the belief in its legitimacy, in addition to the appeal to material or affectual or ideal motives as a basis for its continuance. (ES, p.213) According to Weber, there are two basis of domination: *inner justifications and external means.* We talked about external means while we were mentioning the administrative staff, rationally established structure and coercive means of state. On the other hand, the inner justifications for domination are the 'legitimations' of domination. (PAV, p.78)

From the perspective of ruler(s), legitimacy is the ultimate grounds of the validity of domination and, therefore, the way to assure the continuance of their dominance on a reliable basis. More importantly legitimacy is an example of human need for justification of the privilege and inequality. What is inherent in any power-relationship is *the generally observable need of any power, or even of any advantage of life, to justify itself.* (ES, p.953) Yet, when Weber looks at from the perspective of the ruled, he rejects the belief in legitimacy as a determining motive for the obedience: *It is understood that, in reality, obedience is determined by highly robust motives of fear and hope- fear of magical powers, of the power-holder, hope for the reward for this world or in beyond and besides these by interests of the most varied sort.* In asking for the

¹³⁵ 'Indeed, given the empirical nature of the concept of the validity, only the "stability" of the order, not its legitimacy, is greater the more one ascends along the series: expediency, habit, rational persuasiveness, bindingness (or duty)' Wellen, *op. cit.*, p. 48.

'legitimations' of this obedience, we encounter with pure types of legitimation. It seems that legitimacy has a power only as ideas over the real motives of obedience from the perspective of the ruled and these ideas are tried to be imposed by the authorities.(PAV 79)¹³⁶

Nevertheless this is not only function of legitimacy. Since legitimations are the grounds on which the claims of obedience by the master against 'officials' and of both against the ruled are based, they determine the empirical structure of the domination. (ES, p.953)¹³⁷ *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.* (ES p. 213) Here we have to be careful about the two perspectives that Weber is laying down. Legitimacy claims of the rulers may not be effective as a motive on the actions of subjects actually this is generally the case, Weber asserts. The performance of the command may have been motivated by different material or ideal interests or habits. Yet *sociologically those differences are not necessarily relevant.* (ES, p.946) Every case of submissiveness to persons in positions of power is not primarily (or even at all) oriented to the belief in legitimacy. (ES, p.214) On the other hand, the methods of legitimation, whether effective or not, are significant for the ruler for a number of reasons. First they confirm *the position of the persons claiming authority* and secondly they help to *determine the choice of means of its exercise.* (ES, p.214) And of course, as mentioned several times, *the sociological character of domination will differ according to the basic differences in the major modes of legitimation.* (ES, pp.946-947) .¹³⁸

Lastly, we should focus on the minimum requirement for objective validity. Weber gives an example of an order in which *people may submit from individual*

¹³⁶ Kronmann explains and links justification of authority with the problem of meaning. Inequalities among people should be explained satisfactorily since it is a very human need felt by the fortunate and unfortunate alike. 'It is the threatened meaninglessness of suffering and good fortune alike that is unacceptable. The fact of suffering is redeemed and made tolerable by the meaning we give to it.' The same kind of normative conceptualization, an intelligible and ethical justification, may be observed in the authority structures. Legitimizing explanations of the authorities are the values imposed on the universe of the facts in which it is our fate to live in. (See Kronmann, pp.40-42)

¹³⁷ Craig Matheson notes that Weber defines legitimacy from the viewpoint of the rulers, not of the ruled. 'Weber and the classification of forms of legitimacy', *British Journal of Sociology*, Vol.38, No.2, June 1987, p.206. See also J.G. Merquior, *Rousseau and Weber: Two studies in the theory of legitimacy*, London: Routledge & Kegan Paul, 1980, pp.131-133

¹³⁸ I think that Mommsen also refers to the same point by arguing that there was no room for illegitimate forms of domination in Weber's sociological theory since Weber's approach is purely functionalist and since he defines power and domination in extremely formalistic and probabilistic terms (pp.83-84).

weakness or helplessness because there is no acceptable alternative. (ES, p.214) In such regimes, *of course, persistent dissatisfaction endangers the stability of a coercive regime, but it does not invalidate the consensus (validity) as long as the power-holder can objectively count on the (adequate) execution of his commands.* (ES 1378)¹³⁹ The commands of the power-holder are executed and enforced mainly by the administrative staff. *Normally the rule over a considerable number of persons requires a staff that is a special group which can normally be trusted to execute the general policy as well as the specific commands.* (ES, p.212) Here again we have the minimum requirement of validity but now we may determine the group of people who believe in the legitimacy of the order and find the order valid and act with a sense of duty: **the officials**. What is most interesting in this validity discussion is that Weber comes very close to a Hartian concept of order since he claims for the validity and legitimacy it is enough that people who has the sense of duty are administrative officials.¹⁴⁰(ES, pp.952-53)

The administrative apparatus as the main tool of domination becomes an interface between the subjects and rulers to guarantee the validity of order and of the legitimacy claims. Thereby Weber categorizes people of a domination into three groups concerning validity and legitimacy- the claims of obedience made by the master against the officials and of both against the ruled are based upon the ultimate grounds of the validity of a domination (ES, pp.952-53) Once for the administrative staff, the order is valid for any of the reasons (not always because of legitimacy), legitimacy claims even may not be needed at least towards the subjects. In Weber's words: *Furthermore, a system of domination may- as often occurs in practice – be so completely protected, on the one hand by the obvious community of interests between the chief and the*

¹³⁹ I agree to Mommsen in his conclusion that legitimacy, in Weber's terms, amounts to little more than an equivalent of the stability of the respective political system. I disagree to the conclusion that he attributes to Weber, to that political system will eventually collapse, if 'governed' do not believe in the legitimacy of a political system. It is enough that the 'officials' believe in system legitimacy for whatever reason. It shows that Weber actually has a distinction for the authoritative and totalitarian regimes, on the contrary to Mommsen claim that he fails to produce any criteria which would enable us to distinguish between free and oppressive systems of domination (See Mommsen, *op. cit.*, pp.84-87) although, I admit that it is a very vague criteria to use.

¹⁴⁰ A circle of people who are accustomed to obedience to the orders of leaders and who also have a personal interest in the continuance of the domination by virtue of their own participation and the resulting benefits, have divided among themselves the exercise of those functions which will serve the continuation of the domination and are holding themselves continuously ready for their exercise. (this is what is meant by 'organization') ... (ES 952-53) see also H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 2nd Edition, 1994, pp. 60-61, where Hart argues that while the officials retain critical reflective attitude to the rules and apply them, our ordinary citizen, not any more just because of fear of coercion, but with an arrogant acceptance, keeps the law which is made and identified in this way. For another similarity Kronman points out between Hart and Weber in the definition of legal order please see *supranote* 167.

administrative staff...as opposed to the subjects, on the other hand by the helplessness of the latter, that it can afford to drop even the pretense of a claim to legitimacy. (ES, p. 214) But of course it does not show that the legitimation does not go on between the authority and the staff. On the contrary, *the mode of legitimation of the relation between chief and his staff* is highly significant for the structure of domination.(ES, p. 214) In the same way as the relation between the ruler and the ruled, *the members of the administrative staff may be bound to obedience to their superior (or superiors) by custom, by affectual ties, by a purely material complex interests or by ideal (Wertrationale) motives. The quality of these motives largely determines the type of domination.* (ES, pp. 212-213)

III.III.2 Legitimacy from Three Angles: Scientist, Subjects and Rulers

Now, let's look at Weber's categorizations about legitimacy. Weber has three different types of legitimacy categorization. First of them is on how the rules or authorities can guarantee the legitimacy of the domination. In other words, how they may assure the validity of an order. The second categorization is on the basis of legitimacy attributed to the order by the ruled. In other words, on which basis the ruled find the order valid. The third categorization is on the types of authorities according to their claims to legitimacy. In other words, which legitimacy claims constitute which types of domination.

III.III.2.1 Guarantee for Legitimacy

Weber lists the ways to guarantee the legitimacy of an order for the rulers in this category. He states that (ES, p.33):

I. The guarantee may be purely subjective, being either

1. affectual: resulting from emotional surrender; or

2. value-rational : determined by the belief in the absolute validity of the order as the expression of ultimate values of an ethical, esthetic or of any other type; or

3. religious: determined by the belief that salvation depends on the obedience of to the order.

II. The legitimacy of an order may, however, be guaranteed also (or merely) by the expectation of specific external effects, that is, by interest situations.

An order will be called

a) convention so far as its validity is externally guaranteed by the probability that the deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval;

b) 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.

Now, in this categorization, Weber first uses two main categories: objective and subjective. They may also be called external and internal. Internally, the consensus among the subjects on validity of order on the subjects may be guaranteed through some empathy or through inspiration or through persuasion. Charismatic model of legitimacy generally attempts to influence affectually through empathy or inspiration. Value-rational persuasion may be influential if the subjects are persuaded that the commands of the ruled are based on some absolute values and therefore absolutely valid. Lastly, religion may be used both on traditional and on interest motives such as salvation. Thus the subjects believe that obedience to the order will be rewarded with salvation and disobedience will be punished by God (Motives of fear and of ideal interests are ignited). The rulers can strengthen the validity of order and enhance the obedience by promoting these beliefs in the society. This categorization belongs more to the social action than to the legitimacy as idea. The ultimate aim is to guarantee the stability of the regime by increasing the probability of obedient action through different motives.

Weber also shows an external method to the rulers, which may be used alone or together with such subjective indoctrination. This is external and objective guarantee. The term “interest situation” should not mislead us since what Weber implies is not to create a self-interest-based consensus. Here the interest only implies to a minimum interest of obedience, to the avoidance from the punishment. He gives two examples of orders externally guaranteed: law and convention. In both cases, there is a price of disobedience. These are sanctions implemented on the person either in an organized

way (law) or by society itself (convention). Here Weber seems to degrade the legitimacy to the motive of fear, especially for orders which uses only external guarantees by omitting the subjective bases. However, this passage should be read not as bases but only as guarantees of the legitimacy, in fact of validity only as empirical fact.

III.III.2.2 Bases of Legitimacy

In this categorization, Weber looks purely from the ruled perspective and lists the reasons why the subjects find an order legitimate.

a) tradition: valid is that which has always been;

b) affectual, especially emotional, faith: valid is that which is newly revealed or exemplary

c) value-rational faith: valid is that which has been deduced as an absolute;

d) positive enactment which is believed to be legal.

Such legality may be treated as legitimate because:

α) it derives from the voluntary agreement of the interested parties

β) it is imposed by the authority which is held to be legitimate and therefore meets with compliance (ES, p.36)

A careful reading reveals that four types of bases of legitimacy may be attributed with four-types of social action. Weber analyses the traditional base and finds two motives: motive of self-interest and motive of fear. In the analysis of affectual base, he finds that the revelation is treated as sacred and that comes from the belief in legitimacy of the prophet. For value-rational base, he gives the example of natural law but he does not consider it influential enough on the conduct of people. Whereas the belief in legality is the most common form found in the modern world. At this base, what is significant is the formal correctness of the enactments. Therefore his division between the voluntary and imposed order is a weak one, as he also concedes.

III.IV Legitimacy According to Authority Types

As mentioned before, the bases of legitimacy claims determine the type of domination. Weber gives us three types of authority: Rational, traditional and charismatic. Now it has always been a discussion question among the scholars that why the authority types do not match with the bases of legitimacy from the perspective of the subjects. If we accept that charismatic authority matches with emotional bases, still the question is whether legal authority refers to instrumental-rationality or value-rationality or both. If we remember that natural law is the only example of value-rational base, then it seems that there is no type of authority that corresponds to value-rational action or to subjective value-rational ground of legitimacy. To solve this new puzzle of Weber, it would be a good start to take each of the authority type separately and try to understand the inner mechanisms of domination including the motives of obedience and subjective legitimacy grounds.

III.IV.1 Traditional Authority

Traditional authority is a personal authority and the basis of its legitimacy is the belief in traditions and customs. From the perspective of the subjects, the motivation to obey is largely habitual. But also other motives such as the fear of magical or religious evils and motives of expediency plays a role to maintain the customary modes of action.(ES, p.37) Traditional authority has two pillars, countervailing and supporting each other at the same time. These are *piety toward tradition and toward the master*. In the traditional authority, the validity of power of command rests upon personal authority. Yet the person takes his legitimate authority in turn from the sacredness of tradition. In other words, *the masters are designated according to traditional rules and are obeyed because of their traditional status*. These traditional rules, which prescribe obedience to some particular person are customary and have always been so. (ES, pp.212, 226, 954) However it should not be misinterpreted since the legitimacy of traditional ruler is guaranteed by personal subjection, meaning that at the end, obedience is owed not to rules but to the person who occupies a position of authority by tradition, but of course with some limits. These limits may be understood better by studying two legitimacy spheres of the commands. The commands of the master are

legitimized in two ways: partly their content is determined by the traditions and partly the master uses his discretion in the sphere left to him by tradition.

The second area of command is extensive since the personal obedience tends to be unlimited. The limit could be only that *how far master and staff can go in view of the subjects' traditional compliance without arousing their resistance*. (ES, p.227) For the first area of command, the power of tradition shows itself in a very limitative way. This fact arises from the type of legitimacy and of corresponding social action. The base of legitimacy in the view of subjects is tradition. Therefore corresponding social action is habitual orientation to conform to the mores. The inner support for this sphere comes from the subject's compliance with the norms and they comply with the norms since the norms derive from tradition: *the belief in the inviolability of that which has existed from time out of mind*. However mere habituation stereotypes the traditional relation between the master and subjects and in fact limits the master's discretion and power. Any innovation that could be introduced by the master carries the risk of rebel and resistance by subjects. There are other motives of traditional origin, that constraint the master. One of them is *his own fear of religious powers which everywhere protect tradition and dependency relations*. Another is the motive of self-interest since his interests, especially economic ones may be damaged by any interference with traditional patterns of relations. (ES 1011-1012) In all these situations, being surrendered by traditional prescriptions, *the master's omnipotence toward the individual dependent is paralleled by his powerlessness in the face of the group*. (PAV, pp.78-79)

Traditional domination's two-pillar structure takes the side of tradition in the case of resistance. *When resistance occurs, it is directed against the master or his servant personally*. The authority is accused with failing to observe the traditional limits of his power. Opposition is not directed against traditional system itself. (ES, p.227)

III.IV.1.1 Rulers and Subjects of Traditional Domination

Traditional domination is based on a strictly personal loyalty which results from common upbringing. The belief in legitimacy of the traditional authority comes from the fact that personal relations based on loyalty are perceived by subjects "natural". In turn, this derives from the close and permanent living together, habituation, the persistent influence of education, the memories of childhood and

adolescence and from the feeling of “community of fate”. Personal loyalty also determines the relations of administrative staff to the master. For the servants of the master, in addition to these factors, the facts of life teaches him that *he lacks protection outside the master’s power sphere and that he must submit to him to gain that protection.* (ES, pp. 227, 1007)

Weber classifies traditional dominations in four groups: Gerontocracy, patriarchalism, patrimonialism, sultanism and estate-type domination¹⁴¹. Gerontocracy and patriarchalism have a common characteristic, which is absence of personal (patrimonial) staff. This creates a significant difference: *the members of the domination are not yet really subjects.* Because the members believe that *domination, even though it is an inherent traditional right of the master, must definitely be exercised as a joint right in the interests of all members* and this is possible since *the master is still largely dependent upon the willingness of the members to comply with his orders* without having any machinery to enforce them. (ES, pp. 231-234)

Patrimonialism arises whenever the master has a military force and servants only as his personal instruments. Now the group members are subjects. The military force is important *to maximize the solidarity of interest between master and staff* since then the ruler’s arbitrary power may exceed the traditional boundaries and become as extensive as to grant favor and grace. Yet patrimonial domination still stays traditional although exercised by ruler’s personal autonomy, whereas sultanism *operates primarily on the basis of discretion.* (ES, pp.231-232)

Under the patrimonial domination, the psychological and formal relations between master and subject are regulated merely in accordance with the master’s interests and the distribution of power. *The dependency relationship itself continues to be based on loyalty and fidelity. However such a relationship, even if it constitutes at first a purely one-sided domination, always evolves the subjects’ claim to reciprocity,*

¹⁴¹ Gerontocracy is that domination over the group is in the hands of elders since they are the most familiar with the sacred traditions. Patriarchalism is the situation where, within a group (household) which is usually organized on both an economic and a kinship basis, a particular individual governs who is designated by a definite rule of inheritance. Estate-type of domination is a form of patrimonial authority under which the administrative staff appropriates particular powers and corresponding academic assets. Classification also may be done according to the means of administration. In the cases of gerontocracy and patriarchalism, the means of administration are generally appropriated by the group as a whole. In the case of patrimonialism, they are personal property of the master. In the estate-type, they are in part appropriated by the members of administrative staff. (ES 234)

and this claim “naturally” acquires social recognition as custom. When it changed into a reciprocal relation, the master too “owes” something to the subject, not legally but according to custom and his own self-interest. In this sense, we may talk about reciprocal right and duties between the ruler and the subjects which provides benefits to the subjects who had no formal rights such as slaves.(ES, p.1010)

III.IV.1.2 Traditional Ruler and His Administrative Apparatus

The traditional ruler selects his officials in the beginning from those who are his subjects by virtue of personal dependence (slaves and serfs) to be sure about their absolute obedience. There is no professional specialization in patrimonial offices and every official is responsible from the person of the ruler, in addition to administrative tasks. Just like the bureaucratic officials, they usually develop into a status group over the subjects. In the long-run, the officials are recruited also from among free men because of the resentment about the rise of unfree men to a higher status and of the direct administrative needs. Yet, the rulers insisted these officials to admit the personal dependency similar to slaves, while officials had acquired great advantages from being servant in return of having accepted submission to the personal authority by leaving their personal freedom. (ES, p.1026)

Under patrimonial domination, the administration is a purely personal affair of the ruler. His political power is almost entirely discretionary and delimits the jurisdiction of his officials. The officials’ judicial power is not bound by rules so that every case ends up with a demand of compensation, by creating an area of conflict over interests and powers. The officials are permitted to do whatever is compatible with the power of tradition and the ruler’s interest. Almost all decisions are made ad hoc. This feature of the decisions is connected to the fact that the patrimonial office is based upon purely personal relations of subordination. Everything depends on personal considerations: on the concrete applicant and his concrete case, on purely personal connections, favors and privileges, without referring to any norms as far as there is no traditional rights of the individuals to be protected. Now again we encounter two countervailing pillars of traditional authority: traditions and personal authority of the ruler and these may conflict in judicial cases. *A violation of the old customs may be an offense to perhaps dangerous forces, whereas disobedience to the ruler’s orders*

...subjects the violator...to the ruler's misericordia: his right to impose arbitrary sanctions. (ES, p.1030) Weber summarizes it in the following way: *hence a typical feature of the patrimonial state in the sphere of law-making is the juxtaposition of inviolable traditional prescription and completely arbitrary decision-making, the latter serving as a substitute for a regime of rational rules.* (ES, p.1041)

III.IV.2 Charismatic Authority

Charismatic authority is a personal authority like traditional authority. The base of charismatic authority is the belief in charisma. The motivation to obey of the subjects is emotional surrendering. They surrender to the extraordinary. It indicates an absolutely personal devotion and personal confidence in revelation, heroism, grace or other qualities of individual leadership. *This is 'charismatic' domination, as exercised by the prophet or- in the field of politics- by the elected war lord, the plebiscitarian ruler, the great demagogue, or the political party leader.* (ES, p.954; PAV, p.79)

Not only the person himself but the normative patterns or order revealed or ordained by him has an extraordinary, sanctified, or exemplary character. Therefore, revolutionary characteristic of charismatic authority is important and it plays in the history an important role in the establishments of the new orders. (ES, pp. 37, 215) But there is another important reason for its revolutionary character, in comparison to other two authorities (traditional and rational). Both traditional and rational authorities *share continuity as one of their most important characteristics. In this sense both are structures of everyday life.* (ES, p.1111) These types of domination have a focus on meeting routine demands, everyday economic routines, and normal day satisfaction. *In this respect, bureaucracy is merely the counterpart of patriarchalism.* (ES, p.1111) Charismatic authority is revolutionary since it transcends the sphere of everyday economic routines and meets all extraordinary needs. Revolutionary character of charismatic authority also arises from its specific **irrationality**. It is irrational in the sense of being foreign to all rules. It repudiates the past, while even the traditional authority is rational with its appeal to the rules and precedents of the past. The other aspect of its revolutionary character comes from its rejection of economic considerations and disconnection of the link between the possession of power and of property.

III.IV.2.1 Leader and His Followers

Another specific feature of the charismatic authority is its dependency on the subjects' recognition for its validity. It comes from the fact that charisma itself is also partly up to the considerations and ideas of other persons. In that sense, it is not enough that an individual has an extraordinary quality but that by virtue of this quality he is considered extraordinary and treated as a leader by the others. (ES, pp.241-42) Even it is not important that these charismatic qualities have a value from which point of view (ethical, aesthetic, or any other). *What is alone important is how the individual is actually regarded by those subjects to charismatic authority, by his "followers" or "disciples"*. The recognition of the authority by the subjects is freely given and guaranteed by what is held to be proof of charisma. This tight link between subjects and legitimacy makes the charismatic authority the closest one to the democratic governance.

However this link between charismatic authority and democracy is not a direct one since, Weber asserts, when the charisma is really genuine, the basis of claim to legitimacy by authority lies in the duty of the subjects to recognize its genuineness and to act accordingly. The indirect link between the charismatic authority and democracy occurs when the charismatic authority has to transform and transforms in the rational way. In this case, *it is readily possible that, instead of recognition being treated as a consequence of legitimacy, it is treated as the basis of legitimacy: democratic legitimacy.* (ES, p.267)

In the relation between charismatic leader and subjects, the only motive to obey or "follow" misleadingly seems emotional surrender. Actually it may be main motive but it is not the only motive. There are two more important factors we may count. These are value-rationality and faith. While Weber explains the revolutionary character of the charismatic authority he contrasts the parallel works of "reason" and of "bureaucratic rationalization" with of "charisma". According to Weber, "reason" changes men attitudes only indirectly and with external pressure. First it alters the situations of life and hence its problems, meaning that first it changes the conditions surrounding men and then men have to change their approaches. In this way, *it intellectualizes the individual.* Same kind of "from without" or "external" revolution

comes from the bureaucratic rationalization by changing first the material and social orders with technical means. However the uniqueness of charismatic force comes from its method to revolutionize. It does its work *from within*. It effects subjective or internal reorientation of the individual. This may cause *a radical alteration of the central attitudes and directions of action with a completely new orientation of all attitudes toward the different problems of the world.* (ES, p.245) Now, its link with value rationality comes from the power of ideas since it *rests upon the conviction that certain manifestations- whether they be of a religious, ethical, artistic, scientific, political or other kind- are important and valuable.* (ES, pp.1116-1117) What I would like to emphasize that a common element may be found between affectual and value-rational base when the basis of legitimacy from the perspective of the ruled is analyzed: this is **the faith**.¹⁴² Charismatic authority creates a kind of faith both to the leader and the revolutionary change he has brought. Yet, this change starts with a change in the internal orientations of people through a rising emotionality and enthusiasm about some values and ideas.

III.IV.2.2 Leader and his Charismatic Community

Considering the extraordinary and irrational character of the charismatic authority, it is difficult to talk about an organized authority with administrative staff in the usual sense of terms. Still the charismatic authority has much-or-less organized group around him and Weber calls this *charismatic community*. They are charismatic because they are chosen on the basis of the charismatic qualities, not on the basis of technical competency, social privilege or personal dependency. They are a community because the group is based on an emotional form of communal relationship. It is loyalty which binds the group together. The group lacks any formal structure: there is no such thing as appointment, dismissal, career, promotion, hierarchy, defined limits of competence, salary, titles or ranks.

¹⁴² See Philip A. Woods, Values-intuitive Rational Action: the Dynamic Relationship of Instrumental Rationality and Value Insights as a Form of Social Action, *British Journal of Sociology*, Vol. No.52, Issue No.4, December 2001, 697-706. Woods argues that there is a very close link between emotional action and value-rational action and insight into ultimate values is an affectual phenomenon. The difference between them is consciousness in the formulation of values. He also makes the distinction through the emotions arising from selfish concentration on oneself and emotions that are felt for the good of the others. Although I agree to that affectual action and value-rational action have similar roots, I do not agree to his second distinction which may be called 'social sensibility' since Weber asserts that masses can be only emotionally provoked to some social values.

III.IV.2.3 Routinization of Charismatic Authority

Every kind of charismatic authority is doomed to routinization. As instability is inherent in its nature, *all its modifications have basically one and the same cause: the desire to transform charisma... into a permanent possession of everyday life.* (ES, p.1121) There are several reasons of this transformation, but underlying main reason may be stated as to guarantee the continuance of authority and to ensure its stability. What is inescapable is not only transformation but also a radical change in the pure nature of charismatic authority in the extent that it is not recognizable as charismatic any more. Its transformation may occur in the direction of traditionalization or rationalization or a combination of both.

Weber claims that the transformation may be desired *usually by the master, always by his disciples, and most of all by his charismatic subjects.* (ES, p 249) Although he explains the motives of the disciples, he does not bring an explicit explanation for the subjects. (ES, p.1121) He gives us two main motives: first is that *the ideal and also the material interests of the followers in the continuation and the continual reactivation of the community.* Second motive is *the stronger ideal and also stronger material interests of the members of charismatic community to continue their relationship, to ensure the stability of their position on everyday basis and to enjoy ordinary worldly conditions (family connections and economic relationships).* (ES, p.246) On the other hand, the situation of the subjects after the routinization of the charisma is the following: *the charismatically dominated masses, in turn, become tax-paying subjects, dues-paying members of a church, sect, party or club, soldiers who are systematically impressed, drilled and disciplined, or law-abiding "citizens".* In addition to that, the charismatic message inevitably becomes dogma, doctrine, etc. by losing its pure spirit. (ES, p.1122)

Generally the right moment for transformation is when the problem of succession occurs. Since at this moment, both concerned interests become more evident and any way this problem inescapably channels charisma into the direction of legal regulation and tradition. (ES, pp.246, 1123) Weber gives a variety of alternatives to the problem of succession and each of them leads to the rise of different type of

authoritarian structure. Here I will only mention some of them very briefly.¹⁴³ One of them is traditionalization and it occurs when a set of rules are laid for qualifications of new leader. With respect to these rules, a new tradition arises. Other possibility is legalization and occurs when a technique for selection is deduced from revelation. Then the legitimacy of leader is dependent on the legitimacy of technique of his selection, as in the legal authority. The charismatic authority may transform into an authority on the basis of democratic legitimacy. Designation of a successor by charismatic community indicates preselection, by the predecessor himself nomination and recognition by the group election. In addition to these, when the hereditary charisma is adopted as solution, it may lead to either traditionalization or legalization. In either case, authority becomes a personal right and the recognition of the subjects loses its importance. If the charisma detached from a particular individual, it may become an objective, transferable entity and no more a personal qualification. This is called *the charisma of office*. (ES, pp.266,267, 246-49)

III.IV.3 Rational Authority

One of the most distinguishing features of rational authority is its impersonality. So obedience is not to the personal authority but to the system and norms. It is not an ordinary system but *a system of consciously made rational rules*. The person(s) in the power has their position by designation of the rules and their power legitimated *by that system of rational norms*. (ES, p.954) Thus it is domination *by virtue of "legality"*: the legitimacy claims of the authorities are based on *the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)*. (ES, p.215)

From the perspective of the subjects, the basis of legitimacy may be again *the belief in legality*: the subjects comply with the positive enactments which are believed to be legal in the sense that they are *formally correct* and *have been made in the accustomed manner*. Such legality may be treated as legitimate by the subjects either because *it derives from the voluntary agreement of the interested parties* or *it is imposed by the authority which is held to be legitimate and therefore meets with compliance*. And as we know, in the case of legal authority, the authority is legitimate since the rules

¹⁴³ For detailed information please see ES 1123-1157 and 246-251

do designate so. Weber again creates a self-confirming circle: Legal rules are treated legitimate since they are imposed by a legitimate authority and this authority is legitimate since the legal rules so designate. (PAV, p.79; ES, pp.36-37) ¹⁴⁴

Now, let's try to understand why Weber calls this legal authority rational. First reason is that the order established by such an authority is a system of consciously made rational rules. For the other two types of authorities, this is not the case. Under traditional domination, rules had already occurred long time ago without a conscious effort or consideration of people. Under charismatic authority, it is not even bound by the rules and irrationality is in its nature. Now for the first time the rules are created consciously and with some aims, by some individuals. Legal authority has first of all a formal rationality. There are rules to make the rules. These are the main rules, or constitutional rules underlying the order. (ES, p.37) Secondly, Weber maintains that *any given legal norm may be established ...on the grounds of expediency or value-rationality or both...*(ES, p.217) So the legal norms are either value-rational or instrumentally rational or contains both in a hybrid form. The other reason is linked to obedience. Obedience is given, or claimed so, to the rules, not to the persons. That indicates the absence of any emotional or habitual stimuli. Presumably, not only the rulers but also the ruled acts rationally in the system. Lastly, legal system creates its own rationality and even the person in the authority is subject to the rationality of an impersonal order *by orienting his actions to it in his own dispositions and commands.* (ES, p.217) When this is the case, actually there is little difference between the 'servants of state' and the bearers of power. (PAV, p.79)

¹⁴⁴ The problem of legal validity is handled by an epistemological circularity by neo-Kantian approach. The concept of validity is not established by legal science but presupposed by it. Stephen P. Turner & Regis A. Factor, *Max Weber: The Lawyer as Social Thinker*, London: Routledge, 1994, p. 16. The circular "validation" of law as science reached its fulfillment in legal positivism at the hands of such theorists of the law as Hans Kelsen (Turner, p. 94). Bryan S. Turner, *For Weber: Essays on the Sociology of Fate*, London: Sage Publications, 1996, p.359, states that 'Weber's analysis of legal-rational authority tells us a great deal about how legal and political decisions can be arrived at in organizational terms, but it tells us very little about what these decisions are...given Weber's value-neutrality in the definition of legitimate authority, any state is legitimate by virtue of political monopoly over the apparatus of power...Weber's positivist (in the legal sense) definition of legitimacy is circular because legal correctness is given by the law-making procedure itself.' See also Dhananjai Shivakumar, 'The pure theory as ideal type: defending Kelsen on the basis of Weberian methodology', *Yale Law Journal*, March 1996, Vol. 105, No.5, pp 1383-1414 for the other similarities between Kelsen's and Weber's approaches to law.

III.IV.3.1 Rational Apparatus: Bureaucracy

According to Weber, rational authority with bureaucracy is only fully developed in the modern state and in the capitalist economy. Modern bureaucracy has many specific features that Weber explains at length. It is possible to mention only some of them here. First of them is clear division of competences, powers and functions by the rules. It has developed methods for fulfillment of official duties and the rules which determine who are qualified for which duty. The bureaucratic structure is highly hierarchical: All the regulation, audit and appeal functions from lower authorities to superior authorities. Most of the interactions are based on the written documents. Specialization and training is necessary for the posts. When the office is fully developed, the official activity demands the full working capacity of the official. Maybe, most important of all is the impersonal management of bureaucracy by the abstract and general rules. This constitutes a sharp contrast to other forms of authority which are based on personal relationships. (ES, pp. 956-58)

The officials have a special relation with their posts. For them, it is not only a source of income but rather a *specific duty of fealty to the purpose of the office in return for the grant of a secure existence*. They can acquire their positions only after a long training and special examinations, and they can keep it by their entire working capacity for a long period of time. At the end, they are devoted to *impersonal and functional purposes of the office*. In return to these, they attain a *distinctly elevated esteem vis-à-vis the governed*. (ES, p.959) It is one of the factors that ensures the devotion and subordination of the officers to their duties and superiors. Other factors are assured salary and regulated opportunity of a career work in the same direction. (ES, p. 968)

One of the decisive factors for the development of bureaucracy is economic and technological developments since they indicate an intensive and qualitative expansion of the administrative tasks. Under modern conditions, the bureaucratic organization is technically superior to any other form of organization. It provides *precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs*. (ES, pp.971, 973) Another characteristic of modern bureaucracy is its objectivity. The administrative functions are carried according to purely objective considerations. These functions are

allocated to persons who have specialized training and who by constant practice increase their expertise. *Objective discharge of business primarily means a discharge of business according to calculable rules and without regard to persons.* (ES, p.975) Beside the other factors, capitalist economy demands the calculability of the results. *Bureaucracy develops the more perfectly, the more it is “dehumanized”, the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is appraised as its special virtue by capitalism.* (ES, p.975)

III.V Reconsidering Legitimacy

Now, let's try to reconstruct what Weber means legitimacy and to understand the relation between obedience, legitimacy and validity. Weber lists a variety of motives to obey from the perspective of ruled. However, he insists that the belief in legitimacy is not a motive itself and is not a necessity for obedience. Nevertheless, it ensures the stability of domination over the society and it is a condition for the objective validity of the order. From sociological perspective, validity is a gradual concept and depends on the degree of acceptance of an order as existing by the society. It is mainly concerned about how the people perceive the order. Because of that, order may be treated valid by some people only because they think or believe that the order exists, not necessarily because they believe that it should exist. They believe that the order exists since they believe that some other people in the society also believe that the order exists or should exist. Therefore they think that violation of the order will cause them some costs as punishment or coercion. Weber calls this social consensus on the validity of the order as objective validity. However there is still a minimum requirement for objective validity: it is that at least some people should believe that the order **should** exist and orient at least some of their conducts according to this belief, beside other motives effective on their actions. This minimum requirement is the belief in legitimacy so that the order is valid not because it only exists but also it exists rightly, or should exist, on some accepted grounds. This minimum requirement may be even minimized to the officials, to the people responsible to enforce the order and to execute the orders of the authority. It may be enough that only they have a belief in legitimacy of the order and they obey the rules because of that belief in addition to their material or ideal interests.

From the perspective of the authority or rulers, it is a natural tendency to justify their powers and privileged positions in the eyes of others or of the subjects. It is a necessity to explain people why they do obey, they have to obey to some people in the power and they have to be oppressed when they disobey. On the other hand, it is a way to guarantee the pacification of people and the stability of domination, beside the coercive tools to be used. The ruler's justification attempts are named by Weber as the bases of claims to legitimacy. The authorities have two main domination apparatus in their hands: administrative apparatus and coercive means. Yet, as Weber repeats frequently, these are not absolutely reliable means for a stable order. On the one hand, the power-holders have a natural desire to justify their positions and on the other hand they had to ensure at least the minimum validity requirements subjectively for a number of individuals in order to create objective validity or the consensus on the validity. In some extreme situations, as we mentioned before, this group of people who subjectively find the order valid and legitimate may only be the administrative staff and that could be enough when the order is supported (guaranteed) by the coercive means. In such a case, administrative staff would have a sense of duty, while the subjects would have the habit of obedience. (ES, p.264)

The problems and questions occur when these different perspectives to legitimacy are to be melted in one pot. But the key approach to the questions may be to understand that they can never be put in the same pot and that motives of obedience are separate from the belief in legitimacy from the perspective of the subjects. First of all, it seems that the claims of the authorities to legitimacy do not play a role, or at least a substantial role, in guaranteeing the obedience. On the contrary they have almost a retroactive influence after or during the obedience that are realized by several other reasons and motives, to justify the domination and corresponding obedience. They only try to support the social consensus on the objective validity of the order. That's at the same time the reason why the bases of legitimacy for subjects and rulers are not same or not overlapping entirely. The subjects may obey to the norms or rules of the order because of various motives and these motives of course correspond at the end to the main categories of social action (traditional-habitual, affectual, value-rational and instrumentally rational-self-interest). The belief in validity of the order refers to a

situation that the subjects treat their own situation of obedience or of being dominated, in general normal or legitimate.

On the other hand, the belief in legitimacy is not a motive but it creates a **will** to obey through a sense of duty, of “ought”, almost in Kantian sense. Weber states that *so far as it is not derived merely from fear or from motives of expediency, a willingness to submit to an order imposed by one man or a small group, always implies a belief in legitimate authority of the source imposing it.* (ES, p.37) In another place, Weber urges us that the basis of *every kind of willingness to obey is a belief* through which authorities are lent prestige. (ES, p.263)

However this does not mean that the grounds of this belief do not play a role on the motives of obedience. They would or could play a role of support to the motives of obedient action at the end, either as a mirror motive or only as a sense of duty or a willingness arising from the recognition of the authority as valid or legitimate.¹⁴⁵ By the mirror motive, we are again referring to the motives of main social actions. As it could be easily seen the bases of legitimacy and the main categories of action are overlapping entirely. Yet, it does not mean that the dominant motive in each individual case of obedience would be the mirror motive of legitimacy base chosen by the subjects or that it would play a role at all. It is at the same time not necessarily the bases of claims to legitimacy by the rulers correspond to the motives of obedience or the bases of legitimacy of the subjects. Now in this sense, one individual may find the authority legitimate since he believes that it is value-rational, but in a specific case he obeys just only with the motives of self-interest and at the same time this authority bases its claim to legitimacy on the traditional grounds. Another individual may not believe in the legitimacy of the order at all but may go on to obey for several other reasons.¹⁴⁶ At the end, overlapping of the bases of legitimacy from the perspective of authority and the subjects refer only to the minimum requirement of validity.

¹⁴⁵ For Turner and Factor, the beliefs about the validity of the orders are not direct causes of obedient actions. A legal order may be casually upheld by habits, social pressure, self-interest, etc. Beliefs about legitimacy may have a negligible casual role (*Max Weber: The Lawyer as a Social Thinker, op. cit.*, pp.101-102)

¹⁴⁶ Richard Wellen asserts, ‘the sociological validity of an order depends upon the probability that a given interpretation of the meaning of the order will determine certain actions’ (p. 48). In my reading, it means subjectively given interpretation of the order by the obeying subject.

Weber himself in several places repeats that the categories he presents are the pure-types and empirically they are found always in heterogeneous ways. Neither the authorities nor the subjects purely belong to any of these pure types. (ES, p.262) For example, *submission to an order is almost always determined by a variety of interest and by a mixture of adherence to tradition and belief in legality; unless it is a case of entirely new regulations.* (ES, pp.37-38) The composition of belief in legitimacy is rarely simple. For example belief in legality is never purely legal but also habitual so it is partly traditional. Even it has a charismatic element arising from the success of the rule. For bureaucratic authorities, although they time to time approach to the pure type, it is seldom that they may become stable without a head who has charismatic authority. (ES, pp.262- 263)

III.VI Value-Rational Authority

Weber involves value-rationality in his typology on bases of legitimacy for the ruled. There, he clearly separates the legality from value-rationality and gives the natural law as only example of value-rational bases. Yet, he does not consider it influential enough on the conduct of modern men. Any justification of political power by reference to substantive rationality is precluded by the nature of capitalist society.¹⁴⁷ Value-rational faith is listed among the guarantees for legitimacy of an order. However, in the same text, Weber argues that it is irrelevant for the definition of legal order whether the subjects treat the order or the legal norms valid since they find it ethically correct and value-rational. He maintains that legal rules may have been established entirely on the grounds of expediency. (ES, p.36)¹⁴⁸

At the typology of authorities, Weber has only one rational type and that is legal authority. Legal authority is domination by virtue of “legality”: the legitimacy claims of the authorities are based on the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands. (ES, p.215) On the other hand, the subjects comply with the positive enactments which are believed to

¹⁴⁷ Bryan S. Turner, ‘Nietzsche, Weber and the devaluation of politics: the problem of state legitimacy’, *Sociological Review*, vol.30, No.3, August 1982, 367-391, p.373

¹⁴⁸ J.J.R. Thomas, ‘Weber and direct democracy’, *British Journal of Sociology*, Vol. 25, no.2, June 1984, p.222, concludes mistakenly that legal authority can be grounded in either value- or purpose-rationality is clear enough. Not the authority but the norms may be established on grounds of value-rationality. Yet, an authority type depends on the basis of legitimacy, not on the norms or rules that it produces. Every type of authority may produce value-rational norms.

be legal in the sense that they are formally correct and have been made in the accustomed manner. In this context, the legitimacy of legal order depends on its formal rationality. The only explicit link between the legal order and value-rationality which Weber admits is at the level of legal norms: *any given legal norm may be established ...on the grounds of expediency or value-rationality or both...*(ES, p.217) So the legal norms are either value-rational or instrumentally rational or contains both in a hybrid form.¹⁴⁹

To Weber, orders may be consensual or imposed. In order to explain legality, Weber uses these two categories. Legality may be treated as legitimate by the subjects either because it derives from the voluntary agreement or it is imposed by an authority designated by a rational system of norms. An order is always imposed as far as it does not originate from a voluntary personal agreement of all the individuals concerned on. As far as the underlying agreement about the order is not unanimous, it is always an imposition, at least on the minority.¹⁵⁰ In this sense, even democracies are imposed orders. In addition to all these, the consensual agreement, if it exists, is on the order's legal form, not on its substantive basis. On the one hand, the circularity of validity found in imposed orders seemingly disappears in the voluntary orders. On the other hand, Weber tells us that there is a little difference between the imposed and voluntary orders since what is at stake is formal correctness. (ES, p.37)

As understood, Weber refutes that a state, even a democratic state, may be established on a voluntary agreement. Thus his political sociology may not be explained by the presumptions of social contract theories, which he calls formal natural law.¹⁵¹ In this sense, democracy itself cannot be a value-rational authority since it is only a form, as also claimed by Kelsen, afterwards. Weber explains the democratic legitimacy not among the main authority types but as the sub-type of charismatic authority. Free recognition of authority by the subjects makes the charismatic authority the closest one

¹⁴⁹ Legal-rational authority rests on the assumption that norms are made, not discovered. Therefore only their procedurally correct enactment is enough to confer on them their normative status as standards for the evaluative assessment of human conduct. Kronmann rightly argues that the epistemological assumption of legal authority that the values can only be established by a deliberate and willful act of norm creation is very compatible with Weber's theory of values which entails the logical necessity to distinguish between 'is' and 'ought' (Kronmann, *op. cit.*, pp. 52-53).

¹⁵⁰ On the other hand, a minority may impose an order on majority at by time the majority may begin to find the order legitimate although they had resisted to it originally (ES, p.37)

¹⁵¹ See section on natural law, below.

to the democratic governance. As a result of transformation of charismatic authority, recognition is taken as the basis of legitimacy (not as a consequence of it). This is called an authority on the basis of democratic legitimacy by Weber. (ES, p. 267)

Democratic legitimacy is a kind of hybrid form between charismatic authority and legal authority. Especially parliamentary democracies are closer to the legal form than plebiscitary ones.¹⁵² Democracies in overall cannot be called value-rational authorities because they are not based on absolute value systems.¹⁵³ On the contrary, especially liberal democracies deny such an absolute approach and function according to moral relativism.¹⁵⁴ At this point the discussion is directed to questioning the role of the principles in modern legal systems and the values in liberal democratic systems.¹⁵⁵

In order to understand the role of value-rationality in the modern political orders, the relation between the legal authority and modern politics has to be elucidated. The legal authority is the latest form of political authorities. Therefore legal system and political system have been inseparably connected in the modern age. Modern legal systems' rationality is highly formal. The political authority takes its power from these highly formal laws. Modern legal orders have some principles which they share with political discourse such as equality, freedom and human rights.¹⁵⁶ However Weber takes these principles as formal characteristic of modern legal orders, rather than substantive values. These principles originally belong to formal natural law and provide the basis of capitalist economic order. Under the dominant formal rationality of the modern orders, interpretation of these formal principles substantively only create formal irrationalities in the system.¹⁵⁷ In relation to formalism, Weber's legal positivism understands law as

¹⁵² See section on direct democracy, below.

¹⁵³ For example, Strauss entails that liberalism must be intolerant of those who would be guided by faith and prejudiced against those who believe in an objectively knowable good (Wellen, p. 125)

¹⁵⁴ Here Kelsen's article "Foundations of Democracy", in *Ethics*, Vol. LXVI, 1955, may be very useful to understand the links between modern positivism, liberal democracy and moral relativism.

¹⁵⁵ 'Why is it in the very nature of political legitimacy that it can never be based on a rational commitment to socially valid ideals? Why, in other words, does Weber's political sociology fail to acknowledge the possibility of a rational consensual order of the type required by the ideals of liberal democracy?' (Wellen, p. 50)

¹⁵⁶ Weber does not consider the moral foundation of liberal democratic freedoms or the recognition of the dignity of basic rights as an independent basis for political legitimacy. Morality and politics are separated by modern conditions (Wellen, pp. 8-9). Additionally 'Weber insists that the indirect consequence of the Rights of Man- especially the ideals of "formal legal equality"- was to facilitate the procedural rationality that dominates modern life, and which is the source of legitimation of positive law. As a result, confidence in the function of the formal rationalization of the legal system has become more important for its legitimacy than the moral grounding of the consensual order intended by the rights and freedoms in the name of which it had been established' (Wellen, p. 84)

¹⁵⁷ Hennis states that Weber knew that 'the political 'individualism' of West European 'human rights', so far as it was 'ideally' determined, had grown in part out of religious convictions that rejected all human authority as an ungodly

‘imperative command, supported by the threat of political violence, and not a system of normative guidelines based on substantive values.’¹⁵⁸

This may seem an oversimplified picture of modern conditions. However Weber’s contributions are not limited to the explanations above. He admits that every state has a value system ordering the matters. Every political community possesses value systems ordering matters although the content of the values is irrelevant. (ES, p.902) The values may be welfare-based, constitutional, cultural, etc. Nevertheless, these values do not constitute an absolute system of values that may overcome the formal rationality of the modern legal orders and that may provide the basis of legitimacy. These values may create only some legal norms that are based on value-rationality and obedience may be given to such norms due to value-rational reasons.

In addition to the reasons studied above for Weber not to give a place to value-rational authority in his theory, there are methodological and epistemological reasons.¹⁵⁹ The terms of authority and domination overlap in Weber’s theory.¹⁶⁰ The authority is imposed on people by suppressing all resistance and conflicts through the means of violence. Continuous voluntary submission to the order is a fantasy in Weber’s political understanding.¹⁶¹ A value-rational authority having to use violence will be an inconsistency in itself. As he attempts to explain in ‘Politics as Vocation’, the means of politics are incompatible with any kind of absolute ethic. His epistemological approach

idolization of creatures.’ From Weber, he quotes that individualism of enlightenment was a product of an optimistic belief in the natural harmony of interests between free individuals which is today for ever destroyed by capitalism. Additionally for Weber, human rights were examples of extreme intellectualist fanaticism. Hennis book, pp. 180-181 *Voluntarism and Judgement: Max Weber’s Political Views in the Context of his Work*.

¹⁵⁸ Bryan S. Turner, *Nietzsche, Weber and the devaluation of politics: the problem of state legitimacy*, p. 374

¹⁵⁹ See Martin Barker, ‘Kant as a Problem for Weber’, *British Journal of Sociology*, Vol.31, No.2, June 1980, pp.236-239 for similar explanations but a different conclusion.

¹⁶⁰ Martin Albrow in his comment on Martin E. Spencer’s article (‘Weber on legitimate norms and authority’, *British Journal of Sociology*, Vol.21, 1970, 123-134), emphasizes a similar point. The idea of obedience to commands is at the heart of Weber’s definition of authority. Obedience refers only to the formal obligation, without regard to the value or lack of value of the content of the command. Albrow, in parallel to my comment above, asserts that ‘this definition makes the notion of value rational authority a contradiction in terms. Unquestioning obedience involves the renunciation of value standpoints vis a vis commands’ (Martin Albrow, ‘Weber on Legitimate Norms and Authority’, *The British Journal of Sociology*, No.23, 1972, p.484) Spencer argues that value rational authority is a government of principles, not of men and it is typically found in the higher realms of political office (Spencer, *op. cit.*, p.130). To Spencer a constitutional government with a separation of powers and collegiality is a good example of it (p.131). In turn Albrow dissents that there is no need to resort to a foggy idea like the ‘will of people’. Weber’s contribution to the study of authority is ‘to show how the vague language of ultimate justifications needs to be penetrated by the basic queries of political sociology’ (Albrow, *op.cit.*, p.486)

¹⁶¹ Only direct democracies, which Weber calls underdeveloped domination, are examples of voluntary organizations. But they are transitory and transformed easily to aristocracies. See sections on direct democracy and mass democracy.

in terms of strict division of facts and values only aggravates the situation and results in his sociology of law with an almost Machiavellian view of the state.¹⁶²

To all these, pessimism of Weber about human beings and his *realpolitik* approach to the politics are to be added. Although Weber himself is discontented with the vanishing role of values in political life, his personal distrust to masses and democracy shapes and limits his solutions to the problems that he attributes to modernity. What he proposes is a plebiscitary democracy and a charismatic leader who will use and direct the irrational and emotional tendencies of the masses in the direction of values he chooses for and on behalf of the nation. Instead of rational persuasion, charisma and propaganda will move the masses for the common ends of the nation.

Lastly, I claim that the question about value-rational authority concerning Weber's sociology is misdirected. As questioned before: 'Why should a system of domination that is based on value-rationality tend to a democratic character? It is as tough Weber's critics could conceive of no values other than democratic ones.'¹⁶³ To me, the question is not that why Weber does not admit the liberal democracies value rational but why Weber does not call religious regimes, socialist states and the church law value rational authority. Concerning socialist regimes, his answer is very well known and explicit.¹⁶⁴ Socialist regimes cannot escape from the fate of modernity which is more and more bureaucratization. On the contrary, strict state regulation over many domains of life would necessitate a bureaucratic apparatus even stronger than liberal states. This would make the system more and more irrational due to the conflicts between rising formal rationality and inherently existing substantive rationality in the socialist orders. However, the orders which are based on sacred laws, the canon law and

¹⁶² Bryan S. Turner, *Nietzsche, Weber and the devaluation of politics: the problem of state legitimacy*, p. 374

¹⁶³ J.J.R. Thomas, 'Weber and direct democracy', p.222. Unfortunately, Thomas focuses on the value rational basis of obedience after this question, instead of legitimacy claims on which the order has been based. Hence he approaches to the issue from the perspective of 'the ruled'. What he entails at the end is that value-rational obedience may occur in strictly hierarchical structures such as army and bureaucracy and this fact does not dissolve the relationship of domination (pp.222-224). It is true that Weber downgrades the value rational obedience to a sense of duty. However, in such obedience what is obeyed is not the rule in its overall content but the authority in a sense it is right to obey that authority and any rule it lays down. In other words, sense of duty is only a minimum required for the stability of all types of authorities.

¹⁶⁴ Authority types as ideal-types are not necessarily found in reality in their pure definition. Additionally, the legitimacy claims of the authorities do not have to reflect their real aims or to be sincere bases of the order. Therefore every authority which attempts to base its legitimacy in large on some values may be called value-rational authority without contradicting Weber's own methodology. I admit that Weber's refusal to do so may not be explained fully only with theoretical reasons. See Martin Barker, 'Kant as a Problem for Weber', p. 231

patriarchal system of justice (ES, p.844) are examples of substantive legal orders and in this sense they may well deserve the value-rational authority label.

IV. LEGAL SPHERE

IV.I Concept of Law

The concept of coercion is fundamental for the concept of law, as it has been for the concept of state. Weber states, *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.* (ES, p.33) In the definition, what is specific to law is the organized coercion, meaning that there should be a group of people who is in charge of enforcing the order by executing coercion. In this sense, the concept of law and concept of state approach each other so much that they almost overlap.¹⁶⁵ In the historical order of authority types, legal authority is the latest one, whereas the state is the most developed political community and a historically late product.¹⁶⁶ Weber explicitly claims that as *the fully matured political community*, only the state *has developed a system of casuistic rules*, which is called “legal order”, in order to exercise coercion. (ES, p.904)

Modern state is a model based on legal authority *to which that particular “legitimacy” is imputed.* (ES, p.904) Therefore it may be the only system that has a legal order in most developed, rational and modern sense.¹⁶⁷ However, it does not mean that law cannot be thought independent from the state. On the contrary, Weber insists that there are extra-state laws and they should be recognized. *...we categorically deny that “law” exists only where legal coercion is guaranteed by the political authority...* (ES, pp.316, 34-35) He argues that there are various means of coercion, including non-violent ones and those nonviolent coercion means are sometimes even more effective than violent ones. It seems that the distinction made by Weber is based on the difference between physical force and other coercive means. He defines the “political” only by the

¹⁶⁵ Remember state definition: *a compulsory political organization with continuous operation will be called a “state” in so far as its administrative staff successfully upholds the claim to the monopoly of legitimate use of physical force in the enforcement of its order.* (ES, p.54)

¹⁶⁶ David M. Trubek states that Weber believed that Western law had particular features which helped explain why capitalism first arose in Europe. In order to show that the European legal system differs significantly from others, he developed typologies that permitted him to distinguish European law from the legal order of other civilizations. However Weber denied that capitalism was the only factor behind the special characteristics of European law. There were many other non-economic factors that have played their role in the process. ‘Max Weber on Law and the Rise of Capitalism’, *Wisconsin Law Review*, Vol.3, 1972, 720-753, p. 723

¹⁶⁷ In Trubek’s words, ‘as “law” (in the generic sense) evolved to modern, rational law, so the form of domination evolved toward the modern state, a creation and creature of this type of law’ (*ibid.*, p. 732)

particular means- that is use of physical force (ES, p.55)¹⁶⁸ and he states that non-political organizations may have laws although they do not have the means of physical force. What matters is only *the presence of a staff engaged in enforcement.* (ES, p.34) Then, Weber presents his second but inconsistent argument: *the assumption that a state “exists” only if the coercive means of the political community are superior to all other communities, is not sociological.* (ES, p.316)¹⁶⁹ He gives us some examples of extra-state law, one of which is “ecclesiastical law”. Ecclesiastical law is still law even where it comes into conflict with “state” law. It is true also for the Slavic *Zadruga*, it is law since it has its own coercive apparatus for the enforcement of its norms, although these norms may be contradictory to the state law. (ES, pp.35, 317) Actually, his argument is again partly based on the fact that *as far as psychological coercion is concerned, there is no such monopoly even today, as demonstrated by the importance of law guaranteed only by the church.* (ES, p.317)

But what is the relation between state and extra state law and what happens if it arise conflicts between state law and other types of law? Weber mentions several possibilities. One possibility, especially for Anglo-Saxon law is that modern state law may treat other organizations’ norms valid. Other possibility is that in some cases, such as the application of coercive measures, the state may usurp these norms. But the conflict does not always end with triumph of the state. *To a considerable extent the state must tolerate the coercive power of organizations even in cases where it is directed not only against members, but also against outsiders on whom the organization tries to impose its own norms.* (ES, p.318)

¹⁶⁸ State law is law guaranteed by the state, only when legal coercion is exercised through the specific, i.e. normally directly physical, means of coercion of the political community. Thus, the existence of a “legal norm” in the sense of “state law” means that the following situation obtains: In the case of certain events occurring there is a general agreement that certain organs of the community can be expected to go into official action, and the very expectation of such action is apt to induce conformity with the commands derived from the generally expected interpretation of that norm. (ES, p.55)

¹⁶⁹ In several places, he repeats that state is state since it has the **monopoly** of legitimate use of physical force and in some other places, he attempts to distinguish the “political” communities from other communities and associations existed in the history by emphasizing decentralized and disordered distribution of powers, domination and the means of coercion in the latter group. The supremacy of the “legal order” by the political power has occurred gradually *due to the fact that those other groups which once had exercised their own coercive powers lost their group on the individual.* After he lists the basic functions of the “state”, he adds that these functions lack any form of rational order and performed by ad hoc or disorganized, unconnected groups, under primitive conditions. *Furthermore, private association enters domains of action which are used to regard exclusively as the sphere of political associations.* (ES, pp.901-905) Now, after all these assertions, Weber attempts to convince us on the contrary.

Sociological and Legal Definitions of Law: Normative and empirical approaches to the law should be distinguished from each other. Legal concept of law is concerned with the normative meaning of a legal proposition. On the other hand, sociological concept of law is concerned with the empirical probability of legally-regulated social action for a group of people. In a sense, both of them deal with the validity of a legal order or of a legal norm, but with its different aspects. The difference is parallel to the difference between validity in the realm of “ought” and in the world of “is”. The juridical point of view takes for granted the empirical validity of the legal propositions and conceives the legal order as *a set of norms of logically demonstrable correctness*. Therefore the normative validity of legal propositions is their logically correct meaning so that *all of them can be combined in a system which is logically coherent*. Yet, from sociological point, legal order refers to *a complex of actual determinants of human conduct*. (ES, pp.311-312)¹⁷⁰

Weber excludes “legally normative” but also “subjectively normative” from the subject-area of sociology, As explained in the section on legitimacy, the “oughtness” of legal obligation felt by the subject is not sociologically very relevant. For the sociological validity of rational norms, it is not necessary that all people, or even a majority, obey to the norms due to the sense of legal duty- as already explained above as to the minimum requirement for the validity. After referring to the significance of custom and convention as the reasons to obey to law, he reaches to an extreme conclusion: *the law would no longer “subjectively” be regarded as such, but would be observed as custom* if the obedience to the legal norms out of habituation (*to a regularity of life that has engraved itself as a custom*) were universal. The reason is more interesting than the claim itself: in such cases it is not law anymore since the fundamental component of the concept (or of the concept in the way Weber conceives) disappears: there is no more a chance that coercive apparatus will enforce. Lastly Weber

¹⁷⁰ Kronmann finds three attitudes in Weber toward law: moral attitude, dogmatic jurisprudence and sociological understanding. Moral approach evaluates the law by using an extra-legal standard. Although ‘the law may itself contain standards of an explicitly ethical sort’, still distinction between moral and legal validity is possible. ‘In the first place, one may regard them as morally obliging solely in virtue of their content...the legal status of the norms – their legal form- neither adds nor diminishes their moral force...It is possible, however, to view these same ethical norms in the way judges frequently do- as imposing duties to act or refrain from acting in certain ways only because they happen to be rules in a legal system.’ Kronmann concludes that the distinction can be maintained despite the fact that there are legal norms which state moral principles (Kronman, pp. 8-10). If we look at from the perspective of the obedient subject, however, this distinction loses its clearness. Obedience to the legal norms may be strengthened by the moral oughtness that is felt by the obedient- so one may regard them as both morally and legally obliging.

adds that for the validity of law, it is not required that those who believe in certain norms of behavior actually should live in accordance with that belief at all times. Therefore sociological validity of law is limited to *the “orientation” of an action toward a norm, rather than the “success” of that norm.* (ES, p.312)

It is apparent that Weber, first, purifies the subject of sociology from legally normative and thereby transforms it into a measurable and empirical probability of obedient action. And secondly, he denies including the reasons, or motives, for obedience that could be normative in this already limited area, probably because they are linked to subjective value-judgments, on which an objective science may not comment much. At this point, it has to be asked whether it is a personal concern to establish a positivist science of sociology purified from value-judgments or it is a personal belief (or a presupposition) that these value-related motives play a really minor role at least in the modern life, which motivates Weber to such a sociological conception of law. Or is it that Weber prisons the sociology to another iron cage of modernity by strict criteria of formality and objectivity in order to be “scientific” in the modern sense of the world.

Custom, Convention and Law: Law and convention are different from the custom because they are externally guaranteed, on the scale of Weber starting from the usage going to the law. Usage is a regular orientation toward social action, probability of which is indeterminate. If usage is based upon long standing, it is called custom. The customs are devoid of any external sanction. They are not demanded by anybody. Naturally the transition from this to validly enforced convention and to law is gradual. (ES, p.29) Convention is *externally guaranteed by the probability that the deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval.* (ES, p.33) Now, its difference from custom is that it is held binding on the members of group by the group and its violation is encountered by an external sanction like a strong disapproval. Yet, it is also different from law since there is no special staff to apply the sanctions for convention.¹⁷¹ (ES, p.33)

¹⁷¹ Kronmann also infers from a passage in *Economy and Society* (ES 317) that in defining law as he does, Weber may mean to suggest that it is the existence of binding norms at the second or sanctioning level (which specify who is to punish infractions and what form of punishment is to take) which distinguishes the law from other normative social orders (pp. 30-31). This explanation comes very close to Hart’s understanding of ‘secondary rules.’

IV.II Modern Law

IV.II.1 Weber: Against Classical Legal Thought and the Social Current

Kennedy asserts that Weber's sociology presents classical legal thought as the mode of his present, with critical analysis of the 'social current'. At the same time his approach to law is quite different from the 'social'. Classical legal thought saw law 'as having a strong internal structural coherence based on three traits of exhaustive elaboration of the distinction between private and public law, "individualism" and commitment to legal interpretive formalism. These traits are combined in "the will theory."' As may be seen in this section, these three characteristics imputed to modern law by classical thought are analyzed by Weber in detail. The 'will theory' which largely originates from the Natural Law theories is set aside by Weber with a claim that they have lost their enchanting/legitimizing effect.¹⁷²

Although Weber adopted the critique of the 'social current' towards classical legal thought, he was also a critique of the 'social'. According to the 'social' approach, society is a living organism and transforms in time. Although the will theory and its normative individualism were apt to the conditions of the first half of the nineteenth century, it is no more sufficient to respond to the social needs of the life, since, above all, it ignored the increasing 'interdependence'.¹⁷³ They drew a reform program from their factual analysis of prevailing conditions, which contains labor legislation, the regulation of financial markets and the new rules in international law. According to them, law is a means to accomplishment of social purposes. In their view, classical legal thought maintained an appearance of objectivity in legal interpretation only through the abuse of deduction.¹⁷⁴ Weber's main critique to Social Current is their logical fallacy to reach an

¹⁷² The will theory has a variety of versions, as Kennedy explains. One is restricted to private law rule and entails that private law rules are deduced from the notion that government should help individuals realize their wills. In a more extensive version, the public law norms also follow from this foundational commitment, for example, the principle of separation of powers is derived from the nature of rights. Natural rights theory was highly relevant on the classical theory, in relation to legal analysis based on deduction. 'Natural rights theorists had elaborated the will theory, beginning in the seventeenth century, as a set of implications from their normative premises, and their specific legal technique was the direct ancestor of the legal formalism.' Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality', *Hastings Law Journal*, Vol.55, May 2004, 1031-1076, pp.1032-1033

¹⁷³ '...the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of "interdependence"'. Kennedy, *op. cit.*, p.1034

¹⁷⁴ They advocate that legal pluralism occur due to the new norms developed by various groups such as merchant communities and labor unions, and these new norms that fit the social needs should and, anyway, would be 'the basis for legislative, administrative and judicial elaboration of new rules of state law.' (Kennedy, p.1035).

‘ought’ from ‘is’, i.e. from an analysis of society to a legal reform program. Weber argues that social change results from the conflicts of ideal, material and institutional interests and they are all subject to unintended effects of the law, therefore law cannot be used as an instrument to facilitate the social development. In front of the social view that law reflects society, sometimes with tragic gaps, law for Weber is relatively autonomous, rather than merely reflective.(1037)

IV.II.2 A Brief Introduction to Rationality of Modern law

The most distinguishing characteristic of modern law is its formal rationality. I will attempt to explain in this section what formal rationality means for law and how it has developed. European Law on which Weber has focused was more rational than others since ‘it was more highly differentiated (or autonomous), consciously constructed, general, and universal.’¹⁷⁵ However, Weber reminds us that *a body of law can be rational in several different senses, depending on which of several possible courses legal thinking takes toward rationalization.* (ES, p.655) Weber uses the same categories of rationalization: **formal rationalization** and **substantive rationalization**.

One important rational characteristic of modern law structure is **constitutional rationality of the state**. It means both the distinction between public law and private law and the adoption of principle of separation of powers. Public law is mainly *the total body of those norms which regulate state oriented action, that is, those activities which serve the maintenance, development and the direct pursuit of the objectives, of the state (Staatsanstalt), objectives which must themselves be valid by virtue of enactment or consensus.* Additionally what these aims should be is a question that could be answered in several ways. Weber quickly sets aside this value-centered topic.

The modern distinction between government, legislation and adjudication did not exist in the past and fusion of them indicates to underdeveloped formal rationality. Actually, only through the separation of powers in such a way, *the very concept of public law was made possible.* A systematic theory of public law has developed only in the Occident since only there the separation of powers has arisen from the idea of the state as a rationally organized institution and its practice has been experienced *with*

¹⁷⁵ Trubek, ‘Max Weber on Law’, p. 724

*rationality dovetailed jurisdictions and separations of power.*¹⁷⁶ He details his discussion on the separation of powers by classifying the political organizations' activities as **law-making** and **law-finding**. Law-making and law-finding may be rational or irrational. Weber states that first of all, their fusion is a sign of irrationality. He reaches this conclusion by defining both law-making and law-finding in their formally most rational ways. If law-making is the creation of general norms and law-finding is application of these norms to particular cases and to concrete facts, then every type of adjudication working as administration *in the sense of free decision from case to case* is irrational. (ES, pp.653-656) In other words, legal rationality is 'the degree to which a legal system is capable of formulating, promulgating, and applying universal rules.'¹⁷⁷

IV.II.3 Formal and Substantive Rationality of Law

Weber gives us several characteristics of formally rational law. He begins with 'generalization'. Generalization is based upon a process of reduction both on the side of law and of the facts. On the one hand, reasons for a relevant decision are reduced to one or more legal propositions; on the other, the facts of the case are reduced to the ones relevant in the juristic valuation. 'Casuistry', second characteristic, promotes, and is promoted by, 'generalization'. However, casuistry does not always result in *the development of legal propositions of high logical sublimation*. It may be achieved also only by the analogy of extrinsic elements. Weber intends to explain, here again, analytic and synthetic processes; analytical derivation of legal propositions from specific cases and synthetic work of conceptual construction of legal relations and institutions. These processes do not necessarily show a similar development or rationalization pattern. Third characteristic, 'systematization', refers to a late development of law and *represents an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules, under which it is implied, all conceivable fact situations must be capable of being logically subsumed lest their order lack an effective guaranty*. (ES,

¹⁷⁶ However, there are also other particular historical factors ranging from the consociation of privileged persons in public corporations of the Standstaat to the Roman concept of the corporation; from the ideas of natural law to French legal theory. Weber explains that in the modern state, the separation of powers and the limitation of powers co-exist together. This is fundamental characteristic of modern state. The separation of powers within the state is done and the bearers of these powers are selected according to the established rules. These powers delimit each other and find their legitimacy in set rules of limitation of power.

¹⁷⁷ Trubek, 'Max Weber on Law', p.727

pp.654-656) This last characteristic of formal rationality indicates a stage for law of being a closed and independent order with a specific rationality.

Weber compares legal substantive rationality with legal formal rationality and defines formal irrationality and substantive irrationality. Here, attention should be paid to what makes law substantive or formal and to distinguishing them from what make law rational or irrational. Weber states that law is formal if only unambiguous general characteristics of the facts of the case are taken into account. Rational simply means 'governed by general rules and principles'. Thus, Weber claims '*all formal law is, formally at least, relatively rational*'. (ES, p.656) However, at more basic level, formalism indicates to 'employing criteria of decision intrinsic to the legal system.'¹⁷⁸

Formal irrationality occurs when the means used for law-making and law-finding are irrational. Example of formal irrationality is rigorous formality and it occurs when the means used for law-making or finding cannot be controlled by the intellect- as it happens when the oracles are consulted for decision. We understand that formally irrational examples of law are irrational since the means of law are irrational, while they are formal still. In the rigorous type, as Weber calls, formalism means *that the legally relevant characteristics are of a tangible nature, i.e. that they are perceptible as sense data. This adherence to external characteristics of the facts, for instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning, represents the most rigorous type of legal formalism.* (ES, p.657) This definition of formalism actually explains us the example from oracles for formal irrationality. Here only external facts or actions which are already defined by the legal order are taken into account and have a legal meaning.¹⁷⁹ Irrationality of such a law-finding also arises from lack of clear distinction between substantive and procedural law- i.e. between the rules of law to be applied in the process of law-finding and the rules regarding that process itself.

¹⁷⁸ For a similar description of Weber's typology, see Trubek, 'Max Weber on Law', p. 729

¹⁷⁹ Weber gives examples from magical formalism and symbolism, such as '...straightforward magical acts or at least acts having a magical significance'. (ES, pp.672-673) Two examples of contract from the history are rigorously formal oral transactions (Roman nexum and stipulatio). They required that the necessary acts to be performed by the parties themselves. Legal thought did not recognize as relevant intangible phenomena such as simple promises. Some of these symbolic forms rested on magical conceptions. For a legal transaction to be a transaction, some rigid and formal standards are required (ES, pp.678- 680)

However there is a more developed type of formalism. Formal rationality of law indicates to, or actually requires, an abstract method, *which employs the logical interpretation of meaning*. This method, **logically formal legal rationality**, used in law-making and law-finding gives objective, formal and impersonal results. However, this high level of formalism is at the same time closely linked to rationality. Rationality here indicates to systematic character of a legal order. Weber defines legal rationalism as follows: *...for a principle to have legal validity it had to be “construed” out of a system of given concepts, that nothing outside such logical construction could juristically even be “conceived”*. (ES, p.688) Systematization of law- i.e. *the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions* – may be accomplished only by a formal and abstract method. Weber tries to convince us to a circular argument once again- that we need formal rationality for a formally rational law.

A close look at Weber’s definitions of formalism shows that both types of formalism serve to one aim: to create a system with its own meanings and rationality. Formalism in general refers to the selection method and re-conceptualization of the data and facts which will enter into (or even accepted to) the legal order, from out of the legal order. The second type of formalism, logically formal rationality, is more sophisticated and intellectual but it serves to the same aim- to melt the external-to-system facts and information within the discourse and inner logic of legal order. It contains a higher level of abstraction, logical reasoning and systematization. *It is found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied*. (ES, pp.656-657)

By such a conception of formalism, the distinction between legal rationality and legal formalism becomes blurred. With a formal approach, rationality of the order is developed and hold superior and stable over the case-specific changeable external facts. Here again we encounter the interrelation between formality and rationality, as we observed in the area of economy. In fact, formality increases system rationality. At the end, formal legal rationality refers to a closed system with an innate inclination to generalization and abstraction. Similar to other life-spheres such as economy, politics or religion, the development of formal rationality specific to legal sphere seems to be a

necessary step for its autonomy from other spheres as an order with its own inner logic. 'Weberian formal law is autonomous, a differentiated cultural sphere that obeys its own fully criteria. Weber believed that a legal system could not be rationalized unless it was formal.'¹⁸⁰

Now, the question is whether there is an implicit sentence in the text, which Weber abstains to say, such as "all substantively rational law, at least formally, is irrational". Weber openly expresses that modern professional and legalistic approach to law is possible only with the law having formal characteristics. Substantively rational law accepts contribution or components (ideas, values, interests, emotions) from other orders or thought-systems (ethical, political, religious etc.). However it still stays rule-bound. It does not produce case to case decisions. Substantively rational legal thinking should be the one which takes into account unambiguous general characteristics of the facts of the case while taking some other values or norms from other systems.

For a higher level of rationality, this may not be enough. Substantively rational law should also satisfy the second criterion of rationality. If the scheme of legal rationalization drawn above for formalism is followed, the substantively rational law is rational only when it accomplishes to get systematized through generalization and abstraction. If it may melt the different values in one pot and establish a coherent unity of connected general principles, then it would be both rational and substantive. Weber urges us that formal rationality is in contrast to substantial rationality since the norms from other value-orders are different from *those obtained through logical generalization of abstract interpretations of meaning*. Since the norms from different orders may or would have a potential for inconsistency and disorder, the substantial rationality would, first of all, work against systematization and generally may easily slide towards case to case law-making and law-finding, so to irrationality (as Weber defines it). Additionally (if we remember the definition of formal irrationality), the means used in substantive rationality are not controllable by the intellect. Values and emotions are not rational tools and they cannot be ranked or compared logically. Hence substantively rational law will never be a system as closed as formally rational law and

¹⁸⁰ David M. Trubek, 'Max Weber's Tragic Modernism and the Study of Law in Society', *Law & Society Review*, Vol.20, No.4, 1986, p.590

will always remain open to influence of the values from other life spheres or thought systems.

Substantively irrational law-making or law-finding means that *decision is influenced by concrete factors of particular case as evaluated upon an ethical, emotional or political bases rather than by general norms*. What makes substantive irrationality irrational is not that it takes some other values or norms from other systems; it is irrational because these values are not transformed into generally and uniformly applied norms. Second reason of irrationality is that concrete factors of the case are taken into account and produce case-specific decisions. If rational law-making is the creation of general norms and rational law-finding is application of these norms objectively to particular cases, then every type of adjudication working as administration *in the sense of free decision from case to case* is irrational. Another example of irrational adjudication occurs when law is conceived as privileges. The irrational by-products of such situations are those: lack of conception of legal rights, of legal norms, and of legal claims founded on legal norms. (ES, p.656)

Rational

Formal

<p>rule-bound, logical, determinable and/or measurable means, systematization</p>	<p>Development and use of a legal method, objective use of system-specific criteria and means, even the facts of the case as external data to be absorbed or re-interpreted within a closed system</p>
<p>use of the means that cannot be controlled by intellect, case-to-case jurisdiction, unbound by general rules, fusion of law-making and law-finding</p>	<p>Contribution or components (ideas, values, interests, emotions) from other orders or thought-systems (ethical, political, religious, etc.)</p>

Irrational

Substantive

IV.III Formal and Substantive Rationalization of Law

In his writings on sociology of law, Weber gives us a great deal of historical detail, with several examples from different societies. As for other subjects, he again refrains to oversimplify the complexity of different factors, which contribute to the rise of modern law with high level of formal rationality. Still, it is possible to make a classification of historical factors which he regards influential for development of law. There are mainly four different historical factors: political factors (political actors and political structures of societies), economic factors (modern capitalism and interest groups), intellectual factors (development of legal logic and of modes of thinking under the influence of Roman law, Canon law and natural law) and legal actors.

IV.III.1 Formal Rationalization of Law

IV.III.1.1 Economic Factors: Rationality of Market

Weber analyses private law under the heading of 'forms of creation of rights'. Through his analysis of legal rights and especially of freedom of contract, the connections between law and economic life are more clarified. This section attempts to show how the expansion of market economy has necessitated an improvement in formal rationality of law by demanding legal guarantees and certainty for material or abstract possessions, for power situations and for the (mostly economic) results of certain actions. The study also reveals the meaning of formal rationality more in the sense of using technically rational and efficient means that allows relatively certain calculations in terms of results; thereby formal rationality of law approaches to formal rationality of modern economic order.¹⁸¹ This section will also consider the role of interest groups on the formation of law but will leave the discussion on how formal rationality of modern law serves to particular interest and power groups behind its claims to justice and objectivity, to following sections.

According to Weber, the most essential feature of private law is *the greatly increased significance of legal transactions, particularly contracts, as a source of*

¹⁸¹ See Stephen M.Feldman, 'An interpretation of Max Weber's theory of law', p.217. Formally rational economic sphere and formally rational legal sphere are parallel in the high degree of calculability of the consequences of the social actions.

claims guaranteed by legal coercion. Private law of a contemporary society is a contractual one. (ES, p.669) Freedom of contract is among the rights that arise from permissive 'legal propositions'. Therefore, it is a privilege¹⁸² that expands right-holder's power of control to regulate his relations with others by his own transactions, through granting to an individual autonomy. At the same time, the power of control constitutes the essential connection between law and economic life. *To the person who finds himself actually in possession of the power to control an object or a person the legal guaranty gives a specific certainty of the durability of such power.* (ES, p.667) Concerning freedom of contract¹⁸³, law provides the power of control with durability by recognizing particular arrangements between individuals as valid and thereby giving rise to new obligations and claims.

Modern private law is concerned in great deal with the contracts because of modern capitalism. *The present-day significance of contract is primarily the result of the high degree to which our economic system is market-oriented and of the role played by money* (ES, p.671) for the number and complexity of legal transactions increase by every extension of the market. Additionally, both the scope of such arrangements and of contractual freedom recognized and allowed by law expands together with the expansion of the market. (ES, p.668) In this context, Weber maintains, *a legal order can indeed be characterized by the agreements which it does or does not enforce.* Here the decisive role of interest groups (especially those most powerful ones who have market interests) may be observed on modern substantive law. Their influence predominates in determining which legal transactions the law should regulate by means of power-granting norms. (ES, p.669) However it shouldn't be forgotten that the influence is reciprocal- some aspects of law, conditioned by political factors and by the internal structure of legal thought may determine into some extent the economic relations and structures (ES, p.655). When it is created for a particular purpose, *law can also function ... as to induce...the emergence of certain economic relations which may be either a*

¹⁸² Weber explains that modern law consists of three types of legal propositions: prescriptive, prohibitory and permissive. They give rise to the rights of individuals to prescribe, prohibit or allow an action vis-a-vis another person. The rights increase the probability that a certain expectation of the right-holder will not be disappointed. Weber calls the first two expectations claims and the latter privilege.

¹⁸³ The 'contract', in the sense of a voluntary agreement constitutes the legal foundation of claims and obligations. (ES, p.671)

certain order of economic control or a certain agreement based on economic expectations. (ES, p.667)

Yet, this is not all about law and economic order. The influences of economic factors on the legal order may be indirect, too, that is, that *certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery have influenced the systematization of law or have intensified the institutionalization of the polity.* (ES, p.654) Systematization of law is one of the main characteristics of legal formal rationality. In the quotation above, Weber explicitly states that rationalization of economic behavior and improvement of consciousness about economic-interest and about the role of law as a means to resolve the interest conflicts strengthened the formal rational elements of legal system. Actually, both contractual freedom and systematization of law have similar kinds of results in favor of economic life. They both reinforce the predictability¹⁸⁴ of the results of economic actions and transactions. The probability of fulfillment of expectations facilitates instrumentally rational actions which are the backbones of economic order. At the end, the formal mode of law serves the interests, especially economic interests, of the parties concerned. (ES, p.666)

To be able to understand how freedom of contract and modern capitalism are related to formal rationality, we may examine the history. In the historical account, Weber classifies the voluntary agreements into two: status contracts (the contracts changing total legal situation and the social status of the person) and “purposive contract” (Zweck- Kontrakt), which are peculiar to the exchange or market economy. Originally, legal transactions anteceding the modern contracts were dominantly in public law, family law, the law of descendents’ estates and procedural law. Barter was the archetype of all merely instrumental contracts, yet it was non-economic in the earliest times (ES, pp.672-673). Formal legal construction of barter has begun when

¹⁸⁴ Trubek excellently explains the relation between the law as an autonomous system and predictability. Since the autonomous legal system functions a purely logical, mechanical, manner, its results will be highly predictable. ‘If it is constantly subject to interference by forces which seek to apply coercion for purposes inconsistent with the rules, it loses its predictable quality.’ However this is necessary but not sufficient. The legal system had to be autonomous of other normative orders. ‘This required that the state, as a legal order, be strengthened, so that it superseded other sources of social control, and at the same time be limited, so that it did not encroach upon areas of economic action. The state was to provide a formal order...within which free economic actors could operate’ (‘Max Weber on Law’, pp.744-745)

certain goods, especially metals, have acquired a monetary function. This was an important stage of development for private law since *‘as a non-ethical purposive contract the money contract was the appropriate means for elimination of the magical and sacramental elements from legal transactions and for the secularization of the law* (ES, p.674). As money is for economic order, for legal order *the money contract was, it is true, not the only suitable means, but it was the most suitable.* (ES, *ibid.*)

Above all, there is a dialectic relation between the state monopoly of legitimate law and freedom of contract and it is particularly important in terms of systematization and formalization of law under economic influences. On the one hand, the legal particularism arising from the “special law” of law communities has been abolished by the unification and monopolization of law by the modern political organization; on the other hand, another kind of ‘special law’ has been created by freedom of contract on the basis of ‘formal’ equality. Freedom of contract has the potential to create ‘special law’ with its possible binding effects on third persons. Due to this, it is not limitless, and the limits for its content and form are drawn by the state in modern times. Yet, as far as the parties comply with the official standard terms and with the substantive requirements, they enjoy *the advantages of a legal institution of special law.* (ES, p.695)

However, the modern type of special law is very different from the one developed in the past. *In the past, special law arose normally as ‘volitive law’, that is, from tradition, or as agreed enactment of consensual status groups or of rational associations. It arose, in other words, in the form of autonomously created norms.* (ES, p.695) This is, Weber calls, ‘particularistic law’ and it took precedence to the law of the land. That situation actually indicated to ‘formal irrationality’, as opposite to hierarchical systematization of law- with decisions changeable from case to case in the lack of generally applicable rules to similar cases. Additionally, legal particularism of past was totally subjective (another characteristics of legal irrationality) since it was a privilege (a strictly personal quality) to become subject to the special law, which is acquired by usurpation or by grant. (ES, pp.695-698)

Particular laws and privileges have come to an end by the emergence of modern state. However unification of law by one compulsory institution has been largely achieved by some economic developments. Weber points out the rising of

'bourgeois strata' and its role in repudiation of all privileges in the revolutionary 18th century. Two leading forces, capitalism and bureaucratization led to formal rationalization of law, under the state monopoly. *They reduced the autonomy of what were essentially organized status groups* mainly by one principle: that is *formal equality*. Formal equality has provided the universal application of general legal rules to everybody, thereby abolished the privileges of particular individuals. Two important developments went hand to hand: freedom of contract and the right of association- *the formal, universally accessible, but closely regulated autonomy of voluntary associations which may be created by anyone wishing to do so and the grant to everyone of the power to create law of his own by means of engaging in private legal transactions of certain kinds*. Economically powerful groups for their market interests, the rulers and officials of the state for their power needs have been influential in this legal transformation towards formal rationality. (ES, pp.698-699)

As stated before, instrumental rationality is the dominant rationality of economic actions and refers to the actions the results of which are calculated according to the expectations about the behaviors of the others and other environmental conditions, and oriented towards economic interests as main ends. In this respect, the use of most efficient and 'objective' means for calculation of the possible results is the core of instrumental rationality. Formal rationality of the economic order required the most efficient and suitable means for free market interests. The formal rationality of legal order, to the extent that it is influenced by the economic factors, aims a similar kind of calculability, prediction and objectivity. In Weber's words, *economic interests are among the strongest factors influencing the creation of law* (ES, p.334)¹⁸⁵ and the ever-increasing legal formal rationality. Formal rationality of legal order indicates a variety of formal characteristics. Even the formal legal instruments such as contracts have been the core-concept of substantive law because of expanding market, as *the interference of legal guarantees ...increases the degree of certainty with which a economically relevant action can be calculated in advance*. (ES, p.329) Additionally, systematization of law through state monopoly results from the fact that *the tempo of modern business communication requires a promptly and predictably functioning legal*

¹⁸⁵ For, any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive groups and the formation of social groups depends, to a large extent, upon the constellations of material interests. (ES 334)

system, i.e., one which is guaranteed by the strongest coercive power. (ES, p.337) Lastly, the overall formal structure of law, as general principles universally and rationally applied to the cases, serves to the needs of economic system: *The universal predominance of the market consociation requires ...a legal system the functioning of which is calculable in accordance with rational rules.* (ES, p.337)

Evidently, Weber does not consider the economic factors as the sole determinant of legal structure. He frequently emphasizes the responsibility of legal doctrine, of specialists, of legal techniques and of political organizations and actors. (ES, pp.654, 684, 687) *The mode in which the current basic conceptions of the various fields of law have been differentiated from each other has depended largely upon factors of legal technique and of political organization.* (ES, p.654) Especially, the rational patterns of legal techniques are first to be invented in order to serve the interests. Only after then economic situations provide the actual spread of a legal technique already invented. Next section will focus on the role of legal specialists in law-creation and in modern law conceptions.

IV.III.1.2 Legal honoratiore: More Respectable Citizens of Town¹⁸⁶

By legal honoratiore, Weber implies both the legal specialists and the persons with the power to make an impact on their respective legal system. (ES, p.664, fn.18) This large concept comprises practitioners of the law concerned with adjudication, official administrators of justice, occasionally priests, private counselors and attorneys, professional lawyers and legal scholars. (ES, p.775) According to him, the direction that formal rationalization of law takes is conditioned directly by those persons, *who are in position to influence by virtue of their profession the ways in which law is shaped* and thereby, the prevailing type of legal education. (ES, p.776)

Although legal honoratiore may collaborate with business circles and private initiative, and may cause innovations in prevailing law, their main role is development of mode of legal thought in one or another direction. (ES, pp.757, 775) It refers actually to the basic distinction between English law and continental law approaches. English

¹⁸⁶ In German, the word Honoratioren is used to mean the more respectable citizens of a town. (Es 664)

method is *the empirical training in the law as a craft*. The continental method is the conception of law as a science through academic and legal training.

Concerning the formal rationality, English method is formal but rigorously since its formal rationality (or irrationality) is based on analogies drawn from precedent through concrete and external criteria. Additionally, *the purely empirical conduct of legal practice and legal training* prevents the systematization of law as a coherent whole and does not aim a rational system at all. The legal concepts are not general concepts formed by abstraction or by logical interpretation of meaning but they only serve to the varying needs or interests of clients. There is neither norm-formation from the particular to general propositions nor norm-application from the general rules to the particulars. Of course this provides the system with elasticity for changing conditions, even for the greatest economic transformations.¹⁸⁷ However, *no rational legal training or theory can ever arise in such a situation*. The core reason is the fear of legal practitioners (especially attorneys) to lose their monopolistic position on the legal system and their material interests arising from that. On the other hand, the practical orientation assured that lawyers never lost touch with the actual needs of their, especially commercial, clients. Any attempt of rationalization through legislation or legal science is a threat to be prevented since it may break the traditional procedure that provides the attorneys with occupational or monopolistic benefits. (ES, pp.787-788)

Yet, there is still a similarity between two modes of legal thinking; that is the split of direct bond between the ordinary people and law, in many senses. For the empirical legal method, the emergence of verbal formalism or of a special legal

¹⁸⁷ English capitalism actually benefited from this rigorous formalism and unsystematic approach, Weber observes. The legal life in England shows certain similarities with Medieval particularism. 'The legal concepts produced by academic law-teaching'...often result in 'a far-reaching emancipation of legal thinking from the everyday needs of the public', thereby reducing 'the role played by considerations of practical needs in the formation of the law'. Abstract legal thinking of this sort, often motivated by what Weber calls 'a blind desire for logical consistency', never took root in England and the fact that it did not helps to explain why English businessmen found the law so adaptable to their practical needs' (Kronmann, p.121). The English example shows us that legal predictability for development of capitalism may be realized not only through the systematization of law but in other ways as well (Kronmann, pp. 122-123). Of course, these explanations do not annihilate the inconsistency of England with his theory that legal formal rationality, legal predictability and capitalism are related (Trubek, 'Max Weber on Law', pp.747-748). For an alternative view, see Sally Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law', *Law&Society Review*, Vol.21, No.3, 1987, 487-512. Ewing separates logically formal rationality of legal thought from formal rational administration of justice. She rightly claims that although the former is missing, the latter may be found in the common law. Ewing states that English law is predictable due to binding power of precedent. Therefore calculability and logically formal legal thought are not in an inseparable relation with each other. Formal rational administration of justice refers to the freedom of contract and protection of guaranteed rights, but above all, purely formal certainty of the guaranty of legal enforcement.

language and of complicated technical procedures *compelled the layman to seek the assistance of* an attorney. It was a beginning for a new social stratum, first selected among the clergy later from the upper classes with legal training. After 17th century, there appeared an aristocracy of legal honoratiore composed of barristers. They had no personal contact with the parties to the case and they did not even see them. Every technical preparation belonged to the attorneys as intermediaries between barristers and the party so that the indirect relationship of ordinary people with law (in this case for both in terms of law-finding and law-making) has been doubled as distance. (ES, pp.785-786)

On the other hand, academic method refers to modern legal education in the universities that have a monopoly of legal education. In this method, law shows a high level of rationality both in the sense of abstract norms subsumed by logical interpretation of meaning and of systematization of law and legal doctrines. (ES, p.789) However we have to be careful: that type of legal thought is not necessarily formal although it is rational. Weber gives examples from the religious schools for legal training. He states that some peculiarities of religious legal education are *due to the fact that the priestly approach to the law aims at a material, rather than formal, rationalization of law.* (ibid.) He means the rationalization of law by legal scholarly education but **substantively**. For now, I leave it aside since I will deal with substantive rationalization of law in another section. The Christianity has shown different patterns comparatively. The Occidental Christian church had created for itself organs of rational law-making and no other great religion had developed such institutions like the Councils, bureaucracies, the papal power of jurisdictions and legal doctrines. (ES, pp. 791-792)

However, the real stimulating force behind the continental mode of legal thought was Roman law and Roman jurists. Weber attempts to understand the conditions specific to the Continent which led the assumption and modernization of Roman law by and through university education. Obviously, characteristics of legal honoratiore in different European countries played an important role. Rational and

formal characteristics of Roman law, which secularized the sacred elements, were also significant for the rise of modern law.¹⁸⁸

IV.III.1.3 Political Actors and Legal Formal Rationality

The political power that worked for more rational laws has been the imperium¹⁸⁹ of the princes, magistrates and officials with the intervention in the formalism and irrationalism of the old folk administration of justice. But their significance lays more in the role they played for *the emergence of a new law of general validity, in place of, or in contrast to, the general (common) law.* (ES, p.839) One of the first examples for the rational laws created by princely power was rational panel law and a criminal procedure. A later princely development has occurred in the area of private law, especially as a result of collaboration by two actors; the officials charged with the administration of justice (bureaucracy) and the groups engaging in rational activity (bourgeois strata). These powers also eliminated *certain originally magically conditioned formalities*, strict verbal formalism and irrational methods of proof in private law. (ES, pp.840-842).

Another historical stage for political powers was that princely decrees held the equal validity with that of common law. It was the period of patrimonial monarchs and formal qualities of legal systems have developed by their power of legislation. Princely law-making may take two different forms: “estate” type and patriarchal monarchy. The former type is distribution of political power by the prince to his officials, his subjects, foreign merchants or any other persons as privileges, *which were then to be respected by the princely administration of justice.* The latter type constitutes the case that *the prince would not grant to anyone any claims which would be binding upon him or his judiciary.* Patriarchal monarchs either give commands from case to case by free personal discretion or issue ‘regulations’ containing general directives to their officials,

¹⁸⁸ Roman law was very formal in the sense of court procedures and of the legal concepts used. Religious influences on Roman law were more in the purely formal aspects than on substantive content. The substantive secularization of Roman life, combined with the political impotence of the priesthood, turned the latter into an instrument for the purely formalistic and legalistic treatment of religious matters. (ES 795-797) Roman law was highly analytical so that legal transactions were cut down to the most elementary logical constituents. Additionally, at a very early stage a formal legal education has begun for the legal practitioners. Another cause for formal rationality of Roman law was its involvement in urban business activities based on the contracts. Roman law was systemized by the Byzantine bureaucracy. (ES 793-802)

¹⁸⁹ Imperium is the householdlike power exercised by patrimonial monarchy. Imperium has always included the power to punish an, in particular, the power to crush disobedience not merely through the direct application of force but through the threat of detriment as well. (ES, p.651)

which are valid until a new regulation and not binding himself *to any formal juristic principles or fixed procedural forms*. (ES, pp.842-844)

Concerning formal rationality, the legal order of the estate type is formal but irrational since it operates like judicial procedure but is thoroughly concrete. From such a system, *only an "empirical" type of legal interpretation can develop*. On the contrary patriarchal system of justice is informal but substantively rational. *Judicial administration aims at the substantive truth and thus sweeps away formal rules of evidence*. It may be rational if the adherence to fixed principles is available but this is not a formal rationality in the sense of a logical rationality of its modes of thought but a substantive one *in the sense of pursuit of substantive principles of social justice of political, welfare-utilitarian, or ethical content*. Both the estate type and the patriarchal system do not possess the separation of powers: law and administration are not separated from each other. In this sense, none of them is formally rational. In the estate type, *all administration would assume the form of adjudication*; in the patriarchal type *all adjudication takes the character of administration*. (ES, p.844)

Substantive values such as equity, expediency or politics at the discretion of the prince or of his officials replace any formal guaranty of the rights or the procedural principles for objectively right decision while eliminating *the irrational forms and means of proof in favor of a free official search for the truth* so that it works against both formal rationality and formal irrationality. In the lack of fixed general principles, case-to-case law-making makes the system also substantively irrational. On the other hand, the most substantive type of patriarchal administration occurs when patriarchal welfare policy is combined with theocracy and abolishes all ritualistic, procedural and formal sacred or secular rules. The sole aim becomes to nurture certain ethical attitudes, thereby the boundaries between law and ethics disappears. (ES, pp.845-846)

Weber urges us that not these pure types but a combination of different types, together with the formal procedures of folk justice are generally found in reality and the 'estate' forms preponderates in the West due to tradition of moot justice. Actually this is one of the major reasons for the rise of rationalistic-formal elements at the expense of the typical features of patrimonial law in the West. Administrative officials and the prince had interests in abolition of estate privileges and *in growing predominance of*

formal legal equality and objectively formal norms. In addition to the prince's power interests, the reasons were both the technical requirements of administration and the personal interests of the officials in the orderliness of the law through uniformity so that they could have the clear conditions of employment and career chances. (ES, pp.846-847)

Of course there was another group who desired more rational, calculable and privilege-free legal system, that is, economic interest groups. Since the princes had fiscal and political power interests to favor these groups, the alliance of monarchical and bourgeois interests combined with the bureaucratic needs led towards the formal legal rationalization. (ES, p.847) Yet, collaboration of these forces was not as direct as it seemed. First of all, *the utilitarian rationalism characteristic of every sort of bureaucratic administration tended already by itself in the direction of the private economic rationalism of the bourgeois strata.* Secondly neither the demand by the capitalist groups nor the intention of monarchical powers were to provide for guaranteed rights but only for objective formal norms. In this respect, thirdly, capitalist groups were not homogenous. This was politically oriented capitalism and the great colonial and commercial monopolists and the monopolistic large-scale entrepreneurs of the mercantilist manufacturing period largely rested upon princely privileges. Therefore they were in conflict with the bourgeois middle class. In overall what they needed was not a uniform, formally equal objective legal system but the patriarchal princely power growing against the privileges of the estates and against the protection of the bourgeois craftsmen by the common law. (ES, pp.847-848) However, the result has been more and more unification and systematization of law, especially through codification.

Evidently, there may be other kind of factors and actors stimulating codifications. In the history, even before the monarchies, there had been codifications with the aim of conscious and universal reorientation of legal life. The driving forces behind codification may vary from external political innovations or social revolutions following a social conflict between groups or classes to the formation of new political community.¹⁹⁰ However, Weber distinguishes between two processes of codification, in terms of their results. Especially the law records produced for legal security after a

¹⁹⁰ The examples Weber gives are Israelite confederation, the Twelve Tables, the Book of Covenant etc. (ES 849-850)

compromise within society by prophets or prophet-like fiduciaries are not as systematic and comprehensive as monarchical codifications. First of all, the settlement methods of conflict points were ready to be recorded since they have already been clarified by previous discussions and agitation. *For the rest, the interested parties were more concerned with a formal and clear settlement of the points actually in issue than with a systematic law.* (ES, p.849) Additionally, these kinds of codification combine civil and religious commandments. Weber calls this type of codification *aisymnetic or prophetic legislation*. The second type is monarchical codifications. They are both more rational and systematic since two important actors come into the scene: the practicing lawyers and monarchical officials. The practicing lawyers introduce the system and legal 'ratio' to codifications. However, the monarchical officials were the *true systematic codifiers* since they had a special interest in a comprehensive and rational system. (ES, p.850)

Another type of systematization has been accomplished by didactic literary activity through so-called 'books of law'. But Weber warns us that neither monarchical codifications nor books of law were *real codifications*. Because they were a compilation of the existing laws; *they were nothing but mechanical arrangements*. For Weber, genuine codification is *a systematic revision of the substantive content of the existing law*. Actually both the compilation and codification serve to similar political interests in **legal security**, therefore in the precise functioning of the administrative machine. Another political interest lies, as we mentioned before, in the unification of the legal system as such within the entire realm.

IV.III.1.4 Intellectual Factors: Modes of Legal Thinking

Weber does not regard the codifications as genuine codifications without systematization of content of law. What he refers is a revolution in legal thought: it is development of modern legal logic. He creates two categories as to systematization of law: procedural formal rationality (rationalization of legal procedures) and substantive formal rationality (systematization of the actual substantive law through legal logic.) Roman law, Natural law and Canon law have been quite influential in the legal rationalization through systematization in the Occident.

IV.III.1.4.1 The Roman Law

Some special characteristics of Roman law had already been mentioned. Here, what interests us is the distinction Weber makes between procedural formal rationality and substantive formal rationality. In the reception of Roman law, he underlines the pre-eminence of legal honoratiore (university-trained judges and jurists). The trained jurists owed their advance to their capacity gained by professional training to state cleanly and unambiguously the legal issue involved in a complicated situation and this capacity coincided with the intrinsic needs of justice to rationalize **legal procedure**. Rationalization of legal procedure was highly compatible with the interests of nobles and bourgeois. However bourgeoisie was not interested in the substantive Roman law since their interests were served better by the medieval law. (ES, p.853)

Actually, the legal scholars educated in legal literature played a very significant role in the formal characteristics of Roman law. Already during the Roman Empire, due to the philosophical training of the ancient lawyers, *the significance of the purely logical elements in legal thinking began to increase*. At the same time, Weber observes a decline of substantive rationality in the sense that religious, theological or ethical concerns were considered irrelevant by the lawyers. *As a matter of fact, incipient tendencies toward the view that what the lawyer cannot “think” or “construe” cannot be admitted as having legal reality could be already found among the Roman jurists*. This seems what Weber understands from the formal rationality of substantive law. However, at the time of Roman Empire, the purely logical propositions, which were legal maxims produced by abstract legal logic, were still not generally applied but added to support some concretely motivated individual decisions, and totally disregarded in some others. So the character of legal thought was still empirical. (ES, pp.853-854)

On the other hand, the medieval reception of Roman law and the six centuries of Civil law jurisprudence have resulted in a high level of abstraction of all Roman law institutions. *And the modes of thought were turned more and more in the direction of formal logic*. Weber lists the characteristics of Roman law in terms of formal logic. First of them is the existence of ultimate legal principles from which deductive arguments were to be derived. Second is the creation of the purely systematic categories (such as

legal transaction or declaration of intention). Third is a generally accepted principle that what the jurists cannot conceive has no legal existence now acquired practical significance. The fourth characteristic of the modern Roman law is its “constructive” ability, which means legally construing even the strangest fact situations in a logically impeccable way. At the end, according to Weber, we arrive at the modern conception of law *which sees in law a logically consistent and gapless complex of “norms” waiting to be “applied”*. (ES, pp.854-855)

Modern legal thought has a conceptual rationality. This formally logical rationality is different from formal empirical case law. While the latter can serve to the commercial interests better, the former can cause irrational consequences or *even unforeseen relations to the expectations of the commercial interests*. The former has been led by the legal theorists, their disciples, the doctors, i.e. a typical aristocracy of legal literati.

IV.III.1.4.2 Canon Law

For Weber, Canon law of the Christendom has a special place in terms of formal rationality, although it is one of the sacred laws in the history. Its high level of formal rationality has special positive effects on the formal rationalization of Western secular law. There are several factors having played role in this situation. First of all dualism of secular and religious law has been very clear from the very beginning including the separate areas of jurisdiction. The clear dualism originates from the fact that the early church isolated itself from the state and legal affairs for centuries. When it had to have relations with the secular authorities, it had already possessed a rational body of ideas organized under the Stoic conception of natural law. While creating its first systematic body of law at the beginning of the Middle Age, the Western church took for its model the most formal components of Germanic law. Additionally in the occidental medieval universities, the teaching of canon law has been separated both from the theology and secular law. It seems that both practically and theoretically Canon law accomplished not to intermix with other systems of thought and laws. And this is the reason why Canon law had achieved to develop a high level of formal rationality and coherent systematization, for Weber. Neither hybrid conceptual structures nor hybrid applications of law could be observed in its history.

Concerning Canon Law, Weber speaks as if substantial, religious ends are not an impediment before the legal rationalization but only that mixture of these ends from different systems. (ES, p.828) Yet, it is not the case. Canon law also carried the weak aspects of all theocratic law: *the mixture of substantive legislative and moral ends with the formally relevant elements of normation and the consequent loss of precision.* Nevertheless, it developed and adopted a strictly formal legal technique than any other sacred law. This theocratic weakness has also been compensated by two other characteristics. First, it did not grow through the activities of responding jurists. Secondly, the basic writ of Christianity contained very few legal or ritual binding norms and the rest has been established by rational enactment. (ES, p.829)

Additionally, the rationality of institutional structure of the Church helped in the progress of formal rationalism of Canon law. The sources of law collected by the jurists of the church were *conciliar resolutions, official rescripts and decretals*, so they were already official, written documents with a certain degree of formality. Rational institutionalization of the church also influenced the character of law-making: the church's functionaries were holders of rationally defined bureaucratic office so that legislation by rational enactment has been a part of Canon law. Thereby Weber observes the positive influence of Canon law on the formal rationality of secular law in terms of substantive private law, of rational structure and institutionalization, of procedural law, and of abstract logic. (ES, pp.828-830)

IV.III.1.4.3 Natural Law: value-rational bases of legitimacy

Weber makes an interesting classification about the world's great systems of law. According to this classification, Anglo-Saxon law is a product of juristic practice, the Roman common law a product of theoretical-literary juristic doctrine, whereas the Code Civil a product of rational legislation. (ES, p.865) The Code Civil shows notable differences from the products of pre-revolutionary period. According to Weber, French Civil Code shows some contradictory characteristics which are expressions of a particular kind of rationalism.¹⁹¹(ES, p.866) Not only this particular rationalism with a special emphasis on reason but also substantive content of some legal norms of the

¹⁹¹ 'namely the sovereign conviction that here for the first time was being created a purely rational law in accordance with Bentham's ideals, free from all historical prejudices and driving its substantive content exclusively from sublimated common sense in association with the particular reason d'état of the great nation that owes its power to genius rather than to legitimacy.' ES 866

French Civil Code, which contain postulate-like maxims with a claim that a legal system is legitimate only when it does not contradict those postulates, show that natural law of that revolutionary period have played a considerable role on the revolutionary positive law- probably as another type of legal thought.

Sociologically, natural law is the substantive content of certain legal maxims and of certain principles conceived as having particular legitimacy and directly binding force and as independent from and superior to any positive law. In this sense, they are the conceptions of the “rightness of law”. These conceptions and convictions are sociologically relevant as far as practical legal life itself and the behaviors of the actors in positive legal order are materially affected by them. The norms of natural law are valid independently from any positive law or any enactment. They owe their legitimacy *not to their origin from a legitimate lawgiver, but to their immanent and teleological qualities*. Therefore, they actually legitimize the positive law. (ES, p.867)

In an age, where the religious and traditional bases of legitimacy have lost their force, the natural law is *the specific and only consistent type of legitimacy of a legal order which can remain. Natural law has thus been the specific form of legitimacy of a revolutionary created order*. (ES, p.867) However, Weber has two types of reservations concerning natural law. First of all, natural law has been a tool in different hands and of different powers throughout the history in order to justify their claims.¹⁹² Not only revolting classes but also the dominating powers and authorities have referred to natural law for their legitimacy. Secondly, the natural law theories based on what is historically real instead of abstract norms, such as theories of historical school and of Romantic school¹⁹³, are refuted by Weber. The axioms produced by these schools are irrational and therefore they do not deserve the term ‘natural law’. On the other hand, it is *axioms of legal rationalism which alone were able to create norms of formal type and to which the term “natural law” has a potiori been reserved for that reason*. (ES, p.867)

¹⁹² Niyazi Öktem & Ahmet Ulvi Türkbag, ‘Felsefe, Sosyoloji, Hukuk ve Devlet’, İstanbul:Der yay., 2001, pp.364-645, also refers to the use of the doctrine of Natural Law as a rational shield for irrational interests and the use of religion as an ideologic shield over the capitalist production relations.

¹⁹³ For example, the historical school claims the preeminence of customary law and that validity of customary law should not be restricted by positive enactment. Similarly half historical half naturalistic theories of Romanticism regard the Volksgeist as the only legitimate source of law. ES 867

By “the formal axioms of legal rationalism” Weber refers to a specific part of modern natural law. Modern natural law is characterized by one core axiom, that every human being has certain rights. Although its origins vary from the rationalistic sects to Magna Charta, it has taken its last shape through the rationalistic Enlightenment of seventeenth and eighteenth centuries. Weber uses his typical dichotomy also for the natural law and evaluates its relation with positive law according to **formal** and **substantive** conditions¹⁹⁴. The typical formal natural law is the contract theory and more particularly the individualistic aspects of that theory. In political sense, what Weber refers is social contract theories on which the legitimacy of law and state has been rested.

All legitimate law rest upon enactment, and all enactment, in turn, rests upon rational agreement. This agreement is either, first, real, i.e., derived from an actual original contract of free individuals, which also regulates the form in which new law is to be enacted in the future; or, second, ideal, in the sense that only that law is legitimate whose content does not contradict the conception of a reasonable order enacted by free agreement. The essential elements in such a natural law are the “freedoms”, and above all, “freedom of contract”. The voluntary rational contract became one of the universal formal principles of natural law construction... (ES, pp.868-869) In economic sense, it points out freedom of contract, a system of rights acquired by purposive contract and full development of right of property¹⁹⁵.

Substantive criteria of natural law are nature and reason. The norms of conduct derived from reason are identical with the nature of things- the ought is identical with the “is”. These norms constitute the substantive merit and limit to a legal order. Even these substantive approaches, however have strengthened the formal characteristics of natural law, according to Weber. The main reason behind seems to be the conception of “the nature of things” as existing in the universal average, as may be observed in the rejection of paper money. (ES, p.870)

¹⁹⁴ Yet he admits that it simply *cannot exist a completely formal natural law* since it would consist entirely of general legal concepts devoid of any content.

¹⁹⁵ Although Weber does not explicitly give any name, he seems to mean Lock’s theory.

Therefore, actual transformation of formal natural law to substantive one has occurred in the process of natural law to establish relations with the existing order. The main stream of the substantive transformation has been to slip into utilitarian thinking in order to justify the institutions of the prevailing system. The meaning of the concept of “reasonableness” has shifted from the derivable from the eternal order of nature and logic to the “practically appropriate”. Another type of transformation has evolved through questioning the formal modes of right acquisition and considering the substantive economic conditions. The result was *the socialist theories of the exclusive legitimacy of the acquisition of wealth by one’s own labor*. This view rejected the formal principle of freedom of contract and the right acquired through the instrumentality of contracting. (ES, pp.870-871) Weber does not deny the class interests implicit in both formal and substantive natural law theories. We may infer that even the formal natural law is not objective despite its formality. Socialist natural law axioms are criticized by Weber as being incoherent and incompatible with each other although he admits that the socialist rights of the individual have certain effects on the ideologies of the industrial proletariat.¹⁹⁶

IV.III.1.4.4 Disintegration of Natural Law

Habermas criticizes Weber for not applying his hybrid form of rationality¹⁹⁷ to the level of institutions and to the subsystems. According to him, Weber should have understood the modern legal order as an order of life that could be rationalized under the abstract value standard of normative rightness. In short, the validity of law requires an autonomous foundation. Yet, Weber insists to view the rationalization of the legal order exclusively under the aspect of purposive rationality. ‘He succeeds in this only at the cost of an empiricist reinterpretation of the legitimation problematic and a conceptual separation of the political system from forms of moral-practical rationality.’ According to Habermas, bourgeois private law has three formal properties: positivity, legalism and formality.¹⁹⁸ These properties define ‘a system of action in which it is assumed that all individuals behave strategically, in that they, first, obey laws as publicly sanctioned agreements that can, however, be legitimately changed at any time;

¹⁹⁶ See pp.871-873, ES

¹⁹⁷ This is complex concept of practical rationality in Habermas terms, a kind of combination of value-rationality and instrumental rationality.

¹⁹⁸ see p. 259 in *Theory of Communication* for their definitions.

second, pursue their interests without regard to moral considerations; and third, in accord with these interest orientations, make optimal decisions in the framework of existing laws (that is, with regard to calculable legal consequences as well). In other words, it is assumed that legal subjects utilize their private autonomy in a purposive-rational manner.¹⁹⁹ Habermas These formal features of law are functional for the institutionalization of purposive rational action and market economy. But law still needs explanation for this form. Under a modern legal system, legal subjects are permitted to act purposive rationally only within normatively established limits. Thus for the institutionalization of purposive-rational action, a kind of normative consensus is required, which stands under the idea of free argument and autonomous (will) enactment, and which is characterized by formal properties of value rationality.

Habermas claims that the form of modern law is to be explained in terms of post-traditional structures of moral consciousness it embodies. Modern natural law theories actually presents a model for justifying the legal norms that is an uncoerced agreement, arrived at by those affected, in the role of contractual partners who are in principle free and equal: ‘validity based on traditional consensus is replaced by validity based on rational consensus.’ Habermas explains the problem as follows: ‘the separation of morality and legality effected in modern law brings with it the problem that the domain of legality as a whole stands in need of practical justification. The sphere of law, which is independent of the sphere of morality but at the same time demands the readiness of legal subjects to obey the law, must be complemented by a morality grounded on principles...The catalog of basic rights contained in bourgeois constitutions, insofar as they are formally set down, together with the principle of sovereignty of the people, which ties the competence to make law to the understanding of democratic will formation, are expressions of this justification that has become structurally necessary.’ He insists that this is what Weber purposely neglects and excludes from the concept of modern law precisely the conceptions of modern justification that arose with modern theories of natural law.²⁰⁰

¹⁹⁹ Habermas, *op. cit.*, p. 260

²⁰⁰ *ibid.*, pp.260-262

I doubt such an interpretation of Weber may be justified in the light of his comments on the disintegration of natural law.²⁰¹ Weber does not neglect that the natural law has provided the legitimacy bases of positive law, yet he underlines that its legitimizing effect get weakened and even vanished in front of the ever-expanding instrumental rationality. In short, it is no more convincing enough under modern political and legal conditions. Hennis also claims that it is not negligence or a gap in Weber's theory not to contain or to be based upon liberal values. Weber did lack a belief in a particular dignity of liberal constitutional institutions and values in themselves, including human rights. The whole structure of Weberian sociology rests upon the most radical renunciation of the basic liberal idea that the rule of man by man had been displaced by the public opinion or by the rule of law. Domination, for Weber is the 'central phenomenon of all social organization.' 'His sociology is not a theory of society oriented towards the ideas of freedom and equality, but rather a theory of 'the complex of power' entirely in the sense of Nietzsche.'²⁰²

The relation of legal rational authority with Natural law, in other words with value-rational authority has been explained in detail by JJR Thomas. His explanations are very convincing in many ways. He argues that Weber's claim was that value-rationality is more likely to give rise to legal domination. Weber admits the Enlightenment idea that natural law could be erected...as the ground for legitimate enactment and legislation' and that the origin of radical democratic ideas is partly 'in the conjoining of a notion of Reason to concepts of Rights and Nature.' Indeed Weber mentions the French Civil Code as an archetype of formal law in part based upon natural law postulates.²⁰³ However it was precisely the postulates of Natural law which created the basis for formal rationality in the political and economic spheres.²⁰⁴ According to Thomas, Weber here shows us a transformation of value rational systems into the form of legality and of domination. On the other hand, Thomas urges us that 'Weber was at pains to distance himself from the Enlightenment's hypostatization of human rationality.'²⁰⁵ 'For the Enlightenment, the notion of Reason was constituted by

²⁰¹ (for example see the quotation at page 117)

²⁰² See W. Hennis, 'Voluntarism and Judgment: Max Weber's Political Views in the Context of his Work', in Max Weber: Essays in Reconstruction, London: Allen & Unwin, 1988, pp. 180-183

²⁰³ Thomas, *op. cit.*, p.231

²⁰⁴ *ibid.*, p.232

²⁰⁵ *ibid.*, p.230

a 'proper regard for Nature', but it is just this tradition which disintegrated under the impact of nineteenth century class ideologies which dissolved the account of nature and natural law.' The thrust of Weber's work was to dissolve the metaphysical eighteenth century conception into its component applications.²⁰⁶

In overall, Weber looks at the relation between natural law and positive law from a multi-dimensional perspective. Natural law does not only a bench for positive law but also provides the necessary justification for positive law and legal order. Additionally, while natural law conceptions have been considerably transformed under the effect of prevailing legal orders; the ideas, norms and conceptions of modern natural law have influenced the legal development. These reciprocal relations may be observed in two ways. Formally natural law has *strengthened the tendency towards logically abstract law, especially the power of logic in legal thinking* and provided the positive law of Revolutionary period with the legitimate base of "reasonableness". On the other direction, the codifications of the Revolution strengthened the formal natural law by guaranteeing the individual rights vis-à-vis the political power. Substantively, pre-revolutionary patriarchal powers has benefited from the shift of natural law to utilitarian and substantively technical thinking. (ES, p.873)

Yet, Weber is very pessimistic about his age in this context. Although Weber admits the role of the natural law in the origins of positive law and its legitimizing power especially during the revolutionary period, his claim is that natural law in its different appearances lost its legitimizing capability, afterwards. As to the legitimacy bases of the modern state and of the modern legal orders, belief in legality replaces the legitimacy arising from value-rationality and from natural law which is typical example of value-rationality. Weber finds natural law too weak to be a base for legal orders of modern age.²⁰⁷

Socialism as a substantive law doctrine could not achieve *practical influence over the administration of justice*, due to the doctrine's early disintegration process caused by its own theoretical and practical deficiencies.²⁰⁸ Not only socialist approach

²⁰⁶ *ibid.*, p.237

²⁰⁷ See Sally Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law', *Law & Society Review*, Vol.21, No.3, 1987, 487-512 for a similar criticism of Habermas and legitimacy of modern law.

²⁰⁸ For more details about Weber's critique of socialism see p.874 ES

but also all other axioms of natural law *have been deeply discredited* and have lost all capacity to provide the fundamental basis of a legal system for a variety of reasons. (ES, p.874) The method of the public law to discard forever all the theories having practically absurd consequences, the unchallenged Continental axiom of logically close positive law, the insoluble conflict between formal and substantive natural law axioms, disintegrating and relativizing effect of evolutionist dogmas, juridical rationalism and intellectual skepticism are among the reasons that Weber lists. (ES, p.874)

Also something inherent in the natural law has a role in its regress: *compared with firm beliefs in the positive religiously revealed character of legal norm or in the inviolable sacredness of an age-old tradition, even the most convincing norms arrived at by abstraction seem to be too subtle to serve as the bases of a legal system.* (ES, p.874) On the other hand, the irresistible advance of legal positivism has some negative consequences for law and society. In Weber words: *The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed as the product or the technical means of a compromise between conflicting interests.*²⁰⁹ Yet, the resulting skepticism towards the dignity of positive law unpredictably promoted *the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment.* (ES, p.875)

It seems that the consequence of weakening role of natural law in modern ages has been a decline in value-rational legitimacy of law and a rise of instrumental rationality for obedience, instead. The instrumentally rational reasons for obedience may extend to fear or to interest of survival. In this sense, whoever holds the power of coercion are obeyed without questioning the legitimacy claims of authorities by some value criteria. Likewise, the law enacted positively is based on a similar instrumental understanding with a function of settlement of interest conflicts within the society, in the absence of meta-juridic theories. I claim that it is the peak point of formal legal rationality, alongside the other reasons, because the belief in legality replaces belief in

²⁰⁹ Here we have another important similarity between Kelsen and Weber. According to Kelsen's legal positivism, legislation is a secular process through which a state claiming the monopoly of the legitimate exercise of force enacts valid legal norms as compromises of conflicting interests.

legitimacy of law on the bases of value rational reasons in modern ages.²¹⁰ As it happens in other systems, the dominant instrumental rationality leads to highest formal rationality in the legal system.

IV.III.2 Substantive Rationalization of Law

There is a remarkable passage in 'Economy and Society', by which Weber explains the reasons for the law to take different directions in rationalization. The most remarkable factor is the form of political authority. The transformation from the primitive irrational forms of justice was influenced by the authority of princes or magistrates, or of an organized priesthood. With this transformation, not only the form but also the substance of the law has been altered. The organization of authority played a very significant role in the process:

'The more rational the administrative machinery of the princes or hierarchs became, that is, the greater the extent to which administrative "officials" were used in the exercise of the power, the greater was the likelihood that the legal procedure would also become "rational" both in form and substance. To the extent to which the rationality of the organization of authority increased, irrational forms of procedure were eliminated and the substantive law was systematized, i.e., the law as a whole was rationalized.' (ES, p.809)

However, rationalization was not an intentional policy of the authorities. Rather, their own officials or other powerful interest groups, in short some interests led them to this direction. Therefore it is also possible, in the absence of these interests, that the law may be only rationalized substantively or not rationalized at all. Substantial rationalization of law occurs generally under the authority of ecclesiastical hierarchies and patrimonial sovereigns since their rationality is substantive in character. Additionally theoretically influenced legal systems also show tendency toward substantial rationalization. The aim of authorities and administrators is not to provide

²¹⁰ 'It is most significant feature of all 'instrumentally rational' social systems that they operate exclusively according to the principle of pure formal legality, rather than according to such legal principles as are derived from, and dependent on, a particular set of ultimate values. Unfortunately Weber was never very outspoken on this point, largely because he acted upon the assumption that all value-oriented versions of legality- the most conspicuous case being 'Natural Law'- were in any case dwindling away....The 'disenchantment of the world' closely associated with the progress of modern science as well as the irresistible advance of bureaucratization left less and less room for value-oriented forms of domination' p. 81

legal security and calculability through formal and systematic law and procedure but to serve to some expediential and ethical goals through law. As defined before, substantially rational law means contribution from, influence by, intermixture with or control of other orders such as ethics, religion or other value systems.

There are different directions a substantially rational law system may evolve. Secular law and religious commands may be separated and even the sacred law may be replaced by natural law at the end. Or, the theocratic combination of religious and ritualistic prescriptions with legal rules remains unchanged. Most of the Asiatic civilizations followed the first pattern, while the Western civilization and Christianity followed the latter pattern.

For substantive types of law, Weber only focuses on sacred laws. In the period of revelation of the sacred laws, the method of norm-creation brings a high degree of flexibility in the norms. Yet, after this period, the period of stereotyping begins and the norm-making is frozen. As a result, theocratic laws develop an extremely formalistic casuistry in order to be adaptable to changing circumstances since they are composed of holy, fixed and unchangeable rules. (ES 813-815) There are some other common features for the sacred laws. First of all, the sacred law has to co-exist with other, generally secular, laws of vocational or status groups or castes, given that it is not able to answer to the diverging demands of life by time. Time to time, the sovereign authority or the administrators of justice may establish secular rules or laws for some specific areas beside the sacred ones. These lead to juristic dualism in the administration of justice: religious and secular. Generally the status of particular laws stays ambiguous in front of the sacred law. Additionally, the jurists who are responsible for interpretation of the sacred rules tend to case-to-case law-making, without giving a rational statement of reasons for the decision. For all these reasons and dominant legal particularism, the sacred laws cannot be systematized and cannot have a legal unity or consistency. (ES, pp.813-828)

Substantive rationalization of sacred law partly occurs in the law schools or seminaries in terms of legal thought. The religious approach to the law aims at a material, rather than formal, rationalization of law. The substantively rational approach is rational in the sense of *construction of purely theoretical casuistry ...oriented to the*

needs of uninhibited intellectualism of scholars. (ES, p.789) For example, the holy law books produced by the schools tend to be rational *because of overriding dogmatic objective and the rational nature of priestly thinking.* (ES, p.792) This conceptual and theoretical rationalization may **approximate** rational, systematic legal doctrine. Weber implicitly denies the substantive rationalization to be fully rational even theoretically. (ES, pp.789-790)

In practical sense, he again emphasizes that the strict boundaries of tradition on the law and legal thought necessarily creates a special kind of casuistic formalism in order to apply unchangeable norms to the changing conditions through re-interpretation. But the special practical formalism would not create a rational system of law. As a result, the main claim of Weber is that substantive rationalization of law would never reach to a stage of a rational system of law, theoretically or practically. The main impediment for that is substantial rationality itself: *as a rule it also carries with it elements which represent only idealistic religious or ethical demands on human beings or on the legal order, but which involve no logical systematization of an actually obtaining legal order.* (ES, pp.789-790)

In other words, the problem arises from the belief that the law is to serve to holy ends. *The consequence is a casuistic treatment of the legal data that lacks definiteness and concreteness, thus remaining juridically informal but moderately rational in its systematization. For in all these cases, the driving force is neither the practicing lawyer's businesslike concern with concrete data and needs, nor the logical ambitions of the jurisprudential doctrinaire only interested in the demands of dogmatic logic, but is rather a set of those substantive ends and aims which are foreign to the law as such.* (ES, p.792) This passage shows that formalism is a requirement for a higher level of rationalization for any world order. The law is one of them. The sacred laws prevent both empirical and theoretical formalism by involving non-system elements, by adopting value-ends from different value-orders and considering the law as a tool to reach these substantial ends.

IV.IV. Law in Between Formal Rationality and Substantive Irrationality

IV.IV.1 Freedom, Equality and Justice

Law of the modern ages with its high formal rationality ensures at the same time a high level of formal equality and formal freedom. However, as Weber suggested several times, there is a close connection between economic order and legal order, and legal order is not frequently independent from the capitalistic relations of modern age. For example, Weber claims: “*Obviously, legal guarantees are directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law.* (ES, p.334) The interrelation between economic system and law shows itself in a number of ways. One of the most important influences can be observed in formal qualities of law- or in Weber words, *in the formal mode in which the law serves the interests, especially economic interests, of the parties concerned.* (ES, p.666) Weber attempts to show us that formal equality and freedom provided by law do not always mean equality and freedom in the social reality and, that formal rationality of modern law is accompanied by substantive irrationalities.²¹¹

²¹¹ For a similar interpretation of the legal sphere, see Stephen M. Feldman. ‘An interpretation of Max Weber’s theory of law’, *Law and Social Inquiry*, pp. 226-229. ‘Weber articulated a positivist understanding of social knowledge and then critiqued it as a cultural dead end’ (Trubek, ‘Max Weber’s Tragic Modernism’ p.578). Trubek takes a positivism definition from Heller (Thomas Heller, ‘General Concerns about Legal Economics and Jurisprudence’, in D. Rubinfeld (ed.), *Essays on the Law and Economics of Local Governments*, Washington D.C., Urban Institute, 1979) According to Heller, positivist thought privileges objective, factual, verifiable and determinate at the expense of subjective, normative, expressive, and random. ‘positivism in social science is the belief that knowledge is only scientific if it is based on verifiable statements about factual regularities that express determinate states of the world.’ Positivism is based on a radical distinction between scientific and normative knowledge, by limiting valid knowledge to that which involves either purely logical or exclusively empirical propositions (Trubek, p. 579)

But what is interesting in Heller’s argument is that ‘he relates positivism in the social sciences to a particular view of the law and then asserts that both are part of the same cultural structure that he calls liberalism.’ Trubek claims that Weber’s theory actually has a similar thought structure. Liberal philosophy of law, liberal jurisprudence, ‘seeks to eliminate normative choice from legal decision making, just as positive political science seeks to expunge normative questions from its domain’ (Trubek, p.580). Heller identifies two forms of liberal jurisprudence: the classical moment (formalism) and a modern moment (the law and economics movement). Their common feature is to avoid the necessity for value choice in law.

‘Nineteenth-century classical legal theory, or formalism, was based on the idea that a set of legal principles could be established that would limit the exercise of state force primarily to those situations in which the law was merely enforcing the choices reached by free individuals. In such a circumstance, the law was only normative in secondary sense, reinforcing choices that reflected individual will and free choice. The classical theory of freedom of contract was the clearest manifestation of this idea. Law and economics, which employs market and market-failure theory to reconstruct the idea of a legal order whose only normative commitment is the second-order one of reinforcing voluntary choice, can be seen as a restatement, at a higher level of sophistication and complexity, of nineteenth century formalism’ (Trubek, pp. 580-581)

‘As used by Heller, Liberalism describes an epistemological position and a political theory, and has nothing to do with contemporary political options. Liberalism in this broad sense is a cultural system that presumes individualism and intentionality and clearly separates reason and desire, as well as knowledge of facts and judgments

Concerning formal equality, Weber claims that *modern law has created anew great mass of legal particularisms* although the claimed objectives of effective powers in the beginning were to *extirpate every form of associational autonomy and legal particularism*. (ES, p.698) In this sense, the formal equality in terms of generally and equally applicable norms functions in practice in quite opposite way. By establishing a business corporation or by entailing a landed estate, only those persons who were economically privileged would obtain a sort of autonomy *by virtue of the principle of formal legal equality* in a formally free competitive market since only they are able to take advantage of market powers. (ES, p.699)

On the other hand, formal freedom of modern law is centered on the principle of freedom of contract since it grants to individuals *autonomy to regulate his relations with others by his own transactions* by agreements, the content and form of which are dependent on individual choice. (ES, pp.668, 729) Although it may be regarded as a decrease of constraint and an increase in individual freedom, it is only formally correct. Weber suspects whether formal freedom immensely extended by modern law indicates to an actual increase in the individual's freedom if the freedom is conceived as to shape the conditions of one's own life or whether life has become more stereotyped by this legal development.²¹² (ES, p.729) Formal freedom of contract *by no means makes sure that these formal possibilities will in fact be available to all and everyone. Such availability is prevented above all by differences in the distribution of property as guaranteed by law.*²¹³ (ibid.) The problem is more than a problem of accessibility. As studied above, the rules regulating contracts as "legal empowerment rules" support the

of value.' P.581 Trubek claims that Weber was obsessed by the paradoxes and contradictions inherent in this account of positivism and liberalism and their appearances in social and legal life. (581) Additionally although Weber accepted the positivist's distinction between statements of fact and statements of value, his thinking deviates sharply beyond this point from the other presumptions of social science positivism. (see Trubek p.585) 'Weber... saw that we construct the empirical world out of the infinitude of existence and that our values, and not the world, determine what we study and what meaning it has for us. Weber held on to the idea of a value-free domain of empirical science only by draining of it of most of its meaning and by narrowing its scope to an extreme degree.' P. 586 Trubek concludes that 'If positivism in social science and liberalism in legal theory are triumphant modes of the culture of liberalism or modernity, Weberian sociology is its tragic voice' (Trubek, pp.586)

²¹² Therefore, it would not be correct, as Kronmann did, to interpret the choice between formal legal rationality and substantive legal rationality as a choice between individual liberty and other substantive goals such as distributive justice. (see Kronman, *op. cit.*, pp. 94-95)

²¹³ Weber gives an example of agreement between a worker and an employer. In the process of employment contract, worker's formal right does not provide him with the freedom in the determination of his own conditions of work, and it does not guarantee him any influence on the process due to his pressing economic need, while the employer as more powerful party in the market may set the terms of work.

very autonomy and power positions of the property owners or of those who are economically in a position to make use of these empowerments. (ES, p.730)

Formal freedom might mean a relative reduction in the coercion due to a legal order composed of few mandatory or prohibitory norms and of many freedoms. Yet, the same order can lead to both a quantitative and qualitative increase of coercion, even of authoritarian coercion in its practical effects, depending on the concrete economic order and especially on the property distribution. In this sense, Weber compares a socialist community with a capitalistic system and asserts that neither formal legal analysis nor sociological ones can give us more than a qualitative comparison and that it cannot be decided which one is more coercive. In capitalistic system, coercion is exercised by the private owners of the means of production through the rules of free competitive market and under the legal guarantee of their property. (ES, pp.730-731) In such a system, even the personal and authoritarian relationships are transformed into labor market transactions and while they are drained of all normal sentimental content, authoritarian coercion increase.²¹⁴ (ES, pp.730-731)

Formal justice, as formal equality and freedom are, is directly under the influence of economic conditions and found substantively irrational for the consequences it produces in practice. By formal justice, Weber refers to the modern adjudication process in which the interested parties have the maximum freedom to represent their formal legal interests. The formalistic adjudication is no more in the quest of right decision but of finding the truth. Since it is transformed into *a mere contest between litigants* with considerations of concrete expediency or equity, it cannot answer the substantive demands of a political or ethical character. While formal justice legalizes the unequal distribution of economic power, it contributes *to the further concentration of economic and social power. In all these cases formal justice, due to its necessarily abstract character, infringes upon the ideals of substantive justice.* (ES, pp.812-813)

Trubek explains this conflict of formal rationality and substantive rationality by the role of legalism in legitimizing capitalist domination. ‘Legalism, while seeming to

²¹⁴ However, it is not only the workers who are coerced in the market community but also the enterprisers, producers and consumers are under a special type of coercion in the impersonal form of the inevitability of adaptation to the purely economic “laws” of the market.(ES, p.731)

constrain the state, really strengthens it, and while the system guaranteed formal equality, it also legitimized class domination. Legalism strengthens the state by apparently constraining it, for the commitment to a system of rules increases the legitimacy of the modern state and thus its authority or effective power. And as the liberal state grows stronger, it reduces the hold of other forces on the development of the market. This strengthens the position of those who control property...[Weber] believed that these effects of legalism stem from the fundamental antinomy between formal and material criteria of justice, and the negative aspects of purely formal administration of justice under modern conditions. Formal justice is advantageous to those with economic power; not only is it calculable but, by stressing formal as opposed to substantive criteria for decision making, it discourages the use of the law as an instrument of social justice.’²¹⁵

IV.IV.2 Anomalies in Formal Legal Rationality

Weber observes a variety of anomalies in formal rationality of law, both at practical and at intellectual dimension. What he calls anti-formal tendencies of modern law may occur either as intrusion of substantive criteria and elements into law or as formal irrationalities, or as schools of legal thought that are critical towards strict formal rationality of law. Since these anti-formal tendencies are, in one way or another, based on value-choices external to the closed system of law, they may take a variety of directions, even may be opposed to each other. Weber makes an analogy between the religious order and legal order. Although he does not give a detailed explanation of that, from the text it may be inferred that legal order, like religious order, had to adapt itself to the facts of practical life in order not to lose its connections with the social reality, by adopting non-system, in this case informal, elements. Yet, as happened for the religious sphere, it may cause irrationalization of law and most of the trends are seen as flights to irrationality by Weber. (ES, pp.884, 889)

²¹⁵ Trubek explains us, in ‘Max Weber on Law’, p.749, the symbiotic relation between rational law and legal domination. Although legal domination is one of the authority types, law is associated with all there types of domination. In traditional domination, law is justified as based on tradition. In charismatic domination law is justified as charismatic revelation. However ‘when “law” in generic sense becomes rational law, it becomes its own legitimizing principle, and the basis of all legitimate domination. This is the nature of “modern law” and, thus, the modern state.’ This kind of society dominated by an autonomous rule system suggests to a model which Trubek calls legalism. (See, Trubek, *op. cit.*, pp. 736-737, 732)

Weber, in another context, has referred to the dangers of high level of logical sublimation for law, such as isolation from the realities of life and production of impracticable consequences. Therefore anomalies of the formal rationality of law may be interpreted as an attempt of protection from these dangers. Yet, Weber speaks about them as if they are inescapable compasses of modernity and rationalism. In Weber words, they are *a consequence of increasing rationalization of legal technique, products of a self-defeating scientific rationalization of legal thought as well as of its relentless self-criticism.* (ES, p.889)

One should be careful about hastily interpreting the anti-formal legal tendencies only as prescriptions against substantive irrationalities caused by the strict formalism of law- against the weakness of formal equality, formal justice etc. On the contrary, the first group of anomalies again works for the market powers and interests, and strengthens the legal particularism implicitly produced by the legal formal rationality.²¹⁶ Commercial law is a good example of modern particularism.²¹⁷

The inclusion of a substantive element such as intention and the increase in particularism by creation of special laws, procedures and courts is a result of a number of developments. But the satisfaction of the expectations of commercial and industrial pressure groups which are increasing in number due to occupational differentiation is the most important one. Another important reason is *the desire to eliminate the formalities of normal legal procedure for the sake of a settlement that would be both expeditious and better adapted to the concrete case.* In more simple terms, it seems that the changing conditions of economic life, and thereby changing expectations of the actors, of the especially economically powerful ones, have forced to law to adapt itself by *a weakening of legal formalism out of considerations of substantive expediency.* (ES, p.882)

Not only into the definition of a commercial contract but in many other instances, the “real” intentions of the parties are introduced as *an individualising and relatively substantive factor into legal formalism.* How and why has it happened? The

²¹⁶ See ES p.855 for criticism by Weber of the logical systematization of law as the consequence of the intrinsic needs of the legal theorists and about its failure to answer the practical needs, especially of economic groups.

²¹⁷ The German Commercial Code defines the commercial contract as the contract for acquisition of goods with the intention of profitable sale. Here not formal qualities, but the intended functional meaning of the transaction categorizes the contracts.

reason seen on the surface is a similar type to the one above: the transforming effect of economic life and of its actor's expectations on the law. The commerce in practice, for example, functions on the basis of personal confidence and trust in others and *the need in legal practice to guarantee or secure such trustworthy conduct becomes proportionally greater*. Thereby, the mental attitudes of the parties such as good faith, fair dealing and malice get linked to the legal consequences.

However, there is a deeper reason lying in *the intrinsic necessities of legal thought*. There is and will always be a conflict between strictly professional legal logic (logically consistent formal legal thinking) and the other areas of life, *unless it totally renounce that formal character which is immanent in it.*²¹⁸ Here, I claim that it is possible to rephrase Weber's thought as following: formal rationalization of law is the main factor which makes law systematized, and which transforms the legal order to an autonomous, externally-closed internally-coherent system. Yet, it signifies at the same time a rupture of law from the other life orders and from the practical life of laymen. That break may be recovered only at the expense of damaging the system-forming element of law, which is formal legal rationality.²¹⁹

As we may remember from our previous discussions, the law as an autonomous formal system annihilates non-system elements such as the facts of life only by construing them juridically in order to make them fit into the abstract

²¹⁸ The deduction method is a part of logically formal legal rationality. According to classical legal thought, legal professionals act 'according to a system of induction and deduction premised on the coherence, or internal logical consistency, of the system of enacted legal norms.' They have three alternatives in interpretation: 'to locate the applicable enacted rule', 'to develop a rule to fill a gap by a chain of deductions from a more abstract enacted rule or principle' or 'to determine what unenacted principle must be part of "the system", given the various enacted elements in it.' (ES, 1049) For the social current, these methods are abuse of deduction. However, legal formal rationality is a problem for Weber not because of abuse but because it is a factor in producing universal bureaucratization of social life. (ES, 1051) On the other hand, legal formal rationality has significant positive sides such as formal equality, democracy, due process, impersonality of legal administration. Other approaches such as welfarism and natural law have failed 'at the task of providing operative techniques for the development of a legal order adapted to the needs of the administration of justice in a centralized bureaucratic state.' (ES, 1052) All anti-formal tendencies of law would seriously impair juristic precision and result in irrational law-finding

²¹⁹ Kronmann alleges that for Weber the root of such anomaly lies in the strict formalism of the modern law itself: 'because the logical interpretation of meaning ...seeks to give effect to the purposes and intentions of individual actors, it introduces an 'individualizing' factor into legal thinking which, according to Weber, cannot be 'defined with formal certainty' (Kronmann, p.92). However, I do not agree that that is an automatic consequence of formalism. For Kronman, the analysis of meaning in modern law refers to a form of legal thought that relates legal meaning to particular human purposes or intentions. (See Trubek, *Reconstructing Max Weber's Sociology of Law*, Stanford Law Review, 919, 1984-1985, 928-933) However, these intentions are to be taken into account only if expressed in the form which the law entails, according to formal rationality. When the subjective interpretation of the 'meaning' for the actor is involved in the jurisprudence, it is no more a part of logical formal thinking. Additionally, the role of intentions may be observed explicitly only in the law of contracts. It is open to dispute and examination whether they are playing such a critical role in the rest of legal order.

propositions of law.²²⁰ This is *in accordance with the maxim that nothing can exist in the realm of law unless it can be conceived by the jurist in conformity with those “principles” which are revealed to him by juristic science.* Now, this process of re-interpreting meaning has two, almost opposite, impacts on legal order. First of all, it facilitates particular anti-formal tendencies of law, which are toward the adoption of substantive elements such as intended meaning of behaviors of the parties, due to its special emphasis on ‘meaning’ and to its method of meaning-interpretation. The logical sublimation interprets ‘meaning’ in relation to the legal norms and to legal transactions. The same method of interpretation may be easily applied to interpret the meaning of the behaviors of the parties in relation to ethical categories such as good faith in order to reach legal consequences. Here, the ‘inner’ intentions of actors replace the externally tangible facts of rigorous formalism. Weber calls this informal tendency as *ethical rationalization*. (ES, pp.884-885) Ethical rationalization ‘therefore necessarily involves some ‘evaluation by the judge’, which in turn encourages case-by-case adjudication, often on the basis of extra-legal (ethical or utilitarian) considerations.’²²¹

The other impact is quite opposite of the first one. It arises from the conflict of ‘meanings’. The average or daily meanings of the facts or legal norms as interpreted by ordinary people are different and often incompatible with the meanings given to them within the context of formally legal logic. Weber claims that a lawyer’s law never can be in full conformity with **lay expectation**, although the law had to accept the ethical categories such as good faith with their meanings determined by the average expectations of the parties, at the end. In the economic order, the expectations and objectives of the actors are oriented towards utilitarian meanings and economic results. *However, from the point of view of legal logic, this meaning is an “irrational” one.* In short, the rationality of one system determines the validity of the meanings. As far as formal legal rationality stays immanent in the modern law, those two consequences are inevitable: anomalies of formal legal logic as flights into substantive rationality and the conflicts of legal sphere with other life-spheres.

²²⁰ It is a process going from rigorous formalism to formal rationality (logical sublimation) and from that to substantive evaluation

²²¹ Kronmann, *op cit.*, p. 92

Nevertheless, one has to avoid from overgeneralizations and strict categorizations. Substantive rationality and formal rationality are system rationalities. Modern law as a system has a high level of formal rationality. But it does not show that it does not contain values or substantive concerns. Neither does it indicate a total isolation of legal system from the society. Formal rationality in the Weberian sense means only that every element and rule from external sources (value-based or other) will be re-formed and re-defined before its acceptance to the system. Weber takes into account political and economic factors in the formation of law, on the contrary to the view of some critiques. However, he was well aware of the restrictions of logical formal rationality on those external effects. His main example was natural law, which was a substantively rational system that proved the modern law with the value-ends of its rationalization. At the end, the formal rationalization has formalized even these values and substantial ends, as formal freedom and formal rights. Weber admits that legislation is the political source of modern law. But specialization and expertise knowledge required for preparing the draft laws make the parliaments and lay people powerless in front of the legal rationality. What one has to be careful is also that Weber's writings on the sociology of law have a special focus on private law. Public law has and pursues some other values. Yet this topic is largely neglected in 'the sociology of law' by Weber.

Another important nuance is that Weber explains formal rationality, formal irrationality and substantive irrationality largely through the examples from judicial decision-making and defines legal formalism on the characteristics of an already established legal system. So an interpretation such as that autonomous legal system as perceived by Weber refutes 'legislation' as political aspect of the system is not correct since what Weber refers by the internal deduction of legal rules from higher norms and rules primarily to judicial decision-making (law – finding)²²². Although he was never explicit on this issue, it may also refer to the limitation on legislative power in modern systems. Every new law and rule that is introduced to the system is to become somehow

²²² Kennedy asserts that different modes of legal thought including logically formal rationality, are 'ideal typical descriptions of what is done by the specialists in law finding (as opposed to law making) when it comes to deciding how to apply enacted law to concrete cases. (Kennedy, *op. cit.*, p. 1040)

compatible with the other elements of the system and coherent with higher norms and rules.²²³

IV.IV.3 Flight of Modern Law to Irrationality

Anti-formal tendencies of modern law as schools of legal thought that are critical towards strict formal rationality of law may either support substantive rationalization of law based on some preferred-values or support the abolition of formal boundaries strictly surrounding the law and the freedom of juridical creativity, in such a way that may cause value-irrationalism in legal thought (substantive irrationalization) according to Weber. The motivations behind these attempts range from the ideological choices and class interests to the protection of social statute prestige and power aspirations of the legal profession. In overall, all these trends originate from the extreme rationalization of law, which creates a feeling of an iron cage from which are desired to escape, sometimes even to irrationality.²²⁴ Yet, after Weber critically analyses some of these thoughts, he concludes that the iron cage of modern legal rationality is inescapable. What those anti-formal attempts achieve, instead, is to make that fact more clear and visible, and to strengthen the impression *that the law is a rational technical apparatus, which is continually transformable in the light of expediential considerations and devoid of all sacredness in the content.* (ES, p.895)

‘Social law’ is an example of the demands for substantive rationalization of law. With the ethical postulates like substantive justice or human dignity, it is directed against the business morality and legal formalism. As a product of modern class problem, its demands are advocated both by labour and legal ideologists. It has certain effects on the positive law like the penetration of such ethical concepts as economic

²²³ The comments on Weber made by Joyce S. Sterling and Wilbert E. Moore stay very superficial according to me and based on many misunderstandings and misinterpretations of Weberian concepts. The paragraph above may be read as an critique of their article ‘Weber’s Analysis of Legal Rationalization: A Critique and Constructive Modification’, *Sociological Forum*, Vol.2, No.1, Winter, 1987, pp.67-89. Especially to use ‘instrumental rationality’ and its highly arbitrary definition for elaborating the modern law is a very mistaken modification of Weberian theory. In many senses, it arises from not understanding the comprehensiveness and depth of ‘formal rationality’ as a concept in Weber’s theory. It may be true that formal legal rationality is adaptable to different societies and cultures and that it is very suitable for pluralist democracy. But we do not need a new concept such as ‘instrumental rationality’ in order to explain this unique characteristic of formal rationality, especially a concept which is used for individual actions by Weber.

²²⁴ As Trubek concludes, ‘this is a tragic fate, for in the end the process of legal rationalization leads to the denial, not the realization of the ideals of Western law. For Weber formal law like bureaucracy, creates an iron cage. ‘Max Weber’s Tragic Modernism and the Study of Law in Society’, *Law & Society Review*, Vol.20, no.4, 1986, 574-598, pp.590-591

duress or just proportion of contractual obligations into the statutes and court decisions. However, Weber criticizes such norms as *entirely amorphous* from the legal standpoint and as lacking any juristic, conventional or even traditional basis. (ES, p.886)

On the other hand, the school of 'free law', which is mainly a product of the lawyers who wants to protect their dignity, rejects the conception of law that is only composed of status and contracts, and of lawyers being confined to the interpretation of them. Their demand is judicial creativeness which is inescapable due to the silence of the statutes in the view of irrationality of the facts of life. (ES 886) It is also critical to the legal formalism in its rejection of systematic coherence as a fiction and in its acceptance of the inevitability of the gaps in legal order. From this perspective, the law has never had formal rationality as it is claimed in theory. Concrete judicial decisions, instead of legal propositions, constitute the real body of law. Weber criticizes a judicial system based on the creativity of lawyers and of judges since it would result in substantive legal irrationality and in non-formal and irrational law-finding- due to inapplicability of abstract norms (in the case of value-compromises) and admission of concrete evaluations (in the case of value-conflicts).

Another parallel view disintegrates both the half-mystical concept of customary law and the concept of the statute as the will of legislator. All customary law is in reality lawyers' law. Judicial practices establish new legal principles beside and even against the statutes. Its claim is that *case law is superior to the rational establishment of objective norms and that the expedient balancing of concrete interests is superior to the creation and recognition of "norms" in general*. Yet, the same critique of Weber for the previous theory is valid also for this one. Substantive irrationalism will arise from *free balancing of values in each individual case* since the precedent will be binding only on the concrete facts.

Against all these value-irrational efforts, some lawyers attempted to establish an objective standard of values deduced from the 'nature' of law itself with either a neo-Kantian approach or a Comtean approach. The former takes the 'society of free men' as the normative standard of the right law; the latter takes the average expectations and conceptions of private parties as the ultimate standard.

Furthermore, ‘in the absence of a system of absolute values of natural law, legal professionals find themselves squeezed between demands for social justice from the organized working class and demands for social order from the capitalist class. This struggle is represented ideologically by a clash between two conceptions of law as either social regulation or as a fountain of political rights.’²²⁵ Weber states that legal professionals are inclined to take the side of ‘order’, i.e. the side of the ‘legitimate’ authoritarian political power that happens to predominate at the given moment.

Consequently, neither coherent substantive rationalization of law due to economic reasons and to value-subjectivism²²⁶, nor the determination of law fully by economic conditions due to formal legal rationality is possible. The modernity is the highest epoch of humanity but it is at the same time a cul-de-sac. So the modern law will stay as a technical rational tool to balance the interest conflicts and would get irrationalised if based on value-choices as criteria of justice due to scientific incomparability of the values. On the other hand, the law can never be fully compatible with the lay expectations because of the reasons explained above and will never be intelligible to laymen due to technological and economical developments, in addition to its own specialised rationality.

In this context, an alternative and impressive argument has been developed by Duncan Kennedy. He argues that Weber’s theoretical construction and his narrative of iron cage do not let him to admit any possibility of re-introduction of some ethical or substantive elements into modern legal system. However, his other grand narrative, namely of disenchantment, creates an incoherency in his own theory since it is not possible to hold both arguments, that the modern legal system and logically formal rationality are disenchanted and that logically formal rationality provides us with an objective legal system. According to Weber, each life sphere has a dominant logically

²²⁵ Bryan S. Turner, ‘Nietzsche, Weber and the devaluation of politics: the problem of state legitimacy’, p. 375

²²⁶ ‘The power of Weber’s analysis of this transition comes...from his realization that the various groups, from the socialists to the legal realists, who facilitated this process of disenchantment as a way to escape from the economic relations enshrined by the ideology of formal justice, may have miscalculated the effect of their attacks. Weber believed that the result of this process would not be a reform of the legal system in the direction of greater value rationality to serve such ends as social justice. He cautioned...it is by no means certain that... especially the working class may safely expect from an informal administration of justice those results which are claimed for it by the ideology of the jurists...he also warned that judges, stripped out of their subjective belief in the “sacredness of the purely objective legal formalism”, would not thereby become law prophets confidently and judiciously creating law. Instead, they would be transformed into a bureaucratized judiciary. Sally Ewing, ‘Formal Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law’, *Law&Society Review*, Vol.21, No.3, 1987, p. 510

formal rationality but at the same time they still contain some irrational elements which leave a free area for decisionism and creativity. It is the case for politics as well among many others. Kennedy's argument as follows, although legal formal rationality is kept distinct for the judicial area by Weber, we may still claim at least that lawmaking has been disenchanting on the modern basis of declaration of new laws. Kennedy states:

'Weber's theory of the disenchantment of lawmaking ended with its fusion into politics- specifically legislative politics. In other words, once legitimations for lawmaking had reached the point where multiple natural rights theories, Marxism, and the variants of the social ideology contended to define the necessary ethical substance of the legal order and none of them were plausibly rationally compelled (they were merely charismatic claims), lawmaking was just a branch of politics...Politicians made their decisions about what law to create in the same situation of ethical undecidability (due to contradictory moral imperatives) that applied to all other political questions.' For Weber, the anti-formal tendencies of modern law are irrationalists attacks on 'the supposedly hard rational kernel of logically formal rationality that remains within the legal domain at the level of interpretation after law-declaration has been politicized.'²²⁷

Kennedy asserts, it is implausible that lawmaking can lose enchanting power, while legal formal rationality grows and becomes even stronger. First of all, positivism in law making would mean that different legislative ideals may be contained in actual legislation. In turn, this would jeopardize the claims of internal consistency and of a system composed of hierarchical provisions interlinked from more abstract and comprehensive to more specialized and focused in the context of legal formal rationality. Yet, Weber's another prediction about the modern law was 'the "materialization" of law by the legislative adoption of ever more detailed statutory and administrative norms covering more and more particular cases.' Kennedy states that this would increase the determinacy of the legal order but undermine the plausibility of rational interpretation of the norms ('by the multiplication of flatly incompatible abstract principles each with a claim to explain a large part of the concrete multitude of enactments').²²⁸

At that point, the judges can no more stick to logically formal rationality since it is this rationality itself that has presented us with the choice in question. Logically formal rationality has proved internally indeterminate. Kennedy asserts that a jurist who has reached this point would experience the disenchantment of legal formal rationality in a quite specific Weberian sense. 'The critique of legal formal rationality disenchanting

²²⁷ Kennedy, *op. cit.*, p.1064

²²⁸ *ibid.*, pp.1065-1066

it because it deprives the decision maker of the illusion...that “the system” in some sense produces the norms that decide cases, rather than either some particular earlier jurist enunciating some particular rule, or we ourselves imposing meaning in the presence of a gap in the post-Nietzschean mode.’ Kennedy concludes his article with the method of policy analysis in the USA as an alternative to that dilemmatic situation in modern law-finding.²²⁹

IV.V Law and Ordinary People

The relation between law and ordinary people may be studied from a number of perspectives: the role of ordinary people in law-creation, whether law responds to the expectations of them, whether law is accessible or intelligible by them, whether law ensures justice or equality as desired by them, for which reasons people obey to the law, why they find it legitimate, etc. According to Weber, lay expectations can never be satisfied fully by law. Contrarily, the distance between ordinary people and law will continue to increase in many senses due to a number of reasons arising from the formal characteristics of law under modern conditions.

IV.V.1 Layman versus Formal Legal Rationality

Rationality of autonomous modern life orders indicates at the same time to impersonal characteristic of these orders. An impersonal order functions without regard to person, without regard to personal status and without regard to personal emotions. Modern legal orders are not different from others in this respect. Formal justice works *with complete detachment and for the sake of objective norms and ends, simply for the working out of the rational autonomous lawfulness in justice.* (ES, p.600) The impersonality of the legal order is one of the main hindrances before ordinary people to have an active role in his relation with it.

As a matter of fact, impersonality is inherent in the formal legal rationality, as Weber defines it. Objective application of general rules to the cases, according not to the concrete external facts but according to their ‘meanings’ as processed in the coherent logical world of legal thought refers to formal legal rationality. The problem

²²⁹ *ibid.*, p.1068; See also pp. 1069-1076

about ordinary people from the perspective of formal rationality is their strong subjectivity, their ethical or emotional attitudes, their inclination towards substantively rational, mostly irrational, approach and their lack of expert knowledge and skills.

It seems that the main problem arises from the substantive expectations and attitudes of ordinary people. The substantive expectations of ordinary people from law may range from economically utilitarian to substantively equalitarian. Yet, Weber urges us: *but a "lawyer's law" has never been and never will be brought into conformity with lay expectation unless it totally renounces formal character which is immanent in it.* (ES, p.885) On the one hand, this is the consequence of *strictly professional legal logic;* (ES, p.885) on the other hand, of *the insoluble conflict between the formal and substantive principles of justice.* (ES, p.893) Actually, it is exactly this strict formalism of law which annoys the layman and leaves unsatisfied of the emotional demands of, or for the underprivileged in terms of substantive justice. (ES, p.892)

Not only the substantive expectations of ordinary people from law as to legal consequences but also substantive and emotional attitudes are contradictory to formal legal rationality. Formally irrational attitude justifies prevention of ordinary people from taking an active role in law-making or law-applying. Weber explains the incompatibility of formal justice with the principles of substantive justice by *its necessarily abstract character.* Its abstractness is in a way a guarantee for its impersonal application, without changing from case to case just because of personal or of concrete reasons. For the supporters of formal law, formal rationality is needed to restrain *irrational mass emotions* and to protect the law from *the likelihood of absolute arbitrariness and subjectivist instability* of non-formal justice. So, non-formal justice weakens the predictability, stability and calculability of law. (ES, p.813) It is *the inevitable conflict between an abstract formalism of legal certainty and...a desire to realize substantive goals.* (ES, p.811) Weber seems to be largely agreeing to these arguments. As claimed in the beginning, the irrationality, subjectivism and substantive emotionality of ordinary people threaten the modern law and become obstacles in the law-layman relation.

Concerning law-making, popular democracy model may be a good example. Weber, frequently, compares popular democracy with authoritarian powers, and finds similar tendencies they share. First similarity is found in their rejection of formal justice

and freedom, and in their tendency to create a non-formal type of law. Both despots and democratic demagogues *may refuse to be bound by formal rules, even those they have made themselves*. (ES, p.811) Formal justice diminishes the dependency of individual, for authoritarian powers, upon the grace and power of authorities and, for democratic groups, upon the decisions of their fellow citizens. But, the decisions of fellow citizens originate from *irrational mass emotions* that may constrain the individual liberties as much as authoritarian rules do.²³⁰ Additionally, both regimes adopt a kind of *khadi-justice*, with the objective of substantive justice. Both theocratic and popular administrations of justice are similar *in the primacy of concrete ethical considerations*. What Weber refers to is not only the Ancient Greek democracy, but also modern examples. (ES, p.813)

Concerning law-applying, or in Weber's words law-finding, significant examples for participation of ordinary people in the legal order are folk assemblies, modern trial by jury and lay judges. But these are also examples of *irrational khadi justice* for Weber, which weakens formal legal rationalism. (ES, p.892) They again produce negative effects on the formal aspects of the law, very similar to the ones produced by those theocratic-patrimonial powers. (ES, p.774) Weber states the reason as follows: *Quite generally, in all forms of popular justice decisions are reached on the basis of concrete, ethical, or political considerations or feelings oriented toward social justice*. (ES, p.813) In addition to substantive approach of layman, his formal irrationality which occurs as incoherence and subjectivism produces irrational consequences. *As a matter of fact, the greater the degree to which the decision is a concern of "laymen" the less it proceeds upon purely objective lines and the more it takes into account the persons involved and the concrete situation*. (ES, p.759)

Yet, it seems that there are other concerns behind Weber's harsh critique against lay juries. Among the historical examples, Weber prefers German application called *Umstand*, where the formal character of the law and of law-finding is largely preserved in spite of community participation. For *the law-finding is the product of*

²³⁰ On the contrary to Trubek who comments that 'certain democratic values and types of social justice could only be achieved at the cost of sacrificing strict legalism (in 'Max Weber on Law', p.749), Weber claims that democracy may not be possible even in most substantive forms of legal orders and in the rule of popular 'democracies'. Therefore Weber's pessimism was not only about the liberalism but elevated by practical impossibility of substantive regimes to reach their value-aims.

revelation of the legal sage rather than the whimsical or emotional enunciation of those for whom the law is effective, i.e. those whom it purports to dominate rather than to serve. (ES, p.774) Here, once again emotions of ordinary people occur as a problem in their relation with law, by making them the immature party to the relation. But more than this, there is a deeper problem concerning the role or objectives of the law. The main aim of law is not to serve the ordinary people but to dominate them, according to Weber.

Another problem with the lay juries is also closely connected with the limited knowledge and skills of ordinary people and with ever-growing specialization in legal domain. From a specialist perspective *the laymen's verdict is delivered as an irrational oracle without any statement of reasons and without the possibility of any substantive criticism.* (ES, p.893) Additionally, Weber reminds us, the law cannot assume the form of a rational rule without specific expert knowledge and skill. (ES, p.774) In the example of *Umstand*, while the law remains formal, it is open to influences by the lay sense of justice and by daily experiences of ordinary people, as regard to its content. Legal sage of *Umstand*, as a charismatic figure, must persuade and convince people. This type of relation between charismatic authority and ordinary people receives Weber's support not only for law but also for politics, as may be seen in the following sections.

In dichotomy of "lawyer's law" and "layman's law", two main components are rationality and knowledge. Layman's approach to law is not suitable to formal rationality in the meaning of coherent, stable and systematic approach. For example, sense of justice is a very unstable concept, varying from person to person, or from condition to condition in its definitions. Additionally, popular attitudes about law are widely diffused in diverse directions. (ES, pp.759-760) When we take rationality in terms of highly abstract logical sublimation, ordinary people would not be able to understand this kind of logic without a special legal training and education. On the other hand, concerning lack of knowledge, *it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman increase.* Hence, the law

will stay as a specialists' domain due to the continuous growth of its technical elements.
²³¹(ES, p.895)

IV.V.2 Creation of Legal Norms and Ordinary People

For Weber, many different actors and processes play role in the emergence and creation of legal norms. Of course, legislation is one of the well known and a modern way of law-making. But it has not been so in the history and it is not the only way even in modern times. Accordingly, the main sources of norms are legislation, judge (and lawyers)-made law, charismatic revelation, and customary law. In this section, a special attention will be paid to customary law and charismatic revelation due to their special emphasis on the ordinary people.

IV.V.2.1 Social Consensus and Customary Law

Concerning his writings on customs and customary law, Weber declares his aim as *discovering empirical processes in which nonstatutory norms arise as valid customary law*. (ES, p.753) Actually to follow this transitional process from custom through convention to law is not so easy since *law, convention, and custom belong to the same continuum with imperceptible transitions leading from on to another*.(ES, p.319) During these explanations, Weber makes several interesting remarks and comments about human and social psychology.

The developmental stages of social norms are explained by Weber as follows. **Custom** is a longstanding, unreflective habituation to a regularity of life (ES, p.34). It is a typically and uniform activity which is repeated because men are accustomed to it and

²³¹ Weber states: *The empirical "validity" precisely of a "rational" order rests in turn chiefly upon consensual compliance with the customary, habitual, uncalculated, ever-recurring...Progress of societal differentiation and rationalization thus means – if not absolutely in every case, certainly as a rule- an increasing distancing overall of those affected by the rational techniques and orders from their rational basis, which is on the whole usually more hidden from them than the sense of the magician's magical procedures are from the "savage". Thus rationalization of social action does not at all mean universalizing knowledge of its conditions and connections; usually it means just the opposite.* Habermas interprets Weber's approach as follows. 'Weber is referring here to something like secondary traditionalism, to the gradual disappearance of the problematic aspects of arrangements in which rationality structures are embodied and which are loaded with presuppositions. We might then understand the belief in legality as the expression of such a traditionalizing effect. But in this case it is precisely confidence in the globally assumed rational foundations of the legal order that makes the legality of a decision an indication of its legitimacy' (Habermas, p.266). 'Thus a legal order also lays claim to validity, in the sense of rational agreement, when participants start from the assumption that experts alone would be able to give good reasons for its existence, whereas juristic laymen would not be in a position to do so ad hoc (p.267).

persist in it by unreflective imitation. It is a collective way of acting, not required by anyone. (ES, p.319) Imitation and unreflective habituation are the main motives for customary actions. So, social conduct oriented to custom is a typical **traditional action**, determined by ingrained habituation. (ES, p.25) Weber explains obedience to custom, despite to the lack of external sanction, as obedience by free will. Yet, free will in this context refers to mere failure to think about it, to being more comfortable to conform, or to probability of adherence to custom by other members of the group for the same reasons. (ES, p.34) On the other hand, **convention** occurs when the custom is recognized as binding and protected against violation by sanctions.(ES, p.34) But there is no special staff for coercion²³², except the fact that environment approves of the conduct and disapproves of its opposite. (ES, p.319) Lastly validity of **customary law** lies in the very likelihood that a coercive apparatus will go into action for the conduct's enforcement although it derives from mere consensus rather than from enactment. (ES, pp.319-320) Because there is a chance that a coercive apparatus will enforce compliance with a norm, that norm may be called 'law'. (ES, p.312)

For a sociologist, customs and conventions are important sources for social norms. *By no means, all norms which are consensually valid in group are "legal norms"*. (ES, p.313) Additionally, they are generally more effective than law in terms of securing the obedience. Generally people obey to the legal norms because they are customs or conventions at the same time, not because of obedience regarded as legal obligation.(ES, p.312) Weber explicitly states that *legal coercion, where it transforms a custom into a legal obligation...often adds practically nothing to its effectiveness, and, where it opposes custom, frequently fails in the attempt to influence actual conduct.* (ES, p.320)

But why are custom and convention so effective in regulating the social conduct? First reason given by Weber as follows: In countless occasions, the individual depends on his environment for a spontaneous response not guaranteed by any earthly or transcendental authority. In the earlier periods of history when a comprehensive

²³² In the definition of convention, Weber denies that convention is based on any coercion, physical or psychological or any direct reaction except social disapproval. (ES 319) Yet, in another context, he claims that from sociological perspective, legal order and conventional order do not constitute a basic contrast since convention is also sustained by psychological as well as (at least indirectly) physical coercion. Only difference between them is sociological structure of coercion: having a specialised coercive apparatus or not. (ES 326)

sphere of life has been determined by customs, the deviations from custom and convention could be experienced *on the psyche of the average individual like the disturbance of an organic function*. (ES, p.320) However, the dependence of the human on his social environment almost organically is not the only explanation for the force of conventions. *The mere fact of the regular recurrence of certain events somehow confers on them the dignity of oughtness*. To Weber, this is true both for natural and social actions. (ES, p.326) It is frequently not a conscious process conceived by social actors. *The mere statistical regularity of an action leads to the emergence of **moral and legal convictions** with corresponding contents*. (ES, p.327) So the social norms can gain ethical validity only *by virtue of convention*. (ES, pp 325, 336)

In connection with that, Weber argues that law may create a habituated order and although such an order may originally derive from legal enactment, it may benefit from the ethic and obligation creating force of habit. The actions imposed by the threat of physical or psychological coercion may produce into habituation and regularity of these actions. In turn, the mere repetition of such actions may create the feeling of obligation for these on the subjects. *Some of those who act according to the “norm are totally unaware of them*. On the other hand, the mere regularity of action may lead some others to confer on the actions or norms moral dignity or value.²³³ Consequently *law and convention are intertwined as cause and effect in the actions of men, with, against, and beside, one another*. (ES, pp.326-327)

For Weber there are two conditions of transition from custom to convention: consensual understanding of the action as obligatory and of some modes of conduct as binding, and occurrence of reaction against violation of these modes. The ‘consensual understanding’ relates to an increasing awareness of the diffusion of such conduct among a plurality of individuals. As it may be remembered from the earlier discussion about consensus, it is development of socially objective fact (consensus) from inter-

²³³ Turner discusses the socially commanding element of the ethics and the sense of externality of the morality in Weber’s theory. He concludes that Weber deliberately avoid from the subject and assimilates the notion of command to ‘choice’. However, Turner’s interpretation of Weber neglect Weber’s explanations on the emergence of the sense of obligation among the members of the group- only then the sanctions and the fear of sanctions become effective factors in addition to sense of obligation. Yet I also agree that Weber puts more emphasis on the sanctions and punishment in his evaluation of legal orders, instead of ‘the sense of duty’. In general, Weber generally seems to argue, as also Turner states, that the continuation of “orders” does not rest casually on the power of validating beliefs, but on the sanctions of disapproval, or on legal punishments, or on the habits and self-interest; thereby that in principle ethical ideas are chosen have a pure effect on action is to be understood as a theoretical possibility and a rarity. (Turner & Factor, *MW: The Lawyer as Social Thinker*, pp.77- 85)

subjective attitudes (semi- or vague consciousness about the others' attitudes). Consensus about the custom would mean first reciprocal expectations about a particular conduct in a given situation and then it would be felt by the members as consensually binding. Weber admits that it is hard to determine at which point the subjective conception of "legal obligation" emerges. Only after these, the factual occurrence of a violent reaction against certain types of conduct may arise objectively. (ES, pp.320, 754) The last stage is transformation from convention to customary law, when consensual understandings acquire the guaranty of coercive enforcement. Here again we need an arising consciousness, either in the minds of the guarantors of a particular norm or of the parties who have interest in that, about the norm in order to consider it no more custom or convention but a legal obligation requiring enforcement. (ES, pp.323, 754)

Weber asserts that very early stages of history and the experiences of first homo sapiens may not be very helpful to explain from where habitual actions and violent reactions against certain types of conduct originate. For example such violent reactions have always existed among human beings as well as animals. But in most of these cases, it is hard to talk about a conscious norm or purpose. Even a vague conception of duty may be more determinative for some domestic animals to a greater extent than may be found in aboriginal man. Certain external factual regularities in the conduct of primitive men are only, according to Weber, organically conditioned regularities which we have to accept as psychophysical reality and they ascend the social norms. So some actions and conducts are inherently in human nature and have the natural potential to be repeated and to be transformed into habits.²³⁴ Yet, more than this, human nature has an *inner orientation towards such regularities*. Hence, men are inclined to develop habitual actions. Weber makes a significant comment about this human characteristic:

The inner orientation towards such regularities contains in itself very tangible inhibitions against "innovations", a fact which can be observed even today by everyone in his daily experiences, and it constitutes a strong support for the belief in such binding norms. (ES, p. 321)

²³⁴ 'So the force of morality is rooted in biology. Indeed, morality itself appears to be a quasi-biological phenomenon', (Turner&Factor, *op.cit.*, p. 88). The biological reference of Weber to "inhibitions against innovation" are presumably universal, and universally observable (p.89).

IV.V.2.2 Innovations in Social Norms

Now, Weber's question is how something new can occur in this inert mass of canonized custom in the dark of the observation above about the conservative human nature. One explanation may be that the process of innovation is unconscious: meaning that empirical valid rules of conduct emerge without being regarded by the participants as newly created. It is frequently observed *in the form of unperceived changes in the meaning*. A factually new situation or a new way of application of already existing law has not been regarded as something 'new'. But most of the times, the innovation is felt although in varying degrees. Now, the question is what the sources of innovation are. Very simple answer is the changes in external conditions and their modifying effect on 'consensual understandings'. Yet this answer is neither necessary nor sufficient. (ES, pp.321, 755)

What basically changes is the conduct itself. The conduct may change in two ways: individual changes and structural changes. For the individual changes, one or more individuals who are interested in some concrete action may change their social conduct, either to protect their interests under changing external conditions or to promote them under existing conditions. *A new line of conduct ...results either in change of the meaning of the existing rules of law or in the creation of new rules of law*. On the other hand, the structural changes of social action emerge as a response to changing external conditions. Among the several actions that are suitable to the previous conditions, only one may be better suited *to serve the economic or social interests of the parties involved*, under new conditions. At the end of selective process, only one conduct survives and becomes the customary one. (ES, p.755)

More frequent and important source of innovations is intervention of charismatic personalities. Weber defines them as persons having abnormal psychological states and exercising a special influence by their abnormality which appears to be new to others. The spread of certain new conduct through the influence of charismatic personalities may be in three ways: by **inspiration, empathy and imitation**. Inspiration consists in a sudden awakening with a feeling that a certain action ought to be done by him. Empathy means, in a way identification with the charismatic personality and adoption of his attitude or action. The sense of obligation accompanies

not only to the regularities established after innovations but also to the innovations. In the case of empathy, since it is generally conditioned by rational purpose, accompanying feeling of obligation is very likely and understandable. It is also a psychological component of inspiration. *It is confusing, however, when imitation of new conduct is regarded as the basic element and primary element in its diffusion.* Imitation categorically belongs to *mass psychology*, not to rational sphere. Weber puts a surprising analogy to explain the imitation. *If the conduct of a dog, man's oldest companion, is "inspired" by man, such conduct, obviously, cannot be described as "imitation of man by dog". In a very large number of cases, the relation between the persons influencing and those influenced is exactly of this kind.* (ES, pp.321-322, 755-756) Weber's analogy between dog-man and mass-charisma shows once again that how he perceives the mass.

IV.V.2.3 Other Actors in Law-making

Another charismatic person is the judge. Weber puts a special emphasis on judge-made law. Judge, even in the modern times, is an autonomous authority, who is *doing more than merely placing his seal upon norms...he creates...the empirical validity of a general norm as "law", simply because his maxim acquires significance beyond the particular case.* (ES, p.758) But judge-made law is only possible when the adjudication is formally, to certain extent, rationalised and the rule-orientation occurs in decisions that are perceived as representing norms going beyond the individual case. Even in the traditional systems, Weber observes the power of the predecessors. At least, the judges claim that they stay bound by their own maxims to avoid the charge of bias. He claims that *the subjective conviction that one is applying only norms already valid is in fact characteristic of every type of adjudication which has outgrown the age of prophecy, and it is no way peculiarly modern* (ES, pp.757-759)

Actually, for Weber, the charismatic revelation has been the main source for the law-making throughout the history and he finds the traces of charismatic personalities in every period of law-making from the oracles to prophets, from the *imperiums* to legislation and to modern judges. (ES, pp.758-775) *Characteristics of the charismatic epoch of law-making and law-finding have persisted to a considerable extent in many of the institutions of the period of rational enactment and application of*

the law. Remnants still survive even at the present day. For example the English judge is a sort of living oracle, whose decisions have a certain type of 'charismatic quality'. (ES, p.767) Additionally charismatic revelation of law is the parent of all types of legal 'enactment' since it constitutes a revolutionary element which undermines the stability of tradition. The charismatic law-makers may be magicians, oracles, priests, prophets, the oldest persons of the group, etc. (ES, p.761)

V. MODERN PROPHETS AND SACRED NATIONALISM

V.I Democratic Legitimacy

Great skepticism of Weber towards democracy comes from his various concerns about human beings, masses, bureaucracy and some other characteristics of modernity. Even direct democracy as pure form of democracy is ephemeral and inclined into aristocracy. After many transformations that democracy undergoes, the final shape of it as mass democracy is not democracy in real sense under the dominance of bureaucracy. Rationality, modernity, capitalism, bureaucracy, developing technology and increasing complexity of life create insurmountable obstacles before the democracy. People have neither enough spare time nor enough knowledge to be engaged in, or even just to participate, in the politics. In any way, irrational masses of democracies cannot and should not actively participate in politics. Many details of the life in the mass states are to be regulated by bureaucracy, therefore subject to its hegemony and control. Technical developments make the specialists hidden rulers over the people. Leave aside the people, even the elected politicians and leaders are very weak in front of the expertise of bureaucrats. By this pessimistic approach, Weber does not consider democratic legitimacy worth to categorize a legitimate authority type. Instead, a charismatic leader promoting nationalist sentiments seems to be more credible at that time Germany.

V.I.1 Direct Democracy as a Marginal Case

For Weber there are two main types of democracy: one of them is direct democracy and the other is representative or mass democracy.²³⁵ Immediate democracy may take the shape of aristocracy in the transition period. On the other hand, mass democracy may be the one with leadership or without it. Only genuine form of democracy, for Weber, is immediate democracy. In this sense, democracy means *to minimize the domination of man over man* and to dispense with the leadership altogether. (ES, p.269) It aims to reduce the domination to the minimum so that almost cynically Weber takes immediate democracy not as a type of domination but considers

²³⁵ For detailed analysis of democracy in Weber's theory see Ernest Kilker, 'Max Weber and the possibilities for democracy', in *Max Weber's Political Sociology*, R.M.Glassman & V. Murvar (eds.), Westport: Greenwood Press, 1984, pp. 57-60

it an 'undeveloped' form of domination (ES, p.951) For Weber, democracy is a form of organization of rational groups or may become a rational form. (ES, p.290) At the heart of democracy, it lies that the persons in authority act only in accordance with the will of all members and in their service, by virtue of the authority given by them. (ES, p.289) It sets upon the principle that *everybody is equally qualified to conduct the public affairs.* (ES, p.948).

In any case, immediate democracy is something transitional, provisional, and unstable. (ES, p.949) *Every type of immediate democracy has a tendency to shift to a form of governments by notables.* (ES, p.291) So, direct democracy always tends towards aristocracy. Additionally, with Weber's words, *the attitude of all 'democratic' currents, in the sense of currents that would minimize 'domination', is necessarily ambiguous.* (ES, p.979) It is not so difficult to read the deep doubts of Weber about democracy²³⁶ in those sentences. Now let us look at his reasons for that.

Concerning direct democracy, there are strict conditions of existence. Most important pre-condition is the size of the group. To assemble at a single place and to know each other is only possible for small groups. Additionally the larger the group is, the harder the equality among members is kept. However, more important than this, development, technology and modernization are obstacles before the direct democracy. Any specialization and technical training needed for particular administrative functions would create a group of officials who may not be subject to the procedures of direct democracy. (ES, pp.289-291)

In addition to differentiation of social life, also differentiation among the social statuses of the members leads to distortion of direct democracy. *With every development of economic differentiation arises the probability that administration will fall into the hands of wealthy.* (ES, p.949) Not because of their personal qualities or their more comprehensive knowledge but simply because notables can afford to take the time to carry on the administrative functions cheaply or without any pay. Of course they have a prestigious status in the society and they may be considered well-qualified by experience and objectivity, so fit to rule. (ES, pp. 950, 291)

²³⁶ Weber assesses direct democracy as a marginal type probably because of its rare occurrence due to strict conditions of existence. (ES 949)

There are two more transitions through which the democratic administration may undergo. The first is the emergence of the political parties as result of struggles between notables, poor and some other wealthy groups for power. *As soon as it is thus made the object of a struggle for power, direct democratic administration loses its specific feature, the undeveloped state of domination.* (ES, p.951) The political parties exist for acquiring domination and themselves constitute a structure of domination regardless whether they retain *formally* the previous mode of administration. Neither direct democratic administration nor administration by notables may keep its genuine form anymore (ES, pp. 951, 292)

The last but not least transition of democracy is the transition to mass administration. Weber states: *As soon as mass administration is involved, the meaning of democracy changes so radically that it no longer makes sense for the sociologist to ascribe to the term the same meaning as in the case discussed so far.* (ES 951) What produce such a radical change? Mass administration combined with the technical or social developments bring about the growing complexity of the administrative tasks and in turn the rise of a special administrative group of people, bureaucrats. In short, the bureaucratic domination over the masses transforms the democracy into a very formal one.

Thomas explains the transition to technical administration as follows: ‘the *social alienation* [is] consequent either upon an increase in size or in one of complexity of administrative function. By ‘alienation’ here Weber seems to mean that the ability of each citizen to identify himself or herself with the community and its interests is undermined by the increase in size or in technical differentiation of the population.’²³⁷ Weber emphasizes that the legal forms of modern domination are grounded in *technical expertise* and *functional specialization* whereas the absence of qualitative functions constitutes the vital necessary condition of direct democracy. Thomas goes on to explain reasons of Weber’s pessimism of modern types of democracy:

‘Once technical expertise has a significant role in administration then the processes of recall, of subjection to a general assembly, of ‘answering’, take on, at best, purely ritual significance; more likely they are devalued, or abolished, or come to

²³⁷ J.J.R. Thomas, ‘Weber and direct democracy’, p. 228

constitute an ongoing source of conflict with those practicing diurnal administration. The office-holder is qualified by his or her technical expertise, the layman is disqualified by lack of technical knowledge and is thereby, at least to a degree, disfranchised...The attempt to solve this problem by placing technical advisers alongside democratic representatives or delegates simply conceals a shift of power in the direction of the technically competent'²³⁸

V.I.2 Mass Democracies: 'hybrid forms of administration'

Now, immediate democracy and administration by notables are the marginal cases. On the other hand, mass democracies are so formal that it is even difficult to call them democracies. From this pessimistic perspective, it is easy to understand why Weber does not include democratic authority into his authority types. In fact, Weber categorizes mass democracies as transformed charismatic dominations. He also adds that they carry some characteristics of legal authorities. In short, they are a sort of combination of legal and charismatic authorities. (ES, pp.267, 294, 219-220) Therefore, I will call them 'hybrid forms of administration'.

According to Weber, charismatic authority may transform in a democratic direction. (ES, p.266) Such a transformation is possible because of a feature of charismatic authority, that is the recognition by the ruled. For real charismatic authority, this recognition is the consequence of legitimacy, and thereby almost a duty of the ruled. If the charismatic authority goes through a rationalization process, the mechanism is reversed: the recognition of the charismatic authority by the ruled becomes the basis of the legitimacy. This is called 'democratic legitimacy'. (ES, p.267) If we remember that the basis of legitimacy claims determine the types of authorities, we may easily assert that now we have the fourth type of authority: democratic authority and we have a value-rational authority type, at the end. Unfortunately, it is not that simple. For Weber, democratic domination is only a subdivision charismatic domination. Below I will try to explain why it is so.

When the problem of succession occurs, the charismatic authority may transform into an authority on the basis of democratic legitimacy. Designation of a

²³⁸ Ibid. pp. 228-229

successor by charismatic community indicates pre-selection and by the predecessor himself nomination. Recognition by the group of the pre-selected ruler becomes an election. However, it was not an election in the modern sense in the beginning. The majority principle was not possible against a dissenting minority since it was a question of recognition of genuine charisma, and not the majority but the minority could be right. *Once the majority principle has come to prevail, it is considered the moral duty of the minority to yield to the right cause proven by the election and to join the majority after the event. Yet charismatic domination begins to yield to a genuine electoral system once succession is determined by the majority principle.* (ES , p.1126)

The transition in democratic direction is a long way for charismatic authority. It may take a variety of forms in different contexts. Elections, representation and even majority principle carry traits from charismatic authority. Yet, most important form of democratic-charismatic authority is the freely and directly elected leader. Therefore, especially the plebiscitary democracy is a variant of charismatic authority. There are other transitional forms such as parliamentary systems, democracies with a monarch etc. In any case, Weber reminds us that only in the Occident the election of the ruler gradually develop into a representative system. (ES, pp.1127, 267) A representative system transformed from charismatic domination in general shares some characteristics of the legal domination, especially in its treatment of law. All the laws enacted or appealed by the free will of the group are legitimate, i.e. there is no more a quest for one 'correct' decision. (ES, p.267) Formal rules precede the substantive rules. Similarly, modern parliamentary representation shares with the legal authority the general tendency to impersonality, the obligation to conform to abstract norms, political or ethical. (ES, p.294)

As Merquior maintains, 'Weber did not conceive of representative, mass-citizenship democracy, as normally would be expected, as a (some would say *the*) natural form of legal domination. On the contrary, he preferred to think of it as just an instrument for copying with the lack of charismatic creativity in an increasingly 'rationalized', i.e. bureaucracy-ridden, universe.'²³⁹ It may be concluded that all the representative/mass democracies are combinations of two types of authorities

²³⁹ J.G. Merquior, *Rousseau and Weber: Two studies in the theory of legitimacy*, London: Routledge & Kegan Paul, 1980, p.103

(charismatic and legal) according to Weber. On this scale of hybrid forms²⁴⁰, plebiscitary democracy is the closest to the charismatic authority. On the other hand, the cabinet form of government is almost in the middle depending on the character of the prime minister. Weber states these hybrid forms explicitly in a section on legal authority: *There are very important types of rational domination which, with respect to the ultimate source of authority, belong to the other categories. This is true of the hereditary charismatic type, as illustrated by hereditary monarchy, and of pure charismatic type of a president chosen by a plebiscite. Other cases involve rational elements at important points, but are made up of a combination of bureaucratic and charismatic components, as is true of the cabinet form of government.* (ES, p.221)

V.II Mass Democracy or Bureaucratic Domination?

Weber explains at length why a mass democracy cannot be a genuine democracy in the modern age. Most of the reasons may be technical but his mistrust in masses may be easily read between the lines.

V.II.1. Representation, Elections, and Parliaments

Weber defines representation from the perspective of representative, not of the represented: the action of certain group members (representatives) is considered binding on the others or accepted by them as legitimate and obligatory. (ES p. 292) Among the forms of representation, instructed representation and free representation are important forms since instructed representation may serve a substitute for immediate democracy (as in Soviet Russia) whereas free representation is the most common one in modern political institutions. Instructed representation strictly limits the representatives by an imperative mandate and a right of recall. In the case of free representation, the representative is not bound by the instructions but is free to make his own decisions and to express his own convictions. (ES, pp.293-295)²⁴¹

²⁴⁰ It has been called the charismatic bureaucracy before, as understood a Weberian hybrid form (J.G. Merquior, *Rousseau and Weber, Two studies in the theory of legitimacy*, pp.122-128,134)

²⁴¹ For a similar taxonomy see Hans Kelsen, *Pure Theory of Law*, Berkeley: University of California Press, 1967, pp.299-302; Hans Kelsen, *General Theory of Law and State*, Cambridge: Harvard University Press, 1946, pp. 289-290

Within the context of modern parliamentary representation, free representation means that a deputy is a representative of the people as a whole. Hence he is not a mere agent but he exercises authority over the electors. (ES, pp.293-295)²⁴² It is the product of some unavoidable conditions, and of some power interests pursued by the political actors. Weber asserts: *Both the pragmatic interests in the flexibility of the parliamentary apparatus and the power interests of the representatives and the party functionaries converge on one point: they tend to treat the representative not as the servant but as the chosen 'master' of his voters.* (ES, p.1128) Although there are some attempts to subject the deputy to the will of the electors, they result only in more empowerment of party organizations since only they can mobilize the people.

In conclusion, modern parliamentary system does not represent the will of the governed, at least properly and thoroughly. Above all, Weber does not find 'the parliament' democratic in itself.²⁴³ He asserts that *collegiality*²⁴⁴ *is in no sense specifically 'democratic'.* (ES, p.277) The representative bodies cannot even guarantee the principle of equality. *Quite the contrary, it can be shown that the classic soil for the growth of parliamentary government has tended to be an aristocratic or plutocratic society.* (ES, p.296) The assemblies have been the garden of some privileged groups in the history and the tool to protect their interests from the other groups and monarchs. (ES, p.277) One example is the bourgeoisie collegiality against nobles and monarch, and against proletariat through property qualifications for the franchise. (ES, p.296)

The adoption of universal suffrage meant another stage in the history of the parliaments. The motivations behind the extension of franchise were the necessity for support of proletariat in foreign conflict and the futile hope for their comparatively conservative influence on politics. Nevertheless, universal suffrage had some important influences on the parliaments. First, transition from the smooth-running assemblies with narrow-range political diversity to the assemblies tensed with class-divisions has been observed. Secondly, demagogic and propagandist approaches have become crucial to win the hearts of masses, so have the political parties with strong leaders. The radical

²⁴² Weber lists a number of technical obstacles before the adoption of instructed representation such as instability of the conditions and unpredictability of problems, the costs of frequent elections, irrational results of referendums etc. (ES, p.1128)

²⁴³ 'For Weber, parliamentary democracy was anything but the realization of the principle of self-determination of the people. This was, in his opinion, mere ideological trash', (Mommson, p.87).

²⁴⁴ A general title used by Weber for all kinds of political bodies in the form of assemblies.

consequence has been a second transformation of the parliaments and their members: from being '*master*' of the electors to a merely '*servant*' of the leaders of the party machine. (ES, p.297) This transformation occurred with the growing importance of party organizations and party bureaucracy. From the pre-selection of the candidates to the election campaigns, the parties have been more and more dominant at the political life. (ES, p.1129)

V.II.2 Political Parties

To begin with Weber's definition for the political parties, party is an association which is based on formally free recruitment in its membership and which devotes its activities to the end of securing power within an organization for its leaders in order to attain ideal or material interests for its active members. In this definition, a party, whatever its ultimate end is, always needs and aims the power. Yet, the means of power may vary according to the system. In the modern systems in which legislation and politics are based on voting and ballots, *they are primarily organizations for the attraction of votes.* (ES, pp. 284-285, 1396)

Again, the term 'interests' may refer to personal interests or objective policies or both. If a party aims power only for administrative positions, it is called a patronage party. There are of course ideological parties, which act for the interests of a class, or of objective policies or of abstract principles. However, Weber underlines that even those work to attain administrative positions for their staff at least as a secondary aim *and objective programs are often merely a means of persuading outsiders to participate.* (ES, p.285) For Weber, all the parties, whether they are ideological or patronage parties, aim to secure some administrative posts for their staff, probably because the real power of domination lies in the hands of bureaucracy, as explained in the following sections. (ES, p.1398, PAV, p.87)

Another remarkable aspect of the definition is its hierarchical structure, which excludes the voters. Within its pyramidal approach the leader attains the power at the top and then the party staff holds the administrative offices. It seems that the voters are only the means for the party to attain the power. Actually, Weber details the definition exactly in this way and stresses that it is common to all forms of parties: Party leaders and their staff keep the power in the organization and assume the active direction of

party affairs, including the formulation of party programs and the selection of candidates. There is, secondly, a group of 'members' with a passive role. These active party members have the function of acclaiming their leaders. Time to time, they may exercise some forms of control, participate in discussion, voice complaints, or even initiate resolutions within the party.²⁴⁵ (ES, pp. 285-287, 1396)

In modern political systems, Weber observes that *the inactive masses of electors or voters are merely objects whose votes are sought at election time*. The role of citizens is only that of objects of solicitation by the various parties. *They merely choose between the various candidates and programs offered by the different parties. Their attitudes are important only for the agitation of the competing parties* and their interests are taken into account only when *their neglect would endanger electoral prospects*. Here politics and representative democracy are evaluated, from a real-politic perspective, as a game (or even a market) of interests played by a few actors by using the masses as the means of power. In fact, Weber draws a parallel between the market and the politics. He defines politics as the 'business of interests' and points out the voluntary basis of politics. (ES, pp.285-288) Yet it is a formal freedom of choice in many senses. *'There is a formal similarity between the party system and the system of capitalistic enterprise which rests on the recruitment of formally free labor.'* (ES, p.288)

What Weber refers as 'market' in politics is not only the masses who formally chose pacifism or the competition between the party members as well as the parties for the power or administrative posts, he also refers to a real money market: party finances. Party finances and its consequences have never changed much since Italy of 13th Century. There are two financial ways: a) the electoral candidate may carry the burden of campaign expenses, with the result that the candidates are selected on a plutocratic basis or b) costs may be borne by the machine in which case the candidates become dependent on the party organization. In the last case, party machine is generally bought

²⁴⁵ I agree to Bethaam's statement: 'The involvement of the mass in politics was not regarded by Weber as modifying the fact of oligarchy, but rather the methods by which the few are selected, the type of person who reached the top and the qualities necessary for the effective exercise of power. The advent of democracy changed the rules of selection but not the process of selection itself.' P.103 Because of that 'his theory of parliamentary government cannot be called a democratic theory since it did not seek to justify such government in terms of recognizably democratic values such as increasing the influence of people on the policies pursued by those who governed' (pp. 101-102).

by large individual contributors. It is another appearance of formal freedom of the political market: *the power of the seller as compared with the consumer has been tremendously increased by the suggestive appeal of advertising.* (ES, p.288)

V.II.3 Transformation of Political Parties and Passive Democratization

The universal suffrage has led a transformation not only of the parliaments but, also and especially, of the parties. With the term 'democratization', Weber refers mainly to the democratization of the franchise.²⁴⁶ (PAV, p.105) But when he uses it in a larger context, he refers to formal equality. 'Passive democratization' led to a great transformation of party systems from parties of honoratiorees to highly bureaucratized mass parties. The process was initiated by the fact that the universal suffrage necessitated much more continuous and strenuous electioneering than ever known to the old parties of honoratiorees. (ES, p.1446) For the parties, it meant the rationalization of the electoral campaign techniques, hence bureaucratization of the party central and local offices. (ES, p.1398) *An electoral association had to be formed in every city district to help keep the organization in motion and to bureaucratize everything rigidly hence hired and paid officials of the local electoral committees increased numerically* (PAV, p.105)

In short, the problem before the parties was the problem of administration of mass associations. The solution was simply the trained officials as the core of apparatus since their discipline is the absolute precondition of success especially for the political parties. (ES, p.1399) Weber explains the transformation as follows: *modern mass propaganda makes electoral success dependent upon the rationalization of the party enterprise: the party bureaucrat, party discipline, party funds, party press and party advertising. ...the party apparatus increases in importance, and correspondingly the weight of the honoratiorees declines.* (ES , pp.1443-1444)

Parties before the bureaucratization were the parties of notables. For example, in England, parties were in the beginning pure followings of the aristocracy and later the parties of notables (especially of the bourgeoisie). *In this phase, parties organized as*

²⁴⁶ He calls it 'passive democratization' since 'the advent of universal suffrage had not made politics any more democratic in the sense of any greater diffusion of power: if anything power was more concentrated.' (Beetham, *op. cit.*, p.106)

permanent associations between localities do not yet exist in the open country. Only the parliamentary delegates create the cohesion and the local notables are decisive for the selection of candidates. Politics was not a continuous work but only an avocation and an honorific pursuit for the notables demanded by occasion (PAV, p.101) For example, only the journalist was a paid professional politician. The election periods and parliamentary sessions were the only times the party is alive. In terms of organization, permanent party associations with paid officials existed only in the large cities. A network of local party affiliations were possible only with extra-parliamentary local notables (PAV, p.101)

In the modern form of the political party, the rule of notables and guidance by members of parliament ceases. Bureaucratization of the parties creates a group of officials who handle the work of the party continuously. These professional politicians outside the parliaments take the organization in hand. In some places, the entrepreneurs (examples are the American boss and the English election agent) keeps the control of the party, instead of the officials. *Formally, a far going democratization takes place.* Yet, this democratization is only a formal one. Not the local notables but rather assemblies of the organized party members select candidates and delegate members to the assemblies of a higher order. However, it does not mean an active democratization of the masses or not even of the party members, i.e. that they actively participate in the party decisions.(PAV, pp.102-103) On the contrary, Weber states that *naturally, power actually rests in the hands of those who, within the organization, handle the work continuously. Otherwise, power rests in the hands of those on whom the organization in its processes depends financially or personally* (PAV, p.103)

In conclusion, as Giddens states, ‘the existence of large-scale parties, then, which themselves are bureaucratic machines, is an unavoidable feature of a modern democratic order’.²⁴⁷ Control and power over the party, in its current form, may belong either to the party officials, or to the entrepreneurs (financers of the party) or to the leader. Weber’s hope was that domination of bureaucracy may be avoided if the modern parties are headed by the leaders who possess political expertise and initiative. Actually he claims that the current political conditions prepare the most convenient conditions

²⁴⁷ Giddens, *op. cit.*, p.22

for the plebiscitary democracy. Especially, the party apparatus both necessitates and facilitates the charismatic leadership for the parties and national politics. In Weber words, *the man whom the machine follows now becomes the leader, even over the head of the parliamentary party. In other words, the creation of such machines signifies the advent of plebiscitarian democracy.* (PAV, p.103)

V.III Bureaucratic Domination

Bureaucracy is the highest point of formal rationality in the administration of the modern state. In this sense, it is the most important instrument of the political leader. However, bureaucracy may and does turn from being a tool of domination into being a dominating power itself. Its power comes from knowledge, expertise and official secrets as well as its detailed control over the life of people. As in other spheres of life, formal rationality of administration in political sphere is almost indestructible. Any attempt for more substantive rationality in administration would necessarily result in irrationalities. Yet, its formal rationality is not as objective as it seems. In a close relation with capitalism, it gives support to certain interests of business as well as serves to itself in terms of strengthening the bureaucratic power interests. On the other hand, the iron cage of bureaucracy day by day threatens to become a dystopia for the humanity and emancipation.

How and why did bureaucratization occur, in a relatively late period? Weber states that *the basis of bureaucratization has always been a certain development of administrative tasks, both quantitative and qualitative.* (ES, p.969) Yet, qualitative expansion of the administrative tasks has always been more influential than the quantitative increases (in population or land) (ES, p.971) Among qualitative changes, Weber lists the increasing complexity of civilization, increasing possession of consumption goods and of an increasingly sophisticated technique of fashioning external life, increasing demand of society accustomed to absolute pacification for order and protection, social welfare policies, development of modern means of communication. (ES, pp.972-973)

Bureaucratic organization is technically superior to any form of organization. In fact it is the most rational and most efficient type of organization from purely technical point of view. In this sense it is *formally the most rational known means of*

exercising authority over human beings. (ES, p.223) Technically superior characteristics of the bureaucracy are precision, reliability, stability, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, and reduction of friction and of material and personal costs. *It thus makes possible a particularly high degree of calculability of results for the heads of the organization and for those acting in relation to it.* (ES, pp.223, 973)

Technical superiority of bureaucracy is only possible with the technical knowledge. Weber underlines in several places that *bureaucratic administration means fundamentally domination through knowledge. This is the feature of it which makes it specifically rational.* (ES, p.225) Therefore advance of technology has been a more important factor, comparing to capitalism, in advance of bureaucratization. In fact, the knowledge is the primary basis of bureaucratic power. *The political 'master' always finds himself, vis-à-vis the trained official, in the position of a dilettante facing the expert, no matters whether the master is the 'people', the parliament, the elected president or a monarch.* (ES, p.991) The tremendous power of bureaucracy rests not only on the technical know-how in general sense but also official information growing out of experience in the service. The conduct of the office provides the bureaucrat with a special knowledge of the facts. (ES, pp.1417-1418, 225) From this perspective, *the actual ruler is necessarily and unavoidably the bureaucracy since the power is exercised ...through the routines of administration.* (ES, p.1393)

Every bureaucracy seeks to increase its power further by keeping secret its knowledge and intentions. Weber points at that *the concept of the 'office secret' is the specific invention of bureaucracy, and few things it defend so fanatically as this attitude...*(ES, p.992) Especially against the public and the parliament, to protect itself from criticism and to secure its power position contra any investigation the bureaucracy fights out of a sure power instinct. *Bureaucracy naturally prefers a poorly informed, and hence powerless, parliament.* (ES, p.993) Such a monopoly over the knowledge is challenged only by the capitalist entrepreneur, within his own sphere of interest and by private economic groups. (ES 225, 294)

Weber asserts that the progress towards the bureaucratic state is very closely related to the modern capitalist development. (ES, p.1394) First of all, capitalism has

played a major role in the development of bureaucracy and vice versa. *Capitalism ...requires the bureaucracy...Conversely, capitalism is the most rational economic basis for bureaucratic administration and enables it to develop in the most rational form.* (ES, p.224) Second, at the modern stage of capitalism, the need of capitalist interests for calculability and predictability necessitates *a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms, just like the expected performance of a machine.* (ES, p.1394)

Capitalist market economy expects from the public administration unambiguity, continuity, speed and objectivity. Bureaucracy functions objectively if it functions *according to calculable rules and 'without regard for persons'*. The levelling of social and economic positions, demolishing all privileges and formal equality of treatment accompany to modern bureaucratic domination. However 'without regard for persons' is also the watchword of all pursuits of naked economic interests. Under the free market conditions, it may mean *the universal domination of the 'class situation'*. (ES, pp.225, 974-975) In short formal rationality of bureaucracy and its formal rational characteristics serve to interests of certain groups and they are not substantively as rational and objective as they seem. It is especially those formal characteristics of bureaucracy, which are appraised by capitalism. *Bureaucracy develops the more perfectly, the more it is 'dehumanized', the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is appraised as its special virtue by capitalism.* (ES, p.975)

V.III.1 Bureaucracy versus Democracy

Formal rationality of bureaucracy and social levelling is directly connected to modern mass democracy. Mass democracy makes a clean sweep of all kind of privileges- feudal, patrimonial, and plutocratic- in administration. (ES, pp.225-226, 983-984) Formal equality before law and administration conducted on the general principles -not from case to case- are characteristics of both bureaucracy and passive democratization. Weber calls this process the levelling of the governed. (ES, p.986) Consequently, *the democratization of society in its totality, and in the modern sense of*

the term, whether actual or perhaps merely formal, is an especially favourable basis of bureaucratization. (ES, p.990)

Weber emphasizes that he uses the term 'democracy' and 'democratization' in a specific sense. By democratization he means universal suffrage, elections and a certain measure of influence of public opinion over the administration. On the other hand, the loose term 'democratization' also refers to *the minimization of the civil servants' power in favor of the greatest possible 'direct' rule of the demos.* (ES, p.985) Democracy as such inevitably conflicts with the bureaucratic tendencies.²⁴⁸ (ES, p.985) When Weber refers to the dilemmatic relation of democracy in loose sense with bureaucracy, the examples are some democratic structures and precautions seems to weaken the bureaucratic power, for example some political actors such as economic interest groups, other non-official experts, lay representatives and local, inter-local or central representative bodies. (ES, p.991)

Democracy is in tension with bureaucracy²⁴⁹ *in spite and perhaps because of its unavoidable yet unintended promotion of bureaucratization.* (ES, p.991) It may be observed between the social levelling and the bureaucratic offices. On the one hand, the levelling for the bureaucratic posts on the basis of technical competence is one of the consequences of passive democratization. On the other hand there is a tendency to the plutocracy by a long and special training for the offices. (ES, p.225) *On the one hand, the system of examination means, or at least appears to mean, selection of the qualified from all social strata ...But on the other, democracy fears that examinations and patents of education will create a privileged 'caste'.* (ES, p.999) Additionally, democracy supports establishment of a formal right to the office by regular disciplinary procedures and by the elimination of the completely arbitrary disposition of the superior over the subordinate official. The office procedures which regulate promotion,

²⁴⁸ For example, the parliament (or collegiality in general) is in a direct conflict with administration (bureaucracy in general) since it presents obvious obstacles to one of the most important bureaucratic principles: *to precise, clear and above all, rapid decision.* On the other hand, it favors *greater thoroughness in the weighing of administrative decisions.* (ES, p.277) Yet, it impedes the consistency of the policy, the clear responsibility of individual and the discipline within the group. (ES, p.280)

²⁴⁹ Giddens explains this dilemma as follows: 'According to Weber, the relationship between democracy and bureaucracy creates one of the most profound sources of tension in the modern social order. There is a basic antinomy between democracy and bureaucracy, because the growth of the abstract legal provisions which are necessary to implement democratic procedures themselves entail the creation of a new form of entrenched monopoly (the expansion of the control of bureaucratic officialdom). While the extension of democratic rights demands the growth of bureaucratic centralization, however, the reverse does not follow.' (A. Giddens, *Politics, Sociology and Social Theory*, p. 22)

retirement and the conditions of work are supported by the governed since they serve to the minimization of the domination, especially arbitrary domination of the authorities. Yet, the same procedures promote the rise of a specific status group and cause another ambiguity in respect to democracy. (ES, pp.1000-1001) Democracy attempts to overcome this ambiguity by preferring the election of the officials for short terms to the appointment of them and the recall of officers by referendum to regulated disciplinary procedure. Yet, according to Weber, this is nothing but *to replace the arbitrary disposition of hierarchically superordinate 'master' by the equally arbitrary disposition of the governed or rather, of the party bosses dominating them.* (ES, p.1001)

However, the bureaucracy is in its pure form only when the appointment is the main method for the designation of the officials. An official elected by the governed is no longer a purely bureaucratic figure and the elections damage the hierarchical rigidity of the bureaucracy. Comparing to an elected official, an appointed official *normally functions, from a technical point of view, more accurately because it is more likely that purely functional points of consideration and qualities will determine his selection and career.* In the case of elections, the governed cannot evaluate the technical competence of an official before his service and the political parties may prefer the candidates who are closer to the party bosses. (ES, pp.960-961) In short the elections are not proper way to designate the right persons to the offices.

Weber underlines the formal rationality of bureaucracy in the modern states and compares it with the rationality of different life spheres. Bureaucracy shares the characteristics of impersonality and matter-of-factness with the sphere of economics. Additionally, both for capitalism and modern bureaucracy, efficiency, calculability and predictability are the most important technical standards. However, bureaucratic formal rationality, as in other spheres, is not as objective as it seems. In this sense, it is substantively irrational. For example, objective application of general rules and abstract principles actually does not work for every one impartially and equally. Even the social leveling which vows the formally democratic equality serves to capitalist interests and thereby, it is substantively irrational. Since *bureaucratization and social levelling with the associated breaking up of the opposing local and feudal privileges have in modern times frequently benefited the interests of capitalism or have been carried out in direct alliance with capitalist interests.* (ES, pp.989-990)

It is not only the capitalist interests behind the formalism of bureaucracy. Weber warns us that *formalism, which is promoted by all the interests which are concerned with the security of their own personal situation, whatever this may consist in.* (ES, p.226) Interests of bureaucracy play their own role. That's why, for example, the demands for substantive rationality in public administration in the sense of more space to the official creativity are baseless and futile. Formal rationality may not be broken by the 'freely' creative administration for many reasons. The most important reason is the devotion of the bureaucrats to the 'objective' purposes. Especially those who support the idea of creative discretion regulate their actions according to *the modern and strictly 'objective' idea of raison d'état.* Yet, what Weber attempts to emphasize is not the power of formal rationality over the officials but the interests pursued behind the formality. What gives the content to the abstract idea of *reasons of state* is the power interests of the officials. This content is exploitable by the bureaucracy for maintaining its power. Weber, himself, directs the most ruthless criticism to the formal rationality. *...in principle a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means.* (ES, p.979) In consequence, what make the formal rationality indestructible is the bureaucratic power interests.

Democracy oscillates between formal rationality and substantive rationality. On the one hand, formal and rational objectivity of administration secures some democratic principles such as 'equality before the law' and legal guarantees against arbitrariness. At the same time, such principles promote the bourgeois interests under the modern capitalist conditions. So, the propertyless masses expect justice and administration to serve *to equalize their economic and social life- opportunities in the face of the propertied class.* On the other hand, substantive demands of some democratic currents like minimizing the domination and substantive justice clashes with exactly the same type of rationality. In such a case, democracy should make a choice between two types of rationality. In Weber's words, *emotions must in that case reject what reason demands.* (ES, pp. 980, 226)

V.III.2 Bureaucratic Formal Rationality against Individuals

Considering the power position of bureaucratic apparatus, Weber claims that once bureaucracy is fully established, *the resulting system of domination is practically indestructible*. Not only because of the material or ideal interests of the officials explained above. Main reason Weber asserts is the rationalization effect of bureaucratization on the social action. Rationally organized action is superior to every kind of action. Bureaucracy rationally organizes authority relations. Therefore it is a power instrument. Now again, as observed in other systems, the bureaucratic order becomes an independent power over the individuals with its own rules. (ES, p.987) Among the motivations to obey to the authority and the basis of the domination to continue, it is the sense of duty, especially on the side of administrative cadre, that matters most. The internal mechanism of the bureaucracy functions in much disciplined way. Not only the strict hierarchy but also what feeds that, namely acceptance by the officials of a specific duty of fealty to the purpose of the office matters more in modern bureaucracy. Of course, as mentioned above *these purposes...gain an ideological halo from cultural values such as state, church, community, party or enterprise...* (ES, p.959)

The irreversibility of the bureaucratic administration also results from the needs of mass states and the organization of life bureaucratically.²⁵⁰ *The whole pattern of everyday life is cut to fit this framework*. Bureaucratic expertise, knowledge and specialization re-regulate the life so much that a modern society could no longer function without it. *Wherever the modern specialized official comes to predominate, his power proves practically indestructible since the whole organization of even the most elementary want satisfaction has been tailored to his mode of operation*. (ES, p.1401) From the perspective of the ruled, it is possible neither to dispense with nor to replace it. *It cannot be mastered by improvised replacements from among the governed*. All the specialization, expertise and the control over a system of methodically integrated functions are lacking in the masses so that replacement with something else is impossible. The choice is only that between bureaucracy and dilettantism in the field of

²⁵⁰ Sayer warns us that the translation of the famous image of bureaucracy as an iron cage is unfortunate since 'ein stahlhartes Gehause' means a casing or housing, as hard as steel like the shell on a snail's back in the sense of 'a burden perhaps but something impossible to live without, in either sense of the word. A cage remains an external restraint: unlock the door, and one walks out free. This Gehause is a prison altogether stronger, the armour of modern subjectivity itself.' (Sayer, *op. cit.*, p.144)

administration. If it is totally destroyed, the resulting chaotic situation would be worse for the masses so that elimination of bureaucratic machinery is utopian. (ES, pp. 223-225, 988-989)

In any case, office holding is a vocation with its pre-requirements like a long special training and special examinations and its demands like the entire working capacity of the officials. The office holding as a vocation demands the official to live for its office. The objective application of general rules concerning the office, in other words the formal rationality of internal bureaucratic structure, assures the discipline of the machine. Weber compares the slaves in the history and the means used for their discipline with the officials and the bureaucratic rationality and concludes that *the bureaucratic apparatus functions more assuredly than does legal enslavement of the functionaries*. (ES, p.968) The bureaucrat is a kind of modern slave since *he is chained to his activity in his entire economic and ideological existence*. (ES, p.988). The official neither can emancipate himself nor stop the working of mechanism. He cannot squirm out of the apparatus as he is powerless in the apparatus as much as *a small cog in a ceaselessly moving mechanism*. On the other hand, he cannot stop the machine, as it can be controlled only from the very top. He cannot make decisions for the general aims of the apparatus and his interest lies in the continuance of the apparatus.

Above all, the habit of obedience in human beings is an important guarantor to the public order. The relationship between the bureaucratic machinery and the individual, governed or official, is habitual and blind obedience. Weber emphasizes the settled orientation of man for observing the accustomed rules and regulations so that any upheaval against that machinery would end up with a similar system. The system of files is less vital than the discipline of officialdom. *...the settled orientation of man for observing the accustomed rules and regulations will survive independently of the documents*. This conditioned orientation of obedient adjustment to orders in the subjects as well as in the officials has the power to restore the administrative domination disturbed by the revolts or other catastrophes. (ES, p.988) Additionally, bureaucracy may go on to work smoothly under the new power in the government, even after revolution or occupation due to its peculiarly impersonal character. The objective existence of the apparatus makes it *work for anybody who knows how to gain the control over it*. When the ruler(s) are changed fundamentally- for example, after

occupation- only to change the top officials could be enough for smooth operation of all bureaucratic structure. (ES, pp. 988-989)

Lastly we have to understand ruining effects of bureaucracy and capitalism over humanity. Under the organizational discipline of the factory, the individual worker is considered only like any means of production. He transforms into a mechanical part of the machine by losing his natural rhythm and by being attuned to the functional rhythm of production with his all psycho-physical entity. Yet, it is not only the capitalism responsible from mechanically slaved men. Weber observes the same process in *the bureaucratic state machine* and he calls this *whole process of rationalization*. Weber calls capitalism *inanimate machine* and bureaucracy *animated machine*. They lead to the same outcome and are fed from the same source: *mind objectified*.²⁵¹ To what does Weber refer by objectified minds? I suggest that dominant formal rationality in the life and dominant instrumental rationality in the individuals objectify the minds of people and limit their freedom to choose. Bureaucracy, together with the capitalism, is *busy fabricating the shell of bondage which men will perhaps be forced to inhabit someday, as powerless as the fellahs of ancient Egypt. This might happen if a technically superior administration were to be the ultimate and sole value in the ordering of their affairs and that means: a rational bureaucratic administration with the corresponding welfare benefits*. (ES, pp.1156, 1402) Here the threat is that the means might turn into the ends and the instrumental rationality might become the final end for the modern societies.²⁵²

Weber also questions how we can protect our individual freedom, how we can secure democratic governance at least in limited sense and how we can balance the

²⁵¹ See John O'Neill, 'The disciplinary society: from Weber to Foucault', *The British Journal of Society*, Vol. XXXVII, No.1, March 1986, 42-60

²⁵² Nigel Dodd, *op. cit.*, p.50. Weber warns us that the intellectual side of reason which guides rigorous analysis and thought will be reduced to a demand for technical efficiency; and that this will become valued for its own sake. From a post-modernist approach, Harvey Goldman, in his brilliant book *Politics, Death and the Devil* underlines the professed fears of weakness and impotence that put its stamp on the European discourse in the late 19th century. 'The symptoms weakness seems to appear in deformed social relations and social roles, in overheated and morbid culture and individual creative life, and in the apparent helplessness and drift of politics...The onset of this obsession with weakness and powerlessness has many causes, among them the shaking stable patterns of values and purposes through rapid and unwelcome social change; but once the fear takes hold, it works to prevent the emergence of renewed meaning and purpose...' (p. 1). He evaluates Weber's theory in this context as a call for regeneration and renewal in an attempt to rescue the nation and the meaning of death and work from increasing powerlessness. Weber's implicit concern is with the strengthening and 'empowerment' of the self. The natural self is valueless or unacceptable as given so that its weak parts must be subjected to the stronger, better self, strengthened by service to an ultimate ideal (pp.2,6).

instrumental rationality with substantive rationality and prevent the life to become more and more like a desert? (ES, p.1403) Weber looks for the solution in a charismatic leader, not in people.

V.IV Plebiscitary Democracy

V.IV.1 Danger in Democracy: Masses

For Weber, 'democratic' politics is synonymous with oligarchy since the mass is handicapped by an inherent and crippling disability: it is 'irrational'.²⁵³ *The demos itself, in the sense of a shapeless mass, never 'governs' larger associations, but rather is governed.* (ES, p.985). But why cannot the masses govern? The masses are not like the individuals in politics. According to Weber, the masses are unreliable and irrational. The irrational characteristics imputed by Weber to masses are myopia, homogenization, spontaneity, fitfulness, disorganization, passivity and explosive emotionalism.²⁵⁴ The mass only thinks in short terms and always exposed to direct, purely emotional and irrational influence. These characteristics are direct opposite to 'rational' as perceived by Weber. The masses behave with the *crowd psychology*. The individuals' actions are strongly influenced by the crowd. In the same way, *the behavior of an individual is influenced by his membership in a 'mass' and by the fact that he is aware of being a member.* (ES, p.23) The individuals act and react differently and more emotionally in the crowds or in the masses, comparing to when they are alone.²⁵⁵ *...in the uniform behavior of great masses often only in the case of few individuals, is the subjective behavior, be it rational or irrational, raised to the level of true consciousness.* (BCS, p. 54)

The easier accessibility of all unorganized 'masses' to emotional influences makes them politically exploitable. (ES, p.921) They may follow someone imprudently. In fact, masses are likely to demand a leader and to follow a charismatic leader blindly. (ES, p.227) Under a charismatic authority, they actually may behave according to their

²⁵³ See Peter Baehr, 'The 'masses' in Weber's political sociology', *Economy and Society*, Vol. 19, No.2, May 1990, 242-265, p.244. Baehr argues that Weber's view of the irrational masses was a major reason for this rejection of extensive democratization and participatory democracy.

²⁵⁴ See Baehr, *op. cit.*, pp.244-247

²⁵⁵ As Breiner states, Weber denies to collective mass action the status of social action. Actions oriented to conventions, taken by an assembled collectivity, oriented toward collectively determining the rules, actions collectively held for political protests are not susceptible sociological understanding. (Breiner, *op. cit.*, p. 34)

impulses like animals. (ES, p.17)²⁵⁶ Although, the mechanical and instinctive factors play a decisive role in many stages of human development, *this is particularly true of ...many aspects of charisma, which contain the seeds of certain types of psychic 'contagion' and thus give rise to new social developments.* (ES, p.17) Therefore the masses are, and may be, politically manipulated, in negative or positive way.²⁵⁷ Baehr reminds us that corresponding to the masses' irrationality, and feeding on it, is the irrationality of charisma itself; this is the other side of the equation. 'Unable to engage in political life as social actors, as an involved and reflective public equipped with the wit and the means to take a significant role in shaping and deciding their own destinies, the masses alienates their will to the Caesarist leader...who rules in their place.'²⁵⁸

Above all, it seems that the main problem relating to masses is their substantive demands and highly emotional understanding of justice, which in turn may entail a number of formal irrationalities in the life-spheres. (ES, p.813) The formal rationality of spheres functions in three ways, in relation ordinary people and masses. First, as system rationality, they dictate themselves over the individuals and their lives. In this sense, it is only possible to talk about formal freedom of choice in many spheres, not more. Additionally, it is impossible for the individuals to act against the formal rationality, or possible only at the expense of self-destruction. In this sense, the formal rationality forces individuals to be instrumentally rational. Secondly, the formal rationality of the spheres (especially of the legal sphere) refers to a kind of technical rationality in a closed system with its own language and coding, which requires special expertise to comprehend.²⁵⁹ In this sense, the formal rationality has a function of isolation of ordinary people. Ordinary people hardly understand the sphere's rationality

²⁵⁶ *Traditional behavior and especially charismatic behavior often carry the seeds of psychic contagion and thereby act as transmission belts for many evolutionary stimuli of the social process. Such types of behaviour are closely related to phenomena that can be understood either solely by in biological terms or are subject to incomplete interpretation in terms of subjective motives, fusing almost imperceptibly into the biological.* (BCS, p. 48)

²⁵⁷ It also can be observed in Weber's account of individual leadership. In Bethaam's words: 'The importance of the individual leader to Weber lay not only in what he could achieve historically, in his empirical exploits, but also in the intrinsic value which lay in the individual as opposed to collective action. ...Only an individual could perform 'great' deeds, not a collective. The 'mass' for Weber, as an undifferentiated collective, had a largely negative significance. While being an inescapable feature of politics its only useful role lays in providing an ordered response to a leader's initiative' (p. 112).

²⁵⁸ Baehr, *op. cit.*, pp. 247, 249

²⁵⁹ While science governs thought, technology becomes decisive for the way of life of the masses. 'Political problems are increasingly solved by applying means-ends technical mastery...Within the capitalist economy, technical efficiency means minimizing costs in order to maximize profits...in the sphere of knowledge, technical expertise dictates that specialized knowledge increasingly determines life chances...Scientific training creates an intellectual aristocracy.' Ralph Schroeder, 'Disenchantment and its discontents: Weberian perspectives on science and technology', *The Sociological Review*, Vol.43, No.3, 1995, p.235

and therefore may have no influence on the decisions taken within the sphere. Consequently, the formal rationality has a weakening effect on democracy, concerning the spheres of politics and law.

The third function of formal rationality is *to restrain irrational mass emotions for the purpose of opening up individual opportunities and liberating capacities*. (ES, p.813) Formal rationality at least provide the minimum conditions for the individual freedom, although formally. The masses who are not satisfied by formal freedom and equality may defeat the formal rationality for more substantive justice. However, Weber contends, the results of such mass revolution would not be substantively valuable. It would increase the instances of formal irrationality in the system but would not be able to establish a smoothly functioning substantive rationality.²⁶⁰ A kind of modern kadi-justice might occur instead. (ES, p.980) For Weber, neither socialism may accomplish the substantive equality, nor is bureaucratic domination breakable since the actions pursued for self-interest and specifically power-interests are in the nature of human beings.

What Weber proposes is not the total demolition of the formal rationality but the balance of formal rationality with substantive rationality by using the emotional devotion of the masses to a charismatic leader. In the age of modernity, both politics and the individuals are under the threat of losing valuable ends and of the freedom to choose substantively rational aims; creativity, individuality, and values are oppressed in the iron cage of formal rationality. As Giddens also maintains ‘...there is a tragic antinomy between the historically closely related values of equality and leveling on the one hand, and the individual freedom and spontaneity on the other. The growth of mass politics necessarily limits the degree to which the latter values can be realized in the contemporary social order. Thus Weber saw plebiscitary democracy as the only mode of partially releasing modern man from the iron cage of the bureaucratized division of labor.’²⁶¹

²⁶⁰ ‘Political democracy, then, for Weber, followed from the formal equality presupposed by the institutions of modern society, and was necessary if the masses were to be involved in an orderly way in the political process rather than by spasmodic and ‘irrational’ interventions.’ (Bethaam, *op. cit.*, p.105)

²⁶¹ A. Giddens, *Politics, Sociology and Social Theory*, p.53

What we need is a leader who will drive the masses in positive way. *All extraordinary needs, i.e., those which transcend the sphere of everyday economic routines, have always been satisfied in an entirely heterogeneous manner: on a charismatic basis.* (ES, p.1111)²⁶² Taken into account of the critiques of Weber against the parliaments, the political parties and the elections in democratic states and his mistrust to the masses, the only option seems to be a strong political leader in front of the ever-growing bureaucracy. Any way, *political action is always determined by the principle of small numbers'... In mass states, this caesarist element is ineradicable.* And it should be so.²⁶³ (ES, p.1414) As to recall, the charisma is the power Weber contrasts with the rationality and bureaucracy- charisma is in radical contrast to bureaucratic organization, very opposite to it. (ES, pp.1112-1113, 1116)²⁶⁴ Politics may function properly with a charismatic leader who is conscious of the necessity to balance the overwhelming formal rationality of capitalism and bureaucracy.²⁶⁵ Especially in politics, this is something vital.

V.IV.2 Plebiscitary Democracy, Re-regulated

Weber re-regulates the functions of the democratic institutions according to his plebiscitarian model. In his article called 'Parliament and Government in a Reconstructed Germany', he explains the advantages of plebiscitary democracy by contrasting it with the political conditions of Bismarck's period and of German politics during the World War I. According to Weber, Bismarck's political legacy was a completely powerless parliament, highly bureaucratic government, and politically

²⁶² In parallel, Shellef argues that charismatic domination inherently involves change- 'the charismatic leader setting out what Hans Kelsen would call a new grundnorm.'. Shellef, *op.cit.*, p.46.

²⁶³ Bethaam compares Weber and Schumpeter in the context of elitism. 'In the case of Weber and Schumpeter alike, the apparently tough realism with which they assert the inevitability of oligarchy conceals a prescriptive premise. Their view that initiatives in politics stem from a few at top is colored by their fear of what will happen if they do not. The law of the small number, the fictional character of the popular will, has to be asserted as the truth, so that it should become if possible more firmly established. Underlying this ambiguous position can be discerned the ambivalent attitude towards the 'mass' that is typical of most elite theorists. On the one hand the mass is seen as a passive object, incapable of any independent action and initiative, easily led by the nose. On the other hand, it is a disturbing phenomenon, potentially dangerous, needing to be kept subject to order. ...This double image of the mass produced in the elite theorists the simultaneous assertion of two mutually inconsistent principles: on the one hand a law, 'oligarchy is inevitable'; on the other a principle, 'a few heads are sounder' (p.111).

²⁶⁴ *In radical contrast to bureaucratic organization, charisma knows no formal and regulated appointment or dismissal, no career, advancement or salary, no supervisory or appeals body, no local purely technical jurisdiction, and no permanent institutions in the manner of bureaucratic agencies, which are independent of incumbents and their personal charisma.* (ES 1112)

²⁶⁵ According to Giddens, Weber's sociology juxtaposes the rational (bureaucracy) and the irrational (charisma) in the modern political system. Anthony Giddens, *Politics and Sociology in the Thought of Max Weber*, London : Macmillan, 1972, p.52

unsophisticated nation. What he proposes for the interests of German nation was a political leader coming up from the midst of a powerful parliament and a bureaucracy controlled by the parliament and educated public opinion.

First, let's begin with the role of parliament. In Weberian model, although the most powerful figure is the leader, the parliament also should be very active and competent in the system. Weber considers the parliament as assurance of the modern domination at minimum. *After all, a certain minimum of consent on the part of the ruled, at least of the socially important strata, is a pre-condition of the durability of every, even the best organized, domination. Parliaments are today the means of manifesting this minimum consent.* (ES, pp.1407-1408) Yet, this is not enough. The parliament's role is to be shaped in contrast to the bureaucracy since bureaucratization of politics is perceived, by Weber, as the most important threat to the humanity in general, and to German nation in specific.²⁶⁶

However, the role of parliament should not be restricted to negative politics. If the parliamentary competences cover only discussions of the laws before their enactment, rejection of appropriations or other legislations or introduction of unenforceable motions, the parliament will confront the administrative chiefs as if it were a hostile power. *'As such it will be given only the indispensable minimum of information and will be considered a mere drag-chain, an assembly of impotent fault-finders and know-it-alls. In turn, the bureaucracy will then easily appear to parliament and its voters as a caste of careerists and henchmen who subject the people to their annoying and largely superfluous activities.* (ES, p.1408) What Weber refers by positive participation in the direction of political affairs is a parliament *which supervises the administration by continuously sharing its work.* (ES, p.1416) The administrative heads or leaders are not to be either directly selected among the parliamentarians or elected by them. It is enough that they are subject to the parliamentary vote of confidence. Additionally, there should be parliamentary accountability of the leaders and parliamentary control of the administration.²⁶⁷

²⁶⁶ Giddens, *Politics, Sociology, and Social Theory*, p.22

²⁶⁷ *This is what is meant by the Volkstaat [state of the people], irrespective of whether the term is appropriate or not; by contrast, a parliament of the ruled which can only resort to negative politics vis-a-vis a dominant bureaucracy represents a version of the Obrigkeitsstaat [state of the authorities].* (ES 1408)

Above all, the most important parliamentary function in the model is to produce politically talented leaders. However, only with the functions above listed, a parliament may turn into a recruiting ground for political leaders. In this context, Weber puts the emphasis on the competitive nature of parliamentary politics involving a struggle for personal power as well as a struggle over substantive issues. Only in a system, which the leaders of political parties with clear-cut majority are entrusted the highest executive position, parties support for their own material interests the talented and qualified people in this struggle and only then men with political temperament and talent subject themselves to political struggle. (ES, p.1409) In such a system, party organization will be accordingly. The party interests will compel every party member to subordinate to qualified members, *as soon as these prove that they can win the confidence of the masses.* (ES, p.1459) *The broad mass of deputies functions only as a following for the leader or the few leaders who form the government, and it blindly follows them as long as they are successful. This is the way it should be.* (ES, p.1414)

Here Weber criticizes German system that had compelled deputies to abandon their political positions in their parties and in the parliament in order to become ministers and that had composed the executive from the bureaucrats. (ES, pp.1409-1413) A political leader proper cannot come from civil service or a weak parliament since they do not provide sufficient conditions for training of a political leader. As to the former, competition for bureaucratic advancement does not lead to the development of political autonomy. As to the latter, *only a working, not a merely speech-making parliament can provide the ground for the growth and selective ascent of genuine leaders, not merely demagogic talents.* Additionally, if the parliament is politically weak and the link between party politics and government positions is broken, then the politics would offer nothing to men with leadership qualities. The talents will struggle in the politics only if they know that in the case of victory they will have the powers and the responsibilities of government. Otherwise, they would be lost to the service of capitalist interests. (ES, pp.1413-1414, 1416, 1419)

Parliament must be completely reorganized in order to produce responsible leaders who are neither mere demagogues nor dilettantes. (ES, p.1427-1428) Of course, demagogic speeches are influential instruments in the age of propaganda. *Today political (and military) leaders no longer wield the sword but resort to quite prosaic*

sound waves and ink drops: written and spoken words. (ES, p.1419) Yet, politician needs knowledge and experience for the strength of the words and for not falling in position of a dilettante in front of the bureaucracy. This is also acquired in the parliament *but only through steady and strenuous work in a parliamentary career...Only such intensive training, through which the politician must pass in the committees of a powerful working parliament, turns such an assembly into a recruiting ground not for mere demagogues but for positively participating politicians.* (ES, p.1420) That's why parliaments should not only discuss the great issues but also influence them. It determines both the level of the parliament and the quality of politicians. (ES, p.1392)

V.IV.3 Masses in Plebiscitary Democracy

In his article called *Parliament and Government in a Reconstructed Germany*, his reasons to reject directly popular election of leader are very remarkable.²⁶⁸ It is directly related to Weber's mistrust in masses. The political leader may be a mere demagogue and only this, if the masses are let to be active in the politics and *no longer be treated as purely passive objects of the administration.* (ES, p.1450) This is the alternative to rise of political leader from parliamentary politics. The plebiscitary leadership refers to active mass democratization, which means that political leader *gains the trust and the faith of the masses in him and his power with the means of mass demagogy.* According to Weber, every democracy tends toward such caesarist mode of selection. (ES, p.1451)

In that article, Weber does not support the pure plebiscitary system. Here again his mistrust to ordinary people play a significant role in addition to many technical disadvantages of the plebiscite as a means of election as well as of legislation.²⁶⁹ One of

²⁶⁸ There occurred a change in Weber's ideas about the parliamentary system and the political leadership in the latter years of the war. 'In Deutschlands künftige Staatsform ('The Future Form of the German State') published towards the end of 1918, Weber argued that the president of the future German republic should be plebiscitary, elected by the mass of the population and not through parliament- a clause which eventually, partly under his influence, became written into the Weimer Constitution.' Giddens, *Politics, Sociology, and Social Theory*, p.27

²⁶⁹ The plebiscite only answers 'Yes' or 'No'. The plebiscite does not know the compromise so it would obstruct the passing of the laws that result from a compromise between conflicting interests. *Moreover, the plebiscitary principles weaken the autonomous role of the party leader and the responsibility of the civil servants. A disavowal of the leading officials through a plebiscite which rejects their proposals does not and cannot enforce their resignation, as does a vote of no-confidence in parliamentary states, for the negative vote does not identify its reasons and does not oblige the negatively voting mass, as it does a parliamentary majority voting against a government, to replace the disavowed officials with its own responsible leaders.* Concerning the supervision of bureaucracy, it is needed an independent control organ such as parliament that have the power to demand publicly information from the officials

its most advocated advantages comparing to the parliamentary system, which is the active political participation of the citizens is questioned by Weber. First, dozens of times in a few month citizens are expected to decide about laws through compulsory referendum. Additionally, they have to answer 'yes' or 'no' by excluding any chance of compromise. Therefore, a referendum would result primarily *in a considerable strengthening of all irrational powers of inertia*. (ES, p.1128) Second, citizens have to vote, through compulsory election, for long lists of candidates who are completely unknown to them. It is doubtful whether all those have any educative effect on citizens. Additionally, democratic election of the officials is very problematic in many respects. Citizens may not judge the technical qualifications of the candidates for the offices. However, Weber refutes his own argument just after making this statement. He writes that the monarch does not have technical qualifications to assess the officials as well and *it is certainly not necessary to be a shoemaker in order to know whether a shoe fits*. But Weber had claimed in another passage that the citizens could assess this only after wearing the shoe, i.e. after the candidate has worked in the office. Not only lack of technical knowledge but also *erroneous identification of those responsible for abuses* among the popularly elected officials is a great probability whereas in the parliamentary system the party leaders and the parliament are responsible from the officials' performance. There are again some emotional factors which may hinder the proper functioning of the plebiscitary system. The frequent referendums may cause a growing apathy towards the politics among the citizens but also the masses may be manipulated for some interests, especially when technically complicated laws are concerned. (ES, pp.1456-1457)

Yet the main problem as to the plebiscite is the selection of the leader on purely emotional basis, meaning, merely according to demagogic qualities in negative sense of the word. (ES, p.1459) The plebiscite does not mean more democracy by the direct participation of the masses. *For it is not the politically passive 'mass' that produces the leader from its midst, but the political leader recruits his following and wins the mass through 'demagogy'*. (ES, p.1457) Weber claims that this is true even for the most democratic forms of the state. There is no exception to that since the basis of

and to call them to account. *The specific means of purely plebiscitary democracy: direct popular elections and referenda, and even more so the instrument of the recall, are completely unsuitable in the mass state for the selection of trained officials and for the critique of their performance. ES 1455*

the argument lays in the assumptions about the human nature. Weber states this problem quite plainly: *the political danger of mass democracy for the polity lies in the possibility that emotional elements will predominate in politics.* (ES, p.1459) The irrationality of the masses does not depend on their social status. *The 'mass' as such (irrespective of the social strata which it comprises in any given case) thinks only in short-run terms. For it is, as every experience teaches, always exposed to direct, purely emotional and irrational influence.* (ES, p.1459-1460) The purely plebiscitary system, without political parties and parliament, is the worst for *completely irrational...is the unorganized mass.* (ES, p.1460)

In Weber's understanding of mass democracy, the masses are passive groups in politics and they should stay so for their interests. They, time to time passively, use their vote in the elections. The only way to involve masses in politics is the influence of public opinion over the administration. From Kant to Weber, and to Habermas public opinion keeps its place in the political thought. However public opinion is expected to be mature and sophisticated enough politically to have a positive role in the politics. It may be claimed that it is in a way rationalization process of public opinion. The nation may be educated to develop habits of independent political thinking.²⁷⁰ The nation gets accustomed to *sharing, through its elected representatives, in the determination of its political affairs. Such participation, after all, is the precondition for developing political judgment.* (ES, pp.1391-1392) Parliamentary control over administration and the committee proceedings which are followed by the press and by the readers, accustom the citizens to continuous observation of the administration of their affairs.

²⁷⁰ Breiner misses that point and ignores the emphasis of Weber on public discussion (Breiner, p. 164). In the same way, Wellen asserts that Weber had to ultimately side with positivism as a natural consequence of his assumption that in modern society "political will" can no longer be enlightened. He criticizes Weber not to see that one merely pre-empts 'enlightenment' in so far as one assumes the irredeemable irrationality of public life. Wellen continues, 'one must then favour the technocratic model of decision, or democracy hijacked by elites, by default- that is, as the only available model of political rationalization (even if it is a self-defeating one) for modern societies' (Wellen, p.97). I disagree to Wellen. It was a very deliberate choice of him not to take sides with the Enlightenment. Under modern conditions, the life is disenchanted not only in religious or traditional terms but also in terms of ideal concepts of the Enlightenment. On the other hand, I do not agree to optimistic assessments of Weber, such as by Sung Ho Kim, in terms of civil society. Kim claims, 'Weber holds that insofar as responsiveness and accountability to the public opinion are concerned, bureaucracy can be made more democratic, thus satisfying the procedural requirements for democracy. The problem is, as a result of bureaucratic rule, public opinion itself has degenerated into merely "communal action...born of irrational sentiments.'" 'Max Weber's Politics of Civil Society', *Political Theory*, Vol.28, No.2, 2000, p.215. As elaborated above in details, Weber accepts neither that application of direct democracy tools may be a cure to bureaucratic domination and nor that public opinion may be freely and maturely formed since the masses are vulnerable to manipulation of their emotions into irrational directions.

Weber emphasizes that *only the committees of a powerful parliament can be the vehicle for exercising this wholesome pedagogic influence.* (ES, pp.1456, 1419)

Still, Weber puts his reserve about the masses even in the context of public opinion: Public opinion may be manipulated easily by the politicians, the leaders or some other interest groups. Weber states: *'The demos itself, in the sense of a shapeless mass, never 'governs' larger associations, but rather is governed. What changes is only the way in which the executive leaders are selected and the measure of influence which the demos, or better, which social circles from its midst are able to exert upon the content and the direction of administrative activities by means of "public opinion".'* (ES, p.985) Additionally, the public opinion is again under the threat of mass irrationality and emotionality which may be exploited by the some people. In this way any effective public opinion would be dangerous for the nation. *...any intensive influence on the administration by so-called 'public opinion'- that is, concerted action born of irrational 'sentiments' and usually staged or directed by party bosses or the press- thwarts the rational course of justice ...*(ES , p.980)

V.V Ethics of Politics

V.V.1 Kant and Weber

The ethics of Weber is closely linked to his Kantian epistemology based on the strict division between is and ought and to his ideal type of value-rational action. By his distinction of the empirical facts from values²⁷¹, Weber comes very close to Kant. However he diverges from Kant who finds the source of the will in the pure reason. It is fundamental to Weber's sociological approach that the value choices that are available to us are rationally irreconcilable, meaning that certain kinds of value disputes are not

²⁷¹ Turner finds the influence of neo-Kantian approach, rather than Kantian approach, on desicionism of Weber. 'The idea that many intellectual disputes were in fact rationally undecidable "conflicts of systems" or conflicts of fundamental presuppositions is the primary legacy of neo-Kantianism'(Turner&Factor, *MW: The lawyer as Social Thinker*, p. 15). Similarly, Martin Barker alleges that Weber's stance in favor of value freedom comes directly out of his version of neo-Kantianism. 'Kant as a Problem for Weber', *British Journal of Sociology*, vol.31, no.2, June 1980, pp.224- 245. p. 224. Neo-Kantian epistemological heritage for Weber was that the construction of all scientific theories and concepts in order to explain and understand the meaning of empirical reality start with some basic presuppositions which themselves cannot be proved true and thereby relative. In that sense, even Kantianism becomes a construct (see. p. 126). Weber is Kantian in the sense that humans experience and understand the infinite reality only through certain categories or presuppositions that humans, themselves impose on that reality. Yet, Weber is neo-Kantian since these categories are culturally constructed and thus culturally contingent for him, while these are inherent to human thought or reason and thus universal and static for Kant. Stephen M.Feldman, 'An interpretation of Max Weber's theory of law', *Law and Social Inquiry*, 205-248, p.211

open to rational resolution.²⁷² Whether this difference between Kant and Weber is radical or not, depends on the conception of value-rationality in Weber's theory. Thus one of the questions asked in the first pages of this work comes back: how rational is value-rationality?

For Weber value-rational actions are rational since and when they result from fully conscious and deliberate choices. Definition of value-rational action (*determined by a conscious belief in the values for its own sake of some ethical, aesthetic, religious or other form of behavior, independently of its prospects of success*) is very Kantian. As the categorical imperative in Kantian theory, value rationality in Weber's theory is not condition-contingent. It is based on a self-conscious belief which does not change according to context or success expectations. This mechanism creates a static core. A result ulterior to the choice is not taken into account. Weber states that value rational action is motivated by *unconditional demands*. Actually, *the meaning of the conduct does not lie in the achievement of some goal ulterior to it, but in engaging in the specific type of behavior for its own sake*. (BCS, p.60) These explanations may be used to define Kantian categorical imperative without any modification²⁷³.

Nevertheless, if there are no rational grounds for value-choices, the value-rationality as ideal type cannot be fully rational. Kronman claims that a person's knowledge or beliefs are only sometimes a necessary condition of his values but being committed to a value is not equivalent to having knowledge of a certain sort. 'According to Weber, a person chooses his values; whatever his knowledge or beliefs may be, an additional and distinct act of choice is always necessary to make the object of his choice...On this view, every value owes its existence to the exercise of a power fundamentally different from cognition or understanding – the frightening power we all possess to affirm or disaffirm even those things we understand most clearly. Weber uses its traditional name to describe this power: he calls it the will.'²⁷⁴

²⁷² Turner&Factor, *MW: The Lawyer as Social Thinker*, p.59

²⁷³ M. Albrow, 'The Application of the Weberian Concept of Rationalization', pp. 167-169. Weber's two types of actions are 'rational' because they are derived directly from Kantian idea of reason. 'They are almost direct parallels to the hypothetical and categorical imperatives.... Following rules was rational in itself and needed no explanation' (p. 169).

²⁷⁴ Kronmann, *op. cit.*, pp. 19-20

Weber uses the term 'belief' instead of the 'will' in many contexts as the source of value-rationality. Since this belief is conscious and deliberate it should stem from an act to choose what to believe. I think, this act of choice is what Kronmann calls the will in Weber's theory. Still, a kind of will distinct from the power of rational insight is not very Kantian. Kant finds the free will in pure reason so that free will is purely rational. Or the will should find its source and reasons in the pure reason only then it may become free. Weber's free will is not purely rational since there is no way to make a rational choice among the moral values. In short, 'Weber agrees with Kant that there is radical disjuncture between is and ought based on a categorical split between the empirical world of phenomenon and the will...Thus there is no rational way to ground norms based on empirical knowledge. ..But Weber rejects Kant's argument that reason can provide us with a universal objective law of will...'²⁷⁵

For Weber, decisions may be based on conscious understanding and full knowledge but at the end the decision cannot be demonstrated rationally the best moral decision, which Kant rejects. Even at that point, however, the distance between Weber and Kant may not be very long. For example, Schluchter states that the success of purpose rational action depends on our nomological knowledge. Its consequences are affective on our happiness or well-being, in a way which could remind one the utilitarianism. As the science and technology progress 'the rationality of objective correctness' replaces the subjective rationality concerning instrumental-rationality. Value-rational action, however, belongs to evaluative sphere, not to cognitive sphere. In analogy to Kant, 'the objects of the cognitive sphere are given to us, whereas those of the evaluative sphere are posited; the objective reality of the cognitive sphere can be proved, whereas that of the evaluative sphere can only be defended.'²⁷⁶

Although the origin of choices could be the will to believe in some values, which materializes as a conscious belief, it does not tell us anything about the relation between the will and rationality in Weber's theory. To say that values cannot be ranked or compared rationally does not mean for Weber that a value-choice is irrational. Value-choices are subjectively rational as much as they are consciously made. They become even more rational when someone becomes more aware and informed about the

²⁷⁵ Breiner, *op. cit.*, p. 62

²⁷⁶ Schluchter, *Paradoxes of Modernity*, pp. 65-66

meaning, the origins, conceptual and theoretical framework of her choice. Otherwise Weber would not speak about value-rational action. Our rational relation to norms may contain an intellectual comprehension of what the norm requires and forbids, of how it functions generally and the use of a norm as an evaluative standard.²⁷⁷ ‘Rationality may help to gain the fullest possible knowledge of the implications of holding the values they do, to provide ways of calculating the probable consequences of possible actions, to show the necessity of choice and that ultimate values can often be realized at the expense of one another.’²⁷⁸ I think that this kind of rational understanding may influence the act of choice although it may not determine the choice. The source of choice may be the emotions, the faith and the will but consciousness about the value-choice and their consequences could be heightened by reason.²⁷⁹ This kind of awareness may even change the orientations at the end. ‘Weber argues, a social scientific clarification of meaning and consequences of political action will serve “moral forces”. What he means by this is that it will inform responsible political agency, that is, it will help mold an agent who can exercise proper judgment in combining fundamental convictions and commitments with responsibility for the consequences of deploying political means to their realization’²⁸⁰

Weber urges us several times that value-rational action is a very rare case in empirical world. It means that the actions that may be linked to any value are rarely the product of free choice in Kantian sense. By taking into account the warning of Weber about his ideal types (never found in their purely forms in empirical world), I claim that hybrid forms of value-rationality may explain more about Weber’s ethics. Value-rationality in its pure sense refers to an absolute belief which does not change according to the conditions. When the science or rational analysis shows the actor the meaning of his choice with its full implications under the existing conditions as explained above, two consequences may arise. First, the actor may understand what it means to act according to his value-choice but this understanding does not alter his choice. Only rationality of choice in the sense of consciousness and comprehension increases.

²⁷⁷ Kronman, *op. cit.*, pp. 17-18

²⁷⁸ Wellen, *op. cit.*, p. 92

²⁷⁹ Habermas argues that Weber’s mistrust of the argumentative capacity of practical reason is wholly un-Kantian. However, what Weber rejects does not seem to be the rational argumentation but rather the lack of a rational standard to rank one argument superior to the other. In this he both accepts and rejects ethical cognitivism (Habermas, *op. cit.*, p. 154).

²⁸⁰ Breiner, *op. cit.*, pp. 6-7. See also pp. 68- 71 for how science may help to clarify value-choices.

Secondly, he may be affected by the cognitive factors and may make amendments in his deliberate planning for realizing the value. Regarding the latter, it may not be called purely value-rational action any more, since the belief is not as absolute as in the beginning. As Schluchter claims, what is decisive in unconditional ethic is not that one could not foresee the consequences of a given action, but that one ought not to draw upon foresight to justify action.²⁸¹

Likewise, value-rationality in its hybrid form may approach to emotional action. In this case, the consciousness loses its power and the elements of faith and conviction without reasoning become dominant in the action. Most prominent example of this hybrid form is the masses that follow the values laid down by a charismatic leader. Ordinary people are more inclined to such irrational emotionality than value-rationality. To Weber, they either choose to behave instrumentally rational under the influence of the dominant formal rationality of modernity or to follow some values in an emotional irrationality under the influence of charismatic powers. In none of the cases, the choice is truly free.²⁸² It is either emotional surrender or subjection to system rationality, never or rarely rational persuasion.

Value-rational action is the basis of Weber's ethics and a condition for individual freedom. Ethics as the condition of human freedom is the common point between Kant and Weber. For both of them, freedom means the ability of individual to succeed to become independent from natural determination of empirical world. *The freer...the action, that is the less it is characterized as a natural occurrence, the more the concept of the personality, becomes relevant whose essence is to be found in a constant and intrinsic relation to certain ultimate values and meanings of life which are forged into purposes and thereby translated into rational-teleological action.* (GAW, p.132, RK p. 192)²⁸³ Additionally, Weber defines the typical moral situation as follows: *ever single important action and ultimately life as a whole, if it is not to be permitted to run on as a natural event, but is instead to be consciously guided, is a series of ultimate*

²⁸¹ Schluchter, *Paradoxes of Modernity*, p.55

²⁸² See ES, pp.1116-1117 and ES 245

²⁸³ *Gesammelte Aufsätze zur Wissenschaftslehre (GAW)*, Ed. by Johannes Winckelmann, 5th ed., Tübingen; JCB Mohr 1982 ; Roscher and Knies: *the logical problems of historical economics*, trans. By Guy Oakes, New York, Free Press, 1975; quotation in Breiner, p.64

*decisions through which the soul- as in Plato- chooses its own fate, that is, the meaning of its activity and its existence. (MEN in Methodology, p.18)*²⁸⁴

Weber finds the meaning of life and the dignity of personality in the value-choices, despite the fact that the value-choices may not be proved to be correct or superior to each other scientifically or rationally. To choose subjectively some ultimate values which will give direction to our actions and our lives is the only way for us if we want to give our life a meaning as something objectively valuable. To live a meaningful and free life²⁸⁵ is only possible by following an ethic based on some ultimate values. Value-rational action in the context of the personality becomes more than a value-action. As Habermas states, the rationality of values is measured by whether they can ground a mode of life based on principles. Only values that can be abstracted and generalized into principles, internalized largely as formal principles, and applied

²⁸⁴ Max Weber, *The Meaning of Ethical Neutrality in Sociology and Economics (MEN)*

²⁸⁵ Habermas calls two main critiques of Weber of the present age: a loss of freedom and a loss of meaning. Loss of meaning arises from the differentiation of independent cultural value spheres, (so from disenchantment) other from the growing autonomy of purposive-rational action. the differentiation of independent cultural value spheres makes possible a rationalization of symbol systems under one (at a time) abstract standard value (such as truth, normative rightness, beauty, authenticity) on the other hand the meaning-giving unity of metaphysical-religious worldviews thereby falls apart. A competition arises among the autonomous value spheres can no longer be settled from the subordinate standpoint of a divine or cosmological world-order. Of course, 'polytheism' is not a modern phenomenon. But now the umbrella of religious or metaphysical worldviews which imparts a unitary sense is missing (pp. 243-246). Additionally, Weber argues that, 'in the light of the rational inner logics of the modern orders of life, ethical unification of the world in the name of a secularized faith has become just as impracticable as theoretical unification of the world in the name of science' (p. 246). This is a "new polytheism" in the meaninglessness of the rationalized world: 'reason splits itself up into a plurality of value spheres and destroys its own universality' (p. 247). This 'loss of meaning' thesis is directly linked to the ethics that Weber discusses in the context of science and politics since it is "an existential challenge to the individual to establish the unity which can no longer be established in the orders of society in the privacy of his own biography' (p. 247). However it should be completed by the 'loss of freedom' thesis. The growing independence of subsystems of purposive-rational action restricts into great extent the free choice of individual over his own actions and over his own ends. The formal rationality of the systems forces individuals become more and more instrumentally rational. In this sense, the ethics of vocation seems to be the only way to escape from the iron-cage of instrumental rationality, by taking the dedication to the vocation as an independent value. Actually Habermas rejects Weber's loss of meaning and freedom thesis. He claims that 'the unity of rationality in the multiplicity of value spheres rationalized according to their inner logics is secured precisely at the formal level of the argumentative redemption of validity claims.' What he suggest is a new kind of formal rationality (as I perceive it in this thesis) which is called procedural rationality and which captures the internal connections between *forms* of speech acts and shows wherein the unity of argumentation consists after all substantial concepts of reason have been critically dissolved (pp. 248-249). Austin Harrington, 'Value-Spheres or 'Validity-Spheres'? Weber, Habermas and Modernity', p. 87, states, for Habermas Weber's analyses of modernity demonstrate not the whole disintegration of social reason but, on the contrary, its *differentiation* into at once *distinctive yet interdependent* spheres. Someone who adopts a postmodernist evaluation of Weber would reject Habermas claim by arguing that this would create or make explicit just one more formal rationality dominant in one more life order which is language. For example, John O'Neill compares the conceptions of the discipline by Foucault and Weber and states many parallel conclusions despite of their different methodologies. Under the current conditions, he warns, internalization of the discipline may be led, not only in the workplaces, the bureaucracy, prisons or hospitals but through schools, media and even entertainment at the levels of 'manual, mental and emotional education. 'The disciplinary society: from Weber to Foucault', *The British Journal of Society*, Vol. XXXVII, No.1, 42-60

procedurally, have so intensive a power to orient action that they can systematically penetrate all spheres of life and bring an entire biography.²⁸⁶ Weber states:

It is true that we regard as objectively valuable those innermost elements of the "personality," those highest and most ultimate value-judgments which determine our conduct and give meaning and significance to our life. We can indeed espouse these values only when they appear to us as valid, as derived from our highest values and when they are developed in the struggle against the difficulties which life presents. Certainly, the dignity of the "personality" lies in the fact that for it there exist values about which it organizes its life;--even if these values are in certain cases concentrated exclusively within the sphere of the person's "individuality," then "self-realization" in those interests for which it claims validity as values, is the idea with respect to which its whole existence is oriented.(OSS, p.55)²⁸⁷

The problem occurs at the point where Kant and Weber approaches deviate: in Weber's theory, there are no rational means to rank conflicting value choices. Deliberation about the choice is assumed to occur within the solitude of the individual "soul" seeking not to be overwhelmed by habituation to routine. In the absence of the Kantian imperatives or of any other standard, an appeal to conscience does not yield any substantive decision.²⁸⁸ Individuals should recognize the potential conflicts between choices and make 'responsible decisions' between fully understood alternatives--although there are no rational grounds for choosing such a life.²⁸⁹ Therefore, our freedom and autonomy inhere not only in choosing ultimate values but also in taking responsibility for the consequences of realizing these choices. 'In other words, we have dignity as persons who are the source of their own choices and actions only because we are able to posit certain values as objective and struggle for them in the context of conflicting value spheres.'²⁹⁰

In Weber's theory, for a value to be valid, it is to be posited in the empirical world. Breiner's argument is that the scientific clarification of action regarding its

²⁸⁶ Habermas, *op. cit.*, pp. 171-172. Harrington argues that such an interpretation contradicts with Weber's refusal to take a normative stand in relation to values (pp.88-89).

²⁸⁷ Max Weber, *Objectivity in Social Science (OSS)*.

²⁸⁸ Breiner, *op. cit.*, pp.75-76

²⁸⁹ Turner & Factor, *op. cit.*, pp. 59-60

²⁹⁰ Breiner, *op. cit.*, pp. 62, 66-67

value-rational and instrumental rational aspects is not only a preparation for autonomous individual choice but also a preparation to engage in a struggle to realize that choice. The struggle for the chosen value is the second necessary step to validate a value –choice. The most proper struggle area for the value is the political sphere in which all ultimate cultural values are fought over. ‘Social scientific criticism of politics therefore consists of understanding the prospects for success in realizing one’s ultimate values within the logic of power, not against it.’²⁹¹

Kant and Weber agree to the existence of a link between the world of fact and world of ideals. For Weber, freedom from iron-cage means freedom from instrumental rationality and formal rationality and this is possible only by value-choices. In Wellen’s words, to be free is to live in a rationally conscious way without internally or externally sacrificing that autonomy to one’s socially contingent situation. This is very formal definition of ‘freedom’ and comes very near to Kant’s definition. Yet, it creates a contradiction since one has to take into account especially these contingent conditions for the success of his choices.²⁹² Kant states, reason will not follow the order of things presented by experience, but, with perfect spontaneity, rearranges them according to ideas, with which it compels empirical conditions to agree. However in Kant, causality of the practical freedom requires a capability to exclude the phenomenal causes in determination of our will, a capability of producing effects independently of and even in opposition to the power of natural causes and a capability of spontaneously originating a series of events.²⁹³

Weber largely disagrees to Kant in this respect. If we want to succeed to compel empirical conditions to agree to our values, we have to take into account empirical world in determination of our will and action. Total opposition to the power of natural causes would bring only failure. A kind of consensus²⁹⁴ is needed between the world of facts and ideals, if the ‘individual will’ will be itself a cause in the life.

²⁹¹ *ibid.*, pp. 79-83

²⁹² The seemingly dilemma of Weber’s theory at which Richard Wellen points out may be explained in that way: ‘On the one hand Weber seems to say that the capacity for rational action is the condition of freedom, while in another sense- articulated in some famous sections of his substantive sociology- contemporary social embodiments of rationalization have taken the form of an ‘iron cage’ which may pose a threat to freedom’ (p.8).

²⁹³ Immanuel Kant, *Critique of Pure Reason*, Ed. V. Politis, Everyman, 1994, pp. 377,384

²⁹⁴ Schluchter believes that there is a compromise in Weber’s idea of “self-control vis-à-vis one’s own and alien ‘goods’, an idea which avoids the twin dangers of technocratic science, which is ‘world-mastery’ without moral reflection and the contingency of pure, irrational commitment characteristic of decisionism.’ (Wellen, *op. cit.*, p. 92)

However, such an ethical standing is not free from moral paradoxes of the absolute values, which Weber intends to avoid by balancing the absolute belief with instrumental rationality.

One moral paradox may be observed in another divergence between Kant and Weber concerning the conception of moral autonomy. The Kantian principle of moral autonomy commands to treat human beings always as an end and never as a means only. On the other hand, Weber's understanding of ethics is based on taking into account not only our will but also the social conditions and relations governed by causality in order to accomplish our will. 'Our autonomy as persons is then expressed by choosing among conflicting values, finding the most effective means of realizing them given the context, and taking the responsibility for both the intended and unintended consequences'.²⁹⁵ However, it is in direct contradiction with the categorical imperative of Kant which commands to treat human beings always as an end.

V.V.2 Two Ethics of Weber

For Weber, ethics of conviction refers to value-rationality in its pure form. Utilitarianism refers to instrumental-rationality action in its pure form. Ethics of responsibility refers to a kind of hybrid form of value-rationality and instrumental rationality. However instrumental-rationality in ethics of responsibility does not refer to a utilitarian element in this ethic. Rather it refers to inclusion of the standard of success, the influence of possible consequences of the action on the decision about the action and taking responsibility of these consequences by the decision-maker. The consequences and secondary consequences of action are not evaluated only from utilitarian perspective as in purely instrumental rationality but also from an ethical and social standing in a value-rational way. What Weber proposes to the modern individual in moral terms is the adoption of ethic of responsibility. It is a remedy to fragmented modern men between two types of rationality and between conflicting values in order to become one unified self, an ethical total personality once again.²⁹⁶

It may be discussed whether utilitarianism is an ethic or not. For example Leo Strauss argues that 'if, as Weber contends, no solution is morally superior to the other,

²⁹⁵ Breiner, *op. cit.*, pp. 63-64

²⁹⁶ See Sung Ho Kim, 'Max Weber's Politics of Civil Society', p.212

the reasonable consequence would be, that the decision has to be transferred from the tribunal of ethics to that of convenience or expediency... Thus we can settle the dispute, rationally, on prudential grounds...'²⁹⁷ Turner argues that for a Weberian, if a choice is based on the prudential grounds of expediency, 'expediency' constitutes an ultimate value for that person. The value that decides between conflicting values has to be even more ultimate. He questions the position of prudence and other practical means as ultimate values. He concludes that they are neither more ultimate nor values.²⁹⁸ On the other hand, Schluchter uses the term success oriented ethic instead of instrumental ethic for Erfolgsethik. He states that for Weber purpose means the conception of success that becomes the cause of action.²⁹⁹

The difference between success orientation and value orientation comes from the difference between ideal interests and material interests. Ideal interests are connected to conceptions of duty: such as salvational interests, interest in individual or collective honor. Material interests are connected to conceptions of happiness: (health, wealth, longevity, and so on) the pursuit of happiness or more generally the pursuit of success. Difference in social relations occurs between one behaving according to the calculations of loss and gain and other according to the conceptions of validity of an order, in which duties play a role.³⁰⁰ The fulfillment of these duties is guaranteed by sanctions from within or without. Schluchter proposes an analogy to Kant: 'Success oriented action ultimately follows technical or pragmatic imperatives, rules of skill or prudence...it follows utilitarian maxims motivated by material interests. In contrast, value-oriented action follows categorical imperatives, normative maxims propelled by

²⁹⁷ Turner & Factor, *Max Weber and the dispute over reason and value*, London: Routledge Kegan Paul, 1984, pp.68-69

²⁹⁸ *ibid.*, p. 35

²⁹⁹ Schluchter, *Paradoxes of Modernity*, pp.55, 63

³⁰⁰ Of course relation between material and ideal interests are more complex than this. Habermas explains material and ideal interests as follows: material interests are the needs directed to satisfaction and ideal interests are the need for interpretation and creation of meaning felt by individual embedded in complexes of meaning. Material interests are directed to worldly goods like prosperity, security, health, longevity and so forth (problems of external need). Ideal interests are directed to sacred values like grace, redemption, eternal life or innerworldly interests like overcoming loneliness, sickness, fear of death and so forth (problems of inner need). 'Between ideas and interests there are conceptual and empirical relations. Conceptually, ideal needs are directed immediately to ideas and values, and material needs have to be interpreted with the help of ideas. Empirically, ideas and interests enter into empirical relation to one another both in the life orders of society and in the personality structures of its members.' Habermas, *op. cit.*, pp. 187-188

ideal interests. Such imperatives are carried out for their own sake, out of respect for the duty so formulated, and completely independently of success.’³⁰¹

Schluchter does not consider the standard of success separate from utilitarianism. I claim that success may be used independently from its utilitarian references as standard. Otherwise, hybrid forms of action in ethics could not be other than by-products of utilitarianism. Here the nuance lies at the ethical approach of Weber. Weber denies to give any ethical position to utilitarian adjustment of individuals: ‘An optimally adjusted person, rationalizing his conduct only to the degree requisite for adjustment, does not constitute a unity but only a complex of useful and particular traits.’³⁰² A unified personality occurs only through a complete and inwardly motivated personal devotion to a cause that transcends individuality.³⁰³ Similar to Kant, Weber does not consider utilitarianism as a genuine ethic and prudence as a genuine value, although he considers the material interest as important as ideal interests in human action.³⁰⁴

The ethics of conviction is an unconditional ethic. What is decisive in unconditional ethic is not that one could not foresee the consequences of a given action, but that one ought not to draw upon foresight to justify action. This ethics do not separate the politics from ethics. ‘This stance is based on a worldview in which only ethical values can be recognized as principles guiding action and in which this state of affairs holds for each and every realm of life.’³⁰⁵ Schluchter claims that there are values outside the ethical sphere and ethics of conviction denies the existence and the possibility of ethically indifferent values. For me, ethics of conviction takes its definition from the strict adherence to the values, not from the types of values. If a non-ethical value is followed unconditionally and by neglecting the consequences, such an approach again would belong to ethics of conviction. On the other hand, it is true that

³⁰¹ Schluchter, *Paradoxes of Modernity*, pp.64-65

³⁰² Quotation from Wilhelm Hennis, ‘Personality and Life Orders: Max Weber’s Theme’, in *Max Weber, Rationality and Modernity*, London: Allen&Unwin, 1987; *The Religion of China*, trans. and ed. by Hans Gerth, New York: Free Press, 1951, p. 235

³⁰³ *ibid.*, p. 62

³⁰⁴ Sung Ho Kim, ‘In Affirming Them, He Affirms Himself’: Max Weber’s Politics of Civil Society’, *Political Theory*, Vol.28, No.2, April 2000, 197-229, p.211, states that Weber cannot accept utilitarian ethics for two reasons. First, utilitarianism reduces the meaning of human action into the last instance. Secondly it assumes a hedonist account of human psychology. Concerning the former, Weber refuses the plausibility of metaphysical foundationalism in world of conflicting value spheres. Concerning the latter, Weber finds unrealistic and unacceptable its treatment of the moral self as the agent of utility rather than as the bearer of integrity.

³⁰⁵ Schluchter, *Paradoxes of Modernity*, p.55

ethics of conviction suffers from difficulties in synthesizing different values due to lack of any standard except the absolute belief.

In the case of ethic of responsibility, which is a hybrid form, ‘the action is to be judged not merely by its success value but by its convictional value as well.’ Ethic of responsibility seeks for a balance between the values and the success of value-aims. Its maxim is a delicate combination of the responsibility for the foreseeable consequences of an action with the responsibility for the purity of the will.³⁰⁶ Such an ethical standing is especially possible in the political actions. ‘...the individual can remain a personality only in so far as she strives to forge her ideal motives, goals and worldly responsibilities into a consistent whole, never separating values from success, yet realizing that “moral paradoxes” will always assert themselves. Only from the standpoint of genuinely political activity can one gain the best understanding of how the possibility of meaning occurs against the background of meaninglessness.’³⁰⁷

V.V.3 Ethics of Responsibility as Ethics of Vocation

Ethics of responsibility as ethics of vocation seems to be a practical solution of Weber for its application in daily life by ordinary people. It is a kind of combination of success-oriented action with value-oriented action in the performance of vocation. ‘Success oriented action ultimately follows technical or pragmatic imperatives, rules of skill or prudence...it follows utilitarian maxims motivated by material interests. In contrast, value-oriented action follows categorical imperatives, normative maxims propelled by ideal interests. Such imperatives are carried out for their own sake, out of respect for the duty so formulated, and completely independently of success.’³⁰⁸ Here the success in one’s vocation is only possible by the correct technical rules and the rules of skill specific to that vocation. On the other hand, vocation should be performed with a sense of duty in an ethically correct way. In that sense, vocation is carried out for its own sake, primarily: in a manner of personal dedication to a cause. The material interests gained from such a performance are only by-products or consequences of a devoted approach to the vocation. They are not the primary aims of vocational action.

³⁰⁶ *ibid.*, p. 61

³⁰⁷ M. Albrow, ‘The Application of the Weberian Concept of Rationalization’, p. 165; Wellen, *op. cit.*, pp. 8-12

³⁰⁸ Schluchter, *Paradoxes of Modernity*, pp.64-65

Weber creates an ethic that may be applied by everybody within the iron cage and that thereby, may give a meaning to their life.

'Ethics of vocation' is a term that finds its origins in the writings of Weber on religion. *Beruf* (vocation) as a term consists a substantive value in itself, i.e. it has ethical connotations. *Now it is unmistakable that even in the German word Beruf, and perhaps still more clearly in the English calling, a religious conception, that of a task set by God, is at least suggested.* However, its religious origin finds its meaning only in the context of this-worldly unethical or at least non-ethical affairs. What is interesting is that the ethics of vocation is the solution produced by the religion against a disenchanted world, which is transformed into an iron cage constructed by instrumental rationality, in which human beings very hardly chooses or follows any substantial end and value and which functions according to power-relations in a conflicting way. *..the valuation of the fulfillment of duty in worldly affairs as the highest form which the moral activity of the individual could assume. This it was which inevitably gave everyday worldly activity a religious significance, and which first created the conception of a calling in this sense.* (PESC, p.80) It was a kind of compromise of religion with changing and disenchanting world in order not to lose its influence and power over people³⁰⁹. Yet what it aims to accomplish is much more than this: to change whole meaning of life and to convert it into a unified system of good works by surrounding all action with an integrated set of conscious meanings (PESC, pp.117-118).³¹⁰

Yet, it is not a concept belongs to the history. It stamped its effect on the modern age: it is the spirit of capitalism born from Christian asceticism. In this sense, it means rational conduct on the basis of the idea of the calling. However, Weber warns us that this ethic is no more basis of modern capitalist order and that capitalism no more needs this ethic of vocation to turn its wheels: *Today the spirit of religious asceticism – whether finally, who knows? – has escaped from the cage. But victorious capitalism, since it rests on mechanical foundations, needs its support no longer.*(PESC, pp.181-

³⁰⁹ *The general schema according to which religion customarily solves the problem of the tension between religious ethics and the non-ethical or unethical requirements of life in the political and economic structures of power within the world is to relativize and differentiate ethics into "organic" (as contrasted to ascetic) ethics of vocation.* (ES, p.598)

³¹⁰ Swidler, *op. cit.*, p.39

182) Under modern capitalist conditions, it is difficult to apply the ethics of vocation in its original form, although it has been once the spirit of capitalism. Capitalism imposes its own conditions of working on individuals, no matter whether they are entrepreneurs or labor, so strictly that make it impossible to give an individual meaning to the professions conducted. The profession is performed under economic compulsion. (PESC, pp. 182-183) It is the key to understand the difference between ‘live off’ and ‘live for’ a profession in Weber’s theory. For the genuine application of vocational ethics, the individual should be free, at least partly, from the chains of capitalism either owing to his particular profession or to his wealth. And this is exactly what Weber expects from a good politician.

This ethical understanding one assumes for his vocation has disappeared in the modern world.³¹¹ However, what is left is an iron cage with no offerings in relation to humanity or individuality. Weber’ main concern and main question then comes: *No one knows who will live in this cage in the future.* He conceives his own age as follows “*specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.*” (PESC, p.182) Anachronistically the ethics of vocation becomes the only way to the individual freedom, at least for some professions.³¹² For Weber who accepts a disenchanted world with the sharp difference of *sein* and *sollen* and with no help of science for the conflicting values, any ethical question may be defended if it is formal and objective enough that may be applied into every case in the same manner. So he borrows the sense of duty from Kantian ethics and combines it with the Protestant ethics for vocation. In this sense, ethics of vocation for

³¹¹ Hennis maintains that the conditions of the modern world do not force human subjects to such dedication through tradition, a deep sense of necessity or prophetic power. In any case, an inner decisiveness and discipline was necessary to accomplish a systematic unity by dedication to a cause. The more natural, original form of human ‘ethical’ dedication is not to a cause but to other persons. (Hennis, *Max Weber: Essays in Reconstruction*, p.92)

³¹² Goldman considers the ‘vocations’ as different roles that empowered selves occupy. They are in a way, ‘practices of self’ such as the entrepreneur, the scientist, and politician with a calling and the charismatic leader. The dedication of the self to the chosen vocation would replace the pervious vehicles and sources of the late 19th century (tradition, religion, cultivation, charismatic education and so on), weakened by a rapidly developing capitalist society and advancing rationalization, science and technology, for shaping and legitimating the self (pp.2-3). ‘The self then derives meaning and purpose through disciplined submission to a goal or object, and finds justification through success in a calling’ (p.8). The idea of ‘vocational self’ is compatible with the needs of an advancing rationalistic and specialized culture but not with the *Bildung* which is an effort to grasp the culture as a whole. The idea of vocation is also linked to Weber’s concentration on power to command the world and conquer it for higher purposes. His goal was self-mastery as a means to value-positing, guidance of the nation and world mastery- however metaphorically “world mastery” is understood (pp.4-6). ‘While Foucault argued that the self is unquestionably shaped by relations of power in institutions and social practices, the issue for Weber...is a countervailing one, the generation of selves with power...the shaping of selves for power. Empowerment of self was needed since to Weber, rationalization not only disenchant but also *disempowers* (p.8).

Weber is comprehensive enough to shape an individual's life and to give a meaning to it.

'The principles of responsibility' is based largely on a sense of duty and lays the core of ethics of responsibility. *It is an obligation which the individual is supposed to feel and does feel towards the content of his professional activity, no matter in what it consists, in particular no matter whether it appears on the surface as a utilization of his personal powers, or only of his material possessions (as capital).*(PESC, p.54) This is, as may be observed in Kant too, an attempt to create a kind of rational, or 'formal' value in the world of value relativism, which will serve a 'cause' to life of professionals³¹³. A 'complete human being', a human being as a systematic unity, a whole is possible only with a complete personal dedication to a 'cause' that transcends individuality³¹⁴. Only this is as powerful as the modern formal rationality imposed on human beings. *The objectification of the power structure, with the complex of problems produced by its rationalized ethical provisos, has but one psychological equivalent: the vocational ethic taught by asceticism.* (ES, p.601) This ethic brings together the inner core of personality and everyday necessity of a vocation. Dialectically it is a kind of freedom without denying the formal rationality, even within it. In this sense, Weber, like Kant, finds the freedom in the sense of obligation. As Schluchter remarks, it is vocation as self-limitation.³¹⁵ Goldman explains that 'paradoxically, "impersonality" in service leads to "personality"; abnegation of the self leads to elevation of the self: lack of regard for "personal" aspects of the task allows one to become a "person" in the fullest sense.'³¹⁶

³¹³ Yet, it is hard to estimate whether only some professions have this privilege and others not. In his writings, Weber only mentions officialdom, politics, and science as vocations maybe because other professions does not bear a role over the society as influential as theirs. For example, Schluchter considers it not a form of elitism but an aristocracy of the spirit, which is available for all people who serve with total sacrifice a self chosen cause. (*Paradoxes of Modernity*, p.38)

³¹⁴ Hennis, *Max Weber: Essays in Reconstruction*, p.92

³¹⁵ Schluchter, *Paradoxes of Modernity*, p.37

³¹⁶ Goldman, *op. cit.*, p. 72. Goldman explains this paradox as an attempt of Weber to find a solution to the supposed contrast between the specialist and the personality, which is a widespread confusion in German society at those times. '...to Weber personality today can be found only in specialization and a narrowing focus, in the self-limitation and submission to the object that the calling demands. There remains no other avenue' (p.72). On the other hand, Alexander claims, Weber believed that this worldly asceticism made it possible not only to master the world but to master other human beings. Depersonalization and self-discipline promoted autonomy in part because they allowed the actor to distance his ego from emotions that represented dependency. But this rejection of one's own dependency needs forced one to reject the needs of others as well. The capacity to make a 'tool' out of oneself, therefore also allowed one to depersonalize and objectify others.' Jeffrey C. Alexander, 'The Dialectic of Individuation and Domination: Weber's Rationalization Theory and Beyond', *Max Weber, Rationality and Modernity*, Scott Lash & Sam Whimster (eds.), London: Allen&Unwin, 1987, p. 193. Yet, according to Alexander, this is not what Weber proposes by vocational ethics. This is only one of the ways to escape from rationalization. Cynical adaptation to the

Weber explains ‘vocational ethics’ as follows: *Every professional task has its own “inherent norms” and should be filled accordingly. In the execution of his professional responsibility, a man should confine himself to it alone and should exclude whatever is not strictly proper to it – particularly his own loves and hates. The powerful personality does not manifest itself by trying to give everything a “personal touch” at every possible opportunity. The generation which is now growing up should, above all, again become used to the thought that “being a personality” is something that cannot be deliberately striven for and that there is only one way by which it can (perhaps!) be achieved: namely, the whole-hearted devotion to a “task” whatever it (and its derivative “demands of the hour”) may be... We deprive the word “vocation” of the only meaning which still retains ethical significance if we fail to carry out that specific kind of self-restraint which it requires.* (MEN, pp. 5-6)

V.V.3.1 Politics as Vocation

Ethics of vocation for politics show different characteristics from other vocations. Most important difference comes from the large responsibility a politician should bear and a large range of values that may be selected by a politician. Freedom in the sense of value-choices distinguishes politics from other vocations but at the same time brings the heavy burden of responsibility for this distinguished freedom. Additionally ethics of vocation in politics differs from other vocations in terms of the means used for the success in the political sphere. The means of violence make an ethical standing very difficult, if sometimes not impossible. The choice of values and means may have large consequential effects on the lives of a vast number of people. This only intensifies the feeling of responsibility a good politician should possess. For all these reasons, political leadership is the vocation of only some few privileged people in terms of skills and experiences.

For an actual freedom of choice, politician should be independent from the material interests he may gain from his vocation. After the politics has become a profession because of mass administration, *inside and outside of parliament a*

demands of the day, such as the bureaucrat who obediently follows his orders is one of the flights from the world. The other is internal flight by re-divinizing the world through ethics of conviction. However vocational ethics shows the existential courage for freedom without denying the reality (pp. 198-201). Yet it is difficult to understand for me how a bureaucrat will apply such an ethic except being fully obedient to his order. Is it really a salvation?

characteristic figure is required: the professional politician, a man who at least ideally, but in most cases materially, regards party politics as the content of his life. There are two kinds of professional politicians: those who *live off* the politics and those who *live for* the politics. (ES, p.1447) The former *strives to make politics a permanent source of income*, and lives materially off the party and political activities. (PAV, p.84) The latter has independent means and being propelled by his convictions. *Only in the latter case can he become a politician of great calibre.* (ES, p.1427) Here the politician has not only financial sources independent from politics but he also must be *economically 'dispensable', that is, his income must not depend upon the fact that he constantly and personally places his ability and thinking entirely or at least by far predominantly, in the service of economic acquisition.* (PAV, p.85) In a sense, he should be free from the burden of regular daily work with strict working times, such as labors do, or should not have to dedicate most of his time and energy to his work as entrepreneurs do. According to Weber, only *rentiers* and lawyers are suited to be professional politicians. (ES, p.1427)

Weber attempts to explain the politics as vocation by comparing it with the officialdom which is another vocation. Weber's concern at this point is to emphasize the difference between two types of rationality: bureaucratic and political. Bureaucratic rationality is a kind of instrumental rationality. Bureaucracy as an apparatus is an instrument itself. On the other hand, politics is primarily about the ends. In Weber's words, *specialized training is an indispensable precondition for the knowledge of the technical means necessary to the achievement of political goals. But policy-making is not a technical affair, and hence not the business of the professional civil servant.* (ES, p.1419) The qualifications of a good official and a good politician are very diverse from each other. A good bureaucrat subjects himself to the hierarchy and discipline. He applies the instructions of his superior strictly. Following the rules and procedures and applying them effectively is the main duty of the officials. The rationality of their task is the opposite of the politics. They are responsible from the effective use of the instruments to the given ends, whereas the politics means primarily decision-making about the ends. Weber reminds us *that bureaucracy failed completely whenever it was expected to deal with political problems.* That's why *politicians must be a countervailing force against bureaucratic domination* (ES, p.1417)

The capabilities of a civil servant are inherently very alien to those of a politician. A politician struggles for his own convictions and opinions in the political arena. In other words, a politician has the freedom to choose his substantive ends and the related means in relation to his vocation. A civil servant has to maintain impartiality and has to adhere to rules even if they are against his political inclinations. (ES, p.1417) He shall act with a sense of duty and *sine ira et studio*, 'without scorn and bias', he shall administer his office. (PAV, p.95) The opposite types of performances are expected from a politician and a civil servant. An official shall not do precisely what the politician must always do, namely, fight. (PAV, p.95) On the other hand, *if a man in a leading position is an "official" in the spirit of his performance, no matter how qualified – a man, that is, who works dutifully and honorably according to rules and instructions-, than he is useless at the helm of a private enterprise as of a government.* (ES, p.1404)

Nevertheless, a bureaucrat is not always like a machine, which repeats the same action in a subaltern routine. Not only the heads of the bureaucracy who must always solve political problems (ES, p.1417) but also the subordinates need independent-decision making and imaginative organizational capabilities. Therefore, *the difference is rooted only in part in the kind of performance expected... The difference lies, rather, in the kind of responsibility and this does indeed determine the different demands addressed to both kind of positions.* (ES, p.1404) The principle of responsibility shows us the formal characteristic (in terms of general applicability) of the sense of duty. The ethics of the office is quite different from the ethics of politics. In fact, the conduct of a politician is subject to the opposite principle of responsibility from that of the civil servant. (PAV, p.95) *The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction.* This moral discipline and self-denial demonstrate that his sense of duty stands above his personal preference. (ES, p.1404; PAV, p.95) On the other hand, the honor of politician lies in an exclusive personal responsibility for what he does. His struggle for personal power and the compromises he makes during this struggle necessarily means personal responsibility.

V.V.3.2 Ethics of Political Leader

According to Weber, the ethics of conviction (ethics of absolute ends) may not be internally consistent, at least in the area of politics in which the violence is the main means. Weber finds the absolute ethic unrealistic in the sense that it rejects to evaluate the concrete conditions and calculate the consequences of the actions taken in the name of absolute ends. The ethics of absolute end with its indifference to the realities of politics may lead to morally harmful or unwanted consequences, even opposite to the ethics itself. Or it may and does use morally dubious means to reach its ideal ends. However, in politics especially the use of violence leads to similar results, the ideals pursued has no importance. In consequence, the absolute ethics has only two choices: either it will reject *all action that employs morally dangerous means* or it will concede to the principle that the end justifies the means. (PAV, p.122) In front of the ethical irrationality of the world, none of the ways would be a real solution to the paradox of absolute ethics. Especially for the sphere of politics, this is valid more than any sphere.³¹⁷

Weber asks: *Should it really matter so little for the ethical demand on politics that politics operates with very special means, namely, power backed up by violence?* (PAV, p.119) The answer is that politics should have a special ethics of its own. In fact, *it is the specific means of legitimate violence as such in the hand of human associations which determines the peculiarity of all ethical problems of politics.* (PAV, p.124) It constitutes one of the crucial reasons for Weber to prefer the ethics of responsibility in politics to the absolutist ethics. Ethics of responsibility constitute core of the political ethos. The main difference between ethics of absolute ends and ethics of responsibility may be summarized as follows: *the absolute ethic just does not ask for 'consequences'*,

³¹⁷ Weber seems to conflict with himself while stating that at the same time both that two ethics are 'irreconcilably opposed maxims' (politics as vocation, 120) and that they are 'not absolute contrasts but rather supplements' (PAV, 127). However, I do not think that he actually does- if one takes these two types of ethics as possible guiding maxims of an action. What he only says is that it is not possible to combine these two ethics in one maxim. So, one has to choose between two of them. They are supplements in the sense of being alternatives to each other in each case for an individual. But of course I agree to other authors in that it is not possible for them to be supplements if they are taken as ethical world views: Because one cannot switch from one ethical view to other and at the same time becomes a coherently unified personality. As ethical world view, what Weber proposes is ethics of responsibility, at least for a person who has politics as vocation. Political sphere's inherent characteristics such as conflict, power, interest and violence do not let to apply the ethics of conviction without an internal contradiction. However, ethics of responsibility as a general approach to the world and especially to politics provide the possibility to act only on the bases of ethics of conviction in some cases. However no one can tell to the politician when he should follow one ethic and when the other (PAV 127). That's why the political leader should be a hero.

whereas the one who follows the maxim of an ethic of responsibility has *to give an account of the foreseeable results of one's action.* (PAV, p.120) *Whosoever contracts with violent means for whatever ends- and every politician does- is exposed to its specific consequences.* (PAV, p.124) The ethics of responsibility weight two responsibilities on the shoulder of politician: responsibility to take into account the possible consequences of the chosen means and the ends, and responsibility to take the responsibility of consequences resulting from his choices.

What Weber expects from the politician is something heroic³¹⁸ and warns him about that: *whoever wants to engage in politics at all, and especially politics as vocation, has to realize these ethical paradoxes. He must know that he is responsible for what he may become of himself under the impact of these paradoxes.* (ES, p.125) The paradoxes that a politician should be ready to understand and deal with may be summarized as follows. First, he should understand that whatever value he chooses to pursue he may find himself in a situation to use some ethically dubious means to reach his value –ends and he may have to take the responsibility of the means, which he used to reach these value-ends and which produced ethically negative secondary consequences. Lastly, in each choice of his, he should be aware that no value-choice can be rationally proven to be superior to other and in inescapable conflict with other value-choices. In Weber's words: *What will be the attainment of a desired end "cost" in terms of the predictable loss of other values?...Since, in the vast majority of cases, every goal that is striven for does "cost" or can "cost" something in this sense, the weighing of the goal in terms of the incidental consequences of the action which realizes it cannot be omitted from the deliberation of persons who act with a sense of responsibility.* (OSS, p.53)

³¹⁸ 'In the rigor of its demands, Weber's ethic of personality is a heroic ethic, an aristocratic ethic, an ethic of virtuosi...A heroic ethic may well start from a pessimistic assessment of the nature of the average man. Unlike the ethic of the mean, however, it is not content to accept this average nature as normatively valid, as setting a limit to the ethical demands that can reasonably be made. Instead, it imposes on men arduous demands that can be realized only at the high points of their lives. In this sense, Weber's is clearly a heroic ethic.' (Brubaker, *op. cit.*, pp. 97-98). Weber's examples for that kind of ethic are the ethic of early Christianity as well as that of Kant. In Weber, there is always tension between the ethical imperative and the pursuit happiness. Schluchter, *Paradoxes of Modernity*, p. 58. Heroic ethic is ethic of virtuosi and everyday ethics is ethics of masses. 'the distinction exclusively refers to the fact of unequal religious or ethical qualification, and of unequal interest in such qualifications...The "masses" comprise those "unattuned" (unmusikalisch) to religious or ethical matters. For this reason, the opposition between virtuosi and masses finds more or less sharp expression in all differentiated configurations of order.' Schluchter, *Paradoxes of Modernity*, pp.62-63.

In all actions, the politician should adopt the delicate balance of instrumental and substantive rationality.³¹⁹ by weighing them a sharp sense of proportionality from a healthy distance of objectivity³²⁰, but still with a passionate heart. Weber demands him to apply the excellent form of hybrid type of rational action, which I described in the first chapter.³²¹ Three required qualities of politician- *passion, a feeling of responsibility, and a sense of proportion*- serve to reach this delicate balance. Passion means a passionate devotion to a cause. (PAV, p.115) *The politician may serve national, humanitarian, social, ethical, cultural, worldly, or religious ends.* (PAV, p.117) This is the substantively rational part of the political action. It is what gives the meaning to the politician's life and inner strength to the political action.³²² (PAV, p.117) *He who lives for politics makes politics his life, in an internal sense. Either he enjoys the naked possession of the power he exerts, or he nourishes his inner balance and self-feeling by the consciousness that his life has meaning in the service of a 'cause'. In this internal sense, every sincere man who lives for a cause also lives off this cause.* (PAV, p.84)

On the other hand, he has to *make responsibility to this cause the guiding star of action.* (PAV, p.115) In other words, ethics of responsibility should be his guide; he has to take into account and evaluate the ends, the means, the conditions and possible consequences before he takes the action, i.e. he has to be instrumentally rational. To be

³¹⁹ S.P.Turner&R.A.Factor, *Max Weber and the dispute over reason and value*, London: Routledge& Kegan Paul, 1984, p. 33. They assert that there is no contradiction in claiming that an act is good by virtue of conscience *and* by virtue of its good consequences. One may an intuitionist with respect to ultimate ends and a utilitarian with respect to means and to subordinate ends. For me, this is exactly what Weber proposes for a responsible politician.

³²⁰ As Strong states, healthy distance from the desires is something Weber recommends not only for political hero but also for his audiences and readers. In this sense, Politics as Vocation is therapeutic in taking away the illusions of people about themselves and the world at the expense of the disappointment of their hopes. Weber underlines that he cannot fulfill the need for an answer to the questions of what is to be done and what certainly can be known. This attitude is supported by the image of the transfiguring hero during the lecture and thereby making it impossible for the audience to recognize any individual as that hero. Tracy B. Strong, 'Weber and Freud: vocation and self-acknowledgement', p.400

³²¹ There is a debate in the literature on ethics of responsibility and ethics of conviction. Some authors such as Giddens argue that ethics of responsibility corresponds to the instrumental rationality, and of conviction to value-rationality. (Giddens, *Politics, Sociology, and Social Theory*, p.46). On the contrary, Brubaker, for example, asserts that the ethic of responsibility can best be understood as an attempt by Weber to integrate instrumental rationality with value rationality, 'the passionate commitment to ultimate values with the dispassionate analysis of alternative means of pursuing them'. (Brubaker, *op. cit.*, p. 108). Schluchter also shares this view in the sense that ethics of responsibility consists in itself the convictional values (p.87). Gane agrees to Giddens and argues that that's why Weber demands the combination of ethics of conviction and responsibility (pp.68-69). Bradley E. Starr puts a very extraordinary approach and claims that both ethics are different combinations of value-rationality and instrumental-rationality. 'The Structure of Max Weber's Ethic of Responsibility', *Journal of Religious Ethics*, 407-434.

³²² The politician should use rational means and techniques for self-mastery and world-mastery but at the same time he also needs a source of inner power to mobilize in confrontation with embodied rationality and the weight of institutions not to overcome them but to control and use them. Goldman, *op. cit.*, pp.11-12

passionate and to keep faith in an end but at the same time to stay instrumentally rational, he needs the third qualification: sense of proportion. The balance of hybrid form of action may be adjusted only by proportional ability. In many senses, the political leader of Weber would both be realistic enough to admit the power-politics and be idealistic enough to choose and track some values still.³²³ He would constitute the equilibrium with what frightens and fascinates Weber most, the bureaucratic rationality. He would use the instrument successfully and give it a valuable political direction. These values are preferably to be the nationalistic values which may set free the leader from the certain group interests and give some rational standards.

V.V.4 Value choice of the leader: Nationalism

According to Schroeder, the advocacy of strong leadership by Weber may partly be seen as a response to the political situation in Germany of Weber's day. But more than this, it arises from the need to counteract an increasingly impersonal and disenchanted modern social life by a dynamic national political culture.³²⁴ It is one of the main threats to humanity that instrumental rationality turns into an end for its own sake under the influence of modern forces such as capitalism and bureaucracy. Disenchanted life with disappearance of value-oriented action becomes an iron cage for the individual, whose freedom of choice is surrounded by the life-spheres' own formal rationality and he is forced to only focus on the material gains. Another consequence for individuals may be an escape to irrationality.³²⁵

Now, what is at stake is the meaningful existence of human beings. The problem seems that routinization of social life drags society and individuals into a life without meaning and deprived of value-oriented life-conduct. It is the desert of the

³²³ 'This political agent transforms the functional features of politics into a higher moral commitment and in turn translates fundamental moral commitments into the functional demands of politics.' P. 20 Breiner book Goldman Giddens finds the link indirectly again through the concept of the 'ethical irrationality of the world'. Disenchantment makes plain the irremediable power conflicts which are the essence of politics. The politician should face up 'without illusions' to the realities of the modern life and this is part of political ethics. G2 p. 45) However what Weber recommends, and what Giddens misses, as a cure against the irrationality of the world to the politician in overall originates from the religious basis, namely ethics of vocation.

³²⁴ Schroeder, *Max Weber and the Sociology of Culture*, p. 116

³²⁵ *An increased tendency toward flight into the irrationalities of apolitical emotionalism in different degrees and forms, is one of the actual consequences of the rationalization of coercion, manifesting itself wherever the exercise of power has developed away from the personalistic orientation of heroes and wherever the entire society in question has developed in the direction of national "state". Such apolitical emotionalism may take the form of a flight into mysticism and an acosmistic ethic of absolute goodness or into the irrationalities of non-religious emotionalism, above all eroticism. (ES, p.601)*

modernity. As to society composed of such individuals, the problem elevates to a cultural emptiness. As Schroeder claims, Weber's main intent is discussing the routinization of the sphere of politics in a cultural manner and the sphere of intellectual life or culture proper, where religion is displaced by knowledge. When interpreted from the cultural perspective, advancing bureaucratization is a threat to humanity, causing the 'parcellization of the soul'.³²⁶ The responsibility of charismatic leader is to promote value-oriented action in the masses but by creating faith in some values chosen carefully by the leader himself. Here even it is dubious the faith of the masses is in directly the values, or in the leader and, as an indirect consequence, in any value-end he would pursue.

To Weber, charisma is one of two great revolutionary forces. It is different from the other revolutionary force, namely from 'reason', since *charismatic belief revolutionizes men "from within*, whereas reason first changes the material and social orders and then people *has to adapt to these changing conditions through a rational determination of means and ends*. (ES, p.1116) In that sense, the systems' formal rationality compels individuals to be instrumentally rational, meaning that individuals have no more freedom of choice among values but the obligation to adapt- a life in an iron cage. I claim that what Weber lays down as solution against the iron cage of modern times is value-rational charisma which will shape material and social conditions according to his ideas (whether they are ethical, religious, scientific or political), in other words according to his value-objectives. Concerning charismatic revolution, *the difference is rooted in which the ruled and led experience and internalizes these ideas*. Charisma creates a central change in the followers' attitudes by convincing them into the value of some objectives and through this social movement creates its revolutionary effect. (ES, p.1117) In Weber's words, *Charisma ...may effect a subjective or internal reorientation born out of suffering, conflicts and enthusiasm. It may then result in a radical alteration of the central attitudes and directions of action with a completely new orientation of all attitudes toward the different problems of the "world"*. (ES, p.245)

Now, I have to detail and revise this ideal picture of charisma. First of all, for charismatically led masses, it is not really a manifestation of freedom of choice to orient

³²⁶ Schroeder, *Max Weber and the Sociology of Culture*, pp.113, 116

their contacts to some values. Charisma is an authority which is followed irrationally due to the emotional factors and specifically due to the faith in the charismatic person himself. Therefore the conduct of charismatic politician may be value-rational but the conduct of the masses is emotional, at least of most of them, and not a result of a rational free choice.³²⁷ *The plebiscitarian leadership of parties entails the 'soullessness' of the following, their intellectual proletarianization, one might say.* (PAV, p.113)

Secondly, modern charismatic leader prescribed by Weber is not only value-rational but also instrumentally rational. He is not like many irrational examples of charisma in the history. He knows how to combine these two rationalities in a good balance and follows the ethic of responsibility while using his immense power. Thirdly, although in 'Politics as Vocation' Weber does not specify a particular value to be followed by the politician, - *the politician may serve national, humanitarian, social, ethical, cultural, worldly, or religious ends* (PAV, p.117)- in his other political writings, he explicitly states that his choice is national values.

V.V.4.1 Nationalism as an Objective Value

Schroeder explains the relation between masses and the leader in Weber's theory as follows: 'Weber tried to facilitate the emergence of a leader who would most directly be able to translate the support of the masses into the authority to realize personal political ideas. ..In the face of further gains of power by a caste-like elite of officials who only reached for the 'possible', Weber wanted to concentrate authority so that a striving for far-reaching goals could be promoted. And finally, beyond the adjustment of people to material interests and being tied to technical and economic

³²⁷ 'The charismatic leader organizes the emotional motives of the "masses" toward value-rational ends.' Breiner, *op. cit.*, p. 143. Additionally '...the expression of individual personality on the part of a leader...involved a corresponding suppression of individuality on the part of his following, and the dominance of a great figure threatened the independence of society at large. The values of nation, leadership and freedom thus rested uneasily together.' Although for Weber freedom of individual is important, it was limited to the leader at the end. : 'Weber's leader is an individualist; the source of his actions lies in himself, in his own personal convictions, and not in his following or associates. It is a conception which can be clearly distinguished from that according to which the leader's position depends upon his success in carrying out a programme laid down and accepted as a result of collective discussion and agreement within a group...In such a case the allegiance of members is primarily to the programme itself, only secondarily to the leader : the content is more important than the person' (Bethaam, *op. cit.*, p.231). The great suspicion towards the masses brought the conclusion for Weber that they hardly act value-rational but generally emotional and irrational so that he constructed a political model based on the emotional devotion of masses. However, there is an epistemological part of the argument. Turner and Factor, in *Max Weber and the Dispute over Reason and Value*, rightly argues that 'for Weber there could be no such thing as rational persuasion with respect to ends, save by showing a person the inconsistency in his choices.' Consequently, the leader may not morally persuade the masses on the rational bases. As a result, democracy in its traditional sense is an epistemological impossibility for Weber (pp.65-66).

progress, Weber favored a nation that would aspire to establish certain cultural ideas and national prestige for the benefit of future generations.³²⁸ Turner excellently links the legitimacy gap of modern legal systems with the charismatic solution of Weber. While the natural law collapses as the basis of the legitimacy of the state, Weber attempts to sustain the state ‘by an appeal to certain irrational political instincts in the masses towards the nation state.’ Hence the legitimacy deficit of the modern state is compensated by the existence of emotional commitments to the nation, which will be promoted and regulated by the plebiscitary leadership.³²⁹

Weber’s choice for nation results both from the historical epoch into he was born and from his theoretical choice of ‘objectivity’. Dronberger states that ‘his political philosophy was based essentially on the affirmation of national power as the noblest end toward which the striving of Germany must be directed’ and that his very pathos is ‘reflected in his hope for and faith in the creation of an atmosphere within Germany which would ultimately justify his view of Germany’s “calling as a nation”.’³³⁰ I claim that national interest and national culture are the values which most come close to be objective, in terms of its impersonal applicability to every member of the society, no matter to which class or strata he belongs to. Just for the same reason, it has a unifying power over the society, in the context of practical situation of Germany.³³¹ Weber’s political choice to prioritize the overriding national interests of the state aims to find a

³²⁸ Turner and Factor, *Max Weber and the Dispute over Reason and Value*, pp.118-119

³²⁹ Bryan S. Turner, ‘Nietzsche, Weber and the devaluation of politics: the problem of state legitimacy’, pp. 376-377

³³⁰ Ilse Dronberger, *The Political Thought of Max Weber: In Quest of Statesmanship*, London: Meredith Corporation, 1972, p.115, 23

³³¹ Bethaam also asserts a similar view from a class-perspective. ‘The significance of the national idea and a strongly national policy was that it encouraged the degree of social unity which was a necessary concomitant to a successful world political role. The ‘idea of the nation’ provided a common consciousness which transcended that of class.’ Bethaam, *op. cit.*, p. 144. He claims that Weber’s desire was to secure a political dimension which would transcend that of narrow class interests since ‘the nature of class action was to pursue material interests to the exclusion of other considerations, and to see politics largely as an instrument of this’ (p.216, 210). While Weber recognized that the expression of economic interests formed an inescapable part of contemporary politics, the danger was that it would become its dominant feature (p.225). For Weber, the end of politics should be non-material values as opposed to ‘bread and butter’ questions. Weber’s solution has been the idea of nation. Additionally, ‘the development of capitalism and the internationalization of economic activity had not made nationalism redundant, but rather an insistence on national distinctiveness more necessary (p.131). In addition to supremacy of the political over the economic the political also should be over the bureaucratic. National consciousness which will be created and promoted by the leader serves to the same function. Weber divorces the political leader from Parliament altogether and gives him an independent power base in the mass vote in order to transcend the conflicts and compromises of economic interests within Parliament itself (p. 217). Bethaam compares Marx and Weber in this context. Although both of them emphasize the importance of social classes, their value-choices distinguish them from each other. Marx was committed to belief that the particularism of class could only be transcended by the abolition of capitalism itself... for Weber the divisions of class could be transcended within the capitalist system (p.242) by a leader who would draw men away from an immediate class perception of society to an awareness of their common underlying interests in the perpetuation of a free enterprise system (p.243).

goal to which all members of the national community could subscribe. The best area to strengthen the sense of identity and common interest in the society is the area of foreign policy where the German people may save itself from political alienation and cultivate an interest in foreign policy and where may become a common platform for bourgeoisie and labor.³³²

V.V.4.2 Historical Reasons

My aim is not to neglect or underestimate the influence of concrete political conditions in Germany at Weber's time on Weber's ideas about politics. The historical conditions explain in a certain extent why Weber proposed a plebiscitary leader with a nationalist program as a cure to the political problems of Germany. I present only a brief summary of the events of the period due to the limits of this work.

The German Empire had come to existence in 1871 as a result of a series of compromises. Weber grew up in the atmosphere of the Grand Compromise between the Prussian state³³³ and bourgeois society. The East Elbian nobility (the Junkers) in Prussia was the landowning aristocracy of East Prussia and they held unquestioned elite status in the Empire. The most direct support for the existing political structure came from the Junkers. They provided the new Empire with its administrators and with its officer corps since they had time to devote their energy to politics and they were considered to have a political outlook which transcended that of his immediate self-interest.³³⁴

On the other hand, by 1870 Germany had become an industrial country. Unification of nation had given further impetus to capitalism. International market competition and introduction of mechanization had begun to threaten the economy of large estates in East Prussia. While the landowner became a capitalist entrepreneur, the agricultural worker who had a common interest with the landowner became a proletarian whose interests were in direct conflict with those of his employer. The introduction of capitalism brought not only class conflict but also competition among the workers themselves. It was generally cheaper for the landowner to import Polish

³³² Dronberger, *op.cit.*, pp.132, 124-125

³³³ 'The Prussian state, the bureaucratic organization which the Hohenzollern princes had created in order to give administrative, military, and judicial unity to their originally diffuse dominions, was a hierarchic structure with the King and his ministers at the top.' Lachmann, *The Legacy of Max Weber*, Berkeley: The Glendessary Press, 1971, p.100

³³⁴ Bethaam, *op. cit.*, p.153; Lachman, *op. cit.*, pp.100-101

casual laborers for the summer season than to employ German who had to be paid all the year around. The consequences of industrialization have been various for Germany, among them a large-scale emigration of German workers to the towns and or abroad. While the economic changes had eroded the material basis of Junker power at the same time a new type of elite raised up, namely the liberal bourgeoisie as a result of the movement of the center of economic power from the rural estates to the towns.³³⁵

The economic decline of the Junkers brought about a crisis of political leadership in German politics. The Junkers were economically declining class and such a class could not provide strong national leadership since now their economic insecurity compelled them to use their political power to bolster up their declining economic situation. They were forced to change from patriarchal lords into capitalist business men whose dominant consideration was economic interest. 'The Junker could thus no longer support the claim to represent the common interest of society as a whole; he represented only himself.' However, the economically powerful class, namely the bourgeoisie, was politically immature and uneducated to take the political responsibility of the nation. These conditions of Germany in Weber's time gave shape to his main criticism of the German political system: its leadership failed to reflect the true balance of forces within the nation.³³⁶

Despite their declining economic and social power, the Junkers succeeded to keep the political power mainly for two reasons: First by a vast amount of tacit support within the nation and secondly by the German constitutional structure which provide them with top bureaucratic and ministerial positions. 'In German constitutional structure, the legislative body consisted of two houses, the Federal Council (Bundesrat) and the Reichstag, the latter elected by universal equal adult male franchise. But while there was a parliament, there was no parliamentary government.'³³⁷ The government was neither chosen from the Reichstag nor responsible to it. The Reich Chancellor and his Secretaries of State were appointed by the Emperor and, while they were responsible to the Reichstag, did not require its confidence. If a party leader was appointed to a ministry he had to surrender his seat in Reichstag and so cut himself off from his

³³⁵ Bethaam, *op. cit.*, p.154

³³⁶ Lachmann, *op. cit.*, pp. 106-107

³³⁷ *ibid.*, p. 102

political power base in the support of the electorate. Additionally there was a general preference for appointing civil servants to ministerial positions, the result was a government of bureaucratic complexion through and through, lacking in political responsibility and political will. Especially during Bismarck period, the weight of bureaucrats at government increased tremendously while the parliament's political role has been weakened even more.

The constitutional foundation of the political position of Junkers (and of their bureaucratic government) was also guaranteed by institutional balance between the Reichstag and the Bundesrat. The Reichstag could not legislate without the Bundesrat, and in this latter body Prussia had a right of veto on all matters concerning defense, indirect taxes and customs tariffs. The separation of powers guaranteed the reconciliation between Prussian state and bourgeois society to remain unchanged, as far as both sides of compromise do not agree on any change. Another defect of this Grand compromise was that the industrial working class which was rising in numbers had no part in it.³³⁸ Weber criticized both this institutional structure and its consequences. One of its negative consequences was that it prevents the rise of a real leader: because Parliament had no real power, it did not attract men of caliber or capacity for leadership. Those who wanted a field in which to exercise responsibility went elsewhere, for example into business.

Of course his harshest critique was directed against the bureaucracy. Against the conservatives in Verein für Sozialpolitik, who favored the balance between classes to be secured from above by bureaucratic control over industry and industrial relations, he supported to free the expanding German industry from state regulation. Against idealization of Prussian bureaucracy and acceptance of paternalism in society and state, he conceived bureaucracy as reflecting the class structure of society. It was unable to free itself from the outlook of the social classes from which it was recruited and to which it was allied.³³⁹

'Bureaucracy is not merely a technical instrument; it is also a social force with interests and values of its own, and as such has social consequences over and above its

³³⁸ *ibid.*, pp.104-105

³³⁹ Bethaam, *op. cit.*, p.66

*instrumental achievements. As a power group it has the capacity to influence the goals of the political system: as a status stratum it has a more unconscious effect upon the values of society at large. At the same time it is not independent of other social forces, particularly that of class.'*³⁴⁰

The view of bureaucracy accepted by the conservative wing of the Verein was idealized to a great extent: 'bureaucracy stood...as a natural force above the competing particular interests of party and class, embodying the universal interest of society as a whole, and endowed with a special political wisdom.' They conceived bureaucracy as an independent political force, endowed with the qualities of wisdom and disinterestedness and hence supremely fitted to direct the affairs of society.³⁴¹ However, for Weber, it was only a technical instrument and its inherent tendency to exceed its instrumental function and to become a separate force within society at large was a political threat. Its interest lays in minimizing the power and importance of Parliament: in passing Parliament and co-operating directly with interest groups.³⁴²

Until 1918, Weber's thoughts on German politics were connected to his analysis of Chancellor Otto von Bismarck's (1815-1898) caesarist style of rule. Pfaff states, 'Weber's criticism of Bismarck's Caesarism is so devastating and his analysis of the pathological consequences of charismatic rule so convincing that it makes all the more curious that Weber himself came to invoke a new Caesar during the transition crisis of 1918-1920.' Towards the end of the First World War, instead of a political leader emerging from within a strong Parliament, he begins to support a direct presidential election. He first argued for the president of the future German republic to be plebiscitary, elected by the mass of the population and not through parliament in *Deutschlands künftige Staatsform* ('The Future Form of the German State') published towards the end of 1918. Actually the Weimer Republic established in 1918 largely brought about what Weber proposed for the constitutional reorganization of the political system. What are the reasons for this change in his views? It may be considered as a response 'to the events surrounding the revolution that led to the collapse of the German

³⁴⁰ Max Weber. Quotation from Bethaam, p.67

³⁴¹ Bethaam, *op. cit.*, pp.63 64

³⁴² *ibid.*, pp.65, 72

Empire in the First World War and its replacement with unloved and unstable republic'.³⁴³

Towards the final years of the war, Weber witnessed the progressive disintegration of the national unity which the opening of hostilities had fostered.³⁴⁴ The political divisions between right and left which were postponed during the war began to open up again. At the end of the First World War, the Republic was proclaimed through a revolution as a reaction against the refusal of the Kaiser to resign. The circumstances in which Parliamentary democracy was finally instituted, however, were very different from those Weber had expected or hoped. The protection offered by the landed elite has finally been stripped away. Yet, democratic government has come to Germany not from the sort of 'successful struggle' which the bourgeois fought in Britain but as a consequence of a defeat. Still the main argument of Weber was standing: the political representatives of the bourgeois classes must assume responsibility for the future of Germany.³⁴⁵

The Weimer Republic was standing also on a complex of compromises. 'Politically it rested on a compromise between the trade unions, the Roman Catholic Church, and the liberal intelligentsia, that is, between precisely those forces which under the Empire had been remote from the seats of power.' The weakness of the Republic lay in the compromise which was regarded by too many of the participants as a temporary rather than a permanent one.³⁴⁶ On the other hand 'one disadvantage of the Reichstag under a federal system was that it would be limited by a second chamber composed of representatives from the individual states and therefore a focus of national

³⁴³ Steven Pfaff, 'Nationalism, Charisma, and Plebiscitary Leadership: The Problem of Democratization in Max Weber's Political Sociology', *Sociological Inquiry*, Vol.72, No.1, Winter 2002, 81-107, pp. 90-91, 82

³⁴⁴ Giddens, *Politics, Sociology, and Social Theory*, pp.27, 23

³⁴⁵ *ibid.*, p.24

³⁴⁶ Lachmann, *op. cit.*, pp.107-109. Lachmann explains the position of social democrat party as follows: Especially socialist leaders found themselves in a dilemmatic political situation. As a result of culmination of events in which they had little part, namely Germany's defeat in the war, they had political power, but that they had to govern a capitalistic society. Even worse, they had to govern it in coalition with bourgeois parties. 'In coming to terms with the reality of the 1920s German socialists adopted an ideology which rested on a clear distinction between the dubious capitalistic present and the glorious socialist future, and which came to regard the Weimer Republic merely as a stage of transition to the latter.' They adopted the Marxist principle that 'Capitalism is ever-changing and all such change must therefore not be resisted...Only who defends outmoded ways of thought and obsolete institutions, the 'reactionary', is the enemy (pp. 109-110).

unity had to be provided from outside Parliament to counterbalance local particularism'.³⁴⁷

However this was not all. Even a strong parliament, which Weber had previously advocated insistently, now seemed to him incapable of producing political leadership. The compromise and horse-trading between parties, social composition of the parliament, the principle of proportional representation (creating a parliament composed of a number of minority parties, without any single one able to attain a clear majority) made the parliament the least suitable organ which would bring forth a political leader of a good caliber. In practice this meant that a political leader dependent upon Parliament would be a creature of compromise between the parties, rather than a person capable to attain an independent position above them. The parliament of the Republic was weakened more by its inability to rise above the play of economic interests. Weber insisted on the need for a directly elected president, as a counterbalance to Parliament, in order to preserve a truly political element in the face of the otherwise exclusively economically oriented character of politics.³⁴⁸

Another reason for Weber's strongest insistence on a plebiscitary type of leadership was Germany's defeat in the World War I- when Weber himself recognized that a world political role was no longer possible for his country. At this point it was the problems of internal reconstruction which were more paramount. The aim should be national ones, certainly, but not nationalist. The winter of 1918-19 was a period of heightened social tension and class conflict³⁴⁹, with social unity threatened particularly from the Left. Weber clearly regarded a Parliamentary system as incapable of providing decisive leadership in these tensions, or of sustaining the strong figure who would

³⁴⁷ *ibid.*, p. 233

³⁴⁸ Bethaam, *op. cit.*, pp. 223, 235

³⁴⁹ 'Ultimately, the November revolution with its negotiated transition to parliamentary democracy ended up disappointing both the left and the right. The left saw its hope of achieving socialism thwarted by the victory of "bourgeois" democracy and by "reformist" Social Democratic leaders...The right saw the traditional authority of the monarch and the authoritarian state overturned and replaced by an unloved republic dominated by Liberals and Socialists. Following the constitutional settlement in 1919, coup attempts and armed uprisings from the right and from the left convinced many that civil war was imminent. Counterrevolutionary, monarchist, and extreme nationalist militias countered the threat from leftist radicals with their own rightist terror.' Steven Pfaff, 'Nationalism, Charisma, and Plebiscitary Leadership', p.93.

satisfy ‘the need for leadership’ and provide a focus for national unity over the divisions and cliques of Parliament.³⁵⁰

V.V.4.3 Intellectual Reasons

First let me consider what Weber means by national values. The concept of nation in Weber’s sociology falls into the category of communal relationships which may rest on various types of affectual, emotional or traditional bases. (ES, p.41) What is more important is that *the communal type of relationship is, according to the usual interpretation of its subjective meaning, the most radical antithesis of conflict.* Additionally, a relationship is communal only so far as it involves feelings of belonging together and emotional values which transcend its utilitarian significance. (ES, p.41-42) Weber categorically examines the concept of nation under the main heading of ethnic groups. (ES, p.385) Ethnic groups may or may not have objective foundations such as common descendants or common customs. The core of ethnic group is the widespread belief among its members in common characteristics. *Almost any kind of similarity or contrast of physical type and of habits can induce the belief that affinity or disaffinity exist between groups that attract or repel each other.* (ES, p.388)

For Weber, the belief in the existence of commonality is more important for group formation than the objective and real existence of these common characteristics. He calls ‘ethnic groups’ those human groups that entertain **a subjective belief** in their common descent because of similarities of physical type or of customs or both or because of memories of colonization and migration. This belief, regardless of whether it has any objective foundation, can have important consequences especially for the formation of a political community. *On the other hand, it is primarily the political community, no matter how artificially organized, that inspires the belief in common ethnicity.* Weber calls this “the artificial origin of the belief in common ethnicity”. (ES, p.389)

The similar artificiality is emphasized by Weber also for nationality - *the concrete reasons for the belief in joint nationality vary greatly.* (ES 395) Neither common language, nor common descent, nor common customs may exist objectively.

³⁵⁰ Beetham, *op. cit.*, p.237

In this sense, one can say that Weber saw nationalism as an “imagined community”³⁵¹. That’s why Weber prefers to define ‘nation’ from the perspectives of those who count themselves as members of the nation: it means that *it is proper to expect from certain groups a specific sentiment of solidarity in the face of other groups. Thus, the concept belongs in the sphere of values.* (ES, p.922)

In Weber’s theory, the idea of nation belongs to the sphere of values so that it is directly linked to value-rationality. Yet the concept also has direct connotations with the state and its power interests, therefore it is also linked to instrumental rationality. Nation for its advocates stands in very intimate relation to ‘prestige’ interests and national attachment creates sentiments of prestige for everybody. These prestige interests may be two-fold: cultural or political in terms of power. Nevertheless, *cultural prestige and power prestige are closely associated.* (ES, p.926) In terms of politics, nation as an idea of *a powerful community of people* who share particular common characteristics is very close to the idea of state... *such a state may already exist or it may be desired.* This power-politics perspective refers to a *pathetic pride in the power of one’s own community, or this longing for it.* (ES, pp.397-398)

Politicians who feel an attachment to political prestige, feel responsible for how power and prestige are distributed between their own and foreign polities. They also hold *a specific belief in responsibility towards succeeding generations.* According to Weber, especially those who hold the political power are at the same time strict and reliable advocates of power prestige of the state. Reason is probably that more powerful state would mean also more individual power for those in authority. *It goes without saying that all those groups who hold the power to steer common conduct within a polity will most strongly instill themselves with this idealist fervor of power prestige. They remain the specific and more reliable bearers of the idea of the state as an imperialist power structure demanding unqualified devotion.* (ES, pp.921-922)

The national attachment also creates a longing for cultural prestige, especially among *those who usurp leadership in a Kulturgemeinschaft*, namely intellectuals. *Those who wield power in the polity involve the idea of the state* whereas those *who by virtue*

³⁵¹ In the sense that Benedict Anderson uses the term. Benedict Anderson, *Imagined Communities*, Verso, 1983. Steven Pfaff, ‘Nationalism, Charisma, and Plebiscitary Leadership’, p.84

of their peculiarity have access to certain products that are considered “culture goods” involve the idea of cultural prestige. For them, the idea of nation contains the legend of a specific ‘culture mission’. This mission necessitates justifying and promoting the significance of nation *in the superiority, or at least the irreplaceability, of the culture values that are to be preserved and developed only through the cultivation of the peculiarity of the group.* (ES, p.925) The activity of cultural cultivation confers to intellectuals also a responsibility of cultural and political education of people.³⁵² In Weber’s words, *the intellectuals are specifically predestined to propagate the “national idea.* (ES, p.926)

The objective side of the national idea is found in its subjectively sharable characteristic by anyone, independently from his personal status. This characteristic of national attachment facilitates the avant-garde role of intellectuals and politicians in promoting the national identity. The sentiments of prestige awakened by the national attachment may be shared by anybody, who is a member of the group. (ES, p.922) *The sense of ethnic honor is a specific honor of the masses, for it is accessible to anybody who belongs to the subjectively believed community of descent.* (ES, p.391) Promoting the national identity by political education of people was also the task adopted and encouraged by Weber for German politicians and intellectuals. *‘For ourselves we can envisage only one thing: what must be accomplished is an enormous task of political education. There can be no duty for us more serious than for everyone in his own circle to be conscious of this task: to cooperate in the achievement of the political education of our nation, which must remain the ultimate aim especially of our own science. Economic developments during transitional periods threaten to disintegrate natural political instincts: it would be a misfortune if the science of economics would aspire to the same goal...’*³⁵³

³⁵² Goldman describes the intellectual effort of Weber not especially for Germany but for European culture in general as follows: ‘Weber constructed a “fictional” or mythic subject of history and social theory, the Occidental personality, rooted in the methodological factionalism of ideal types. He ascribed to this mythic subject a world-historical role...’ In this sense Weber finds both personal redemption and redemption of the nation through the use of social theory combined with fictions or models of the subject. Goldman claims that through such a social theory, Weber hoped to rescue both the world and the self from the self-destruction of European culture. Ironically, he suggests that ‘the self became fragile and the social world rigidified precisely through the wordly influence of older fictions of “self-fashioning”.’ In spite of such a historical understanding, he believed that ‘self and world could put on track again only through the redeployment of these same fictions, revitalized for a secular and post-bourgeois world.’ Goldman, *op. cit.*, pp.6-7

³⁵³ Dronberger, *op. cit.*, p.23

Weber's support for *Machtstaate* and national politics should be evaluated in the light of his conceptualization of nationalism. First of all, his views reflect that national identity is a construction of some powerful groups in the society. Secondly he conceives the power-state as an inseparable part of the national attachment. Thirdly, national and cultural interests are socially unifying value-objectives in comparison to other values and interests. Concerning power-politics, Weber already views the politics in terms of endless conflict between power interests. However, it should be kept in mind that what he proposes for the politician is to balance this cruel instrumental rationality with the belief in some values. Weber is not a disciple of *realpolitik* in the negative sense of the term. 'Power politics, in effect, were required for the realization of constructive politics.' He, as a man of almost excessive integrity, considered the pursuit of power as both justified and compelling only in terms of criteria involving ultimate values.³⁵⁴ In the same way, the *Machtstaat* was a means to increase and spread German culture,³⁵⁵ as democratization being used to strengthen national unity³⁵⁶. Yet, he also does not deny that power-politics and national culture are complementary.³⁵⁷ In this context, the political education of German people in order to remove ignorance of or hostility to national goals was essential for the future leaders to find themselves supported by German nation when they respond to the challenge of given political situations.³⁵⁸

³⁵⁴ *ibid.*, pp.130, 131

³⁵⁵ It was not only national honour, but the quality and character of her culture that Weber believed to be bound up with Germany's external power. The development of a world political role had decisive implications for the character of her 'Kultur' and the quality of her internal life. See Bethaam, p.134.

³⁵⁶ Weber states that 'We demand the 'democratization' (as it is called) of German political institutions as an indispensable means for securing the unity of the nation and Parliamentary government as a guarantee of uniformity in the direction of the policy'. See Dronberger, pp.183-185, 197, 237. Steven Pfaff asserts that, as Weber understands it, the nation-state project could provide political consensus and integration but democracy itself was never the intended goal. It may only be a secondary effect of the process of nationalization. National power as an end should not be sacrificed for the sake of democracy (pp.86-87).

³⁵⁷ Breiner also interprets the choice of nationalism as value in another light. He claims that this value is the one which is adaptable to the power-politics understanding of Weber in best way. The commitment to the nation state can reconcile both the ethic of responsibility and conviction since it is the one ideal that is not injured when power backed by violence is used on its behalf. It also combines four types of social action under its umbrella: Emotional commitment to nation as a value, as a traditional habituation to common language, religion or custom, support to the instrumental power of the state (pp.195-196). According to Schluchter's conceptual scheme of values, in addition to success-values and ethical values, there are cultural values in Weber's theory as a distinct group of values (p.67).

³⁵⁸ Dronberger, *op. cit.*, p.23

PART II: A WEBERIAN LOOK AT THE EUROPEAN UNION

VI. THE COMMUNITY AS A LIBERAL ECONOMIC PROJECT

The European Economic Community (EEC) has been launched by its founding fathers in 1957 as a liberal economic project which has the liberalization of trade between the Member States both as an aim in itself and as a means to other economic aims (such as Europe-wide economic recovery and prosperity after the WW II) and political aims (such as keeping and promoting peace and stability in Europe).³⁵⁹ It may be claimed that the EEC was established from the beginning on a kind of purpose-rationality and even more on instrumental rationality.³⁶⁰ In other terms, it was a 'rational purpose coalition' (Zweckverband).³⁶¹ It is true that this approach led the Community actors to leave political institutions and democratic accountability aside and made for them easier to avoid the difficult questions linked to cultures and values.³⁶²

In fact by the establishment of such a community of States, three life spheres in the sense of Weberian sociology, namely economic, legal and administrative (political) spheres have come into being. However, all the spheres have been constructed around the economic rationality, since the core and main aim of the Community was economic. It may also be seen only as the replacement of liberal national economic systems by one liberal supranational economic system: meaning that although the Communitarian aim is the utility of all, this would be accomplished by the invisible hand of the Common Market. If we continue to follow Weber, the formal rationality of the system should in

³⁵⁹ The Treaty of Rome (1957) originally states the aims of the Community on purely economic basis (Article 2): 'It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.' On the other hand, Weiler mentions three principal ideals, instead of two, for which the Community was instrumental. In addition to peace and prosperity, supranationalism was the third one. J.H.H. Weiler, 'Fin-de-Siecle Europe: do the new clothes have an Emperor?', in *The Constitution of Europe*, Cambridge: Cambridge University Press, 2002, p. 246

³⁶⁰ Larry Siedentop, *Democracy in Europe*, the Penguin Press, 2000, p.33, calls this understanding focusing on economical concerns 'economism'. 'Economism has deep roots in the European project. It can be traced back at least to the idiom of Jean Monnet and others who helped to create the European Coal and Steel Community shortly after World War II.'

³⁶¹ 'The process of European communitarization has over the years altered the character of the Community. The original conception was of a 'rational purpose coalition' (Zweckverband) which had been given limited tasks by the member states to be dealt with jointly with little material restraints on the action competence of the members. M. Reiner Lepsius, 'The European Union: Economic and Political Integration and Cultural Plurality' in *European Citizenship between National Legacies and Postnational Projects*, Klaus Eder&Bernhard Giesen (eds.), NewYork: Oxford University Press, 2001, p.208

³⁶² *ibid.*, pp.33-34

turn determine the action rationality of individuals, at least within the concerned sphere. Again Weber asserts that the category of economic action is limited to the actions that are based on “goal-oriented” rational calculation with the technically most adequate available methods. (ES, pp.101-103) So from a purely Weberian perspective, ‘the foundations of an ever closer union among the peoples of Europe’ was the economic instrumental rationality. And the purely commercial relationships are above all impersonal and value-free. (ES, pp.584-85)

For the founding period of the EU, the conceptual model of instrumental rationality is not something original. As Joerges already claims, instrumental rationality is one of the ways of conceptualizing the EU. ‘*Instrumental* rationality ties in with social choice theories, which define ‘democracy’ as a decision-making method or a method of preference aggregation. From such a perspective, the EU will be characterized as an institution committed to economic rationality and technocratic problem-solving.’³⁶³ Actually he borrows this modeling from Eriksen, and Eriksen’s first possible model of the EU is market-based governance which I claim, develops into regulatory governance, (second conceptual model)³⁶⁴ Regulatory model is based on a theory of Majone³⁶⁵, which may be used to explain the developments of the European Community until the ratification crisis of the Maastricht Treaty. While accepting this model as explanatory tool, it is also necessary to keep a critical distance since it was, according to me, more than a theoretical model: it also partly represents a dominant political mentality, of the member states for a particular period³⁶⁶.

On the other edge of this political mentality, there was a theory of international systems, namely the theory of neo-functionalism. Although contradicting in their conclusions, they were representing the two edges of one paradigm. Their common point was their focus on the superiority of technical rationality of the Community. Neo-functionalism entailed that basis of European integration is the superior problem-

³⁶³ Christian Joerges, ‘The Law’s Problems with the Governance of the European Market’, in *Good Governance in Europe’s Integrated Market*, C. Joerges and R. Dehousse (eds.), New York: Oxford University Press, 2002, p. 26

³⁶⁴ Erik O. Eriksen, John Erik Fossum and Helene Sjursen, ‘Widening or reconstituting the EU?’, paper prepared for the Arena Conference on Democracy and Democratic Governance. Towards a new political order in Europe. Oslo, Grand Hotel, March 4-5. 2002, pp.4-6

³⁶⁵ G. Majone, *Regulating Europe*, London: Routledge, 1996; G. Majone, ‘Europe’s Democratic Deficit’: The Question of Standards’, *European Law Journal*, Vol.4, No.1, March 1998, pp.5-28

³⁶⁶ Together with intergovernmentalism. Actually regulatory model can be seen between neo-functionalism and intergovernmentalism concerning the question of state sovereignty.

solving capabilities of international cooperation. Therefore, the transfer of power from the nation-states to the supranational institutions of the European Community would increase due to the superior problem-solving capacities of the latter and this would be accompanied by a re-orientation of actors' interests and loyalties.³⁶⁷ This was the main academic justification of the Community and laid down the basis of federalism discussions. However, the theory dangerously degrades the politics, not only international but also national politics to a simple technical function of problem solving. Additionally it is based on simplistic assumption that European integration is driven by or at least contributed by utilitarian concept of interest politics.³⁶⁸

VI.I European Spheres of the Community

Before focusing on regulatory model, let me focus on the European orders constituted by the Treaty of Rome. In addition to an economic order, the roots of a legal order and an administrative order might be found in the Treaty. The orders came into being through the Treaty, the supranational institutions, secondary legislation and implementation, and gained character of systems although they stayed largely interrelated / interdependent to each other.³⁶⁹ However, without the character of supranationality, the Community never might be able to create its own spheres with their own inner logics.

The establishment of supranational institutions by the signature States through a Treaty may be understood in the context of 'new economics of organization'. According to that approach, the Treaty of Rome was a contract between the signatory states, which outlines a set of goals in a general manner and structures the relations without dictating the outcomes and without detailing the implementation mechanisms. It was a framework law in legal terminology. In order 'to provide the burgeoning agreement with the long-term stability necessary to make the agreement credible' 'to create a mechanism to bind the governments to their contract' it was necessary to delegate authority to an agent distinct from governments, which would also be

³⁶⁷ M. Jachtenfuchs, 'Theoretical Perspectives on European Governance', *European Law Journal*, Vol.1, No.2, July 1995, pp.115-133

³⁶⁸ K. A. Armstrong, 'New Institutionalism and European Union Legal Studies', *Lawmaking in the European Union*, P.Craig and C.Harlow (eds.), London: Kluwer Law Int, p.92

³⁶⁹ Inclusion of reciprocal relation between the orders is actually the strong point of Weber's life orders conceptualization, comparing to Luhmann's system theory.

instrumental in terms of efficiency, expertise and cost-reduction. 'Given that the Treaty of Rome amounted to a policy road map, the agents were assigned the responsibility and the authority to help 'fill-in' details.'³⁷⁰

The Treaty of Rome has been also the legal backbone of the new community. The Community as a legal entity itself was a product of international law. It owed its foundation to an International Treaty. It was also not possible to think the Community independent from its founding Treaty, in the same way for Weber to think the Modern State independent from Modern Law. Lasok states that 'it is axiomatic that a body which itself is a distinct legal entity will have its own law either infused into its forms by a superior legislator or generated by its organs or both. In the Community legal order both elements are present: the law of the Treaty and the law generated by the Community organs. Moreover, a certain area of the law will be enacted by the Member States themselves in accordance with the Treaty.'³⁷¹ Although the Community started its life as an international organization in the traditional sense, it actually transformed into a new and autonomous legal order on its own from 1963 onwards.³⁷² This transformation may be explained by the Treaty provisions conferring capacity of supranational rule-making on the Community institutions (to perform the function of 'filling-in'), by the establishment of a supranational court (the European Court of Justice-ECJ) to interpret and apply the Treaty provisions and by the ECJ doctrine. Above all, the EEC Treaty as a self-executing Treaty and the EC regulations become an integral part of the legal systems of the Member States - irrespective whether the latter has a monist or dualist view of international law and although the legal sphere of the Community is limited in scope and competence by the Treaty.

In 1963, the ECJ stated that the Community is more than an agreement which merely creates mutual obligations between the contracting states and that the Community constitutes a new legal order of international law. Just one year after, in another judgment, it held that the EC Treaty has created its own legal system.³⁷³ The

³⁷⁰ T.J.Doleys, 'Member states and the European Commission: theoretical insights from the new economics of organization', *Journal of European Public Policy*, Vol. 7, No. 4, October 2000, pp. 534-540

³⁷¹ D.Lasok, *Law&Institutions of the European Union*, 6th Edition, London: Butterworths, 1994, p.81

³⁷² J.H.H.Weiler, 'The Autonomy of the Community Legal Order', in *the Constitution of Europe*, Cambridge: Cambridge University Press, 2000, p.295

³⁷³ Case 26/62, N.V. Alg Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1, 12; Case 6/64, Costa v. ENEL 1964, ECR 585,593. The

European Community law is a legal order in Weberian sense with its own legal rationality, formalism³⁷⁴ and authority. In Craig's words, 'the EC has developed from a legal relationship binding upon the states *qua* states, to an integrated legal order that confers rights and obligations on private parties, and one in which the controls on the exercise of public power are similar in nature to those found in nation states.'³⁷⁵ It may be disputed that whether the EU legal order would not be accepted by Weber as an order or even law since it does not have coercive power. However this objection is baseless. First of all, coercive power does not only mean physical coercion and secondly physical coerciveness is not a prerequisite for calling an order law, according to Weber. Lastly, the EC law is applied by the Member States administrative organs in the same way with national law.

Main supranational institution of the administrative sphere was the Commission composed of independent commissioners who would serve to the Community interest. It was to be the executive authority with powers of initiating all legislation and the overall watchdog of the Treaty. It is responsible for execution of the EU law and policies and holds the monopoly of legislative initiative - the formal power to initiate and draft legislation.³⁷⁶ This confers upon the Commission a significant measure of agenda-setting. When looked at its functions in more detail, it is seen that it is granted with important administrative powers. 'It is at once a manager, helping to adapt and implement the Treaty, and a monitor entrusted with seeing that member

ECJ decisions with direct and immediate effect in the Member States are often perceived as emanations of European competence. Time to time, the ECJ jurisprudence clearly steps outside the wording of the Treaties by its expansive interpretation of Community competences (either through an extensive interpretation of the functional competences related to internal market or through the doctrine of implied competences). Additionally, some of the constitutional doctrines adopted by the Court such as reference to general principles, doctrine of direct effect, the supremacy of the EU law and its entire fundamental rights jurisprudence led to constitutionalization of the EU law. This is called by some writers as normative supra-nationalism. The normative supra-nationalism strengthens, and is strengthened by, a direct relation between Community norms and the peoples of Europe. The Treaty is transformed from an agreement between states to an agreement between the peoples of Europe so that it establishes a direct relationship between EC law and those peoples.

³⁷⁴ J.H.H. Weiler, 'The least-dangerous branch: a retroactive and prospective of the European Court of Justice in the arena of political integration', in *the Constitution of Europe*, Cambridge: Cambridge University Press, 2000, p. 195

³⁷⁵ P.Craig, 'Constitutions, Constitutionalism and the European Union', *European Law Journal*, Vol.7, No.2, June 2001, pp. 128-133

³⁷⁶ Art. (155 EEC) With a view to ensuring the functioning and development of the Common Market, the Commission shall:

- ensure the application of the provisions of this Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof;
- formulate recommendations or opinions in matters which are the subject of this Treaty, where the latter expressly so provides or where the Commission considers it necessary;
- under the conditions laid down in this Treaty dispose of a power of decision of its own and participate in the preparation of acts of the Council and of the Assembly; and
- exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.

governments uphold their commitments.’³⁷⁷ The Commission exercises the powers conferred on it by the Council for the implementation of the rules laid down by the latter. It not only issues administrative rules, but it also renders decisions amounting to policy law. It enjoys broad powers to issue decisions and regulations in order to implement legislative acts. Finally the Treaty confers upon the Commission a degree of enforcement authority. The Commission’s principal role is that of monitor. This includes, but is not limited to, making certain that member governments comply with their Treaty obligations. Under certain circumstances, however, the Commission may act as prosecutor, judge and jury.’³⁷⁸

The Commissioners are required by the Treaty to be completely independent in the performance of their duties. It stands above the national concerns and work to promote the general interest. It is composed of bureaucrats who are expected to serve only to the interests of the Union. On the one hand, the Commission is a typical example of bureaucratic apparatus as defined by Weber.³⁷⁹ Its *raison d’être* is the same with the *raison d’être* of the Community. To protect and to promote the Community interests within the limits drawn by the Treaty is the main responsibility of the Commissioners. In this sense, bureaucratic rationality with its highest formal rationality seems to have been designed as an efficient and competent tool in order to reach the Treaty objectives. The Commissioners are the high position bureaucrats since they are recruited on the basis of appointment and they are expected to represent not the private interests or national interests but objectively and only the Community interests. More than this, they cannot determine the ends of the Commission or the Community but they are strictly bound by the objectives and scope of the Treaty. In other words, they can use their competences only to reach to already determined ends. On the other hand, the governmental powers of the Commission, their large area of discretion under the broad wording of the Treaty and their monopoly on the legislative initiative makes it more than a bureaucratic institution. That’s why sometimes the EU is called the bureaucratic

³⁷⁷ T.J.Doleys, *op. cit.*, pp. 541-542

³⁷⁸ *ibid.*; K.Lenaerts & A. Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’, in *Good Governance in Europe’s Integrated Market*, Christian Joerges and Renaud Dehaousse (eds.), New York: Oxford University Press, 2002, p.75

³⁷⁹ For some scholars, the Commission may not fit to Weberian category of bureaucracy. However, as Edward C. Page claims, it shows great similarities to the administrative systems of many European states and it is the bureaucratic core of the Union. See *Political Authority and Bureaucratic Power: A Comparative Analysis*, Cornwall: Prentice Hall/ Harvester Wheatsheaf, Second Edition, 1992. Especially see the chapter 10: Afterword on the European Community.

governance. And that's why the legitimacy of the Commission has become an important concern for the Community in time. As Lenaerts states:

'The role of the European Commission has always been controversial. Heralded by some as the very motor of European integration, it has been debunked by others a group of pretentious technicians (De Gaulle) or faceless bureaucrats (Douglas Hurd)...One reason for this controversy is the fact that the Commission fits uneasily in classical institutional theory. As of today, the Commission remains the "most original and unprecedented of the institutions"...It is less than a government- and altogether different- but surely more than a secretariat of an international organization...it is not a representative body, yet its members are called to act in the "general interest of the Community". Nor it is subject to classical mechanisms of control as national governments are. It retains, as of today, a rather large institutional autonomy vis-à-vis both the Council and the European Parliament.'³⁸⁰

The European political sphere was represented by the European Parliament and the Council. The Council as representative of the Member States and as the main legislative organ was very important and powerful. The European Parliament as so-called representative of the European peoples were weak with its only consultation role in the legislative process and in the absence of any popular direct elections at European-wide basis. The Council members were the executives of Member states. Therefore in the beginning the main actors of the political sphere were the governors of the Member States who insists to take their decisions by unanimity. Their decision-making power was restrained by two factors: by the Treaty provisions themselves and by the European Commission which keeps the initiative of legislation. The first 30 years of the European Community seemed to be based on a tension between an intergovernmental political sphere and a supranational legal sphere.

VI.II European Community: A Technocratic Authority ?

In the light of the sphere analysis above, it may be claimed that the European Community in 60s and 70s has developed into a bureaucratic-legal authority, though supranational, by increasing its competences and regulative effect and by justifying itself with its economic liberal aims. The European order has evolved on the rationality of its founding Treaty. From 1958 to 1986, the main development has occurred in the legal sphere. In this sense, it may be claimed that the first sphere which has proved its autonomous position has been the legal European sphere. Administrative sphere has also been developing but very slowly under the strict control of the political sphere, namely of the member states through the Council. It was a tension between inter-

³⁸⁰ K.Lenaerts& A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance', pp.50-51

governmentalism and supranationalism which marked its stamp on the period- a conflict between state sovereignty and supranational logic. Attempts for full harmonization in this period have been largely hampered by the requirement of Council unanimity and by the burdensome nature of formulating uniform legislation. The only exception was the Common Agricultural Policy.³⁸¹

On the other hand, the roots of comitology as well as the empowerment of the Commission with delegated competences, which would provide the basis of the claims of ‘the European Union as administrative authority’, after 90s lies at this period. ‘As early as the 1960s, its increasing workload, and a need for detailed technical and bureaucratic expertise (in particular in the agricultural field), forced the Council to contemplate delegating significant decision-making powers to the Commission. However the Member States did not wish to completely surrender their powers in the decision-making process on the matters subject to delegation...This dilemma was resolved by creating committees composed of national representatives which would be able to assist and control the Commission in the exercise of its delegated powers.’³⁸²

Until the Single Market Programme, the European Community was focused on the mere removal of trade barriers and the European integration was associated with market unification.(negative integration)³⁸³ We may claim that the European Community has evolved from market-based model to the regulatory model from 1957 to 1990s. However this period does not refer at the same time to a laissez-faire liberalism. Actually Joerges attempts to explain the Community with a model established in front of the economic and constitutional crisis of the Weimer Republic. This model is called *ordo-liberalism*, which means basically a ‘strong state’ which would impose an *ordo* intrinsic to economic life, without political inhibitions. According to *ordo-liberal* theory, the state must create a proper legal environment for the economy and maintain a healthy level of competition by adopting measures compatible with market principles. The state should take active measures to foster competition in order to prevent emergence of firms with monopoly (or oligopoly)

³⁸¹ W. Sauter & E. Vos, ‘Harmonization under Community Law: The Comitology Issue’, in *Lawmaking in the European Union*, P.Craig and C.Harlow (eds.), London: Kluwer Law Int, pp.170-171

³⁸² *ibid.*, p. 174

³⁸³ R. Dehousse, ‘Misfits: EU Law and the Transformation of European Governance’, in *Good Governance in Europe’s Integrated Market*, Christian Joerges and Renaud Dehousse (eds.), NewYork: Oxford University Press, 2002, p.208

power, which will not only subvert the advantages offered by the market economy, but also possibly undermine good government. In short, the state should form an economical order instead of directing economical processes. In *Ordo*-liberalism a strong state did not mean a state intervening into economy by some political concerns. On the contrary, ‘it was this very core idea that lent *ordo*-liberalism significance in the formative stage first of the Federal Republic and then of the European Economic Community. Domestically, the economic constitution was set alongside the political constitution, so as to protect the market economy against discretionary political encroachments.’³⁸⁴

Ordo-liberalism has similarities with regulatory model. It entails the executives to have an essential positive role to play in creating and maintaining an appropriate framework of rules and institutions.³⁸⁵ Similarly, it proposes to create a division of labour in economic management, with specific responsibilities assigned to particular institutions. In the context of Community, it meant that the executives of the member states were sharing the economic management with the Community institutions and the institutions in turn with the committees and other technical agencies. While *ordo*-liberalism could provide a support to the new supremacy claims of Community law by its theory of ‘economic constitution’ and thereby the Community law could be understood to institutionalise a “system of undistorted constitution”, it was still needed a justification of Community powers and European supremacy claims. The answer came with the discussions on the intrusion of technical developments and scientification into politics through politically independent technical organs of state governance. It was important to take technically correct decisions with a satisfactory technical knowledge and these types of areas dominated by the technical necessities of scientific and technical civilization are to be administered by an “inner circle” and cannot be subject to political decisions. These discussions ‘nurtured public awareness for the emergence of technocratic governance – and grounds for its justification. In Hans Peter Ipsen’s theory (1972) of the European Communities as *Zweckverbände funktioneller*

³⁸⁴ C. Joerges, ‘“Economic Order”- “Technical Realization”-“the Hour of Executive”’: Some legal observations on the Commission White Paper on European Governance’, The Jean Monnet Working Papers, No.6/01, 2001, <http://www.jeanmonnetprogram.org/papers/01/012201-03.html>, (01.08.2007), pp.4-5

³⁸⁵ J.P. Marissing, ‘A policy of change : an appeal for further reform of aspects of EU competition policy.’, Breukelen: Nyenrode Business Universiteit, 2005. p. 9, <http://www.nyenrode.nl/download/lectures/marissing.pdf> (01.08.2007)

Integration (“special purpose associations of functional integration”) it found a version that procured institutional anchorage for technical rationality in the EEC, the sphere of whose application was, however, to be confined to “questions of knowledge”, with genuinely “political” questions to be left to democratically legitimated decision makers.³⁸⁶

Ipsen’s theory of purpose association has certain similarities with Majone’s theory of regulatory state. The regulatory model also views the community as a special purpose organization (*Zweckverband*) or an agency, whose purpose is to address a number of (non-political) issues which it can achieve a greater efficiency than the Member States acting individually. Ipsen assigned the Community with only technical tasks which required knowledge, not a political choice and considered the Commission as an “executive agency”. On the other hand Majone assigned the European institutions with the tasks of developing regulatory solutions for a series of socio-economic problems and but not editing norms regarding broad, political matters. Both models put an emphasis on the centrality and indispensability of ‘expert knowledge’ in the European integration process and on the protection of the European institutions from political influences for the correct performance of their tasks. Of course, in the period when Ipsen wrote for the EEC (70s), neither the internal market policy nor the interplay of de-regulation and re-regulation, which Majone analyses, did exist.³⁸⁷

VI.III Establishment of European Legal Sphere

Concerning legal sphere for the same period a dilemma may be observed, as Weiler also asserts. European legal sphere was developing as an autonomous sphere by the decisions of the European Court of Justice towards an enhanced supranationalism, while there was a counter-development towards intergovernmentalism in political-decisional-procedural terms. Weiler lists four doctrines established by the ECJ case law from 1963 till 1973.³⁸⁸ These doctrines on the one hand indicates the development of a new legal order beside the nation state legal orders, on the other hand but being related to the former from a Weberian perspective, an increase in the formal rationality of the

³⁸⁶ C. Joerges, ‘ “Economic Order” - “Technical Realization” - “the Hour of Executive”’: Some legal observations on the Commission White Paper on European Governance’, pp.7-8

³⁸⁷ C. Joerges, op.cit., pp. 12-13; K.Lenaerts& A. Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’, pp.51-52

³⁸⁸ Weiler, ‘The transformation of Europe’, in *the Constitution of Europe*, p. 19

Community legal order. Weiler also agrees to that the systemic evolution of European law was self-referential and resulted from the internal dynamics, almost as if it were insulated from those external aspects. Within the realm of law there was a clear internal legal logic.³⁸⁹ As may be remembered from the analysis of law by Weber, formal rationalization of the legal sphere is a requirement to be an autonomous order for Weber. At the same time, formal rationality of a legal order increases its predictability and calculability for the actors in the liberal economic order. In this sense, formal rationality of legal order and capitalism develop hand by hand. The European Community is maybe the purest example of this theoretical proposition of Weber.

The first doctrine introduced by the ECJ in 1963 was the doctrine of direct effect and provided the actors in the Community acting according to rationality of common market with more certainty about the consequences of their purposive actions. According to the doctrine, Community legal norms that are clear, precise, and self-sufficient must be regarded as the law of the land in the sphere of application of Community law. Additionally these types of norms create enforceable legal obligation not only between the Member States and individuals but also among individuals inter se. It is clear that this doctrine creates a more secure economic environment supported by legal coercion for the individuals and for the instrumentally rational economic actions. It strengthens the formal rationality of European law by maintaining its uniform application to all citizens of member states. In turn, economic sphere contributes to the development of a uniform supranational legal order by the cases brought by the individuals mostly against state public authorities on the basis of this doctrine. In Weiler's words, they became 'the principal guardians of the legal integrity of Community law within Europe'.³⁹⁰

This doctrine may be seen as a first step in the rationalization of the European legal sphere- in Weber's theory, legal rationality is the degree to which a legal system is capable of formulating, promulgating, and applying universal rules. The doctrine together with the doctrine of supremacy also increased the formal rationality in a specific sense since the formalism indicates to employing criteria of decision intrinsic to the legal system. The doctrine of supremacy entails that any Community norm, a Treaty

³⁸⁹ Weiler, 'The Transformation of Europe', pp. 15, 31-32

³⁹⁰ *ibid.*, p.20

article or a secondary legislation, trumps conflicting national law whether enacted before or after the Community norm. ‘The combination of two doctrines means that Community norms that produce direct effects are not merely the law of the land but the “higher law” of the land.’³⁹¹ Supremacy of the Community law reminds Weber’s historical explanations for modern rational legal orders: the emergence of a new law of general validity, in place of, or in contrast to, the general (common) law. (ES, p.839) The Community seems to be a good example for systematization and formalization of law under economic influences. Weber explains the rationalization of law under state monopoly as follows: the legal particularism arising from the “special law” of law communities has been abolished by the unification and monopolization of law by the modern political organization.

Here ‘employing criteria of decision intrinsic to the legal system’ is facilitated by the doctrines of supremacy and direct effect. Thereby, the member state courts have to apply the criteria of the Community in their decisions for the cases falling in the sphere of application of Community law. However, the systematization of the Community law does not refer to a complete abolition of the ‘special law’ of law communities since each law is supreme within its own sphere of competence, i.e. the Community law is supreme to the member state law only in the areas belonging to its exclusive competence. The ECJ is the supreme institution which exclusively decides Kompetenz-Kompetenz questions. The new legal order exists side by side and develops time to time at the expense of national legal orders.

The third doctrine is the doctrine of implied powers, which deals with the division of competences between the Community and member states. The doctrine is directly connected to the expansion of Community legal sphere. Although the Treaty does not give a clear division of powers between the supranational and national level, the ECJ developed its jurisprudence to the interest of the Community through the doctrine of implied powers. The powers not explicitly stated in the Treaty but necessary to serve the legitimate ends pursued by it would be accepted as implied in favor of the Community. This purposive rationality that leaks into the Community jurisprudence seems to be a necessary implication of a legal order solely based on economic purposes.

³⁹¹ *ibid.*, pp. 20-22

The supranational law by implied powers doctrine turns explicitly into a means to the economic ends. The exclusive competence of Community may be read as an announcement of legal monopoly by the Community since it means that Member States were precluded taking any action per se, whether or not their action conflicted with a positive measure of Community law (a prominent example is Common Commercial Policy). In other fields, only after the Community legislates positively, the member states should abstain from taking any action. Overall, these doctrines would certainly increase the areas on which the new legal order establishes its monopoly and dominance by time and it did. The fourth doctrine that Weiler mentions is the doctrine of human rights, which will be dealt in the next section on legitimacy of the EEC.³⁹²

One important legal factor contributing to the systematization and uniform application of the Community law is the judicial review both at the Community level³⁹³ and at the national level. At the national level, a national court may request a preliminary ruling from the ECJ about a question concerning the interpretation of the Treaty. The national courts and the ECJ are integrated into a unitary system of judicial review. This mechanism, thereby, furthers the uniform interpretation of the Community law. In terms of autonomy, it creates two important consequences for the Community legal order. First of all it creates a habit of obedience and respect towards the Community law. Secondly, the community legal order becomes ‘a truly self-contained legal regime’ independent from member state political attitudes. The period from 1973 to the Single Act is called the period of mutation by Weiler. Transformation of legal sphere to an autonomous political order by expanding and absorbing some more areas of national legal orders continues. This period is important to understand the dilemmas of the European Union today.

In this second period, Weiler observes that the Community legal competences expanded so radically that no core of sovereign state powers was left beyond the reach of the Community. In some areas, exclusive competence of the Community limited and restricted – *absorbed*– the exclusive legal competence of the Member States. If the national measures in the areas on which the Community has no competence conflict

³⁹² *ibid.*, pp. 22-23

³⁹³ Either the Commission or an individual member state may bring an action to the ECJ against a Member State for failure to fulfill its obligations under the Treaty.

with the Community legislation for the areas on which the Community has exclusive competence, the national legislation must give way to the Community law. It meant simply a clear preference for Community competence over Member State competence. Extension of the European legal sphere also has been accomplished by a collaboration of political and legal actors by making use of Article 235.³⁹⁴ By a decision of Member States in the Paris Summit of 1972 the Community competences expanded both quantitatively and qualitatively into a variety of new fields by making full use of Art. 235. It meant simply that there is no national sphere of competence which may stay immune from the Community action and may not be brought within the objectives of Treaty by this wide reading of the Article. In this process, the role of the ECJ was to interpret the ‘implied powers’ doctrine more flexibly under the political influence and to support the Council in the expansion of the Community legal order. However all these analysis about the years until the Single Act should not be read as refutation of the claim above that the Community was in a stagnation process in terms of reaching to the aim of single market. ‘the Community was unable to act in concert on the issues that really mattered during the 1970s, such as developing a veritable industrial policy or even tackling with sufficient vigor Member State obstacles to the creation of the common market. The momentum was directed to a range of ancillary issues such as environmental policy, consumer protection, energy, and research, all important of course, but a side game at the time.’³⁹⁵

Political spheres and legal spheres in those periods are entirely self-referential and self-contained.³⁹⁶ The dominant logic of the political sphere was intergovernmentalism, meaning that the Member States, often at the expense of the Commission, assumed a dominant say. Each Member State kept its veto power over proposed legislation through Luxembourg Accord. They kept a strict control over the Commission legislative initiative by a sub-organ of the Council, the Committee of Permanent Representatives (COREPER), composed of Member States’ representatives and by other regulatory committees. Since Member States could not control the

³⁹⁴ Art. 235: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

³⁹⁵ Weiler, ‘Transformation of Europe, pp. 39-58

³⁹⁶ *ibid.*, p.31

application of the Community law once it has been legislated and had to submit to the dominance of the European legal order, they seemed to prefer keeping a strict control over the decision-making. At the same time, only such a strong intergovernmentalism would make possible for the Member States to accept the development of a new legal order over their sovereignty. Of course, the State interests in the Community also played their role. The strengthening of the Community meant the strengthening of the Member States, more specifically of their governments. The Community seemed to them almost as an instrument in their hands and relative expansion of the Community law after 1973 may be explained by their interests in this mutation and by their tendency to escape the nuisance of the parliamentary accountability.³⁹⁷

VI.IV A Weberian Look at the Legitimacy of the European Community

As an association of rational purpose, the European Economic Community has been established by an agreement. Although it seems to be a voluntary association due to its founding Treaty approved by all member states, it would be more correct to call it a compulsory association since an order is always imposed as far as it does not originate from a voluntary personal agreement of all the individuals concerned, for Weber. Therefore the governments' consent to the Treaty of Rome and even the Parliamentary approvals are not enough to call the European Economic Community as a voluntary association. Sociologically, an association is a social relationship within which the actions of the parties to the relationship are regulated. Its regulations are enforced by an administrative staff. In this sense, the Commission and the European Court of Justice, in addition to the Member States' administrative staff, are responsible realizing the EEC's order (the Common Market).

Weber tells us that if an organization is compulsory (or voluntary) it has necessarily rationally established rules. These rules, Weber emphasizes, are rationally established whenever and wherever an order is imposed. It may be concluded that an organization innately contains rationality. Weber maintains that association occurs whenever an agreement is made in a purpose rational manner, even though its extent and meaning may vary greatly. (ES 1379) Weber considers an organization rational since it fits into the means-ends scheme. The European Economic Community in this

³⁹⁷ *ibid.*, pp.30,34-39, 58-59

sense is an example of a purpose-rational organization since it typically fits into the means-ends scheme, by a Treaty which lays down the objectives and structures the means to be used. Yet, it certainly is not a State since it does not keep the monopoly of coercive physical power- actually no physical power at all in terms of police force, prisons, or military force. Yet, it retains still a kind of coercive power, though largely based on the administrative structures of the Member States.

The legal and administrative orders of the European Economic Community should be analyzed in the light of law-economy relation since its objectives are mainly economic. First of all, it is to be underlined that non-political organizations may have laws although they do not have means of physical force. What matters is only the presence of a staff engaged in enforcement. (ES, p.34) The main objective of the Community legal order was to create an economic order with a specific rationality which finds its substance in the term of Common Market. When it is created for a particular purpose, as Weber states, law can also function ... as to induce...the emergence of certain economic relations which may be either a certain order of economic control or a certain agreement based on economic expectations. (ES, p.667)

In return, the law is systematized and formally rationalized under the influence of the economic factors. Weber claims that certain rationalizations of economic behavior...and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery have influenced the systematization of law or have intensified the institutionalization of the polity. (ES, p.654) I claim that the systematization (constitutionalization) of the Community law in the period until the Single Market should be understood in the light of this relation between economy and law. under According to Weber's theory, any expansion of market economy necessitates an improvement in formal rationality of law by demanding legal guarantees and certainty for material or abstract possessions, for power situations and for the (mostly economic) results of certain actions. The Community legal order has developed its formal rationality in accordance with the necessities of a common market economy, especially in order to guarantee the conditions of a common market to the economic actors who take and calculate their actions accordingly. Establishment of a specific economic sphere by law would only be possible if the social actors' actions in the sphere may be regulated and directed according to the rationality of the aimed economic

sphere. One possible way to do that in a market economy is to reinforce legally the predictability of the results of economic actions and transactions. The probability of fulfillment of expectations facilitates instrumentally rational actions which are the backbones of economic order. (ES, p.666)

In the establishment of the modern state law economic factors and especially capitalistic interests play an important role. The European Economic Community goes through a similar process in the establishment of a common (transnational) market and of a legal order regulating that market. For a smooth operation of the market and trade, it was necessary to abolish the legal particularism and privileges arising from the “special law” of law communities and to unify them under the state monopoly on the basis of ‘formal equality’. In the same way, for the smooth operation of the common market, it was necessary to abolish special legal regulations of the Member States on the trade and privileges given to different actors and actions on the national basis. Although it is only in the economic sphere, and only in the commercial law in the beginning, we may still talk about the legal monopoly of the Community, based on the exclusive competence. This kind of unification was aiming to create a formal equality between economic actors in the Community. From the perspective of the common market rationality, the particularism of the commercial law indicated to ‘formal irrationality’, as opposite to hierarchical systematization of law- with decisions changeable from case to case in the lack of generally applicable rules to similar cases (depending on national legal system). The grants and protections served by the Member States to trade were damaging the rationality and formal equality of Community legal order.

In terms of the actors’ interests, as there was in the formation of state monopoly over law, there are economic interest groups who desire more rational, calculable and privilege-free legal system in European transnational trade. Since the governments have fiscal and political power interests to favor these groups, the alliance of governmental and bourgeois interests combined with the bureaucratic needs led towards the formal legal rationalization. (ES, p.847). Naturally, the economic interest groups in the Community were not homogenous. Commercial monopolists and monopolistic large-scale entrepreneurs largely rested upon national trade and industrial privileges. What they needed was a supranational power against the national trade barriers but not a uniform, formally equal objective legal system. However, the result

has been more and more unification and systematization of the Community law. The only difference from the State legal orders may be that from the beginning, the Community legal system was established against a kind of ordo-liberalism model, which contained regulations against all kind of market distortions such as monopolies.³⁹⁸

Lastly, the Community legal order under the direct influence of economic rationality develops a rationality very similar to the formal rationality. As stated before, instrumental rationality is the dominant rationality of economic actions and refers to the actions the results of which are calculated according to the expectations about the behaviors of the others and other environmental conditions, and oriented towards economic interests as main ends. In this respect, the use of most efficient and 'objective' means for calculation of the possible results is the core of instrumental rationality. Formal rationality of the economic order required the most efficient and suitable means for free market interests. The formal rationality of legal order, to the extent that it is influenced by the economic factors, aims a similar kind of calculability, prediction and objectivity. In Weber's words, economic interests are among the strongest factors influencing the creation of law (ES, p.334)³⁹⁹ and the ever-increasing legal formal rationality. Systematization of law results from the fact that the tempo of modern business communication requires a promptly and predictably functioning legal system (ES, p.337) Lastly, the overall formal structure of law, as general principles universally and rationally applied to the cases, serves to the needs of economic system: The universal predominance of the market consociation requires ...a legal system the functioning of which is calculable in accordance with rational rules. (ES, p.337)

Weberian explanations may be very useful also in explaining the behaviors of judicial actors in the Community who contributed to the rationalization of new legal order. Weiler attempts to explain the national Courts' activist attitudes in accepting the

³⁹⁸ It is almost the same process with the States in terms of interest conflicts: 'Capitalist groups were not homogenous. This was politically oriented capitalism and the great colonial and commercial monopolists and the monopolistic large-scale entrepreneurs of the mercantilist manufacturing period largely rested upon princely privileges. Therefore they were in conflict with the bourgeois middle class. In overall what they needed was not a uniform, formally equal objective legal system but the patriarchal princely power growing against the privileges of the estates and against the protection of the bourgeois craftsmen by the common law. (ES, pp.847-848) However, the result has been more and more unification and systematization of law, especially through codification.

³⁹⁹ For, any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive groups and the formation of social groups depends, to a large extent, upon the constellations of material interests. (ES 334)

supranational legal order against the intergovernmental political resistance in 60s by the empowerment of their status. With the supranational law, lower courts and judges in the member states were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation. 'Institutionally, for courts at all levels in all Member States, the constitutionalization of the Treaty of Rome, with principles of supremacy and direct effect binding on governments and parliaments, meant an overall strengthening of the judicial branch vis-à-vis the other branches of government.'⁴⁰⁰ For Weber, formal rationalization of law is led mainly by the legal actors. Especially, the autonomy of the legal order and a high-level specialization contribute to the status interests and power aspirations of the legal profession. Therefore Weber already provides us with the theoretical framework for Weiler analysis.

Before it may be focused on the issue of legitimacy of the Community, one has to understand what kind of authority the Community is. Since the authority types of Weber is not specific to the modern state structures, the EEC could be called as rational authority. For the rational authority, obedience is not to the personal authority but to the system and norms. It is a system of consciously made rational rules. The person(s) in the power has their position by designation of the rules and their power legitimated by that system of rational norms. (ES, p.954) Thus it is domination by virtue of "legality". (ES, p.215) The Community fits to rational authority definition not only by its rational means-ends scheme but also by its specific legality. The executives of the Member-States have the power of legislation by virtue of the founding Treaty, although they are not elected for legislation in their own States. Therefore, it may not be concluded that their decision making power is based on any kind of democratic legitimacy. The Treaty is legitimate since it was signed by the legitimate national authorities and approved by the legitimate national procedures. In a similar way, the administrative and judicial authorities of the decisions of supranational institutions come from the Treaty and its specific procedures. The Community legal rules are treated legitimate since they are imposed by a legitimate authority and this authority is legitimate since the legal rules so designate. (PAV, p.79; ES, pp.36-37)

⁴⁰⁰ Weiler, 'The Transformation of Europe, p. 33

The only direct link between the Communitarian authority and people in political sphere is supposed to be the European Parliament. However, the European Parliament was not composed of the elected representatives of the people until 1974. Its powers were very limited and its role in the legislation was squeezed to giving its unbinding opinion. It was almost powerless in front of the Commission and the Council. The ineffective assembly is another indication for that the Community authority is based more on legality than democratic legitimacy. When taken into account that the Commission which is the executive power of the Community is composed of bureaucrats, together with a weak parliamentary body, actually situation until 90s reminds one Weber's Germany. One scholar already made the analogy already: 'Like the German Parliament in the Bismarck era, today's European Parliament is not a ruling parliament but a parliament of subjects – despite the completely lacking subject mentality.'⁴⁰¹ As in Germany, the executives do not come from the assembly but from among the bureaucrats and the administration is very strong in politics. It may be a historical explanation for why Weber's analyses of legitimacy provide us with a deep insight into the Community's legitimacy question.

Concerning the Community administrative sphere, as we have already seen in the model of *ordo*-liberalism and Ipsen's theory, management of economic sphere was to be left to the administrative and technical rationality. Economic sphere was considered independent from the political sphere and the isolation from politics was a necessity for economic success. In administrative sphere, economical rationality combines with pure technical rationality and scientific rationality. This kind of division between spheres lies already at the core of Weberian theory. Bureaucratic organs become more and more independent from the political control and create an authority on its own based on its highly developed technical knowledge. For Weber, this is one of the dilemmas of the modernity. Bureaucratic and technocratic organs with their impersonal and objective attitudes are supposed to be free from the value-conflicts and power struggles of political sphere. The delegation of powers to the Community from the Member States and from the Commission to the committees and technical agencies empowers the 'bureaucracy' (as a generic name) at the expense of politics and formal

⁴⁰¹Hauke Brunkhorst, 'The legitimization crisis of the European Union', *Constellations*, vol.13, No.2, 2006 , p.173

rationality at the expense of substantive rationality- technical rationality at the expense of value rationality.

What is maybe more interesting is that the ground for justification of powerful administration. It seems to be based on the typical separation of 'is' and 'ought', between values and facts, an epistemological approach almost all Weberian theory settles on. The tasks of the Community were considered as the issues of 'facts' based on knowledge. The decisions taken by the supranational institutions were about the correct answers not about the right answers. Therefore it was justified by the argument that the 'expert knowledge' should be protected from the political influences for the correct performance of the administration. Weber maintains that one of the decisive factors for the development of bureaucracy is economic and technological developments since they indicate an intensive and qualitative expansion of the administrative tasks. A project for common market between a number of member states together with advances in the science and technology in this period of course meant an enormous administrative task. Additionally, again Weber states that the bureaucratic organization is the most suitable type for such tasks since it is technically superior to any other form of organization. It provides precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs. (ES, pp.971, 973)

However more than this, objectivity was a significant characteristic of modern bureaucracy. The administrative functions are carried according to purely objective considerations. At the supranational level, the Commission was supposed to be even more objective than the State bureaucracies since the Commissioners were working for only the Community interests, not for the national states' interests. They were even independent from the national politics comparing to their colleagues at the States. It was the most suitable design for a non-political and economic organization that is assigned with the technical functions and with the questions of knowledge. Weber underlines that *bureaucratic administration means fundamentally domination through knowledge. This is the feature of it which makes it specifically rational.* (ES, p.225)

However, from the beginning, the conflicts between the bureaucratic power and the political actors were apparent at the Community. As Weber urges us,

bureaucracy may and does turn from being a tool of domination into being a dominating power itself. The tremendous power of bureaucracy rests not only on the technical know-how in general sense but also official information growing out of experience in the service. From this perspective, *the actual ruler is necessarily and unavoidably the bureaucracy since the power is exercised ...through the routines of administration.* (ES, p.1393) This was certainly a perceived threat by the Member State executives, especially when it is taken into account that now the bureaucracy was under less control due to supra-nationality and it was the Commission that keeps the initiative of legislation. The warning of Weber was more real than ever: *the political 'master' always finds himself, vis-à-vis the trained official, in the position of a dilettante facing the expert*, no matters whether the master is the 'people', the parliament, the elected president or a monarch. (ES, p.991)

The establishment of the COREPER and other regulatory committees was an attempt of the political actors, the Member States, to control the supranational bureaucracy with another type of bureaucracy, which is this time responsible with the protection of national interests at supranational level and to prevent a supranational bureaucratic domination. However, from the perspective of the individuals, this only meant the strengthening of bureaucratic domination over them. Their only supposedly direct representative's position, comparing to the Commission was another piece which fits to Weberian puzzle. According to Weber, especially against the public and the parliament, to protect itself from criticism and to secure its power position contra any investigation the bureaucracy fights out of a sure power instinct. *Bureaucracy naturally prefers a poorly informed, and hence powerless, parliament.* (ES, p.993) This time, it was not only the bureaucracy but also the member states themselves who want to keep the supra-nationality under control and the only supranational democratic element powerless. The long struggle of the Assembly first for the direct elections and secondly for a stronger position in decision-making may be explained largely by this approach.

Now, we are ready to focus on the question of legitimacy. From the picture above, it is clearly understood that the Community domination was based on formal rationality in many senses and in many spheres. Actually, the main justification for its authority was its formal rationality. It was free from any value choice- moral, political, ethical etc. As completely isolated from political sphere, it was in no need of any

political legitimacy for its decisions, except the approval of the Member States and for purely technical issues event not this. If this was a negative explanation for the legitimacy of the supranational authority, serving to interests efficiently and successfully was the positive justification. Remarkably, this positive justification is at the same time definition of instrumental rationality in its pure type, according to Weber. In other words, political legitimation of the Community was its formal rationality and functional legitimation of the Community was its instrumental rationality- A couple which is inseparable á la Weber. In Lepsius words:

‘The European Community has legitimized itself primarily due to criteria of economic efficiency and long rejected more comprehensive ideas of a cultural order... Thus, the definition of objectives and decision-making processes were largely freed from national orders based on political, social, and cultural values. Criteria of efficiency could be instrumentally directed at specific targets: the customs union, the creation of a large internal market, and the making of a competitive market. The intended and unintended consequences associated with these decisions were left to the socio-political systems of the member-states. Thus, the European Community could concentrate on well delimited policy fields and continue to present itself as a ‘specific administrative union’, although it had long outgrown this status. Until Maastricht, constitutional debates were effectively avoided. Furthermore, they had not been raised by the public.’⁴⁰²

Attention should be paid on the fact that the justifications for the Community domination could be the justifications for the Member State executives to keep the decision-making power at supranational level, although democratically they were not granted by such a power. As far as important policy changes are made by the Treaty amendments that have to be approved on the national basis by the Parliaments or through referendums, those type purely administrative and technical decision-making could be delegated to Member State government representatives. Additionally, they were in the Council to guarantee the compatibility of the Community interests with their national economic interests under the safe shadow of the unanimity procedure- thereby it was the economic interests of the Member States and the people as economic actors in the market (whether as consumer, labor or entrepreneur) which were served by the Community by promoting the Common Market and reaching to the Treaty objectives. ‘The belief in welfare benefits for all participants justified the integration policy without recourse to non-economic values.’⁴⁰³

⁴⁰² M. Reiner Lepsius, ‘The European Union: Economic and Political Integration and Cultural Plurality’, in *European Citizenship between National Legacies and Postnational Projects*, Klaus Eder&Bernhard Giesen (eds.), NewYork: Oxford University Press, 2001, p. 209

⁴⁰³ *ibid.*, p. 210

From this perspective, 'it was common to assume that the EC faced fewer and lighter legitimation requirements than the state...the efficient production of useful policy outputs would be enough.'⁴⁰⁴ The legitimacy relation was also partly based on the formal freedoms and rights provided by the Community to the individuals. These were economic freedoms and rights which would facilitate the smooth functioning of the Common Market and were supportive for the argument of Weber that the origin of human rights was mainly economic liberalism. The adjudication of the ECJ concerning human rights was interpretation of human rights in the context of market economy. The anti-discrimination clause of the Treaty was intended to provide a formal equality in front of the opportunities that could be presented by the new economic order.

⁴⁰⁴ C.Lord & D.Beetham, 'Legitimising the EU: Is there a 'post-parliamentary basis' for its legitimation?', *Journal of Common Market Studies*, Vol.39, No.3, September, 2001, p. 444

VII. THE SINGLE MARKET ACT AND AFTER

In the late 1980s and early 1990s, European integration shifted from a judicial to a more political mode.⁴⁰⁵ There are many ways to explain the new impetus that the European Community gained in the mid of 1980s. The 30 years passing without reaching to most of the Common Market objectives by the many fruitless attempts for full harmonization under the shadow of the unanimity principle in the Council is one of them. There are other political factors such as that the economic crisis in the 70s which could not be overcome by a growth of non-tariff barriers created a coalition of business interests and European governments which finds the solution in neo-liberal economic doctrine and in ‘a much faster move towards a Single European Market so as to modernize European industry and withstand competition from Japan, the United States and Newly Industrialized Countries.’ Additionally, it was understood that there was an urgent need for institutional reforms after the entry of new members making an agreement between Members even more difficult.⁴⁰⁶

The need for reforms in the methods of harmonization and in the institutional model led to the adoption of the Single European Act in two steps. First, the ECJ introduced the principle of mutual recognition of national standards and opened the possibility for ‘negative harmonization’ by court action in the *Cassis de Dijon* case of 1979. Secondly, the Commission, following the Court’s approach, outlined the strategy of minimum harmonization in the 1985 White Paper, by setting out 300 specific measures of harmonization required to remove the main remaining barriers by the end of 1992. The essence of the strategy is as follows: ‘the Member States would be left a greater degree of freedom to implement “essential requirements”, set at the Community level, but the various national implementing legislation would be mutually recognized as satisfying these minimum standards. With its new emphasis on removing market barriers, rather than formulating common policies, harmonization now become a tool of “negative integration”.’⁴⁰⁷

⁴⁰⁵ P.L.Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community’, *Columbia Law Review*, Vol.99, No.3, April 1999, p.638

⁴⁰⁶ M.Newman, *Democracy, Sovereignty and the European Union*, London: Hurst&Company, 1996, pp.34-36

⁴⁰⁷ W. Sauter & E. Vos, *op. cit.*, pp.171-172

Following those two steps of the ECJ and the Commission, the Single European Act (SEA) was agreed by the Member States in December 1985 and implemented after the ratification process in July 1987. The SEA was an amendment of the Treaty of Rome, defining the internal market as an 'area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' and setting a timetable for its achievement by the end of 1992. Additionally, the Member States agreed to move from the unanimity voting to the qualified-majority voting (art.100A) for harmonization measures necessary for the completion of internal market. Reasons for such a move to more supra-nationality may be listed as follows. First of all, there was a will to overcome the deadlock occurred in policy-making and to find an alternative of letting the judicial process continue to make necessary policy choices incrementally. However that will was furthered by the purely technical approach of the Commission in the 1992 White Paper. 'It delineated the ostensibly uncontroversial goal of realizing an internal market, and, in the form of a technical list of required legislation, the uncontroversial means necessary to achieve that goal.' Therefore the move to majority voting was viewed as a 'low-key technical necessity in realizing non-controversial objectives of the White Paper'.⁴⁰⁸ Lastly, the Member States attempted to balance this altruism by another article (100A.4) which allows derogating from a Community measure by national safeguard measures.

The Single European Act has been very successful together with a number of secondary consequences of this success. The majority voting has reached its impact by surpassing the impasse in the Community decision-making. Until 1992, most of the hindrances before the Common Market have been abolished by the Community legislation. However the equilibrium in the Community has changed to the advantage of the supranationality, not only due to qualified-majority voting but also due to the Commission heightening status and role in the decision-making; qualified-majority voting greatly enhanced the autonomy of the Community's permanent bureaucracy in Brussels. First of all, it was the Commission who proposes the legal basis of the decisions. Only by unanimity, the Council could change the legal basis. It resulted in the principle of qualified-majority to become a rule and unanimity an exception in the decision-making. When vote by majority forced the States to reach a consensus before

⁴⁰⁸ P.L.Lindseth, 'Democratic Legitimacy', p. 667; Weiler, 'Transformation of Europe', p. 68

resorting to the vote. As a result, 'the power of the Commission as an intermediary among the negotiating members of the Council has been considerably strengthened.'⁴⁰⁹ Concerning the harmonization and the Community regulation, the expansion of the exclusive competence of the Community has been enhanced into great extent and into areas of which pure technicality is quite disputable. The areas which first seemed to be in need of only de-regulation came to involve not only economic but also social choices. The rising question of legitimacy of the EC occurred as a consequence of all these effects of the SEA. When the supranational bureaucracy or technocratic supra-authority has been combined with a number of agencies and committees being involved in the decision-making process, the ground for a new theory of legitimation for the Community was almost ready.

VII.I Regulatory Model for the Single Market

The rise of the bureaucratic power at supranational level was not only the result of the Treaty amendment by the Single European Act. There was another factor which was not limited to the Community but covering also the national state policies. A new mode of governance was rising on the basis of regulation. According to Majone, this new model of governance includes privatization, liberalization, welfare reform, and deregulation. It emerges in the late 70s first not at the supranational level but at the national state level in Europe. Paradoxically, these changes have been accompanied by 'an impressive growth of regulatory policy-making both at national and European level.' Therefore it is not correct to call this change only 'de-regulation' (in the sense of a return to a laissez-faire situation). Traditional methods of regulation and control have transformed into a combination of deregulation and re-regulation at European level of governance or by different means. In other words, certain regulatory objectives are accomplished by less burdensome and more effective policy instruments.⁴¹⁰

The European Community, with the failure of full harmonization and with a tendency of withdrawal of the states from the market in 1980 as explained above, has turned its face to the negative integration in 1980s. However, just removal of non-tariff

⁴⁰⁹ Weiler, 'The Transformation of Europe', p. 72

⁴¹⁰ G.Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', *Journal of European Public Policy*, 1996, p9. The examples are the regulation of prices and conditions of services following the privatisation of public utilities and the replacement of environmental standards by pollution taxes.

trade barriers while the social regulation has been left to the Member States created a pressure of de-regulation on the States, i.e. to leave their economically interventionist policies, whereas the Member States were reluctant to allow the free flow of goods and services across borders prior to the establishment of common regulatory standards. Therefore one of the reasons for the gradual Europeanization of regulatory policies was to reconcile market integration with social regulation programs of the Members and thereby to avoid from trade distortions. The pressures from the European firms for uniformity of regulation was another reason. Additionally ‘many market activities continued to be valued by a public which demanded that some form of regulatory oversight would still apply.’⁴¹¹ All these factors led to an expansion and deepening in the nature of the Community activities, from the realm of negative economic integration into the areas such as environmental and consumer protection, and health and safety issues. The single market program just contributed more to the gradual Europeanization of regulatory policies.⁴¹² With the single market program, ‘the European Union has assumed that are largely linked to what is increasingly referred as ‘risk regulation’; that is, the assessment and management of the risks that may result from natural events or human activities. It has also become apparent that – unlike the mere removal of trade barriers –managing a single market entails a degree of positive action that does not always fit within the neat categories inherited from the past.’⁴¹³

Such a regulatory delegation to supranational level actually was following the rise of administrative power in the States during modernization. Lindseth underlines the same point: ‘In this sense, the Community is best understood as an extension of the executive-technocratic governance that has characterized the development of the modern administrative state at the national level over the course of the twentieth

⁴¹¹ M.Everson, ‘Administering Europe?’, *Journal of Common Market Studies*, Vol.36, No.2, June 1998, p. 197

⁴¹² See M.Everson (1998), Dehousse(2002), Majone (1996). Majone states that ‘the SEA provided an explicitly legal basis for environmental protection, and established the principle that environmental protection requirements shall be component of the Community’s other policies (Art.130r (2)). It also introduced the principle of qualified majority voting for occupational health and safety, and the notion of ‘working environment’ which opens up the possibility of regulatory intervention in areas such as human-factor engineering (ergonomics), traditionally outside health and safety regulation. Finally, Art. 100A(3) of the SEA urges the Commission to take a high level of protection as the basis for its proposals relating to health, safety, environmental protection and consumer protection...by the end of 1989 the Council had approved 215 directives concerning the quality, safety and packaging of goods, and more than 100 directives adopting technical standards. Scores of directives regulating the use of food additives, the naming and composition of food products, and the composition of materials and products likely to come into contact with foodstuff, were introduced in the same period. Majone, ‘the European Community between Social Policy and Social Regulation’, *Journal of Common Market Studies*, Vol.31, No.2, 1993, pp.163-164

⁴¹³ R.Dehousse, ‘Misfits: EU Law and the Transformation of European Governance’, p. 208

century.’⁴¹⁴ The administrative governance on the national level already, starting in 1920s, conferred a significant degree of rule-making authority on executive and administrative bodies as well as quasi-public and even traditionally private entities by taking some normative powers away from the national parliaments. In this sense, the administrative regulation means ‘economic and social regulation by means of agencies operating outside the line of hierarchical control or oversight by the central administration.’ The perceptions of mismatch between existing institutional capacities and the growing complexity of policy problems required such a delegation of power to committees and independent agencies.⁴¹⁵

At supranational level, this type of delegation may be observed at three levels. At the first level, the administrative regulatory powers are delegated by the Member States to the Community as their supranational administrative agency or regulatory branch. At the second level, the delegation occurs from the Council to the Commission which is the administrative organ of the Community and at the third level there is a delegation from the Commission or from the Council to the committees and agencies. ‘As a consequence, regulatory policy readily becomes the domain of experts and corresponds to the Commission’s view of its own role as an unpolitical institution with the task of putting forward conceptually solid and scientifically proven proposals for the solution of practical problems’⁴¹⁶

Here one should be careful about the definition of regulation in the Community context. Regulative administration within the European Market is designed to foster rather than hinder private economic activity. It is based on market-friendly regulatory mechanisms. A closer cooperation between market and administration is supposed to yield more efficient solutions to the purely technical problems of the market.⁴¹⁷ Here Majone distinguishes the regulatory policies from the re-distributive policies on the basis of differences between political and technical criteria. This categorization is exact parallel of categories of formal and substantive rationality of Weber. Re-distributive

⁴¹⁴ Lindseth, ‘Democratic Legitimacy’, p.659

⁴¹⁵ *ibid.*, p.684; P. L. Lindseth, ‘Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market Polity’, in *Good Governance in Europe’s Integrated Market*, C. Joerges & R. Dehousse (eds.), New York: Oxford University Press, 2002, pp. 143-144

⁴¹⁶ M. Jachtenfuchs and B. Kohler-Koch. ‘The Transformation of Governance in the European Union’, 1995, http://www.hertie-school.org/en/7_facultyandresearch/core_faculty/jachtenfuchs/downloads/dateien/transfo.pdf, (01.08.2007), p. 12

⁴¹⁷ Everson, *op. cit.*, p.198

policies are evaluated on the political criteria whereas regulatory policies may be measured by purely economic and technical standards. Objectivity is assured by calculations and rational methods in administrative regulation. Weber defines substantive rationality similarly in the economic sphere. Substantive rationality uses another criterion that does not belong to economic order. So, it is not rationality of economic system but of some other orders. It uses the scales of ultimate values whether they be ethical, political, utilitarian, hedonistic, feudal, egalitarian or whatever, to measure the results of the formally rational economic action. According to Weber, substantive rationality is mainly concerned with the question of distribution of wealth or goods or utilities. However it can never reach to a high level of formal rationality. It does not subject itself to scientific and objective calculations.

The powers delegated to the Community institutions are limited to regulatory politics, which are, in Weberian terms, purely formal. Re-distributive social concerns should belong to the Member States and their political authorities. This strict division of the issues of value-rationality from the issues of formal rationality places the complex regulatory issues directly at the sphere of administration and expertise. The latter type of issues requires the highest technical rationality which may be met only by bureaucratic and technical organs. 'it begins with the basic assumption that ...those segments of economy whose operations can be adapted to the (utilitarian) criterion of macroeconomically efficient private wealth creation without any redistributive consequences, may be legitimately regulated by scientific and economic expertise.'⁴¹⁸ Additionally they should be isolated from political influences as much as possible in order to pursue efficient wealth criterion in the long term. In Weber's words, the substantive rationality should not be allowed disturbing the formal rationality of the system and creating irrationalities in its functioning.

Delegation of power to unelected technocratic bodies has been justified at national states for a long time by considering the administration as the simple recipient of detailed instructions from legislative and executive organs. This justification assumes that the administrative authorities do not make any creative decisions or does not have to use their discretion but only follow the democratically determined guidelines

⁴¹⁸ *ibid.*, p.207

instructed to them. The agents may not be electorally responsible to the people but they are to their representative institutions (executive and legislative). This is an ideal type of administration which also Weber used while defining bureaucracy as vocation. On the other hand, he also drew the attention to the danger that administration generally exceeds these ideal borders by getting empowered day by day. However the problem is greater in a supranational body like the EC. In such structures there is no democratically legitimate hierarchical superior. Rather there are at best indirect political controls exercised by national executives over otherwise-autonomous supranational technocratic agents.⁴¹⁹

In over all, the bureaucratic authority has risen and the supranational administrative sphere became more and more autonomous in the 90s. The Scientific expertise has acquired an unprecedented level of importance. Technical and bureaucratic rationality has come to a level which creates direct conflicts with the political sphere. To be able to understand the formal rationalization and systematization of administrative formal rationality, the actors of this sphere, namely the Commission, the committees and the agencies, and their relations with each other and with the political actors are to be analyzed. This transformation is not limited to the 80s and 90s but continues until today. Therefore, the focus will not be limited to the years of the Single Market program but will extend to the 1990s and even to 2000s.

VII.I.1 System of Comitology

The history of comitology lays back to the Common Agricultural Policy in the 1960s. The Council, while conferring on the Commission some implementing powers for in particular in the agricultural field, has sought to limit the discretion of the Commission through the so-called comitology system. 'Under this system, the Commission must, before it takes an implementing act, seek the advice of a committee of national representatives in accordance with procedures that, in certain cases, enable the Council to take over the work of implementation.'⁴²⁰ The first committees which were introduced in the agricultural sector are called as management and regulatory committees. The legal basis of the comitology has been the Articles 145 and 155,

⁴¹⁹ Lindseth, 'Democratic Legitimacy', pp.634-635

⁴²⁰ K. Lenaerts & A.Verhoven, *op. cit.*, p. 75

strengthened by the SEA with a change to Article 145.⁴²¹ The first Court decision about comitology has been given in 1970 in *Köster* in which the Court held that the management committee procedure did not distort the institutional balance.⁴²²

There are two types of committees: the committees of which consultation compulsory and committees whose consultation is not compulsory. The former are generally composed of national representatives and the latter is generally set up by the Commission in order to provide it with technical data or other information. Also functionally we may categorize the committees as implementation committees, interest committees and scientific committees.⁴²³ The system worked relatively well up to the adoption of the Single European Act. In overall, the committee system has been expanded and refined by the adoption of the Internal Market Program in 1985 and the SEA of 1987. The re-introduction of qualified majority voting and extensive delegation of subordinate rule-making power to the Commission through the SEA has been attempted to be compensated by the Comitology Decision of the Council in 1987.⁴²⁴

‘The Comitology Decision of July 1987 established three alternative types of committees- the “regulatory committee”, the “management committee” and the “advisory committee” – each charged with overseeing the formulation of subordinate legislation at the Community level. All are chaired by a non-voting Commission official but staffed by members of national administration. Of these three types, the regulatory committee involves the highest degree of Member State control, prohibiting a measure from coming into effect until it has been approved by the committee voting by qualified majority. However the management committee is the more common form of oversight. Under this set up, if the committee rejects the Commission’s proposal, again by qualified majority, it is referred to the Council. If the Council rejects the proposal within

⁴²¹ SEA added to art. 145 : ‘The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.’.

⁴²² Case 25/70, *Einfuhr – und Vorratstelle für Getreide und Futtermittel v. Köster, Berodt &Co.* [1970]ECR 1161; W.Sauter&E.Voss, *Harmonisation under community law*, p.176

⁴²³ Sauter and Voss, *op. cit.*, p.174-175. Functionally the comitology provides rules and procedures to implement the Community Law, a mechanism to guarantee residual Council control over implementing legislation, input from national bureaucracies and interested parties into the Community policy-making process; and a method of aiding the structurally overburdened Commission to shoulder its ever larger workload.

⁴²⁴ Council Decision 87/373/EEC of 13 July 1987; Yataganas X.A., ‘Delegation of Regulatory Authority in the European Union’, Jean Monnet Working Paper 3/01, p. 42

one month, it is definitively rejected; otherwise, failing Council action, the measure is adopted.’⁴²⁵

However it is still doubtful whether the system of comitology accomplished to preserve Member State control. For example, the constructivists claim that national delegates at the committees slowly move from representatives of the national interest to representatives of a Europeanized interadministrative discourse. The national control over the delegates is generally weak and sometimes the delegates are given a wide range of discretion. ‘In other instances, delegates use their unique informational status to influence their governments’ perception of their own preferences or even simply bypass them. It is not by accident that even the intergovernmental Committee of Permanent Representatives (COREPER) is commonly known in the German administration as the ‘Committee of Permanent Traitors’.⁴²⁶

VII.I.2 The Agencies

Everson emphasizes that there is a radical difference between the committees and the agencies involving in the Community decision-making process. The agencies are engaged with the technical task of sector-specific executive regulation and the more general scientific or economic evaluation of information. In contrast to the committees, they are non-political agents. Agencies are largely shielded from explicitly political processes by their founding status, permanent staff, organizational independence, budgetary autonomy and direct networking with national administrations. Agencies generally interact with a wider public to respond to the challenge of policy –making under scientific and economic uncertainty.⁴²⁷ Joerges also underlines that ‘they collect information and inform policy- they act as technocratic supplier firms to policy. Their semi-official status obviously opens them up to private/social interests and strengthens a technocratic, apolitical, autonomy-oriented self-perception.’⁴²⁸

The emergence of European agencies is a very recent phenomenon. First two agencies were established in 1975 (in the field of social affairs) and ten agencies at the

⁴²⁵ Linseth, ‘Democratic Legitimacy’, p. 689

⁴²⁶ C. Joerges & J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology’, *European Law Journal*, Vol.3, No.3, September 1997, p. 291

⁴²⁷ Everson, *op. cit.*, pp. 198-199

⁴²⁸ C. Joerges, ‘Economic Order’, p.15

beginning of the 1990s, in connection with the completion of the internal market. The agencies have a limited mandate laid down by the establishing regulation. The majority of their management board is representatives of Member States. Four types of European agency may be listed according to their objectives: Regulatory agencies serve the operation of the internal market (for example, the Office of Harmonization, the European Agency for the Evaluation of Medical Products); The monitoring agencies provide reliable and comparable information acquired through a network of partners (e.g. European Environment Agency); Cooperation agencies promote social dialogue at European level (e.g. European Agency for Safety and Health at Work); Executive agencies operate as subcontractors to the European public service (e.g. Translation Center for Bodies in the EU).⁴²⁹

VII.I.3 Relations of Administrative Sphere with the Political Sphere

According to principal-agent relation, the legitimacy of the bureaucratic agents depends on the control of them by the democratically elected representatives, i.e. the political is supposed to dominate the bureaucratic. This may be simply called accountability. In the Community, there are two institutional actors who may carry this task: the Council composed of the executives of the Member States and the European Parliament directly representing the peoples of the Community. Therefore I think that it is necessary to explain briefly the relations of these actors with the actors of administrative and technocratic authority, namely the Commission, the Committees and the agencies.

The relation between the Council and the Commission may be studied from a number of perspectives. For the purposes of this study we will focus on the implementing, legislative and budgetary powers of the Commission. From a general legal perspective, the Member States may question the legality of the Commission's acts on the grounds of lack of competence, infringement of the Treaty or any rule of law relating to its application, or misuse of powers. If the court holds that the Commission has acted beyond its mandate, the offending actions are subject to nullification. Another control mechanism is the power of political (re)appointment. Although it is not possible to recall or dismiss a Commissioner, the Member States may simply refuse to reappoint

⁴²⁹ Yataganas X.A., *op. cit.*, pp.28-29

a Commissioner after her five-year term completed. The third way of control over the Commission is the power to amend its mandate, either by amending Treaty or regulations that delegate authority to the Commission. Additionally the system of comitology is an informal way to control the Commission's implementing powers. The Comitology functions as follows: the Commission submits a draft of proposed implementation measures to a committee of member state representatives. The committee renders a decision about the draft. Depending on the prevailing procedure, the decision of the Committee may be only advisory, obligatorily amending or blocking without amendment.⁴³⁰

From 1958 to 1980, the European Parliament had the weakest roles in the EEC legislative process and indeed in the EC's whole mechanism. Its role was limited to the consultation for the draft legislation. In parallel to this, until 1979 it was merely a forum composed of delegations from national parliaments. Step by step, it evolved into a real co- legislature position in the Community. In 70s it gained a decisive role on the budgetary issues. In 1979, it was elected by universal suffrage for the first time. In 1987, it increased its legislative powers by cooperation and assent procedures. In 1993 it gained almost an equal status to the Council in legislation of some areas by the co- decision procedure. The Maastricht Treaty also extended the cooperation and assent procedures to a number of areas. The Maastricht(1993) and Amsterdam Treaties (1997) empowered the Parliament in scrutinizing the Commission.⁴³¹

The Parliament has a Treaty right to dismiss the Commission a whole. 'The very powerful nature of this weapon has meant that the Parliament was, until 1999, very reluctant to attempt to use it, and it has proved ineffective as a tool of parliamentary accountability. The absence of any right to dismiss individual Commissioners reduced its utility still further as regards individual problem areas within the Commission.'⁴³² The Parliament gained its formal powers as regards appointment of the Commission first by the Maastricht Treaty. These powers further extended by the following Treaties

⁴³⁰ T.J.Doleys, *op.cit.*, pp. 542-543

⁴³¹ R.Corbett, F.Facobs & M. Shackleton, *The European Parliament*, the 4th Edition, London: John Harper Publishing, 2000, pp.3-5

⁴³² *ibid.*, p.233 There are contrary views. For example, it is the power to table, rather than to carry, motions of censure that gives the parliament influence over the Commission. The Commission will have to show sensitivity to many different strands of parliamentary opinion if it is to avert all moves to organize a censure motion. Christopher Lord, *Democracy in the European Union*, Sheffield Academic Press, 1998, p.61

cover the approval of the nominee for Commission President and of the entire College of the Commissioners. However, it has been an established practice that the Parliament takes a vote of confidence on an incoming Commission since 1979 and that the Commission waited until it had received the vote of confidence from Parliament before taking the oath of office at the ECJ.⁴³³ Now according to Maastricht Treaty, the commission to have a five-year term of office instead four, linked to that of the Parliament.

The Commission is expected to come before Parliament and explain its actions on a very regular basis. The Parliament has a right to put oral or written questions to the Commission. In connection with the Parliament's supervision of the implementation of the budget, the Commission must submit a number of reports to the parliament and give hearings. Concerning 1987 Comitology Decision of 1987, the Parliament made the following objections:

- they were very bureaucratic, retaining too many types of committee and weakening the Commission's ability to implement agreed legislation .
- only Council appointed committees could block a Commission decision and refer it back to the legislative authority; Parliament was not given no such role although the Commission was, under the Treaty, responsible to Parliament
- decisions that were blocked were referred only to the part of the legislative authority, namely to the Council alone and not to Parliament

However the case brought by the Parliament to the Court about the Comitology decision was rejected by the Court on the ground that the Parliament has no right to bring such a case. The reaction of the Parliament has been twofold: 'first it pushed for those committee procedures to be used which gave more discretion to the Commission, because it believed that the Commission must be allowed to act effectively, and because the Commission, unlike the Council, is accountable to the Parliament for its actions. It thus frequently attempted to amend legislative proposals to avoid the types of comitology that most restricted the Commission....Second, Parliament sought more

⁴³³ *ibid.*, p. 234

information on what was being sent to comitology committees and about the committees themselves'⁴³⁴ In 1988, the Commission agreed to transmit draft implementing measures to Parliament at the same time as they were forwarded to the relevant committee of Member State experts. Yet, the system did not work well in general.

Concerning the agencies, there are concerns both on the side of the Commission and of the Member States. Dehousse states: 'Commission officials have warned against a development that might lead to the establishment of rival structures and that they thus view as a threat to their institution. Commission President Romano Prodi was most explicit in this respect. In a speech before the European Parliament on 3 October 2000, he made a vibrant plea in favor of the necessity of preserving the Commission's authority over specialised agencies. On their side, national administrations have often insisted on retaining a measure of control over the work of agencies.'⁴³⁵

The check and balances on the agencies are attempted to establish by composing their administrative boards from national representatives and occasionally from an expert appointed by the European Parliament. Additionally, agencies' powers are strictly limited. Most of them do not have any decision-making power of their own. All agencies are subject to a legality control by the Commission.⁴³⁶

VII.II Legitimizing Supranational Administration

VII.II.1 by Regulatory Model

From 1986s until today, there is an observable empowerment of bureaucratic sphere of the Community. Increasing administrative regulation also indicated an increase in the administrative authority of the Community, more and more experienced in the daily lives of the people. The rise of supranational administrative sphere does not only result from the strengthening role of the Commission in rule-making at the expense of the Member-States, although this is a sign for that the administrative sphere becomes

⁴³⁴ Corbett, Facobs & Shackleton, *op. cit.*, pp.256-257

⁴³⁵ R.Dehousse, *op. cit.*, p. 218

⁴³⁶ *ibid.*, p.219

more autonomous. The autonomous development of administrative rationality is also observable in the increase of committees and agencies in numbers and in weight. Although the Comitology originally has begun for containment of the bureaucratic agent by the political actors, it is quite doubtful whether it has been successful in that. On the contrary, it seems to increase the role of technocratic rationality by involving the national bureaucrats into the decision-making process. The agencies have contributed to this technocratic transformation by their completely independent structures based on expertise. The regulatory theoretical model is an attempt to legitimize the growing supranational administrative authority at the Community level.

In this model, the Community itself and especially the Commission is considered an agent to which administrative powers are delegated by the Member States in the regulatory policy areas. But more than this, 'the EU is seen as a regulatory entity made up of a wide range of politically independent institutions – such as specialist agencies, Central Banks, and bodies for judicial review- with delegation of policy making functions to such independent regulatory commissions.'⁴³⁷ However, the development of non-majoritarian institutions at the Community level does not fit to the Majone's conception entirely. It is true that the amount of technical and scientific information necessary for regulation often exceeds the expertise and knowledge available to the commission and that it has to take support from consultative committees and other bodies. Although there are now a wide range of agencies, 'none has the independence or regulatory power that Majone saw exemplified in the US.'⁴³⁸ They are not, at the same time, only assistants to the Commission, which perceives itself at the top of administration of the Internal Market. The agency system is close to the committee system legally yet de facto they are more clearly visible, better accessible and in their functioning more autonomous than committees.⁴³⁹

In general, regulatory model starts with some basic presumptions. Main assumption is that it is a general tendency in Europe towards the regulatory state model. This is the result of increasing complexity of administration, and scientific and technological developments. Complexity of the administrative task and the workload

⁴³⁷ Eriksen, Fossum & Sjurson, *op. cit.*, p. 6

⁴³⁸ Jachtenfuchs and Kohler-Koch, *op. cit.*, p. 12; C.Joerges, 'Deliberative Supranationalism- Two Defences', *European Law Journal*, Vol.8, No.1, March 2002, p. 140

⁴³⁹ *ibid.* P. 149

pushed the states to more and more delegation of powers to the dependent and independent administrative agents. The regulatory state replaces economically interventionist state. The empirical statement of the theory at the same time contains in itself the justification. The performance of the regulative functions of the states by administrative structures is legitimate due to their expertise, stability, efficiency and objectivity (value-free and non-political natures). It comes from the nature of the regulatory policies which are quite different from the re-distributive policy area. Regulatory functions are concerned with non-political and value-free issues. Simply they do not require the value judgments. In Weberian terms, they are linked to purely formal rationality. Such non-political formally rational functions should be handled within the purely formal administrative sphere for protecting the decision-making from the interventions of subjective popular choices of the politicians.

The legitimacy criteria of the regulatory administration are efficiency and success in reaching to the aims. Actually, these criteria are same with those of instrumentally rational actions and of formal rationality of the economic sphere. Specifically the EC as a regulatory regime is legitimated by its superior problem-solving capacity. As Eriksen states, 'this conception of governance is premised on pragmatic arguments and a means-ends type of rationality, where actors are considered to make decisions based on scientific calculations and on a given set of interests.'⁴⁴⁰ The other pillar of the legitimacy depends on the distinction between majoritarian and non-majoritarian democracy. According to majoritarian type, in its most extreme version, majorities should be able to control all of government legislative executive judicial. By majoritarian standards, all institutions that are not directly accountable to the voters or to their elected representatives are democratically suspect.⁴⁴¹ It reminds the tension between the democracy and the bureaucracy that Weber underlines. Democracy is in tension with bureaucracy *in spite and perhaps because of its unavoidable yet unintended promotion of bureaucratization.* (ES, p.991) Giddens explains this dilemma as follows: 'According to Weber, the relationship between democracy and bureaucracy creates one of the most profound sources of tension in the modern social order. There is a basic antinomy between democracy and bureaucracy, because growth of the abstract

⁴⁴⁰ Eriksen, Fossum & Sjurson, *op. cit.*, pp. 6-7

⁴⁴¹ Majone, 'Europe's Democratic Deficit', p.10

legal provisions, which are necessary to implement democratic procedures themselves entail the creation of a new form of entrenched monopoly (the expansion of the control of bureaucratic officialdom). While the extension of democratic rights demands the growth of bureaucratic centralization, however, the reverse does not follow.’⁴⁴² To remind the related explanations in this dissertation about Weber’s theory:

‘The danger is that there is a tendency to the plutocracy by a long and special training for the offices. (ES, p.225) *On the one hand, the system of examination means, or at least appears to mean, selection of the qualified from all social strata ...But on the other, democracy fears that examinations and patents of education will create a privileged ‘caste’.* (ES, p.999) Democracy attempts to overcome this ambiguity by preferring the election of the officials for short terms to the appointment of them and the recall of officers by referendum to regulated disciplinary procedure. Yet, according to Weber, this is nothing but *to replace the arbitrary disposition of hierarchically superordinate ‘master’ by the equally arbitrary disposition of the governed or rather, of the party bosses dominating them.* (ES, p.1001)

‘...the bureaucracy is in its pure form only when the appointment is the main method for the designation of the officials. An official elected by the governed is no longer a purely bureaucratic figure and the elections damage the hierarchical rigidity of the bureaucracy. Comparing to an elected official, an appointed official *normally functions, from a technical point of view, more accurately because it is more likely that purely functional points of consideration and qualities will determine his selection and career.* In the case of elections, the governed cannot evaluate the technical competence of an official before his service and the political parties may prefer the candidates who are closer to the party bosses. (ES, pp.960-961) In short the elections are not proper way to designate the right persons to the offices.’

Following Weber, it may be concluded that the categories of majoritarian and non-majoritarian democracy by Majone aims to solve this tension by legitimizing the power of bureaucracy with efficiency and objectivity.

Within the context of the Community, Majone actually structures his theory around a majoritarian assumption but in the long term. He assumes that there is a unanimous intergovernmental will to pursue wealth-increasing economic policy through delegation of some powers to the Community.⁴⁴³ This model views the internal market ‘as a democratically autonomized sphere established in accordance with the clear, unitary will of the European polity (in the character of the Council) to pursue (but only where possible in the absence of redistributive concerns) the long-term goal of macroeconomic efficiency.’⁴⁴⁴ The main reason for this will lies at the advantages

⁴⁴² Giddens, *Politics, Sociology and Social Theory*, p. 22

⁴⁴³ Everson states that one of the basic assumptions of the non-majoritarian thought is a unitary political will to delegate the regulatory policies. He summarizes this traditional democratic base as follows: ‘the desire to ensure that so democratically established a ‘long term’ will to pursue efficient wealth creation will not be subverted by the ‘short-term’ considerations of a transient political elite.’ (p.207)

⁴⁴⁴ Everson, *op. cit.*, p. 207

specific to the delegation. Democratically elected authorities may not show the necessary stability to follow the requirements of a long-term success under the influence of short-term expectations of the public and to ensure their success in the next elections.⁴⁴⁵ On the other hand, the administrative agents combine the expertise with the stability and objectivity, without any re-election concern.⁴⁴⁶ The danger of the public opinion is something that Weber also emphasizes: the public opinion is under the threat of mass irrationality and emotionality which may be exploited by the some people. In this way any effective public opinion would be dangerous for the nation. ...*any intensive influence on the administration by so-called 'public opinion'- that is, concerted action born of irrational 'sentiments' and usually staged or directed by party bosses or the press- thwarts the rational course of justice ...*(ES , p.980)

'Weber states this problem quite plainly: *the political danger of mass democracy for the polity lies in the possibility that emotional elements will predominate in politics.* (ES, p.1459) *The 'mass' as such (irrespective of the social strata which it comprises in any given case) thinks only in short-run terms. For it is, as every experience teaches, always exposed to direct, purely emotional and irrational influence.* (ES, p.1459-1460)'

A la Majone, the categories of majoritarian and non-majoritarian match with the categories of regulatory and re-distributive policies. Redistributive policies which contain political value choices should not be left to the unelected technocratic agents. This 'should' is again both empirical and normative. From empirical perspective, re-distributive policies have gain-loss consequences so it is not possible to arrive at unanimity between Member States for such policies. They require direct expenditures, a budget and allocation of that on the basis of decisions. On the other hand, the costs of regulatory policies are borne by those who comply with policy changes (individuals, firms, etc.). 'Thus, regulatory policy is not only cheap for the Union, it also avoids conflicts between Member States over the distribution of costs and benefits.'⁴⁴⁷ From normative respective, it is not possible to justify re-distributive decisions by the criteria

⁴⁴⁵ C. Karlsson, *Democracy, Legitimacy and the European Union*, Dissertation for the Degree of Philosophy in Political Science presented at Uppsala University, 2001, pp.142-143

⁴⁴⁶ G.Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', *Journal of European Public Policy*, 1996, p.10

⁴⁴⁷ Doleys, *op. cit.*, p.544: Jachtenfuchs and Kohler-Koch, *op. cit.*, p. 12

of efficiency and objectivity. These types of value-laden choices should be made by elected representatives in order to have legitimacy. They can only be arrived by majoritarian decisions.

On the other hand, it is questionable whether the regulatory policies and objectives can really be delineated from the distributive ones. In other words, it is emphasized the secondary consequences of the regulatory decisions from the perspective of value-rationality by some authors. They claim that most of the regulatory policies have re-distributive effects which allegedly make one of the presumptions of Majone invalid.⁴⁴⁸ In other terms, every type of formal rationality cause substantive irrationalities in one way or other.

Concerning legitimacy, some scholars advocated that the criterion of efficiency should be supported by accountability. This is also what Majone proposes. According to him, accountability in a non-majoritarian model is not to the voters or to their elected representatives: 'it is possible to keep independent agencies democratically accountable by a combination of control mechanisms: clear and narrowly defined objectives, to facilitate accountability by results; strict procedural requirements, to limit regulatory discretion; judicial review, to ensure protection of the rights of citizens; professionalism and peer review, to certify the technical quality of agency decisions; transparency and public participation, to make agencies responsive to public concerns.'⁴⁴⁹ On the other hand, Lindseth argues for keeping the principle of principal-agent relationship, i.e. there should be a reasonable control over the administrative institutions by the member states and it should be kept and even more strengthened.

The Community actually suits to Majone's accountability conception. Accountability to elected representatives is only considered as accountability to the Council and sometimes only to the Commission. The Parliament which is only directly elected representative is already weak in front of the Council and Commission and even how accountable the Commission to the Parliament is debatable. Comitology and agents just worsen this accountability gap between the Parliament and administration. Parliament's reaction has been at least to work for strengthening the position of the

⁴⁴⁸ C. Karlsson, *op. cit.*, p.146

⁴⁴⁹ G.Majone, 'The Agency Model', p.14

Commission in the comitology and as to the agents since at least the Parliament has a limited scrutiny function over the Commission. So there is a kind of indirect accountability of new regulatory administrative sphere to the Parliament. Of course there are also deep suspects of representative characteristics of the European Parliament, which makes the subject even more complicated. Yet we will deal with that in the following sections.

Accountability and control of administrative sphere is hindered with one of its legitimizing property: namely technical knowledge. Neither Parliament, nor the Council and of course the public may have enough expertise to establish a detailed control over the administrative agents at most of the areas and for most of their functions. As Weber states *the political 'master' always finds himself, vis-à-vis the trained official, in the position of a dilettante facing the expert*, no matters whether the master is the 'people', the parliament, the elected president or a monarch. (ES, p.991) The problem has been attempted to overcome by limiting the agencies' role to information-supplying although nowadays there is a general tendency to give more powers to the agencies.⁴⁵⁰ Especially the relation between laymen and experts is problematic. They both may have comparable intelligence and virtue but they boast different types of knowledge.⁴⁵¹ Of course, it is worse when the ordinary people are considered. Lindseth states: 'Similarly, the objects of regulation will no longer be strictly national but supranational, often rooted in a commitment to abstract economic values- free trade, efficient markets- that many people poorly understand or fear and disparage as alien and technocratic.'⁴⁵²

There is another debate about the interest-representative functions of administrative governance. Whose interests do the regulative agents represent?

⁴⁵⁰ M.Everson, in 'Administering Europe?', pp.206-207 states that 'European administrative agencies, having largely been denied meaningful executive powers and full autonomy, non-majoritarian thought has withdrawn from its most confident (possibly functionalist) theoretical position which designated the whole of the EC a legitimate 'independent administration'. Similarly it has toned down its demand for full formal independence for European agencies and now draws residual comfort from the fact that existing agencies, though subject to political control and largely without implementation powers of their own, have nonetheless secured a degree of administrative meaning and autonomy through their networking with national administrators and the quality of the advice which they supply to policy-makers and industry clients.'

⁴⁵¹ C.Joerges, 'Deliberative Supranationalism- Two Defences', p. 145

⁴⁵² See Lindseth, 'Democratic Legitimacy'. The average citizen loses any possibility of following the political process and of influencing its outputs. Furthermore, the rational voter cannot sanction any single person or party for a negative or positive performance. The 'benevolent diffusion of responsibility' is not compatible with the notion of responsibility. Wolfgang Wessels, 'The Modern West European State and the European Union: Democratic Erosion or a New Kind of Polity?', in *The European Union: How Democratic is it?*, Svein S. Andersen & Kjell A. Eliassen (eds.), London: Sage Publications, 1996, p.63

According to Majone, the Commission is the best institution which may ensure that EC policies are directed towards the advancement of the general interests of the Community (as defined by the Treaties) as opposed to national or sectoral interests. Majone admits that the Commission has interests of its own, and is not free from pressures from special interests when making decisions. 'It is, however, better placed than the other political institutions to take into account the general interests of the Community in its legislative proposals...the fundamental interests of the Commission are aligned with those of the Community as whole.' Above all, the Community interests are explicitly detailed in the Treaties.⁴⁵³

There are many contra-views especially concerning administrative net-works. Mancini asserts that the EU is in a very weak position in representation of diffuse interests such as wage-earners, women, consumers, patients, pensioners, the unemployed and the environmentally aware and that it is a well-known among the Euro-lobbies, individual companies and accountancy and law firms have the easiest access to the COREPER, the Commission and even the Parliament. 'All available evidence suggests a mobilization of bias on the part of powers that be in favor of business and business related interests.'⁴⁵⁴ This may be interpreted as a consequence of the rationality of administrative sphere and actually provides regulatory model with another practical and theoretical basis. Weber underlines the formal rationality of bureaucracy in the modern states and compares it with the rationality of different life spheres. Bureaucracy shares the characteristics of impersonality and matter-of-factness with the sphere of economics. Additionally, both for capitalism and modern bureaucracy, efficiency, calculability and predictability are the most important technical standards.

'However, bureaucratic formal rationality, as in other spheres, is not as objective as it seems. In this sense, it is substantively irrational. For example, objective application of general rules and abstract principles actually does not work for every one impartially and equally. It is not only the capitalist interests behind the formalism of bureaucracy. Weber warns us that *formalism, which is promoted by all the interests which are concerned with the security of their own personal situation, whatever this*

⁴⁵³ Majone, G., 'Europe's Democratic Deficit', p.23

⁴⁵⁴ G.F. Mancini, *Democracy and Constitutionalism in the European Union*, Portland: Hart Publishing, 2000, pp. 69-70

may consist in. (ES, p.226) Interests of bureaucracy play their own role. That's why, for example, the demands for substantive rationality in public administration in the sense of more space to the official creativity are baseless and futile. Formal rationality may not be broken by the 'freely' creative administration for many reasons. The most important reason is the devotion of the bureaucrats to the 'objective' purposes. Especially those who support the idea of creative discretion regulate their actions according to *the modern and strictly 'objective' idea of raison d'état*. Yet, what Weber attempts to emphasize is not the power of formal rationality over the officials but the interests pursued behind the formality. What give the content to the abstract idea of *reasons of state* are the power interests of the officials. This content is exploitable by the bureaucracy for maintaining its power. Weber, himself, directs the most ruthless criticism to the formal rationality. *...in principle a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means.* (ES, p.979) In consequence, what make the formal rationality indestructible are the bureaucratic power interests.'

VII.II.2 by Deliberative Model

The deliberative approach to the supranational regulatory administration finds a virtue in the relations of administrative structures with interest groups. Actually this net-work of interest and lobbying carry a potential of democratic legitimation through deliberation. The main criticism towards deliberative model of administration came from Weiler. Weiler criticizes the comitology under the heading of 'infrationalism'. According to him, comitology is an inevitable and indispensable feature of administrative governance. The real actors of the comitology are the key public official actors of which are European and national mid-level (often capable and professional) civil servants, behind the labels of commission or council. In other words, as claimed in this work too, it is a bureaucratic sphere of administration. Additionally, the Commission, Council, EP and the Member State governments have a rare and limited control of the comitology decisional process and outcome.

In this sense, it is almost an autonomous sphere with its own actors and rationality. Weiler has a deep suspicion, as Weber, about this purely formal rationality and objectivity of technicality. The comitology involves a network of public and private interests. These networks by their nature tend to privilege certain interests and under-privilege other competing interests. Accountability is very underdeveloped comparing to highly consequential regulation and regulatory process allocates privileges by unequal and hence unfair access.⁴⁵⁵ He maintains: ‘The technocratic and managerial solutions often mask ideological choices which are not debated and subject to political scrutiny beyond the immediate interests related to the regulatory or management area...The process itself not only lacks transparency but also is typically of low procedural formality, thus not ensuring real equality of voice for those who actually do take part in the process. Judicial review is scant and tends to insist on basic rights to be heard rather than fairness of outcome.’⁴⁵⁶

However Weiler criticism of the comitology on the basis of hiding actually value-choice behind formality is founded on a much deeper critique. ‘The single European *market*’ is ‘not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology, and political culture: the culture of “the market”. It is also a philosophy, at least one version of which – the predominant version – seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition as a means to maximize utility. The above is premised on the assumption of formal equality of individuals.’⁴⁵⁷ The problems of comitology are just the necessary consequences of the foundations of the Community. The tight relations between bureaucracy, liberal economy and politics, which have been openly observed by Weber, may be observed at the Community level after almost a century. Formal equality and formal rationality in general serves to some particular interests.

⁴⁵⁵ Weiler, *op. cit.*, p.15-16

⁴⁵⁶ Weiler, *op. cit.*, p. 22

⁴⁵⁷ *ibid.*, pp.90-91

VIII. THE TREATY ON THE EUROPEAN UNION

It would not be wrong to call the Maastricht Treaty signed in 1992 a turning point for both the Community and the theoretical debates surrounding it: in this text, supranational intervention in national core policies are observed in many dimensions: in terms of objectives, areas, and values. It is the Treaty which establishes the European Union, composed of three-pillar structure, with pillar of the Community, of Common Foreign and Security Policy and of Justice and Home Affairs. The latter two pillars are based on intergovernmental mechanisms. Yet they are important in respect that the European Community is no more only an economically oriented formation but it is a political union in the process of development from now on⁴⁵⁸. The centerpiece of the treaty is the Economic and Monetary Union to be accomplished and administered mainly by supranational regulatory tools. In the area of EMU, the Treaty creates the European Central Bank, a new regulatory agent. The Treaty also confers substantive competence on the Community in potentially controversial non-economic fields such as culture and education. Subsidiarity principle is laid down basically for determination of the border between the competences of the Community and its Member States.

Significantly the Treaty on the European Union aims to establish “ever closer” union between the peoples of the Union and introduces the concept of European citizenship and requires decisions to be taken as closely as possible to the citizen. A Parliamentary Ombudsman is created. With introduction of co-decision procedure the legislative role of the Parliament is strengthened, it is given the right to request the Commission to initiate legislation and power to approve the new Commission. The other two pillars are based on intergovernmental mechanisms. Yet they are important in respect that the European Community is no more only an economically oriented formation but it is a political union in the process of development from now on⁴⁵⁹.

VIII.I The Road Going to the Union

There are a variety of factors leading the Member States to sign a Treaty establishing the European Union. It may be interpreted, by focusing on the core

⁴⁵⁸ W.Wallace, “The Sharing of Sovereignty: the European Paradox”, *Political Studies*, Vol.XLVII, 1999, pp. 513-514

⁴⁵⁹ W.Wallace, *op. cit.*, pp. 513-514

agreement on monetary union, as 'mainly a competitive response by the EC and its member countries to global economic developments and forces. After the Cold War ends, in an emerging tripolar world to become a powerful economic competitor of the United States was the motivating concern for the Community. On the other hand, neofunctionalist theories view the Maastricht Treaty as a result of 'spillover effect' of the economic integration accelerated in 1980s by the Single Market Project. A majority of Member States were convinced that a single market ultimately requires a single currency if the full benefits of market integration are to be achieved. Abolishment of internal frontiers, on the one hand, had lead to a growing need to collaborate in areas such as trans-frontier crime, immigration and asylum policy (the second Pillar of the Maastricht) and on the other hand to regulate many areas more in common, such as consumer protection, environment, public health, social policy and structural policy.⁴⁶⁰ For some others, it is a political response by EC countries to the end of the cold war. Suddenly, the Community and its member countries are confronted with the need to adjust to a radically new strategic and security environment, which includes not only an open and politically fragmenting Eastern Europe and former Soviet Union, but also the likelihood of a greatly reduced security presence and role for the United States. Among those after-cold war conditions, the prospect of German unification has been the most influential factor on the European integration. The Maastricht Treaty 'represents a political bargain between the EC's two most important members, Germany and France, each of whom viewed the agreement as a means of securing vital national interests.'⁴⁶¹

The attempts to establish the Economic Monetary Union has roots in 1970s. Its first step was the European Monetary System (EMS) in 1978; a system of fixed exchange rates that permitted a limited (2.25 percent) fluctuation around the official established rate for national currencies. The EMS proved to be fairly successful; in the 1980s the Community experienced the reduction of both inflation and exchange rate stability. It also promoted habits of cooperation in economic and monetary affairs among European governments. However there were also negative aspects of the EMS such as declining rates of economic growth and domination of Germany over the EMS.

⁴⁶⁰ Richard Corbett, 'Intergovernmental Conference on Political Union', *Journal of Common Market Studies*, Vol.30, No.3, September 1992, p.272

⁴⁶¹ Michael J.Baun, 'The Maastricht Treaty as High Politics: Germany, France, and European Integration', *Political Science Quarterly*, Vol.110, No.4, Winter, 1995-1996, pp.605-606

Since the Germany is the Europe's strongest economy and most stable currency, the conservative monetary priorities of Germany and its independent central bank (the Bundesbank) were dominating the EMS. The Bundesbank were under no formal obligation 'to take into consideration the economic and political needs of other EMS members when making its policies, not to intervene in currency markets or otherwise act to defend exchange rates. This task falls instead to weaker countries in the system.' Although there was a rising reaction towards German monetary domination, the key moment was that the Socialist government of François Mitterrand had to abandon its expansionary economic program in order to remain within the EMS, in 1983. Since then, a central objective of the French government has been to establish control over German monetary policy through the creation of supranational monetary institutions.

It was not only the member states but also the Community institutions and officials were supporting the goal of monetary union. Particularly Commission President Jacques Delors saw it as a means for advancing the European project toward its ultimate destination of political union. The European Parliament had already presented a detailed proposal for a Treaty on European Union in 1984 and was in a continuous effort of pressure for further reform through a series of reports adopted in the 1987-1990.⁴⁶² Finally, France came with a proposal for the creation of a central European Bank, to which Germany agreed mainly for political reasons in 1988. A commission established under the chairmanship of Delors announced the so-called Delors Plan that envisages establishment of a European Central Bank and a single currency in three stages. However, in 1989, the fall of Berlin Wall and the prospect for German re-unification put the issue of monetary union in a new context. Among many Europeans there was a fear that a united and powerful Germany in the center of a politically fragmented Europe might 'in the future become increasingly independent and nationalistic, and thus turn away from the course of peaceful integration into Western institutions that had characterized the postwar identity and policy of the Federal Republic.' This fear led many European leaders to promote a strengthening or deepening of the Community in order to bind Germany permanently to the Community and to prevent it to take a more independent or nationalistic course in the future. The

⁴⁶² Corbett, *op. cit.*, p.273

most important exponents of this view were Commission President Delors and the French government.⁴⁶³

For its part, Germany was also in favor of deepening the EC for a number of reasons. First, Germany had been a primary beneficiary of integration into international institutions over the past four decades and viewed a continuance of this pattern as the key to its future economic prosperity and political security. Additionally, the German government wanted to dispel the suspicions and fears of its neighbors. Chancellor Helmut Kohl was determined to show that German unification and European integration were not contradictory but instead complimentary processes. In addition, Kohl placed a high priority on maintaining positive relations with France as the basis for Germany's European policy. For these reasons, he viewed Germany's agreement to further EC integration and in particular monetary union as the price that had to be paid for gaining Europe's acceptance of German unification.

After fruitless international efforts to prevent the unification of Germany, France changed its attitude and focused on containing Germany by integrating it more closely into the Community. The reconciliation of France-Germany relations were based on French acceptance of German demands on political union and German support for monetary union which remained the key objective of France.⁴⁶⁴ As a result, their joint proposal on 19 April to the president of the European Council has been both an accelerated pace for monetary union and new initiatives on political union by suggesting a second intergovernmental conference on political union be held parallel to the one on EMU in December. As so often in the past, Franco-German cooperation resulted in rapid EC movement.⁴⁶⁵

⁴⁶³ 'the shift from a security order dominated by military power and concerns to one based on economics favored the German civilian power over the French nuclear state. In the new Europe, in other words, the value of the D-mark would be significantly enhanced relative to that of the bomb. To compensate for these developments, France sought a deepening of EC structures, which would allow it to retain some influence and control over its powerful neighbor. At the same time, France feared that an EC that neglected further integration and remained instead a simple trading bloc would be more capable of being dominated in the future by Germany, and that within such a Community, France's own national standing would be even further diminished.' (Baun, *op. cit.*, p.610)

⁴⁶⁴ Germany was insisting on a stronger European parliament and more cooperation in foreign and defense policy. Such goals were not only in keeping with Germany's federalist leanings, but they also provided Germany with multilateralist cover for unification and its enhanced power position in Europe. In addition, gains on political union were necessary for domestic political reasons, so that Chancellor Kohl could claim to have extracted something in return for agreeing to surrender the D-mark and German monetary sovereignty. (Baun, p.616)

⁴⁶⁵ On 7 December, a joint proposal was made by Kohl and Mitterrand, which laid the tracks for negotiations on political union. This centered on the development of a "common foreign and security policy, which could in time lead

In the pre-conferences and the intergovernmental conference held before the Maastricht Summit, the discussions on political union were much less focused comparing to the monetary union, due to the greater diversity of issues being discussed and to the fact that for the most, monetary union was the core objective while the political union conference was largely a set of side-bargains. 'Most importantly, it was viewed as a concession to the German government, which needed an agreement on political union so that an EMU treaty would be politically defensible at home.' Although it could not be reached to a final consensus on many important issues, Community leaders met on 9-10 December and gave their approval to the Treaty on European Union in order not to miss an historic opportunity of integrating Germany to Europe. Treaty laid down a detailed plan for the EMU process⁴⁶⁶, however could not show the same success for political union.⁴⁶⁷

to a common defense." While the key innovation in foreign policy would be more majority voting in the European Council, the basis for a common defense would be a revitalized West European Union (WEU). In addition, the proposal called for giving more powers to the European Parliament, the creation of a common "European Citizenship," and the extension of EC competencies in such areas as environmental, health, social, and energy policy. It also called for greater intergovernmental cooperation on internal security and police matters. Beyond its practical significance for the upcoming intergovernmental conference on political union, the joint proposal was of great symbolic importance to the governments of France and Germany. After the tensions experienced over the previous year, both Paris and Bonn viewed it as an indicator that the Franco-German partnership had survived the test of German unification and remained the primary motor of European integration. (Baun, pp.618-619)

⁴⁶⁶ The centerpiece of the treaty was an agreement to achieve full monetary union by the end of the decade. According to the treaty, stage two of the EMU process would come into effect on 1 January 1994, with the establishment of a European Monetary Institute (EMI); while monetary sovereignty would remain in the hands of national authorities during this transitional phase, the EMI would help to coordinate national monetary policies and oversee the preparations for full EMU. At the end of stage two, the EMI would formally become the European Central Bank, an institution that would closely resemble the German Bundesbank in its organization and powers. The first opportunity for full EMU would come in 1996, if by then a majority of EC countries met a set of strict criteria for economic performance. If this was the case, a two-thirds vote in the European Council would be sufficient to approve the final transition to EMU, which would take place on 1 January 1997. Failing this, EMU would automatically come into existence in 1999, with the participation of all countries meeting the economic convergence criteria. As a price for its agreement to the treaty, which required the unanimous approval of EC member states, Britain was given an opt-out clause, which allowed it to delay making a final commitment to EMU. The same privilege was not extended to other countries, however. (Baun, p.620)

⁴⁶⁷ Instead, the Maastricht Treaty provided for only a limited enhancement of the powers of the European Parliament and contained vague commitments to work toward common foreign and defense policies. In addition, there was agreement to coordinate police and internal security affairs more closely, as well as the decision to make increased use of majority voting in the Council of Ministers on a number of policy issues. The treaty also called for a new intergovernmental conference in 1996 to review progress on the Maastricht agreements, with the possibility of taking further steps toward political union at that time. The limited outcome on political union was a particular disappointment for Chancellor Kohl, who had made progress in this area a requirement for Germany's agreement to EMU; repeatedly throughout the previous year, Kohl had proclaimed that monetary and political union were not separable but were instead two sides of the same coin. Nevertheless, as the date for the Maastricht conference had approached, the chancellor backed away from his demands on political union, subsuming them to his overriding interest in gaining an acceptable EMU agreement. Also playing a role in the Maastricht compromise was the developing situation in Yugoslavia in the summer and fall of 1991 and the side-bargaining among EC governments this engendered. In the face of strong public pressure, the German government had sought early recognition by the EC of Slovenian and Croatian independence, something to which France and Britain were opposed. In the end, Bonn gained the agreement of other Community countries to recognize the independence of the two republics, but only at the cost of German concessions on European Union. For the French, who were opposed to giving greater powers to

VIII.II 'More than an Alliance Less Than a Union'⁴⁶⁸

It may be thought that this is the way it goes in the Community, as some assert. The integration always processes as a 'continuous negotiation between those member states and those more reticent. Usually they result in a compromise acceptable to all in the short run.' The negotiations are generally locked on the future of the Community. And Member States come together generally earlier than agreed in order to discuss about the necessary amendments again.⁴⁶⁹ Therefore the embryonic political union of the Maastricht Treaty may be considered as an acceptable beginning. Baun views the Maastricht Treaty as a result of compromise between two important member states on high politics who viewed the agreement as a means of securing vital national interests, rather than of providing technical solutions to domestic economic and social problems (low politics). He asserts:

This is nothing particularly new, for the entire history of the EC and European integration has involved a mixture of high and low politics. In particular, Germany and France have tended to view European integration in terms of broader strategic and positional interests. What is different in the present situation, however, at least from the pattern of EC politics over the previous three decades, is the dominance of high politics concerns. In this respect, the politics of European integration in the 1990s somewhat resembles that of the 1950s, when France and West Germany were first exploring new ways of living together-and developing new institutions for this purpose in the postwar context of a divided Europe.

However, as mentioned above, the Community institutions and the integrationist and functionalist forces and views also played their own role. Combination of intergovernmentalist and supranationalist factors may be observed in the resulting Treaty. Supranationalist approach is most visible at the structure of Monetary Union. Objectives of European Central Bank (ECB) and single common currency was a radical step in terms of state sovereignty. The ECB as a supranational

the European Parliament and Commission, the Kohl government agreed to reduce its demands on political union. Britain, on the other hand, used its position on Yugoslavia as leverage to secure German agreement to an opt-out on EMU. (Baun, pp.620-621)

⁴⁶⁸ See Fabio Luca Cavazza and Carlo Pelanda, 'Maastricht: Before, During, After', *Deedalus*, Spring 1994, Vol. 123, No. 2, pp.53-80

⁴⁶⁹ Corbett, *op. cit.*, p.272

regulatory agent was designed as a very strong and independent institution over the Member States. The Member States, by agreeing to leave their sovereign decision making power on monetary policy to such an institution and to dispense with their significant symbol of sovereignty (national currency) have definitely taken a radical step towards binding themselves to a supranational authority. On the other hand, the two pillars (justice and home affairs, and foreign policy) related to the political union were left to the ‘intergovernmental mechanisms’ by giving even to the Commission a very minor role to play and strictly sticking to unanimity. Concerning the areas falling under the Community pillar, the competences of the Community have been expanded to a number of areas. However supranational developments have been balanced by two important and novel principles: principle of subsidiarity and opt-out.⁴⁷⁰

VIII.III. Legitimacy in Crisis

Nevertheless, to consider the concept of political union limited to two intergovernmental pillars would be a mistake. Maybe more than those pillars, the discourse of political union was formally and legally uttered by a Treaty and a concept of supranational citizenship for the first time, for Europe and the world, has been laid down. ‘In transcending the boundaries of the state (and of state-centered constitutional law), the establishment of European citizenship undoubtedly constitutes a “conceptual revolution” in terms of contemporary theory of constitutional law and of the understanding of civil and political rights.’⁴⁷¹ The Treaty, with its own words marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen (TEU, Title I, Common Provisions, Article A)

According to the Treaty, every person holding the nationality of a Member State shall be a citizen of the Union and enjoy the rights conferred by the Treaty. (TEU,

⁴⁷⁰ Article 3b:

‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’

⁴⁷¹ Hans Köchler, ‘Decision-Making Procedures of the European Institutions and Democratic Legitimacy, how can democratic citizenship be exercised on the transnational level?’, Report prepared for the Council of Europe, V4/06.04.99, Innsbruck, 1999, p.2, http://www.i-p-o.org/koechler-democratic_citizenship_europe.pdf, (02.08.2007)

Part II, Article 8) These rights may be summarized as follows: the freedom of movement and residence within the borders of the Union; the right to vote and to stand as a candidate at municipal elections and in elections to the European Parliament in the Member State of residence; the right to be entitled to protection by the diplomatic or consular authorities of any Member State in the territory of a third country; the right to petition to the European Parliament⁴⁷²; the right to apply to the Ombudsman. Additionally, the Union undertakes to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights, as they result from the constitutional traditions common to the Member States and as general principles of Community law.

The Ombudsman appointed by the European parliament receives complaints from the Union citizens concerning instances of maladministration in the activities of the Community institutions or bodies. Yet its powers are limited as an institution. He conducts inquiries for the complaints, in the case of maladministration, refers the matter to the concerned institution which have inform him in three months and at the end prepares a report to the EP and to the institution concerned.⁴⁷³

⁴⁷² Article 20c; Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Community's fields of activity and which affects him, her or it directly.

⁴⁷³ Article 20d

1. The European Parliament shall appoint an Ombudsman empowered to receive from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

4. The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.'

As mentioned above, the literature on the EU ‘legitimacy’ crisis emerged in the wake of adverse popular reaction to the signing of the EU. Especially in Germany, France and United Kingdom, politically very intensive ratification debate took place. ‘Popular opposition appeared to focus principally on the implications of the TEU for the rather ill-defined notions of national sovereignty and national identity, or symbols thereof (such as the national currency).’⁴⁷⁴

Ratification process of the Treaty has been long and difficult. Although the political elite supported the Treaty, it has met with significant resistance among citizens. Discontent among citizens was furthered by the currency crises of September 1992 and July-August 1993 which shattered the ERM, the mechanism for preserving exchange-rate stability that was a necessary basis for EMU. While the Maastricht Treaty was rejected in Denmark in June 1992, the referendum result in France in September was a narrow win for the "yes" vote. The difficulties experienced during ratification which is perceived as an open sign of the gap between Brussels and the people inflamed the discussions about the democratization of the Union. “The force of the opposition to the Treaty on European Union proposals demonstrated that the period of popular consent which had facilitated an elite-driven and ultimately successful period of economic integration across post-war Western Europe had come to an end”⁴⁷⁵. The public debate over the Treaty revealed that national policies are determined by the Community bodies far from home and domestic circumstances are affected strongly by Community law and the ECJ’s case law⁴⁷⁶. Even after its ratification completed, analysis on the EU legitimacy and democracy continued among academia.

The decision⁴⁷⁷ of the Federal Constitutional Court of Germany in 1993 occupies a special place in the legitimacy crises⁴⁷⁸ of the European Union (EU). When the Court was applied about the unconstitutionality of the Maastricht Treaty and of the amendments that it had necessitated in the Constitution, the *Bundestag* and the

⁴⁷⁴ C.Carter and A.Scott, ‘Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union’, *European Law Journal*, Vol.4, No.4, 1998, p.430

⁴⁷⁵ *ibid.*

⁴⁷⁶ D.Grimm, ‘Does Europe Need a Constitution?’, *European Law Journal*, Vol.1, No.3, November 1995, p.283

⁴⁷⁷ BverfGE 89,155

⁴⁷⁸ C.Carter and A.Scott states that the legitimacy crisis is manifest in a dramatic shift in the popular opinion vis-a-vis the construction of ‘an ever closer Union’ at the end of the 1980s. (p.429)

Bundesrat had already approved the Treaty.⁴⁷⁹ The Court dismissed all claims of the complainants, except one. The Court found that the law approving the Treaty of Maastricht might possibly violate a right of the complainant founded on Article 38(1) of the Basic Law that the *Bundestag* as Parliament retain as much right and power as the principle of democracy (Article 20(1) and (2) of the Basic Law) requires. This interpretation cleared the way for judicial review of the Union Treaty.

The Court asserted the continuing sovereignty in the German people, with apparent corresponding restriction of powers of the organs of the Community or Union. Since the fundamentals of the German constitution are reserved to the ultimate democratic control of the German people, the Court would have power to uphold the fundamentals of German constitutional law, if the Union competences puts any of the fundamental constitutional rights or powers of the German Bund.⁴⁸⁰ Although, the *BVerfG* declared the Treaty to be compatible with the principle of democracy as a result, it also maintained certain conditions for the European Union and raised particular requirements for its democratic legitimacy.

‘The principle of democracy does not prevent Germany’s membership of a supranationally organized intergovernmental community. A condition of membership, however, is that a legitimacy and influence flowing from the people is assured within the association of states ("*Staatenverbund*"). Since the Treaty founds a *Staatenverbund* aiming to realize an ever closer union of the peoples – organized in states – of Europe, but not a State based on a single European people, it is primarily the peoples of the Member States who must provide democratic legitimacy via their national parliaments for sovereign acts of the European Union. In this respect the principle of democracy lays down limits to the extension of the tasks and powers of the European Communities. The German *Bundestag* must retain tasks and powers of substantial weight. In the

⁴⁷⁹ The applicants are four German members of the EP, belonging to the Green Party and M.Brunner, a former high ranking official of the European Commission. The complainants claimed that the amendments to the Basic Law and the law transforming the Treaty of Maastricht into national law violated the following: (i) the right to human dignity; (ii) the right to free development of personality; (iii) the right to form associations and societies; (iv) the right to freely establish political parties; (v) the right to freely choose a trade, occupation or profession; (vi) the right to property; (vii) the right to elect deputies of the German Bundestag; (viii) the right to constrain any person seeking to abolish the constitutional order of Germany. Joachim Wieland, *Kaleidoscope*, ‘Germany in the European Union’, *European Journal of International Law*, Vol.5, 1994, <http://ejil.oxfordjournals.org/cgi/reprint/5/1/259.pdf> (02.08.2007), p.260.

⁴⁸⁰ Neil MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, *European Law Journal*, Vol.1, No.3, November 1995, pp.259-260

current phase of development, the European Parliament has only a supportive role in providing legitimacy, which can be strengthened when it is elected by a procedure common to all the Member States and its influence on the politics and law-making of the European Communities increases. It is decisive that the democratic foundations of the Union should be extended in step with the process of integration, and that a living democracy can be retained in the Member States.’⁴⁸¹

More than important than this core of the decision was the Court’s particular skepticism for the democracy in the EU in the future and its reasons. According to Weiler⁴⁸², the Court’s pessimism for supranational democracy is grounded on ‘no-demos’ thesis. According to this thesis, the people of a polity, the *Volk*, its demos, is a concept which has a subjective – socio-psychological – component which is rooted in objective, organic conditions. The subjective manifestations of the demos can be found in a sense of social cohesion, shared destiny and collective self-identity, which in turn result in loyalty. The subjective manifestations are result of the following objective elements: common language, common history, common cultural habits and sensibilities. The critical element of the demos is its relatively high degree of homogeneity measured by these ethno-cultural criteria. The Volk pre-dates historically and precedes politically, and provides the basis of, the modern state. Volk/nation are also the basis of modern democratic –majoritarian- state: ‘both descriptively and prescriptively...a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same Volk, belong to the nation...A parliament is, in this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the volk, the nation, the demos from which derive the authority and legitimacy of its decisions.’.

When the criteria of Volk applied to the EU, the conclusion is that there is no European Demos. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective condition which could produce this (language, history, ethnicity and others).According to Weiler, there are “hard” and “soft” versions of this thesis. The German Court adopts the “soft” version: although there is no demos now the

⁴⁸¹ <http://www.jura.uni-sb.de/Entscheidungen/abstracts/maastricht.html> , Germany's Federal Constitutional Court Report Abstracts in English. (03.08.2007)

⁴⁸² J.H.H.Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’, *European Law Journal*, Vol.1, No.3, November 1995, pp. 219-258

possibility for the future is not precluded *a priori*. Under these conditions, there cannot be a democracy or democratization at the European level for the now being. Weiler claims that the Court's suggestion of the function of European Parliament to add to the democratic legitimacy only demonstrates the Court's inconsistency.⁴⁸³

In general the most important consequence of the Maastricht Treaty, including its referendum processes and the Court's decisions on the Treaty, for the legitimacy discussions has been to carry the European people to the center of the discourse. From Weberian perspective, the popular resistance to the TEU shows us that it is not easy to have the transition from instrumental rationality to value-rationality. A system or systems revolving around formal economic rationality may not easily adapt themselves to the conditions of substantive rationality, even though those values are 'formalized' ones by the Nation-State systems already. From another perspective, it may even be claimed that such formal values do not provide the sufficient basis to the feelings of loyalty and to the political unification, at least at the level of people, if not at the level of governments.

Before studying the substantive rationality of the Union, its developing norms and values, it is needed to explain further the legitimacy in transformation since the TEU.

VIII.III.1 In the Quest for more Legitimacy: Two more Treaties

Under these political conditions, it was not a surprise that 1996 Florence European Council determined the main objectives of the Intergovernmental Conference for revising the Treaty on European Union as to bring Union closer to its citizens, to strengthen its capacities for external action and to make its institutions more efficient

⁴⁸³ For a strong criticism of Weiler's interpretations of the Court decision, see P. Lindseth, 'The Maastricht Decision Ten Years Later', EUI Working Papers, RSC No.2003/18. Lindseth asserts that Court's reasoning, on the contrary to Weiler's view, is anti-Schmittian since the Court's aim was to emphasize the separation-of-powers doctrine that had developed since 1945 explicitly in reaction to the constitutional disintegration of parliamentary democracy under the Weimer Republic in 1933. On the other side, Schmitt's writings in the inter-war period were hostile to the idea of parliamentary democracy rooted in the separation of powers. According to Lindseth, the core of the Court's reasoning was that the delegation of legislative power outside the parliamentary realm (including now at the supranational level) could be reconciled with notions of democracy rooted in separation of powers as long as the necessary constitutional oversight mechanisms preserved. Additionally the Court also stressed the extra-legal conditions for democracy: a common European public opinion, the transparency of the political aims of the Union and the possibility of every citizen of the Union to communicate in his negative tongue with any public authority to which he is subject. Presently the Parliament's democratic function could be strengthened by uniform election laws in all Member States. Wieland, *op. cit.*, p.260.

and democratic given the coming enlargement. Yet Treaty of Amsterdam has not been a real victory in accomplishment of these objectives. The TOA strengthened the European Parliament by extending the range of Treaty Articles to which the co-decision procedure applies and by simplifying the procedure. It is added to the Treaty that decisions within the EU should be taken as openly as possible to the citizen. The Union is founded on respect for human rights, democracy and the rule of law. (Art.6) Also if the Council finds a serious and persistent breach by Member States of principles set out in Art.6, the Council may suspend some of that state's rights under the Treaty including voting rights without affecting its obligations. One achievement is the transfer of legislative powers to the Community in the areas of visas, asylum, immigration and other policies relating to the free movement of persons. The need for more transparency caused a number of amendments such as the greater access to institutional documents and publicly declaration of the votes in the Council. With the new roles given to the Community institutions in the 2nd and 3rd pillars, the distinction between the intergovernmental pillars and the Community pillar has become more blurred and the links and the overlaps are multiplied⁴⁸⁴. It also opened the way for differentiated integration by providing that the Council may authorize closer-cooperation between Member –States whereas within the boundaries laid down in the related Article.

The Nice Treaty, particularly aiming to prepare the EU structurally after-enlargement period, has achieved only the most basic institutional reforms required to integrate the current candidate countries. Yet, the heads of State and government adopted a declaration on the future of the Union, which acknowledges the need to establish a more intelligible and democratic system of governance. Until the next inter-governmental conference, reforms needed to improve democratic legitimacy of the Union, and the future of Europe, are to be debated at all levels of civil society and in political and scientific circles. The Laeken Declaration in 2001 set up a “Convention” as a forum of public debate for this aim⁴⁸⁵.

⁴⁸⁴ P.Craig and G. de Burca, *EU Law: Text, Cases and Materials*, 2nd Ed., 1998, NewYork: Oxford University Press, p.34

⁴⁸⁵ J. Hergenhan, 'Governance in the European Union After Nice', *Eurocities*, no.13, 2001, www.notre-europe.asso.fr/pages/noteJH2-en.htm (27.02.2007); C. Lord, 'Democracy and the Future of Europe: Five Questions Raised by the Laeken Declaration', Briefing Note 1/ 02 , ESRC One Europe or Several Programme, www.one-europe.ac.uk (04.02.2007)

VIII.III.2 Legitimacy Problem after Maastricht

The problem of legitimacy of the Union seems to result from certain shifts which occur in its decision-making procedures, in its core rationality and in its type of authority. Until the mid of 1980s, the legal formal authority of the Community were mainly based on the authority of member state governments. According to Weber, the legal authority is domination by virtue of “legality”: the legitimacy claims of the authorities are based on *the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)*. (ES, p.215) The legitimacy claim of the Member State governments to hold the authority at the Community level was that they had the right to make decisions under the founding Treaties which were enacted to the national systems with legal and usual procedures. In a way, formal legal procedures at the national level were legitimizing the formal procedures of Community decision-making.

Weberian theory explains the legitimacy basis of legal authority on the part of subjects as again the belief in legality: the subjects comply with the positive enactments which are believed to be legal in the sense that they are *formally correct and have been made in the accustomed manner*. Such legality may be treated as legitimate by the subjects either because *it derives from the voluntary agreement of the interested parties or it is imposed by the authority which is held to be legitimate and therefore meets with compliance*. (PAV, p.79; ES, pp.36-37) The European Community was a typical case of the latter form. The Community rules were imposed by the national executives which are held legitimately competent for international issues, especially when the approval of the nation has been attained according to the legitimate national procedures.

However, this formal structure which provides the basis of legitimacy of Community legal authority has begun to change in 80s. First, the shift to qualified majority meant that there was no more a guarantee that the ‘commands’ to peoples of Europe originate from the will of concerned legitimate authority i.e. the national executive of the concerned people. Secondly, the Commission and other administrative bodies were gaining more and more power in the decision-making processes. It was becoming more apparent that all the Community rules were no more under the strict control of the Member States. There was a growing co-authority, namely bureaucratic

authority which is composed of Community bureaucrats, experts and technocrats. The third factor which aggravates the second factor was that the regulations of the Community have advanced both in quantity and quality, meaning that the authority of the Community has been strongly perceivable in the daily lives of people. The rising regulative influence of the supranational authority has begun to create awareness and in turn some suspicions about the legitimacy of that authority.

The legitimacy basis of the Community on the other hand was on the efficiency and utilitarian outputs of the supranational policies, as explained in the previous sections. However, the efficiency criteria were applicable for an authority over a certain sphere of life. Mainly, its legitimizing effect is dependent on two conditions at the Community: measurability and being beneficial to all member states, without creating net 'losers'. Regulatory model finds a solution satisfying both of these conditions at the same time. According to Majone's ideal type of Community, a supranational technocratic authority only focused and limited to the regulative policies would be legitimized due to its calculable success and efficiency, without creating net losers. Certainly, ideal types do not reflect the reality perfectly, although they have certainly some legitimizing influences as discourses for the real authorities. The shift experienced in the Community in 1980s was a kind of dilemmatic change. On the one hand, it was understood that the 'negative' integration by just abolishing the trade barriers was not enough for achieving the objective of single market but regulations of positive integration in the areas which are not purely economic was necessary; on the other hand, it was possible neither to make objective calculations nor to escape from their secondary effects creating losers and gainers among Member States and individuals. It also showed that it was no more legitimate political authority of governments who decides but some agents of expertise.

From Weberian perspective, this model was an ideal-type of ends-means rationality. Already explicitly and, politically in a legitimate way, determined ends in the Treaties will be achieved by using the most efficient and rational means. The most efficient means for the Treaty objectives was the Community, its bureaucratic, dependent and independent, staff and experts. The Community, organized as a means to achieve already determined objectives, in Weberian terms, only may be an organ of technical rationality, not an authority. That's why it is not surprising that Majone and

the others do not look for a solution to the legitimacy problem but accept it to be solvable by the 'accountability', either to the Member States, or the Commission or to the Parliament or to the Court of Justice.

At this point too, Weber's warnings may be taken into account. His first warning was orders that are submitted only because of pure expediency, yet they are less stable than the order *which enjoys the prestige of being considered binding, or ...of legitimacy* (ES, p.31) Secondly, Weber was specifically pessimistic about the modern mass democracies since the legal forms of modern domination are grounded in *technical expertise* and *functional specialization*. Let me repeat the quotation from Thomas:

'Once technical expertise has a significant role in administration then the processes of recall, of subjection to a general assembly, of 'answering', take on, at best, purely ritual significance; more likely they are devalued, or abolished, or come to constitute an ongoing source of conflict with those practicing diurnal administration. The office-holder is qualified by his or her technical expertise, the layman is disqualified by lack of technical knowledge and is thereby, at least to a degree, disfranchised...The attempt to solve this problem by placing technical advisers alongside democratic representatives or delegates simply conceals a shift of power in the direction of the technically competent',⁴⁸⁶

I think that just at the period going to the Maastricht Treaty, the Community was suffering from an image that Weber portrayed as a dystopia: Bureaucracy, together with the capitalism, is *busy fabricating the shell of bondage which men will perhaps be forced to inhabit someday, as powerless as the fellahs of ancient Egypt. This might happen if a technically superior administration were to be the ultimate and sole value in the ordering of their affairs and that means: a rational bureaucratic administration with the corresponding welfare benefits.* (ES, pp.1156, 1402) Here the threat is that the means might turn into the ends and the instrumental rationality might become the final end for the modern societies. Therefore Weber already warned us that the intellectual side of reason which guides rigorous analysis and thought will be reduced to a demand for technical efficiency; and that this will become valued for its own sake.

⁴⁸⁶ .J.R. Thomas, 'Weber and direct democracy', pp. 228-229

The Maastricht Treaty may be considered as an attempt of the Community to encounter the dilemmas facing it in 90s and creating many unwanted and unexpected consequences one of which is already appearing signals of legitimacy-loss. Weber claims that *almost every association tends to create consensual action beyond the realm of its rational purposes* (ES, p.1379) For that, a further element is needed: *the belief in legitimacy*. (ES, p.213) Because of already explained problems, the benefits of the Community were under question, even more than this, reason d'être of the Community was shattered. The Maastricht Treaty seemed to answer to both of the problems, by creating the monetary union, the utilitarian criteria of the validity of the Community order was aimed to be restored and by creating the political union, a new legitimacy basis was seek for the Community, at the same time by strengthening its reason d'être on the basis of external and internal security.

However, the Maastricht Treaty at the end made the legitimacy loss of the Community just more explicit, if not worse. First of all, the Treaty establishing the Union was covering the areas, which traditionally belong to the State. Monetary policies, internal affairs and foreign policy were the matters directly linked to the core of state sovereignty. Except the monetary policy, it is true that the Treaty had established a purely intergovernmental mechanism, based on unanimity principle with a main role to the Council of Europe and a minimized role to the Commission. By that way, not harmonization or unification but first of all cooperation was aimed, without touching the exclusive competences of the Member States. Therefore the national reaction to the Treaty was looked for not at the decision mechanisms of the Union. For Weber, submission to an order is almost always determined by a variety of interest and by a mixture of adherence to tradition and belief in legality, unless it is a case of entirely new regulations. (ES, pp.37-38) Additionally, even belief in legality is not purely legal but also habitual so it is partly traditional (ES, pp.262- 263) The popular reaction to the Treaty may be partly explained by its implicit threat to the traditional concept of the nation-state. What was traditionally and habitually valid was that the core areas of sovereignty belong to the Member States. Even the Community for 30 years has not changed this fact. Weber, while explaining the traditional authority, although the personal obedience tends to be unlimited, the limit is that *how far master and staff can go in view of the subjects' traditional compliance without arousing their resistance*.

(ES, p.227) The motive of this resistance is the belief in the inviolability of that which has existed from time out of mind. When this type of resistance occurs, *the authority is accused with failing to observe the traditional limits of his power.* (ES, p.227) Concerning the EU, it may be claimed that it failed to observe the traditional limits of its power and the Member States exceeded the traditional limits of transferring sovereignty that originally belong to the nation, by agreeing to the Maastrich Treaty. Therefore, the legal formal basis of the Union, which is intergovernmentalism, could not be sufficient to legitimise the Union coordination on the new political areas.

While the intergovernmental structure of the two pillars were far from convincing people to its legitimacy, the monetary union was already another strong regulatory area of the supranational bureaucracy and the situation was even more dangerous for traditionally national values. The State money was not a simply technical issue but a symbol of sovereignty. Here the utilitarian expectations were conflicting with the values. In terms of traditional state sovereignty, the exclusive transfer of the decision-making powers to independent regulatory agents such as European central bank was definite. Although in the Member States too, the monetary issues were regulated by the administrative organs, and in some of them they were independent from governmental and political intervention, the national bureaucracy had gained and created its legitimacy basis, into an extent.

It may be claimed that the core reason of the problem lies at the sudden shift from instrumental rationality to the realm of political values in overall, which cannot be proven or justified by the numbers and which are connected to beliefs, convictions and subjective or democratic preferences. In short, the Union lacked the tools and arguments necessary for creating democratic legitimacy for political decisions and value-choices. Additionally, the relations between the Member States and more important than this, between people are based on what may be called interest-partnership. At most, there was a solidarity but for increasing the 'welfare' and preventing the 'warfare'. The Community was assumingly to the interest of all, to an economically unified but politically divided all.

The concept of political union assumes existence, or potential, of people or at least citizens. The concept of citizenship in the Treaty was necessary result of the

political union. However, the citizenship as a concept although supported by some rights was not very meaningful for individuals who have a very indirect or minor influence on the Union decisions. Additionally, 'political' as a concept carries in itself many implicit connotations such as identity. Every political order presupposes some kind of common identity to foster allegiance and respect for laws. Actually, from the Maastricht till today, the discourse on the Union democracy and legitimacy has been combined with the search for a common European identity. Lord states: 'Democracy requires at least enough of an identity for people to accept that they should deliberate and vote as a group, yet, there is no guarantee that an adequate sense of identity will be available at the exact moment that a political system comes under pressure to democratize its decision-making. *Eurobarometer* survey consistently indicate that publics identify overwhelmingly more strongly with their member states than with the EU.'⁴⁸⁷

One of the ways to support the legitimacy of the Union is to refer to an already existing or developing common identity based on common values and interests. The other way is to strengthen the democracy of the Union and to provide its authority with democratic legitimacy. However, even this second way assumes the existence of a political society which has a sense of belonging and unity. Since the Maastricht, the intellectuals, politicians and academia discuss about the existence, potentiality or possibility of creating such a common European identity. According to some views, there are already common values and principles that unite the European citizens, and a European culture and identity. Laffan asserts that there are already some common European values, norms and symbols but they are not enough to claim that there is a common European identity. According to him, the basis of EU legitimacy is at the same time moral. Most important value from the beginning was 'civic statehood', in other words, peace. The other value which is promoted and protected is democracy. In 1993, the Copenhagen criteria are the values of utmost importance for being a member to the EU: democracy, the rule of law and protection of human rights, both in relation to individuals and minorities. Article F1 of the Amsterdam Treaty establishes that 'The Union is founded on the principles of liberty, democracy, respect for human rights and

⁴⁸⁷ Christopher Lord, 'Legitimacy, Democracy and the EU: when abstract questions become practical policy problems', policy paper 03/00, 2001, www.one-europe.ac.uk (04.03.2007), p.5

fundamental freedoms, and the rule of law, principles which are upheld by the Member States.⁴⁸⁸ Laffan also underlines the importance of symbols for a European identity:

‘From the 1980s onwards, the institutions of the EU began to fashion EU specific symbols intended to reconfigure the symbolic universe within which individual Europeans lived. There was a deliberate attempt to portray the EU as a visible social space by creating symbols of integration and community. The emblems used were the traditional nationbuilding emblems fashioned by nation-builders in the past, such as a European flag, a common passport, and an EU driving license, an anthem, an EU product mark and European sporting days. The passport, flag, product mark and driving license were to provide individuals with additional symbolic frames through which meaning is constructed. The blue flag with its gold stars is flown from public buildings, private enterprises, in ministerial offices and in universities throughout the Union. A version of the flag is flown beaches that conform to certain environmental standards. The circle of stars can be found on car plates, communal notices and has many other everyday uses. Interestingly, EU symbols are rarely stand-alone symbols. Rather, they are used in conjunction with national symbols to connote the embedding of the national in the European and the European in the national. From January 2002, individuals living in at least eleven EU states will have an additional and very powerful symbol of the EU added to their universe. The single currency, the euro in people’s pockets, will provide individual Europeans with a material and symbolic expression of their participation in the EU. Common coinage is a very appropriate symbol for a Union in which market integration exercises such a pivotal role. The fact that euro coins will have a common face on one side and national symbols on the other underlines that subtle balance required when new symbols are being crafted on to an already crowded symbolic universe’⁴⁸⁹

According to some others, the common identity may be created or strengthened by stronger democratic mechanisms through which individuals use their civic and political rights. Some other goes far in following the way that nation-states followed in the past and underline some common myths, religion and common history of the west against the east. Lord calls this Communitarian approach which emphasizes various real or imagined characteristics that are intrinsic to being European; ethnic background, cultural heritage; a common past and so on. Like nationhood, it would be a form of Europeanness into which people are born. ‘it can, therefore be understood negatively as an identity that is not chosen; not open to all comers; and not extrinsically justified as a means of promoting other values. Rather than being rationalized, it is more likely to consist of symbols and sentiments.’⁴⁹⁰

In any way, the enlargement process of the Union complicates more the efforts of creating a common identity and establishing a democratic union. Including Nice, the Treaties could not contribute much to the democratization of the Union. Lastly, the

⁴⁸⁸ B.Laffan, ‘The European Union polity: a union of regulative, normative and cognitive pillars’, *Journal of European Public Policy*, 2001, Vol. 8, No.5, pp.714-715

⁴⁸⁹ *ibid.* p.718

⁴⁹⁰ Lord, ‘Legitimacy, Democracy and the EU’, p.9

intellectual efforts for/on supranational identity, remind one the processes of disenchantment and re-enchantment. It may be claimed that the European Community and Union have accompanied to the globalization in the disenchantment process of nation-state and creating a supra-nationalism with particular values is an uncompleted enchantment process. 'The citizens loose the feeling of loyalty towards 'their state' and by this, also the notion of solidarity with other citizens. They see themselves confronted by a complex system of different layers of functional organizations on several territorial levels which cannot stimulate any kind of sufficient basic support.'⁴⁹¹

VIII.III.3 Proposals for More Legitimacy

The characteristic of the 'after-Maastricht' period is its focus on democratic legitimacy and citizenship. In this context, many scholars have called attention to especially the improvement of parliamentary regime in the Union at both national and European level. According to this view, the weakness of the European Parliament (EP) as the only directly elected EU institution and the inability of the EP to hold the European executive accountable were among the main reasons of the democratic deficit. However the problem seems deeper than that: European elections are fought primarily on the basis of national political concerns, rather than on problems relevant to the European arena. It means that the EP not only lacks power but also a mandate to use that power in any particular way.⁴⁹² The abstentions in the European elections and the lack of real European political parties just aggravate the situation for the EP.⁴⁹³

However, 'the shift of powers to the relatively undemocratic EU undermines the quality of democracy at the national level as well, because many areas of policy are no longer under direct national democratic, control. National governments tend to blame undesirable outcomes on the policies of Brussels.' This tendency is encouraged by the secrecy surrounding meetings of the Council.⁴⁹⁴ At the national level, the European Union structure has caused a feeling of frustration for the national parliaments due to a

⁴⁹¹ Wolfgang Wessels, 'The Modern West European State and the European Union: Democratic Erosion or a New Kind of Polity?', in *The European Union: How Democratic is it?*, Svein S. Andersen & Kjell A. Eliassen (eds.), London: Sage Publications, 1996, p.63

⁴⁹² Richard S. Katz, 'Models of Democracy, Elite Attitudes and the Democratic Deficit in the European Union', *European Union Politics*, Vol.2, No.1, 2001, p.55

⁴⁹³ For more details about the elections of the EP and the elector behaviours, see Jean Blondel, Richard Sinnot and Palle Svensson, *People and Parliament in the European Union*, Clarendon Press, Oxford 1998.

⁴⁹⁴ Richard S. Katz, *op. cit.*, pp.56-57

transfer of a part of their powers to the European institutions. ‘Partly deprived of their powers to legislate, they have considered with a certain distrust the exercise of the legislative powers by the representatives of the national governments in the Council of Ministers’,⁴⁹⁵

The argument for national parliaments was that democracy of the Union must be restored by giving more power to the national parliaments. In accordance with this argument, there is a steady development of the role of the national parliaments on supranational decision-making. In 1989, regular meetings of the EC committees of national parliaments along with the European Parliament, known as COSAC (French acronym for *Conférence des Organes Spécialisés dans les Affaires Communautaires*) were established on the initiative of the French Presidency.⁴⁹⁶ The national parliaments received official recognition in the Declaration no. 13 on the “Role of National Parliaments in the European Union” appended to the Maastricht Treaty. The Protocol ‘on the role of national parliaments in the European Union’ of the Amsterdam Treaty concedes that the transfer of information from the European to the national level, in particular the transfer of all Commission consultation documents and proposals for legislation, must be improved. A period of six weeks shall elapse between a proposal being made available in all languages to the European Parliament and the Council by the Commission and the date when it is first placed on the Council agenda for decision.⁴⁹⁷

Actually Lord argues that there are already some mechanisms of democratic legitimacy at the EU. Each member ratifies any change to EU Treaties through their parliaments or referendums. Even with majority voting, this allows national parliaments to influence the development of EU policy and hold their governments responsible for their behavior at Union level. They can review the negotiation positions of their governments before meetings of the Council of Ministers. They can scrutinize draft

⁴⁹⁵ Joel Rideau, ‘National Parliaments and the European Parliament- Cooperation and conflict’, in *National Parliaments as Cornerstones of European Integration*, Elvind Smith (ed.), London: Kluwer Law International, 1996, p. 161

⁴⁹⁶ COSAC meets every six months in the country holding the Presidency and consists of delegations of up to six members from each member state drawn from the European Affairs Committees (of both chambers where that applies) of each parliament and six members of the EP. The delegations are not mandated and the conference proceeds always by consensus.

⁴⁹⁷ Fulvio Attinà, University of Catania, ‘Strategies for democratising multi-state systems and the European Union’, Jean Monnet Working Papers in Comparative and International Politics, November 2000 - JMWP n° 28, <http://www.fscpo.unict.it/EuroMed/jmwp28.htm> (01.09.2007)

legislation, which has to be circulated to each national parliament in its own language at least six weeks before it is voted in the Council. They also have important discretion in deciding how Union legislation is to be transposed into national law, since directives only require member states to achieve certain results, without specifying the methods to be employed.⁴⁹⁸

VIII.III.3.1 Deliberative Supranationalism

The model is summarized by Lord as follows: the Union loses very little by not being able to use hierarchical methods to enforce political accountability; it is but an extreme example of a universal trend (at national and transnational level) away from government by hierarchy and towards government by network; and it is a mistake to judge these new forms of governance by old approaches to democratic accountability, since they allow for the application of novel-and in many ways normatively preferable – methods of political responsibility.⁴⁹⁹ In the European Union, political network is composed of a wide range of actors, from member governments, to officials from Commission, to MEPs from transnational and national interest groups. Although they are hardly subject to public or hierarchical scrutiny, ‘each component of each policy network has to satisfy its own highly demanding public in a manner that often corresponds to simple and generalizable needs.’⁵⁰⁰ In this sense, the European Union has neither an intergovernmental nor a supranational structure dominantly but it is developing to transnational governance.

Deliberative supranationalism conceives European law as a species of conflict of laws, a law which responds to “true conflicts” by resorting to principle and rules which are acceptable to all concerned polities. They find the democratic basis of this function of the European law at the failures of nation states with extra-territorial effects. Nation states while attempting to adopt social regulations good for their society, they did this at the expense of the people living in the other states and foreigners in their own territories. Joerges’ claim is that ‘European law has repeatedly managed to civilize national idiosyncrasies on normatively good grounds and with *de facto* considerable success.’ European law and institutions also has an arising function of re-regulation

⁴⁹⁸ Lord, ‘Legitimacy, Democracy and the EU’, p.6

⁴⁹⁹ Christopher Lord, *Democracy in the European Union*, p. 100

⁵⁰⁰ *ibid.*, p.101

which created or necessitated the transnational governance structures and the legitimacy of this type of governance is to be measured by the deliberative quality of the decision processes organized in it. The function of European law at this point should be to guarantee the deliberative quality of the governance and to establish the necessary connections between the transnational structures, the national and supranational institutions.⁵⁰¹

Joerges claims that at the theoretical level, the deliberative supranationalism seeks to overcome the age-old dichotomy between *Sein* (being) and *Sollen* (ought).⁵⁰² It is not only a normative model but the EU has already developed some institutional features which are compatible with the deliberative model of democracy.⁵⁰³ For example, the committee system and COREPER rely on persuasion, argument and discursive processes rather than command, control and strategic action. The committee system is understood as an institutional response to the tension between the dual supranational and intergovernmentalist structure of the EC on the one hand, and its problem-solving tasks on the other. Comitology provides ‘a forum for the development of novel and mediating forms of interest formation and decision-making’⁵⁰⁴ According to this model, committees operate ‘much more comprehensively as *fora* for political processes and as coordinating bodies between supranational and national, and governmental and social actors. And both, agencies and committees, are surrounded by – or surround themselves with- semi-public and private policy networks.’⁵⁰⁵

⁵⁰¹ Christian Joerges, ‘Deliberative Supranationalism-Two Defences’, pp. 138-139

⁵⁰² Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology’, *European Law Journal*, Vol.3, No.3, September 1997, p. 275

⁵⁰³ Erik Oddvar Eriksen and John Erik Fossum, in their paper ‘Democracy through strong publics in the European Union?’, Arena Working Papers, WP 01/16, http://www.arena.uio.no/publications/wp01_16.htm, (21.12.2002) argues that the public spheres may be divided into two: strong and general publics: strong publics are spheres of institutionalised deliberation and decision-making and general publics are spheres of opinion formation without decision-making power. The strong publics of the EU are the system of comitology, the Courts and the European Parliament. According to them, these strong public spheres are already working according to deliberative model very successfully.

⁵⁰⁴ Joerges and Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes’, p. 279

⁵⁰⁵ Joerges, ‘Deliberative Supranationalism-Two Defences’, p. 141. Wolfgang Wessels, ‘The Growth and Differentiation of Multi-Level Networks: A Corporatist Mega-Bureaucracy or an Open City?’, in *Participation and Policy-Making in the European Union*, Helen Wallace & Alasdair R. Young (eds.), Oxford: Clarendon Press, 1997, pp.16-41, states that the number of officially declared interest groups has increased from around 200 (1960) to some 2,200 (1995); 10,000 lobbyists working in Brussels in 1990 and meetings organized by the Commission assemble 30,000 participants per year. Also, the Commission has established some 600 expert groups until 1997 and the Council has forced upon the Commission around 420 committees composed of national civil servants. Another striking example, in 1990 roughly 30 per cent of all ‘A’ grade civil servants in the German federal government take part in Brussels meetings and are directly involved in one segment or other of the EU policy cycle as a part of their everyday duties. Among the interest groups, the largest number is the commercial representations, namely trade

Although the model considers this anarchic atmosphere of the supranational administration as a dynamic process open to competing private and public, political and social, national and supranational values and interests to be expressed, they anyhow admit that some control mechanisms are required. In order to improve the deliberative democracy at the Union, member state representatives at the committees must be given an open mandate and be allowed to have their initial opinions altered even if that contradicts what their ministers assume to be in the national interest. Secondly, the accountability of committee decision makers should be strengthened through efforts designed to increase transparency. For example, the meetings of committees should be open to media and non-governmental actors. The role of the parliament during the policy process should be clarified on a stable compromise reached between the Council and the Parliament in order to remove the threat of a Parliament which rejects any legislative act that does not specify every technical detail.⁵⁰⁶

Karlsson criticizes deliberative supranationalist model by focusing on ordinary people. He claims that ‘decision-making through deliberation will, with few exceptions, mean deliberation among members of the elite.’⁵⁰⁷ ‘The proposed reform measures would not increase citizens’ control over the agenda setting powers held by the Commission; they will not strengthen citizens’ opportunities to participate in the policy process nor increase their influence over the final decisions made by the Council and the Parliament.’⁵⁰⁸ The answer of Joerges and Neyer to the critiques who label their model as a paternalistic rule with “expertocratic alienation of legal medium” is that on the contrary they attempt to overcome this by preferring comitology to the agencies. According to them, risk regulation is not an isolated technocratic matter and that’s why the committees which have links with bureaucrats, politicians and interest groups are the most appropriate structures to deal with it. In their presentation of the model, it seems as if that the public itself is the responsible to sow the necessary attention to the issues and to be insistent in participating to the public debate. The structure is open

associations, business and industry and chambers of commerce. Many large corporations have opened their own offices, often with more staff than the European federations. Also, the growth of specialized consultancies may be observed. There are also semi-public intermediary groups such as CoR composed of regional and local authorities and international organizations (86 in number) Labour unions, issue-oriented groups and consumer representatives should be added to this picture.

⁵⁰⁶ Christer Karlsson, *op. cit.*, pp. 227-241

⁵⁰⁷ *ibid.*, p.243

⁵⁰⁸ *ibid.*, p.244

already everybody who likes to get information. Additionally, the normatively desired seems already having turned to an empirical fact:

‘Risk issues in internal market can scarcely complain lack of public attention....along with expertise, counter-expertise is institutionalized; not only do experts and counter-experts observe each other, they, in turn, are observed by those affected in European society, who, in this way, become attentive to each other. The outcome of the communication is the *demos*, which produces itself in the process of European communication.’⁵⁰⁹

The deliberative model proposed by Cohen and Sabel seeks to overcome the handicaps of the deliberative supranationalism. The model, ‘directly-deliberative polyarchy’ as they call it, is a kind of radical, participatory democracy in which collective decisions are made through public deliberation in arenas open to citizens who use public services or who are regulated by public decisions. It combines ‘the advantages of local learning and self-government with the advantages of wider social learning and heightened political accountability...’⁵¹⁰ In a deliberative democracy, democratic decisions are taken on the basis of public reasoning among equals. Arguments and reasons to convince others to support an interest or an idea play a significant role during this process. It is not enough that a majority of citizens aggregatively support a decision. The politics should arise from a free discussion among equal citizens and the political power structurally should be responsible and accountable to public power. Deliberative democracy also may apply to majority voting at the end of the day. However, its basic difference from aggregative democracy is that citizens

⁵⁰⁹ Joerges ‘Deliberative Supranationalism-Two Defences’, pp. 140-143. However, two years later, in the same article which a little bit amended by an additional defense, Joerges claim that the expert’s knowledge cannot be substituted or ‘overruled’ by the problem perceptions and preferences of the layman. He admits that expert opinion can and even should be exposed to counter-expertise and public criticism. Nevertheless, such a perspective ... ‘can merely approve the inequalities by recognizing the existence of experts’ deliberative privileges over the opinions of ordinary citizens’ p.145 It seems that public is free to participate in deliberation although the result of the process will not change a lot in any way by that participation.

⁵¹⁰ Joshua Cohen & Charles Sabel, ‘Directly-Deliberative Polyarchy’, *European Law Journal*, Vol.3, No.4, December 1997, pp. 313-314. They borrow the term polyarchy from Robert Dahl. It refers to a political system in which virtually all adults have rights of suffrage, political expression, association, and office-holding, as well as access to diverse sources of information; in which elected officials control public policy; and citizens choose those officials through free and fair elections (pp. 317-318)

decide on the substance of public policy, instead of only choosing the representatives who decide on substance.⁵¹¹

Oliver Gerstenberg considers that the directly-deliberative model of Cohen and Sabel surmount the impasse of no-demos thesis and develops an alternative to the aggregative democratic model for radical pluralism inherent in the EU. Democratic legitimacy does not depend on pre-political homogeneity of 'the people'. Actually deliberative democracy is not diverted but rather benefits from the heterogeneity of participants and comprehensive moral outlooks. Any kind of demand for cultural homogeneity conflicts with the principles of freedom and equality since it makes political membership dependent on the adherence to a particular moral or political outlook. In a deliberative democracy, it would be enough to commit to the idea of conducting political argument on common ground.⁵¹²

VIII.III.3.2 Calling as a European Demos: an objective value?

The look for a common identity for the Union results from a variety of factors, one of which is to find a solution to the legitimacy problem of the EU. While the supranational structures were eroding the political national identity and the legitimacy of the nation-states, it could not succeed to compensate it with a new kind of identity with a legitimizing potential.⁵¹³ The dominant instrumental rationality had no potential to produce a sense of belonging among the peoples of Europe and to give any substance to European citizenship. Rising popular discontent with the European Union was conflicting with the new political objectives of the EU in the 90s. What has to be done

⁵¹¹ *ibid.*, pp.320-321

⁵¹² Oliver Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel', *European Law Journal*, Vol.3, No.4, December 1997, p.350

⁵¹³ 'One of the greatest achievements of the nineteenth century model of the European nation state was its ability to bring together identity and order, legitimacy and community, national economy and national welfare within a single framework. The weakest dimension of the emerging post-sovereign European order is that it loosens the ties, which bind elites to masses within nation states, and the links between policy outcomes and political accountability, without providing any substantial sense of shared identity, of representation or of accountability at the European level. European institutions were designed for administrative elites, for networks of experts and specialists; it was part of the supranational compromise to present the European level of governance as technical administration, leaving political representation through national governments. The post-sovereign European order is characterized by disaggregated policy networks and disjointed and opaque policy-making processes, without any of the symbols, myths or rituals through which modernizing national governments built up a sense of national solidarity and virtual representation. ... The central paradox of the European political system in the 1990s is that governance is becoming increasingly a multi-level, intricately institutionalized activity, while representation, loyalty and identity remain stubbornly rooted in the traditional institutions of the nation state. Much of the substance of European state sovereignty has now fallen away; the symbols, the sense of national solidarity, the focus for political representation and accountability, nevertheless remain.' W.Wallace, *op. cit.*, pp. 520-521

was to start a reciprocally reinstating process: supra-nationally initiating a political project covering internal and external political areas and to uphold the formal rationality of the Union with substantive rationality by inserting some hopefully-common values to the integration project. It was seen as the way to surmount the vicious cycle of the Union: the legitimacy gap was partly arising from the lack of a feeling of the common identity which might justify the decisions taken at the supranational level, with the assertion that these common decisions and policies to the common interest of all European citizens. The other possibility of overcoming the legitimacy by democratization of the Union was in a desperate need of a public politically active and interested in the Union policies. Even to solve the democracy problem with the minimum attempt, i.e. by giving more powers to the European Parliament and more effective role to the national parliaments, was only possible first with the existence of a unified society to be represented at the supranational level. Both the concept of citizenship and the institutional and intellectual quest for common values were intending to create a shared basis which will facilitate the evolvement of supra-national political authority and its legitimacy.

The above analysis actually forces me to turn back to Weber once more, this time in the issue of nationalism. It has to be accepted that the Union's aim is not to establish a supra-national identity which will abolish the national identities in the future. Treaty of Amsterdam (Art 17) states that every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. However, it does not still make the evaluation of the Union citizenship from a Weberian perspective irrelevant. Actually the period Weber experienced and the period in 1990s has certain similarities for Europe. Weber's period signifies the beginning of the rise of nationalism and of nation-states in their full meanings. This is especially valid for Germany. The period is also important for the fact that the crises of modernization, especially in terms of legitimacy, have been first identified clearly. Weber's proposed solution to the political wasteland of instrumental rationality without any value-commitment was nationalism. It may be seen also as one of his impressive prophecies for the century. It was Weber who favored a nation that would aspire to establish certain cultural ideas and national prestige for the

benefit of future generations, beyond the adjustment of people to material interests and being tied to technical and economic progress.

On the other hand, the Union, almost after 70 years, is at the edge of another crises, which belong partly to modern world and partly to the global developments. Yet, the crises in some parts so similar to those in 1920s, one can even claim that this is only a magnified type of the same thing. The crises is again about the instrumental rationality, value-loss and legitimacy. However, this time the nation-states and nationalism are part of the problem, not of the solution. Solution is looked for in a supra-national identity and the values it may create and grow. Weber attempted to sustain the legitimacy gap of modern legal systems by an appeal to certain irrational political instincts in the masses towards the nation state. Hence the legitimacy deficit of the modern state is compensated by the existence of emotional commitments to the nation. This time the same compensation is attempted by emotional commitments to a supra-national Union.

I had claimed that:

‘national interest and national culture are the values which most come close to be objective, in terms of its impersonal applicability to every member of the society, no matter to which class or strata he belongs to. Just for the same reason, it has a unifying power over the society, in the context of practical situation of Germany. Weber’s political choice to prioritize the overriding national interests of the state aims to find a goal to which all members of the national community could subscribe. The best area to strengthen the sense of identity and common interest in the society is the area of foreign policy where the German people may save itself from political alienation and cultivate an interest in foreign policy. According to Bethaam, the significance of the national idea and a strongly national policy was that it encouraged the degree of social unity which was a necessary concomitant to a successful world political role. The aim was to overcome the dominant and widespread approach to pursue material interests to the exclusion of other considerations, and to see politics largely as an instrument of this While Weber recognized that the expression of economic interests formed an inescapable part of contemporary politics, the danger was that it would become its dominant feature. For Weber, the end of politics should be non-material values as opposed to ‘bread and butter’ questions. Weber’s solution has been the idea of nation.’

For the main actors of the EU, the aim with the Maastricht was both to give the Union a successful world political role and to strengthen the sense of identity and common interest in the European society. A citizenship for a newly-forming political union would transcend the traditional divisions between the populations living in the

different member-states would save the public from the political alienation from the supranational issues. However, the strategy which worked well 80 years ago for Germany failed this time. The mistake in calculation was the underestimation of national loyalties among people and the neglect about the weakness of the Union to create a strong value sphere and a common public sphere.

To understand the importance of a common identity for the Union, we may remember the explanations of Weber about the concept of nation. The concept of nation in Weber's sociology falls into the category of communal relationships which may rest on various types of affectual, emotional or traditional bases. (ES, p.41) What is more important is that *the communal type of relationship is, according to the usual interpretation of its subjective meaning, the most radical antithesis of conflict.* Additionally, a relationship is communal only so far as it involves feelings of belonging together and emotional values which transcend its utilitarian significance. (ES, p.41-42) In Weber's theory, the idea of nation belongs to the sphere of values so that it is directly linked to value-rationality. Yet the concept also has direct connotations with the state and its power interests, therefore it is also linked to instrumental rationality. Now it is easier to understand the density of intellectual discussions about the European identity in our age. It is a way to create a real communal relationship, which involves emotional values and transcends the utilitarian rationality, between the peoples of EU. And for the Member States it was a way to changing power balances of the World after the cold war by using the Union as an instrument.

Additionally, Weber stays at the side of civil understanding of the no-demos thesis since the belief in the existence of commonality is more important for group formation than the objective and real existence of these common characteristics for him. The basis of identity is subjective belief in its existence; in other words, this belief, regardless of whether it has any objective foundation, can have important consequences especially for the formation of a political community. *On the other hand, it is primarily the political community, no matter how artificially organized, that inspires the belief in common ethnicity.* Weber calls this "the artificial origin of the belief in common ethnicity". (ES, p.389) Therefore, Weber may be accepted as an avant-garde of the European intellectuals who supports the idea that the European identity may be established by political and civil rights within a process.

However, the basic difference between them and Weber's approach should not be neglected. They perceive the demos in non-organic civic terms, a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences. The final aim is not to make the people believe that they have a common origin or ethnic basis. A homogeneous culture is not the final aim. Weiler maintains that 'the conceptualization of a European demos should not be based on real or imaginary trans-European cultural affinities or shared histories nor on the construction of a European 'national' myth of the type which constitutes the identity of the organic nation. The decoupling of nationality and citizenship opens the possibility, instead, of thinking of co-existing multiple demoi.'⁵¹⁴ According to Weiler, Europe is not yet a Demos in the organic national-cultural sense and should never become one.

He even overhauls Grimm who advocates that lack of common language is almost an insurmountable hinder in front of the European identity.⁵¹⁵ Weber states that *the concrete reasons for the belief in joint nationality vary greatly.* (ES 395) Neither common language, nor common descent, nor common customs may exist objectively. In this sense, one can say that Weber saw nationalism as an "imagined community". More than this, he gives the most important role in creation of the common identity to the intellectuals and politicians.

The national attachment also creates a longing for cultural prestige, especially among *those who usurp leadership in a Kulturgemeinschaft*, namely intellectuals. *Those who wield power in the polity involve the idea of the state* whereas *those who by virtue of their peculiarity have access to certain products that are considered "culture goods"* involve the idea of cultural prestige. For them, the idea of nation contains the legend of a specific 'culture mission'. This mission necessitates justifying and promoting the significance of nation *in the superiority, or at least the irreplaceability, of the culture values that are to be preserved and developed only through the cultivation of the peculiarity of the group.* (ES, p.925) The activity of cultural cultivation confers to intellectuals also a responsibility of cultural and political education of people. In

⁵¹⁴ Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', p. 252

⁵¹⁵ Dieter Grimm, in 'Does Europe Need a Constitution?' p.295, sees the lack of a common language as the biggest obstacle to Europeanisation of the political substructure. Grimm states that the EU is not a country with 10 million inhabitants with two or three languages. The EU is 370 million with eleven languages.

Weber's words, *the intellectuals are specifically predestined to propagate the "national idea.* (ES, p.926)

Let us remember Goldman who claims for Weber that he believed that 'self and world could put on track again only through the redeployment of these same fictions, revitalized for a secular and post-bourgeois world.' For the EU, it was and is again intellectuals who took their historical and tradition role in identity-creation by re-deployment of the same fictions that were used for the nation-state, re-vitalized for a post-national union. However, the role of the intellectuals also put a great burden of responsibility on their shoulders. It is never to be forgotten the catastrophic results of the rising nationalism for Europe and for the world 80 years ago. Therefore, the myths and re-written history are to be the tools which were already tried and found quite dangerous to be used. Unfortunately, some scholars still insist on using the same methods for the Union. Today, some conscious intellectual works to construct a European identity are also finding the common European values in Christianity and in a "selective" history, at the expense of current exclusion of historically excluded.⁵¹⁶ Additionally, the writers of these works seem to believe that European identity construction will or should follow the same patterns with nation-state construction process; a process, according to them, actually led and controlled by a group of political, legal and intellectual elites from top to down and composed of transmission of some created/recalled myths, re-written history and selected values to the people and adoption of all these by the people, through several media

The relations between a common identity and democracy may be found in that sentence of Weber: 'We demand the 'democratization' (as it is called) of German political institutions as an indispensable means for securing the unity of the nation and Parliamentary government as a guarantee of uniformity in the direction of the policy'. Instrumentalization of democracy for the identity-formation and power-politics is a point about which scholars writing about the European identity should also be careful. Until now, it seemed that a unified public is necessary for democracy in Europe. And at the same there was a belief that more democracy would create a sense of identity. This is what Weber confirms. The danger is the instrumentalization of democracy. It would

⁵¹⁶ For a good example of such arguments see Anthony Pagden, *The Idea of Europe*, Cambridge University Press, 2002, especially Introduction and Chapter I written by Anthony Pagden.

refer to a mentality that supra-national power as an end should not be sacrificed for the sake of democracy. The practical meaning of this warning for the EU is that the area of foreign policy should be gradually transferred from inter-governmental mechanisms to supra-national mechanism where more democratic tools may be utilized.

IX. THE UNION IN MILLENIUM: KNOCKING ON PEOPLE'S DOOR

In 2000s, the legitimacy question of the EU has entered into a new phase. First of all, the authorities' awareness of the European people and of their isolation from the Union politics has heightened remarkably. It did not stay only at the level of consciousness but influenced the governmental practice also. A methodical change in governing practice at the EU level may be observed from 2000 till now. Participation, public discussion and civil society have become the 'mottos' of the Union. The importance of public opinion has been emphasized at every occasion by different institutions of the EU. In practical life, attempts to involve European people into the EU policy-making have several examples such as the Charter, the White Paper, debate on the future of the Union and the Convention.

IX.I 'Convention'al Participation

There are many factors playing role for this rationality change at the EU politics. First of all, the modified approach to 'legitimacy' is directly linked to the discussions on 'identity' which has been studied above in details. Actually 'identity' question has become even more difficult by the prospective enlargement to the Eastern Europe and 'a common foreign policy' question by still-undefined role of the Union in a fast-changing, globalised world.⁵¹⁷ The Laeken Declaration is a good example of raising consciousness among the national political leaders about the weak legitimacy of the Union in the eyes of citizens and the challenges in front of it:

'Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near...At the same time, the Union faces twin challenges, one within and the other beyond its borders. Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union's broad aims, but they do not always see a connection between those goals and the Union's everyday action. They want the European institutions to be less unwieldy and rigid and, above all, more efficient and open. Many also feel that the Union should involve itself more with their

⁵¹⁷ The Commission's approach is not quite different from the Member States. While it explains the timing for working program on good governance, it mentions three challenges that Europe is facing, namely the challenge of enlargement, the institutional challenge (including the completion of EMU and CFSP) and democratic challenge ('a mismatch between a general sympathy of citizens towards European ideals and a nagging mistrust of the institutions'). 'Work Programme for White Paper on European Governance', Commission of the European Communities, Brussels, 11 October 2000, SEC (2000), 1547/7 final, p.5

particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States' and regions' elected representatives. This is even perceived by some as a threat to their identity. More importantly, however, they feel that deals are all too often cut out of their sight and they want better democratic scrutiny...At the same time, citizens also feel that the Union is behaving too bureaucratically in numerous other areas. In coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardising Member States' individuality. National and regional differences frequently stem from history or tradition. They can be enriching. In other words, what citizens understand by "good governance" is opening up fresh opportunities, not imposing further red tape. What they expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life...In short, citizens are calling for a clear, open, effective, democratically controlled Community approach, developing a Europe which points the way ahead for the world. An approach that provides concrete results in terms of more jobs, better quality of life, less crime, decent education and better health care. There can be no doubt that this will require Europe to undergo renewal and reform.⁵¹⁸

One of the most remarkable attempts to fill the legitimacy gap between the Union and the citizens was the EU Charter of Fundamental Rights. At the Cologne European Council of June 1999, it was decided to establish such a charter. In the modern political thought, the human rights are the most important guarantee for the legitimacy of a political authority. Therefore, the EU Charter may be viewed a radical step in empowering the legitimacy of the EU. However, not only the idea but also how it is realized was an example of 'legitimizing-itself' efforts of the Union. An ad hoc body (called Convention) composed of representatives from supranational and national institutions was established. The drafting process itself was 'extraordinarily open and participative, with almost instantaneous access to papers on the internet and open meetings at which civil society could press its views'⁵¹⁹

In February 2000, the Commission presented the reform of European Governance as one of its four strategic objectives for its entire term of office. The process at that time foresaw a lengthy period of open and accessible public debate, leading to publication of a White Paper by mid-2001. According to the Commission, the

⁵¹⁸ Laeken Declaration, 2001

⁵¹⁹ Christopher McCrudden, 'The Future of the EU Charter of Fundamental Rights', The Jean Monnet Working Papers, No10/01, 2001, <http://www.jeanmonnetprogram.org/papers/01/013001.rtf> (27.08.2007), p. 10

paper would ‘highlight the contemporary and unique character of the democratic project to which the European Union has been committed since its origin’ since it was ‘clear that the reform of European modes of governance is all about improving democracy in Europe.’ The purpose of reform was to increase legitimacy of the decision-making procedures.⁵²⁰ Entailed presentation of the White Paper to the European Parliament in July 2001 has never occurred since by this time, the debate had been linked to, and somewhat overshadowed by, a wider debate on the ‘Future of Europe’, initiated by the Nice Summit.⁵²¹

The Nice Treaty has left many expectations concerning the structural and democratic reform unfulfilled. However, the Member States agreed to meet again. During the Nice European Council meeting in December 2000, the heads of government approved a Declaration on the Future of the European Union. The agreement was to launch “a wider and deeper about the future development of the European Union”, which would end with a new intergovernmental conference (ICG) on treaty revisions in 2004. Until then, wide-ranging discussions would be encouraged with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc. The Conference recognizes the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.(Art. 6 of the Nice Declaration)⁵²²

On 7 June, 2001, between the Nice Declaration and the Laeken Declaration and just before White Paper on Good Governance being published, Irish ‘No’ to the Nice Treaty by referendum came about as if an evidence of omen.⁵²³ The pressure on the European political actors and officials were increasing. In such an atmosphere, the European Council, meeting in Laeken, adopted a Declaration on the Future of the

⁵²⁰ ‘Work Programme for White Paper on European Governance’, Commission of the European Communities, Brussels, 11 October 2000, SEC (2000), 1547/7 final, pp.3-4

⁵²¹ Justin Greenwood, ‘EU public Affairs and the White Paper on Governance’, *Journal of Public Affairs*, Vol.1, No.4& Vol.2, No:1, 2002, pp.425-426

⁵²² De Witte, Bruno; ‘The Nice Declaration: Time for a Constitutional Treaty of the European Union?’, *The International Spectator*, Vol. XXXVI, No.1, January-March 2001

⁵²³ The Irish people rejected Nice Treaty by 53.87% to 46.13%. The level of turn-out was low as 34.79%. The argued reasons behind the failure of first referendum are lack of a strong political campaign on the issue, the belief of Irish voters that the Treaty marginalised smaller states and threatened Irish neutrality. In large measure, the Nice Treaty was lost because pro-treaty supporters simply never bothered to vote, while the ‘Vote No’ campaigns were effective in raising serious questions as to the value of the Treaty. On October 19 2002, the Treaty has been accepted by 62.89% in the second referendum in Ireland and turn-out has been raised to 49.47%.

European Union, or Laeken Declaration, committing the Union to becoming more democratic, transparent and effective. It convened a Convention bringing together the main stakeholders to examine the fundamental questions raised by the future development of the Union so as to prepare in as broad and transparent a way as possible for the 2004 IGC. Convention would examine four key questions on the future of the Union: the division of powers, the simplification of the treaties, the role of the national parliaments and the status of the Charter of Fundamental Rights. Three phases were envisaged: a listening phase, a deliberating phase and a drafting phase. At the end of the last phase, a single constitutional text would be proposed. This document would serve as the starting point for the IGC negotiations conducted by the Heads of State and Government, ultimately responsible for any decision on amendments to the treaties.

The beginning of 2000s has witnessed a - assumingly- debating Europe. The debate on the future of the Union continued until mid-2003, via discussions and the Internet, so as to gather together as many opinions as possible on the key issues relating to the future of Europe. The exchanges which took place in the context of this debate were conducted in parallel with the work of the preparatory Convention for the IGC 2004. The Convention is an innovation in the history of the European Union as previous IGCs had never been preceded by a phase of debate open to all stakeholders. At the end, Convention concluded its work on 10 July 2003 and presented a proposal for a European Constitution.

IX.II Bureaucracy as promoter of democracy?

White Paper on European Governance published in July 2001 was encountered with strong criticisms by many scholars. In the White Paper, the Commission defines the problem of legitimacy as follows: 'Today, political leaders throughout Europe are facing a real paradox. On the one hand, Europeans want them to find solutions to the major problems confronting our societies. On the other hand, people increasingly distrust institutions and politics or are simply not interested in them... Many people are losing confidence in a poorly understood and complex system to deliver the policies that they want. The Union is often seen as remote and at the same time too intrusive.' And the solution, according to Commission, lies at another top-down initiative: 'Democratic institutions and the representatives of the people, at both national and European levels,

can and must try to connect Europe with its citizens. This is the starting condition for more effective and relevant policies.’⁵²⁴ The White Paper’s announced focus is ‘the way in which the Union uses powers given by its citizens.’ The Commission proposes to modify the Community method by following a less top-down approach and by complementing it with non-legislative instruments.

It seems that the Commission observes the loss of belief in legitimacy of the EU and gives the task to recover the legitimacy gap on the national and supranational institutions. In this sense, the Commission focuses on a political question as the non-political actor of the EU. From Weberian perspective, it seems quite odd that an administrative authority intends to promote democracy in a polity. However, the intention in the White Paper seems to be only a means to another aim. Following sentences in the Paper indicates that the main problem is that the objectives and general interest of the Union, as if this is something apart from the people who composes it, is damaged by the legitimacy gap. The gap persists in spite of great success of the project. ‘Yet despite its achievements, many Europeans feel alienated from the Union’s work. This feeling is not confined to the European Institutions. It affects politics and political institutions around the globe. But for the Union, it reflects particular tensions and uncertainty about what the Union is and what it aspires to become, about its geographical boundaries, its political objectives and the way these powers are shared with the Member States.’⁵²⁵

Although it is generally accepted that the gulf between people and Union results from elitism and top-to-bottom approach in management of the Union project, the Commission continues to follow the same approach. The reasons for the ‘alienation’ of people from European politics which are laid down in the White Paper put the blame on the people and the Member States. ‘Where the Union does act effectively, it rarely gets proper credit for its actions. People do not see that improvements in their rights and quality of life actually come from European rather than national decisions.’⁵²⁶ Additionally they do not know the difference between the Institutions and do not understand who takes the decisions that affect them and do not feel the Institutions act

⁵²⁴ ‘European Governance: a White Paper’, Commission of the European Communities, Brussels, 25.7.2001, COM(2001) 428, p. 3

⁵²⁵ *ibid.*, p.7

⁵²⁶ *ibid.*

as an effective channel for their views and concerns. Member States do not inform their own citizens about the Union and provide disinformation about the difficult decisions. Lastly and surprisingly, the Commission asks for new Union competences in the areas such as employment and foreign policy. More empowerment to strengthen the legitimacy of an authority seems quite dilemmatic.

The Commission calls the situation ‘disenchantment’. In Weber’s theory, or in the way I understand it, disenchantment does not refer to something negative. It refers to increasing consciousness and awareness together with rationalization of the attitudes towards the concerned subject. In this sense, disenchantment of people with the Union may mean an increasing awareness and critical attitude towards the EU instead of simply believing and supporting it without any deliberation.

The Commission accepts that the Union needs new criteria of legitimacy. It states that the Union will ‘no longer be judged solely by its ability to remove barriers to trade or to complete an internal market; its legitimacy today depends on involvement and participation.’⁵²⁷ Therefore it seems to accept that the imposition of the common policies and decisions should be replaced by a more democratic and participatory method. However, its proposals for change are far away from satisfying the expectations for more democratic governance. Governance is defined as rules, processes and behavior that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence. However, in concrete, what Commission proposes are a well-organized ‘regulatory’ system in Majone’s sense, a structured communication with a disciplined civil society⁵²⁸, a deliberating and debating society without effective channels to be influential actors in politics, and in overall a stronger Commission.⁵²⁹

⁵²⁷ *ibid.*, p.11

⁵²⁸ Erik Oddvar Eriksen, ‘Democratic or Technocratic governance?’, p.5, Hence, there is the problem of domestication of civil society organizations. Civil society is not seen as an arena for voluntary action and for open and free public debate. The democratic division between state and civil society is endangered when voluntary associations (NGOs) are used as merely instruments to implement policies more smoothly.

⁵²⁹ Neil Walker, ‘The White Paper in Constitutional Context’, Jean Monnet Working Paper, No.6/01, p. 32 ‘There is a danger that the pattern in the White Paper of consolidating power in the Commission risks being seen as the product of naked ambition or the jealous preservation of vested interests. Clearly, ...we ought neither to be surprised nor shocked that a key institution of the Union should look favorably on its own role in any redesigned regime of governance.’

The White Paper underlines that democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinize the policy process in its various stages. However, there is no method or structure suggested in the Paper which will provide people with the means to have a 'real say' in the decision-making. As Eriksen emphasizes, 'in such settings, actors are heard and may voice criticism, but there is no chance of equal access and popular control. The citizens lack the instruments of power to force decision-makers to look after their interests. The inhabitants are merely the subjects (or subordinates –Untertanen) of power, not the holders of power themselves – they are not empowered to authorize or instruct their rulers. The ultimate instruments of control do not rest with the people but with the decision-makers.'⁵³⁰ Civil society refers only to organized society and includes the following: trade unions and employers' organisations ("social partners"); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. Without referring to any possibility to increase the accountability of the Commission towards the Parliament or people, the Paper proposes to annihilate the Commitology while increasing the number of agencies.

The White Paper in overall may be read as an attempt to combine technocratic rationality with democracy. Joerges claims that the institutionalization of regulatory policy in the internal market may not be White paper's only theme but an extraordinarily important one. Eriksen criticizes the White Paper by reflecting a technocratic attitude, which may help in rationalizing policy-making and implementation but do not contribute much to close the legitimacy gap. 'The Commission perceives itself at the top of the "administration" of the internal market, as though it were carrying out the will of a European sovereign, as if...it were acting as a mere "transmission belt" in a "unitary polity".'

Yet, what exists in the White Paper is more than this: more communication, more information, more discussion but still limited active participation. Participation stays under the monopoly of already organized groups, while ordinary citizens will not

⁵³⁰ *ibid.*, p.8

be encouraged to become more active. Second problem with the concept of participation is its limitation to non-decision. There is a net division between the actual decision, which is reserved to the elected bodies, and the rest of policy process. Additionally there is no concrete proposal to develop participation in the implementation and evaluation of policies. The solution for legitimacy gap is sought in public discussion. Yet, deliberation without any participatory tools may only increase legitimacy in appearance.

Actually, deliberation for legitimacy but without democracy is a typical case since 2000s for the Union. For example, the preparation of the White Paper was such a process fully open to public both to passively follow and to actively participate in the discussions. However, '[t]he apparent readiness to strive for new perspectives, which was apparent in the whole presentation of the White Paper project and throughout its elaboration, is still clearly visible in these reports. But the text which was finally adopted came as a surprise to those who had followed the working process, and certainly also to those who had undertaken major research efforts.'⁵³¹ Actually, the convention period of the Charter was similar in those terms. As De Búrca asserts, 'this was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level....the secretariat to the convention body, which was drawn mainly from the general secretariat of the Council had one of the less obvious but nonetheless significant influences on the drafting of the Charter'.⁵³² I think, this is not only a practical problem but also a gap in theoretical deliberative democracy models, which I will discuss in the following sections.

IX.III Public for a Constitution: Who will constitute Europe?

The Convention is another example of deliberation-without-democracy. It is an important point that the Convention's final document would only be a starting point for discussions in the IGC in 2004. Regarding to representation and participation, the Convention were designed to be as democratic as possible, without hindering its efficient functioning. According to the principle of transparency, all the debates and the

⁵³¹ Joerges, 'Economic Order – Technical Realization- The Hour of Executive', p.10

⁵³² Gráinne de Búrca, 'The drafting of the European Union Charter of Fundamental Rights', *European Law Review*, Vol.26 , 126, 2001

official documents concerning the Convention are open to public, as contrary to the ultimate Intergovernmental Conference. From the perspective of participatory democracy, it intended to create an open environment of debate, not to avoid from any type of ‘taboos’ and to include the civil society. The reforms needed to improve democratic legitimacy of the Union and the future of Europe would be debated at all levels of civil society and in political and scientific circles. With this aim, a Forum representing the civil society, including the social partners, the business world and non-governmental organisations and academia was set up. The Forum as an area of discussion was open to everyone and serving to interchange regular information and opinion with the Convention.⁵³³ In terms of representative democracy the convention had a core structure that is composed of representatives of the member-states, of the national parliaments and of the EU institutions.

Despite to this structure, it is disputable whether the Convention has been successful at incorporating the civil society into the process or at the democratic representation. Only two days of hearings with ‘civil society’ and the 4-day Youth Convention of 210 young Europeans has been termed as a ‘gallant failure’ and accused to please only the Brussels-based lobbies. The Convention prepared the draft Treaty establishing a Constitution for Europe by working from February 2002 till July 2003. The IGC having started in October 2003 approved the last version of the text after intense negotiations and meetings, only in June 2004 and in October 2004 the draft Treaty has been signed by all Member States⁵³⁴. However, the EU decided on a ‘period of reflection’ after Dutch (1 June, 2005) and French voters (29 May, 2005) rejected the EU constitutional treaty by freezing the ratification period until the mid of 2006.

IX.IV Constitutional Crisis

According to Follesdall, the central tasks of a constitution are to establish and limit political authority. The constitutional Treaty of the EU attempts to reach both of those aims. The draft constitutional treaty by incorporating the Charter of Fundamental Rights and a number of constitutional check and balances (narrow mandate, fiscal limits, super-majoritarian and concurrent voting requirements and inter-institutional

⁵³³ P.Norman, *The Accidental Constitution*, Brussels: EuroComment, 2005, p. 23

⁵³⁴ *ibid.*, pp. 16-50

balance, division of competences), and the principles of subsidiarity and proportionality sets strong limits on the supranational power. Additionally, the text defines the common good with declarations in preamble, values, objectives and policies.⁵³⁵

Both as a set of legal and political instruments limiting power and as a repository of the notions of common good justifying the existence of polity, constitutional process is a necessary condition for legitimate rule. More than this, a constitution ‘contributes to shaping citizens, by regulating the institutions that shape their life plans, interests and expectations’⁵³⁶ It fosters civic virtue among the citizenry, by laying down the ends of the political order more clearly. It facilitates individuals’ acceptance and support for the European political order. Additionally, the process yielding a constitution may contribute to building a political culture.

However, discussion about the process was centered around actually the ‘legitimacy deficit’ of the Union. More specifically, whether it is legitimate to have a constitution in the lack of a European ‘demos’, or whether the constitutional process and the constitution itself may have a certain affect to create a common identity, thereby to strengthen the weak legitimacy of European polity. The lack of European people as a common identity referred to many other negative opinions, for example lack of a commonly shared commitment to the European interest. From the value-rational perspective, it was debatable if there is a common ground of shared values and norms which may provide the normative basis of a constitution, with a European conception of justice. ‘the absence of such a shared conception makes it easier to suspect the participants of engaging in unconstrained pursuit of own interests- and thereby undermining the legitimacy of the whole endeavor.’⁵³⁷

On the other hand, there is a group of scholars who emphasizes the legitimating effect of a constitution. Neil Walker underlines that constitutions may have a generic outcome associated with polity legitimation, i.e. the very acceptance of the entity in

⁵³⁵ Carlos Closa, ‘Constitution and Democracy in the Treaty Establishing a Constitution for Europe’, *European Public Law*, Vol.11, Issue 1, 2005, pp.149-153

⁵³⁶ Andreas Follesdal, ‘Drafting a European Constitution-Challenges and Opportunities’, *Constitutionalism Web-papers*, ConWEB, No.4/2002, <http://les1.man.ac.uk/conweb/> (22.08.2007), pp. 2-3

⁵³⁷ *ibid.*, p.13

question as a legitimate political community.⁵³⁸ First of all, constitutions have symbolic functions: it is a condensing symbol which enables individuals and groups within a political community both to make sense and to articulate a sense of their common past, to form and pronounce judgments about their common present, and to plan and project various imagined common features.’ In addition to its ideational implications, the symbolic constitutionalism is ideological as well. ‘Constitutionalism is both a means to make sense –individually and socially – of the relationship between politics and society, and a means of conveying or communicating that sense more or less persuasively to others...the constitution conceived holistically can provide a socially legitimate vision of the kind of political society it seeks to construct.’⁵³⁹ Thus constitutionalism has a potential to create the society for the political structure it constructs. Bogdandy examines the draft text of the Constitutional Treaty in terms of creating suitable starting points for citizens’ identification processes. The text refers to the World Wars as common past and to prevent even the possibility that something similar could reoccur as a common aim. The expressions such as ‘community of destiny’, a ‘special area of human hope’ and a ‘community of values’ are the usages which may be underlined.⁵⁴⁰ Bogdandy also emphasizes the significance of democratic reforms in the draft Treaty for creation of a common identity: ‘If the external aspect of European identity politics requires a European foreign policy, the internal aspect demands institutions which allow political participation at the Union level, thereby stimulating processes of identification of the participating citizens.’⁵⁴¹

The power of constitutional process also lies in the social process it stimulates. It encourages the civil society to mobilise in terms of interests and aspirations which transcended national boundaries. It generates an intensive public debate which may in turn contribute to the development of a European public sphere. Finally, the debate over common values in the Convention, which would mean a debate on a common public

⁵³⁸ Neil Walker, ‘Europe’s Constitutional Momentum and the Search for Polity Legitimacy’, in Weiler and Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-01.html>] (25.08.2007).

⁵³⁹ *ibid.*, pp.19-21

⁵⁴⁰ Armin von Bogdandy, ‘The European Constitution and European Identity: Potentials and Dangers of the IGC’s Treaty Establishing a Constitution for Europe’, in Weiler and Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-07.html>]. (27.08.2007)

⁵⁴¹ *ibid.*, p.14

culture may help in the creation of that very sense of a common public culture.⁵⁴² In this context, the symbolic value of the constitutional process is not limited to short-term influences but it becomes a historical reference point for the discussions in the future about the meaning and significance of the European polity.

However, the resulting constitutional text has been criticized in many respects. First of all, its labeling as a Treaty establishing a Constitution has been found dangerous. Neil Walker states: that 'the projection takes place in a constitutional frame at all is not innocent of social meaning. The invocation of a constitutional frame already conveys the message that the EU is the kind of entity which is suitable for constitutional treatment. And since, in historical terms, the paradigm case of the kind of entity suitable for constitutional treatment is the state, such an invocation may relay the controversial message that the EU has or aspires to state-like qualities, or at least that it is a political community of standing equivalent to or comparable to that of a state.'⁵⁴³ Weiner shares the same view. Both citizenship rights and the constitution are, in the end, more of symbolic than procedural value. But the constitution is presented to the public as practical (tidying up) or substantial (more democratic and legitimate) improvements. However symbolic politics borrowed from modern nation-state experience are likely to trigger conflict, as the experience and expectations of symbolic meaning do not converge among different communities.⁵⁴⁴

In terms of providing democratic participation channels and tools, innovation brought by the draft Treaty is very limited: By underlining stating what already exists, very few are added. Another problem is the incorporation of the *acquis* to the text only after a simplification effort made by the experts. Retaining the former policy articles in a constitutional text leads two negative consequences; its large programmatic dimension on specific policy areas with a strong constitutional rigidity limits the options for democratic politics and, secondly, it limits the constitutional values and objectives to negative legal rights and legal customers.⁵⁴⁵ In addition to that, the fact that social

⁵⁴² Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy', pp.43-44

⁵⁴³ *ibid.*, p.22

⁵⁴⁴ Antje Wiener, *Evolving Norms of Constitutionalism in Europe: From 'Treaty Language' to 'Constitution'*, in Weiler and Eysgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-06.html>], (13.08.2007), pp.5-6

⁵⁴⁵ Carlos Closa, "Constitution and Democracy in The Treaty Establishing a Constitution for Europe", *European Public Law*, Vol. 11, Issue: 1, 2005; Massimo La Torre states: 'the subject projected under the rights described in the

questions regarding the positive integration are excluded from both the Convention and the draft Treaty prevents the discussions of alternative visions of the common good such as distributive justice between its citizens under the constitutional framework.⁵⁴⁶ Thus, the identity-forming influence of the draft Treaty is questionable.

For the stability and legitimacy, any constitutional text prepared for the EU needs a broad-based social consensus on the common objectives and values of the EU. Such a consensus is only possible with active participation of the European citizens in the political debate with a sufficient informational background. Any environment of deliberation aiming a compromise among the representatives of the Member-States and of particular groups and institutions on the conflicting interests carries the potential to fail. The text which has occurred at the end may be seen a patchy work of unsuccessful balance created between the Eurosceptic approach – by which the Constitution is perceived as a tool to stop ever-progressing supra-nationalism – and pro-European approach –by which the Constitution is perceived as another step towards federalism. The process has been even named by some authors as ‘hegemonic preservation’ of the Member States before enlargement into 25 in order to protect their vested interests in the established objectives, values and functioning of the Union.⁵⁴⁷ Yet, in over all, it is a widely-accepted view that the constitutionalism has been more a consolidation of various interests concerning the Union, than reaching a consensus on the *raison d’etre*, common good, and shared values of a new polity.

Fossum& Trezn asks: ‘Why was the Constitutional Treaty rejected? In some quarters, it was taken for granted that people should approve of a constitutional text whose presumed effect would be to expand their rights and enable them to participate more effectively in the decision-making processes at supra-national level. These participants and analysts were perplexed when they found that large portions of the peoples of Europe - maybe even the majority - did not take up the offer or simply did not care.’ In order to answer this question I offer to focus on a general theory of

Charter is still an economic actor, and fundamentally an entrepreneur, the capitalist. The civil rights established in the charter find no counterpart in any intense political rights’. ‘Europe’s Constitution in Times of Empire’, *European Public Law*, Vol.11, Issue 1, 2005, p.52

⁵⁴⁶ Maduro, *op.cit.*, p.45

⁵⁴⁷ Ran Hirschl, Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution, in Weiler and Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-05.html>] (11.07.2007)

legitimacy for the Union, instead of focusing on the particular process of constitution-making in the Union since, in my opinion, failure of the draft Treaty is only a symptom of a bigger illness.⁵⁴⁸

IX.V A Weberian Look at the Legitimacy Crises of the Union

In this last section of my thesis, I would like to make a general comment about the legitimacy question of the European Union, including the possible reasons of failure of the draft Constitutional Treaty. The main claim of this section is that the legitimacy deficit that the Union has to face is not a phenomenon specific to this *sui generis* supranational polity. This problem should be located into its historical and global/local context in order to understand it better. First of all, it is not only the Union but also the nation-states are in a crisis of legitimacy and democracy. Paradoxically, the EU as an element of globalization is one of the factors which aggravate the democratic crises of the member states. On the other hand, it is the Union where these crises make themselves much more evident comparing to the nation-states for a number of reasons. Comparing to the nation-states, the Union is a polity in radical transformation from an economic integration to a political union; neither its objective nor its *raison d'être* is settled down clearly. Additionally, there is no social or political consensus, yet, on its general objectives, values and even on its form and reasons of existence. What is even more problematic for the Union is the question of what kind of democratic procedure is acceptable, legitimate and feasible for reaching a consensus on those undetermined polity elements. In any terms, whatever long-term objectives or common policies which Union will adopt, it needs the support of people for their applicability. Union's democratic deficit is directly linked to the question of legitimacy in two respects. Union is unable to make use of representative/majoritarian democratic model which is the main source of legitimacy for the nation-states. Interlinked to that, the Union is lacking the common identity which traditionally legitimates the states and, additionally, enables them to rely on majoritarian procedures.

⁵⁴⁸ John Erik Fossum and Hans-Jörg Trenz, 'When the people come in: constitution-making and the belated politicisation of the European Union', p.30

However, as mentioned in the beginning, the Union is not the only polity in crises. But it is the only one with this scale and this form. Its scale and form which contain a diversity of cultures and a plurality of political methods and layers just deepen its legitimacy and democracy deficit. My interpretation at large agrees to Dahl's third transformation thesis. Democracy as a form has been transformed throughout the history with changing conditions of social life. Now, we witness its third transformation. From another perspective, what we suffer is furtherance, and pains, of modernity crises. It may be surprising to evaluate the EU in terms of modernity since it is frequently conceived as a sign of postmodernity – all network theories, plurality of authority and centers, the element of non-hierarchy, a stroke against the nation-state, main tower of the modernity. Nevertheless, an analysis of ordinary people and authority relations indicates that problems of the individual with the socio-political systems in which she is situated have not changed much, except being augmented.

In order to establish this argument firmly, let us start with Dahl's third transformation thesis. He asks 'are we now in the midst of another dramatic increase in the scale of decision-making?'⁵⁴⁹ He highlights that decisions which significantly affect the fundamental interests of the citizens of a country are taken more and more outside the country's boundaries. National economy, environment and security are increasingly dependent on actors and actions not directly subject to the national governments. Dahl states that the proliferation of transnational activities and decisions reduced the capacity of the citizens of a country to exercise control over matters vitally important to them by means of their national government. According to Dahl, the link between delegates and the demos in the transnational political associations will remain weak and democracy in such associations will be even more attenuated than in existing polyarchies. In short, 'the danger is that the third transformation will lead to an extension of the democratic idea beyond the nation-state but to the victory in that domain of de facto guardianship.'⁵⁵⁰

Here, important point for our argument for us is the delegation of decision-making powers to the technocratic guardians for the issues which has to be efficiently and rationally solved on a large scale. The result of such a loss of control by people is

⁵⁴⁹ Robert A. Dahl, *Democracy and Its Critics*, New Haven: Yale University Press, 1989, p.318

⁵⁵⁰ *ibid.*, pp. 319-320

not only negative in terms of democracy but also for political life and for individuals. Dahl points up danger of 'alienation'. These observations for third transformation of democracies directly reminds us Weberian warnings about instrumental, scientific and technocratic rationality and its disenchanting but also disappointing and alienating affects on individuals' life. What makes Weberian theory apt to apply to our age is his special emphasis on the rationality. Nation-state, bureaucracy and capitalism are only some forms of history that rationality puts its stamp on. Therefore *'the shell of bondage which men will perhaps be forced to inhabit someday, as powerless as the fellahs of ancient Egypt'* seems to have arrived at our age by technocratic guardianship. Because the warning of Weber for modern individuals goes on like this: *this might happen if a technically superior administration were to be the ultimate and sole value in the ordering of their affairs and that means: a rational bureaucratic administration with the corresponding welfare benefits.* (ES, pp.1156, 1402) Here the threat is that the means might turn into the ends and the instrumental rationality might become the final end for the modern societies. There it arrives loss of meaning in individual lives and loss of freedom in politics. Domination of rationality together with a scale-change of polity repeats itself once more almost 80 year after Weber, by just proving and exceeding his foresights.

However, Dahl's explanations for third transformation do not cease at this point. He further delineates the problem of 'knowledge' and 'specialization' since 'the long-run prospects for democracy are more seriously endangered by inequalities in resources, strategic positions, and bargaining strength that are derived not from wealth or economic position but from special knowledge.'⁵⁵¹ Public policy specialists, as Dahl calls them, constitute another danger to the democracies since the increasing complexity of public policies prevents the effective control over these policy elites by the demos. Moreover, the management of this growing complexity in policies led in turn to greater complexity in the policy making process. This was already a characteristic of the second-transformation observed in democratic nation-states. As we may know from Weber's emphasis on specialization in decision-making and on its isolative affect not only on ordinary people but also on politicians. What happens now is that not only the means but also the ends are out of control.

⁵⁵¹ Dahl, *Democracy and Its Critics*, p.333

From the explanations above, it may be clear now why I insist on interpreting the Union's political crises in the context of modernity and more, by a Weberian perspective. The last point which should be clarified is the concept of 'nation-state'. It may be argued that nation-state has transformed so much since Weber's time that it is not reasonable to use his theoretical tools to analyse the current situation. Second argument could be that using his sociological writings at the golden age of nation-state for a non-state polity even makes my arguments more unconvincing if not absurd. My main answer to those critics is that although the nation-state has transformed under globalizing influences, the relations between the people and the authorities which have been shaped by modern conditions of life, by modern practical and theoretical rationality, still may be understood by making use of the modern dilemmas that Weber shows us in depths in his writings. Secondly, the transformation of authority-subject relations within the context of the nation-state may be traced more easily if we know the original defects of this relation. Thirdly, neither the democracy nor legitimacy question of the European Union is independent from the Member States which it is composed of. Fourthly, as I underlined before, I advocate that the crises of the Union should be located into its external and historical context, in this sense neither theoretically nor practically it is independent from the context of modernity. Despite to all *postmodern* elements surrounding us and being found within the Union, we are at an age that *postmodern* and *modern* coexist together. Fifthly, Weber is both one of the most important theorist and *critique* of modernity, a factor which places him in between modernity and *post modernity*.

Weiler also reminds us that at the beginning of century the turn into fascism in Italy, France and Germany were reactions to some of the manifestations of modernism. I will quote him in length since he also approaches the legitimacy deficit of the Union in a broader context:

'At a pragmatic level the principal manifestations of modernism were the increased bureaucratization of life, public and private; the depersonalization of the market (through, e.g., mass consumerism and brand names), and the commodification of values; the "abstractism" of social life, especially through the competitive structures of mobility; and the rapid urbanization and the centralization of power. At an epistemological level modernism was premised on, and experienced in, an attempt to group the world into intelligible concepts making up a totality which had to be understood through reason and science- abstract and universal categories. On this reading, fascism was a response to, and an exploitation of, the angst generated by these practical and cognitive challenges.

Early at the end of the century, the European Union can be seen as replicating, in reality or in the subjective perception of individuals and societies, some of these very same features; it has come to symbolize, unjustly perhaps, the epitome of bureaucratization and, likewise, the epitome of centralization. One of the most visible policies, the Common Agricultural Policy, has had historically the purpose of “rationalizing” farm holdings which, in effect, meant urbanization. The single market, with its emphasis on competitiveness and the transnational movement of goods can be perceived as a latter-day thrust at the increased commodification of values (consider how the logic of the Community forces a topic such as abortion to be treated as “service”) and depersonalization of, this time, the national market. The very transnationalism of the Community, which earlier on was celebrated as a reinvention of the Enlightenment idealism is just that: universal, rational, transcendent: wholly modernist.

That the Union has ceased to be a vehicle for its foundational ideals and has thus become a contingent being and experience removed from a normative framework just gives a fashionable “post-modernist” twist to modernist anxiety.’⁵⁵²

If we specifically focus on the Union, legitimacy question of the Union is not independent from the member-states. On the one side of this relation, the supra-national decision-making, as seen in third transformation thesis, damages the democracy and thereby legitimacy of the nation-state governments. On the other hand, the Union legitimacy may be further developed, and thereby the legitimacy in the nation-states, by the nation-states themselves by providing the necessary link between the supranational and national. On the contrary, the use of political methods such as demagoguery including dishonest explanations about the Union policy would damage the legitimacy of politics and authorities both at national and supranational level. This was mostly the case we have last observed before the referenda in France and Denmark for the draft Treaty. In Weberian terms, the politicians should adopt the ethics of responsibility in order to provide the popular support for the Union, instead of playing to the emotional attitudes of the masses.

It is true that there are many other actors other than the officials and representatives of the Union and Member States politicians at the political arena. These actors may be grouped under the generic name of transnational civil society. They constitute the most postmodern element of the Union. However, from another perspective one should not hasten to arrive at the conclusion of a post-national democracy. These actors are partly the policy specialists and delegates to whom Dahl refers as obstacles before a healthy democracy. From Weberian approach they are representatives of capitalist rationality and technocratic rationality. An elitist democracy may not provide the Union with the legitimacy it needs. First of all, democracy is not

⁵⁵² Weiler, ‘do the new clothes have an emperor?’, pp.260-261

only about the interests but also about the values. Of course this does not mean that all trans-national civil associations are interest-groups. There are many NGOs and civil associations which are found to protect some values. Still, the link between them and the public in general is questionable.

Just at this point, the question turns back to two issues that Weber analyzed in detail. First of them is nationality and the other is the formal rationality. One may claim that the civil society within the nation-states is not much different from the trans-national in the sense mentioned above and may ask why we, and people, find it legitimate and more than this as legitimizing factor for the nation-state but not for the Union. The reason is similar to the illegitimacy of majoritarian politics for the Union, but not the same. Lack of common identity at supranational level seems to be an answer to this claim. Lack of common identity creates problems with defining a common good and a set of value-choices for the peoples of Europe. However, behind this reason, I think there is a more important reason that Weberian analysis may show. At the level of nation-states, nationality as a common identity functions as a common reference point for the people of a state. As may be remembered from the first part of this thesis, nationality is almost an 'objective' value for Weber that may formally equalize and unite people under a divine meaning. Nationality provides a source of meaning both for the polity and the individuals. It may be argued that what Weber found in nationalism was a power of enchantment, which is fed from 'created' myths and history. Under this enchanting influence of common identity people could easily find legitimate the domination of an authority or governance of few on behalf of them. At our age, national identity is not only an emotional basis of legitimacy but an example of traditional legitimacy as well. That is why, according to some authors, what the Union lacks is that kind of emotional/habitual legitimizing structure, which would support its weak democracy.

Again if we quote from Weiler: 'There are many social responses to these phenomena. One of them has been a turn, by many, to any force which seems to offer "meaning". Almost paradoxically, but perhaps not, the continued pull of the nation-state, and the success in many societies of extreme forms of nationalism...are, in part of course, due to the fact that the nation and state are such powerful vehicles in responding

to the existential craving for meaning and purpose which modernity and pos-modernity seem to deny.⁵⁵³

In the light of thoughts above, my claim is that the lack of a common identity is one of the most important explanations why the Union's legitimacy crisis is more evident than the nation-state. Modern thought and practice combined with globalization also weakened into great extent the democratic legitimacy of the nation-states (according to Weber, it was already very embryonic). But the traditional legitimacy provided by the nationality still prevents this problem to turn into a big crisis at the nation-state level. It is still observable only in apolitization of the masses, as Weber envisaged. *'An increased tendency toward flight into the irrationalities of apolitical emotionalism in different degrees and forms, is one of the actual consequences of the rationalization of coercion, manifesting itself wherever the exercise of power has developed away from the personalistic orientation of heroes and wherever the entire society in question has developed in the direction of national "state". Such apolitical emotionalism may take the form of a flight into mysticism and an acosmistic ethic of absolute goodness or into the irrationalities of non-religious emotionalism, above all eroticism. (ES 601)*

However, I have a reservation here. Globalization together with its side effect of glocalization in general and the EU in specific already created a certain effect of disenchantment with nationality. This disenchantment has not led to dissolution of the bond among people within the states although the pace of regionalization and localization has increased and sub-national units have been empowered during the process. On the other hand, the Union has been unsuccessful at re-enchanting people with a supranational identity.

Failure of the Union to create a common identity under the concept of EU citizenship may be understood by the conflict between formal rationality and substantive rationality. More correctly, by domination of formal rationality over different life-spheres. As written before, according to Weberian theory:

⁵⁵³ Weiler, 'To be a European citizen: Eros and civilization', in *the Constitution of Europe*, p.331

At the end, the problem occurs more between the formal rationality and substantive rationality than between the different instrumental logics of the systems. It is tension between ‘ultimate value commitments and the requirements of successful economic and political action, requirements that are alien to all questions of ultimate value.’ Demands based on some values may not be satisfied by the formal rationality since values cannot be measured with some objective standards. Values and even their meaning cannot be objectively determined and ranked. Formal rationality can only accomplish what is possible but cannot answer what should be done. Any substantive rationalization effort would result at the end, with another type of substantive irrationality from another value-based point of view. In short, no real ‘justice’ is possible since it is not possible to define it and to know the objective means to reach it. Yet, Weber’s formal rationality is not as formal as he intended either. ‘Formal rationality is a value-neutral concept, but the formal rationality of the modern social and economic order is not neutral with respect to the values and interests of different social groups. Maximum formal rationality favors economically powerful group. According to me, we should also take into account the fact that what defines and shapes the instrumentally rational action at individual level is the formal rationality of the system. Because the ultimate end of the system determine what the success is and only the formal rationality define what the conditions for success are.

Instrumental rationality dominant at the social action and formal rationality dominant at the spheres of politics, economy and law has one important effect on individuals: lack of faith in faith. Or in Weiler words, ‘*a shattering of the ability to believe in anything*’.⁵⁵⁴ Values become more and more spare in the social life, actions and systems are oriented towards the value-ends rarely. ‘Not only are things what they seem to be, but their reality always has a cynical malevolence. Public life and its codes mask power and exploitation; private life with its codes masks domination.’ Post-modernism adds extreme relativism, subjectivism and individualism to this picture. ‘To the angst of modernity is added the end-of-century fragmentation of information, and the disappearance of a coherent worldview, belief in belief and belief in the ability to know, let alone control.’⁵⁵⁵ Concerning the European Union, this is even more radically

⁵⁵⁴ *ibid.*

⁵⁵⁵ *ibid*

evident. The supra-national spheres created through the European Union, as analysed in the previous sections, are founded on instrumental rationality and self-interest. The Union, established according to market principles, attempts to re-arrange some of its spheres according to the substantive rationality unsuccessfully since the Maastricht Treaty– for example ‘the Social Charter’, the ‘values of the Union’, ‘the Charter of the Fundamental Rights’ and ‘the Social rights’. Yet, the question for the Union is: “how is it possible to create a common identity through common values while the value-rational approach is so scarce both among the peoples of the Union and in the systematic rationality of the Union?”

In overall, Weber’s importance for the Union also lies at that he shows us the problems and dilemmas which occur at social and political life when economic liberalism combine with modern democratic approach in the context of positivism and rationalism . Weber puts a light on the understanding of authority and individual at our age. Yet, it does not mean that I follow Weber without questioning or criticising him. On the contrary, the first part of this thesis is both an analytic and a critique of Weberian approach. Although he himself was hypercritical of modernity and enlightenment, he was still a part of it in his way of thinking. Let us look at the question of legitimacy. Weber mainly conceives legitimacy on the basis of authoritarian claims not through the beliefs of people. One main reason of it is that ordinary people- masses- have no chance or role at politics, according to him. It cannot be. It should not be. He is also very pessimist about the future of values and substantive rationality. Politics is mainly a field of interest-conflicts. And only a charismatic leader who would address to the emotions (not minds) of the masses could change this situation. The masses are a real danger for a polity with their irrationality. His conception of politics is an elitist one. First this is his observation about the reality. And secondly there was no other reasonable alternative under the modern conditions and with irrationality of people. This approach is not only defect of Weberian theory but also the defect of the modern political paradigm. That’s why we can understand the gaps in theory and reality through him. Just to give some examples, the top-down elitist approach of the Union until 2000, the proposal for a charismatic leadership for the Union, information gap in the public about the Union, the demagogic experiences with the Member State leaders in presentation of the Union (so-called Brussels).

I will attempt to present my views for strengthening the legitimacy of the European Union in the next and last part of this thesis. Shortly, my suggestion is democratic legitimacy strengthened by a number of participatory methods. This is only possible at the most, possible, local level. Yet, legitimacy cannot be based on only some formal, procedural, structures. That's why the values such as social rights and justice are very important. In more theoretical sense, the proposal is to support people to take the ethics of responsibility, instead of a charismatic leader supported by a group of elites. In terms of rationality, this suggestion refers to a combination of instrumental rationality with value-rationality. A kind of balancing between two types of rationality may be found in Habermasian theory together with a new rationality type, which is 'communicative'. Below, I will just briefly analyze this new theory together with its practical implications on the EU new policies such as communication policy and convention method.

The rest of this section is devoted to a kind of categorization of academic and political approaches to the Union legitimacy deficit according to Weberian classification. It will be a 'test-drive' about the applicability of Weberian thought and warnings on the European Union in a compact way since this chapter has already contained an analysis of the European Union with the help of Weber as re-interpreted by me. The division of bases of legitimacy for the Union is not my innovative idea. Eriksen already used such a category, as mentioned in the beginning of this chapter. If we turn back to this division, Eriksen states:

'Conceptions of the EU, either as a regulatory agency or a constitutional, democratic entity.. These conceptions of the political order of the EU are underpinned by three adhering approaches to discursive legitimation, namely legitimation through outcomes, through cultural values, and through principles. The relevant criteria refer to efficiency, values and rights. .. The two latter criteria, values and rights, explicitly refer to normative justifiability. 'Value' refers to something, which is seen to be valuable, or ethically salient, and which is important to a group's, or community's sense of identity and conception of the good society. 'Right' is a legal entity, which presupposes mutual recognition and respect, that every rights-holder is compelled to offer and essentially entitled to receive from other rights-holders. In a modern democracy, rights ensure

individual protection and participation and foster community-based allegiance and consent through the establishment of public spheres.’

However the categories I use below is more than this in number. I will also try to cover the legitimacy bases from the eyes of individuals.

IX.V.1 Formal/Legal Authority

In the beginning, at least until 80s, the Community took the source of its legitimacy from its Member States even after it has begun to establish itself as a supra-national authority, partly independent from the Member States.⁵⁵⁶ Based on an international Treaty, it was fitting very well to the definition of formal rationality: the subjects may find an order legitimate because of positive enactment which is believed to be legal. *Such legality may be treated as legitimate because ...it is imposed by the authority which is held to be legitimate and therefore meets with compliance* (ES, p.36) The authorities which were held to be legitimate by the citizens (the nation-state governments and the parliaments) were imposing the legality of the Rome Treaty. Therefore the Treaty was also legitimate in the eyes of the citizens, as also claimed by the ‘authorities’. Of course, as any legitimacy basis, it was not pure. This legitimacy was supported by two other elements, the first one was peace (value-rational) and the other one was self-interest (instrumentally rational). Instrumental rationality was the most evident characteristic of the Communities especially due to its market functions and its prosperity promises. While legality could be maintained during the process by the unanimity rule in the Council and by keeping the Parliament at consultative role, instrumentally rational element has been supported by a well-functioning market i.e. efficient problem-solving, economic success and equal distribution of the gains and losses i.e. Pareto-optimal. That’s why it is time to time called outcome legitimacy. However, self-interest cannot be the basis of legitimacy for Weber. It is too fragile to be so. Weber admits that there are orders that are submitted only because of habitual motives or of pure expediency, yet they are less stable than *the order which enjoys the prestige of being considered binding, or ...of legitimacy* (ES, p.31) For the Community, many public opinion surveys indicate that it is a utilitarian support that the Community

⁵⁵⁶ Andreas Follesdal calls this legitimacy as legality, ‘Legitimacy Theories of the European Union’, Arena – Centre for European Studies, Oslo, Working Papers, WP 04/15

enjoyed and therefore it fluctuates easily by contingent events such as economic crisis, unemployment and migration flows.⁵⁵⁷

In the second stage, after 80s, two developments have shaken this delicate balance of legitimacy. It may be summarized as rise of the Community as an independent supra-national authority with regulative functions and with distributive and re-distributive effects. It was the time to question the indirect procedural legitimacy of the Community. The Community was, in other words, was putting itself forth as a 'legal authority' with its autonomous legal order. It was not only a judicial phrase of the ECJ but also a fact of real life with increasing role and powers of the supranational institutions such as the Commission and the Parliament, shifting to the qualified majority rule in the Council, increasing regulations by the Single Market objective, and with the thickening shadow of the Community over the details of the ordinary life. According to Weber, legal/rational authority is not an ordinary system but a system of consciously made rational rules. The person(s) in the power has their position by designation of the rules and their power legitimated by that system of rational norms. (ES, p.954) Thus it is domination by virtue of "legality": the legitimacy claims of the authorities are based on the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). (ES, p.215)

In this sense, the claim of the Community to legitimacy was based on the Treaties. Yet, not in the sense at the beginning. Now, the system was autonomous enough to create the necessary legality circle. The rules of the system were providing the authority necessary to make the rules. From the perspective of the ruled, this is more sensitive than it seems. Weber tells, the subjects comply with the positive enactments not only because they are formally correct but also because they have been made in the accustomed manner. Supranationalism was not an accustomed way to make rules for people. Additionally output legitimacy was also under question. Regulative policies were no more simply technical tools of eliminating obstacle before the single market. They had far-reaching, unpredictable and sometimes unpreventable influences and consequences on the Member States. These consequences were not limited to economic

⁵⁵⁷ Stefania Panebianco, 'European Citizenship and European Identity: From Treaty Provisions to Public Opinion Attitudes' in *Who are the Europeans now?*, Edward Moxon-Browne (Ed.), Hants: Ashgate Pub., 2004, pp.25-26

sphere and there appeared losers and winners among the parties.⁵⁵⁸ In this sense, output legitimacy was under suspect in two ways. First, measurability of outcomes was not as certain as before. Regulated areas have been widened into some grey areas for which it is difficult to determine objective value-free ends with measurable results such as environment and health. In short, it was not any more purely technical rationality placed in a large context of end-means rationality. The values have steal into isolated area of formal rationality. The second problem was confirming a foresight of Weber. Hidden value-choices behind the technocratic curtains created irrationality (anomalies) in the system. The consequences of the Community policies were not as successful and efficient as before for each and all.

Losing ground for legitimacy has been attempted to be re-balanced by democratic legitimacy. The powers of the European Parliament, which is the only institution to have the potential of directly legitimating effect have been increased and some measures which will enhance the accountability and transparency of supranational decision-making have been taken. Nonetheless, the Maastricht Treaty has shown that democratic legitimacy of for the Community is a far-away ideal. Monetary Union established by the Treaty was the highest point of economic integration. The Union was declaring its authority over the whole economic sphere. Monetary Union would function according to technocratic supra-national rules and almost independently from Member States. Monetary authority of the Union was a quite radical step for a Union whose authority has not been legitimately accepted yet by all people. The problem was not only with the formal rules of the system (procedural legitimacy). Additionally the monetary union was decreasing dramatically the powers of the most legitimate actors of the Union (member-states) in one more area. The Treaty was proposing to adopt one currency by annihilating the national currencies. Symbolically and indirectly, nationality and nation-state has been perceived as under threat. Later on, in terms of its consequences, the monetary policy has limited the member-states' economic actions (restricted their ability to pursue an independent monetary policy and requires joint decision making in economic and fiscal policies) and had many negative influences.

⁵⁵⁸ Christopher Lord & David Beetham, 'Legitimizing the EU: Is There a 'Post-parliamentary Basis' for its Legitimation?', *Journal of Common Market Studies*, September 2001, Vol.39, No.3, p. 447-448 'the EU is very much a reallocative polity. Even if it does so by rule-making more than by budgets, the Union effects distribution of values, resources and entitlements between states, regions, generations, the sexes and forms of economic activity.

The outcome success was only understandable if the Union is taken as whole in international area. But the initiative of the states on social welfare and employment policies were curbed. The social charter has been proposed but stayed as an unbinding document. From sociological perspective, the situation contained a tension between two authority levels. On the one hand, it was hoped that a single European currency will promote a common citizenship and identity in the EU as a symbol and as a manifestation of European unity. On the other hand, 'a currency is closely associated with a state's political and legal authority. Moreover it also reflects and is indeed a result of the common economic history and shared values of society.'⁵⁵⁹

This was not all. With the Maastricht Treaty, the Community was stepping into a new area of rationality: politics. This was the area of values as well as interests. The new pillars of the Union were common foreign and security policy and justice and home affairs. Although these pillars were subject to intergovernmental mechanisms, they were the declarations of new intentions and objectives. The answer to the question of politics for whom is Union citizenship and of politics for what is the values listed in the Treaties since the Maastricht. The concept of citizenship, the rights granted to the Union citizenship and increase in the powers of the Parliament was a requirement of being a political union but also to enhance democratic legitimacy of the Union. The ratification process of the Treaty has shown that these measures were not enough to legitimize the Union. In short, the Union has entered into a new sphere: it was the area of values, incommensurable, unpredictable and non-provable. After the Maastricht, discussions about the legitimacy have been intensified.

IX.V.2 Democratic legitimacy

To enhance the democratic legitimacy of the Union, there are many proposals. First group of them is focused on representative democracy. Actually Weber, too, defines the 'democratic legitimacy' by some elements of representative democracy. According to him, the charismatic authority may transform into an authority on the basis of democratic legitimacy. When the majority principle becomes prevailed in the election of the charismatic leader by the group, *it is considered the moral duty of the*

⁵⁵⁹ Nickolas Reinherdt, 'Pecuniary Identity and European Integration', in *Who are the Europeans now?*, Edward Moxon-Browne (ed.), 2004, Hants: Ashgate Pub., pp.115, 129

minority to yield to the right cause proven by the election and to join the majority after the event. Yet charismatic domination begins to yield to a genuine electoral system once succession is determined by the majority principle. (ES , p.1126) Weber reminds us that only in the Occident the election of the ruler gradually develop into a representative system. (ES, pp.1127, 267) A representative system transformed from charismatic domination in general shares some characteristics of the legal domination, especially in its treatment of law. All the laws enacted or appealed by the free will of the group are legitimate, i.e. there is no more a quest for one 'correct' decision. (ES, p.267) Formal rules precede the substantive rules. Similarly, modern parliamentary representation shares with the legal authority the general tendency to impersonality, the obligation to conform to abstract norms, political or ethical. (ES, p.294)

To increase the democratic legitimacy of the Union, one proposal is to make the European Parliament much more powerful in legislative process of the Union and give it more control over the Commission. The other one is to increase the role of national parliaments at the supra-national decision-making and to create close coordination between the national parliaments and the Union parliament. The defects of representative democracy for the Nation – States already listed by Weber re-occurs at the Union level in an aggravated way. Due to the scale of polity, the complexity of the issues, domination of technocratic rationality and conflict of formal rationality of the system with value-rational demands and emotional reactions of the people, democracy transformed in such a way that it becomes really difficult to call it democracy. *As soon as mass administration is involved, the meaning of democracy changes so radically that it no longer makes sense for the sociologist to ascribe to the term the same meaning as in the case discussed so far.* (ES 951)

Mass democracies in the representative form tend to evolve into bureaucratic dominations and the bureaucratic domination over the masses transforms the democracy into a very formal one. This is a problem which has been already discussed for the Union in the previous sections. However the Union had one more important problem with representative democracy: lack of the demos. A feeling of common belonging has been the solution for the failing democracy of the Germany proposed by Weber too. I will analyze this solution below since a common identity has more than one meaning in respect to legitimacy. It may provide traditional/emotional basis of legitimacy or a

value-rational base. In any way, just to strengthen the representative democracy in the Union would not make much sense, if not combined with some other methods.

In some senses, democratic legitimacy is part of formal legitimacy at modern age. The legal system re-validates itself with some democratic procedures. In other words, democracy is formally rational and it is supposed that it provides the necessary structure for the contest of plural values and for vitality of value-rationality. However, Weber urges us that modern legal orders may not permit the substantive rationality to grow and modern political systems are *oriented to average human qualities, to compromises, to craft and to the employment of to other ethically suspect devices and people, and thereby oriented to relativization of all goals.*(ES, p.593) The legitimacy of modern legal systems are not based on value-rational attitudes. On the contrary, the modern law owes its power to its objectivity, abstractness and impersonality. However, *compared with firm beliefs in the positive religiously revealed character of legal norm or in the inviolable sacredness of an age-old tradition, even the most convincing norms arrived at by abstraction seem to be too subtle to serve as the bases of a legal system.* (ES, p.874) The law has no more a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed as the product or the technical means of a compromise between conflicting interests. Yet, the resulting skepticism towards the dignity of positive law unpredictably promoted *the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment.* (ES, p.875) Therefore, the EU law lacks the tools of value-rational legitimacy.

IX.V.3 Traditional and Emotional Basis

One of the proposals to strengthen the legitimacy of the Union is return to inter-governmentalism. From Weberian perspective, it is only a try to establish a traditional/habitual basis for the legitimacy of the Union. Nation-states as already legitimized as conventional actors of decision-making could only provide a habitual obedience to the Union with a kind of traditional legitimacy. First of all, the legitimacy provided will not be based on politically-informed and consciously-consented citizens but on a habitual acceptance of the national governmental decisions as legitimate. Additionally, the national politicians use some democratically suspect methods such as

demagogy, misinformation and political secrecy in order to maintain the popular support to the government. We already have such examples about the Union policies and most remarkable example is the discussions held in the ratification process of the draft Treaty establishing the Constitution for the EU. The supranational policies and decisions will be legitimated by some emotionally manipulated public under the influence of traditional national 'interest' discourse. This is neither suitable to the dignity of 'human reason' which is allegedly most important enlightenment heritage nor to the honorable conception of the EU citizens as active participants of a democratic policy.

On the other hand, the Union with charismatic authority with a leader is another false assumption. It was one of the proposals for the draft Constitutional Treaty to elect the president of the Commission by Union-wide popular voting, not accepted at the end. There was another proposal- though not accepted- to elect one President for the Union as a whole. The draft Treaty entails a president of the Commission, a president of the European Council and an EU minister for foreign affairs, none of them popularly directly elected.⁵⁶⁰ Not one elected leader but three leaders without election. Now, I have to detail and revise this ideal picture of charisma. First of all, for charismatically led masses, it is not really a manifestation of freedom of choice to orient their contacts to some values. Charisma is an authority which is followed irrationally due to the emotional factors and specifically due to the faith in the charismatic person himself. Therefore the conduct of charismatic politician may be value-rational but the conduct of the masses is emotional, at least of most of them, and not a result of a rational free choice. *The plebiscitarian leadership of parties entails the 'soullessness' of the following, their intellectual proletarianization, one might say.* (PAV, p.113)

Another suggestion which contains a parallel humiliation of freedom of choice is a common European identity constructed by politicians and elites by re-writing the history and making up a non-existent tradition. It was also Weber's solution for Germany. While the natural law collapses as the basis of the legitimacy of the state,

⁵⁶⁰ Paul Craig, European Governance: Executive and administrative powers under the new institutional settlement', in Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, [<http://www.jeanmonnetprogram.org/papers/04/040501-12.html>], (24.06.2007)

Weber attempts to sustain the state ‘by an appeal to certain irrational political instincts in the masses towards the nation state.’ Hence the legitimacy deficit of the modern state is compensated by the existence of emotional commitments to the nation, which will be promoted and regulated by the plebiscitary leadership. This ‘imagined’ community finds its basis on the ‘myths’ and stories and create a kind of emotional bond between the members of the bordered group with a faith in common origins. It may be called *ethno-cultural* identity⁵⁶¹. By creating its own ‘others’, such type of identity has a dangerous power as the European history experienced through the World Wars. Additionally, the legitimacy basis of the Union will not be the rational individuals with a heightened critical awareness of the meaning of their common polity but indoctrinated masses⁵⁶² with a potential of euro-centrism, xenophobia and racism. This is not a suggestible solution for the Europe when the current global polarization on the line of religions and its multi-cultural and multi-religious population taken into account.

IX.V.4 Value -Rational Legitimacy

There are of course other ways to establish a common identity. On value-rationality basis, both an identity may be formed and the legitimacy may be empowered. However, the crisis of meaning in the life of individuals combines with the loss of *raison d’être* by the Union. Weiler urges that the Union suffers from a crisis of ideals. For Weiler, ‘ideals are a principal vehicle through which individuals and groups interpret reality, give meaning to their life, and define their identity – positively and negatively...The questions of what kind of society do I live in, and what does our society “stand for”, can only be given an answer by reference, at least partially, to ideals...If we are, then, interested in the European persona, in a European polity, we will profit by understanding the world of ideals which is part of the polity....Can there be an appreciation of the political culture of a polity without reference to its values and

⁵⁶¹ Christopher Lord, ‘Democracy in the European Union’, p. 115

⁵⁶² The Commission’s proposal for the IGC before the Maastricht Treaty was as follows: it reinforces and renders more tangible the individual’s sentiment of belonging to the Union; and, secondly, that citizenship confers on the individual citizenship rights which tie him to the Union. In that way, ‘the Commission describes the relationship between Union and citizens using the terminology of ownership, that it is the citizen which belongs to the Union.’ Weiler, ‘Eros and civilization’, p.333

ideals? In the tension between Eros and civilization, our discourse of civilization is in substantial part a discourse of values and ideals.’⁵⁶³

Until now, there are many values that the Union laid down officially and legally. The draft Constitutional Treaty singles out the central values of the Union. According to Art.2, these values are “respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination (Art.3.). Among main objectives of the Union, there are the promotion of peace, its values and the well-being of its peoples. It shall also “promote social justice and protection”, “economic, social and territorial cohesion, and solidarity among Member States”, respecting Europe’s “rich cultural and linguistic diversity”.

To suggest a value-rational-base to the Union, both to strengthen its legitimacy in the eyes of citizens and to provide the potential common identity with value-sources, seems much more acceptable in democratic terms. Value-rational attitude, contrary to the traditional and emotional actions, is based on freedom of choice, it is conscious and rational. Concerning value-rational actions, they are *clearly self-conscious formulation of the ultimate values governing the action*. (ES, p.25). However there are many problems accompanying the value-rationality. The main problem is that the value choices that are available to us are rationally irreconcilable, meaning that certain kinds of value disputes are not open to rational resolution. Values chosen as the core of substantive rationality of the Union may intensify the value-conflicts and cleavages in a multi-plural society instead of supporting the social unification. Follesdal states that an important challenge to the value-discussion is the pluralism of values, institutions and political cultures in Europe. As Rawls maintains, there are multiple conceptions of value and views about the good life among the citizenry. Acceptance of such pluralism within limits seems highly appropriate for a theory of normative legitimacy for Europe. According to Scharpf, Member States have diverse institutions providing different solutions to somewhat similar problems, shaping individuals expectations and life plans in ways that cause conflict when seeking European wide consolidation.

⁵⁶³ Weiler, ‘Do the new clothes have an emperor?’, pp.243-244

Secondly, an orientation towards substantive rationality may conflict with the established formal rationality of the Union spheres. Substantive rationality of a system belongs to the sphere of values and of ethics. Substantive rationality is subjective and its 'correctness' or 'rightness' may not be measured by an objective tool such as success or efficiency. It is itself a subjective tool to evaluate the orders. It finds its meaning in the beliefs of individuals. Therefore it maintains a close connection with value rationality at the level of individuals. Weber was deeply pessimistic about overcoming the instrumental rationality with value-rationality. It creates a tension between 'ultimate value commitments and the requirements of successful economic and political action, requirements that are alien to all questions of ultimate value.'

To emphasize the common values to establish a common identity is reinforced by a European citizenship, which will be the formal/legal context of the identity. The Maastricht Treaty in 1992 included a chapter on 'Citizenship of the Union', adding political rights to economic and social rights. The citizenship of the Union does not replace the national citizenship or compete with it but the nationality of a member state is a condition for European citizenship. The European citizenship entitles the holder to some rights such as the right to move and reside freely within the territory of the member states, the right to vote and to stand as a candidate at municipal and the EP elections, the right to petition to the European Parliament and the right to access to the Ombudsman.⁵⁶⁴ However the citizens are not aware of their rights. Only four out of ten Europeans do know that they are allowed to vote in local elections in another EU country. But generally percentages (80 %) are higher for the rights to move to, study or work at another member state. Certainly utilitarian interests play a major role than political concerns. Additionally, in the surveys conducted between 1994-1997 on European identity, there is a constant increase in the feeling of having only a national identity and reached to 45% in 1997.⁵⁶⁵ In over all, 'the establishment of the European citizenship apparently has not stimulated a stronger European identity. Contemporary surveys show that EU citizens continue to identify first of all with their own country. According to a Eurobarometer survey at the end of 2004 only 47 % of EU citizens saw themselves as citizens of both their country and Europe, 41 % as citizens of

⁵⁶⁴ Stefania Panebianco, *op. cit.*, pp.19-20

⁵⁶⁵ *ibid.*, p. 28

their country only. 86 % of the interviewees felt pride in their country, while 68 % were proud of being European. In general, people feel more attached to their country (92 %), region (88 %), city (87 %) than to Europe (67 %). Low voter turnout at the European Parliament elections in 2004 (54 %) seems to be an indicator hereof.⁵⁶⁶

It seems that neither some principles such as the rule of law, freedom, democracy or equality nor a Union citizenship accompanied by civic and political rights has accomplished much in terms of creating a common identity and of legitimizing the supranational authority. Weiler criticizes the citizenship chapter of the TEU by bestowing very few rights, most of which are not new. He states: ‘even if we take the entire gamut of rights (duties are usually forgotten in most accounts of European citizenship) granted under the treaties to European citizens, we would be struck by the poverty of provisions normally considered as political and associated with citizenship.’⁵⁶⁷

The main question may be that whether the values listed in the Treaties and the rights themselves do really belong to substantive rationality or are they ‘formal values’ in Weberian sense? Weiler urges us about the commodification of even human rights. They ‘represent just another goodie with which to placate a disaffected consumer of European citizen.’ European citizenship is perceived as a medicine to alienation and disaffection towards the European construct by individuals. In this context, the human rights become like medical products: ‘more rights, better rights, all in the hope of bringing the citizen “closer to the Union”, as if it is a need to be satisfied but not a cultural undertaking. In a commodified political process consumer replaces the citizen.’⁵⁶⁸ Another critique to the Charter of fundamental rights is that it contains mostly economic rights.

If we follow Weber, modern legal orders may have some principles such as equality, freedom and human rights. Weber takes these principles as formal characteristic of modern legal orders, rather than substantive values. These principles originally belong to formal natural law and provide the basis of capitalist economic

⁵⁶⁶ ‘European values and identity’, <http://www.euractiv.com/en/future-eu/european-values-identity/article-154441>, Published: Wednesday 19 April 2006 | Updated: Monday 2 April 2007

⁵⁶⁷ Weiler, ‘Eros and civilization’, p. 326

⁵⁶⁸ *ibid.*, pp. 334-335

order. Under the dominant formal rationality of the modern orders, interpretation of these formal principles substantively only create formal irrationalities in the system. Weber's legal positivism does not conceive law as a system of normative guidelines based on substantive values. Weber does not consider the moral foundation of liberal democratic freedoms or the recognition of the dignity of basic rights as an independent basis for political legitimacy. Morality and politics are separated by modern conditions. Weber insists that the indirect consequence of the Rights of Man- especially the ideals of "formal legal equality"- was to facilitate the procedural rationality, the source of legitimation of positive law, which dominates modern life. As a result, confidence in the function of the formal rationalization of the legal system has become more important for its legitimacy than the moral grounding of the consensual order intended by the rights and freedoms in the name of which it had been established. Individualism of enlightenment was a product of an optimistic belief in the natural harmony of interests between free individuals which is today for ever destroyed by capitalism. Additionally for Weber, human rights were examples of extreme intellectualist fanaticism.

Habermas attempts to overcome this pessimism by separating the moral norms and principles from the values. Habermas argues that 'the sphere of law, which is independent of the sphere of morality but at the same time demands the readiness of legal subjects to obey the law, must be complemented by a morality grounded on principles...The catalog of basic rights contained in bourgeois constitutions, insofar as they are formally set down, together with the principle of sovereignty of the people, which ties the competence to make law to the understanding of democratic will formation, are expressions of this justification that has become structurally necessary.' He insists that this is what Weber purposely neglects and excludes from the concept of modern law precisely the conceptions of modern justification that arose with modern theories of natural law.⁵⁶⁹

I have discussed this view of Habermas before. Just to remind this discussion shortly, I doubt such an interpretation of Weber may be justified in the light of his comments on the disintegration of natural law. Weber does not neglect that the natural law has provided the legitimacy bases of positive law, yet he underlines that its

⁵⁶⁹ Habermas, *op. cit.*, p.260-262

legitimizing effect get weakened and even vanished in front of the ever-expanding instrumental rationality. In short, it is no more convincing enough under modern political and legal conditions. As Hennis also claims, it is not negligence or a gap in Weber's theory not to contain or to be based upon liberal values. Weber did lack a belief in a particular dignity of liberal constitutional institutions and values in themselves, including human rights. The whole structure of Weberian sociology rests upon the most radical renunciation of the basic liberal idea that the rule of man by man had been displaced by the public opinion or by the rule of law. Domination, for Weber is the 'central phenomenon of all social organization.'

In similar way, JJR Thomas holds that Weber's claim was that value-rationality is more likely to give rise to legal domination. Weber admits the Enlightenment idea that natural law could be erected as the ground for legitimate enactment and legislation and that the origin of radical democratic ideas is partly in the conjoining of a notion of Reason to concepts of Rights and Nature. However it was precisely the postulates of Natural law which created the basis for formal rationality in the political and economic spheres. On the other hand, Thomas urges us that Weber was at pains to distance himself from the Enlightenment's hypostatization of human rationality. The thrust of Weber's work was to dissolve the metaphysical eighteenth century conception into its component applications.

While Eriksen⁵⁷⁰ separates the value-based community from the norm (or right) based community uses that Habermasian distinction between moral norms and values. 'Value' refers to something, which is seen to be valuable, or ethically salient, and which is important to a group's, or community's sense of identity and conception of the good society. In these terms, values are group-specific. 'Right' is a legal entity, which presupposes mutual recognition and respect, that every rights-holder is compelled to offer and essentially entitled to receive from other rights-holders. In a modern democracy, rights ensure individual protection and participation and foster community-based allegiance and consent through the establishment of public spheres. In these terms, the rights offer the necessary and just framework in which the value and interest conflicts may be conciliated. He states that this theoretical scheme builds on 'a

⁵⁷⁰ Eriksen, Fossum and Sjørusen, *op. cit.*, p.5

conceptual distinction between values and moral norms, where the latter refer to higher-order principles and which claim universal validity. Values are understood as collective representations of the good that vary according to cultural and social context, and which are therefore relative and particular. To establish what is good for us, is logically different from establishing what is just or fair all interests and values considered. The question of fairness does not refer to a value, but to a moral norm, because it concerns what we are obliged to do when our actions have consequences for others.’⁵⁷¹

The separation of moral norms from the values is very meaningful and illuminating for Weberian theory but also very problematic for the common identity of the Union. Habermasian re-interpretation of Weber confirms that some values of modern liberal democracies have formal characteristic. Habermas, by creating another category of values, called moral norms, attempts to restore the divided rationality into values and procedures. At the same time, he reinstates the objectivity and universality that values losses by modernism, Weberian theory and sein/sollen distinction. He still keeps the cultural/ethical values apart from the objectivity but supports their rational avocation by communicative rationality. Even this new semi-procedural rationality may be conceived as a proof of which that ‘cultural’ values cannot be ranked rationally. What is problematic and unsolved in this innovation is that while the rest of Habermasian theory accepts the damages of instrumental rationality of the economic and political system over life-spheres as Weber does by using another terminology, how could it be possible to keep and exculpate them from the charge of ‘comprador’ of the system rationality. While Habermas asserts that a combination of liberalism and republicanism is possible at a higher level, this question still seems to be unanswered.

The category of ‘moral norms’ produces some other questions, in respect to European identity. What Habermas calls ‘moral norms’ are common values of the European culture, although they are formalized by some other Europe-specific conditions. Some cultural, intellectual (such as Enlightenment), religious (Christianity), economic (capitalism) and political (nation-state) conditions come together and so-called ‘moral norms’ emerge in Europe. In this sense, these moral norms are at the same time common cultural values of Europe in Weberian theory. However, they became part

⁵⁷¹ *ibid.*

of the formal rationality of modern orders. Now, the logical conclusion of the claim of their universality and objectivity in a very Kantian way is either the universal validity of European values or the denial of their cultural and historical root in Europe. Admittedly, this is the point that will also be reached if Weber's theory is drawn into its implicit conclusions.⁵⁷² The practical implications of these entirely theoretical discussion over common identity question in Europe is that the 'moral norms' and the rights lack the potential to create a common identity which will evolve around themselves since they are incapable, and too-much-used and worn-out, to create a belief for individuals, though a rational one, in themselves. It is really difficult to have a substantive attachment to formal procedures without content and then from there to build a feeling of belongingness.

Secondly, there is another and more serious problem for Europe. Mostly, the moral norms are called common values⁵⁷³ in the discussions about the European Union and even at the Treaties. This partly results from the above-mentioned cultural roots and established social status of these norms. But partly reason is that there is not much more to lie down as common values of the European political culture. From this perspective, the supranational sphere is the dessert of values. Whatever we may find is more formal than substantive, more procedural than meaningful thanks to the development of the Union on the formal rationality as the heritage of modernity.

IX.V.5 Social Values

There is one more source of common values which I have not discussed yet and which is really a substantive value-orientation in Weberian theory. This is the social justice, social welfare policies and rights. These can be some values around which an identity may be established. They may function to create a belonging to devote to some

⁵⁷² See, Ahmet Çiğdem, 'Bir İmkan Olarak Modernite: Weber ve Habermas', İletişim Yay. 2004, for comparison of Habermas and Weber in terms of modernity conceptions and more particularly his rejection of Euro-centric modernist understanding.

⁵⁷³ Even Carlos Closa insists to use the term of 'values' instead of moral norms and defines the legitimation basis of post-national deliberative community as value-based. It is not only him but also the TEU and the Draft Treaty which name respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, tolerance, justice, equality, solidarity and nondiscrimination as values. Just in the second chapter of the same project, Eriksen warns him that these are not values but moral norms. Carlos Closa, 'Deliberative Constitutional Politics and the EU Value-Based Constitution', in *Deliberative Constitutional Politics in the EU*, Carlos Closa and John Erik Fossum (eds.), Oslo, August 2004, Arena, http://www.arena.uio.no/cidel/Reports/Albarracin_Ch1.pdf (03.09.2007); Erik O. Eriksen, 'Comment on "Deliberative Constitutional Politics and the EU Value-Based Constitution" by Carlos Closa', http://www.arena.uio.no/cidel/Reports/Albarracin_Ch2.pdf (03.09.2007)

precious value-aims. However, social policy has always been one of the most sensitive issues for the Union. First of all, there is a long-standing reluctance to give the Union competence in this field. The Member States have always been reluctant to cede even limited competence to the Union for social policy and industrial relations. 'The welfare state is a major source of legitimacy for national governments and the complex systems for union and other worker representation in firms and participation in national policy-making form an important part of the political culture of most European nations. It is not surprising that the nations would resist "Europeanization" of this area.'⁵⁷⁴ As may be concluded from this observation, the social policies and rights are part of the cultural values in Europe. Therefore it may function as a common value for the Union citizens. However, the problem is that this value becomes plural and diverse in each national culture in its interpretation and implementation. There is an 'the inherent difficulty of framing common policies for social policy given the great diversity of policies and practices within Europe and the deep embeddedness of social policy in unique national institutions. While one can see common features of the European Social Model across most of the 15 Member States, the model is implemented in many different ways through legal and institutional structures that vary tremendously yet are deeply embedded in national life and costly to change.'

Additionally, classical vicious circle of the Union is valid also about the social policy and rights. Social policy which can be a legitimizing source for the Union needs a legitimate authority to be adopted. 'The lack of adequate institutional arrangements for the reconciliation of the relevant social interests, a sufficiently integrated public sphere, and the absence of a European form of citizenship with relations of solidarity comparable to those in the nation state' are obstacles in legitimization of decisions in social policy. According to this view, 'solidaristic welfare arrangements can only be maintained among co-nationals who share a nationality including a culture, thereby denying such prospects in Europe.'⁵⁷⁵ If this presumption is accepted as a prerequisite, 'Social Europe would not enhance, but massively put at risk the legitimacy of the

⁵⁷⁴ David M. Trubek and James S. Mosher, 'New Governance, EU Employment Policy, and the European Social Model' Jean Monnet Working Paper No.6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance.

⁵⁷⁵ Andreas Follesdal, 'Legitimacy Theories of the European Union', Arena – Centre for European Studies, Oslo, Working Papers, WP 04/15, pp. 21- 22

project of European integration, furthering distrust and alienation of citizens from its institutions.’⁵⁷⁶

Actually, since 80s, social dimension of the common market has been conceived as connected to the legitimacy of European integration. The developments since the SEA may be summarized as follows: the intensification of EU regulation due to the introduction of qualified majority voting in the field of health and safety in the SEA, the adoption of the Social Protocol in the Maastricht Treaty which extends legislation to important areas of labor law, the establishment of the Social Dialogue, which has helped to adopt EU directives in the field of parental leave and atypical work, the establishment of the Luxembourg Employment Strategy, the application of the Open Method of Coordination to the fields of social inclusion and pension reform, definition of a set of common European social rights and values in the Charter of Fundamental Rights, adoption of broad aims in the social field by the Nice treaty such as high level of employment, high level of social security, the promotion of well-being and of the quality of life, social cohesion and solidarity among the Member States and adoption of the value-objective ‘to work for a social market economy’ by the draft Constitutional Treaty.⁵⁷⁷ Yet, all these developments, for many scholars, resulted in a weak Social Union in over all.⁵⁷⁸

The social welfare and justice as a value actually poses a quite dilemmatic choice to the Union. On the one hand, as explained above, to adopt a social model at supra-national level may have opposite influences in terms of the Union legitimacy. On

⁵⁷⁶ Frank Wendler, ‘The paradoxical effects of institutional change for the legitimacy of European governance: the case of EU Social Policy’, European Integration online Papers (EIoP), Vol. 8, No. 7, 2004, <http://eiop.or.at/eiop/texte/2004-007a.htm> (01.09.2007), Date of publication in the : 6.7.2004

⁵⁷⁷ See Frank Wendler; Christian Joerges and Florian Roedl, ‘Social Market Economy’ as Europe’s Social Model?’, <http://www.iue.it/PUB/law04-8.pdf> (18.08.2007)

⁵⁷⁸ ‘First, the Social Charter, which includes a set of rights for ‘workers’, was approved in 1989. However, British opposition resulted in it being confined to the status of a political declaration, and, more to the point, in the impossibility of developing policy measures aimed at rendering effective the said rights through Union action. Second, the Treaty of Amsterdam inserted an Employment Title in the Treaty of the European Communities. This resulted in an open but weak assumption of social competences by the Union. Several informal processes of co-ordination have resulted from it, among which the rather fashionable ‘Open Method of Co-ordination’. However, all this amounts to a rather weak competence of the Union on social matters. As a result, we are still in the midst of a tension between market-making and market-redressing. On the one hand, the legal framework applicable to most of the ‘productive factors’ is determined by Community law, and given the supremacy of the latter, has de facto become inscribed in the constitutional law of each Member State. On the other hand, social protection remains a national competence, and without a proper normative sheltering at the European level.’ Agustín José Menéndez, ‘The rights’ foundations of solidarity: Social and economic rights in the Charter of Fundamental Rights of the European Union’, ARENA Working Papers WP 03/1, 2003, http://www.arena.uio.no/publications/working-papers2003/papers/wp03_1.pdf (02.08.2007)

the other hand, just keeping the status quo just erodes the legitimacy of both the Union and the nation states in the eyes of citizens since the dynamics of the common market leads to factual and legal challenges to the economic, social and legal basis of the welfare state.’ Then, the Union is perceived as a threat to the value of justice by the citizens. Menéndez explains the situation as follows:

‘As the law stands, freedom of establishment and free movement of capital allow entrepreneurs to fish for lower social standards around the Union. The well-known episodes of Hoover moving from Dijon (France) to Scotland, Digital (Computer) from Ireland also to Scotland, or the closing down of the Villevorde factory of the car manufacturer Renault are illustrative of the extent to which ‘lower production costs’ can be based on ‘lower social costs’, and the extent to which a pressure to reduce social standards might derive from the referred two economic freedoms. Without European regulatory disciplining forces on capital, there is no longer a guarantee that higher social standards would not lead capital to escape from a given state or region. As a consequence, the lack of a robust social dimension in the European project might lead to active social dumping, especially in the aftermath of enlargement, which would result in a wide disparity of productivity rates and of social protection standards within the Union.’⁵⁷⁹

In order to overcome the dilemma above defined, one proposal is cooperation at supranational level to secure the welfare systems characteristic of European states. For some others, the solution may well be to allow more Member State independence. In addition to its wearisome effect on the legitimacy of the Union of that the social regimes weaken, what more matters is to perceive the social rights not as a means to some other aims but as ends. Alexander Somek underlines that by explaining the function of social policies with de-commodification. Commodification is the economic form of alienation and de-commodification aims to remove the omni-present existential threat from the market, in its weak form without affecting the basic distribution of social power in the relationship between capital and labour and its stronger form with the alteration of power-relationships. The social policies are ‘aimed at making people more independent from markets by insulating the satisfaction of wants and needs from the nexus of voluntary transactions. Thus understood, de-commodification stands for a bundle of measures that help to establish and to sustain a certain degree of market-independence (such as unemployment insurance, access to public education, health care, etc.)’⁵⁸⁰

The idea behind is that formal legal equality without social freedom is an empty shell; social policy restores the freedom that capitalism cannot guarantee.

⁵⁷⁹ Agustín José Menéndez, *op. cit.*, p.3

⁵⁸⁰ Alexander Somek, ‘Weak Social Policy’, p.319 -320

However, there is a difference between freedom-restoring social policy and participation-facilitating social policy. The latter one only aids people to be market-participants, either in the role of producers or in the role of consumers. Here the problem lies at the dissociation of individuals as workers and as consumers. People as workers have to realize their productive potential and generate the funds to create utility for themselves. People as consumers may have the greatest freedom to consume. Economic liberalism does not recognize any liberty outside the realm of consumption.⁵⁸¹

The weak social policy of the Union, according to Somek, is productivist so that it uses resources to facilitate market access for those who suffer from certain deficiencies for inclusion. ‘Such a social policy does not shelter from, but instead creates, ‘equal opportunities for commodification’. It is also instrumentalist in the sense that it subordinates social to economic policy. The managerial style of the economic policies is exported to social policy by soft law methods such as open method of coordination, which is restricted to the level of communication. ‘The result is that the ‘hybrid’ colonialisation of the world of European social welfare states by the functional imperatives of neo-liberal adjustment policies.’⁵⁸²

Somek points out that European social policy is not ideologically neutral but is genuinely neo-liberal. Actually, I would like to express it like that: it became a means to the neo-liberal ends. Such instrumentalisation of social values does not create more areas of real liberty but more and more ‘the control over their lives is going to be taken out of the hands of European citizens. Significantly, Somek uses a Weberian

⁵⁸¹ *ibid.*, pp.-321-323

⁵⁸² ‘Similarly, European social policy, as a normative orientation, is based on a faith, in this case, the faith in the concordance in the relationship of social and economic objectives. Indeed, ever since the launching of the Lisbon Strategy, which is about transforming Europe into the world’s most dynamic and competitive knowledge-based economy, European economic and social policy appears to be based upon what might be called, with an eye to Cusanus’ classic treatise, a new concordantia catholica. In the medieval intellectual world of Nicholas of Cusa, the church was perceived as being permeated and animated by ‘a sweet spiritual harmony of agreement’. It was thus taken to partake of the concordance of God’s external existence and creation. Where there is eternal life, according to Cusanus, there cannot be contradiction, for otherwise instability and conflict would threaten such life with extinction. But since concordance, nevertheless, presupposes difference, he concludes that ‘the less opposition there is among these differences, the greater the concordance and the longer the life’. Concordance thus accounts for the ontological dignity of things: the more concordance, the more similarity to God. In a similar vein, in an age in which there seems to be nothing outside, and no longer any alternative to, the market economy, the Commission would like to see its own *raison d’être*, the Common Market, as being ruled by a basic concordance of its elements. Unity and concord are to prevail in the relationship of economic and social objectives. The European Council does not even perceive a tension, let alone a contradiction, between transforming the Community into the most competitive and dynamic knowledge-based market economy on the one hand, and the promotion of social cohesion and social inclusion on the other.’ Somek, pp.327-328

terminology to explain the danger: ‘In a word, citizens. In a word, the more uncomfortable life will become in the *Gehäuse der Hörigkeit der Zukunft*, the more it will be perceived as the subordination of life to the life-denying imperatives of the global economy.’⁵⁸³

X. COMMUNICATIVE RATIONALITY AND THE UNION

In this section, I will briefly focus on communicative rationality and deliberation in the limited context of common European identity. Eriksen expresses that deliberative theory has the power to explain integration in the absence of a European demos and a collective identity and to compensate it by extensive contact and public deliberation that forms catalytic functions of enlarged solidarity.⁵⁸⁴ What is proposed on the basis of deliberative theory is a rights-based post-national union, with a fully-fledged political citizenship. The model proposed is as follows: In an age that statehood is divorced from nationhood and place that is not bound by pre-political features, it is possible to build on the idea of a rights-based reflexive integration process. Through reciprocal recognition of basic rights citizenship can take a cognitive turn. People have to acknowledge equal rights to each other while regulating their common affairs by law. Political rights turn human beings into a unified body of citizens capable of making the very laws they are to obey. In this model, it is not necessary for citizens to be each other’s brother or sister, friend or neighbor, or to be a native inhabitant, for political integration to take place. This procedural democratic context made up of equals can lend legitimacy to its outcomes. Justice is defined as establishing terms for mutual recognition so that everybody’s interests and values are taken into account. In this perspective, the medium for the political execution of power is deliberation. Production of right political results and the justification of norms are provided by public deliberation.

⁵⁸³ Somek, *op.cit.*, p.329

⁵⁸⁴ Erik Oddvar Eriksen, ‘Reflexive Supranationalism in Europe – on the cogs and wheels of integration’, in *Law and Democracy in the Post-National Union*, Christian Joerges and Florian Rödl (eds) ,ARENA Report No 1/2006 Oslo, October 2006, p. 2

X.I. Theory of Communication and Deliberative Legitimacy

Deliberative democracy model is established on Habermasian theory of communication. Habermas' theory searches for a consensus point at a higher level between liberalism and republicanism, cosmopolitanism and communitarianism, formal and substantive rationality. His first and main attempt is to conciliate the instrumentalist and value rationality at communicative level by communicative rationality. To his typology Habermas adds social communicative action which is oriented to reaching a common understanding with other actors concerning what should be done. In this context, rationality is not only cognitive but may also be normative: it may also answer ethical and moral questions. Communicative action is rational since first of all, it is based on relevant knowledge of situation. But, the knowledge and arguments used to persuade others about the validity of the claim about what is to be done.⁵⁸⁵ Communicative rationality which is mostly procedural also contains values in itself. Habermas's perspective implies '*a procedural view of rationality*, where it is not our conclusions but the manner in which we arrive at them which are permanent and in a way above criticism.'⁵⁸⁶ This procedure cannot guarantee to arrive at the right results but to arrive at a position which is supported by the weightiest arguments and any conclusion stays open to new challenges. What Habermas shares with Weber are that he accepts that there are systems at which the purposive rationality is dominant and that the instrumental rationality has a tendency to impose itself on or colonize other areas. 'The

⁵⁸⁵ Habermas's communicative action is more complex than I present here. The actors are situated namely in three different worlds. In the objective world, the actor relates to his environment as existing states of affairs or facts. His actions towards this world may be either purposive rational or strategic by an objectifying attitude even towards other people, or cognitive in which the rationality criteria is the actor understands its environment truly. The social world is a normative context for legitimate inter-personal relations. The actions are oriented towards some shared values. Criteria of rationality is rightness. The subjective world is the sphere of inner, personal experience. The action in this world is self-presentation or self-expression to the others. Rationality depends on truthfulness that is shown by the actor about himself. All of those actions except teleological/strategic one are oriented to reaching understanding according to Habermas. Communicative action refers to the situations which at least two subjects negotiate and try to achieve a mutual understanding about conditions that belong to the objective, subjective or social world in order to be able to coordinate their action plans and thus their actions. Of course language may also be used in teleological and success-oriented way. Except this strategic use of language, still communicative action may be weak or strong. Strong communicative action occurs when consensus or agreement is reached on the same grounds of validity. Weak communicative action occurs when the actor's understand each other intentions and reasons but do not make those reason their own. In strong communicative action, the actors do not only accept each other claims true but also share the value-orientations and hold this normative context superior to their private choices. By strong communication a normatively based trust and agreement between parties are established.

⁵⁸⁶ E. Eriksen and J. Weigard, *Understanding Habermas: Communicating Action and Deliberative Democracy*, London: Continuum, 2003, p.4

consequence is that relations which should be based on personal commitment, common understanding and involvement, are instead regulated on impersonal basis, with alienation, disintegration of social responsibility and decline of legitimacy as results.⁵⁸⁷

However, what Weber and Habermas do not share is pessimism. Habermas do not evaluate all the consequences of modernity for the humanity and morality negatively. Additionally, there is a way to overcome the dilemmas of both realpolitik and communitarianism. Rational decision making in method and content may be both legitimate and democratic through argumentative procedures which are based on equality of participation in deliberative process. Hence what we need is a forum where we can discuss and decide what the common good is for us. Habermas calls this forum *public sphere*. In the early writings Habermas is advocate of a view that public sphere has lost its critical and legitimating function which it had till the middle of the 19th century, by the transition to a more power-based politics of the interest groups and political parties. In this sense, he has more in common with Weber than it is generally perceived.

He further develops Weberian analysis by separating the modern societies into two parts: public sphere and the systems sphere. The public sphere is cultural and political, but uninstitutionalized, sphere. Here what is supposed to be dominant is communicative rationality leading to consensus. System integrated sphere is composed of political parties, interest groups, economical area, bureaucracy and other power structures and represents the level of decision-making. At this part what dominates is purposive rationality and the use of the 'steering medium' of power. The danger is that the logic of system integration with its steering mediums (power and money) invades the social spheres of mutual understanding. Instead of accepting the invasion and try to explain the social reality with empirical instrumentalist theories, Habermas proposes a critical approach. In over all, the legitimacy of those systems depends on the underlying consensus and social approval and the process of instrumentalization should be stopped before the fundamental social relations simply breaks down.

In his book *Between Facts and Norms*, Habermas adopts a more positive approach to the legitimacy question. He claims that 'our representative democracy to a

⁵⁸⁷ *ibid.*, p.6

large extent represents precisely a *deliberative model* of politics, in spite of the fact that much political activity takes the form of power struggles and strategic play.’⁵⁸⁸ Legitimacy of political power has a dual basis; one is procedural and the other is deliberative. Procedural basis is legal rules and procedures which guarantee that purposively-rational conflicts take place on a morally-acceptable ground. Deliberative basis results from the public political discussions about the good and the just. The dilemma between the rule of law and democracy is reconciled by showing the complementary nature of private and public autonomy. ‘democracy cannot survive in a society where individuals do not enjoy personal autonomy in the form of, among other things, legal security, just as personal autonomy does not have a secure foundation in a society which is not democratic (i.e. where citizens can make use of their political rights to decide the rules of their intercourse).’⁵⁸⁹

In order to understand the deliberative democracy model of Habermas, first let us focus on ‘discourse ethics’. Discourse ethics is based on a theory of development of morality. According to that, at pre-conventional state norm-following is based on command-obedience. At the conventional (ethical) level, the requirements for correct action are internalized by identification with a particular role or by with the general norm system of the society in question. At post-conventional (moral) level, the identification with society is dissolved and morality becomes open to questions. We realize that also established norms must be tested rationally in relation to superior principles of justice. And at the end we reach to the procedures for justification of norms. P.60 According to Habermas, there are some other ways to approach to normative questions. Pragmatic approach is purely utilitarian and aims the maximization of happiness and satisfaction. Ethical approach is linked to value rationality and depends on the definition of the common goods by a particular society. In this sense, it belongs to conventional level of development. Moral approach is universal and intersubjective and aims to follow the norms of justice. It belongs to post-conventional level. As the last stage of development, post-conventional is linked to the discourse ethics. Discourse ethics is universalist, formalist, and cognitivist. In other

⁵⁸⁸ *ibid.*, p.8

⁵⁸⁹ *ibid.* P.9

words, moral theory of Habermas claims to have universally valid principles⁵⁹⁰ everywhere and at all times; to present a format/procedure, not the content of moral rules, to arrive at morally tenable truths; to prove that moral principles may be rationally reached and known.

In the ethical discourse, discussion is about which values are really good and which principles should be chosen to guide one's life conduct. 'Standards of rationality – what values are good or bad – are seen as collective properties inherent in and unique to each society, which implies a contextual concept of rationality.' In the moral discourse, moral rules and expectations of a particular society are tested by an ideal and universal social world. Habermas, although he holds the moral discourses superior to the ethical questions, still admits that we need ethical discourses which discuss what is good for a particular society. However, in pluralistic societies of our age, the only way to do is to follow the moral principles of justice.

Habermas also separates the life-world from the systems. Life-world has three structural components: culture, society and personality. For Habermas, what modernization and disenchantment with religion brought up is differentiation and dissolution of those components, thereby the individuals become more autonomous. Life-world is only one part of the society. The other part is systems. Market economy and political-administrative apparatus should be understood by the system perspective. While economic system is influential on private sphere of the life-world, administrative system is influential on public sphere of the life-world. Habermas does not agree with Weber is that the unrestricted dominance of purposive rationality of these systems over the life-world is unavoidable. The remaining aspects of the life-world may saved by political action.

The political action needed to prevent colonization of the life-world by the systems is a deliberative model of democracy, which is a third way between democratic liberal and republican traditions. While the liberal model emphasizes the freedom and the rights of individuals, the republican prefers the common good of the society. For

⁵⁹⁰ Habermas largely building on Kant, proposes principle of universalisation and principle of discourse ethics. First principle: All affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interest (and these consequences are preferred to those of known alternative possibilities for regulation) The latter: Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.

liberals, legitimation of the political system is ensured by the elections and the minimum state limited by the individual rights. Politics is seen in the context of interest-conflicts and of rational choice aggregation. For republicans, politics is a normative activity and democratic participation is an ultimate good. The deliberative model of democracy shares with the liberals that freedom, equality and justice are universal values and that the right takes precedence over what is good. On the other hand, it agrees that political opinion and will-formation is an intersubjective communicative process. At the same time, political participation and the political rights are as important as civic rights. Deliberative model is different from the republican with its emphasis on procedures. What will ensure an open public debate and regulate the parliamentary negotiations, bargaining and elections are the institutionalization of procedures. The model still attempts to reconcile democracy and individual rights. The system of rights cannot be reduced to a moral reading of human rights nor to an ethical reading of popular sovereignty. Because the private autonomy of citizens must neither be superior to nor be made subordinate to their political autonomy. On the contrary, the principle of democracy and the systems of rights are co-original and reflect the mutual presupposition of citizen's public and private autonomy.⁵⁹¹ In this sense, 'the model distinguishes between the public sphere, which is regarded as a power-free arena of public opinion and communication and the formal political system, which is where alternatives are formed and specified, and decisions made.'

If we focus on political views of Habermas, we have to understand the concept of law for him. While the systems get more rationalized and integrated, life-world also develops and get complex. Social development at normative level corresponds to the pre-conventional, conventional and post-conventional stages of development. At pre-conventional level is characterized by magical ethics; conventional level by ethics of the law, norms and traditional law; post-conventional level by ethics of conviction and responsibility, principles and formal law. Morality and law is separated at this last stage. Law in post-conventional societies has the role of a medium which translates opinion formation processes into political decision-making. In other words, 'in highly differentiated and pluralist societies the task of social coordination and integration falls

⁵⁹¹ Kenneth Baynes, 'Democracy and Rechtsstaat: Habermas's Faktizität und Geltung', in *Jürgen Habermas*, D.M.Rasmussen & J. Swindal (eds.), Cambridge: Sage publications, 2002, p. 181

to institutionalized procedures of legitimate law making that transform into binding decisions the more diffuse public opinions initially produced via the anonymous communication network of a loosely organized and largely autonomous public sphere.⁵⁹² In other words, it transforms communicative power into administrative power. However, to be able to do that, the law needs a new legitimacy basis. Habermas argues that law may succeed that only through moral universal discourses which aim at an impartial regulation of action conflicts.

In the modern states, there is no need any more for a value-based agreement about the good life but a commitment to fundamental rights and principles would be enough. (constitutional patriotism). The distinction between moral norms and values may be seen in the system of law, too. Constitutional norms have a universal validity, sometimes at the expense of majority's values. In contrast to values which are particular and contingent, it is the appeal to the universal public that constitutes the basis for the higher order principles upon which the democratic constitutional state is founded. In this context, the social integration takes the form of political in citizens' mutual recognition of each other as persons with equal rights.

Lastly, let us look at the concept of public sphere. The public sphere is a critical institution, which gives citizens an opportunity to assemble in order to hold the power holders accountable for their actions. Public sphere is not homogenous but divided into different types and categories, from regional to international public spheres, from where elites and mass can meet to cultural street gatherings, to abstract forums made possible by new technologies. Habermas uses the concept in the weak sense, i.e. opinion-formation deliberations outside the political sphere, not for the formally organized institutions such as parliaments or discursive bodies. When the citizens come together and in public forums and come to an agreement about the rules for social existence and about which collective goals should be realized the kind of power that emerges is called *communicative* power by Habermas. It is the consensus forming process that takes place in the public sphere that generate and authorize power. However public sphere does not act. The common opinions that emerge in the free spaces of civil society are converted into binding decisions via the law. Opinion-

⁵⁹² Kenneth Baynes, *op. cit.*, p. 177

formation is expected to influence will-formation and decision-making processes which would take place in the institutionalized discourses such as the Parliament. There is one important rule for political deliberations, public opinion should be formed on the basis of *adequate information* and *relevant reasons* and that those whose interests are involved have an equal and effective opportunity to make their own interests (and the reasons for them) known.⁵⁹³

One important critique to Habermas's public spheres is that deliberative processes in public spheres will tend to operate to the advantage of dominant groups and to the disadvantage of subordinates, where societal inequality persists. 'The idea of a free-wheeling deliberative democracy remains ideological as long as avoidable social inequalities undermine the deliberative capacities of the vast-majority of humankind'⁵⁹⁴ Additionally, the relation between communicative and administrative power is more ambiguous than it seems in Habermasian theory. Habermas at some instances asserts that communicative power can rely on the medium of law to determine administrative power. Yet, in other parts of the book (*Between facts and norms*) we find a more modest view of the communicative power. 'communicative power more or less programmes and merely influences and countersteers administrative power. In any event, communicative power itself cannot rule, but only steers the use of administrative power in certain directions.'⁵⁹⁵ Even at one point, Habermas shifts all the model: to perceive and thematize the problems are not functions of the civil society anymore but of the Parliament and it is the administration, no more the parliament, which possesses the most impressive capacity for handling and resolving the problems. In description of normal politics, the deliberative 'periphery' inevitably plays a minor role in determining the policy-making process. The autonomization of the centre vis-à-vis the periphery is inevitable considering the complexity of modern social life. Even the Parliament loses its rational role to decide on the problems on the agenda at the expense of government and administration.⁵⁹⁶

⁵⁹³ William E. Scheuerman, 'Between Radicalism and Resignation: Democratic Theory in Habermas's *Between Facts and Norms*', in *Jürgen Habermas*, p. 276

⁵⁹⁴ *ibid.*, p.278; the critique is based on Nancy Fraser's socialist-feminist democratic theory.

⁵⁹⁵ *ibid.*, p.280

⁵⁹⁶ *ibid.*, pp.281-283

X.II Communicative Rationality of the Union

Habermasian deliberative democracy model has been effective on the European Union in several ways. Some authors argue that the model is already effective in the Union as analyzed in deliberative democracy theories. Secondly the convention model which has been applied for the Constitution and the Charter is generally evaluated as an application of it. Thirdly, the Commission adopted a very active communication policy for last four years. The convention model as applied in the EU has not been very successful and has been criticized by many. The critiques generally accuse the convention and public deliberation for the preparation of the draft Treaty being elitist, not including ordinary people and ineffective in overall.

In May and June 2005, the project for a European Constitution collapsed in France and the Netherlands. Europe's citizens decided against the new constitution. The failure of the draft Constitutional Treaty has been discussed extensively in the academia. Failure of the Treaty has been explained by different authors in a number of ways. Some argued that the resulting text was a patchwork of different constitutional approaches and divergent interests.⁵⁹⁷ Some argued that the draft Treaty has not become

⁵⁹⁷ There were groups with different positions to the Constitution. Neil Walker groups them according to their conception of the draft treaty. Constitutional skeptics hold that constitutionalism is incapable of making a significant positive difference to the legitimacy or effectiveness of the political domain since the EU is not a kind of entity and never will be such that is worthy of characterization in constitutional terms (in a weaker form, at least not now but may be in the future. For constitutional historical-contextualism, the EU has already a constitutional heritage, the text produced is only record of existing constitutional doctrine and practice than a source of something new. Constitutional serialism conceives European constitutional developments as an iterative series of constitutional events rather than as a long process of normal politics interrupted by one or very few constitutional moments. There are again two versions: 1st version is that it is a part of a 'semi-permanent' constitution conversation and sees in this a reasonably healthy reflection of ongoing structural debate within a polity-in-the-making- a sign of entity responsive to the dynamic expansion in the reach of European policy making and seeking to come to terms with the diverse and changing aspirations of its citizens. The second one is less optimistic and serial change is seen as reflecting an increasingly breathless search for legitimating foundations for a polity which, since the first mobilization of popular discontent around the Maastricht Treaty, has no longer been able to present itself in technocratic terms as a limited functional entity in no need of broad popular endorsement. Europe is caught in a tragic cycle of constitutional inflation. To constitutional processualism, constitutional discourse and practice within the EU is not exclusively or even mainly a matter of Treaties and constitutional documents. It is not a formal but a functional process composed of any activity and any form of reflection concerning the overall legitimacy of the Union. Instead of top-down approach, down-to-top approach is to be preferred. Comitology or the new Open Method of Co-ordination, or local partnership agreements or other new forms of governance are vital constitutional processes threatened by the focus of the drafting efforts of the Constitutional Treaty. These views also reflect particular political attitudes and motivations during and in the constitution-making process itself. These views not only interpreted the text and process but they shaped it and constituted the resulting product. According to Walker, sceptics view may be observed in the public opinion of the public. % 55 of the public has never heard of the Convention at the time of presentation of the results to the Council. They also perceived the Treaty as a polity-limiting device. Supporters of charter of rights or a strong competence catalogue are the examples. Historical contextualists imprinted their effect by the idea of consolidation

a constitutional text at the end but only a compiling and re-writing of already existing Treaties. There was another view advocating that it was not the right constitutional moment for the Union and that the Union's public was not ready and political nature was not mature enough. Therefore the use of even 'Constitution' as a term has created a strong negative reaction among the member state citizens. On the contrary, it was argued that the text and the process were not motivating and innovative enough to draw the attention and support of the public.⁵⁹⁸

Bellamy finds the deliberative processes which are supposed to provide the democratic legitimacy to the final decisions unsatisfactory. 'The conventions that drew up both the Charter of Rights and Treaty contained a large number of parliamentary representatives. However neither of these bodies was electorally accountable. Nor can their deliberations be said to have issued in a pan-European consensus. On the one hand, the drafters side-stepped their agreements disagreements by choosing formulations that were so abstract that all sides could read into them what they liked. Yet, this strategy merely postpones the day of reckoning and assumes legitimate bodies exist to decide the question, which is doubtful. On the other, they bargained to produce very determinate solutions reflecting the current balance of ideological and national interests.'⁵⁹⁹

The elitist approach of the constitutional process has also been clearly criticized by Brunkhorst. It was not enough to call the proposed treaty constitutional in order to give the existing treaties a new, let alone a revolutionary, meaning. It is not a constitution for and of people but for the governmental organs of the member states and the Union, for judges and legal experts, for professional politicians, business managers, union bosses, television moderator, and ministerial officials.' This elite transnational group in alliance with the economic powers and the mass media produces a new and highly flexible ruling class and speaks only top-down of the people out there.⁶⁰⁰ Another aspect that Brunkhorst critically underlines that the Treaties and the last failed

and simplification of the Treaties. Neil Walker, 'The legacy of Europe's Constitutional Moment', *Constellations*, Vol.11, No.3, pp. 368-378

⁵⁹⁸ Richard Bellamy states that the strong advocates and the weak advocates of the EU constitution tend to blame each other for the failure. 'The European Constitution is dead, Long live European Constitutionalism', *Constellations*, Vol.13, no.2, 2006, p.181

⁵⁹⁹ *ibid.*, p.185

⁶⁰⁰ Hauke Brunkhorst, 'The legitimation crisis of the European Union', *Constellations*, vol.13, No.2, 2006 pp.166-167

one has never been the constitution of people with their complexity, juristic sophistication and length. Additionally it is not enough to entitle people with comprehensive rights. Treaties have long since been a constitution of all the citizens equally in respect to providing rights: Anyone could make use of his equal right to go to court and claim his European rights, 'but only as an individual or in concert with the strictly limited deliberative publics of democratically defined courts. The voluntarism of individualized claimants is indeed a constitutive contribution to the egalitarian-democratic legitimation of law, but not a general, legislative will. This is the central problem of the EU constitutional system that became dramatically evident in 2005.'⁶⁰¹

Brunkhorst finalizes his critique by approving the rejection of the constitution in France and Holland as a reaction of people who for the first time have acted as a European people and did nothing other than take their European citizen rights seriously against the situation he explains as follows and I take as a full quotation:

'Here it is a matter of *interests* and *relations of domination*. The winner of the game is the political class; the loser, the European citizenry. The path of the political class over supranational (and international) law stabilizes the arbitrary rule of the government over parliament, ministers over their areas of competence, the administration close to the government over the regions, and the political class and its networks of employers associations, bank presidents, union bosses, and political media stars over the people. The new constitution, had it come, would have changed nothing essential about this....The development of a new transnational ruling class, ...the cosmopolitanism of the few, is not a European but a global process, though it is massively reinforced and institutionally stabilized by organizations like the EU. For the European Union is a central, *regional*, intermediate stage in the denationalization and globalization of previously state-centered constitutional law.'⁶⁰²

Deliberative process and communicative rationality of the Constitutional process has been even found not deliberative enough even by the supporters of Habermasian approach. Eriksen defines the process as 'more than a compromise but less than a rational consensus.' It was clear that the members of the Convention has not agreed on the reasons. But still he argues that at least the parties 'learned' and established a new basis for handling European affairs through the *Convention process*.⁶⁰³ Still there are many points which put the Convention out of the Habermasian ideals: 'The 'shadow of the IGC hung over the whole process; it constrained the process of deliberation and prevented a proper mediation between strong 'deliberative' publics and general (or 'weak') publics *at European level*. Assessments of the entire Laeken

⁶⁰¹ Brunkhorst, *op. cit.*, p. 167

⁶⁰² *ibid.*, p.176

⁶⁰³ Erik Oddvar Eriksen, 'Reflexive supranationalism in Europe – on the cogs and wheels of integration', pp.22-23

process have found that the degree of interconnection of strong and general publics was low, while inclusivity and transparency were insufficient to characterize the process as a properly constitutional one, from a deliberative democratic perspective.’⁶⁰⁴

Neyer and Schroeter also agree to that from the very beginning, the constitutional process was led by political élites and strong publics and by a very low level of participation of general publics. It was the decision of the European Council to convene a Convention and it was not in response to a significant popular demand, as would be required by democratic standards. Governmental dominance of the process was not limited to setting the agenda for the convention, but dominated over all phases of the process. The link between the Convention and the IGC was very weak from the beginning. The IGC would be autonomous from the Convention preparatory work. The mandate of the Convention was limited to answering the questions which the governments had agreed upon in advance. In this atmosphere the Conventioneers (and its chair) felt constrained by their governments. Interaction by means of arguments quickly became marginalised by traditional diplomatic bargaining. Defending predefined national interests and the building of coalitions among Member States became dominant when concrete issues were put on the table.⁶⁰⁵

It seems that even the ‘strong public’ of the constitutional process was far away from fulfilling the requirements of deliberative discourse. When it comes to the ‘weak public’ the situation was even worse. Most of the citizens at the time of IGC even was not aware of the constitutional process and at the end knew very little about the content of the Constitution. ‘In the absence of a prior process of mobilisation, politicisation through referenda is restricted to a short moment in time. Only a couple of weeks prior to the referenda, the European constitution had no particular meaning to the overwhelming majority of voters.’ This communication deficit has been explained in a variety of ways. The distortion of communication by the mass media and by utilization of the referenda by national politicians for some ‘popular politics’ is one of the arguments:

⁶⁰⁴ John Erik Fossum and Hans-Jörg Trenz, ‘When the people come in: constitution-making and the belated politicisation of the European Union’, in *Law and Democracy in the Post-National Union*, Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds.), ARENA Report No 1/2006, Oslo, October 2006, p. 38

⁶⁰⁵ Jürgen Neyer and Michael Schroeter, ‘Deliberative Europe and the Rejected Constitution’, in *Law and Democracy in the Post-National Union*, Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds.), ARENA Report No 1/2006, Oslo, October 2006, pp.69-71

‘Different actors use the *referenda* as ‘windows of opportunity’ to come forward with very different problems and their perceived solutions. In such a situation of deep ambiguity, the Constitution is a means to different ends, and can signify quite different things: within the conservative camp, it represents a bulwark against Anglo-Saxon market ideology (Jacques Chirac) or represents the complete opposite as a tool against the French trust in the state (Nicolas Sarkozy); within the socialist camp, it represents a weapon against the existing liberal market jungle (François Hollande), or the first step into the jungle (Laurent Fabius).’⁶⁰⁶

It is quite interesting that deliberative model comes back to a century-old discussion about public opinion, demagoguery and mass’ emotional reactions, about which Weber was quite pessimistic. It is not only a problem for the EU but for modern mediatized societies. The problem is not only misinformation but also non-information and non-attention: ‘The turn of political communication into public political communication is restricted by the attentive capacities of the public. Even the case of absolute publicity would not bring about much change in the amount of attention that ‘ordinary people’ are willing to dedicate or capable of devoting to politics... The European Union is seriously affected by this communication-attention gap’⁶⁰⁷

There is also another way to interpret the non-reaction of the people. It may be conscious and rational reaction to an elitist insistence to include the lay men to their own integration project. In this case, Injecting the silent majority with more and rational information to make them politically active may fail again simply because of the public’s indifference. Their preference for spectacle over substance, for symbols over facts, and for entertainment over information, may be a way of subverting the political system which they have no interest in legitimating.⁶⁰⁸

A dangerous approach which was already adopted by some pro-European elites is to explain the rejection of the draft Treaty with the insufficient knowledge or the immaturity of the voter. This attitude ‘resembles that of teachers who treat the voters like young pupils or who self-critically admit that they have not been successful in

⁶⁰⁶John Erik Fossum and Hans-Jörg Trenz, *op. cit.*, p.40

⁶⁰⁷*ibid.*, pp.50-51

⁶⁰⁸*ibid.*, pp.51-52

transmitting their lessons. The voters' rejection thus leads to a change in pedagogical styles in order to improve communication with stakeholders and targeted audiences (Plan D for Democracy, Dialogue and Debate).⁶⁰⁹

However I suspect that the problem may be deeper than that. Another important factor in political alienation of the people may result from the gap, both theoretical and practical, between, so called, strong and weak publics and worse than this, between public sphere and political/administrative powers. Without any guarantee, or even with the proofs of the contrary, for the public opinion to be taken into account by the 'decision-makers', it could be illusionary to wait a response from the public about 'already too-complex' issues. In other words, 'in the absence - on the part of the system -of an explicitly declared will to channel arguments into binding actions, which includes structuring the process in such a manner as to enable citizens to *imagine themselves truly as Europeans*, citizens may be appeased by symbolic politics, or may react with disdain or not feel affected at all. Reflection will thus, at best, amount to 'reflection about its difficult implementation'.⁶¹⁰

What comes as a surprise is the reaction of deliberative theorists which lays down explicitly the elitism of the model. The solution is not in more participation. There will be always two levels of political structures: the passive subjects who are unable to produce acceptable reasons and rational arguments and the wise governors. 'democratic legitimacy is not merely a matter of congruence between the addressees and the authors of the law, but is also one in which *the reasons* for political decisions are accepted by those affected. More participation may not help to find correct answers to intractable problems. Furthermore, correct answers to moral and ethical questions can hardly be obtained through bargaining over these. Only decisions that have been critically examined by qualified and entrusted members of the community through a reason-giving practice can claim to be rational.'⁶¹¹

It may better to follow Dahl, while underlining that international and supranational organizations cannot be as democratic as desired, still advocates that

⁶⁰⁹ *ibid.*, p.53

⁶¹⁰ *ibid.*, p.58

⁶¹¹ Erik Oddvar Eriksen and John Erik Fossum, 'Rescuing democracy in Europe', in *Law and Democracy in the Post-National Union*, Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds.), ARENA Report No 1/2006, Oslo, October 2006, p.415

avoiding extensive public deliberation would be morally and politically wrong. And it is him who warns us again about leaders who are afraid of that discussion may cause adverse reactions among citizens with insufficient understanding of the long-term, and uncertain, advantages of transnational arrangements: ‘when faced with a choice between wider public discussion or less, leaders favoring such moves may be tempted to avoid the pitfalls of widespread public deliberation.’⁶¹²

⁶¹² Robert A. Dahl, ‘A Democratic Dilemma: System Effectiveness versus Citizen Participation’, *Political Science Quarterly*, Vol. 109, No.1, 1994

CONCLUSION

Max Weber, despite to the view that he did not present a coherent theoretical picture, has provided me with a quite comprehensive perspective and a framework of interpretation for this thesis. There is always a possibility that one could be trapped in the theory of the scholar whom she utilizes and loses her objective insights towards its own means. I tried to be careful not to turn my means to my aims. During this work, keeping a hermeneutical and critical distance to Weber has been one of my concerns. Keeping this concern in mind, I still may conclude that the sociology of Max Weber, in my interpretation, has still a contemporary theoretical value for us.

Weberian theory deconstructs European authority structures with a quite objective perspective, without any preference to any particular value. His legitimacy discussion in this context is not based on the relations between the institutions and values. On the other hand, he seems to consider Europe as a civilization providing a special context of modernity and his pessimism about modernity and legitimacy partly comes from his insider point of view. This dissertation does not aim to provide an alternative definition for legitimacy since such an effort requires posing a group of value against ethical relativism. Nevertheless, critical theory of Weber provides deep insights about what went wrong with the 'legitimacy' of modern authorities and what kind of approaches may not be useful for the European Union to overcome its dilemmas in its legitimacy crises. I believe that such an upside-down approach has provided the work with some new conclusions for the political processes that the Union went through and on these conclusions new solutions may be built up.

Concerning the European Union, it has not been an easy task to analyze the transformations of such a complex entity from a theoretical standpoint under a time and space limit. There are many other details and aspects that I had to neglect or skip. The main aim was to present a general view of the Union from a chronological perspective and to reveal the impasses of modernity still surviving at this ever-evolving organism. It has been Weberian theory that illuminated my way during this chapter and I think that it proved its utility and relevance into great extent. An inquiry focused on the question of legitimacy has demonstrated that the perceptions of authority-subject relations are still under the impact of modern paradigms, even at the assumingly-post-modernist entities.

I would like to present my conclusions in three parts. The first part will be on a general presentation of Weberian thoughts on modernity and modern individual, of course in the way I interpret him. At this part, I especially focus on the thesis of loss of freedom and loss of meaning. At the second part, I would like to summarize my conclusion on Weberian theory of legitimacy. At the last part, I present my overview of the European Union and its legitimacy deficit from Weberian look.

a) Freedom of Modernity: more or less?

An extensive examination of Weber's writings shows us how the ghost of Weber is still among us, at the academic works, in the mentalities and viewpoints of many, at the background of many theories as a hidden hand. On the other hand, it shows also that the social, political and legal life in practice, in many aspects, still suffers from the iron cage of modernity as he describes it. He successfully exhibits that ambiguity of the modernity stems from that modernization process has meant both the emancipation of people from rigid traditional and religious structures, and the fall into the cage of rationality. Religion has a central place in his theory since disenchantment of the societies and people has gone in parallel with rationalization of the religions and the development of other life spheres (economic, legal, political, scientific, etc.) autonomously from religion. The conception of Weber of the secularization and rationality is much broader than the Enlightenment philosophers since he takes not only the theoretical aspects but also the concrete developments such as capitalism into account. He does not restrict his view into the rise of human reason and 'the individual' but includes the practical and theoretical consequences of this.

Religious disenchantment and development of capitalism led to rationalization processes in many areas of life. In other words, the life is departmentalized through autonomous systematization of religion, economy, law and politics according to their inner logics. For individuals, the belief in particular values, customs and religious ethics which are all externally presented and imposed, and generally followed emotionally, habitually or under oppression were losing their effectiveness and place in their lives. Two types of rationality for individuals meant freedom from the discriminative, arbitrary and irrational structures. Instrumental rationality was referring to making a free choice for the actions according to subjective wants, desires or objectives. It also

meant that life and world were coming under the control of human reason, instead of controlling them. Calculability, predictability, effectiveness and success are the terms that qualify this term. On the other hand, value rationality refers to freedom of individual in another area. Choice and interpretation of every kind of religious, ethical, social or philosophical values has become a function of human will. There was no authority which could objectively impose those values on human beings. The values are internalized and became subjective. An age of pluralism, relativism and individualism has begun.

On the other hand, rationalism did not mean a peaceful and conflict-free life. Contrary to that. An age of eternal conflict was on the way. Not only between the religion which keeps to protect some values and the other spheres based on instrumental rationality but also between different values and between substantive rationality and formal rationality within the spheres, a rationally-insoluble conflict has occurred. There was no way to decide which value is more 'valuable' or whether self-interested instrumental rationality is worse than value-rationality. In terms of individual, the freedom came with its price. It was only the individual who would take the responsibility of his decisions and choices. His reason was available to him for instrumental rationality to compare the objectives and the means according to the standards which he chooses at the end. When it comes to values, neither the reason nor science gave him a relief in choice of them. Of course, every value-choice could be explained with some logically coherent way but could not be proved superior to the other.

Additionally, it was becoming increasingly difficult to believe in any value and to act accordingly. In this sense, freedom of choice has been curtailed by life, once more. The new orders of the modernity have gone through a formal rationalization process. Under the influence of capitalism and liberal ideology (enlightenment philosophy), the new structures of life such as the market, nation-state and modern law was functioning under some formal rules and according to a kind of instrumental logic. Any intrusion of a substantively rational element into the dominant formal rationality of those systems was leading irrationalities in them and anyway was so difficult. The rationality of those systems was determining the conditions of life, of action, of success and even of survival. On the one hand, they were providing security, effectiveness and

certainty for life. On the other hand, by defining the standards and determining the conditions, they were the limits of the individual freedom in most optimistic sense. The subjective freedom of instrumental rationality depends on taking into consideration of the surrounding conditions and the possible behaviors of other actors for the success or effectiveness of the action. It was the formal rationality of a system which determines the conditions of success and efficiency and what they mean. Weber questions whether the self-interested instrumental rationality even in the market serves to really subjectively perceived self-interest of the individual. And his answer is no.

The freedom, however, was much more limited in the sphere of values. Under the modern conditions, individuals were not only taking a particular type of instrumental action but also they get more and more inclined to be instrumentally rational. Not only to choose a value but also to believe in a chosen value was difficult. Not only the cost of believing a value was too high but also to take the responsibility of the possible irrational consequences that such a choice would create was too heavy in an instrumentally rational world. Loneliness of the individual was accompanied by meaninglessness of his life. Individuals were free but too weak in front of the rationality that exceeds its aims. The means were dominating the ends; the systems created by individuals were creating a proto-type of individual; departmentalized life was being reflected in fragmented individuals. The hybrid form of rationality, which is called 'purpose rationality' and would combine value-rationality with instrumental one, was instrumentalizing the values and human beings instead of giving them the highest place at the action.

In addition to freedom, the modernity and rationalization brought forward equality among individuals. Equality which is a natural product of universality of human reason in Enlightenment thought comes with rational systems in Weberian sociology. Modern orders were the symbols of impersonality and objectivity. They were free from all types of subjective decision-making based on emotions, traditions or values. They are rule-bound systems and function according to cold logic of formal justice. Neglecting all subjective elements, they stand at an equal distance against everybody. This is the equality definition of modernity and is especially valid for economic, legal and administrative systems. On the one hand, they happily indicate that all kind of arbitrary and subjective use of power, personal privileges, irrational

regulation have ended. At the age of 'the rule of the rules, there was no more 'special treatment', not people for other people but the rules according to facts would decide.

On the other hand, formal equality was not the same with substantive equality and impersonality of the orders were working for new 'privileged's. Demands based on some values may not be satisfied by the new orders since values cannot be measured with some objective standards. Formal rationality can only accomplish what is possible but cannot answer what should be done. Any substantive rationalization effort would result at the end, with another type of substantive irrationality from another value-based point of view. In short, no real 'justice' was possible since it is not possible to define it and to know the objective means to reach it. Yet, Weber's formal equality was not as formal as he intended either. The formal rationality of the modern social and economic order was not neutral with respect to the values and interests of different social groups. Maximum formal rationality favors economically powerful groups.

This gloomy picture of modernity drawn by Weber creates some suspects about his original idea about the modernity- whether he defends or accuses modernity. Actually, his pessimism for the destruction of rational structures of modernity and for incompatibility of formal rationality with substantive rationality reaches to such a level that one considers whether Weber exaggerates the situation or overestimates the power of rationality. It almost turns into a fallacy of Weber: he derives from 'empirical is' a 'cannot be done', and from there a 'should not be done'. He interprets the formal rationality of occidental world, which is a product of contingent historical conditions, as a rule for social systems not to attempt to adopt any substantive criteria since it may damage the development that is reached by the Western civilization in terms of rationalization. Pessimism about the dilemmas of modernity also comes from the perception of only two alternatives by Weber. Either return to pre-modernity and become irrational and subjective again or tolerate the iron cage of modernity. The solution in the midway is refuted by Weber. Subjectivity of values makes the substantive rationality irrational for system rationality. Only area, these two rationality types may be made compatible was politics and only by a heroic individual who would become a leader of the nation. If ever Weber considered a way-out, it was for Germany. However, pessimism of Weber partly also originates from his mistrust in masses and ordinary people. People were not inclined to be value-rational at any age of history.

Value-rational behavior was a rare case. They were generally too emotional, too irrational and too weak.

In the light of these explanations, it may be concluded that the modern life was not regulated only by a rational authority, it was under domination of rationality. Therefore, it is not possible to understand the changes in political sphere without understanding the developments in the sphere of economics and law. In this sense, domination was everywhere. There is a special place of capitalism in the shape of modernity. For Weber, capitalism is the most fateful force of our modern life. He writes as if there is no other possible economic system except capitalism since other approaches are based on substantive rationality which uses other criteria that do not belong to economic order - the scales of ultimate values ethical, political, utilitarian, hedonistic, feudal, egalitarian to measure the results of the formally rational economic action. The formal-rationality oriented to profit-making and war-like competition of the market is associated with a system of domination: domination of the appropriators of the means of production over the others. It is not the consumers that would affect what will be produced and at which price since their demand is largely directed by the powerful suppliers of the market. At most, what will be produced may sometimes be determined by a specific income group which has the purchasing power. On the other hand, other group in the market, namely labor, is only formally free due to its extremely weak position within this power conflict and submits to the enterprises.

Domination of capitalist system over the individuals which loses its protestant spirit is a very vivid example of limitation on individual freedom. Although capitalistic action serves to a false self-interest, namely aims only more profit-making, why individuals still behave in accordance with system rationality is explained by Weber as follows. Economic rationality creates regularities and uniformities of social actions even incomparable to what any normative system or structure could create. Whenever economic sphere occurs as an autonomous sphere with its own independent rules, structures and rationality at the end of a rationalization process, system rationality overrides the personal rationality of the individuals. Weber tells us that the capitalism of today educates and selects the economic subjects which it needs through a process of economic survival of the fittest. This educational process comes basically from the risk that an individual has to take if he does not adapt to the economic system. Those who

do not follow the suit had to go out of business. Once the system is totally autonomous, it does no more necessitate the conscious acceptance of maxims of capitalist culture by the individuals. The capitalistic economy of the present day is an immense cosmos into which the individual is born, and which presents itself to him, at least as an individual, as an unalterable order of things in which he must live. It forces the individual, in so far as he is involved in the system of market relationships, to conform to capitalistic rules of action.

One sphere which developed in interaction with economic sphere has been the legal sphere. However this sphere was at the same time directly connected to the modern type of authority, therefore to the modern state. The legal/rational authority of modernity was concretized in the modern state with the centralization of law as state law and with an administrative staff which will ensure the authority of the state and of its law through application of coercion for obedience. Therefore, the development of modern state and development of modern legal system in Weberian sociology are inseparable processes. The authority of state is the authority of law at the same time since it is 'the modern rule of rules'. Modern legal systems are centralized systems of rationally established and hierarchically ordered rules. As the other systems, the most distinguishing characteristic of modern law is its formal rationality. Modern law is autonomous, consciously constructed, general, and universal. It mostly owes its systematic and universal character to formal rationality.

Modern law separates activities of law-making and law-finding from each other. If law-making is the creation of general norms and law-finding is application of these norms to particular cases and to concrete facts, then every type of adjudication working as administration in the sense of free decision from case to case is irrational. In other words, legal rationality is the degree to which a legal system is capable of formulating, promulgating, and applying universal rules. Legal authority governs with objective and rational rules and once the rules are established they are applied to every one equally and in the same way. In judicial or administrative application of law, subjective factors are eliminated, legal security is ensured by not creating new rules case by case and by interpretation of already existing laws and facts according to inner logic of the legal system. Universality and impersonality of law ensures formal equality, formal freedom and formal justice.

There are many factors which played role in the systematization and rationalization of law. In addition to economic factors, political factors, legal strata, and intellectual factors play a large role. Law was formally rationalized around some core concepts such as the concepts of right and contract. That radically diverges Weber from the Enlightenment philosophy is his analysis of economy-law relations in development of these concepts. The present-day significance of contract is primarily the result of the high degree to which the economic system is market-oriented and of the role played by money. Additionally, both the scope of such arrangements and of contractual freedom recognized and allowed by law expands together with the expansion of the market. Here the decisive role of interest groups (especially those most powerful ones who have market interests) may be observed on modern substantive law. Their influence predominates in determining which legal transactions the law should regulate by means of power-granting norms (rights).

Economic interests necessitated the unification and monopolization of law by the modern political organization and abolishment of the legal particularism arising from the “special law” of law communities. Particular laws and privileges have come to an end by the emergence of modern state. Two leading forces, capitalism and bureaucratization led to formal rationalization of law, under the state monopoly. Unification of law has brought about the principle of formal equality. Formal equality has provided the universal application of general legal rules to everybody, thereby abolished the privileges of particular individuals. Additionally, the awareness of complex conflicts of interests to be resolved by legal machinery have influenced the systematization of law and intensified the institutionalization of the polity. Actually, both contractual freedom and systematization of law have similar kinds of results in favor of economic life. They both reinforce the predictability of the results of economic actions and transactions. The probability of fulfillment of expectations facilitates instrumentally rational actions which are the backbones of economic order. At the end, the formal mode of law serves the interests, especially economic interests, of the parties concerned. The formal rationality of legal order, to the extent that it is influenced by the economic factors, aims a similar kind of calculability, prediction and objectivity. The tempo of modern business communication requires a promptly and predictably functioning legal system.

Evidently, Weber does not consider the economic factors as the sole determinant of legal structure. He frequently emphasizes the responsibility of legal doctrine, of specialists, of legal techniques and of political organizations and actors. Formal rationalization of law has been conditioned directly by those persons, who are in position to influence by virtue of their profession the ways in which law is shaped and thereby, the prevailing type of legal education. Those people were the legal specialists, practitioners of the law concerned with adjudication, official administrators of justice, occasionally priests, private counselors and attorneys, professional lawyers and legal scholars. Their main role was development of mode of legal thought in one or another direction. Political influences occurred when administrative officials and the prince had interests in abolition of estate privileges and in growing predominance of formal legal equality and objectively formal norms. In addition to the prince's power interests, the reasons were both the technical requirements of administration and the personal interests of the officials in the orderliness of the law through uniformity so that they could have the clear conditions of employment and career chances. Of course there was another group who desired more rational, calculable and privilege-free legal system, economic interest groups. Since the princes had fiscal and political power interests to favor these groups, the alliance of monarchical and bourgeois interests combined with the bureaucratic needs led towards the formal legal rationalization. The other developed law systems in the Occident such as Roman law, Natural law and Canon law have been quite influential in the legal rationalization through systematization in the Occident.

By these explanations, Weber disenchant the concept of law which was abstracted and mystified by the Enlightenment philosophy. He attempts to show us that the content and form of law may not be independent from the concrete conditions, the active and powerful groups of society and from material or ideal interests. Weber's writings on natural law even more disclose the transformation of the concept of right and the principles of Enlightenment philosophy by the development of law as a modern system. It is in a sense re-interpretation of the bases of legitimacy of the legal authority. Weber does not believe that natural law and the rights may be legitimacy base of modern law.

The relation of individual with the legal system shows the main characteristics of modernity. Law of the modern ages with its high formal rationality ensures at the

same time a high level of formal equality and formal freedom. However, there is a close connection between economic order and legal order, and legal order is not frequently independent from the capitalistic relations of modern age. Weber attempts to show us that formal equality and freedom provided by law do not always mean equality and freedom in the social reality and, that formal rationality of modern law is accompanied by substantive irrationalities. Concerning formal equality, Weber claims that modern law has created a new great mass of legal particularisms although the claimed objectives of effective powers in the beginning were to extirpate every form of associational autonomy and legal particularism. In this sense, the formal equality in terms of generally and equally applicable norms functions in practice in quite opposite way.

On the other hand, formal freedom of modern law is centered on the principle of freedom of contract since it grants to individuals autonomy to regulate his relations with others by his own transactions by agreements, the content and form of which are dependent on individual choice. Although it may be regarded as a decrease of constraint and an increase in individual freedom, it is only formally correct. Weber suspects whether formal freedom immensely extended by modern law indicates to an actual increase in the individual's freedom if the freedom is conceived as to shape the conditions of one's own life or whether life has become more stereotyped by this legal development. Formal freedom of contract by no means makes sure that these formal possibilities will in fact be available to all and everyone. Such availability is prevented above all by differences in the distribution of property as guaranteed by law. Formal freedom might mean a relative reduction in the coercion due to a legal order composed of few mandatory or prohibitory norms and of many freedoms. Yet, the same order can lead to both a quantitative and qualitative increase of coercion, even of authoritarian coercion in its practical effects, depending on the concrete economic order and especially on the property distribution.

Formal justice, as formal equality and freedom are, is directly under the influence of economic conditions and found substantively irrational for the consequences it produces in practice. By formal justice, Weber refers to the modern adjudication process in which the interested parties have the maximum freedom to represent their formal legal interests. The formalistic adjudication is no more in the quest of right decision but of finding the truth. Since it is transformed into a mere

contest between litigants with considerations of concrete expediency or equity, it cannot answer the substantive demands of a political or ethical character. While formal justice legalizes the unequal distribution of economic power, it contributes to the further concentration of economic and social power. In all these cases formal justice, due to its necessarily abstract character, infringes upon the ideals of substantive justice.

b) Weberian Theory of Legitimacy

According to Weber, domination (authoritarian power of command) is the probability that a command with a given specific content will be obeyed by a given group of persons. Weber urges us that a ruling organization exists insofar as its members are subject to domination by virtue of the established order. An established order inherently carries domination in its nature. Domination in the nature of an established order, especially of a rational one results from its administrative group. If it possesses an administrative staff, an organization is always to some degree based on domination and in general an effectively ruling organization is also an administrative one. The fact that the chief and his administrative staff often appear formally as servants or agents of those they rule naturally does nothing whatever to disprove the quality of dominance. Weber adds that this is valid for almost all cases, including democracies since dominance means assured power to issue commands and a certain minimum of it is necessary for every case.

An order may regulate the social actions of individuals through their belief in the existence of a legitimate order. The validity is a question of probability and depends on how much the action will really be guided by such a belief. Validity is a gradual concept and depends on the degree of acceptance of an order as existing by the society. It is mainly concerned about how the people perceive the order. Because of that, order may be treated valid by some people only because they think or believe that the order exists, not necessarily because they believe that it should exist. They believe that the order exists since they believe that some other people in the society also believe that the order exists or should exist. Therefore they think that violation of the order will cause them some costs as punishment or coercion. Weber calls this social consensus on the validity of the order as objective validity. However there is still a minimum requirement for objective validity: it is that at least some people should believe that the order should

exist and orient at least some of their conducts according to this belief, beside other motives effective on their actions. This minimum requirement is the belief in legitimacy so that the order is valid not because it only exists but also it exists rightly, or should exist, on some accepted grounds. This minimum requirement may be even minimized to the officials, to the people responsible to enforce the order and to execute the orders of the authority. It may be enough that only they have a belief in legitimacy of the order and they obey the rules because of that belief in addition to their material or ideal interests.

The approach of Weber to legitimacy at first look indicates that the bases of legitimacy of an order are at the motives of the obedience. Weber considers obedience from two perspectives: from the perspective of the rulers and of the ruled. On the side of the subjects, they can orient their actions regularly in accordance with the rules or commands of the order for a variety of diverse reasons: all the way from simple habituation to the most purely rational calculation of advantage. The motivation behind the obedient action may be the ruled's own conviction of its propriety, or his own sense of duty, or fear, or 'dull' custom, or a desire to obtain some benefit for himself. From the perspective of the ruler, the command may have achieved its effect upon the ruled either through empathy or through inspiration or through persuasion by rational agreement or through some combination of these three principal types of influence of one person over another. In the former, Weber lists the subjective motives to obey for the ruled; in the latter he refers to the means to create the motives of obedience by the ruler.

Among these motives, only the sense of duty, and a voluntary compliance (an interest in obedience, based on ulterior motives or genuine acceptance) may be the sign of a belief in legitimacy. This only forms a sufficiently reliable basis for a given domination. One significant point is to comprehend that the belief in legitimacy itself is not a motive of action for Weber. It has only a mirror image as a motive, which is the sense of duty or as feeling of obligation or as an ideal motive. Weber states that so far as it is not derived merely from fear or from motives of expediency, a willingness to submit to an order imposed by one man or a small group always implies a belief in legitimate authority of the source imposing it. The basis of every kind of willingness to obey is a belief through which authorities are lent prestige. The belief in legitimacy of

an order only shapes the attitude of the subject towards the order in overall and therefore the rules of order or the commands of the authority guides and orients his actions so that time to time it does not even create a mirror motive but only as an idea of order validity it gives a direction to the actions beside the direct motives of the action.

From the perspective of ruler(s), legitimacy is the ultimate grounds of the validity of domination and, therefore, the way to assure the continuance of their dominance on a reliable basis. More importantly legitimacy is an example of human need for justification of the privilege and inequality. What is inherent in any power-relationship is the generally observable need of any power, or even of any advantage of life, to justify itself. In this context, legitimation of the authority are the grounds on which the claims of obedience by the master against 'officials' and of both against the ruled are based and they determine the empirical structure of the domination. Legitimacy claims of the rulers may not be effective as a motive on the actions of subjects actually this is generally the case, Weber asserts. The performance of the command may have been motivated by different material or ideal interests or habits. Every case of submissiveness to persons in positions of power is not primarily (or even at all) oriented to the belief in legitimacy. On the other hand, the methods of legitimation, whether effective or not, are significant for the ruler for a number of reasons. They confirm the position of the persons claiming authority and secondly they help to determine the choice of means of its exercise. The sociological character of domination will differ according to the basic differences in the major modes of legitimation.

The reasons which create a sense of duty towards the authority among the subjects, but especially among the officials may be tradition, emotional faith, value-rational faith, belief in legality of positive enactments (either because they derive from the voluntary agreement of the interested parties or because they are imposed by the authority which is held to be legitimate). At this base which is the most common form found in the modern world, what is significant is the formal correctness of the enactments. Therefore his division between the voluntary and imposed order is a weak one, as Weber also concedes. On the other hand, Weber categorizes the authorities according to the legitimate grounds they base their authority. Three types of authority are traditional, charismatic and legal authorities.

From the perspective of the authority or rulers, it is a natural tendency to justify their powers and privileged positions in the eyes of others or of the subjects. It is a necessity to explain people why they do obey, they have to obey to some people in the power and they have to be oppressed when they disobey. On the other hand, it is a way to guarantee the pacification of people and the stability of domination, beside the coercive tools to be used. The ruler's justification attempts are named by Weber as the bases of claims to legitimacy. The authorities have two main domination apparatus in their hands: administrative apparatus and coercive means. Yet, as Weber repeats frequently, these are not absolutely reliable means for a stable order. On the one hand, the power-holders have a natural desire to justify their positions and on the other hand they had to ensure at least the minimum validity requirements subjectively for a number of individuals in order to create objective validity or the consensus on the validity. In some extreme situations, as we mentioned before, this group of people who subjectively find the order valid and legitimate may only be the administrative staff and that could be enough when the order is supported (guaranteed) by the coercive means. In such a case, administrative staff would have a sense of duty, while the subjects would have the habit of obedience.

The problems and questions occur when these different perspectives to legitimacy are to be melted in one pot. But the key approach to the questions may be to understand that they can never be put in the same pot and that motives of obedience are separate from the belief in legitimacy from the perspective of the subjects. First of all, it seems that the claims of the authorities to legitimacy do not play a role, or at least a substantial role, in guaranteeing the obedience. On the contrary they have almost a retroactive influence after or during the obedience that are realized by several other reasons and motives, to justify the domination and corresponding obedience. They only try to support the social consensus on the objective validity of the order. That's at the same time the reason why the bases of legitimacy for subjects and rulers are not same or not overlapping entirely. The subjects may obey to the norms or rules of the order because of various motives and these motives of course correspond at the end to the main categories of social action (traditional-habitual, affectual, value-rational and instrumentally rational-self-interest). The belief in validity of the order refers to a

situation that the subjects treat their own situation of obedience or of being dominated, in general normal or legitimate.

To clarify the concept of legitimacy, I should add that the dominant motive in each individual case of obedience is not necessarily the mirror motive of legitimacy base chosen by the subjects or that it would play a role at all. It is at the same time not necessarily the bases of claims to legitimacy by the rulers correspond to the motives of obedience or the bases of legitimacy of the subjects. Now in this sense, one individual may find the authority legitimate since he believes that it is value-rational, but in a specific case he obeys just only with the motives of self-interest and at the same time this authority bases its claim to legitimacy on the traditional grounds. Another individual may not believe in the legitimacy of the order at all but may go on to obey for several other reasons. At the end, overlapping of the bases of legitimacy from the perspective of authority and the subjects refer only to the minimum requirement of validity.

Weber himself in several places repeats that the categories he presents are the pure-types and empirically they are found always in heterogeneous ways. Neither the authorities nor the subjects purely belong to any of these pure types. For example, submission to an order is almost always determined by a variety of interest and by a mixture of adherence to tradition and belief in legality; unless it is a case of entirely new regulations. The composition of belief in legitimacy is rarely simple. For example belief in legality is never purely legal but also habitual so it is partly traditional. Even it has a charismatic element arising from the success of the rule. For bureaucratic authorities, although they time to time approach to the pure type, it is seldom that they may become stable without a head that has a charismatic authority.

ba) Legal Authority

Since legal authority represents the modern type of authority, I just like to explain it briefly. One of the most distinguishing features of rational authority is its impersonality. So obedience is not to the personal authority but to the system and norms. It is not an ordinary system but a system of consciously made rational rules. The persons in the power have their position by designation of the rules and their power legitimated by that system of rational norms. Thus it is domination by virtue of

“legality”: the legitimacy claims of the authorities are based on the belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). From the perspective of the subjects, the basis of legitimacy may be again the belief in legality: the subjects comply with the positive enactments which are believed to be legal in the sense that they are formally correct and have been made in the accustomed manner. Such legality may be treated as legitimate by the subjects either because it derives from the voluntary agreement of the interested parties or it is imposed by the authority which is held to be legitimate and therefore meets with compliance. Weber creates a self-confirming circle or at least the circularity of legal authority: legal rules are treated legitimate since they are imposed by a legitimate authority and this authority is legitimate since the legal rules so designate.

Legal authority has first of all a formal rationality. There are rules to make the rules. These are the main rules, or constitutional rules underlying the order. Any given legal norm may be established on the grounds of expediency or value-rationality or both. So the legal norms are either value-rational or instrumentally rational or contain both in a hybrid form. The other reason is linked to obedience. Obedience is given, or claimed so, to the rules, not to the persons. That indicates the absence of any emotional or habitual stimuli. Presumably, not only the rulers but also the ruled act rationally in the system.

Rational authority with bureaucracy is only fully developed in the modern state and in the capitalist economy. Specific characteristics of modern bureaucracy are clear division of competences, powers and functions by the rules; highly hierarchical structure; interactions based on the written documents; specialization and training which is necessary for the posts; the impersonal management of bureaucracy by the abstract and general rules. The officials have a special relation with their posts. For them, it is not only a source of income but rather a specific duty of fealty to the purpose of the office in return for the grant of a secure existence. One of the decisive factors for the development of bureaucracy is economic and technological developments since they indicate an intensive and qualitative expansion of the administrative tasks. Under modern conditions, the bureaucratic organization is technically superior to any other form of organization. It provides precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material

and personal costs. Another characteristic of modern bureaucracy is its objectivity. The administrative functions are carried according to purely objective considerations.

bb) Value-Rational Authority or Right-based Domination

Weber involves value-rationality in his typology on bases of legitimacy for the ruled. There, he clearly separates the legality from value-rationality and gives the natural law as only example of value-rational bases. Yet, he does not consider it influential enough on the conduct of modern men. Any justification of political power by reference to substantive rationality is precluded by the nature of capitalist society. Value-rational faith is listed among the guarantees for legitimacy of an order. However, in the same text, Weber argues that it is irrelevant for the definition of legal order whether the subjects treat the order or the legal norms valid since they find it ethically correct and value-rational. He maintains that legal rules may have been established entirely on the grounds of expediency.

In short, the legal authority is not based on the value-rationality but on accepted procedures and formal rules. This has created an important discussion in the literature. One possible source of modern law could be the rights and principles that originate from the Enlightenment philosophy and natural law. However Weber finds this basis too weak and abstract in front of the harsh reality of modernity. He does not refuse that natural law has provided a ground for development of modern law systems but the axioms of natural law has been formalized so much that they are unable to perform as a yardstick to evaluate the positive law.

According to Weber, modern natural law is characterized by one core axiom, that every human being has certain rights. Although its origins vary from the rationalistic sects to Magna Charta, it has taken its last shape through the rationalistic Enlightenment of seventeenth and eighteenth centuries. However it contains very formal elements such as contract theory and more particularly the individualistic aspects of that theory. In political sense, what Weber refers is social contract theories on which the legitimacy of law and state has been rested. The essential elements in such a natural law are the “freedoms”, and above all, “freedom of contract”. The voluntary rational contract became one of the universal formal principles of natural law construction. In

economic sense, it points out freedom of contract, a system of rights acquired by purposive contract and full development of right of property.

Formally natural law has strengthened the tendency towards logically abstract law, especially the power of logic in legal thinking and provided the positive law of Revolutionary period with the legitimate base of “reasonableness”. On the other direction, the codifications of the Revolution strengthened the formal natural law by guaranteeing the individual rights vis-à-vis the political power. Weber does not neglect that the natural law has provided the legitimacy bases of positive law, yet he underlines that its legitimizing effect get weakened and even vanished in front of the ever-expanding instrumental rationality. In short, it is no more convincing enough under modern political and legal conditions. He does not believe in a particular dignity of liberal constitutional institutions and values in themselves, including human rights and in the basic liberal idea that the rule of man by man had been displaced by the public opinion or by the rule of law.

Weber’s claim is that value-rationality is more likely to give rise to legal domination. Weber mentions the French Civil Code as an archetype of formal law in part based upon natural law postulates. However it was precisely the postulates of Natural law which created the basis for formal rationality in the political and economic spheres. Weber here shows us a transformation of value rational systems into the form of legality and of domination. Weber attempts to distance himself from the Enlightenment’s hypostatization of human rationality. He shows us that how the principles of Enlightenment was disintegrated under the impact of nineteenth century class ideologies. He dissolves the metaphysical eighteenth century conception into its component applications.

Although Weber admits the role of the natural law in the origins of positive law and its legitimizing power especially during the revolutionary period, his claim is that natural law in its different appearances lost its legitimizing capability, afterwards. As to the legitimacy bases of the modern state and of the modern legal orders, belief in legality replaces the legitimacy arising from value-rationality and from natural law which is typical example of value-rationality. Also something inherent in the natural law has a role in its regress: compared with firm beliefs in the positive religiously

revealed character of legal norm or in the inviolable sacredness of an age-old tradition, even the most convincing norms arrived at by abstraction seem to be too subtle to serve as the bases of a legal system. On the other hand, the irresistible advance of legal positivism has some negative consequences for law and society. The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed as the product or the technical means of a compromise between conflicting interests.

Weber admits that every state has a value system ordering the matters. The values may be welfare-based, constitutional, cultural, etc. Nevertheless, these values do not constitute an absolute system of values that may overcome the formal rationality of the modern legal orders and that may provide the basis of legitimacy. These values may create only some legal norms that are based on value-rationality and obedience may be given to such norms due to value-rational reasons. Additionally, modern legal orders have some principles which they share with political discourse such as equality, freedom and human rights. However Weber takes these principles as formal characteristic of modern legal orders, rather than substantive values. These principles originally belong to formal natural law and provide the basis of capitalist economic order. Under the dominant formal rationality of the modern orders, interpretation of these formal principles substantively only create formal irrationalities in the system.

bc) Democratically legitimate authority

Weber was pessimistic about democratically legitimate authority as well as the value-rational bases of modern orders. The reasons may be understood if Weber's thoughts on political sphere of modernity and democracy are elaborated. For him, only proper type of democracy and it always tends to shift into aristocracy. Mass democracies of modern age may hardly be called as democracies. They are more hybrid forms of mass administration and they combine some democratic elements such as elections and parliaments with charismatic and bureaucratic elements. They tend to become bureaucratic dominations. Rationality, modernity, capitalism, bureaucracy, developing technology, increasing complexity of life and specialization of the functions, differentiation among the social statuses of the members create insurmountable

obstacles before the democracy. People have neither enough spare time nor enough knowledge to be engaged in, or even just to participate, in the politics. In any way, irrational masses of democracies cannot and should not actively participate in politics. Many details of the life in the mass states are to be regulated by bureaucracy, therefore subject to its hegemony and control. Technical developments make the specialists hidden rulers over the people. Leave aside the people, even the elected politicians and leaders are very weak in front of the expertise of bureaucrats. At the end, Weber does not consider democratic legitimacy worth to categorize a legitimate authority type.

Representation at the mass democracies is established on power interests and bureaucratic domination of political parties. Both the representatives and the party functionaries tend to consider the representative not as the servant but as the chosen 'master' of his voters. Although there are some attempts to subject the deputy to the will of the electors, they result only in more empowerment of party organizations since only they can mobilize the people. Modern parliamentary system does not represent the will of the governed, at least properly and thoroughly. In modern political systems, the inactive masses of electors or voters become merely objects whose votes are sought at election time and their interests are taken into account only when their neglect would endanger electoral prospects.

The universal suffrage which is called passive democratization by Weber has led a transformation not only of the parliaments but, also and especially, of the parties. Party systems transformed from parties of honoratiorees to highly bureaucratized mass parties. The process was initiated by the fact that the universal suffrage necessitated much more continuous and strenuous electioneering than ever known to the old parties of honoratiorees. For the parties, it meant the rationalization of the electoral campaign techniques, hence bureaucratization of the party central and local offices. The problem before the parties was the problem of administration of mass associations. The solution was simply the trained officials as the core of apparatus since their discipline is the absolute precondition of success especially for the political parties. Bureaucratization of the parties creates a group of officials who handle the work of the party continuously. These professional politicians outside the parliaments take the organization in hand. Formally, a far going democratization takes place. Yet, this democratization is only a formal one. it does not mean an active democratization of the masses or not even of the

party members, i.e. that they actively participate in the party decisions. On the contrary, power actually rests in the hands of those who, within the organization, handle the work continuously. Otherwise, power rests in the hands of those on whom the organization in its processes depends financially or personally

Bureaucratic threat to mass democracies also comes from the bureaucratic apparatus of the authority itself. Bureaucracy is the highest point of formal rationality in the administration of the modern state and the most important instrument of the politics. However, bureaucracy may and does turn from being a tool of domination into being a dominating power itself. Its power comes from knowledge, expertise and official secrets as well as its detailed control over the life of people. As in other spheres of life, formal rationality of administration in political sphere is almost indestructible. Any attempt for more substantive rationality in administration would necessarily result in irrationalities. Yet, its formal rationality is not as objective as it seems. In a close relation with capitalism, it gives support to certain interests of business as well as serves to itself in terms of strengthening the bureaucratic power interests. On the other hand, the iron cage of bureaucracy day by day threatens to become a dystopia for the humanity and emancipation.

Considering the power position of bureaucratic apparatus, Weber claims that once bureaucracy is fully established, the resulting system of domination is practically indestructible. Now again, as observed in other systems, the bureaucratic order becomes an independent power over the individuals with its own rules. The irreversibility of the bureaucratic administration also results from the needs of mass states and the organization of life bureaucratically. Bureaucratic expertise, knowledge and specialization re-regulate the life so much that a modern society could no longer function without it. Above all, the habit of obedience in human beings is an important guarantor to the public order. The relationship between the bureaucratic machinery and the individual, governed or official, is habitual and blind obedience. Weber emphasizes the settled orientation of man for observing the accustomed rules and regulations so that any upheaval against that machinery would end up with a similar system. The system of files is less vital than the discipline of officialdom. The settled orientation of man for observing the accustomed rules and regulations will survive independently of the documents.

In addition to all these, the negative approach of Weber to democracies at modern age comes from his distrust in the masses. At this point, his elitism combines with the despised view of Enlightenment about the ordinary men and masses. This point, according to me also reflects the dominant but unconfessed paradigm of modern politics. For Weber, the mass is handicapped by an inherent and crippling disability: it is 'irrational'. The demos itself, in the sense of a shapeless mass, never 'governs' larger associations, but rather is governed. The masses are not like the individuals in politics. According to Weber, the masses are unreliable and irrational. The irrational characteristics imputed by Weber to masses are myopia, homogenization, spontaneity, fitfulness, disorganization, passivity and explosive emotionalism. The mass only thinks in short terms and always exposed to direct, purely emotional and irrational influence. These characteristics are direct opposite to 'rational' as perceived by Weber. The masses behave with the crowd psychology. The individuals' actions are strongly influenced by the crowd. In the same way, the behavior of an individual is influenced by his membership in a 'mass' and by the fact that he is aware of being a member. The easier accessibility of all unorganized 'masses' to emotional influences makes them politically exploitable. They may follow someone imprudently. In fact, masses are likely to demand a leader and to follow a charismatic leader blindly. Under a charismatic authority, they actually may behave according to their impulses like animals. Therefore the masses are, and may be, politically manipulated, in negative or positive way.

Above all, it seems that the main problem relating to masses is their substantive demands and highly emotional understanding of justice, which in turn may entail a number of formal irrationalities in the life-spheres. The formal rationality of spheres functions in three ways, in relation ordinary people and masses. First, as system rationality, they dictate themselves over the individuals and their lives. In this sense, it is only possible to talk about formal freedom of choice in many spheres, not more. Additionally, it is impossible for the individuals to act against the formal rationality, or possible only at the expense of self-destruction. In this sense, the formal rationality forces individuals to be instrumentally rational. Secondly, the formal rationality of the spheres (especially of the legal sphere) refers to a kind of technical rationality in a closed system with its own language and coding, which requires special expertise to

comprehend. In this sense, the formal rationality has a function of isolation of ordinary people. Ordinary people hardly understand the sphere's rationality and therefore may have no influence on the decisions taken within the sphere. Consequently, the formal rationality has a weakening effect on democracy, concerning the spheres of politics and law. The third function of formal rationality is to restrain irrational mass emotions for the purpose of opening up individual opportunities and liberating capacities. Formal rationality at least provide the minimum conditions for the individual freedom, although formally.

Under these conditions as perceived by Weber, it is not surprising that the democratic legitimacy cannot be a strong base of rational authorities of the modernity. However, he proposes a model which can both balance and even use the irrationality of the masses and can orient their emotions to some common values and at the same time can limit the power-aspirations of and superimpose the value-rational objectives on the instrumental rationality of bureaucratic domination. This is the model of plebiscitary democracy and may be possible only with a strong parliament which may educate and prepare the potential political leaders and prepare the public to put control over the bureaucratic apparatus together with the leader. However this leader also should be prepared to follow the ethics of vocation. At this point, Weberian elitism reaches to its highest peak.

The politically responsible leader is almost a Plutonian ideal. He will be able to be the most free individual in the society. He does not live in the iron cage. He is not only economically independent from the system but also independent from the objectifying influences of formal rationality over the minds. He will be strong enough to choose values and objectives not only for himself but for all society without the help of his reason and despite to the conflictual and power-centered characteristic of political sphere. He will have the passion and emotions to believe in these values and experienced and charismatic enough to convince the others. He will act according to the ideal balance between value-rationality and instrumental rationality. Meaning that he will be realistic enough to take into account and evaluate the surrounding conditions and facts and he will be calculative enough to consider the consequences and secondary consequences of his decisions for himself and others. At the same time, he will be ready to take the responsibility of those consequences. In this context he is still be able to

follow his value-objectives with a personal belief and passion. For Weber, the most convenient value-objective of a leader would be national objectives. The leader should strengthen the national feeling among the society. Since it is only this sentiment which may unite people under an objective equality and which may ensure their support for the policies that the leader would follow on behalf of the society. The feeling of belonging and the value of nationality is also the most convenient one for the modern conditions. The objective side of the national idea is found in its subjectively sharable characteristic by anyone, independently from his personal status. The sentiments of prestige awakened by the national attachment may be shared by anybody, who is a member of the group. The sense of ethnic honor is a specific honor of the masses, for it is accessible to anybody who belongs to the subjectively believed community of descent.

In Weber's theory, the idea of nation belongs to the sphere of values so that it is directly linked to value-rationality. Yet the concept also has direct connotations with the state and its power interests, therefore it is also linked to instrumental rationality. Nation for its advocates stands in very intimate relation to prestige interests and national attachment creates sentiments of prestige for everybody. Especially those who hold the political power are at the same time strict and reliable advocates of power prestige of the state. Reason is probably that more powerful state would mean also more individual power for those in authority. The national attachment also creates a longing for cultural prestige, especially among those who usurp leadership in a *Kulturgemeinschaft*, namely intellectuals. For them, the idea of nation contains the legend of a specific culture mission. This mission necessitates justifying and promoting the significance of nation in the superiority of the culture values. The activity of cultural cultivation confers to intellectuals also a responsibility of cultural and political education of people. In Weber's words, the intellectuals are specifically predestined to propagate the national idea.

c) the European Union and its legitimacy deficit from Weberian look

The European Union which has been studied under the conclusions arrived from the analysis of Weberian theory has led me to conclude that The Union still under the dilemmas of modernity. The European Economic Community was established the

beginning on a kind of purpose rationality and even more of instrumental rationality. In fact by the establishment of such a community of States, four life spheres in the sense of Weberian sociology, namely economic, legal, administrative and political spheres have come into being. However, all the spheres have been constructed around the economic rationality, since the core and main aim of the Community was economic. It may also be seen only as the replacement of liberal national economic systems by one liberal supranational economic system: meaning that although the Communitarian aim is the utility of all, this would be accomplished by the invisible hand of the Common Market. I like to present my conclusions in four periods.

ca)The Period of Establishment

The European orders came into being through the Treaty of Rome, the supranational institutions, secondary legislation and implementation. They gained character of systems although they stayed largely interrelated / interdependent to each other. However, without the character of supra-nationality, the Community never might be able to create its own spheres with their own inner logics. Concerning the legal order, although the Community started its life as an international organization almost in the traditional sense, it actually transformed into a new and autonomous legal order on its own from 1963 onwards. This transformation may be explained by the Treaty provisions conferring capacity of supranational rule-making on the Community institutions, by the establishment of a supranational court to interpret and apply the Treaty provisions and by the doctrine of this court. The administrative order has developed under the leadership of the European Commission. The Commissioners are required by the Treaty to be completely independent in the performance of their duties. It stands above the national concerns and work to promote the general interest. It is composed of bureaucrats who are expected to serve only to the interests of the Union. On the one hand, the Commission is a typical example of bureaucratic apparatus as defined by Weber. Its *raison d'être* is the same with the *raison d'être* of the Community. To protect and to promote the Community interests within the limits drawn by the Treaty is the main responsibility of the Commissioners. In this sense, bureaucratic rationality with its highest formal rationality seems to have been designed as an efficient and competent tool in order to reach the Treaty objectives. The European political

sphere was represented by the European Parliament and the Council. The Council as representative of the Member States and as the main legislative organ was very important and powerful. The European Parliament as so-called representative of the European peoples were weak with its only consultation role in the legislative process and in the absence of any popular direct elections at European-wide basis. The Council members were the executives of Member states. Therefore in the beginning the main actors of the political sphere were the governors of the Member States who insists to take their decisions by unanimity.

It may be claimed that the European Community in 60s and 70s has developed into a bureaucratic-legal authority, though supranational, by increasing its competences and regulative effect and by justifying itself with its economic liberal aims. The European order has evolved on the rationality of its founding Treaty. From 1958 to 1986, the main development has occurred in the legal sphere. In this sense, it may be claimed that the first sphere which has proved its autonomous position has been the legal European sphere. Administrative sphere has also been developing but very slowly under the strict control of the political sphere, namely of the member states through the Council. The development of the Community legal order occurred especially with the doctrines of the EJC. These doctrines on the one hand indicates the development of a new legal order beside the nation state legal orders, on the other hand but being related to the former from a Weberian perspective, an increase in the formal rationality of the Community legal order. The systemic evolution of European law was self-referential and resulted from the internal dynamics, almost as if it were insulated from those external aspects. Within the realm of law there was a clear internal legal logic.

The doctrines of direct effect and supremacy provided a more secure economic environment supported by legal coercion for the individuals and for the instrumentally rational economic actions. It strengthens the formal rationality of European law by maintaining its uniform application to all citizens of member states. The combination of two doctrines means that Community norms that produce direct effects are not merely the law of the land but the higher law of the land. The Community seems to be a good example for systematization and formalization of law under economic influences. However, the systematization of the Community law does not refer to a complete abolition of the 'special law' of law communities since each law is supreme within its

own sphere of competence, i.e. the Community law is supreme to the member state law only in the areas belonging to its exclusive competence.

One important legal factor contributing to the systematization and uniform application of the Community law is the judicial review both at the Community level and at the national level. At the national level, a national court may request a preliminary ruling from the ECJ about a question concerning the interpretation of the Treaty. The national courts and the ECJ are integrated into a unitary system of judicial review. This mechanism, thereby, furthers the uniform interpretation of the Community law. In terms of autonomy, it creates two important consequences for the Community legal order. First of all it creates a habit of obedience and respect towards the Community law. Secondly, the community legal order becomes ‘a truly self-contained legal regime’ independent from member state political attitudes.

For this period, especially two theories have explanatory power. One of them is Ipsen’s theory of “special purpose associations of functional integration” and the other is ordo-liberalism. Both theories were established on an understanding of the Community as a technical instrument for economy. It was important to take technically correct decisions with a satisfactory technical knowledge and these types of areas dominated by the technical necessities of scientific and technical civilization are to be administered by an “inner circle” and cannot be subject to political decisions. The Community was executive agency assigned with only technical tasks which required knowledge.

For this period, Community domination was based on formal rationality in many senses and in many spheres. Actually, the main justification for its authority was its formal rationality. It was free from any value choice- moral, political, ethical etc. As completely isolated from political sphere, it was in no need of any political legitimacy for its decisions, except the approval of the Member States, and even not for purely technical issues. If this was a negative explanation for the legitimacy of the supranational authority, serving to interests efficiently and successfully was the positive justification. Remarkably, this positive justification is at the same time definition of instrumental rationality in its pure type, according to Weber. In other words, political legitimation of the Community was its formal rationality and functional legitimation of

the Community was its instrumental rationality- A couple which is inseparable á la Weber.

Attention should be paid on the fact that the justifications for the Community domination could be the justifications for the Member State executives to keep the decision-making power at supranational level, although democratically they were not granted by such a power. As far as important policy changes are made by the Treaty amendments that have to be approved on the national basis by the Parliaments or through referendums, those type purely administrative and technical decision-making could be delegated to Member State government representatives. Additionally, they were in the Council to guarantee the compatibility of the Community interests with their national economic interests under the safe shadow of the unanimity procedure- thereby it was the economic interests of the Member States and the people as economic actors in the market (whether as consumer, labor or entrepreneur) which were served by the Community by promoting the Common Market and reaching to the Treaty objectives. The belief in welfare benefits for all participants justified the integration policy without recourse to non-economic values.

From this perspective, it was common to assume that the EC faced fewer and lighter legitimation requirements than the state. The efficient production of useful policy outputs would be enough. The legitimacy relation was also partly based on the formal freedoms and rights provided by the Community to the individuals. These were economic freedoms and rights which would facilitate the smooth functioning of the Common Market and were supportive for the argument of Weber that the origin of human rights was mainly economic liberalism. The adjudication of the ECJ concerning human rights was interpretation of human rights in the context of market economy. The anti-discrimination clause of the Treaty was intended to provide a formal equality in front of the opportunities that could be presented by the new economic order.

cb) The Single Market Act and after

The need for reforms in the methods of harmonization and in the institutional model led to the adoption of the Single European Act. The SEA was an amendment of the Treaty of Rome, defining the internal market as an 'area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' and setting

a timetable for its achievement by the end of 1992. Additionally, the Member States agreed to move from the unanimity voting to the qualified-majority voting. The Single European Act has been very successful together with a number of secondary consequences of this success. The majority voting has reached its impact by surpassing the impasse in the Community decision-making. Until 1992, most of the hindrances before the Common Market have been abolished by the Community legislation. However the equilibrium in the Community has changed to the advantage of the supranationality, not only due to qualified-majority voting but also due to the Commission heightening status and role in the decision-making; qualified-majority voting greatly enhanced the autonomy of the Community's permanent bureaucracy in Brussels.

It was the period that the administrative sphere has developed its autonomy in many senses. In addition to that, it was a golden period for technocratic rationality at the European Community. Concerning the harmonization and the Community regulation, the expansion of the exclusive competence of the Community has been enhanced into great extent and into areas of which pure technicality is quite disputable. The rise of supranational administrative sphere does not only result from the strengthening role of the Commission in rule-making at the expense of the Member-States, although this is a sign for that the administrative sphere becomes more autonomous. The autonomous development of administrative rationality is also observable in the increase of committees and agencies in numbers and in weight. Although the Comitology originally has begun for containment of the bureaucratic agent by the political actors, it is quite doubtful whether it has been successful in that. On the contrary, it seems to increase the role of technocratic rationality by involving the national bureaucrats into the decision-making process. The agencies have contributed to this technocratic transformation by their completely independent structures based on expertise. The regulatory theoretical model was an attempt to legitimize the growing supranational administrative authority at the Community level.

The new theory of legitimacy was regulatory model with a more advanced technocratic rationality. The reality was an expansion and deepening in the nature of the Community activities, from the realm of negative economic integration into the areas such as environmental and consumer protection, and health and safety issues. The single

market program had just contributed more to the gradual Europeanization of regulatory policies. It has also become apparent that – unlike the mere removal of trade barriers – managing a single market entails a degree of positive action that does not always fit within the neat categories inherited from the past. In one sense, the Community was experiencing just an extension of the executive-technocratic governance that has characterized the development of the modern administrative state at the national level over the course of the twentieth century, due to the growing complexity of policy problems requiring delegation of power to committees and independent agencies.

At supranational level, this type of delegation may be observed at three levels. At the first level, the administrative regulatory powers are delegated by the Member States to the Community as their supranational administrative agency or regulatory branch. At the second level, the delegation occurs from the Council to the Commission which is the administrative organ of the Community and at the third level there is a delegation from the Commission or from the Council to the committees and agencies. As a consequence, regulatory policy readily becomes the domain of experts and corresponds to the Commission's view of its own role as an unpolitical institution with the task of putting forward conceptually solid and scientifically proven proposals for the solution of practical problems.

At the regulatory model of Majone's theory, the legitimacy of the Community was provided by a strict separation of distributive and regulatory policies. What distinguishes the regulatory policies from the re-distributive policies is the difference between political and technical criteria. This categorization is exact parallel of categories of formal and substantive rationality of Weber. Re-distributive policies are evaluated on the political criteria whereas regulatory policies may be measured by purely economic and technical standards. Objectivity is assured by calculations and rational methods in administrative regulation. Powers delegated to the Community institutions are limited to regulatory politics, which are, in Weberian terms, purely formal. Re-distributive social concerns should belong to the Member States and their political authorities. This strict division of the issues of value-rationality from the issues of formal rationality places the complex regulatory issues directly at the sphere of administration and expertise. The latter type of issues requires the highest technical rationality which may be met only by bureaucratic and technical organs.

The legitimacy criteria of the regulatory administration were efficiency and success in reaching to the aims. Actually, these criteria are same with those of instrumentally rational actions and of formal rationality of the economic sphere. Specifically the EC as a regulatory regime was legitimated by its superior problem-solving capacity. This conception of governance was premised on pragmatic arguments and a means-ends type of rationality, where actors were considered to make decisions based on scientific calculations and on a given set of interests. The other pillar of the legitimacy depends on the distinction between majoritarian and non-majoritarian democracy. It reminds the tension between the democracy and the bureaucracy that Weber underlines.

Concerning legitimacy, some scholars advocated that the criterion of efficiency should be supported by accountability. The Community actually suits to Majone's accountability conception. Accountability to elected representatives is only considered as accountability to the Council and sometimes only to the Commission. Accountability and control of administrative sphere is hindered with one of its legitimizing property: namely technical knowledge. Neither Parliament, nor the Council and of course the public may have enough expertise to establish a detailed control over the administrative agents at most of the areas and for most of their functions. There is also a critique that regulatory model works in favor of business and business related interests.

cc) The Treaty on the European Union and legitimacy crisis

It would not be wrong to call the Maastricht Treaty signed in 1992 a turning point for both the Community and the theoretical debates surrounding it: in this text, supranational intervention in national core policies are observed in many dimensions: in terms of objectives, areas, and values. It is the Treaty which establishes the European Union, composed of three-pillar structure, with pillar of the Community, of Common Foreign and Security Policy and of Justice and Home Affairs. The latter two pillars are based on intergovernmental mechanisms. Yet they are important in respect that the European Community is no more only an economically oriented formation but it is a political union in the process of development from now on. Maybe more than those pillars, the discourse of political union was formally and legally uttered by a Treaty and

a concept of supranational citizenship for the first time, for Europe and the world, has been laid down.

The EU 'legitimacy' crisis emerged in the adverse popular reaction to the signing of the EU. Especially in Germany, France and United Kingdom, politically very intensive ratification debate took place. Ratification process of the Treaty has been long and difficult. Although the political elite supported the Treaty, it has met with significant resistance among citizens. While the Maastricht Treaty was rejected in Denmark in June 1992, the referendum result in France in September was a narrow win for the "yes" vote. The difficulties experienced during ratification which is perceived as an open sign of the gap between Brussels and the people inflamed the discussions about the democratization of the Union. In the quest of legitimacy and on the edge of a large enlargement, two more Treaty, the Treaty of Amsterdam and Nice has been signed. But they could not be solution to the legitimacy deficit of the Union.

There are many reasons for unrecoverable legitimacy deficit which goes earlier than the Maastricht Treaty in their origins. The formal structure which provides the basis of legitimacy of Community legal authority has begun to change in 80s. The shift to qualified majority meant that there was no more a guarantee that the 'commands' to peoples of Europe originate from the will of concerned legitimate authority i.e. the national executive of the concerned people. Secondly, the Commission and other administrative bodies were gaining more and more power in the decision-making processes. It was becoming more apparent that all the Community rules were no more under the strict control of the Member States. There was a growing co-authority, namely bureaucratic authority which is composed of Community bureaucrats, experts and technocrats. The third factor which aggravates the second factor was that the regulations of the Community have advanced both in quantity and quality, meaning that the authority of the Community has been strongly perceivable in the daily lives of people. The rising regulative influence of the supranational authority has begun to create awareness and in turn some suspicions about the legitimacy of that authority.

The legitimacy basis of the Community on the other hand was on the efficiency and utilitarian outputs of the supranational policies. However, the efficiency criteria were applicable for an authority over a certain sphere of life. Mainly, its legitimizing

effect is dependent on two conditions at the Community: measurability and being beneficial to all member states, without creating net 'losers'. Regulatory model finds a solution satisfying both of these conditions at the same time. Certainly, ideal types do not reflect the reality perfectly, although they have certainly some legitimizing influences as discourses for the real authorities. The shift experienced in the Community in 1980s was a kind of dilemmatic change. On the one hand, it was understood that the 'negative' integration by just abolishing the trade barriers was not enough for achieving the objective of single market but regulations of positive integration in the areas which are not purely economic was necessary; on the other hand, it was possible neither to make objective calculations nor to escape from their secondary effects creating losers and gainers among Member States and individuals. It also showed that it was no more legitimate political authority of governments who decides but some agents of expertise.

The Maastricht Treaty may be considered as an attempt of the Community to encounter the dilemmas facing it in 90s and creating many unwanted and unexpected consequences one of which is already appearing signals of legitimacy-loss. The benefits of the Community were under question, even more than this, reason d'être of the Community was shattered. The Maastricht Treaty seemed to answer to both of the problems, by creating the monetary union, the utilitarian criteria of the validity of the Community order was aimed to be restored and by creating the political union, a new legitimacy basis was seek for the Community, at the same time by strengthening its reason d'être on the basis of external and internal security. However, the Maastricht Treaty at the end made the legitimacy loss of the Community just more explicit, if not worse.

First of all, the Treaty establishing the Union was covering the areas, which traditionally belong to the State. The popular reaction to the Treaty may be partly explained by its implicit threat to the traditional concept of the nation-state. What was traditionally and habitually valid was that the core areas of sovereignty belong to the Member States. Even the Community for 30 years has not changed this fact. Weber, while explaining the traditional authority, although the personal obedience tends to be unlimited, the limit is that how far master and staff can go in view of the subjects' traditional compliance without arousing their resistance. The motive of this resistance is the belief in the inviolability of that which has existed from time out of mind. When this

type of resistance occurs, the authority is accused with failing to observe the traditional limits of his power. Concerning the EU, it may be claimed that it failed to observe the traditional limits of its power and the Member States exceeded the traditional limits of transferring sovereignty that originally belong to the nation, by agreeing to the Maastricht Treaty. Therefore, the legal formal basis of the Union, which is intergovernmentalism, could not be sufficient to legitimize the Union coordination on the new political areas.

While the intergovernmental structure of the two pillars were far from convincing people to its legitimacy, the monetary union was already another strong regulatory area of the supranational bureaucracy and the situation was even more dangerous for traditionally national values. The State money was not a simply technical issue but a symbol of sovereignty. Here the utilitarian expectations were conflicting with the values. In terms of traditional state sovereignty, the exclusive transfer of the decision-making powers to independent regulatory agents such as European central bank was definite. Although in the Member States too, the monetary issues were regulated by the administrative organs, and in some of them they were independent from governmental and political intervention, the national bureaucracy had gained and created its legitimacy basis, into an extent.

It may be claimed that the core reason of the problem lies at the sudden shift from instrumental rationality to the realm of political values in overall, which cannot be proven or justified by the numbers and which are connected to beliefs, convictions and subjective or democratic preferences. In short, the Union lacked the tools and arguments necessary for creating democratic legitimacy for political decisions and value-choices. Additionally, the relations between the Member States and more important than this, between people are based on what may be called interest-partnership. At most, there was a solidarity but for increasing the 'welfare' and preventing the 'warfare'. The Community was assumingly to the interest of all, to an economically unified but politically divided all.

The concept of political union assumes existence, or potential, of people or at least citizens. The concept of citizenship in the Treaty was necessary result of the political union. However, the citizenship as a concept although supported by some

rights was not very meaningful for individuals who have a very indirect or minor influence on the Union decisions. Additionally, 'political' as a concept carries in itself many implicit connotations such as identity. Every political order presupposes some kind of common identity to foster allegiance and respect for laws. Actually, from the Maastricht till today, the discourse on the Union democracy and legitimacy has been combined with the search for a common European identity. Since the Maastricht, the intellectuals, politicians and academia discuss about the existence, potentiality or possibility of creating such a common European identity. The intellectual efforts for/on supranational identity, remind one the processes of disenchantment and re-enchantment. It may be claimed that the European Community and Union have accompanied to the globalization in the disenchantment process of nation-state and that the creation of a supra-nationalism with particular values is an uncompleted enchantment process.

Since the Maastricht Treaty, many models have been proposed to strengthen especially the democratic legitimacy of the Union. Many scholars have called attention to especially the improvement of parliamentary regime in the Union at both national and European level. According to this view, the weakness of the European Parliament (EP) as the only directly elected EU institution and the inability of the EP to hold the European executive accountable were among the main reasons of the democratic deficit. However the problem seems deeper than that: European elections are fought primarily on the basis of national political concerns, rather than on problems relevant to the European arena. It means that the EP not only lacks power but also a mandate to use that power in any particular way. In response to that weakness of the EP, the argument for national parliaments was that democracy of the Union must be restored by giving more power to the national parliaments. In accordance with this argument, there is a steady development of the role of the national parliaments on supranational decision-making.

One important theory which gained strength since the middle of 90s is deliberative supranational democracy. Its advocates claim that it is not only a normative model but the EU has already developed some institutional features which are compatible with the deliberative model of democracy. For example, the committee system and COREPER rely on persuasion, argument and discursive processes rather than command, control and strategic action. Comitology provides a forum for the

development of novel and mediating forms of interest formation and decision-making. Another model, directly-deliberative polyarchy, seeks to overcome the handicaps of the deliberative supranationalism. The model is a kind of radical, participatory democracy in which collective decisions are made through public deliberation in arenas open to citizens who use public services or who are regulated by public decisions. It combines the advantages of local learning and self-government with the advantages of wider social learning and heightened political accountability.

One important proposal for increasing legitimacy is to create a common European identity. I just want to remind that Weber's proposed solution to the political wasteland of instrumental rationality without any value-commitment was nationalism. It may be seen also as one of his impressive prophecies for the century. It was Weber who favored a nation that would aspire to establish certain cultural ideas and national prestige for the benefit of future generations, beyond the adjustment of people to material interests and being tied to technical and economic progress. On the other hand, the Union, almost after 70 years, is at the edge of another crisis, which belongs partly to modern world and partly to the global developments. Yet, the crises in some parts so similar to those in 1920s, one can even claim that this is only a magnified type of the same thing. The crises are again about the instrumental rationality, value-loss and legitimacy. However, this time the nation-states and nationalism are part of the problem, not of the solution. Solution is looked for in a supra-national identity and the values it may create and grow. Weber attempted to sustain the legitimacy gap of modern legal systems by an appeal to certain irrational political instincts in the masses towards the nation state. Hence the legitimacy deficit of the modern state is compensated by the existence of emotional commitments to the nation. This time the same compensation is attempted by emotional commitments to a supra-national Union.

The dominant instrumental rationality had no potential to produce a sense of belonging among the peoples of Europe and to give any substance to European citizenship. Rising popular discontent with the European Union was conflicting with the new political objectives of the EU in the 90s. What has to be done was to start a reciprocally reinstating process: supra-nationally initiating a political project covering internal and external political areas and to uphold the formal rationality of the Union with substantive rationality by inserting some hopefully-common values to the

integration project. It was seen as the way to surmount the vicious cycle of the Union: the legitimacy gap was partly arising from the lack of a feeling of the common identity which might justify the decisions taken at the supranational level, with the assertion that these common decisions and policies to the common interest of all European citizens.

For the main actors of the EU, the aim with the Maastricht was both to give the Union a successful world political role and to strengthen the sense of identity and common interest in the European society. A citizenship for a newly-forming political union would transcend the traditional divisions between the populations living in the different member-states would save the public from the political alienation from the supranational issues. However, the strategy which worked well 80 years ago for Germany failed this time. The mistake in calculation was the underestimation of national loyalties among people and the neglect about the weakness of the Union to create a strong value sphere and a common public sphere.

cd) The Nice and after: knocking on people's door

In 2000s, the legitimacy question of the EU has entered into a new phase. First of all, the authorities' awareness of the European people and of their isolation from the Union politics has heightened remarkably. It did not stay only at the level of consciousness but influenced the governmental practice also. A methodical change in governing practice at the EU level may be observed from 2000 till now. Participation, public discussion and civil society have become the 'mottos' of the Union. The importance of public opinion has been emphasized at every occasion by different institutions of the EU. In practical life, attempts to involve European people into the EU policy-making have several examples such as the Charter, the White Paper, debate on the future of the Union and the Convention.

One of the most remarkable attempts to fill the legitimacy gap between the Union and the citizens was the EU Charter of Fundamental Rights. Human rights are the most important guarantee for the legitimacy of a political authority. Therefore, the EU Charter may be viewed a radical step in empowering the legitimacy of the EU. However, not only the idea but also how it is realized was an example of 'legitimizing-itself' efforts of the Union. During the Nice European Council meeting in December 2000, the heads of government approved a Declaration on the Future of the European

Union. The agreement was to launch “a wider and deeper about the future development of the European Union”, which would end with a new intergovernmental conference (ICG) on treaty revisions in 2004. Until then, wide-ranging discussions would be encouraged with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc. The Conference recognized the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States. The European Council, meeting in Laeken, adopted a Declaration on the Future of the European Union, or Laeken Declaration, committing the Union to becoming more democratic, transparent and effective. It convened a Convention bringing together the main stakeholders to examine the fundamental questions raised by the future development of the Union so as to prepare in as broad and transparent a way as possible for the 2004 IGC.

The beginning of 2000s has witnessed a - assumingly- debating Europe. The debate on the future of the Union continued until mid-2003, via discussions and the Internet, so as to gather together as many opinions as possible on the key issues relating to the future of Europe. The exchanges which took place in the context of this debate were conducted in parallel with the work of the preparatory Convention for the IGC 2004. The Convention is an innovation in the history of the European Union as previous IGCs had never been preceded by a phase of debate open to all stakeholders. At the end, Convention concluded its work on 10 July 2003 and presented a proposal for a European Constitution.

White Paper on European Governance published in July 2001 was an important document on the legitimacy gap of the Union. Yet the document was proposing more communication, more information, more discussion but still limited active participation. Participation stayed under the monopoly of already organized groups, while ordinary citizens would not be encouraged to become more active. Second problem with the concept of participation was its limitation to non-decision. There was a net division between the actual decision, which was reserved to the elected bodies, and the rest of policy process. Additionally there was no concrete proposal to develop participation in the implementation and evaluation of policies. The solution for legitimacy gap was

sought in public discussion. Yet, deliberation without any participatory tools might only increase legitimacy in appearance.

Actually, deliberation for legitimacy but without democracy is a typical case since 2000s for the Union. For example, the preparation of the White Paper was such a process fully open to public both to passively follow and to actively participate in the discussions. Actually, the convention period of the Charter was similar in those terms. This was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level. I think, this is not only a practical problem but also a gap in theoretical deliberative democracy models. The Convention for the draft Constitutional Treaty was another example of deliberation-without-democracy. It is disputable whether the Convention has been successful at incorporating the civil society into the process or at the democratic representation.

The preparatory phase for constitution witnessed discussions centered on the 'legitimacy deficit' of the Union. More specifically, whether it is legitimate to have a constitution in the lack of a European 'demos', or whether the constitutional process and the constitution itself may have a certain affect to create a common identity, thereby to strengthen the weak legitimacy of European polity. The lack of European people as a common identity referred to many other negative opinions, for example lack of a commonly shared commitment to the European interest. From the value-rational perspective, it was debatable if there is a common ground of shared values and norms which may provide the normative basis of a constitution, with a European conception of justice. On the other hand, there was a group of scholars who emphasizes the legitimating effect of a constitution. First of all, constitutions have symbolic functions: it is a condensing symbol which enables individuals and groups within a political community both to make sense and to articulate a sense of their common past, to form and pronounce judgments about their common present, and to plan and project various imagined common features. The power of constitutional process also lies in the social process it stimulates. It encourages the civil society to mobilize in terms of interests and aspirations which transcended national boundaries. It generates an intensive public debate which may in turn contribute to the development of a European public sphere.

Thus constitutionalism has a potential to create the society for the political structure it constructs.

However, the resulting constitutional text has been criticized in many respects. Especially, in terms of providing democratic participation channels and tools, innovation brought by the draft Treaty is very limited: By underlining stating what already exists, very few are added. Another problem is the incorporation of the *acquis* to the text only after a simplification effort made by the experts. Retaining the former policy articles in a constitutional text leads two negative consequences; its large programmatic dimension on specific policy areas with a strong constitutional rigidity limits the options for democratic politics and, secondly, it limits the constitutional values and objectives to negative legal rights and legal customers. In addition to that, the fact that social questions regarding the positive integration are excluded from both the Convention and the draft Treaty prevents the discussions of alternative visions of the common good such as distributive justice between its citizens under the constitutional framework. Thus, the identity-forming influence of the draft Treaty is questionable.

At the end, none of those is capable to answer to the question why the Constitutional Treaty was rejected. To be able to answer this question, a focus on a general theory of legitimacy for the Union is needed since failure of the draft Treaty is only a symptom of a bigger illness. The approach of this thesis requires to place the legitimacy deficit of the European Union into the context of modernity. The European Union suffers from the same illness that the member states already do. However, its symptoms are more heavily experienced in the Union due to its lack of some traditional and habitual support that the nation-states take from their special history of authority. If the fact that supranational law-making augments the legitimacy crises of the Member States, one possible solution is to increase the role of national parliaments at supranational level and to make the national politicians more accountable to their parliaments and publics. This solution may work both by enhancing the democratic legitimacy of the Union and by being fed by the traditional legitimacy attributed to their states and their parliaments by the citizens. It may also enhance the eroding legitimacy of nation-state governments. In terms of democratic legitimacy, one more solution could be more localization of some policy issues instead of more supranationalization. In other words, to use the subsidiary principle more effectively and thereby to close the gap of

knowledge necessary to get involved in politics in favor of ordinary people. The deliberative democracy model for strengthening the Union legitimacy when it is analyzed in the light of Weberian theory lacks the necessary participation mechanisms for ordinary people, in short it is quite elitist. Participation through public discussions stays at the level of an intellectual brain training in the lack of any tool which will convert these public choices or complaints. Additionally this weakness of the model is demotivating for the people to be actively involved in supranational politics, especially at an environment of more than 20 languages and highly technical knowledge requirements for the discussion. One important improvement for the European public sphere could be the more frequent use of referendums. The referendums, although carries the danger of demagogic abuse and of having influences on the integration negatively more than positively, would be a good practice for politicians, officials, intellectuals and ordinary people to get used to develop and adopt an ethics of responsibility for politics.

Concerning the common identity, it seems that it is quite difficult to create a common identity around common values or around common moral principles. The former is difficult due to plurality of cultures in the Union and the latter is difficult due to weakness of some formal moral principles in creating feeling of belonging. One way could be to create a union of people around some social values. However, this seems even harder since social justice is one of the most sensitive issues in one society and belongs to most traditional functions of the nation-state. To reach a Union-wide consensus on this issue would be as hard as other cultural values. Yet, one important action that can be taken socially by the supranational level is to take necessary precautions not to damage the social functions of the member states since these kind of indirect negative influences on social provisions weakens both the legitimacy of the states and of the Union.

Lastly, the common identity as a medicine to the legitimacy deficit should be re-evaluated in the light of the analysis above. Habermasian model of European identity is a combination of formal rationality with value-rationality from Weberian perspective. Habermasian common identity proposal may be seen as a mega-model of the ideal combination of instrumental rationality with value-rationality which is advised by Weber to the political leader. It is quite interesting that in his model the nation-states

correspond to value-rational level while the Union to formal rational level. In Weberian theory, the authority of the state is the most formal authority as ever seen. After almost one century, the new supra-authority that emerged seems to be even more formal than the conventional legal authority. This may give us some hope for the future of the Union that it may create its own value-rationality in the future. For near future, there is not any value promising to have the power to create a Union-wide feeling of belonging. Therefore, to promote an active political attitude in the member states not only at the level of governments but also at the level of parliaments and public seems more reasonable. For the social values, a similar kind of cooperation between two levels is necessary in order to prevent the invasion of another sphere of substantive rationality by formal rationality. For the common identity, while member-states continue to provide the value-rational, traditional, emotional and historical core of the identity, to create a feeling of tolerance and sympathy not only among the Union citizens but also towards the immigrants and foreigners would be a very humble, comparing to other proposals, but a quite challenging value-objective for the Union.⁶¹³ Adoption of multiculturalism in real sense as a value would also help to prune the racial, ethno-centric and dogmatic parts of the classical nationalism which seems to be in a rise in Europe and in the world nowadays.

⁶¹³ Communicative rationality of Habermas may find its really emancipating meaning in this ideal which has already been aspired by Vitoria and Spinoza in the 16th and 17th centuries. See Cemal Bali Akal, *Varolma Direnci ve Özerklik: Bir Hak Kuramı için Spinoza'yla*, Ankara: Dost Kitapevi, 2004 especially see the chapter: 'iletişim hakkından evrensel yurttaşlık hakkına'. Additionally see Reyda Ergün and C. Bâli Akal, 'Kimlik Bedenin Hapishanesidir', *Doğu Batı*, Sayı: 38, Ağustos, Eylül, Ekim 2006, Milliyetçilik 1, for the significance of the concept in the context of immigration.

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