

Max Weber, *Economy and Society*, ed. by Guenther Roth and Claus Wittich, vol. II (Berkeley: University of California Press, 1978), pp. 784-802 [1922] (notes omitted).

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The Legal Honoratiores and the Types of Legal Thought¹

For the development of a professional legal training and, through it, of specifically legal modes of thinking two different lines are possible. The first consists in the empirical training in the law as a craft; the apprentices learn from practitioners more or less in the course of actual legal practice. Under the second possibility law is taught in

special schools, where the emphasis is placed on legal theory and "science," that is, where legal phenomena are given rational and systematic treatment.

1. *Empirical Legal Training: Law as a "Craft"*

A fairly pure illustration of the first type is represented by the guildlike English method of having law taught by the lawyers. During the medieval period a sharp distinction was made between advocate and attorney.² The need for an advocate was due to the peculiarities of procedure before the popular assemblies; the attorney emerged when procedure began to be rationalized in the royal courts with their jury trial and the increasing evidentiary importance of the record.³ In the French procedure, the verbal formalism which grew out of the strict application of the accusatorial principle before the popular assembly, gave rise to the need of an *avant-rulier* (*avant-parlier*). The legal maxim *fautes volent exploits*⁴ and the formalistic effect of the words spoken compelled the layman to seek the assistance of an *avant-rulier* or *prolocutor* who, upon the party's request, would be assigned to him by the judge from among the judgment-finders,⁵ and who would publicly "speak for," and in the name of, the party the words required for the progress of the case. Among other advantages there was thus conferred upon the litigant, since the formalistic words had not been pronounced by the litigant himself, the advantage that he could "amend" the verbal mistakes that might have been committed.⁶ Originally, the advocate stood before the court next to the party litigating. His position was thus quite different from that of the attorney (*avoué*, *Anwalt*, *procurator*, *solicitor*), who assumed the technical tasks of preparing the case and obtaining the evidence. But the attorney could not assume these functions until procedure had undergone a considerable degree of rationalization. Originally an attorney in the modern sense was not possible at all. He could not function as the "representative" of the party until procedural representation had been made possible, as in England and France, by the development of the royal law; as a general rule, an attorney's appointment to such a representative function rested upon special privilege.⁷ The advocate was not prevented by his acting for the party from participating in the actual finding of the judgments; indeed, he would not have been able to propose a judgment unless he was one of the judgment-finders. The attorney, however, became exclusively the representative of the party and nothing else. In the

royal courts of England, attorneys were originally recruited, almost without exception, from among those persons who could write, i.e., the clergy, for whom this activity constituted a major source of income.⁸ But the preoccupations of ecclesiastical service on the one hand, and the expansion of legal training among the upper classes on the other, resulted not only in the progressive exclusion of the clergy from the legal profession, but also in the organization of the lay lawyers in the four Inns of Court, and in the pronounced movement on their part to monopolize the judicial positions as well as those other official jobs which required legal knowledge; the lawyers indeed succeeded in the course of the 15th and 16th centuries. With the coming to the fore of rational modes of procedure, the old *prolocutores* disappeared. But a new aristocracy of legal *honoratiore*s came into being, consisting of counsels, serjeants, and barristers, i.e., of those admitted to represent, and plead for, litigants before the royal courts.⁹ Indeed, this new type of lawyer took over many of the characteristics of the old "prolocutors." He was subject to a strict professional etiquette. He refused to have anything to do with the technical services required in the case, and ultimately he lost all personal contact with the party whom he would not even see face to face.¹⁰ The handling of the case lay in the hands of "attorneys" or "solicitors," a stratum of business people, neither organized in guilds nor possessing the legal education provided by the guilds; they were the intermediaries between the party and the "barrister" to prepare the "brief" or *status causae* so that the barrister could present it before the court. The practicing barristers lived together in communal fashion in the corporate and closed guildhouses. The judges were exclusively chosen from among them and continued to share the communal life with them. "Bar" and "bench" were two functions of the corporate and later highly exclusive legal profession; in the Middle Ages its members came largely from the nobility, and admission to the guild was regulated with an ever increasing measure of autonomy. There was a four-year novitiate, connected with instruction at the guild school; the call to the bar conferred the right to plead; for the rest, training was purely practical. The profession insisted on the maintenance of the code of etiquette, especially with regard to the observance of minimum fees, all fees, however, to be paid voluntarily and not to be actionable. The lecture courses in the Inns were only introduced as the result of the competitive struggle with the universities.¹¹ As soon as the monopoly was achieved, the lectures began to decline, to be ultimately discontinued altogether. Thereafter, training was purely empirical and practical and led, as in the craft guilds, to pronounced specialization.

This kind of legal training naturally produced a formalistic treatment of the law, bound by precedent and analogies drawn from precedent. Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craftlike specialization of the lawyers, but legal practice did not aim at all at a rational system but rather at a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations. The upshot was the emergence of what had been called in Roman law "cautelary jurisprudence," as well as of such practical devices as procedural fictions which facilitated the disposition of new situations upon the pattern of previous instances.¹² From such practices and attitudes no rational system of law could emerge, nor even a rationalization of the law as such, because the concepts thus formed are constructed in relation to concrete events of everyday life, are distinguished from each other by external criteria, and extended in their scope, as new needs arise, by means of the techniques just mentioned. They are not "general concepts" which would be formed by abstraction from concreteness or by logical interpretation of meaning or by generalization and subsumption; nor were these concepts apt to be used in syllogistically applicable norms. In the purely empirical conduct of legal practice and legal training one always moves from the particular to the particular but never tries to move from the particular to general propositions in order to be able subsequently to deduce from them the norms for new particular cases. This reasoning is tied to the word, the word which is turned around and around, interpreted, and stretched in order to adapt it to varying needs, and, to the extent that one has to go beyond, recourse is had to "analogies" or technical fictions.¹³

Once the patterns of contracts and actions, required by the practical needs of interested parties, had been established with sufficient elasticity, the official law could preserve a highly archaic character and survive the greatest economic transformations without formal change. The archaic case analysis of the law of seisin, for example, which originally corresponded to the conditions of peasant tenure and manorial lordship of the Norman period, persisted to the very threshold of the present epoch with, what were from a theoretical point of view, often grotesque results in the American Middle West.¹⁴ No rational legal training or theory can ever arise in such a situation. Wherever legal education has been in the hands of practitioners, especially attorneys, who have made admission to practice a guild monopoly, an economic factor, namely, their pecuniary interest, brings to bear a strong influence upon the process not only of stabilizing the official law and of adapting it to changing needs in an exclusively empirical way but also of preventing

its rationalization through legislation or legal science. The lawyers' material interests are threatened by every interference with the traditional forms of procedure, and every interference menaces that situation in which the adaptation of the scheme of contracts and actions to both the formal norms and the needs of the interested parties is left exclusively to the legal practitioners. The English lawyers, for example, were largely successful in preventing both a systematic and rational type of lawmaking and a rational legal education, such as exists in the Continental universities;¹⁵ the relationship between "bar" and "bench" is still fundamentally different in the English-speaking countries from what it is on the Continent. In particular, the interpretation of newly made laws lay, and still lies, in the hands of judges who have come from the bar. The English legislator must, therefore, take special pains with every new act to exclude all sorts of possible "constructions" by the lawyers which, as has so frequently happened, would be directly contradictory to his intentions.¹⁶ This tendency, partly immanent, partly caused by economic considerations, and partly the result of the traditionalism of the legal profession, has had the most far-reaching practical consequences. For example, the absence of a system of registration of title, and consequently the absence of a rationally organized system of real estate credit, has been largely due to the lawyers' economic interest with regard to the fees for that title examination which must in every transaction be made because of the uncertainty of all land titles. It has also had a deep influence upon the distribution of land ownership in England and, quite particularly, upon the peculiar form of the land lease as a "joint business."¹⁷

In Germany this type of legal profession with a clearly defined status or guild organization did not exist; for a long time it was not even necessary for a litigant to be represented by a lawyer. In France the situation was similar. It is true that the formalism of the procedure before the popular tribunals had necessitated the use of a *prolocutor*, and the regulation of their duties had become universally necessary; the earliest such regulation was promulgated in Bavaria in 1330. But the separation of the counsel from the attorney was achieved in Germany quite early, as the result essentially of the spread of Roman law.¹⁸ The requirement of special legal training established itself relatively late and was usually caused by complaints of the Estates at a time when the Roman-law oriented university education already determined the standard of the upper-class legal practitioners.¹⁹ A powerful guild organization was prevented from arising because of the decentralization of the administration of justice. Thus the status of the lawyers was determined by governmental regulation rather than by professional autonomy.²⁰

2. *Academic Legal Training: Law as a "Science"—Origins in Sacred Law*

Modern legal education in the universities represents the purest type of the second way of legal training. Where only law-school graduates are admitted to legal practice, the universities enjoy a monopoly of legal education.²¹ At the present time it is supplemented by apprenticeship in legal practice and another examination; it is in this manner that legal education is nowadays everywhere combined with empirical training. The Hanseatic cities were the only places in Germany where the academic degree alone was sufficient for admission to the bar, but even there the requirement of apprenticeship has recently been introduced.²²

The legal concepts produced by academic law-teaching bear the character of abstract norms, which, at least in principle, are formed and distinguished from one another by a rigorously formal and rational logical interpretation of meaning. Their rational, systematic character as well as their relatively small degree of concreteness of content easily result in a far-reaching emancipation of legal thinking from the everyday needs of the public. The force of the purely logical legal doctrines let loose, and a legal practice dominated by it, can considerably reduce the role played by considerations of practical needs in the formation of the law. It took some effort, for instance, to prevent the incorporation into the German Civil Code of the principle that a lease is terminated by the sale of the land.²³ That principle had originated in the distribution of social power in Antiquity. However, the plan of taking it over into the new Code was entirely due to a blind desire for logical consistency.

A peculiar special type of rational, though not juristically formal, legal education is presented in its purest form in the legal teaching in seminaries for the priesthood or in law schools connected with such seminaries. Some of its peculiarities are due to the fact that the priestly approach to the law aims at a material, rather than formal, rationalization of the law. This point will be discussed at a later stage [see section v]; at this place we shall only deal with those results which are produced by certain general characteristics of this type of legal education. The legal teaching in such schools, which generally rests on either a sacred book or a sacred law fixed by a stable oral or literary tradition, possesses a rational character in a very special sense. Its rational character consists in its predilection for the construction of a purely theoretical casuistry oriented less to the practical needs of the groups concerned than to the needs of the uninhibited intellectualism of scholars.

Where the "dialectical" method is applied it may also create abstract concepts and thus approximate rational, systematic legal doctrine. But like all priestly wisdom, this type of legal education is bound by tradition. Its casuistry, inasmuch as it serves at all practical rather than intellectual needs, is formalistic in the special sense that it must maintain, through re-interpretation, the practical applicability of the traditional, unchangeable norms to changing needs. But it is not formalistic in the sense that it would create a rational system of law. 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.

The situation is similar in the case of law schools which, while not, or not entirely, under immediate priestly control, are yet bound to a sacred law.

In their purely external form, all "sacred" laws tend to approximate a type which is shown most purely in Hindu law.²⁴ Insofar as commandments are not fixed, as in scriptural religion, by revelation in writing or by an inspired recording of revelations, sacred law must be transmitted "authentically," i.e., by a closed chain of witnesses. But in the scriptural religion, the authentic interpretation of the sacred norm, as well as its supplementation by other traditions, must also be guaranteed in written form. This is one of the most important reasons why Hindu law, in common with Islamic law,²⁵ has rejected the purely scriptural tradition. The tradition must have passed by word of mouth directly from one reliable holy man to the next. Reliance on the written word would mean that one believed more strongly in parchment and ink than in the prophets and the teacher, i.e., those persons who are charismatically qualified. The fact that the Koran itself was a written work, whose chapters (*suras*) were believed to be promulgated by Mohammed, after consultation with Allah, in carefully written form, was explained in Islamic teaching by the dogma of the physical creation by Allah himself of the individual copies of the Koran. For the *hadiths*²⁶ orality was a condition of validity. It normally is only at a late stage that a scriptural text will come to be preferred, viz., when the unity of traditional interpretation is endangered by purely oral transmission. At this stage new revelations are then rejected, typically with the argument that the charismatic age has long since come to an end. In such situations great emphasis is laid upon the proposition which is basic to the "institutional" character of a religious community and which has well been formulated recently by Freiherr von Hertling,²⁷ namely, that it is not the holy writ which guarantees the truth of the tradition and of ecclesiastical doctrine but rather the holiness of the church and its tradition, to which God has given the truth in trust and which thus

guarantees the genuineness of the holy writ. This position is consistent and practical: the opposite principle, as it was held by the early Protestants, exposes the sacred writ to philological and historical criticism.

The Vedas are the sacred books of Hinduism. They contain little "law," even less than the Koran or the Torah. The Vedas were considered as *shruti* ("revelations"), while all derived sacred sources were viewed as *smriti* ("recollection" or tradition). The most important categories of secondary literature, the prose Dharma-Sutras and the versified Dharma-Shastras²⁸ (the last ranking entirely as *smriti*, while the former occupy a middle position), are, on the contrary, compendia of dogmatics, ethics, and legal teaching standing alongside the tradition of the exemplary lives and teachings of holy men. The Islamic *hadiths* correspond exactly to this latter source; they are traditions concerning the exemplary deeds of the prophet and his companions, and those sayings of the former which have not been incorporated into the Koran. The difference is that in Islam the prophetic age is regarded as having ended with the prophet.

For the Hindu Dharma books one can find a counterpart neither in Islam or Christianity, which are book religions with only one holy writ. The Dharma books, and especially one of the latest, viz, that of Manu, were important for a long time in the courts as "books of authority," i.e., private works of legal scholars, until they were displaced in legal practice by the systematic compilations and commentaries of the schools. This displacement was so complete that by the time of the British conquest legal practice was dominated by one such tertiary source, the *Mitakshara*, dating from the eleventh century. A similar fate befell the Islamic Sunna through those systematic compendia and commentaries which achieved canonical status. The same is also true, though to a somewhat lesser extent, of the Torah in relationship to the rabbinical works of Antiquity (the Talmud) and the Middle Ages. Rabbinical lawmaking in Antiquity, and, to a certain extent, even up to the present, and Islamic lawmaking in a great measure even today, have rested in the hands of the theologian jurists responding to concrete questions. This feature was unknown both to Hinduism and to the Christian church, at least after the extinction of charismatic prophecy and the Didaskalia, which were, however, of an ethical rather than a legal character.²⁹

The reasons why Christianity and Hinduism did not have this type of lawmaking were quite different. In Hindu law, the house priest of the king is a member of his law court, and he atones for wrong judgments by fasting. All important cases have to come before the king's court. The unity of the secular and the religious administration of justice is thus guaranteed, and there is, therefore, no place for any

licensed class of responding legal honoratiore. The Occidental Christian church, on the other hand, had created for itself organs of rational lawmaking in the Councils, the bureaucracies of the dioceses, and the Curia, and, quite particularly, in the papal powers of jurisdiction and infallible exposition of doctrine. No other of the great religions has ever possessed such institutions. Thus in Occidental Christianity, the legal opinions and decrees of the ecclesiastical authorities, together with the Conciliar Canons and the papal decretals, have played the role which is played in Islam by the *fetwa* of the mufti, and in Judaism by the opinions of the rabbis.³⁰ Hindu legal erudition was to a great extent purely scholastic, theoretical, and systematizing; it was the work of philosophers and theorists and strikingly possessed those features of a sacrally bound, theoretical, and systematizing legal thinking which has little contact with legal practice. In all these respects it differs from Canon law. All typically "holy" laws, and thus quite particularly that of India, are products of the schools. The treatises always present an abundance of casuistry about completely obsolete institutions. Examples are provided by Manu's treatment of the four castes, or the presentation of all the obsolete parts of the *shari'ah*³¹ in the works of the Islamic schools.³² But because of an overriding dogmatic objective and the rational nature of priestly thinking, the systematic structure of such law books frequently tends to be more rational than that of similar creations unconnected with priesthood. The Hindu law books, for example, are more systematic than the *Mirror of Saxon Law*. But the systematization is not a legal one but one concerned with the position of status groups and the practical problems of life. Since the law is to serve holy ends, these law books are therefore compendia not of law alone but also of ritual, ethics, and, occasionally, of social convention and etiquette. The consequence is a casuistic treatment of the legal data that lacks definiteness and concreteness, thus remaining juridically informal and 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.

3. *Legal Honoratiore and the Influence of Roman Law*

The effects of legal training are bound to be different again where it is in the hands of *honoratiore* whose relations with legal practice are professional but not, like those of English lawyers, specifically

guild-like or income-oriented. The existence of such a special class of honoratores is, generally speaking, possible only where legal practice is not sacredly dominated and legal practice has not yet become too involved with the needs of urban commerce. The medieval empirical jurists of the Northern European continent fall into this class. It is, of course, true that where commercial activity is intense the function of the legal honoratores is merely shifted from the consultants to the cautulary jurists; and even this shift occurs under special conditions only. After the decline of the Roman Empire, the *notaries* were the only remaining group in Italy by whom the traditions of a developed commercial law could be perpetuated and transformed.³³ They were, for a long time, the specific and dominant class of legal honoratores. In the rapidly growing cities they formed themselves into guilds and constituted an important segment of the *popolo grasso*, that is, they were also a politically important class of honoratores. Indeed, mercantile relations operated here from the very beginning through notarial documents. The procedural codes of the cities, such as Venice, preferred the rationality of documentary evidence to the irrational means of evidence of the ancient procedure of the popular courts. We have already spoken of the notaries' influence upon the development of commercial paper [sec. ii:3], but the notaries were one of the most decisive strata in the development of the law in general, and until the emergence of the class of legally trained judges in Italy they were probably the most decisive stratum. Like their forerunners in the ancient Hellenistic East, they took a decisive part in the interlocal assimilation of the law and, above all, in the reception of Roman law, which, here as there, was first brought about in the documentary practice. Their own traditions, their long-lasting connection with the imperial courts, the necessity of quickly having on hand a rational law to meet the needs of the rapidly growing requirements of trade, and the social power of the great universities caused the Italian notaries to receive Roman law as the very law of commerce, especially since, in contrast to England, no corporate or fee interests were standing in the way. Thus the Italian notaries were not only the oldest but also one of the most important of the classes of legal honoratores who were interested and directly participated in the creation of the *usus modernus* of Roman law. Unlike the English lawyers, they did not act as the bearers of a national body of law. Again, they could not compete with the universities through a guild system of legal education of their own simply because, unlike the English lawyers, they did not enjoy that nation-wide organization which was made possible in England by the concentration of the administration of justice in the royal courts. But thanks to the universities, Roman law in Italy continued as a world force, influencing the formal

structure of law and legal education even after its original political sponsor and interested protector, the Emperor, had become politically unimportant. The *podestà* of the Italian cities were often chosen from among the honoratiorees who had been trained in the universities; the *signorie* were based completely on political doctrines derived from Roman law.³⁴ In the cities of the French and Eastern Spanish coasts the notaries' position was quite the same.³⁵ Essentially different, however, was the status of the honoratiorees in Germany and Northern France. They were, at least at first, involved less in urban legal relations than as aldermen (*Schöffen*) or officials in the legal affairs and the administration of justice of rural manors.³⁶ Their most influential types, such as for example, Eike von Repgow or Beaumanoir,³⁷ created a systematization of the law which was based on the concrete problems of everyday practice and their essentially empirical concepts, slightly refined by abstraction. The "law books" which they compiled aimed at the restatement of the existing tradition; although they contained some occasional argumentation, they had little specifically juridical *ratio*. Indeed, the most important of these works, the *Mirror of Saxon Law*, contained a good many constructions of legal institutions which were not parts of the existing law at all but rather constituted fanciful attempts, inspired by the author's desire for completeness or his predilection for sacred numbers, to fill in gaps or complement other inadequacies.³⁸ Formally, their systematic records were private works just like those of the Hindu, Roman, and Islamic jurists. Like these, they have influenced legal practice considerably as convenient compendia and some of them even came to be recognized by the courts as authoritative source books. Their creators were representatives of a system of administration of justice by honoratiorees but, unlike the English lawyers and the Italian notaries, they did not constitute a strong organized guild which, by corporate and economic interests, through a monopoly of the bench and a central position at the seat of the central courts, could have given them a measure of power which neither King nor Parliament could have easily brushed aside. Hence they could not, like the English lawyers, become the bearers of a corporate legal education and were thus unable to produce a fixed empirical tradition and a legal development that could have provided an enduring resistance against the subsequent encroachment of the jurists trained by rational university education. Formally, the law of the empirical law books of the Middle Ages was fairly well organized; systematically and casuistically, however, it was less rational, and oriented more towards concrete techniques of distinction than towards the abstract interpretation of meaning or legal logic.

The particular influence of the ancient Roman jurists³⁹ rested on the fact that the Roman system of administration of justice by honora-

tiores, which economized on public officials, accordingly also minimized their instructional role in the concrete conduct of a lawsuit. But this specific fact which distinguished Rome from, for instance, the Hellenic democracy also excluded the "kadi justice"⁴⁰ as practiced in the Attic people's courts. The official presidency over the course of the lawsuit was preserved together with the separation of power between the magistrate and the judgment finders. The combination of these factors created the specifically Roman practice of trial instruction (*Prozessinstruktion*) through a strictly formal order of the magistrate to the citizen judge (the *iudex*), giving him directions with regard to those issues of law and fact according to which he should grant or deny the plaintiff's claim.⁴¹

The magistrate, especially the *aedilis* and *praetor*, eventually recorded the schemata of these trial instructions in his "edict"⁴² at the beginning of his year of office. It was, however, only relatively late that, in contrast with the Nordic *lag saga* he was regarded as being bound by the content of these "edicts." Naturally, in composing his edict the magistrate was advised by legal practitioners, and the edicts were thus continuously adapted to newly emerging needs. In the main, however, each magistrate simply took over the edict of his predecessor in office. Hence, the great majority of the recognized causes of action had naturally to be defined not in terms of concrete facts, but by the legal concepts of everyday language. The use of a juridically inappropriate formula by the party having to choose the appropriate action thus resulted in the loss of the case. This contrasts with our principle of fact pleading, under which a presentation of facts will support an action if the facts justify the claim from some legal point of view. Obviously under the "principle" of "fact pleading" no such sharp legal definition of concepts is required as was the case under Roman law where the practitioner was forced to define the legal terms of common usage with juristic rigor and to elaborate sharp distinctions between them.⁴³ Even where the instructing magistrate confined his trial instruction to purely factual matters, as he did in the *actiones in factum conceptae*,⁴⁴ the interpretation assumed a strictly formal character, as a result of the then accepted methods of legal thinking. In this state of affairs, the practical development of legal technique was at first largely left to "cautelary jurisprudence," i.e., to the activities of legal counselors who not only drafted the form of contracts for the parties but were also expert advisors to the magistrate in his *consilium*, a consultation that was typical for all Roman officials in the preparation of their edicts and formulae. Finally, they were legal advisers of the citizen judge when he had to decide the questions put to him by the magistrate and to interpret his trial instructions.

According to historical tradition, the consultative activities of the

jurisconsults seem first to have been carried out by the *pontifices*, of whom one was chosen annually for this purpose. Under this priestly influence the administration of justice, in spite of the codification of the Twelve Tables, might easily have assumed a sacrally bound and irrational character, similar to that produced in Mohammedan law by the consultative activity of the mufti. It is true that religious influences seem to have played only a secondary role in the substantive content of early Roman law, but in its purely formal aspects, which are also its most important aspects from a general historical point of view, the influence of sacred law was obviously considerable, as Demelius has made plausible for at least certain important instances.⁴⁵ For example, such important legal techniques as procedural fictions seem to have arisen under the influence of the principle of sacred law that *simulata pro veris accipiuntur*.⁴⁶ We may recall the role played in the cult of the dead of many peoples by the simulated transaction and also the role which the simulated transaction had to play in situations in which certain ritual obligations were formally fixed in an absolute fashion. It was the repugnance to an essentially bourgeois society of such obligations, which were also economically highly burdensome, which led to their replacement by a mere *pro forma* performance. 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. Furthermore, the early development of the technique of cautelary jurisprudence in temporal matters resulted in an obvious furtherance of the use of this technique in the sphere of the cult. But we may assume with confidence that the earliest techniques of cautelary jurisprudence were at first largely concerned with sacred law.

One of the most important characteristics of early Roman law was its highly analytical nature; this at least is still valid among von Jhering's views, of which so many have become obsolete. A lawsuit would be reduced to the basic issues involved and legal transactions were cut down to the most elementary logical constituents: one lawsuit for just one issue; one legal transaction for just one object; one promise for just one performance.⁴⁷ The breaking up of the complex situations of life into specifically determined elements has been the main achievement of the early *ius civile*, the methodological effects of which have also been the most far-reaching. On the other hand, there has resulted from it a certain neglect of the constructive synthetic capacity in the perception of concrete legal institutions, as it arises in the case of a legal imagination unconfined by logical analysis. This analytical tendency, however, corresponds closely to the treatment of ritual obligations in the Roman

national religion. We may recall that the peculiarity of the genuine Roman *religio*, namely, the conceptual, abstract, and thoroughly analytical distinction of the jurisdictions of the sacred *numina* [deities], resulted in a large measure in a rational juridical treatment of religious problems. According to tradition, already the *pontifices* had invented fixed schemata of admissible actions. This pontifical legal technique seems to have remained a professionally monopolized secret knowledge. The emancipation from sacral lawfinding came only in the third century. When the *ensor* Appius Claudius was trying to establish himself as a tyrant, one of his freedmen is said to have published the pontifical formulary of actions.⁴⁸ The first plebeian *Pontifex maximus*, Tiberius Coruncanius, is reported to have been the first to render *responsa* in public.⁴⁹ It was only from that stage that the edicts of the officials could develop to their later significance and that lay honoratores came to fill the gap as legal consultants and attorneys. The opinion of counsel was communicated orally to private parties and in writing to the official who had requested it. Until the period of the Empire the opinion did not include any statement of reasons, resembling in this respect the oracle of the charismatic *lag saga* or the *fetwa* of the mufti. The expansion of professional juristic activity in step with increasing demand brought about a formal legal education as early as during the Republic, when students (*auditores*) were admitted to the consultations of the legal practitioners.

Another cause of the assumption by early Roman law of a highly formal and rational character, both regarding the substantive rules and their procedural treatment, was the growing involvement of the law in *urban* business activities as carried on through contracts. In this respect, medieval German law presents a rather different picture, for its main concern related to *rural* matters such as social rank, property in land, or family law and inheritance.

But in spite of its formalism, Roman legal life, until well into the time of the Caesars, lacked not only a synthetic-constructive but also a rational-systematic character, and it did so much more than has at times been assumed. It was the Byzantine bureaucracy which finally systematized the existing law; but as far as the formal rigor of juridical thought was concerned, it stood far behind the achievements of the jurisconsults of the Republic and the Principate. It is striking that the systematically most useful among all the literary products of the jurisconsults, namely the Institutes of Gaius, which was an introductory compendium to the study of law, was the work of an unknown person who was certainly not an authority in his own lifetime and who stood outside the circle of the legal honoratores; one may say that Gaius' relation to them was

analogous to the relation of the modern cram book to the learned treatises of the scholars. But the difference was that the literary products of the practicing Roman jurists of that time, to whose circle Gaius did not belong, did not possess the quality of a rational system, such as university teaching tends to produce; they were mainly moderately rationally organized collections of individual opinions.⁵⁰

The jurisconsults remained a very specific class of honoratiore. To the property-owning strata of Rome they were the universal "fathers confessor"⁵¹ in all economic matters. It is uncertain whether a formal license to render *responsa* was necessary in earlier times, as a passage in Cicero might lead us to suppose.⁵² Certainly, it was required at a later date. The *responsa*-rendering jurists emancipated themselves from the methods of the older cautelary jurisprudence, as well as the actual practice of draftsmanship, as their legal refinement increased. By the end of the Republic they formed themselves into schools. It is true that during the Republic the orators, such as Cicero, showed the tendency, familiar from Athens, to argue emotionally and "ad hominem" rather than rationally, insofar as the specifically political assize courts (*quaestio repetundarum*) came close to assuming the character of popular justice. In this way, the orators contributed to the weakening of precise legal conceptualization; but in Rome this happened almost exclusively in political cases. Under the Empire, the administration of justice became entirely a specialized professional matter. A part of the jurisconsults were placed in an official status vis-à-vis the administration of justice by Augustus' grant of the privilege making their *responsa* binding on the judges.⁵³ The jurisconsults ceased to be attorneys (*causidici*); even less could they form a lawyers' guild whose interests and intellectual training would have been directed to daily practice and the needs of clients. The jurisconsults had nothing to do with the technical or business aspects of attorneyship but were concerned exclusively with the rendering of legal opinions about statements of fact which had been prepared by an attorney or a judge.⁵⁴ They were thus in the best possible position to elaborate a rigorously abstract scheme of juristic concepts. In this way the responding jurisconsults were sufficiently remote from the actual contact of legal business to allow them to reduce individual details to general principles by employing scientific techniques. This remoteness was greater in Rome than it was in England, where the lawyer was always the representative of a client. It was, however, the controversies between the schools which forced these principles into even greater abstraction.⁵⁵ Because of the binding character of their opinions, jurisconsults dominated the administration of justice; however, the *responsa* continued, at least for a time, to be rendered without a statement of

reasons, like the sage's oracle or the mufti's *fetwa*. But they began to be collected by the jurists and then to be published with comments indicating the legal reasons.⁵⁶ School discussions and disputations about legal cases among and with the *auditores* grew out of the latter's presence in the exercise of the consultative practice, but only by the end of the Republic did there develop a fixed course of training.⁵⁷ Just as the steadily increasing formal study of Hellenic philosophy took on a certain significance for juristic thought, so the Hellenic philosophical schools served, in many respects, as models for the external organization of the schools for lawyers. It was from this pedagogical and publishing activity of the law schools that the technique of Roman law developed from a stage when it was strongly empirical, despite the precision of its concepts, to increasing rationality of operation and scientific sublimation. But theoretical legal training remained secondary to legal practice and this fact explains how a slight degree of development of abstract legal concepts could go hand in hand with a high degree of abstraction in legal thinking, wherever the abstract legal concepts would have served essentially theoretical interests rather than practical requirements. The treatment of numerous, and apparently heterogeneous, fact situations under the one category of *locatio*, for instance, had important practical consequences.⁵⁸ But no direct practical consequences can arise from the elaboration of the concept of "legal transaction," which is intended to serve a mere desire for intellectual organization. Thus neither this concept nor similar ones, like "claim" or "disposition," existed in Roman law of Antiquity, and even in the time of Justinian its general systematization was not rationalized beyond a relatively modest degree. The sublimation of concepts took place almost exclusively in connection with some concrete type of contract or form of action.⁵⁹

Two reasons are responsible for the fact that this sublimation nevertheless led to those results which we have before us now. Decisive was, first, the complete secularization of the administration of justice, including the office of jurisconsult. The binding *responsum* of the Roman jurist clearly has a parallel in the *fetwa* of the Islamic mufti. He too is an officially licensed legal consultant. But he receives his training in an Islamic school. These schools, to be sure, developed upon the pattern of the officially recognized law schools of the late Roman empire. Under the influence of the formal training through ancient philosophy, they also developed, for certain times at least, methods similar to those of Antiquity. But their instruction remained predominantly theological, and the trends just mentioned were thwarted by religious ties and traditional observance, by the vagueness and precariousness of sacred law, which can neither be eliminated nor be enforced, and by those other features

which are characteristic of all theocratic justice bound to a sacred writ. Legal education thus remained limited there to empirical and mechanical memorization and theoretical casuistry without contact with life.

The second reason for the difference between Roman and Islamic law lies in the kind of judicial organization and in the politically conditioned limits which were set to rationalization in the economic field. The theological element was completely absent from Roman legal development. The purely secular and increasingly bureaucratic late Roman state culled that unique collection of the Pandects from the products of the responding jurisconsults and their disciples, whose legal thinking was of the utmost precision, however imperfect their "system" may have been. Supplemented by autonomous Byzantine ideas, the Roman materials thus collected in the Pandects provided the stuff for the legal thought of the medieval universities for centuries to come. As early as during the imperial period, an increasingly *abstract* character trait had been added as a new element to the age-old indigenous *analytical* quality of the Roman legal concepts. To some extent this abstract character had been anticipated by the nature of the Roman forms of action. In every one of them the state of the operative facts was expressed in the form of a legal concept. Some of these concepts were so formulated, however, that they afforded the practitioners, be they cautelary jurists, attorneys, or jurisconsults, the opportunity to subsume an extraordinarily diverse range of economic situations under one single concept. The adaptation to new economic needs thus took place in large measure through the rational interpretation and extension of old concepts. It was in this way that legal-logical and constructive thinking was raised to the highest level to which it can be raised within the range of the purely analytical method. Goldschmidt⁶⁰ has properly pointed out the extraordinary elasticity of such legal concepts as *locatio-conductio*, *emptio-venditio*, *mandatum* (and especially *actio quod iussu*), *depositum*, and above all, the unlimited capacity of *stipulatio* as the one *constitutum* for most of those obligations to pay a sum certain for which we have today the bill of exchange and other formal contracts.⁶¹

The specific character of Roman legal logic, as it developed from the given conditions, becomes especially clear when one compares it with the modes of operation of English cautelary jurisprudence. It, too, utilized and manipulated numerous individual concepts with the greatest boldness in order to achieve actionability in the most diverse situations. But we can easily see the difference between the way in which, on the one hand, the Roman jurists used the concept of *iussum* to achieve both the drawee's authority to pay for the drawer and the latter's warranty⁶² and, on the other hand, the ways in which the English lawyers derived

the actionability of numerous heterogeneous contracts from the tort concept of "trespass."⁶³ In the latter case, *legally* heterogeneous phenomena are thrown together in order to obtain actionability by indirection. In the Roman instance, by contrast, situations which are new and diverse *economically*, i.e., externally, are subsumed under a single and appropriate legal concept.

One must note, however, that the abstract character of many legal concepts which today are regarded as being particularly "Roman" in their origin, is not to be found originally, and in some cases did not even originate, in Antiquity. The much discussed Roman concept of *dominium*, for example, is a product of the denationalization of Roman law and its transformation into world law. Property, in national Roman law, was by no means a particularly abstractly ordered institution, and it was not even a unitary one in general.⁶⁴ It was Justinian who first abolished the fundamental differences and reduced them to the few forms which were observable in land law; and it was only after the old procedural and social conditions of the praetorian interdicts had died out that medieval analysis could concern itself with the conceptual content of the two Pandectian institutions of *dominium* and *possessio* as wholly abstract concepts. Nor was the position essentially different with many other institutions. In their earlier form, in particular, most of the genuine Roman legal institutions were not essentially more abstract than those of German law. The peculiar form of the Pandects arose out of the peculiar transformations of the Roman state. The sublimation of juristic thinking was in itself, as far as its direction was concerned, influenced by political conditions which operated in different ways in the Republican and the late Imperial period. The important technical traits of the earlier administration of justice and the jurisconsults were, as we have seen, essentially the products of rule by the Republican honoratores. But this very rule was not entirely favorable to a professional juristic training of the political upper-class magistrates with their short terms of office. While the Twelve Tables had always been taught in the schools, knowledge of the *leges*, however, was acquired by the Roman republican magistrate mostly by practical experience. His jurisconsults looked after the rest for him. In contrast, the necessity of systematic juristic studies was greatly increased by the imperial system of legal administration through appointed officials and its rationalization and bureaucratization, especially in the provincial service. The general effect of all bureaucratization of authority will be seen later in a wider context. The systematic rationalization of the law in England, for example, was retarded because no bureaucratization occurred there. As long as the jurisconsults dominated the Roman legal administration of justice

as the legal honoratiore, the striving for systematization was feeble, and no codifying and systematizing intervention by the political authority occurred. The downfall of the Roman aristocracy under the Severi was correlated with the decline of the role of the responding jurisconsults and parallels a rapidly increasing significance of the imperial rescripts in the practice of the courts. Legal education, carried on in the later period in state-approved schools, assumed the form of textbook instruction from the works of the jurists. The courts, too, used them as authoritative sources and, in case of dissent among these books, the Emperors, by the so-called "Law of Citations," established both a certain order of priority among them and the principle that the majority of the approved authors should prevail.⁶⁵ The collections of *responsa* thus came to occupy the position held in the Common Law by the collection of precedents. This situation conditioned the peculiar form of the Pandects and the conservation of that part of classical juristic literature which had been incorporated in them.