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Max Weber and the Origin of Human Rights: A Study on Cultural Innovation.

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There can be little doubt that a belief in human rights and the dignity of the human person is one of the most important characteristics of our time, at least since the end of the Second World War and to an even greater degree following the collapse of communism in Europe. While this development was anticipated by a few sociological theorists, such as Émile Durkheim, it stands in sharp tension with the gloomy prognoses about the future that Max Weber formulated on various occasions. What is more, since human rights are rarely discussed in Weber's gigantic oeuvre, the question of their origins may at first seem rather marginal for the study of his work. However, it can be shown that the origin of this value complex – so central to the modern age – yields an interesting perspective on several aspects of Weber's sociology.

In his empirical views about the origins of human rights, Max Weber was completely dependent on the research of his friends and colleagues Georg Jellinek and Ernst Troeltsch. So it seems sensible that we begin with them. This detour will allow us to pursue three different goals at once. First, it will enable us to formulate the problem more clearly. Second, by contrasting Weber's views with those of his contemporaries, we can more precisely specify his position. Third, and finally, this contrast will allow us to draw some conclusions regarding the interpretive power of the so-called Weber paradigm.

Our reflections begin with a scene. It takes place on an October evening in 1922 in downtown Berlin, when the German College for Politics (“Deutsche Hochschule für Politik”) is celebrating its second anniversary in a famous building, Schinkel's Bauakademie. The President of the Reich, Friedrich Ebert, and outstanding figures in Berlin's academic-intellectual life, such as the historians Friedrich Meinecke, Erich Marcks, and Hans Delbrück had accepted the invitation of this newly-created institution, which had set itself the goal of promoting adult education in the spirit of democracy and therefore had a somewhat difficult task in the early years of the Weimar Republic. The keynote address was given by one of the greatest scholars of the old *Kaiserreich*, the Protestant theologian, historian, and philosopher Ernst Troeltsch; the topic was “The Ideas of Natural Law and Humanity in World Politics.”¹ Contemporaries were fascinated by Troeltsch's argument. After reading the text, Thomas Mann responded with a

¹ Ernst Troeltsch (1923), “Naturrecht und Humanität in der Weltpolitik”, in: Ernst Troeltsch (2002), *Schriften zur Politik und Kulturphilosophie (1918-23)*, Berlin (Critical Edition Volume 15), p. 493-512. The “editorial report” (p. 477-490) and the editor's introduction to this volume (p. 1-42) contain important information regarding the background of this text. For an English translation see Troeltsch (1934).

detailed essay that appeared in the *Frankfurter Zeitung*; Friedrich Meinecke dedicated his book *Die Idee der Staatsräson* [The Idea of Reason of State] to Troeltsch, and devoted the final chapter of the book to Troeltsch's lecture; and Leo Strauss, the emigrant political philosopher, took them as the starting point for his 1949 lectures at the University of Chicago, in which he warned America against the relativistic influence emanating from defeated Germany, and out of which he developed his influential book *Naturrecht und Geschichte* [Natural Right and History].² Even today Troeltsch's vision continues to fascinate, and perhaps it can only now be fully understood -- by us, some three generations later.

What was so special about this lecture? Its unique contribution lies in a remarkably productive confrontation between the Western human rights tradition and a sophisticated conception of individuality, creativity and self-realization that was developed primarily in Germany. At the same time, Troeltsch's tone was entirely sober and calm. Troeltsch had stood at the frontlines of the heated nationalist output of university professors and the public intellectual debates that took place during the first years of the War, and had mostly emphasized the differences between Germany and the West in his own interventions. Though highly knowledgeable and generally above crude stereotypes, he was mainly interested in marking an impassable cultural and political boundary. The war's events and outcome did not drive him further in the direction of nationalistic radicalism, however, as they did others, such as Oswald Spengler. Neither did Troeltsch simply conform to the new circumstances for external or strategic reasons, by adopting the guise of a "rational republican", nor throw himself into the arms of the West, in a complete about-face. Rather, he attempted, by means of a genuine and deep-reaching auto-critique, to break open the disastrous alliance that had formed between the German understanding of individuality and the glorification of *raison d'état* and power politics. To reach this goal, he first showed clearly that the ideas of natural law and humanity were not, as was often assumed, "merely modern or merely West European concepts", but rather "ideas of great antiquity (...) and of general European scope; ideas which are the basis of our European philosophy of history and ethics; ideas which have been closely connected, for thousands of years, with theology and humanism".³ He further argued that Catholicism had always remained

² Thomas Mann (1923/1986), "Naturrecht und Humanität," *Frankfurter Zeitung*, 25 December 1923, reprinted in Thomas Mann (1986), *Aufsätze, Reden, Essays*. Volume 3, Berlin, p. 428-431; Friedrich Meinecke (1924/1957), *Die Idee der Staatsräson*, Munich; Leo Strauss (1956/1977), *Naturrecht und Geschichte*, Frankfurt am Main, p. 1.

³ Troeltsch (1923/2002), p. 495 (1934, p. 203).

much closer to this “common tradition of Europe,”⁴ the Romantic image of Catholicism notwithstanding. What was really new and modern, according to Troeltsch, were the – typically German -- conceptions of the Romantics and Historicists that essentially emerged out of a revolt against natural law, which, in its modern form, was perceived as a fusion of utilitarianism and ethics. The Romantics and Historicists, for their part, focused “on the particular, the positive: on what is eternally productive of new variety, constructive, spiritually organic, on plastic and super-personal creative forces”.⁵

In fact, since Herder and Humboldt, a significant strand of German thought had conceived of the human person neither as a utility-maximizing individual nor as a rational subject following the dictates of morality, but rather as a being that expresses itself, and in this sense realizes itself, in its utterances and acts.⁶ In this view, individuals are not just so many identical atoms, whose relationships to each other are subject to universal laws; rather they are highly unique personalities that undergo complex developmental processes as they seek out a path to self-realization through their own actions. This epochal transformation in thought also resulted in a new and different understanding of “community”, which is sharply distinguished from contractual relationships; of humanity, which is conceived as the struggle of the national spirits; and of history, which is not interpreted as progress. For Troeltsch -- and he believes for us -- this transformation cannot simply be undone, any more than this demanding new understanding of all individuality -- including our own -- can be renounced. His gesture consists not in any such retraction, but rather in the very insistence with which he questions the political realizations of the expressive conception of individuality characteristic of Germany and their opposition to Western universalism. Looking back, Troeltsch tended to see the consequences of the grandiose innovations of the classical period of German thought in terms of a history of decline: “But the conception of a wealth of unique National Minds turns into a feeling of contempt for the idea of Universal Humanity: the old pantheistic deification of the State becomes a blind worship of success and power; the Romantic Revolution sinks into a complacent contentment with things as they are. From the idea of the particular law and right of a given time, men proceed to a merely positive acceptance of the State: morality of the spiritual order, transcending bourgeois convention, passes into moral skepticism, and the urgent movement of

⁴ *ibid*, p. 497 (English: p. 204).

⁵ *ibid*, p. 502 (English: p. 210).

⁶ Compare Hans Joas (1992), *The Creativity of Action*. Chicago 1996, pp. 75-85.

the German mind towards a political form and embodiment ends merely in the same cult of imperialism which is rampant everywhere.”⁷ Troeltsch very explicitly distances himself from Germany’s fatal antipathy toward human rights and the League of Nations. “The theory of the Rights of Man – rights which are not the gift of the State, but the ideal postulates of the State, and indeed of Society itself, in all its forms – is a theory which contains so much of the truth, and satisfies so many of the requirements of a true European attitude, that we cannot afford to neglect it; on the contrary, we must incorporate it into our own ideas.”⁸ The key point is to be found in the last clause. Troeltsch is not only concerned with conquering the anti-western mixture of Romantic excess and the militaristic craze for order in Germany; he also wants to draw on the tradition of German thought concerning individuality and history to place the ideal of human rights on a new and possibly superior foundation.

And therein lies the challenge, still unsatisfied, that emanates from the text even today. It might at first appear as if Troeltsch’s text simply documents Germany’s long and arduous path toward the West. Initially, of course, this path led still deeper into anti-Western resentment, so that during the Third Reich, one historian (Wilhelm Ihde) would actually argue that the idea of human rights derived from a “decadent and pathological type of human.”⁹ After the step-by-step process of Westernization that occurred in Germany following the catastrophes of the Second World War and the Holocaust, first in the Federal Republic of Germany and then in Germany as a whole, Troeltsch’s concerns might seem outdated. But this would be a crude simplification of reality. For the West was never as homogeneous as its critics or the advocates of complete Westernization believed. And the differences among the western countries and their political camps and cultural traditions can only appear negligible when viewed from a great distance. What is more, the cultural tensions that exist within the West clearly resemble the ones that were employed to construct a cultural boundary between Germany and the West. For example, the French declaration of the rights of man from 1789 simultaneously proclaims the inviolability of individual freedoms and the sovereignty of a common will, without really resolving the tension between the two principles. If one follows Alain Touraine’s “Critique de la Modernité”¹⁰ the

⁷ Troeltsch, p. 504 (English: p. 214).

⁸ *ibid.*, p. 510 (English: p. 220) (emphasis mine, H.J.)

⁹ Wilhelm Ihde (1941), *Wegscheide 1789. Darstellung und Deutung eines Kreuzweges der Europäischen Geschichte*, cited in Wolfgang Schmale (1997), *Archäologie der Grund- und Menschenrechte in der Frühen Neuzeit*, Munich, p. 71f.

¹⁰ Alain Touraine (1992), *Critique de la modernité*, Paris, p. 70-74.

tension in the declaration can be seen as rooted in a tension between two fundamental principles of modernization: a process of progressive rationalization on the one hand, and a process of progressive subjectivication on the other. While this tension was indeed contained from time to time, it broke out into the open again and again, most recently during the cultural upheavals of the 1960's experienced by all Western societies. This shows that Troeltsch's search for an alternative to utilitarian and rationalistic justifications of human rights has, in fact, become increasingly relevant, even in the West, in part because of the massive and historically unparalleled diffusion of values of creative self-realization. Troeltsch's question of 1922 can thus be rephrased today as follows: How can belief in human rights and the dignity of the human person be linked to an ethos of self-realization? We can only answer this complex question once we have clarified its two poles. We must first investigate whether it is indeed true that human rights developed out of a desire for "liberty of action in business" (as Gerhard Ritter¹¹ for example has claimed) and the anti-religious spirit of the French Enlightenment, as the anti-Western accounts have claimed. This poses the question of the religious roots of human rights. On the other hand, we must determine whether the ethos of self-realization necessarily entails a Promethean self-conceit, or whether it aims instead at a change in the form of religiosity in the direction of individual and expressive forms of spirituality. How, then, can an affective tie to universalistic moral values develop under these new conditions?

First, the question of historical genesis. The point of departure for the discussion that follows is Georg Jellinek's book *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte* [The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History].¹² First published in 1895, this book is widely regarded as the seminal work which initiated work on the subject.¹³ It advances four exciting key theses.¹⁴ One of the most important constitutional historians and legal theoreticians of the time, Jellinek begins by arguing that the declaration of human and civil rights in the French revolution did not mark a final point of historical origin for the codification of human rights, as had

¹¹ Gerhard Ritter (1948), "Wesen und Wandlungen der Freiheitsidee im politischen Denken der Neuzeit," in: Gerhard Ritter, *Das sittliche Problem der Macht*, Bern, p. 105-138, here p. 112.

¹² Georg Jellinek (1895), *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte*. Munich and Leipzig (cited here according to the 3rd edition from 1919) (English translation New York 1901).

¹³ Schmale (1997), p. 30.

¹⁴ Compare also the foreword by Jellinek's son Walter, *ibid* p. VI/VII.

frequently been assumed. Rather, he argues, this declaration was directly influenced by, or even modeled on, the American Declaration of Independence, and the various “Bills of Rights” proclaimed in Virginia, Pennsylvania and other newly independent North American states in 1776. Jellinek also contested the claim -- dominant in his time -- that Rousseau’s “contrat social” was the model for the French declaration. In addition – and this is the third point -- he stressed that we should not overestimate the continuity between natural law and human rights, since the concepts of natural law could never have led to the institutionalization of human rights in or by themselves. A driving force was needed, the driving force behind this development, in Jellinek’s fourth thesis, were the struggles of Protestant dissenters for religious freedom in North America. With these theses, Jellinek shifted the credit for the first declarations of human rights away from the French Enlightenment, which was rather skeptical or even hostile toward religion, and traced them back to their Christian roots. He thereby provided the inspiration for a much more famous book: Max Weber’s *Die protestantische Ethik und der Geist des Kapitalismus* [The Protestant Ethic and the Spirit of Capitalism]. Weber was deeply impressed by Jellinek’s argument, and especially by his “demonstration of religion’s relevance to the genesis of ‘human rights’” insofar as it contributed to “the investigation of the scope of religious influences in general, even in areas where one would not expect to find them.”¹⁵ To what extent can Jellinek’s theses be maintained given our current state of knowledge?

In answering this question, we must continually bear in mind three different time periods. The first period is the late 18th century, when declarations of human rights were proclaimed in North America and France. The second period is the time around 1900, when the question of the Christian, and specifically Protestant, roots of modernity more generally became a key subject of intellectual debate. And the third time period is, of course, the present day, from which we look back over the development of human rights and the effects of their changing historical interpretations (*Wirkungsgeschichte*). The middle period continues to be important because we

¹⁵ Thus Max Weber in a commemorative address for his deceased friend on the occasion of the wedding of one of Jellinek’s daughters. See Marianne Weber (1950), *Max Weber. Ein Lebensbild*. Heidelberg, p. 520. Günther Roth has repeatedly pointed to the importance of Jellinek for Weber. See Reinhard Bendix and Guenther Roth (1971), *Scholarship and Partisanship*, Berkeley, p. 308-310. The literature on the relationship of Jellinek and Weber (astonishingly) often does not even touch on the question at issue here. See Stefan Breuer (1999), *Georg Jellinek und Max Weber. Von der sozialen zur soziologischen Staatslehre*, Baden-Baden; Gangolf Hübinger (1988), “Staatstheorie und Politik als Wissenschaft im Kaiserreich: Georg Jellinek, Otto Hintze, Max Weber,” in Hans Maier et al. (ed.), *Politik, Philosophie, Praxis. Festschrift für Wilhelm Hennis*, Stuttgart, p. 143-161. In spite of its promising title, this also holds for Benjamin Nelson (1975), “Max Weber, Ernst Troeltsch, Georg Jellinek as Comparative Historical Sociologists,” in *Sociological Analysis* 36, p. 229-240.

are concerned here not just with historical details and facts, but also with the interpretation of the historical process that produced human rights. For any such interpretation, controversies regarding human rights as part of modernity, such as those conducted around 1900, are still of the utmost importance.

Jellinek's book became the subject of a heated national and international debate immediately upon publication. French critics perceived it as a perfidious attempt to deny France's contribution to one of the most significant achievements of modernity.¹⁶ One can still sense a certain degree of resistance even in Marcel Gauchet's 1989 book on the origin of the French declaration of human rights,¹⁷ where he concedes that "German scholarship" had shown the influence of the American Declarations to have been decisive. In Germany, Jellinek's thesis was an important point of reference for all those who wished to separate the question of human rights from the constitutional traditions of France, Germany's "historical enemy" traditions that were usually looked upon with skepticism and resentment. Here, however, Jellinek's text drew Catholic critics into the field, who contested vehemently any possible claims of Protestant superiority with respect to the historical development of freedom and tolerance. Jellinek felt that his intentions and his book were misunderstood in many respects. And indeed his intentions are surely missed by such petty, nationalistic and confessional insinuations. Instead, it seems to me that Jellinek's work must be interpreted as an effort to move beyond the dead-end debate between historicism and the theory of natural law.¹⁸ Like the historicists, Jellinek did not believe that binding metanorms for the regulation of positive law could be derived from any philosophy, not even from natural law or Kant. In this sense, he remained a proponent for the unlimited sovereignty of the state. But in contrast to many German historians of his time, especially the anti-liberal and nationalistic ones, he did not hold conceptions of natural law to be "idle dreams",

¹⁶ Best known is the critique of Émile Boutmy, to which Jellinek responded at length. Compare both contributions in the collection by Roman Schnur (ed) (1964), *Zur Geschichte der Erklärung der Menschenrechte*, Darmstadt, p. 78-112 (Boutmy, "Die Erklärung der Menschen- und Bürgerrechte und Georg Jellinek) and p. 113-128 (Jellinek, "Antwort an Boutmy").

¹⁷ Marcel Gauchet (1991/1989), *Die Erklärung der Menschenrechte. Die Debatte um die bürgerlichen Freiheiten 1789*, Reinbek, p. 44.

¹⁸ In this I follow a suggestion of Ernst Troeltsch. Compare his review of Jellinek's *Ausgewählte Schriften und Reden* in *Zeitschrift für das Privat- und öffentliche Recht in der Gegenwart* 39 (1912), p. 273-278. For a similar view, see also Friedrich Wilhelm Graf (2002), "Puritanische Sektenfreiheit versus lutherische Volkskirche. Zum Einfluß Georg Jellineks auf religionsdiagnostische Deutungsmuster Max Webers und Ernst Troeltschs," in: *Zeitschrift für neuere Theologiegeschichte* 9, p. 42-69. Regarding Troeltsch's own position in this respect, the following source is interesting: Jean-Marc Tétaz (1999), "Identité culturelle et réflexion critique. Le problème de l'universalité des droits de l'homme aux prises avec l'affirmation culturaliste. La stratégie argumentative d'Ernst Troeltsch," in: *Études théologiques et religieuses* 74, p. 213-233.

but rather sympathized with the notion of a state that limited itself by law and posited individual rights and freedoms.¹⁹ So he had to try to find a place for such rights within his historicist approach. In this sense, his text marks the point where historicism, becoming aware of the dangers of its own relativism, seeks to transcend itself. This point is hardly foreign to us today. If the question of the historical roots of the idea of inalienable individual rights is not conceived of simply as a question of genesis that is completely independent of the question of their grounding and validation, then an essential point is indeed marked here. For then it is a matter of the possibility in principle of advancing universal validity claims, with the awareness that the genesis of values is historically contingent.²⁰

Despite all the objections that were and are raised against it, much of Jellinek's argument can now be regarded as well-confirmed. He was correct not only in his emphasis on the chronological priority of the American declarations of human rights and their influence on the French "Déclaration" (though the latter one certainly was no mere imitation of the American declarations). He was also correct when he pointed out that there is a difference between theories of natural law, on the one hand, and, on the other, the legal codification of specific individual rights that are supposed to hold for all people and be removed from legislative authority. [T]he assertion of objective moral and legal limits to all worldly powers," writes Hasso Hofmann, agreeing with Jellinek, does not itself devolve into "a theory of subjective rights. The idea of constitutional freedom and security against illegal tyranny is not equivalent to the human rights idea of basic, individual freedoms and protection against legal tyranny."²¹ We must also agree with Jellinek when he rejects the view that the English legal tradition, with its codification of rights and freedoms, led directly to the declarations of human rights of the late 18th century, since these guarantees only applied to the traditional rights of the subjects of the English king and by no means to all people. It is also true that Rousseau cannot be regarded as the source of

¹⁹ These tensions in Jellinek's thought have been particularly intensely pursued in: Jens Kersten (2000), *Georg Jellinek und die klassische Staatslehre*, Tübingen. He too sees Jellinek's theory of the state as an attempted "mediation between facticity and normativity" (p. 5) on historical and statist ground. Compare also p. 410: "The theory of self-commitment wants to answer the question pertaining specifically to German constitutionalism: how a factual national will that is conceived as formally free of any legal commitment can include normativity." He admittedly accuses Jellinek's thought of being visibly anchored in the German tradition of the predemocratic power state, in the primacy of the state over the citizens, and of failing to understand the basic rights in the sense of a charter of a commonwealth of citizens (compare p. 427). In this, Kersten's proximity to contract-theoretical ideas and the French tradition becomes apparent. He does not deal with the intrinsic difficulties of these, which causes his judgment concerning Jellinek to turn out somewhat one-sided.

²⁰ This is also the topic of Hans Joas (1997), *Die Entstehung der Werte*. Frankfurt am Main.

²¹ Hasso Hofmann (1988), "Zur Herkunft der Menschenrechtserklärungen," in *JuS* 28, p. 841-848, here p. 844.

inalienable rights to freedom that also apply against the state, since he had argued precisely against any limitations on the legislative power of popular sovereignty. In this political respect, Rousseau is better seen as representing the collectivist pole of the French declaration of human rights, rather than the individualistic one, even if we do not want to claim that the same unresolved tension is found in his work as in the “Déclaration”. If one can thus say today, notwithstanding certain opposing voices, that there is a widespread consensus in favor of Jellinek on all of these points, then the debate narrows to the last, and in any case boldest thesis of the book, namely, the thesis that the American declarations of human rights had religious roots.

Here, the utmost caution is necessary. We must first demonstrate that we are not simply dealing with an intellectual background. Of course, Jellinek was aware that the belief in the dignity of all people had deep roots in the centuries-old Judeo-Christian tradition -- though this tradition cannot be treated as an unbroken process of maturation that gave rise to modern ideas, especially when one considers how often its universalism was violated, when Jews, heretics, or native peoples were denied these selfsame rights. The intellectual roots of human rights in Renaissance humanism, the Reformation, or Spanish late scholasticism are in general less interesting for an understanding of our problem than are the dynamics of their sudden institutionalization. And it is here that Jellinek saw the struggle of American Protestants, especially the (Calvinist) Congregationalists, for religious freedom as decisive. Although religious toleration can be observed in the most varied regimes—the enlightened absolutism of Frederick the Great in Prussia, for example, or colonial Maryland under Catholic leadership—utilitarian calculations usually formed the basis for policies of toleration. Jellinek, however, was interested in the religious roots of the struggle for religious freedom – meaning religious freedom not just for one’s own confession but for all believers. This is a highly salient topic today—as the threat from Islamic fundamentalism clearly shows. Accordingly, the hero of Jellinek’s story is the Puritan preacher Roger Williams, who left Massachusetts in 1636 for Rhode Island, where he guaranteed religious freedom not only for Christians of all sorts but also “for Jews, heathens, and Turks”. Jellinek’s central thesis is that: “The idea of securing the inalienable, inborn, and sacred rights of the individual in the law is of religious rather than political origin. What has hitherto been viewed as a product of the [French] Revolution is in fact a fruit of the Reformation and its struggles. Its first apostle is not Lafayette, but rather Roger Williams who, driven by powerful, deeply religious enthusiasm, sets off into the wilderness to found a realm of religious freedom,

and whose name is still mentioned with reverence by Americans today.”²² According to Jellinek, all other individual rights, such as freedom of opinion, of the press, and of assembly—stem from this source. The whole idea that individuals not only have rights within a state, but also rights against the state, and that these are not simply conferred by the state, points to a religious origin, at least in the sense of a historical explanation.

Our current state of knowledge necessitates three corrections to Jellinek’s fourth thesis. The first of these corrections stems from none other than Ernst Troeltsch. For him, it was not the Calvinists, as for Jellinek, but rather the Baptists, Quakers, and certain types of free spirituality -- the “stepchildren of the Reformation” as he famously called them -- who helped win acceptance for a religiously founded idea of religious freedom, as he argued in his great work on *Die Soziallehren der christlichen Kirchen und Gruppen* [The Social Teachings of the Christian Churches and Groups]. “Only that spiritualism which individualizes and relativizes all external forms is the father of true tolerance; the only truly Calvinist stance concerns the inviolability of religion by the state.”²³ Jellinek himself accepted this correction in the third edition of his book, albeit a little reluctantly.

The second correction relates to the claim – historicist in the negative sense -- to have found the germ-cell of all human rights in religious freedom. This view cannot be defended. It does not obtain for France in any case. Nor did religious freedom exist in most of the North American colonies or states. Indeed, it was not until the 20th century that the separation of church and state at the national level was legally secured in the various states of the Union as well. The historical codification of human rights was, of course, generally affected by the opportunistic and strategic considerations of social actors, by constellations of power, and by structures of opportunity. While it is true that the legal recognition of the freedom of religion and of conscience represents the first form of universal human rights, we should not by any means ascribe to it an autonomous causal power or overestimate its significance in the late 18th century. To do so, would be an injustice to the actual dynamics of institutionalization.

At the same time, however – and this is the third correction -- we should not underestimate the role of religious interpretations and motives at this time either. Rather, we must abandon this un-dialectical opposition of two explanatory hypotheses, one of which gives

²² Jellinek, *ibid* p. 57.

²³ Ernst Troeltsch (1912a), *Die Soziallehren der christlichen Kirchen und Gruppen*, Tübingen, p. 761.

the responsibility for the origin of human rights to American Protestantism, and the other to the French Enlightenment. Troeltsch, much more than Jellinek, had already recognized the transformative effects that Enlightenment thought exerted on Protestant Christianity in North America. For, in a well-known phrase, Americans in the 18th century learned their Enlightenment from the pulpit.²⁴ Conversely, there were also affinities between certain forms of Christian spiritualism and Enlightenment rationalism. For Troeltsch, admixtures of this sort were nothing new, since, in his opinion, the entire history of western culture was characterized by an interplay between the Christian idea of love and conceptions of natural law. Current work on the historical genesis of the American Declaration of Independence vividly shows just how impossible it is to draw any clear boundaries in America's Puritan-Enlightenment synthesis. The primary author of the Declaration, Thomas Jefferson, was of course a deist and only Christian in the broad sense that he accepted the teachings of Jesus, though not his divinity. In his formulations, however, Jefferson strove for a consensus that would be acceptable to the various strains of Christianity as well as to enlightened non-Christians. The claim that the Creator has endowed us with inalienable rights was presented as a self-evident rational truth. The delegates of the Continental Congress later strengthened the references to God in Jefferson's text, partly for strategic reasons no doubt, to increase its acceptance among the citizens, but certainly also out of true conviction. Even if the other human rights thus do not follow from religious freedom in an organic fashion, religious freedom was nevertheless understood in the America of the late 18th century "as the 'first freedom', as the most significant and important of the freedom rights, the one that formed the basis for the entire rest of the constitution."²⁵ In this modified form, Jellinek's thesis regarding the religious roots of the declaration of human rights can indeed be considered as well-confirmed for North America.

If this is true, this thesis has important implications for our understanding of modernity, of which human rights are incontestably a part. For it destabilizes the view that the development of human rights is part of a larger process, sometimes referred to as the sacralization or

²⁴ Compare Dieter Grimm (1970), "Europäisches Naturrecht und amerikanische Revolution," in: *ius commune. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte* 3, Frankfurt am Main, p. 120-151.

²⁵ Wolfgang Vögele (2000), *Menschenwürde zwischen Recht und Theologie. Begründungen von Menschenrechten in der Perspektive öffentlicher Theologie*, Gütersloh, p. 103; Max Stackhouse (1984), *Creeds, Society, and Human Rights*. Grand Rapids, Mich. especially p. 70ff., speaks of a "liberal-Puritan synthesis" and its institutionalization in a presentation that, to a large extent, confirms Jellinek's work and—as an exception in American scholarship—also explicitly mentions him. An excellent new study on Roger Williams is: Timothy I. Hall (1998), *Separating Church and State. Roger Williams and Religious Liberty*, Chicago.

charismatization of reason. For some authors²⁶ who build on Max Weber, the origin of human rights plays itself out exclusively in the context of a belief in rationality whose characteristic expression is Robespierre's quasi-religious "cult of reason", but which continued on in Marxism's pretences towards a "scientific socialism".

Let us consult Max Weber himself at this point. However strongly he may have been influenced by Jellinek (and Troeltsch) in these matters, he nonetheless gave their arguments a particular twist, by integrating them into his theory of occidental rationalism and its future. At first glance, Jellinek's thesis seems to fit perfectly into this framework, which is, of course, no coincidence, since Weber's own studies on Puritanism had been strongly inspired by Jellinek's book. The way in which the subject of human rights surfaces in Weber's *Soziologische Grundbegriffe* [Basic Concepts in Sociology] is nonetheless a bit jarring. Though few have noticed it, Weber refers to human rights in this context as "extremely rationalistic fanaticisms" and as the epitome of those ultimate ends or values, that, like "religious and charitable virtuoso performances for those not receptive to them," are barely understandable if at all for one who does not share them or who "radically abhors them."²⁷ Here, Weber was surely thinking of the French-Enlightenment version of human rights. But for him there was no contradiction between this emphasis on the rationalistic character of human rights and their religious roots, since he was interested precisely in the religious roots also of such "extremely rationalistic fanaticisms". For Weber, the Enlightenment, as a mere negation of tradition, would have been too weak to effect such an intensification of belief. In this sense, Jellinek's thesis anticipates Weber's views regarding the religious roots of the rational, capitalist spirit.

In other contexts Weber relates human rights to the expansion of capitalism and the progress of bureaucratization. For him it is clear "that the demand for formal, legal equality and

²⁶ Günther Roth (1987), *Politische Herrschaft und persönliche Freiheit*, Heidelberg, p. 147; Stefan Breuer (1993), "Das Charisma der Vernunft" in: Winfried Gebhardt, Arnold Zingerle, and Michael Ebertz (eds.), *Charisma*, Berlin p. 154-184. In his extensive study on Weber's sociology of law, our topic is touched on by: Werner Gephardt (1993), *Gesellschaftstheorie und Recht. Das Recht im soziologischen Diskurs der Moderne*, Frankfurt am Main, p. 565ff. Also worth mentioning: Jean Martin Ouédraogo (1996), "Sociologie religieuse et modernité politique chez Max Weber," in: *Revue européenne des sciences sociales* 34, p. 24-49. Winfried Brugger has dealt with Max Weber especially thoroughly in the context of the human rights discussion in his works: (1980a) *Menschenrechtsethos und Verantwortungspolitik. Max Webers Beitrag zur Analyse und Begründung der Menschenrechte*. Freiburg. (1980b), "Sozialwissenschaftliche Analyse und menschenrechtliches Begründungsdenken. Eine Skizze im Anschluß an Max Webers Werk," in: *Rechtstheorie* 11, p. 356-377. Brugger's emphasis on the constitutive role of experiences of injustice is particularly interesting. Compare here also: Matthias König (2002), *Menschenrechte bei Durkheim und Weber*. Frankfurt am Main, p. 78-138.

²⁷ Max Weber (1922), *Wirtschaft und Gesellschaft*, Tübingen, p. 2.

economic freedom of movement paved the way for the destruction of all specific foundations of patrimonial and feudal legal systems in favor of a cosmos of abstract norms, and thus indirectly of bureaucracy, but on the other hand favored the expansion of capitalism in a very specific way.”²⁸ He draws a direct parallel between his own thesis that the “innerworldly asceticism” of the sects engendered the capitalist mind-set and the rationally acting “Berufsmensch”, and the claim that “human rights and basic rights [created] the precondition for the free play of the capitalist drive to valorize goods and persons.” It is in this context that we encounter his remark concerning the charismatic transfiguration of reason as the core of the Enlightenment vision, that individual freedom must result in “the relatively best world” for all. This charisma of reason is “the last form that charisma took on in its fateful path.” This sentence is of course ambiguous, since we do not know whether Weber was speaking here of the last form that has appeared up until now or the last form that will ever appear.

At this point it may seem as if Weber’s understanding of the history of human rights is almost functionalist and materialist. But the opposite is true, as can be seen particularly in his writings on Russia.²⁹ There, Weber is confronted with the direct influence of Jellinek on leading liberal Russian politicians of the time, such as Peter Struve, during a short phase around 1905, when it appeared that the idea of human rights could unite the various wings of a rebellious Russian intelligentsia. The Russian political situation awoke a passionate interest in Weber precisely because it concretely posed the question of whether civic freedoms and constitutionally certified rights could in fact be established afresh under modern conditions, that is, in a world of advanced capitalism and a (more or less) modern bureaucracy. Unlike some optimistic western liberals and (later) modernization theorists, he did not believe that these elements of modernity bore any particular affinity to democracy and freedom. But he analyzed the political and social powers of Russia in order to determine which side might successfully lead the fight against bureaucratic and Jacobinic centralism, against authoritarianism within the worker’s movement, and in favor of the expansion of modern individualism. The Russian situation seemed to him a tragic one insofar as even a success of the liberal forces in the struggle for the right to vote would

²⁸ Weber, *ibid.* p. 817.

²⁹ Max Weber (1980/1921), *Gesammelte politische Schriften*, Tübingen, especially p. 33-111. On Weber’s Russian writings, compare Richard Pipes (1955), “Max Weber und Rußland,” in: *Außenpolitik* 6, p. 627-639; Gordon Wells and Peter Baehr (1995), Editors’ Introduction in: Wells and Baehr (eds.), *Max Weber. The Russian Revolution*. Ithaca, NY, p. 1-39; Wolfgang Mommsen (1989), Einleitung, in: Max Weber, *Zur Russischen Revolution von 1905*, Tübingen, p. 1-54. On Struve and Jellinek, compare Richard Pipes (1970), *Struve. Liberal on the Left 1870-1905*, Cambridge, Mass, especially p. 302ff.

initially, by strengthening the peasantry, be more likely to hinder than advance the development towards western individualism.

His pessimism did not apply only to Russia, however. According to Weber, both the ideal and material preconditions for the belief in human rights have essentially vanished throughout the world. Because of the Enlightenment, Weber believed, the religious convictions that Jellinek saw as the source of the political individualism of human rights can no longer arise as a mass phenomenon, at least not in their current form, while “the optimistic belief in the natural harmony of interests of free individuals” has been “destroyed forever by capitalism.” This “specifically bourgeois individualism” “has already been overcome even within the “educated and property-holding” classes and will certainly not be able to conquer the ‘petite bourgeoisie’ any more.”³⁰

Today, in the context of global capitalism, when the future of human rights is itself a question, the question of their origins is posed more sharply still. If Weber could imagine a capitalism of the future absent a belief in human rights, then how exactly should we understand the relationship between capitalist development in the past and the origins of human rights? How did Weber himself understand this relationship, given that he agrees not only with Jellinek’s thesis regarding the Protestant origins of human rights but also with the view that freedom of contract was a functional prerequisite of capitalist economies? If one consults Weber’s sociology of law in search of an answer, especially the long, third section, “Die Formen der Begründung subjektiver Rechte” [The Forms of Justification for Subjective Rights]³¹ one finds astonishingly little about Jellinek, human rights, and rights to freedom, but rather extensive discussions of the freedom of contract, whose history, Weber claims, is much longer than the the history of human rights à la Jellinek. Weber emphasizes not only how common contracts were in premodern societies, which allows him to dispense with any simple model of social evolution based on the formula “from status to contract”; he also argues that the degree of freedom of contract is “naturally first of all a function of the expansion of markets.”³² The apparent contradiction in Weber’s thought can probably only be resolved in the way suggested in an excellent essay by the

³⁰ *ibid.*, p. 42f.

³¹ Weber, *Wirtschaft und Gesellschaft*, p. 412-455.

³² *ibid.*, p. 413

French Weber-expert Cathérine Colliot-Thélène.³³ According to her interpretation, Weber saw the moral individualism of Protestantism as a historical opportunity for the systematization of all subjective rights; however, the willingness to incorporate the idea of freedom of contract into this system required certain pre-conditions that were by no means the result of this moral individualism itself. The history of freedom of contract therefore antedates the origin of human rights and would continue even if the epoch of human rights irreversibly approached its end. As Wolfgang Schluchter points out in his essay “Rechtssoziologie als empirische Geltungstheorie” [“The Sociology of Law as an Empirical Theory of Validity”] the law would not be unaffected by this kind of uncoupling from moral universalism; it would certainly change its character, but by no means in the sense of a complete disappearance of those aspects that were necessary for a market-oriented economy.³⁴

But must we really see the future in such a gloomy light? As salutary as it is, that we not simply trust in the stability of Western cultural traditions, neither need we unquestioningly accept the scattered and fragmentary arguments that Weber uses to justify his gloomy perspective.

New forms of religious conviction have emerged during the 20th century. The inherent tendencies of moral judgment promote universalistic moral orientations. The history of violence and of human degradation has led in some places to a clearer awareness that the dignity of the person must be inviolable. Capitalism has experienced long phases of prosperity, and the construction of welfare states has demonstrated that divergent interests can be reconciled in a peaceful and just manner, even if it has not revived the belief in a natural harmony of interests. The expansion of education has led to the emergence of new milieus in which a belief in human rights is widespread. And Weber surely exaggerated the degree to which the lower middle-class and the creative entrepreneurial spirit were in retreat. Weber unites his thesis about the religious roots of modern individualism and his diagnosis of the present in the form of a tragedy. In this construal, religious forces bring about a regime that takes the life out of these very forces.

³³ Cathérine Colliot-Thélène (2001), “Les modes de justification des droits subjectifs,” in: Colliot-Thélène, *Études weberiennes. Rationalités, histoires, droits*, Paris, p. 259-278. In this, she leans on the thorough thesis by Romain Melot (2000), *La Notion de droit subjectif dans l’oeuvre de Max Weber* (Mémoire de DEA, Université de Paris I Sorbonne).

³⁴ Wolfgang Schluchter (2000), “Rechtssoziologie als empirische Geltungstheorie,” in: Wolfgang Schluchter, *Individualismus, Verantwortungsethik und Vielfalt*, Weilerswist, p. 59-85.

If, however, Weber's historical prognoses -- or, better, his sociological assumptions regarding the future -- have not proven correct after the close of the 20th century, then perhaps the relationship between our time and the origin of the belief in human rights and human dignity need not be a tragic one. Treating this relationship as contingent opens up more space for historical complexity and allows for more hope. Indeed, insofar as it has been confirmed, I believe that we should remove Jellinek's thesis from Weber's framework. Weber assumed that the only alternative to cultural Protestantism, with its sometimes superficial and evolutionistic optimism about the future, was a heroic pessimism that defends liberal individualism against the tendencies threatening its existence together with a stark Kierkegaardian "Either-Or" in the choice between values. Troeltsch, by contrast, teaches us that another view of Christianity's potential role in the modern period is possible. One must think here of productive re-interpretations and creative continuations of the Judeo-Christian tradition, of new experiential foundations for a belief in individualistic values, and of new religious organizational structures, in which the characteristics church, sect, and individual spirituality are bound together. This would result in a strengthening of Christianity as a support for the sacrality of each person over against the depersonalizing forces of modernity. Here, we would not longer be dealing with an over easy compromise between religion and modernity, of the sort found in cultural Protestantism, nor with an antithetic opposition, as in Weber and, with a reversed valuation, in large parts of Catholicism.

Liberating Jellinek's thesis from Weber's framework also permits us to conceive of the belief in human rights as something other than a sacralization or charismatization of reason. The sacralization of reason touches only one side of human existence and does not affect all people in equal degree. But the belief in human dignity and human rights does affect all of us -- and in equal degree. It sacralizes the young and the old, the intelligent and the mentally retarded. When we speak of the "charisma of reason", our attention is misdirected--towards Jacobinism and Bolshevism, two political world views whose human rights record is not particularly admirable. The belief in human rights rests in fact on a sacralization of the individual; it is inspired, or so I wish to claim, by a "sacralization" or a "charisma of the person". During the 18th century, of course, this charisma of the person was articulated within a framework of rationalistic convictions--in Jefferson and Kant, for example; today, however, we can and must separate

these two components more clearly from one another. The historical process of the depersonalization of charisma can lead to a charismatization of the person.

What implications does this discussion have for the existence of a “Weber paradigm”? The considerations presented above display a certain distance from any “Weber orthodoxy”. Max Weber should not be treated as a solitary figure, as often happens in sociology, especially outside of German-speaking areas. If we see him in the network of his German and non-German contemporaries, then Weber becomes perceivable as a—and perhaps the most imposing—figure in the transition from German historicism of the 19th century to the modern social sciences—social sciences, though, that by no means withdraw from the treatment of normative questions, and which lend historical depth to the analysis of the present and proceed interdisciplinarily in a universal-comparative perspective. If this type of social science is what is signalled with the appeal to Max Weber, then the name “Weber paradigm” can serve well to characterize it.

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