Max Weber. By Anthony T. Kronman. Stanford: Stanford University Press, 1983. Pp. 214. $19.50.

*Reviewed by Edgar Bodenheimer**

This book is the third work in a series entitled *Jurists: Profiles in Legal Theory*, which is being published under the general editorship of William Twining. The first volume examined the ideas of the contemporary British legal philosopher H.L.A. Hart. The second volume dealt with the legal theory of the nineteenth-century British jurist John Austin.

At first sight, it is somewhat surprising that a writer known throughout the academic world as an outstanding sociologist would be included in a collection of monographs presenting profiles of great legal thinkers. The surprise diminishes, however, once one realizes that Max Weber received a formal legal training at the Universities of Berlin and Goettingen, that he was certified by the German government to teach Roman, German, and commercial law, and, above all, that an extensive chapter in his magnum opus *Economy and Society* had the Sociology of Law (*Rechtssoziologie*) as its subject matter.[1] It is this celebrated and trailblazing essay which is analyzed in some detail in the volume here reviewed, although the author also makes reference to other works by Weber. Weber's legal sociology deals with such matters as the social and economic origins of new law, the distinctions between rational and irrational forms of lawmaking, the limitations placed upon the exercise of power through the law, the character of primitive law, types of legal thinking, and the ethos of the legal profession in England and on the European continent. In keeping with the objectives of the main work, of which the sociology of law forms a part, there is a rather heavy emphasis on economic factors that influence, or are influenced by, legal developments. We find, for example, an elaborate discussion of contracts typical for various economic systems, the scope and limits of contractual freedom, the economic foundations of barter and sales agreements, the degree to which testamentary freedom is recognized in the

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[1] M. WEBER, WIRTSCHAFT UND GESELLSCHAFT, Chapter VII (1925). An English translation will be found in 2 M. WEBER, ECONOMY AND SOCIETY 641-900 (G. Roth & C. Wittich ed. 1978).

law of different countries, and the functions of business associations.

After pointing out the difficulties confronting the reader of the *Rechtssoziologie* because of its dense style and heavy use of technical terms, Professor Kronman turns to Weber's reflections on the methodology of law. Weber distinguished between three forms of legal thinking. The first he called moral thinking: it assesses the moral goodness of specific legal rules and principles and must be sharply distinguished from legal reasoning in its technical sense. As Professor Kronman points out, it has been argued that this distinction does not always hold true for the method of reasoning used by the United States Supreme Court in constitutional cases (p. 9). The federal Constitution incorporates ethical norms of a very general character, such as the due process and equal protection clauses. In interpreting these clauses, the Court has often imported moral notions into the judicial process, a method of reasoning which has recently been approved by Ronald Dworkin.[2]

The second type of legal thinking is dogmatic thinking: it seeks to explicate the "correct" meaning of a particular rule without consideration of its goodness or badness. The third type is the sociological approach: it neither sets out to judge the ethical quality of the law nor seeks to expound its true meaning from a strictly legal point of view. Legal sociology is concerned with tracing the social and economic causes of legal norms and with describing the effect of such norms on the behavior of people. From the sociologist's perspective, even illegal behavior constitutes a legal phenomenon (pp. 10-14).

Kronman then turns to Weber's theory of value, which forms a very important part of his thinking. Weber sought to maintain a sharp distinction between the "is" and the "ought," although he recognized that in some situations the distinction becomes unworkable. Empirical data are discovered by studying reality, whereas values are freely chosen by an act of the human will. This assumption suffuses the entire scholarly work of Max Weber. It is subject to questioning, however, since cultural and environmental conditions, as well as personal experiences, often decisively shape a person's value preferences. Furthermore, the sharpness of the distinction becomes blunted in the legal area when result-oriented considerations enter into the judicial decisionmaking process. Judges are often not entirely free to achieve a certain result deemed by them to be just, especially when a statutory scheme is applicable in a litigated case. It is true, of course, that statutory provisions or other rules frequently have an "open texture":[3] they leave a measure of

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[2] *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 123-30 (1977).

[3] H.L.A. HART, THE CONCEPT OF LAW 124-25 (1961).

interpretive discretion to the judge. But the choices made by the judges within this area of decisional latitude — choices that obviously represent an "ought" (the achievement of a just outcome) — are limited by certain facts of external reality. Illustrations are the semantic boundaries of the applicable norms, which normally may not be transgressed by the judge, and the prevailing societal conceptions of rightness and fairness with which the judges have become imbued because they are children of their time.

One of the most original contributions of Weber to the sociology of law was his distinction between the formal and substantive rationality of the law. The distinction is fully discussed in Professor Kronman's book (pp. 72-95);[4] my own account of it will introduce some additional considerations.

According to Weber, the legal structures of the Western world are characterized by a high degree of rationality. This rationality is partly formal and partly substantive. Formal rationality of a legal system means, first, that legal decisions are based on general rules applicable to all persons coming within their purview. An attempt is made to bring these rules into a logical relationship in order to ensure coherence and consistency. This technique imparts to the legal system a substantial degree of predictability. Such predictability, according to Weber, is of particular importance in a capitalistic system, in which a multitude of private producers must calculate potential profits and risks on the basis of expectancies which can be made safer by legal guideposts.

Second, the formal rationality of the law requires, according to Weber, a sizable degree of autonomy for the legal system. A distinction should be made between legal and nonlegal sources. Judicial decisions should be based to the greatest possible extent on purely legal sources, which are usually more precise and more articulately verbalized than nonlegal sources, such as ethical principles and cultural habits. This autonomy of the legal system is an additional factor promoting legal certainty and predictability of judicial decisions.

The substantive rationality of the law relates to the political, social, and economic substrata of the law. Weber holds that substantively rational principles, such as general axioms of justice, tenets of political ideology, and economic preferences are extrinsic to the formalized legal system. Weber points out that the substantive principles of Western law embody the ideals of personal liberty and freedom of enterprise. In his economically oriented approach, Weber puts special emphasis on

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[4] The discussion is based on 2 M. WEBER, ECONOMY AND SOCIETY, *supra* note 1, at 655-57, 809-15.

freedom of contract, freedom to acquire and dispose of property, and antagonism to restraints on alienation.[5] The philosophical foundations for the substantive rationality of Western law will be found in the writings of the classical natural-law thinkers of the seventeenth and eighteenth centuries.[6]

Substantively rational principles are normally more vaguely formulated than formalized technical rules, because postulates of material justice cannot be encased in a tightly closed straitjacket. If they are relied on to a great extent by the judiciary, these principles tend to detract from the predictability of the law. There are hints throughout Weber's work that in the future of Western civilization narrowly circumscribed technical rules may on many occasions be crowded out by flexible notions intended to insure fair decisions in individual situations. Weber's forecast of things to come has indeed proved to be valid. The reason for this development has been the rise of the welfare state and a growing (though sometimes interrupted) concern for social well-being, two phenomena which often require departure from inflexible rules that may favor the status quo and the interests of privileged groups.[7]

Weber contrasted the rational forms of lawmaking and lawfinding with its irrational manifestations. The latter prevail when use of oracles, reliance on magic, and invocation of divine intervention become characteristic devices in the administration of justice (pp. 80-87). According to Weber, another form of irrational law is "khadi-justice": pronouncements of legal judgments by charismatic figures who are inspired by religious ideas or motivated by personal intuitions of justice.[8] Weber points out that since primitive law employs means which are not controlled by the intellect, its techniques are particularly ill-adapted to the discovery of the "real truth."

In the last chapter of the book, entitled *Modernity*, the author portrays Weber's overall reactions to the world in which he lived: the European social scene in the first quarter of the twentieth century. Weber's position toward the trends discerned by him in this world was an ambivalent one. On the one hand, he admired the increasing intellectualization and rationalization that he found characteristic of West-

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[5] 2 M. WEBER, ECONOMY AND SOCIETY, *supra* note 1, at 666-94, 705-29.

[6] *See* E. BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW, Chapter 3 (rev. ed. 1974) (discussing the philosophies of Grotius, Pufendorf, Hobbes, Spinoza, Locke, Montesquieu, and Rousseau).

[7] Examples are the introduction of the notion of the unconscionable contracts into commercial law and the suspicion exhibited toward contracts of adhesion, which may contain provisions detrimental to the economically weaker party.

[8] 2 M. WEBER, ECONOMY AND SOCIETY, *supra* note 1, at 813, 845.

ern civilization. He contrasted this aspect of modernity, as Kronman points out, with the world of primitive civilization, which in the contemplation of those belonging to it was filled with mysterious and incalculable forces that could be approached only by magical means. Weber thought that savages were able to achieve a modicum of control over the forces of nature, but that this control was tenuous, incomplete, and often entirely illusory (p. 168).

On the other hand, Weber apprehended some fateful tendencies in modern Western civilization which he feared might imprison Western man in an "iron cage."[9] He foresaw an increasing disparity in the distribution of wealth, a growing bureaucratization of the economic life, in the private sector of the economy as well as in the operations of government, and the enervating consequences of modern mechanical factory discipline. Weber also believed that the future would experience an increasing dearth of strong leadership capable of rectifying the ills of society. He intimated that the human spirit had escaped from the "iron cage," leaving a large sediment of gross materialism.[10]

Professor Kronman's lucid book is replete with perceptive comments on Max Weber's complex analysis of the sociological underpinnings of law. The book constitutes a valuable contribution to the already rich literature dealing with the always suggestive thoughts of a great scholar.

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[9] M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181 (T. Parsons trans. 1958).

[10] *Id.* at 181-82.