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Max Weber's Contribution

to the Economic Sociology of Law

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by

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Abstract

During recent years a few scholars have advocated that more attention be paid to the intersection of law, economics and sociology – what may be called the economic sociology of law. This article suggests that a theoretical foundation for such a field of study, or parts of such a foundation, may be found in the work of Max Weber. It also provides an introduction to those parts of Weber's work that are relevant in this context. Weber especially emphasizes the role that law plays in raising the probability for actions taking place, in the economy and elsewhere; and that this probability has to be established while taking the motives of the actors into account. The main contribution of the legal system to modern capitalism, Weber also argues, is to make economic life more calculable. What factors account for the increasing rationalization of law, including economic factors, is also discussed.

It has recently been suggested that we need more studies at the intersection of economics, law and sociology – what has been called *the economic sociology of law* (Swedberg 2003; for similar arguments Stryker 2003, Edelman and Stryker 2005).¹ The main focus of this type of studies would be sociological studies of the role of law in economic life. These studies would fill a void that exists in economic sociology, a new and burgeoning field that defines itself as the study of economic life from a sociological perspective (e.g. Smelser and Swedberg 2005). The economic sociology of law would also add to the repertoire of the sociology of law, which is an older and more established field. Finally, but of much importance, it is clear that the economic sociology of law would overlap with the area claimed by law and economics. Indeed, one of the main tasks today of the economic sociology of law, I would argue, is precisely to challenge law and economics on several points since this perspective is woefully underdeveloped when it comes to the sociological dimension of law and economy.

The main purpose of this article is to provide an introduction to the contribution of Max Weber to the economic sociology of law. There are several reasons for singling out Max Weber in this respect. The most important of these is that Weber himself was involved in a project very similar to that of the economic sociology of law. Being a formidable theoretician as well as having an encyclopedic knowledge of a number of social science disciplines, it is also clear that what Weber has to say on economy and law is of great interest to the economic sociology of law.

It should be emphasized that while this article aims to provide a short introduction to Weber's economic sociology of law, it is exploratory in nature. It is exploratory in the sense that most studies of Weber's work are exploratory, namely that there exist few studies of Weber that in any sense can be called definitive for the simple reason that his ideas are exceedingly complex and that the secondary literature on Weber's work is enormous. What is needed to make real progress on a topic such as Weber's economic sociology of law is attention from a number of scholars over a period of time.

Law, Economics and Sociology in Weber's Life

¹ For helpful comments I thank Mabel Berezin, Nicolas Eilbaum, Keith Tribe and an anonymous reviewer.

It can be argued that to do work in a field such as the economic sociology of law, you ideally need to be an expert in three areas: law, economics and sociology. If that is true, Weber had indeed the perfect qualifications; he was not only a master sociologist but also had important careers in law as well as in economics. While some knowledge of Weber's work in each of these three disciplines is indispensable for an understanding of the way that Weber attempts to position his sociological analysis of law and the economy, I have decided not to include a detailed discussion of these issues at this point in the article. One reason for this is that some readers are likely to view this type of information as irrelevant and are eager to quickly get to Weber's analysis law and economy. I have therefore decided to put this information in an appendix, to which the reader is referred.

A few points must nonetheless be made already at this stage of the article, both when it comes to Weber's education and the status of *Economy and Society*, the work in which we can find most of Weber's sociology of law. First of all, Weber had a very thorough education in law, especially in the history of law. He also very early became fascinated with the economic dimension of legal phenomena and spent much time educating himself in this area.

Secondly, the fact that Weber later switched from the discipline of law to that of economics, and taught classes in economics for several years, means that he was uniquely qualified to take on a topic such as the economic sociology of law. He intimately knew the way of thinking and reasoning in legal science as well as in economics. The reader should also be aware of the fact that Weber was competent in two different types of economic science, both of which were important in Weber's time. These were the analytical type of economics (usually associated with English 19th century economics and the one that today dominates mainstream economics) and the historical type of economics (usually associated with Germany and some scholars who Weber knew personally and/or had taken courses with).

To this must finally also be added that the separation between Weber's so-called legal period, on the one hand, and his so-called economic period, on the other, has often been exaggerated. During both of these periods Weber was deeply interested in the interaction between legal and economic phenomena. This interest also continued during

the last ten or so years of Weber's life when he started to view himself primarily as a sociologist.

Weber's main attempt to deal with law from a sociological perspective can be found in *Economy and Society*. Recent scholarship on Weber has shown that this work consists of manuscripts from several different periods that were put together after Weber's death by various editors who proceeded according to their own ideas. It is also not known how Weber himself wanted the final version of this work to look like, nor if *Economy and Society* is the title that Weber wanted.

The confusion surrounding *Economy and Society* also extends to the general character of this work. Did Weber want to create a work in general sociology (including its major subfields) - or did he want to produce a work that primarily deals with economy and society, as indicated by the title as well as by the fact that this work was part of a giant handbook in social economics (*Grundriss der Sozialökonomik*) that Weber was in charge of? Seen from the perspective of the analysis of law that can be found in *Economy and Society*, this also means that it is not clear if this analysis was primarily intended as an exercise in sociology of law in general or as an attempt to analyze the relationship of law to the economy, from a sociological perspective. Two logics, in brief, seem to be present in the same work: the logic of general sociology and the logic of a sociological analysis of economy and society.

And finally, there is the problem of interpreting the fact that Weber assigned the topic of "modern private law and capitalism" to jurist Alexander Leist in the handbook of social economics. I will be arguing that this means that Weber did not feel that he had to cover this topic himself in *Economy and Society*. One can however also argue that since Weber wanted the analysis in *Economy and Society* to be sociological, this means that he had to cover the same area as Leist - but from a sociological as opposed to a legal perspective. Again, in brief, the ambiguity that surrounds *Economy and Society* enters into our understanding of Weber's economic sociology of law.

Weber's Analysis of Economy and Law

After this brief comment on the role of law, economics and sociology in the life of Weber, time has come to present his contribution to the type of analysis that is here

termed the economic sociology of law. To do this in a satisfactory manner, however, is also difficult for a few other reasons than the ones that have just been mentioned. For one thing, there is the fragmentary nature of Weber's work. He never produced the final, rewritten version of the section in *Economy and Society* that he refers to as his "sociology of law", and the status of the various manuscripts on law in *Economy and Society* is somewhat unclear, at least till the volume on "Law" has appeared in Weber's *Collected Works* which are currently in the process of being published in Germany (MWG/22-4; to be edited by Werner Gephart).

There is also the fact that what Weber wrote on the theme of economy and law is scattered throughout his life work, which is voluminous and hard to penetrate. There is not only Weber's sociological work (roughly from 1905 to 1920); and here we especially need to consider the essays in *The Economic Ethics of the World Religions* and the bulk of *Economy and Society*, including the crucial Chapter 2 on economic sociology and the sections on the state (Weber [1920] 1951, [1921] 1952, [1921] 1958; see also e.g. Weber 1988:71-76). But there is also his pre-sociological work, which includes his two dissertations, his study of Antiquity and the inaugural lecture at Freiburg with its bold pronouncement that economic thought is about to replace law as the leading discourse in society and that we therefore have to be aware of its normative implications (Weber [1909] 1976, [1895] 1989).

In trying to extract Weber's contribution to the economic sociology of law, one may naturally turn to the secondary literature on his work, especially his sociology of law since economic sociologists have paid little attention to what Weber has to say on law (but see Swedberg 1998:82-107). My estimate, based primarily on existing bibliographies, is that something like fifty articles and a few monographs in English have been devoted to Weber's sociology of law, and that the number for the non-English languages may well be roughly the same (for the literature in English, see Sica 2004, and for especially important contributions, see e.g. Rheinstein 1954, Winkelmann 1967, Kronman 1983, Breuer and Treiber 1984, Reh binder and Tieck 1987, Gephart 1993, Turner and Factor 1994, Lascoumes 1995, Schluchter 2002).

Most of this literature, however, sets as its task to lay bare and/or discuss Weber's sociology of law but ignores that Weber produced his sociology of law as part of a

commitment to a handbook in economics. They only look, so to speak, at *one* of the two logics of *Economy and Society*. Another weakness with much of this literature is that it has been produced by scholars who are primarily interested in what Weber has to say on law but not on other topics. That Weber's sociology of law is closely related to his other types of sociology (say his sociology of the state and economic sociology) and to his project of an interpretive sociology more generally is usually ignored (for exceptions, see e.g. Winkelmann 1960, Schluchter 2002).

This last point is also relevant when it comes to a discussion of the relationship between economy and law in Weber's work. This theme is unfortunately often discussed without much reference to Weber's voluminous writings on the economy. While useful studies of what Weber has to say economy and law do exist – especially when it comes to the contract and the general role of law in modern capitalism – there is also the misplaced energy that has been devoted to the discussion of the so-called England Problem. While an early and highly competent commentator such as Max Rheinstein simply noted in passing that modern capitalism was usually accompanied by a formal type of law, according to Weber, David Trubek some years later announced that there exists a fatal contradiction in Weber's argument about the link between law and modern (Rheinstein 1954:1, Trubek 1972). The contradiction consists of the fact that while Weber says that modern capitalism has to be accompanied by formal law, this did not happen in the case of England. For rebuttals of Trubek's argument, the reader is referred to the secondary literature on the England Problem as well as to relevant passages in the work of Weber himself (see especially Ewing 1987, and more generally Weber [1922] 1978:814, 855, 890; [1920] 1951:102, 149-50).

My own suggestion for how to make it easier to understand Weber's contribution to the sociological analysis of economy and law is as follows. The most important material on this topic was written while Weber worked on the early versions of *Economy and Society*; and if we go to the two existing plans for this work (see the Appendix), we find that Weber divided up the topic of economy and law into three parts. First of all, there were the two parts that he had assigned to himself, and then there was the part he had assigned to Alexander Leist. Weber, in short, appears to have felt that the theme of economy and law could be adequately covered by looking at the following three topics

(and I use his terminology from the 1914 plan): *Economy and Law and the Principles of Their Relationship, Developmental Conditions of Law and Modern Private Law and Capitalism*.

My suggestion is that it may be helpful to present Weber's work on the economic sociology of law under these three headings, something that would give us the following. Throughout his writings Weber often addressed issues relating to economy and law that are of a very general nature (*Topic # 1: Economy and Law and the Principles of Their Relationship*). Weber was also fascinated by the various forces that drove the development of law, especially the ones that transformed it in a formal rationalistic direction (*Topic # 2: Developmental Conditions of Law*). And even though Weber basically handed over the topic of the relationship between economy and law in contemporary capitalism to Alexander Leist, he nonetheless touched on it now and then (*Topic # 3: Modern Private Law and Capitalism*).

The primary text that addresses Topic # 1 or *Economy and Law and the Principles of Their Relationship* is the short section entitled "The Economy and Social Norms" in *Economy and Society* (Weber [1922] 1978:311-38).¹ Weber here discusses some very general questions about the nature of law from a sociological perspective, what distinguishes the approach of the sociology of law from those of jurisprudence and economic theory, and some questions about the general relationship between economic phenomena and legal phenomena. There is a mixture in this text, in other words, of what I earlier referred to as the two different logics of *Economy and Society* – of sociology of law, and of the relationship of law to the economy, from a sociological perspective.

According to Weber, jurisprudence and the sociology of law look at law very differently. While jurisprudence sees law as a set of rules which should be followed, the sociology of law views law as "a complex of actual determinants of human conduct" (Weber [1922] 1978:312; cf. Weber [1922] 1978:33, [1907] 1977:115-26, 131). From a sociological perspective, Weber specifies, you may speak of a "legal order"; and the impact of the legal order on the behavior of actors comes from the fact that these latter orient their actions to it (Weber [1922] 1978:312). Other factors than the legal order, in short, may drive their actions and typically do so.

It is also in “The Economy and Social Norms” that Weber provides an early version of his sociological definition of law that would be given its final, famous formulation some years later in Ch. 1 in *Economy and Society*: “an order will be called...*law* if it is guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation” (Weber [1922] 1978:34; cf. 313, 336).

There are two elements in this definition of law that are essential to Weber’s sociology of law. The first is easy to spot since Weber has put in italics, and this is *the staff*. What is characteristic of law as a sociological phenomenon, and also sets it apart from norms (“conventions”), is that there has to be a special group of people who have as their task to enforce these norms. While it is easy enough to identify members of such a staff in modern society - Weber mentions “judges, prosecuting attorneys, administrative officials, or sheriffs” - this is something that becomes more difficult, he says, in pre-modern times (Weber [1922] 1978:34-5). Nonetheless, even a clan can operate as “an enforcing agency”, as long as there are “rules” for the enforcement

The second word that should be highlighted in Weber’s definition of law is “*probability*”; and here the key idea is that the main effect of a law, from a sociological perspective, is to increase the probability that a certain type of behavior will take place. Law is ultimately no different, to Weber’s mind, from other social phenomena that also they increase the probability that some action will take place, say material interests and tradition. That someone has a legal right, Weber explains, similarly means that the probability is now quite large, thanks to the law, that the actor will not be disappointed.

According to Weber, there also exist important differences between the way that law is conceptualized in sociology and in economic theory. First of all, in economic theory the assumption is made that the actor will obey the law, and that the role of norms can be disregarded. From a sociological perspective, on the other hand, you always have to determine *empirically* if and to what extent the actor is influenced by the law in his or her behavior (Weber [1922] 1978:327). Weber notes, for example, in this context that businessmen typically prefer *not* to go to court to settle their differences (Weber [1922] 1978:328). This is an observation that is usually associated with the work of Macaulay in the sociology of law, but which can already be found in Weber (though Weber, in

contrast to Macaulay, does not explain why this is the case; cf. Macaulay 1963).

Secondly, Weber argues that a crucial importance between an economic action from the perspective of economic theory and from the perspective of sociological theory, is that the latter always has to take economic power into account (“power of control and disposal [*Verfügungsgewalt*]”; Weber [1922] 1978:67). Economics, in contrast, ignores power.

Weber ends his 30-page text “The Economy and Social Norms” with an enumeration of six very general statements about law and the economy, that are presumably applicable to most or perhaps all societies (Weber [1922] 1978:333-37). It is here said that the law defends many types of interest in society, not only economic ones (# 1). A legal order, Weber also suggests, can remain unchanged while economic relations have changed (# 2); and the economic consequences of two different legal provisions can be the same (# 3). Law guarantees economic interests, and “economic interests are among the strongest factors influencing the creation of law” (# 4; Weber [1922] 1976:334). There exist, on the other hand, limits to the extent to which one can use law to make people engage in some specific form of economic behavior (# 5). And finally, law, including economic legislation, does not necessarily have to be enforced by a state; also other social groups may perform the disciplinary function (# 6).

All of these relationships can be further explicated, and I shall say something brief about each of them. The notion that the law does not only defend economic interests but also other types of interests, should probably be seen within the context of Weber’s relationship to Marxism, including the Marxist analysis of law (# 1). In Weber’s view, Marx was wrong in only seeing economic interests as important driving forces for human beings. According to a famous formulation by Weber, “material and ideal interests directly govern men’s conduct” – by which is meant that also such interests as religious and political interests may importantly affect the behavior of human beings (Weber 1946:280).

Weber’s second example of a general relationship between law and the economy is also that close to Marxism, namely that the law does not by necessity have to change in situations where economic relations are changing (# 2; cf. e.g. Renner 1949). While a Marxist would argue that the reason for this is that the base (the economy) is what really

matters, and not the superstructure (the law), Weber notes that even in situations where the law does not change so as to match new economic conditions, it still maintains its capacity to unleash coercive powers when called upon. In a related manner, Weber also argues that while it is true that the same economic phenomenon may be handled differently, in different legal texts, the practical economic consequences of doing this may nonetheless be the same (# 3).

Weber's fourth statement about a general relationship between law and the economy has to do with his thesis that economic interests are among the strongest factors that influence the creation of law (# 4). According to Weber, this is so "even where this does not seem to be [the case]". The reason for this is that law is usually backed by the major social groups – and all of these have strong economic interests to defend. "Any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive social groups, and the formation of social groups depends, to a large extent, upon constellations of material interests" (Weber [1922] 1978:334).

While economic interests may influence the law in a powerful way, Weber continues, the law, in contrast, can only direct the behavior of economic actors in a limited way (# 5). According to Weber, there are especially two factors in a modern capitalist economy that limit the impact of the law: economic interests may go counter to the intentions of the law, and the disposition (*habitus*) of economic actor is hard to change. What this means is that it is very difficult to predict the general impact that a law can have on economic life. Or in Weber's formulation: "the extent of factual impact of the law on economic conduct cannot be determined generally, but must be calculated for each particular case" (Weber [1922] 1978:336).

The final general relationship between law and the economy that Weber discusses has to do with the role of the state (# 6). The first point that he makes is that law, including economically relevant law, does not have to be enforced by a state; also other social groups may perform the disciplinary function. Weber, however, also adds a very important qualification to this statement, namely that in the modern capitalist world only the state can be in charge of the legal system. The reason for this is that the rational capitalist economy demands "a promptly and predictably functioning legal system" – something that only the modern state can guarantee.

Let me now proceed to what I suggest should be regarded as the second major theme in Weber's work, namely *Developmental Conditions of Law*. The main text here is the famous Ch. 8 in *Economy and Society*, which is what most commentators have in mind when they refer to Weber's sociology of law.² Its current title is "Economy and Law (Sociology of Law)"; and it is probably a text of this scope that Weber had in mind when he referred to "Economy and Law (...2. Periods of Development until the Present)" in his plan from 1910, and later as "Developmental Conditions of Law" in his plan from 1914 (see the Appendix). While it is true that the formulations used in the title of these two plans vary slightly, I suggest that the main difference between them is to be found elsewhere. In the 1914 plan, Weber had removed the section on law and its development from its placement next to "Economy and Law (1. Principal Relations)", and instead placed it in a section that deals with such topics as political organizations and the nation. This indicates, I suggest, a shift towards an analysis in which Weber not only wanted to discuss what economic factors drive the development of the law, but also to pay attention to political and other non-economic factors. This is also what he does in Ch. 8 in *Economy and Society*.

The main bulk of this chapter is otherwise taken up by a discussion of how the following factors affect *private law* (public law is discussed in the chapter on domination): economic factors, political factors, religious factors, the legal profession and administrators (Weber [1922] 1978:641, 653). In discussing the impact of these non-economic factors Weber also raises the question of the extent to which they, in their turn, are related to economic factors.

He similarly inquires about the role of the economic factors in what he views as the general thrust of the overall development in Western legal doctrine, namely its move in the direction of an increasing rationalization (Weber [1922] 1978:882). This process has a distinctly formal dimension (related to procedure, logic and generality) as well as a distinctly substantive dimension (related to values, a sense of justice and individual cases); and the former has clearly overtaken the latter in the West (Weber [1922] 1978:893). According to Weber, economic forces have only played an *indirect* role in this whole process (Weber [1922] 1978:776; cf. 883). "We may thus conclude that capitalism has not been a decisive factor in the promotion of that form of rationalization

of the law that has been peculiar to the continental West ever since the Romanist studies in the medieval universities” (Weber [1922] 1978:892).

Political actors have sometimes introduced a formal-rational dimension to law, as exemplified by their attempts to create uniform laws for their empires. Authoritarian rulers, however, have typically preferred less formal systems of law, in order to keep control over their subjects; and the main advocates of the formal dimension of law have been the administrators of the princes rather than the princes themselves. Princes in Europe have, however, often been interested in eliminating the power of the estates and more generally in introducing enough logic and clarity in the law to ensure their fiscal interests. The European bourgeoisies have been similarly positive to the attempt to eliminate the power of the estates; they have also tried to limit the influence of religion on law and of tradition more generally.

Weber is also famous for his discussion of how legal education has influenced the development of law; and how its impact differs depending on whether law is taught as a craft (from practitioners) or as a science (in special schools). While the legal profession in England, Scandinavia and some other countries blocked the introduction of Roman law, this did not mean, according to Weber, that it was not positive to powerful economic interests or did not get along with these. Capitalism can live with different legal systems, Weber argues, as long as there is a certain degree of calculability involved (e.g. Weber [1922] 1978: 847, 855, 1394, [1920] 1951:103).

Since Weber’s emphasis on calculability is at the heart of how he viewed the role of law in modern rational capitalism, it is important to try to specify what Weber meant by this term. First of all, modern rational capitalism has to fulfill a number of requirements to qualify as such, according to Weber, and one of these is what he terms calculable law (Weber [1922] 1978:161-62; cf. e.g. Weber 1982:277, 313). Weber seems to have had especially three items in mind when he referred to calculability in this context: (1) that the legal text lends itself to prediction; (2) that the administration of the law is not arbitrary; and (3) that contracts are legally enforced (see especially Weber [1922] 1978:847). That the text is predictable typically (but not necessarily) means that it is of high formal quality. That the administration of the law is not arbitrary means that it is independent or free from undue political and religious pressure. And that contracts can

be legally enforced is important since a capitalist economy is primarily an exchange economy.

Two more points need to be made about what calculable law meant to Weber. First of all, this type of law means a predominance of the formal qualities of law over its substantive qualities, or that *form* is predominant over *justice*. The reason for this is that generality is related to form for Weber, while justice resides in the unique qualities of the single case. Secondly, a calculable legal order tends to favor those with economic power, while it does little for those without economic resources (Weber [1922] 1978:813).

At one point in Ch. 8 in *Economy and Society* Weber also states that “the development of those legal institutions, indispensable for a modern capitalist society, will be discussed elsewhere”, and with “elsewhere” he meant the section assigned to Alexander Leist (Weber [1922] 1978:682). As a result of this decision from Weber’s side, one will only find a discussion of the legal institutions that existed *before* modern capitalism in Ch. 8 and in Weber’s other texts on law in *Economy and Society*. This roughly means that Weber discusses legal-economic institutions up to and including the Middle Ages. In order to make this part of Weber’s analysis, which is quite difficult, more easy to follow, I will however save the discussion of what Weber has to say on early capitalism and law till I get to the theme of *Modern Private Law and Capitalism*.

Leist died in 1918 and left behind an unfinished manuscript of some twenty pages that was published in 1925, five years after Weber’s death.³ We do not know if Weber ever read Leist’s manuscript and, if so, what he thought of it. In any case, the fact that Leist had been assigned the task of discussing law and capitalism in the handbook of social economics means that Weber stayed away from the topic, something that leaves us in the difficult and unfortunate position of having to pull together all the brief statements that can be found in Weber’s work on modern capitalism and its relationship to law, if we want to know his position on this topic. This represents a difficult task of reconstruction that merits its own separate study, and in this short article I shall limit myself to a discussion of a few well-known statements of Weber on modern capitalism and its legal institutions.

Before doing this, however, it deserves to be emphasized that from Weber’s perspective the roots of modern rational capitalism stretch far back in time, and what he

has to say on capitalism and its relationship to law *before* modern times is sometimes also of relevance for his portrait of modern rational capitalism. In Ch. 8, for example, Weber makes an important addition to his general statement of what law is, when he states that law does not only mean constraint on action (as his famous definition of law may lead one to believe), but can also help to create new social relationships, not least in the economic sphere. This is especially the case with the contract, which is a very old legal institution (what Weber calls “the purposive contract” would eventually replace the original “status contract”). According to Weber, the contract belongs to the type of law that entails “*autonomy to regulate [one’s] relations with others*” or what he refers to as “enabling law” and “legal empowerment law” (Weber [1922] 1978:668, 730).

It is also at this point in Ch. 8 that Weber discusses another crucial legal institution, namely the firm – which from a legal standpoint constitutes an associational contract and which has its roots in pre-modern times. Weber in particular draws attention to the historical importance of the emergence of the notion of legal personality or, in sociological terms, to the idea that people can create an actor or organization that is separate from their own individual being. This was also a topic that had been at the center of Weber’s first dissertation on medieval trading corporations (see the Appendix).

Weber carefully tries to follow how the idea of the modern firm has emerged in the West, and what role economic factors have played in this development. He also carefully tracks the evolution of the firm in other cultural contexts than that of the West, in Ch. 8 as well as elsewhere in his work. One can also find an important attempt in Weber’s later work to investigate the type of commercial law that has existed in several non-Western cultures, including India and China (cf. Swedberg 1998:91-9).

This brings us to modern rational capitalism, as Weber called it, and its relationship to the legal order. Some clues for how Weber might have handled this topic, if he had not assigned it to Leist, can for example be had from various statements scattered throughout his work. In one of these, he for example refers to “all characteristic legal institutes of modern capitalism”, by which he meant institutions “from the share, the bond, the modern mortgage, the bill of exchange and all kinds of transaction forms to the capitalist forms of association in industry, mining and commerce” (Weber [1922] 1978:1464, n. 14; cf. e.g. Weber 1982:341). A close look at what Weber wrote about the

legal dimension of commodity and stock exchanges in the 1890s may also give some indication of how he might have gone about the task of addressing the role of law in a modern economic institution (Weber 1999; for Weber's view of modern mortgage law, see also Weber [1895] 1985).

One can also find some other general statements in Weber's work about modern rational capitalism and its relationship to law. He points out, for example, that with huge investments in industry and the need to have complex economic organizations more generally, it becomes absolutely imperative to be able to calculate, as correctly as possible, the impact of various factors on economic matters – including the law. While Weber's statements about formal law as a logical system without gaps, and that judges should operate as legal machines have often been commented on, the qualifications that he added about the economic usefulness of legal formalism have attracted less attention. Weber emphasizes, for example, that what is needed for economic operations to be calculable is not primarily formal elegance and coherence but *predictability*. One can also find a resistance among judges to act like legal machines, Weber says, since this type of behavior goes against their sense of status. Historically, as in the case of good faith, business may also benefit from irrationalities; indeed, many formal legal rules have their origin precisely in irrational behavior. Again, the kind of legal predictability and calculability that modern rational capitalism needs in order to function properly, is considerably more complex than what one may at first think.

Concluding Remarks on the Economic Sociology of Law versus Law and Economics

One way of summarizing the argument in this article would be to say that Weber's work at the intersection of law, economics and sociology is very complex and very much in need of being explored and discussed. What seems particularly useful about Weber's work are several qualities. Weber, for one thing, supplies us with clear and useful definitions of several basic concepts in this enterprise (most famously law). He also outlines the differences between jurisprudence and a sociological approach to law, and between a sociological approach to law and that of economic theory, in an exemplary manner. And one can find useful statements in his work about the general relationship between legal and economic phenomena as well as suggestive analyses of the historical

interaction between economic forces, on the one hand, and, say, law and politics or law and religion, on the other.

Before concluding this article, something should also be said about a topic that I alluded to in its opening lines about the differences between the economic sociology of law and law and economics. The main similarity between these two approaches, as I see it, has to do with their subject matter; they both focus on the intersection and interaction between law and the economy. The main difference has to do with how this is done. While law and economics is deeply influenced by the method of economics, the economic sociology of law draws on the sociological method. The two methods also differ in the following ways: while economics is normative, sociology is not; and while sociology is typically empirical, law and economics is typically not.

Being a sociologist, I find the approach of sociology preferable to that of economics, even if I realize that what makes economic logic so useful to the legal profession is that it can offer something that sociology is not able to provide, namely a normative logic or a type of reasoning that at one point says: *this is how things should be done*. Sociology is more skeptical, saving itself the errors that come with an explicit normative position, but also unable to become a useful and powerful everyday tool in the life of the law. This, of course, is the prize that has to be paid by any social science that wants to adhere to Hume's dictum that that you must keep "is" and "ought" separate (for Weber's advocacy of this position, see e.g. Weber [1922] 1978:312).

Nonetheless, and this is the point on which I would like to end, the sociological approach, despite the fact that it does not easily lend itself to policy recommendations, is a powerful intellectual tool for analyzing empirical reality, including the places where law and economy meet. This is especially the case with Max Weber, and since his work has been severely attacked by Richard Posner, the most important advocate of law and economics, a few words need to be said about this criticism.

While Posner refers approvingly to Weber's "enormous erudition" and even suggests that he has played "a founding role" in the law and economics movement (without specifying what he means by this statement), he also and more importantly argues that "Weber's methodology is not scientific" and that Weber has "a useless methodology" (Posner 1995:268, 1998:684-85, 1999). The reason for this statement is

that Weber's methodology, according to Posner's reading, makes Weber mostly end up in observations about "vast world-historical movements" (Posner 1998:685). "He is not a reformer, but a historian and a prophet". The main problem with Weber's methodology, Posner continues, is that it does not aim at "conditional predictions", which is what a scientific methodology should do. Proponents of law and economics, in contrast, have the right type of scientific methodology; and Posner gives the following example of a conditional prediction: "if you raise the cigarette tax, the output of cigarettes will fall; not, the output of cigarettes is going to continue on its downward path" (Posner 1995:267, 1998:685).

Despite what Posner says about Weber's methodology one can find a few predictions of the type that Posner likes in the work of Weber ("if you do this, this will happen"), but this is not where the main difference between their methodologies exist. Theoretical economics, of the type that Posner is inspired by, starts out from the notion of actors with assigned preferences which they also know how to realize. Weber's type of sociology, in contrast, starts from a very different position, namely that the actors themselves assign a meaning to their behavior, and that this meaning has to be empirically established since it has crucial consequences for the behavior of the actors. This last qualification, when it is worked out in a coherent and systematic manner - which is what Weber does in his interpretive sociology in *Economy and Society* - makes all the difference in the world. It assigns to the researcher first of all the task of trying to establish how the actors themselves view things, and once this has been done, to determine what the consequences of their actions are, first for the actors and later also for other actors.

One may also phrase the difference between law and economics and the economic sociology of law as follows. While law and economics has a traditional view of law as a few key actors getting together and dictating to others what they should do, the economic sociology of law has a much broader scope: law and justice are what people make them into as well as how they perceive them – and this is something that must be studied empirically. Weber's type of work, in brief, leads in a very different direction from that of law and economics, both when it comes to the analysis and to its implications for political and legal action.

Appendix: Law, Economics and Sociology in Weber's Life

Weber had an expertise in each of the three areas that figure prominently in the economic sociology of law: law, economics and sociology. His legal period began in 1882 when Weber (1864-1920) enrolled at the University of Heidelberg, where he primarily studied law. And it ends in 1894 when Weber moved to Freiburg and an appointment as professor in economics. Weber resigned his professorship in economics in 1903 (because of an illness that had started in 1897), and a few years later he began to devote himself primarily to sociology and especially to the enterprise of developing *an interpretive sociology*.

This gives us three periods in Weber's life: one in which the primary focus was on law (1882 - 1894), one in which it was on economics (1894 – circa 1903), and one on sociology (circa 1905/1910-1920). In the secondary literature on Weber it is sometimes said that Weber first gave up law for economics, and later economics for sociology; one can also find a tendency to draw fairly sharp boundaries between these three periods. Some modification, however, is probably needed on both accounts. It is known today, for example, that Weber's activities in law did not end with his acceptance of the professorship in Freiburg. He did important work on law while he worked as a professor of economics in the 1890s, and he was also interested in constitutional law throughout his life. A few years before his death, for example, he contributed importantly to the Weimar Constitution (e.g. Mommsen 1984:332-89; see also Weber's writings on Russia in Weber 1995). It has also been established that Weber's main work in sociology – *Economy and Society* – grew out a task that he had accepted in his capacity as an economist, namely to edit a giant handbook in social economics. In his personal life Weber was involved in a number of law suits and gave legal counseling to his friends – all fuelled by his intense and inflammatory sense of justice (e.g. Marianne Weber [1926] 1975:429-48). A few times he challenged people to duels, though he never fought one.

Weber's legal period began in 1882 when he enrolled at the University of Heidelberg. Among his teachers were experts on commercial law, such as Richard Schröder and Heinrich Brunner, and on mortgage law, such as Karl Ludwig von Bar and Ferdinand Regelsberger. The emphasis in Weber's legal education was on the historical

dimension of law; and he was especially interested in commercial law and penal law (Schiera 1987:162).

Weber passed his law exams in 1886, at which time he also started to work at the Royal District Court in Charlottenburg (Berlin). From 1886 to 1893 he worked in different capacities in the German court system (*Referendar, Assessor*). During the first part of this period he was also a doctoral student and had Levin Goldschmidt, who was an important pioneer in the history of commercial law, as his thesis adviser (for Goldschmidt, see Weyhe 1996). Weber presented his dissertation in 1889 and received his doctorate in May the same year. The topic he had chosen for his thesis was medieval merchant companies, and it is clear that he was very attracted to topics at the intersection of legal history and economics.

Weber's thesis had a long and awkward title - *Development of the Principle of Joint Liability and the Separate Fund in the Public Trading Company from the Household and Trade Communities in Italian Cities* - and it was part of a larger study that appeared as a book (which today exists in English translation as *The History of Commercial Partnerships in the Middle Ages* – Weber [1889] 2003). Weber's second dissertation (*Habilitation*) was presented in 1891 and was also that devoted to a topic that dealt with legal history and economics, more precisely with the emerging market in land in Rome and its legal dimension. The thesis was entitled *Roman Agrarian History and Its Importance for State and Civil Law*, and Weber's thesis adviser was an expert on agrarian history, August Meitzen (Weber [1891] 1986).

When he approached the end of his legal education Weber had still not decided on what type of career to pursue. It also seems that he was somewhat bored by legal studies and longed for a bit of action. In 1892 he was asked to substitute for Goldschmidt, who had fallen ill, and in this capacity he taught Roman legal history and commercial law at the University of Berlin. The next year he was appointed assistant professor in commercial law and German law, and it is clear that the university authorities regarded him as a rising young star and as Goldschmidt's replacement.

In 1894 Weber left Berlin and moved to Freiberg as professor in economics and public finance. The brake between law and economics was, however, considerably less sharp than is many times believed. Weber had begun to study economics on his own

already as a young student, and by 1891 he considered himself to have “become approximately one-third political economist” (Weber 1936:327). An important reason for this development appears to have been Weber’s sense that economics was a better tool than legal science for understanding and changing social reality. During his time as a law student Weber had also become an active member in the main association for social reform in Germany, *Verein für Sozialpolitik*, to which most of the country’s leading economists belonged.

Weber did not totally give up law when he moved to Freiburg and his professorship in economics. During the Freiburg period (1894-1897) he took a very active part in the attempt to regulate the stock and commodity exchanges in Germany that was going on at the time and produced, as part of this effort, a number of articles that were published in legal periodicals. According to the leading expert on this aspect of Weber’s work, these writings constitute “the principal literary output [of Weber] during his years as Professor of Economics and Public Finance [at Freiburg]” (Borchardt 2002:140). Weber also gave courses on commercial law, the history of German law, and the stock exchange and its law. He was further an active member in the newly created *Association for Comparative Studies in Legal Science and Economics* (Weber 1993:799-802). It appears, in brief, that Weber during his Freiburg years tried to be active not only in economics but also in law.

At the University of Heidelberg, where Weber moved in 1897 (still as a professor in economics and public finance), he gave no courses in law but concentrated exclusively on economics. It is, however, clear from his lecture notes and a proposal for a text book in economics that he worked on during these years, that he paid attention to law as part of what a student in economics should think about. In his general course on economics, for example, Weber touched on property, commercial legislation and the relationship of law to economic power (e.g. Weber 1990:8-9, 24, 27, 58-9).

When he lectured on law in Heidelberg, however, he mainly did so from the perspective of economics; and this provides us with an opportunity to now turn to Weber’s engagement with economics at Freiburg and Heidelberg, including the courses he taught in this subject (e.g. Tribe 1995). Since Weber had only taken one course in economics as a student, he had to quickly read up on the topic when he became professor

at Freiburg. He had, however already done some reading on his own, and he had also produced a very impressive study for the *Verein für Sozialpolitik* that counted as economics among its historically oriented members (see Weber [1892] 1984). Nonetheless, Weber had quite a bit of literature to catch up on in order to teach the type of courses that he would be giving during his years as a professor of economics: “General Theoretical Economics”, “Practical Economics”, “Money, Banking and the Stock Market”, “Finance” and quite a bit more.

At the time when Weber worked as a professor of economics the science of economics in Germany was divided into two camps that fought each other with all the energy that they could muster. On the one hand there were those who advocated a type of analytical economics (along the lines of Ricardo and Menger) and, on the other, those who advocated what is today known as German historical economics (such as Schmoller and Karl Knies, Weber’s one-time teacher in economics). While the former type of approach largely excluded social (including legal) factors, the latter cast its net much very widely. Weber took a stance somewhere in between the two, knowing both types of economics and also drawing on both of them in his own work and thinking.

From his time in Freiburg till his death in 1920 Weber would always present himself publicly as an economist; there is also the fact that his appointments after his resignation in 1903 from Heidelberg were broadly in economics (at the universities of Vienna and Munich, in 1918-1920). It is nonetheless clear that a distinct shift in Weber’s primary interest took place somewhere during the years 1905-1910 and in the direction of sociology.⁴ Exactly when the transition took place and how it developed over the years, after Weber had left his position at Heidelberg in 1903, is on the other hand not known.

Weber’s interest in history had always lent a certain “social” dimension to his writings, and it is possible to read some of his writings from the 1890s as an early version of his sociology. But it should also be stressed that during approximately the fifteen last years of his life Weber embarked explicitly on a somewhat different enterprise, namely to try to lay the foundation for the very special type of sociology that he termed *interpretive sociology*. The main place where he presented this *verstehende Soziologie* was in *Economy and Society*, even if some other works from this period are relevant as well.

The history of *Economy and Society* is very special, but of central importance for an understanding of Weber's sociology of law and its relationship to economics (e.g. Baier, Lepsius, Mommsen and Schluchter 2000; cf. Schluchter 1989, Mommsen 2000). The most important fact for the purposes of this article is that *Economy and Society* was part of a giant handbook of social economics (*Grundriss der Sozialökonomik*) that Weber accepted to edit in 1909 and which eventually resulted in the production of about a dozen huge volumes. Just as Weber decided that the handbook should have sections on such topics as economy and nature, economy and technology, economy and population, there was also to be a section - which Weber had reserved for himself! - on *economy and society*. The work that we today know as *Economy and Society* was not, in other words, originally conceived as a general work in sociology, but as a sociological work about the relationship between the non-economic and the economic parts of society. This fact is also of relevance for our understanding of the analysis of law that this work contains.

In the end the handbook of social economics turned out to look quite differently from Weber's original conception. According to the first plan from 1910, Weber was to write a large number of sections, including three that were labeled *Economy and Society* (for the full plan, see Weber 1994:766-74). These were described as follows (with the material on law in bold type):

- a **Economy and Law (1. Principal Relations, 2. Periods of Development until the Present).**
- b Economy and Social Groups (Family and Community. (*Gemeinschaftsverband*), Status Groups [*Stände*], Classes, the State).
- c. Economy and Culture (Critique of Historical Materialism).
(Baier, Lepsius, Mommsen and Schluchter 2000:105)

Weber had also committed himself to write one of the two sections on *The Legal Foundations of Modern Capitalism*. Weber's section was called *The Modern State and Capitalism*, and its companion piece (to be written by jurist Alexander Leist) *Modern Private Law and Capitalism*. Weber, in brief, had from the very beginning of the project with the handbook decided to *not* write himself on the role of private law in modern capitalism.

By 1914 Weber had changed his mind about the way that the handbook should be structured on a number of points, and this includes *Economy and Society* (for the new plan, see e.g. Bücher et al 1914). *Economy and Society*, in all brevity, was to cover much more material in its new version. The idea of having a separate section in the handbook on the role of law in modern capitalism (*Modern Private Law and Capitalism*) had not, however, changed. The structure of *Economy and Society* now looked as follows:

1. Categories of Social Orders. **Economy and Law and the Principles of Their Relationship.** Economic Relationships of Associations in General.
2. Household, *Oikos* and Enterprise.
3. Neighbourhood, Sib, Community.
4. Ethnic Communities.
5. Religious Communities. Class Conditioning of Religions; Cultural Religions and Economic Mentality.
6. Formation of Community through the Market [*Marktvergemeinschaftung*].
7. The Political Association. **Developmental Conditions of Law.** Status Groups, Classes, Parties. The Nation.
8. Domination: (a) The Three Types of Legitimate Domination, (b) Political and Hierocratic Domination, (c) Non-Legitimate Domination. Typology of Cities, (d) Development of the Modern State, (e) Modern Political Parties.

(Baier, Lepsius, Mommsen and Schluchter 2000:106)

The two contributions to what Weber in the 1910 plan had called *The Legal Foundations of Modern Capitalism* were still part of the 1914 plan, but Weber had now dropped their common title. Their individual titles, however, remained the same: *The Modern State and Capitalism* and *Modern Private Law and Capitalism*.

In between the plan of 1914 and his death in 1920, Weber again changed his opinion about the way in which his contribution to the handbook of social economics should be structured. He did not, however, write down or in some other way indicate what he wanted the new (and final) structure of *Economy and Society* to be like. All that

we know about this final version - except that it was to be “*shorter*” and “more *textbook-like*” - comes from the fact that Weber finished the four first chapters (Winkelmann 1986:46; Chs. 1-4; Weber [1922] 1978:1-307). More precisely, he produced a final version of the four first chapters, sent them off to the printer and corrected the proofs just before he died. He also made references in these four chapters to three more chapters: one on “sociology of law”, one on “sociology of the state” and one on “sociology of religion”.

All that we know about the final structure of *Economy and Society* can be summarized as follows:

- Ch. 1. Basic Sociological Terms.
- Ch. 2. Sociological Categories of Economic Action.
- Ch. 3. The Types of Legitimate Domination.
- Ch. 4. Status Groups and Classes.
- Ch. X. [**Sociology of Law**].
- Ch. X [Sociology of the State].
- Ch. X [Sociology of Religion].
- Ch. X - ???

The sections on law that can be found in the first edition of *Economy and Society* that was published in 1921-22 after Weber’s death are manuscripts that Weber had written before his decision to restructure this work one last time. In English these manuscripts are known as “The Economy and Social Norms” and “Economy and Law (Sociology of Law)” (Weber 1978:311-38, 641-900).

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¹ Mommsen dates this manuscript to 1913 or 1914, while according to Schluchter there exist two versions of this text – one presumably from before 1910 and one from not later than 1913 (Mommsen 2000:176, Schluchter 2002:269).

² According to Mommsen, this manuscript was presumably written in 1913 or 1914 and approved by Weber for publication in 1920 (Mommsen 2000:377, 381).

³ Little is known about the relationship of Weber to Alexander Leist (1862-1918). It appears that Weber had read Leist's study of private law and capitalism, *Privatrecht und Kapitalismus im 19. Jh. Eine rechtsgeschichtliche Voruntersuchung* from 1911 (e.g. Weber 1994:195, 414, 419, 768, 800). In his contribution to Weber's handbook, "Die moderne Privatrechtsordnung und der Kapitalismus", Leist primarily focuses on the law about corporations and their financing, emphasizing the importance of looking at law in action as opposed to law on the books. His approach can be characterized as legal and broadly social.

⁴ Dirk Käsler sets the date to around 1908-1909, while Guenther Roth states that by 1910 Weber regarded his social and comparative type of work as "sociology" (Käsler 1988:15, Bendix and Roth 1971:37).