

21A 219

Law and Society

Social Theories of Law (continued)

Max Weber (1864-1920)

1. connection between legal decision making and other aspects of society
 - focused on increasing rationality - a world view and orientation - as the engine of the modern world; rationality refers to individual or collective action that is goal oriented (forward looking) and involves articulation of rules and standards which, if followed, will accomplish goals
 - rationalization permits prediction and connection among actions and outcomes
2. Based on concept of rationalization, produced typology of legal systems that varied along two dimensions (degree of rationality, degree of autonomy from other social institutions)
 - rational v. irrational
 - substantive connections to religion, science etc. vs. formal independence
 - produced four types of legal decision making:
 - substantively irrational - oracles, juries, no process
 - formally irrational -- ordeals, formal process without connection to substance
 - substantively rational -- based on reasons but not only legal logic
 - formally rational -- legal logic, legalistic
3. Historical trend toward formally rational systems. Saw this linked to capitalism which requires long term investments and rational acquisition. In order to invest and acquire, need to predict obligations, rights, duties etc. over the long term. Plan costs if know legal contracts will be in force, etc.
4. On law and inequality: "The propertyless classes in particular are not served in the way in which the bourgeois are by formal "legal equality" and "calculable adjudication and administration." The propertyless demand that law and administration serve the equalization of economic and social opportunities, vis-a-vis the propertied class, and judges or administrators cannot perform this function unless they assume the substantively ethical and not formalistic character of the khadi (i.e. not constrained by formal rules, but guided by practical value judgments.)

What are examples, in modern law, of formal rationality, substantive rationality, formal irrationality, substantive irrationality? How would you classify the following:

- a. Congress passes a law requiring all buildings above a certain size to have ramps so that people in wheelchairs have access to them; -
- b. two couples are on their way to the movies and cannot decide which of two to go to; they toss a coin to decide;
- c. the Supreme Court, in *Roe v. Wade*, decided that restrictions on abortion in the early months of pregnancy violated a woman's right to privacy, a right not expressly stated in the Constitution;
- d. in the early years of the Chinese Revolution, "tribunals" were empowered to roam about in the country and do "revolutionary justice;" they punished landlords and other "class enemies;" there was no right of appeal from the decisions of these tribunals.
- e. judges in family courts are told to award custody according to the "best interests" of the children; the judge hears arguments, talks to the parents, reads the report of a social worker, and makes his decision;
- f. in a criminal case, a jury may decide on guilt or innocence; the jury deliberates in secret, and does not give any reasons for its decision, which (if the jury acquits) is absolutely final;
- g. an American state requires a license to hunt deer; to get a license, an applicant has to pay \$10 and be over 21 years of age, and a resident; a forty-three year old woman applies, fills out a form, pays the money to a clerk, and shows her driver's license; the clerk then issues a license to hunt deer;
- h. a statute forbids divorced people from marrying again within a year from the date of the decree. Mr. and Mrs. Smith get a divorce on June 1st; later, they reconcile, and two months after the divorce, they remarry in a civil ceremony. The question is, is this remarriage legally valid? A court holds that it is not, because it took place within one year, even though the Smiths argue that the statute was not supposed to apply to the case where the divorced couple marries each other.