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SUBSTANTIVE AND REFLEXIVE ELEMENTS IN MODERN LAW

by

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TABLE OF CONTENTS

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I. INTRODUCTION

We live in a time of increasing disenchantment with the goals, structures, and performance of the regulatory state. The political debate over "deregulation" is just one manifestation of a much broader reappraisal of the systems of law and public organisation. Recent debates in legal sociology mirror the more general concern over the effects of welfare-regulatory intervention. Thus,scholars have explored the causes and effects of the "legalization" of various spheres of social life (see Voigt 198o) as well as the sources and implications of movements for delegalization and informal justice (see Abel 198o). Attention has been drawn to "alternative" forms of dispute processing, to systems which could replace adjudication through formal legal means with various types of mediation and conciliation (see Blankenburg et al. 198o).

Viewed historically, the present moment seems to represent an era in which society is reassessing its commitment to purposive and positive law and to the bureaucratic and legal structures that are associated with it. The classical models of law and state which we inherited from the nineteenth century stressed what Max Weber called "formal rationality" (Rheinstein, 1954:61,3o1). A formal rational legal system creates and applies a body of universal rules. Formal ratio-

nal law relies on a specialized body of legal professionals who employ modes of reasoning developed within the law for the resolution of conflict. With the coming of the welfare and regulatory state, greater stress has been placed on what Weber would have called the "substantive rationality" of law, i.e. the use of law as an instrument for purposive, goal-oriented intervention (Rheinstein, 1954:63,3o3). As law in this sense is designed to achieve specific goals in concrete situations, it tends to be more general and open-ended, yet at the same time more particularistic, than classical formal law.

European scholars have called this trend away from formality the "rematerialization" of the law (e.g. Brüggemeier 198o). They see the trends towards more open-ended forms of legal regulation and more goal-oriented, concrete and purposive intervention as an inherent part of the program of the welfare-regulatory state and a development that leads to the dissolution of formal rationality. For some at least, the "materialization" of the law seems to threaten important social values (see Voigt 198o). These trends may at the same time threaten individuality by weakening the protections which formal law (at least in theory) provided against arbitrary state action, while at the same time removing barriers to bureaucratic intervention in collective domains of human interaction (family, neighborhood, school).

Legal sociology in Europe and the United States has succeeded in giving us useful phenomenological accounts of the conflicting and contradictory tendencies in the current situation. But while we have become aware that there are movements towards legalization and shifts from formal to substantive modes of legal thought and practice, we have no way to say why this is occuring nor any guides toward predicting the likely outcome of the current crisis. Critics tell us that legalization can not deal with the complexity and particularity of modern conflicts and argue for "alternatives" to law (see Blankenburg et al. 198o). But this criticism is met by those who note that delegalization and informalism can, under current social conditions, reinforce rather than erode asymmetric power relations (Abel 198o). Observers of the "rematerialization of law" note the pernicious effects of this process, but are unable to answer critics like Kennedy who stress the impossibility of realizing the program of formal law (Kennedy 1976). But what is bringing about this crisis? Is the debate over legalization and delegalization , form and substance, evidence of cyclical oscillations between arbitrary yet antagonistic principles of legal and social organisation? Or is the current crisis the reflection of more basic, underlying forces whose operation can be grasped and whose direction can be anticipated? Because most current analyses of the situation lack either a macro-social or a developmental grounding, they cannot provide answers to these questions.

The purpose of this article is to outline an approach to change in law and society that would allow us to see the current situation as a "crisis" of legal and social evolution, and thus to situate the phenomenological accounts of legalization/delegalization and form/substance in a more comprehensive social theory. To do this, I shall draw on an older tradition in social thought about evolutionary theory of law and society. While legal evolutionism has an ancient tradition, in past decades it has fallen in disrepute. Yet in recent years there has been something of a renaissance in evolutionary approaches to explaining changes in law and society, both in the United States and Europe[1]. I propose to work with these "neo-evolutionary" thoughts to provide a way of seeing the current situation in context.

The method I shall follow is to analyze the two leading German neo-evolutionary theories of law in society, and to contrast these to the most recent American essay in neo-evolutionary legal thought. From this juxtaposition of different but overlapping approaches, I hope to identify a new "evolutionary" stage of law, which I call "reflexive law", and to give an account of the problem of transition from substantive law -- which is the prevailing mode in our societies -- to this as -yet- unrealized stage of reflexive law.

This analysis is clearly a preliminary and tentative approach. My goal is to show how an evolutionary account which avoids the shortcomings of prior evolutionary models can be constructed to demonstrate the utility of such an account for preliminary appraisal of our current situation. But the social theory I build on is itself imcomplete, and my efforts to apply it to the current legal scene are at best partial and tentative. For this reason, the article concludes with an outline of a further program of research needed fully to develop and test the approach suggested here.

II. NEO-EVOLUTIONARY THEORIES ABOUT LAW

The most comprehensive efforts to develop a new evolutionary approach to law are to be found in the work of Selznick and Nonet, in the US, and Jürgen Habermas and Niklas Luhmann in Germany. These three neo-evolutionary accounts seek to identify differents "types" of law, show the progression from one type to another, and explain the processes of transition. Whilst there are substantial differences between them, all three of these theories are concerned with a common problem: the crisis of formal rationality. They treat formal rationality as the dominant feature of modern law (at least until recent times); assert that phenomena like the "rematerialization of law" are a manifestation of the crisis, and seek a theoretical insight into the situation.

To some degree all these approaches hark back to Max Weber's formulation of the issues. Writing more than a half a century ago, Weber both described the system of formal rationality and suggested the possibilities for a "rematerialization of law". Weber set forth a typology which included both formal and substantive rationality (Rheinstein, 1954:61,3o1; Trubek, 1972:72o). He traced the sociological determinants of the shift from primarily material attributes of action (ethically determined, eudaimonistic or utilitarian) to primarily formal attributes (conceptually abstract, precisely defined and procedural). In his account, formal rationality is sustained by a set of methodological rules (legal syllogism, rules of legal interpretation) that guarantee uniformity and continuity of the legal system[2].

Max Weber pointed, however, to some antiformal tendencies in modern legal development (Rheinstein, 1954:3o3). In contract law, for instance, these tendencies manifested themselves in an "increasing particularization" of the law and growing legislative and judicial control of the material content of agreements. Weber interpreted this as a renewed infusion into law of "ethical imperatives, utilitarian and other expedential rules, and politcal maxims" (Rheinstein, 1954:63), which in his view would endanger the formal rationality of law. "In any case, the juristic precision of judicial opinions will be seriously impaired if sociological, econo-

mic, or ethical argument: were to take the place of legal concepts" (Rheinstein, 1954:32o).

While Weber thought these trends rather marginal as compared to the overriding process of formal rationalization, contemporary evolutionary theories seem to attribute high significance to the "materialization of formal law" [3]. They search for process models that would explain the dissolution of formal rationality in terms of transformation, directionality and evolutionary potential. In fact, all these models do point to a new type of rationality toward which post-modern law may be moving.

While the three leading neo-evolutionary theories have a common problematic and, to some degree, a common starting point, the approaches they take and the basis for their theories are very diverse. Selznick and Nonet (1978) present a developmental model with three evolutionary stages -- repressive, autonomous and responsive law. Responsive law, in this account, is the result of a crisis of legal formalism, out of which a new form of law emerges which combines purposiveness and participation (1978:78,95). In explaining the transition to responsive law, Selznick and Nonet stress internal developments within autonomous law which erode its formal tendencies.

Luhmann and Habermas, on the other hand, ground their analyses in theories of evolution in societal structures and processes of legal and social co-variation. Luhmann, who follows the Parsonian - Durkheimian tradition and is the leading German exponent of "systems theory", employs a three stage evolutionary scheme of society which distinguishes between (i) segmented, (ii) stratified and (iii) functionally differentiated societies (1977a). Luhmann applies an analysis of co-variation between legal and social structures (197oa:3; 1972a:132; 1981a:45). That is, for each type of social organisation there is a corresponding type of legal order. Following this analysis, Luhmann is able to identify the current crisis in law as being generated by the transition from a stratified to a functionally differentiated society. This transition "demands" a parallel transition within law, so that the legal order can perform its functions within a differentiated society and adopt principles appropriate to it. From this point of view, the current crisis in law results from the inadequacies of the system of positive law. What is needed is not more purposiveness and more participation in law but higher abstraction, functionalist perspective, and "self reflection" (1972b:325; 1974:49; 1979:176).

Jürgen Habermas approaches the same issue from a different vantage point (1975). The leading spokesman of "critical theory", Habermas has attemped a "reconstruc-

tion of historical materialism" along neo-evolutionary lines (1976). Like Luhmann, Habermas identifies evolutionary stages in society and analyses the relationship between these stages and moral-legal developments. Habermas's model develops stages of social organisational principles which arise out of the interaction of structures of social labor and communicative interaction[4]. In his model, law is presented as the institutional embodiment of a historical sequence of "rationality structures": preconventional, conventional, and postconventional[5].

What then, given the controversial nature of these models, are plausible features of an emerging postmodern legal rationality? One way to deal with this question would be to relate the competing models to their respective theoretical background and to choose between them on grounds of theoretical "rightness", which would mean to open a new round in the perennial debate between "grand theories". We will, however, try a different approach. Consciously setting aside the great controversies between functionalism and critical theory, we will seek implicit agreements and tacit convergences. The goal is to transform seemingly irreconcilable standpoints into complementary perspectives, constructing an integrated model of legal evolution by decomposing the existing models into their elements and restructuring them in a different way. In this view, all three models do not really conflict, since they

tackle different aspects of the same problem. By means of mutual adaption -- which requires some re-interpretation -- the differences can be reconciled in a comprehensive model.

In our case, Nonet and Selznick, in order to explain legal change, rely strongly on "internal" variables of the legal system, while Habermas as well as Luhmann tend to stress "external" interrelations between legal and social structures. Thus, it might be fruitful to combine "internal" and "external" variables in a model which seeks to explain their co-variation. What follows for legal rationality, if we contrast the inherent developmental potentialities of the present legal system (Nonet and Selznick) with constraints and necessities of an emerging post-modern society (Habermas and Luhmann)?

It is my view, that if we follow this method we shall be albe to identify an emerging kind of legal structure which I shall call "Reflexive Law". The development of this concept arises from the effort to explain how the internal dynamics of legal development described by Selznick and Nonet is likely to work itself out in the environmet of societal transformation which form the basis of the theories developed by Habermas and Luhmann. The result is a concept which is similar to Selznick and Nonet's but at the same time differs from it in important respects.

The argument proceeds as follows. In section III, I will look more closely at Selznick and Nonet's concept. What they describe as "responsive law" turns out, when analysed from a European perspective, to involve two separate and potentially contradictory dimensions. Thus, while Selznick and Nonet see the growth of "responsive law" as a unidimensional movement toward a more participatory and purposive system, I shall show that their model actually incorporates two related but distinct trends in post-modern law, namely the move towards greater substantive rationality and the emergence of reflexive rationality. Since it includes substantive and reflexive elements, "responsive law" turns out to be, on closer analysis, an amalgam of two different types of legal rationality. This discovery leads to the question of whether "responsive law" is a stable or plausible "stage" or merely a moment in a transitional situation.

This is really the central question in the paper. But one cannot answer it in terms of the evolutionary theory which Selznick and Nonet use themselves, since the only dynamic element in their evolutionary model is internal change in law. This means that it is necessary to develop more complex models of legal and social evolution, in which changes in the legal system are explained in terms that include both, the internal dynamics of the legal order and the impact of social structural factors. I turn to this task in section IV. In this section I use insights from Haber-

mas and Luhmann to develop some basic principles of socio-legal evolutionary co-variation. This preliminary analysis suggests the importance of two such principles: I shall call these the principles of "social adequate complexity" and the "congruence of organizational principles". The principle of socially adequate complexity, derived from Luhmann, states that the legal order in post-modern societies must have mechanisms adequate to operate in a complex environment of functionally differentiated, semi-autonomous sub-systems. The principle of congruence derived from Habermas, states that the basic organising concepts of the legal order of a society must be homologous with the organising principles of the society as a whole. Applied to the problem of post modern society, both principles lead to the conclusion that a post modern legal order must be oriented toward self-reflective processes within different sub-systems of society.

In section V, I apply these principles to the original problem, namely analysing whether the amalgam of substantive and reflexive rationality contained in Selznick and Nonet's theory of responsive law is a stable or merely transitory stage. This analysis leads me to conclude that the two strands of the amalgam have different probabilities of realization in the conditions of post modern society. It can be shown that the reflexive dimension of responsive law is more

likely to meet the requirements of the principles of socially adequate complexity and congruence of organization principle than are the purposive or substantive aspects of responsive law. Therefore, I argue, even if responsive law accurately describes the current situation in law, the amalgam it describes is unlikely to hold together. Moreover, a tentative case can be made that reflexive law, now just an element in a complicated mixture of legal orientation, may emerge as the dominant form of post modern law.

III. "TOWARD RESPONSIVE LAW": INTERNAL DYNAMICS OF LEGAL CHANGE

In order to understand the specific rationality of responsive law, it seems necessary to examine more closely how Nonet and Selznick connect their major thesis -- the transformation of legal formalism -- with their method of a "social science strategy". How does this strategy differ from traditional ju- jurisprudential and sociological approaches to law? What follows for the concept of legal change? And how is it related to the conceptual dimensions of legal responsiveness?

1. Social Science Strategy: Beyond Jurisprudential and Sociological Reductionism

Nonet and Selznick take up a whole range of jurisprudential issues using, however, non-jurisprudential

methods (1978:8; Selznick, 1968:5o; 1969:3). In their social science strategy they approach law in an empirical rather than an exclusively analytical manner. They define law not as unidimensional, but as multidimensional. They include especially the social, the political and the institutional dimensions in particular and treat them as variables that depend on social context. Finally, they conceive these dimensions as forming a system of interrelated elements which can take on only a limited number of evolutionary configurations. In this perspective, the theory of responsive law succeeds in going far beyond traditional jurisprudence. Legal development is not identified exclusively with the unfolding of norms, principles, and basic concepts of law, Rather, it is determined by the dynamic interplay of social forces, institutional constraints, organizational structures, and -- last but not least -- conceptual potentials.

On the other hand, this type of social science strategy avoids the fallacies of sociological reductionism. It is a common weakness of several sociological approaches to law that they lose sight of the legal phenomena as such [6]. This holds true for base/superstructure theories in which law appears only as an epiphenomenon disguising the genuine economic contradictions [7], as well as for positivist approaches in which law is reduced to a set of decisions determined by either power relations, organizational structures, professional

roles, personal attitudes or a combination of these independent variables. In contrast, Nonet and Selznick view law as an autonomous social institution, the development of which is not a mere reflection of external social forces but of the internal dynamics of law itself.

Autonomy of legal evolution seems to be the striking feature of "Law and Society in transition". It is a theory of institutional constraint and response within the legal system whose "main point is that a determinate disposition to change is traced such that systematic forces set in motion at one stage are said to produce characteristic outcomes at another" (Nonet and Selznick, 1978:2o). For instance, the very function of repressive law -- legitimation of power -- generates pressures within this type of legal system that undermine its specific structures; similarly, the emerging new type of law,autonomous law, develops internal modes of reasoning and participation that press for its own transformation into a more responsive type of law (1978:51,71).

Thus, a "social science strategy", going beyond jurisprudential as well as sociological reductionism, offers an alternative to traditional interpretations of legal change. Consider recent trends of materialization of formal law. In the jurisprudential account, they are explained as resulting form eternal tensions between

equity and security of law (e.g. Radbruch, 1965; Engisch, 1977: ch.VI). As a sociological phenomenon, the Marxist tradition interprets these trends as a superstructural reaction to the emergence of organized capitalism (Neumann, 1967:7), while Weberian thinking relates it to the pressures of certain social interests (Rheinstein, 1954:3o3). In Selznick and Nonet's account, however, the legal system itself, in its formal stage of autonomous law, develops internally certain conceptual structures, methods of inquiry, institutional patterns and modes of participation that systematically produce a different type of law, characterized by purposive thinking, social science methods, and political participation (1978:78,95,1o4).

Such an "institutional logic", on which Nonet and Selznick insist, is strongly supported by their European counterparts. Habermas transforms "economistic" versions of the base/superstructure thesis into more abstract relations between "labor" and "interaction" and provides for an autonomous "developmental logic" of normative structures. Since the evolution of moral and legal consciousness follows its own autonomous pattern it cannot be reduced to a mere reflection of the "developmental dynamics" of the base social and economic structures (1979:13o).

It is one of Habermas' major theses that rationalization of the "life-world" in which moral and legal

development take place, is independent from processes of increasing complexity of the economic and political "system".

Luhmann accounts for the autonomy of legal evolution by defining it as an interaction between different evolutionary mechanisms inside the legal system. Its normative structures provide for variation; its procedural institutions fulfill the selection function; its conceptual abstractions represent stabilization mechanisms (197oa). Despite large differences in their respective models, which will be discussed later on, one finds a striking convergence in their view of the autonomy of legal evolution.

What does it mean to re-formulate legal change in terms of an autonomous development? Is this not a -sociological concept of law which tends to isolate jurisprudence from the social sciences once again? Legal autonomy is not to be equated with autarky, since the legal system is not conceptualised as a "closed" system, as self-sufficient and independent from changes in the broader social environment. However, in sharp contrast to competing socio-legal models, legal evolution is thought to be self-programmed. Self-reference of legal structures is the key to the problem; law changes in reaction only to its own impulses [8]. The legal order -- norms, doctrines, institutions, organizations -- reproduces itself, and it does so by responding to en-

vironmental interests. The processes of institutional constraints and responses take place only between legal structures within the legal system, but this self-programmed change makes law responsive for external social exigencies. External changes are neither ignored, nor are they directly reflected according to a "stimulus-response-scheme". Rather, they are selectively filtered into legal structures and adapted in accordance with the logic of normative development. Even the strongest social pressures are recognized only insofar as they appear on the internal screen of "legal constructions of social reality". Thus, broader social developments serve to "modulate" legal change which carries out its own developmental logic.

Self-reference, thus opens a perspective to legal development in which the legal system appears at the same time as a "closed" system and as an "open" system. Autonomy of legal development and its dependency on social environment form neither a dichotomy nor the extreme poles on a continuum. Rather,both aspects appear to be compatible with one another and even variable against each other. Legal development is self-referential and at the same time "stimulated" by the social environment. While the first aspect -- autonomy -- is stressed in Nonet/Selznick's theory, the second aspect -- dependency -- needs to be critically re-examined later on.

It is the very concept of self-referential legal structures that enables us to take account of the "distinctively legal" character of specific normative phenomena, without at the same time losing a broader social-science perspective. We can sociologically recognize and analyse the differences between legal doctrines and scientific theories, between legal constructions of reality and social science constructs between "Rechtstatsachenforschung" and sociological empirical research, between a specific juridical type of rationality and that of other social subsystems. Most important for our context, the concept of self-referential legal development leads to a theory of post-modern law in which a new legal rationality appears as the product of an internal "institutional logic". What then are the dimensions of rationality in "responsive law"?

2. Two Dimensions of Responsive Law: Substantive Versus Reflexive Rationality

While the contemporary discussion on materialization of formal law has revealed a variety of its aspects, Nonet and Selznick, with their core idea of autonomous legal change, present a coherent and systematic model of its consequences for the main elements of the legal system. Emerging from the internal crisis of legal formalism, "sovereignty of purpose" is the new substantive orientation which transforms fundamentally rigid normative structures into "open-textured" stan-

dards and "result-oriented" rules. The new purposive orientation influences basic doctrinal concepts ("obligation and civility"), as well as legal constructions of social reality ("political paradigm")(1978: 78,84,87,93). In this development, classical methods of legal inquiry need to transform themselves into methods of "social policy analysis", parallel to changes in the modes of legal participation ("legal pluralism")(1978:84,96,1o6). Moreover, materialization of law corresponds to totally new institutional and organizational structures: it demands"regulation, not adjudiciation" carried out by non-hierarchical "post-bureaucratic organizations". Outside of the legal system, its boundaries need to be re-defined in respect to the political and social environment: substantive rationality requires an "integration of legal and moral judgment and of legal and political participation" (1978:1o4,1o8,11o).

However, one can detect elements in responsive law which cannot feasibly be associated with the emergence of a new substantive rationality. Although the authors themselves explicitly subsume them under "substantive justice" as opposed to "procedural fairness" in autonomous law and to "raison d'etat" in repressive law (1978:16), these elements obey the logic of a different rationality.

Consider their concept of "institutional design and institutional diagnosis" (1978:111). Here, legal attention focuses on creating, shaping, correcting and redesigning social institutions that function as self-regulating systems. Legal norms are designed in order to produce a "harmonious fit" between institutional structures and social structures, rather than to influence the social structures themselves. Instead of substantive guidance of behavior, these norms are directed toward organization, procedure and competence. Instead of taking over responsibility for concrete social results, the law is restricted to regulate self-regulating mechanisms such as negotiation, decentralization, planning, organized conflict. While substantive rationality would require a comprehensive regulation, "institutional design" aims at "enablement and facilitation" (1978:111).

The same is to be said about features of responsive law. Politicization of law, for instance, as suggested by new modes of political participation (social advocacy, class action, representation of group interests, etc.) (1978:95), has the effect of importing a different set of social conflicts and of integrating different interests into the legal process. It does so without engaging in specific results, which a substantive rationality would require. Even the infusion of social science into legal doctrine may serve other purposes than result-orientation which is commonly asso-

ciated with social policy approaches (1978:84). Social science might turn out to be much more relevant to abstract model-construction in law, to fundamental changes in the conceptual structures. This has not very much in common with the "scientific" production of material results which a substantive rationality would demand.

These considerations suggest a clear analytical distinction. There are two trends in the transformation of legal formalism. In responsive law, "formal" rationality is replaced by a new "substantive" rationality and a new "reflexive" rationality. This needs some conceptual clarification.

Legal rationality is a compact concept. In order to define the specific rationalities of formal, substantive and reflexive law, we have to dissolve that compactness by breaking up the concept into different dimensions. This can be done by using the dimensions of rationality. Habermas (1976:262) uses to analyse modern formal law and then applying the same dimensions to substantive law and reflexive law. Habermas's categories expand on the original Weberian concepts, which equated legal rationality with internal features, i.e. the construction of general conceptual categories and the systematization of doctrine. For Habermas this is only one dimension of legal rationality. This <u>internal rationality</u> is dependent on two other dimensions:

system rationality and norm rationality. System rationality refers to the external social functions of law: it designates the capacity of the legal order to respond to control problems of society at large. Norm rationality, in contrast, refers to fundamental principles which justify the specific way that legal norms should govern human actions. These three dimensions of legal rationality are connected to each other in a systematic fashion which we will discuss at length later on. Here for the purpose of conceptual clarification, it is sufficient to sketch the interrelation as follows: Developments in the moral-cultural sphere press for the emergence of a new norm-rationality. Insofar as developments in the social sphere create the need for a new system rationality of law, a new internal structure might develop as an "incorporation" of the new norm-rationality. If we apply this formal model to our analysis of modern law, we propose the following three dimensions: (1) justification of law ("norm rationality"); (2) external functions of law ("system rationality"); (3) internal structure of law ("internal rationality").

Formal rationality of modern law is then defined by a historically specific configuration of these three dimensions: (1) The justification of formal law is the perfection of individualism and autonomy (Kennedy, 1976). Formality in this respect means that law is clearly restricted to the definition of abstract spheres of

action for the autonomous pursuit of private interests. Formal law "defines scopes of legitimate arbitrariness of private actors" (Habermas, 1976:264). Law guarantees only a formal framework while the substantive value judgements are made by private actors. "Formalities" facilitate private ordering, they are "premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter"(Kennedy, 1976:1685). Formal law regulates negatively by restricting principally accepted subjective rights, instead of a positive regulation via concrete duties and substantive prescriptions. Its corollary elements are: conventionality, legalism and universalism (Habermas, 1976:264). (2) With this orientation, formal law fulfills specific external social functions. Formal law develops its own system rationality insofar as it establishes spheres for autonomous activity and fixed boundaries to the action of private actors. Thus it fulfills the normative imperatives of a developed market-society by contributing to the mobilization and allocation of natural resources (Habermas, 1976: 264; 1981:352)[9]. In the systematization of subjective rights we find a "semantics of decentralization" which is the adequate legal form for the functional differentiation of an autonomous economic system (Luhmann, 1981:8o). (3) It is by the interplay of both these elements that we can explain the internal structure of formal law. In this dimension, law is formally rational to the extent that it is structured according to stan-

dards of analytical conceptuality, deductive stringency and rule-oriented reasoning (Habermas, 1976:263; 1981:348). A highly developed rule-orientation is realized in precise definitions of factual situations of norms and their legal consequences. Professionalization is an additional element: Legal experts apply universally formal-operational thinking to their professional knowledge [10].

We propose to apply this trichotomy of norm, external function and internal structure to substantive and reflexive rationality as well. Substantive rationality emerges in the processes of increasing state regulation. It is commonly associated with the growth of the welfare state and state intervention in market structures [11]. In these developments, law loses its formal characteristics in regard to all three dimensions. (1) In its"norm rationality", substantive law shifts focus from autonomy to regulation. The justification of substantive law is to be found in collective regulation of economic and social activities and in compensation of inadequacies of the market. Thus, the law tends directly to regulate social behavior. Instead of defining spheres for autonomous private action, the legal order defines concrete duties and substantive prescriptions. At the same time, law loses its universalist orientation which abstracts sharply from social status, and shows a tendency toward particularism, i.e. a renewed orientation on social roles and statuses. (2) With this

new internal justification, substantive law fulfills different external functions. It tends to be instrumental in state-induced modifications of market-determined patterns of behavior. Substantive law demonstrates its"system rationality" by the contributions it offers to political interventions of the welfare state. Substantive law is instrumental as the political system takes over responsibilities for defining goals, selecting normative means, prescribing concrete actions, and implementing programs. (3) Insofar as substantive law takes over this new function and develops a regulatory justification, it tends to alter its internal structures. The dominant rule-orientation of formal law is supplemented by an increasingly purposive orientation. Substantive law is realized through purposive programs and implemented through regulations, standards and principles. This development toward a purposive law has grave consequences for the conceptual construction of doctrinal legal systems. It is one of the most contested questions today to what degree legal thinking and legal practice can cope with the cognitive consequences of consequentialism [12].

Reflexive rationality, finally, represents a much less well-defined type of legal orientation, which is due to its incipient and inchoate status. It has emerged only recently in the crisis of the welfare state as a still undeveloped alternative to regressive tendencies of re-formalization of substantive law. It shares

with state-interventionist concepts the notion of legal activism intervening in social processes but it retreats from taking over full responsibility for substantive outcomes. (1) Its justification is neither to be found in the perfection of autonomy, nor in the collective regulation of behavior. Rather, reflexive law is justified by the coordination of recursively determined forms of social cooperation. In this "norm rationality", reflexive law shows, indeed, resemblance to liberal and neo-liberal concepts. By legally supporting social autonomy, it relies on invisible-hand-mechanisms. But in contrast, it does not restrict itself to adapting to "natural social orders". Quite to the contrary, it searches for "regulated autonomy", it designs actively self-regulating "learning" social systems through norms of organization and procedure. In contrast to formal law, reflexive law does not accept "natural" subjective rights. Rather it attemts to steer human action by redefining and re-distributing property rights. (2) Thus, reflexive law performs different external social functions to substantive law. The role of reflexive law is to structure and re-structure social systems, the procedures of internal discourse and their external coordination with other social systems. In that respect, reflexive law shows elements of "system rationality" insofar as it facilitates integrative processes within a functionally differentiated society. Instead of prescribing authoritatively ways and means of social integration, it tends to create structural premises

for a decentralized integration of society, and it does so by supporting integrative mechanisms within autonomous social subsystems. (3) In its internal structures, reflexive law has to go beyond the alternative of rule-orientation and purpose orientation. Its "internal rationality" is represented neither by a system of precisely defined formal rules nor by the infusion of purpose-orientation through substantive standards. Instead, it tends to rely mainly on procedural norms which regulate processes, organization, the distribution of rights and competencies. A new procedural orientation can be observed in different legal fields as an emerging alternative to formal as well as to substantive rationality of law [13]. This type of law has a tendency towards more indirect, more abstract modes of social control.

(Insert table)

Types and Dimensions of Modern Legal Rationality

Dimensions \ Types	FORMAL	SUBSTANTIVE	REFLEXIVE
JUSTIFICATION OF LAW	perfection of individualism and autonomy	collective regulation of economic and social activity and compensation for inadequacies of market	coordination of recursively determined forms of social cooperation
EXTERNAL FUNCTIONS OF LAW	establishment of spheres of activity and fixed boundaries for action of private actors	instrumental modification of market-determined patterns and structures of behavior	structuring and restructuring systems for internal discourse and external coordination
INTERNAL STRUCTURE OF LAW	conceptually constructed rules applied through deductive logic	purposive programs of action implemented through regulations, standards and principles	relationally oriented institutional structures and decisional processes

Why "reflexive" rationality? The theoretical context to which this term refers will be treated systematically in section V. Here, in order to defend the terminology, it might suffice to sketch out three dimensions. This type of law employs reflexive mechanisms: instead of making substantive decisions, the law decides about organizational and procedural premises of future decisions. It is characterized by a specific legal self-restraint following reflexive processes in the legal system which concern the capacity limits of the legal order. Finally, its main concern is to facilitate reflexive functions within autonomous social subsystems: instead of proscribing ways and means of social integration it creates structural premises for a decentralized integration of society.

To use again contract law as an example, each of these rationality types would suggest a distinct approach. Formal conditions of the "meeting of minds" characterize formal legal rationality. While a substantive approach tends to judicial and legislative control of the material terms of contract, reflexive legal rationality would look to the procedural and organizational conditions of power equalization in the bargaining process and to contractual mechanisms of "public responsibility" which would make the cooperative system sensitive towards its social effects.

"External decentralization" might serve as a second example in which we can identify developmental chances for a reflexive law (Lehner, 1979:178; Gotthold, 1982). The present discussion on the limits of the social state has again and again pointed to disfunctional consequences of "legalization". Materialization of law finds its limits in those sectors of life which in their internal structuring resist processes of monetarization and legalization. The neo-conservative solutions are well-known: de-regulation, re-formalization, privatization. The concept of "external decentralization" has been developed as an alternative solution. "Public tasks" are delegated to semi-public or private institutions, however, they remain "public" in the sense that political responsibility prevails. Examples for such external decentralization can be found in the delegation to "neo-corporatist" mediation-systems, semi-public associations, local social organizations. The political responsibility is restricted to a legal framework, to the "constitution" of the organization, to rights of participation and to procedures of decision-making. The crucial point is a permanent public supervision and revision of the institutional design. If the results of those social learning processes turn out to have socially detrimental consequences political responsibility involves a re-definition of the institutional arrangements.

To be sure, Nonet and Selznick, in their concept of responsive law, discuss elements of both, reflexive as well as substantive rationality, without, however, sufficiently distinguishing between them in a systematic fashion. What makes this distinction relevant? One reason is that reflexive legal rationality would require institutional legal structures, cognitive models of reality, and normative characteristics quite different from its substantive counterpart. More important is the second reason: the distinction is necessary to assess to what extent the potential of responsive law can be realized. This is because the theoretical notion of autonomous internal legal evolution, which we have described up to now as a major gain of Nonet and Selznick's social science strategy, may have been purchased at too high a price. The price may be that of losing sight of the systematical interplay between legal and social evolutionary processes. If the attention focuses, instead, on co-variation, then we find a perspective in which we can develop our main thesis: Social developments outside the legal system limit drastically the potential of substantive law while they favor systematically the reflexive type of legal rationality. To put our thesis into the authors' conceptual framework: It is reflexive rather than substantive rationality that represents the "con- "conceptual readiness" of responsive law to take advantage of "opportunity structures" emerging in post-modern society (Selznick, 1968:5o,55,57; 1969:243).

IV. "LAW AND SOCIETY IN TRANSITION" : EVOLUTION OF LAW WITHOUT SOCIETY

1. A Model of Internal Growth

We now focus on the relation between legal and social structures in the development of law. In Nonet and Selznick's account, this relation appears as rather marginal. The "inner dynamics" are in the foreground; they set in motion systematic forces that produce characteristic configurations of the law (1978:2o), while "external" influences appear only as historical contingencies that might block or facilitate legal development (1978:21,23,115). To be sure, variations of the multidimensional legal institutions are said to be dependent on social context. But throughout the analysis one can detect a systematic underestimation of society's external dynamics.

This criticism should not be understood to suggest that the authors underestimat the relative strength of social forces as compared with specifically legal forces. This would imply a multi-factor model of legal evolution in which legal and social factors appear as independent variables, and the consequential question would be how to analyze their relative weight. Such a trade-off between legal and social structures, however, would not take into account the fruitful concept of legal autonomy. Rather, underestimation means that the authors, while successfully utilizing the analytical

legal autonomy, fail to recombine it with an elaborate model of the interrelations between an autonomous legal evolution and broader social developments. Obviously a systems approach is needed. There are, however, different ways of providing a satisfactory analysis of inter-systems relations.

In Nonet and Selznick's account, the relation between legal and social system can be described by a model of internal growth. The role of the social environment is restricted to aiding or speeding up independent legal developments. Due to its internal dynamics, the legal system gains a developmental potential which defines exclusively its pattern of growth and decay. In this respect, we seem to have law without society. Broader social structures are decisive only in regard to the degree to which they help to actualize legal potential. They only determine the stability of an evolutionary stage and the probability of progress or regression (1978:18,23,116).

Such a growth model views the relation between law and society as rather minimal. It leaves open the question of what mechanisms provide for the social actualization of legal potential, and which analytical tools should be applied. Do we have to think of social pressures being translated into legal developments in terms of a causal analysis? Or, is a means-end analysis more appropriate, in which individual and collective actors

use legal norms for social purposes? A third option would be a functionalist type of analysis which establishes a relationship between external functions and internal structures of the law.

More fundamentally, questions are to be raised about the extremely limited role of "external" social structures in this model. In the classical models of legal sociology, characteristics of legal development were seen as interdependent with specific levels of social evolution. For instance, Durkheim's "restitutive law" representing "organic solidarity" is intimately connected to a new stage in social organization. Division of labor replaces a segmented organization of society and its corollaries, mechanic solidarity and repressive law [14]. Similary in May Weber's theory, formal legal rationality is closely related to processes of "rationalization" in the whole society, particularly in the economic and scientific sphere (Rheinstein, 1954:61,3o1) [15]. It is plausible to reduce these insights of systematic socio-legal interrelations -- as imperfect they ever might be -- to the notion of potential and actualization? Moreover, can we formulate a developmental model for a specific subsystem of society -- in our case, law -- without at the same time designing a theory of societal evolution?

A third set of questions must be raised in regard to Nonet and Sleznick's concept of developmental "crisis" -- a concept central to evolutionist thinking. Do the

specific internal crises in repressive as well as in autonomous law refer to "system integration" in the sense that the respective legal structures allow for fewer possibilities than are necessary for the maintenance of the system (Habermas, 1975:1)? The authors' stress on "greater capacities for problem solving", on "the economy of power" and on the "precariousness of responsive law" (Nonet and Selznick, 1978:24,33,115) would aptly fit into a functionalist systems approach. On the other hand, the problems of both repressive and responsive law are viewed as legitimation crises, leading to problems of "social integration" and social identity and to the dissolution of social norms (Habermas,1975). Perhaps Nonet and Selznick are deliberately refusing to be forced into making such a clear cut distinction between social and system integration. Their concept of crisis probably contains elements of both. But, since we cannot equate social integration with system integration, are we not compelled to clarify at least the internal relations between rationality crises concerning the social-engineering capacities of the law, and legitimation crises concerning social identity and social norms?

Let us reconsider the crisis of formal legal rationality in Max Weber's sense. Is it a deficiency of abstract, general, and formal control mechanisms [16], or is it a deficiency of legal formalism to take into account substantive justice (Habermas 1979b:184)? A clarifica-

tion of this question would have important consequences for the concept of responsive law. The challenges to which responsive law responds could be analyzed more precisely in terms of either an "internal" legitimation crisis or an "external" rationality crisis of autonomous law. Obviously, the response themselves would also be different according to this distinction.

These three sets of questions are intended to go beyond a mere clarification of the model's assumptions. They are aimed at broadening the scope of the theory in a specific direction: shifting the focus of the argument from a theory of internal legal growth to one of socio-legal co-variation. It may be possible in this manner to preserve the classical goals of a comprehensive socio-legal analysis whilst at the same time viewing in the perspective of the "internal dynamics" of legal evolution which Nonet and Selznick have successfully analyzed in detail.

2. Alternatives: Co-Variation of Legal and Social Structures.

In order to clarify this point it would be useful to examine two important discussions of the co-variation of legal and social structures found in the work of Habermas and Luhmann respectively. Both authors take into account the autonomous nature of the development of norms within the legal system, but

at the same time systematically examine the relationship between law and its social context.

Habermas argues that post-Darwinian theories of social evolution which rely on the interplay of evolutionary mechanisms (variation, selection, stabilization) cannot account for the identity of societal stages of evolution and for their learning potential, both of which can be analyzed only in terms of "social consciousness" (Habermas, 1976a:226). Consequently, Habermas contrasts the "developmental dynamics" of those evolutionary mechanisms with an autonomous "developmental logic" of normative structures (moral and legal consciousness) which are supposed to follow a rationally reconstructable pattern of evolutionary sequences. He uses models of the moral development of the individual from the Piaget-Kohlberg tradition to study the development of social norms (Habermas, 1979c:95). The resulting "principles of social organization" form a logical sequence of "structured wholes" which are characterized by the common features of irreversibility, structured hierarchy, and directionality (Habermas, 1979a:98).

In Habermas' evolution theory, these highly abstract principles of organization of society -- which include legal institutions (Habermas, 1976c:266) -- designate the "learning niveau" of a given society (Habermas, 1971:27o; 1975:17; 1976a:2oo; 1976b:92; 1976c:26o; 1976d:129; 1979a:95; 1979d:13o). They determine the

scope for variation of types of social integration (social identity, consensus on values) as well as for system integration (the capacity for control of a society). Principles of organization emerge as the result of a double learning process which can be explained -- according to Habermas -- by combining two models. A functionalist system/environment model can be fruitfully used to analyze the capacity of a certain principle of organization to deal with the system problems of a given society. In the event of a crisis, however, i.e., when developments in the social sphere create system problems which cannot be resolved by the capacity for control of the principle of organization, new learning processes within the cultural sphere emerge which can be interpreted only by a model of "rational reconstruction". In this model, the evolution of norms obeys a specific "developmental logic" analogous to the logic of moral evolution in the Piaget-Kohlberg tradition.

> "These structural patterns depict a <u>developmental logic</u> inherent in cultural traditions and institutional change. This logic says nothing about the <u>mechanisms</u> of development; it says something only about the range of variations within which cultural values, moral representations, norms and the like -- at a given level of social organization -- can be changed and can find different historical expression. In its developmental <u>dynamics</u>, the change of normative structures remains dependent on evolutionary challenges posed by unresolved, economically conditioned system problems and on learning processes that are a response to them."
>
> (Habermas, 1979a:98)

This interplay between the logic and the dynamics of the development of norms can be seen in the following sequence of explanation (Habermas, 1976a:242; 1979d: 161; 1981):

1. Initial State: The principle of organisation of a given historical period has the necessary capacity to solve the problems of social and system integration. Example: Political class structures of medieval feudal society were generally well-suited to agrarian production and urban artisanship.

2. Evolutionary Challenge: The social structure creates system problems which surpass the adapting and learning capacity of society within the present organization principle. Example: Economic problems (international trade and monetary economy) cannot be dealt within the framework of the principle of organization of medieval politics.

3. Experimentation: Cognitive potentialities which have been developed autonomously in the cultural sphere according to its own developmental logic, are used for social organization in an experimental manner. Example: Normative concepts are institutionalized as models for strategic action (the idea of the market or rational organization are instances of this).

4. Stabilization: When successful, the new organizational principle is institutionalized throughout society and is incorporated in fundamental legal structures

in particular. Example: The creation of a complementary relationship between the economy, the private law system, state taxation, and modern administration.

What makes this concept of the "organizational principle" useful for our purposes, is its focus on the relationship between legal and social structures. Fundamental legal norms -- seen as incorporating organizational principles at an institutional level -- are analyzed in terms of an interplay between normative structures and broader social structures. Normative structures develop according to an autonomous evolutionary logic which can be analyzed by rational reconstruction in a manner similar to Nonet and Selznick's concept of autonomous legal development. At the same time, the analysis is supplemented by a system/environment-model which shows the influence of the dynamics of social evolution. The crucial point is that both approaches are combined. It allows us to construct a more comprehensive model of socio-legal co-variation in the sense, " ... that in social evolution higher levels of integration can only be established insofar as legal institutions have emerged in which a moral consciousness of the conventional or post-conventional stage (Habermas) is embodied." In this respect Habermas has found a solution to the problem which we considered to be unresolved

in Nonet and Selznick's theory. The combination of two different analytical models enables him to analyze legal development both in terms of its autonomy and in terms of its social dependency.

Moreover, from this combination one gains a three-dimensional concept of legal rationality (which we have already used in our preliminary definition of reflexive law). Legal rationality can be analyzed in its normative, social and cognitive dimensions. "Rational reconstruction" leads to a concept of "norm rationality" which determines the possible norms and values within a given moral and legal order. The "system/environment model" supplements this internal view with a concept of "system rationality" which determines the capacity of the legal order to respond to problems of control in society. Both norm rationality and system rationality in turn, determine the constraints on the internal conceptual, procedural and organizational structures of the legal system. They define the "internal rationality" of legal concepts.

The question, however, of how societal organization principles are "translated" into legal structures, is left more or less open in Habermas' theory. Luhmann's concept of the "socially adequate complexity" of legal systems is helpful in this respect.

By rejecting the key concepts of classical evolutionism, and in particular those of unilinearity, necessity, and progress, Luhmann develops a minimalist version of an evolutionary model. This involves three basic assumptions concerning dynamics, mechanisms, and directionality [17]. The dynamics of evolution derive primarily from a fundamental difference in complexity between system and environment:

> "Evolution presupposes ... an overproduction of possibilities in regard to which systems can be selectively maintained by structures and, on theses premises, it renders probable otherwise improbable systems of order. Impulse and regulation of evolution is the complexity difference between system and environment" (Luhmann, 1972a:136).

This difference in complexity produces changes in the social systems which adapt if and insofar as they develop specific evolutionary mechanisms for variation, selection, and stabilization (Luhmann, 1975a: 15o). In the case of the legal system:

> "The main source of overproduction of possibilities is the normative, i.e., the temporal dimension. The mechanism of institutionalization serves as a selection factor which chooses among new expectations those for which consensus of third parties can be presumed. Stabilization is reached by linguistic definition of a transferable meaning which can be worked into and preserved in the conceptual structure of law"
> (Luhmann, 1972a:14o).

Socio-legal evolution, in Luhmann's account, is characterized by the interplay between these "endogenous" evolution mechanisms within the legal system and "exogenous" evolution of the society at large (Luhmann, 197oa: 7; 1972a:132). Endogenous evolution is systematically affected by exogenous evolution since certain

organization principles of society at large influence the relative effect of the endogenous evolution mechanisms. Law has to adapt to specific levels of social differentiation. The dominant organization principle of society; (segmentation, stratification, functional differentiation creates particular configurations of the legal system with specific "bottlenecks" of legal evolution (Luhmann, 197oa:16).

In segmented societies, which are characterized by a "poverty of alternatives", "archaic law" has its evolutionary problems in providing for an adequate variety of normative structures. Stratified societies possessing a diffentiated hierarchical order have solved this problem by producing a greater variety of norms; the resulting "law of pre-modern high culture", however, faces problems in the selection procedure of decisions. Finally, functionally differentiated societies are characterized by a massive overproduction of norms; the corresponding " positive law" has developed sufficiently sophisticated selection mechanisms, particularly in legislative procedures, but its stabilization mechanisms are still bound to traditional doctrinal concepts. It is this underdeveloped status of legal doctrine which produces the crisis of positive law (Luhmann, 1973:13o, 142; 1974:49). Its rigid normative character hinders the emergence of a social adequate "learning" law. What is missing, according to Luhmann, is " ... a con-

tual system oriented towards social policy which would permit one to compare the consequences of different solutions, to compare experiences from different fields, in short: to learn" (Luhmann, 197oa:19).

In order to test the explanatory power of these two concepts -- that of "organizational principles" and that of "adequate complexity" -- we will in an experimental manner combine them with Nonet and Selznick's concept of "internal legal dynamics", and spell out the consequences for each evolutionary stage of law. Because of our particular concern with modern legal rationality, this can be done only briefly for "repressive" and "autonomous" law, while the implications for "responsive" law will be analyzed in more detail.

3. Re-interpretation of Repressive and Autonomous Law

In Nonet and Selznick's theory, the initial stage of legal development is "repressive law" -- a legal order whose main function is to provide legitimation for an emerging political order (1978:29). For Habermas as well as for Luhmann, "repressive law" would represent a rather modern type of legal order, reflecting the social organization principles of an advanced "political society" (Habermas, 1978d:161; Luhmann, 1972a: 166). This suggests that Nonet and Selznick's typology needs expanding by introducing a pre-modern type

of legal order -- "archaic law" -- (Luhmann, 1972a: 145) the characteristics of which cannot be subsumed either under repressive, autonomous, or responsive law. In contrast to repressive law, archaic law reflects the organization principle of segmented societies which are charcterized by the predominance of kinship-relations(Luhmann, 1972a:145)[18]. Retribution and reciprocity are the main principles of archaic law which in various forms of sacred law develops very concrete and rigid norms, has only ritualistic forms of procedure, and stresses expressive rather than instrumental functions (Luhmann, 1972a: 154). This primitive law will be transformed into "repressive law" only if and insofar as system problems emerge which surpass the control capacity of the kinship organization principle and lead to the development of a political organization (Habermas, 1979d:162).

It is with the emergence of a new social principle of organization (Luhmann: "stratification" (1977a:33); Habermas : "political class domination" (1979d)) that the legal structure needs to change its character. Nonet and Selznick analyze in detail the intimate connections of political power and "repressive law" (1978:29). This corresponds to Luhmann's account of "high cultural law", the structure of which reflects the supremacy of the political order in stratified societies and their hierarchical form of domination (1972a:166). Adequate legal complexity, in Luhmann's

analysis, is achieved by the institutionalization of court procedures which can cope with the much higher degree of social conflict in stratified societies (1972a:171). Habermas' analysis of the organization principle in stratified societies focuses on the specific type of social integration which becomes possible under "political class domination". Through the institutionalization of court procedures, a conventional morality can replace its preconventional predecessor:

> "This was the case when the judge, instead of being bound as a mere referee to the contingent constellations of power of the involved parties, could judge according to inter-subjectively recognized legal norms sanctified by tradition, when he took the intention of the agent into account as well as the concrete consequences of action, and when he was no longer guided by the ideas of reprisal for damages caused and restoration of a status quo ante, but punished the guilty party's violation of a rule" (1979d:161).

Again , the crisis of this type of law needs to be analyzed in terms of its socio-legal interrelations. The interplay of both, an internal "legitimation crisis" of repressive law (Nonet and Selznick, 1978: 51) and an external "system crisis" (Habermas: economic system problems (1976a:242); Luhmann: the emergence of functional differentiation (1972a:19o)), press for the development from repressive law to a more "autonomous" type of law.

"Autonomous law", in Nonet and Selznick's definition, fulfills the condition of formal legal rationality in Max Weber's sense: the separation of law and po-

litics, legal professionalization, strict rule-orientation, universality and precision, "artificial reasoning", and procedural justice (1978:53; Rheinstein, 1954:61,3o1). If one relates formal law, as Habermas suggests, to the dominant organization principle of modern societies, then law appears to obey a specific "system rationality" as well as specific "norm rationality" (1976a:262). Formal law contributes, on the one hand, to the mobilization and allocation of natural resources by fulfilling the normative imperatives of a developed market-society. This is the system rationality of modern law which is facilitated by its characteristics of conventionality, legalism, and formality. On the other hand, in its universalist elements, law begins to institutionalize a post-conventional norm rationality, i.e. the necessity to justify norms by reasoning via universal principles. In a complementary fashion, it is possible to use Luhmann's analysis to demonstrate how "autonomous law" develops adequate complexity with respect to the principle of functional differentiation. In this perspective, the phenomenon of "positivity" and the separation of judicial and legislative procedures appear to be the crucial variables (Luhmann, 197ob:176; 1972a:19o). Similarly to explain the crisis of this modern type of law, the internal dynamics resulting in pressure for increased responsiveness (Nonet and Selznick, 1978:7o) need to be related to inadequacies of legal complexity (Luhmann, 1972a:19o) as well as to tendencies to enter

into crisis of the dominant organization principle (Habermas, 1976a:242).

Thus, this tentative re-formulation of "repressive" and "autonomous" law may have plausibly demonstrated the explanatory value of a synthesis approach. To combine "organization principle" and "adequate social complexity" with the theory of "law and society in transition" means to considerably modify the encompassing model. In short, this approach compels us to supplement the threefold typology of legal evolution with an additional evolutionary stage -- "archaic law" -- and to give different assessments of "repressive" and "autonomous" law in terms of external functions and internal structures and in terms of their inherent crisis tendencies. However, the question more relevant for our present purpose needs still to be answered: How does this synthesis approach improve our understanding of "responsive law"?

V. "THE QUEST FOR RESPONSIVE LAW" : ADEQUATE SOCIAL COMPLEXITY?

To recapitulate our initial question was, what solutions are offered in legal theory to cope with the present crisis of formal legal rationality? Nonet and Selznick, combining a "social science strategy" with an evolutionary approach, develop the concept of "responsive law" which contains -- in our interpretation --

two major dimensions: substantive and reflexive rationality (part I). The development model seems to be unsatisfactory, however, insofar as it does not sufficiently account for interrelations between legal and social evolution. A more comprehensive model of socio-legal co-variation can be constructed by combining the analysis of "internal legal dynamics" (Nonet and Selznick) with concepts of the "external" relations of law and society namely Habermas' "social organization principle", Luhmann's view of the "adequate social complexity" of the law. In this context, "repressive" and "autonomous law" could be systematically linked to corresponding developmental levels in theories of social evolution (part II). The resulting question would be how to re-define "responsive law" in the light of socio-legal interrelations. What type of social "organization principle" does it respond to? What elements in responsive law provide "adequate social complexity"? If it is true that internal legal dynamics produce the potential for a substantive as well as for a reflexive rationality, how then is this potential realized in external socio-legal dynamics?

To put these questions in a more amenable form, we will make use of concepts of post-modern society from Habermas' as well as from Luhmann'theory. We will then ask how, in the light of these concepts, social structures affect substantive and reflexive legal rationality.

Certainly, Luhmann and Habermas, representing a major controversy in macro-sociological theory, disagree widely over the analysis of essential features of post-modern society[19]. But for our present purposes, at least, we can treat their theories as complementary, rather than as competing approaches. In the context of legal evolution both theorists focus on a common problem: How is normative integration possible in modern society which is characterized by disintegrating, even disruptive, conflicts between the different rationalities of highly specialized social subsystems?[20] We can interpret their subsequent analyses as supplementing each other. On the one hand, Habermas' account of the tendency towards crisis in organized capitalism can be translated into the general framework of a systems theory which describes the inherent conflicts between the different rationalities of the political, economic, and cultural subsystems. On the other hand, the integrative mechanisms which Luhmann proposes for highly differentiated societies can be seen to be included in Habermas' theory: they represent mechanisms of system integration which -- in Habermas' account -- would need to be supplemented by mechanisms of social integration (Habermas, 1975:113). This inclusion of both critical theory and neo-functionalism with encourage us to use the analytical potential of both thoeries to assess the chances for realization of responsive law.

1. Substantive Legal Rationality in the Crisis of the Interventionist State

Habermas (1975) has developed a theory of the legitimation problems within organized capitalism which can be systematically linked to the concept of responsive law. In essence, the theory argues that organized capitalism is characterized by a series of successive crises shifting between different social subsystems: Primary economic crises are partially resolved by state intervention, thus creating new crisis phenomena within the political system; the emerging political legitimation problems lead to a politicization of the cultural system; this in turn produces cultural crises which might be resolved only by fundamental changes in the normative structures (Habermas, 1975:33). Within this framework, the crisis of formal legal rationality -- which Nonet and Selznick explain exclusively by internal institutional constraints and pressures in "autonomous law" -- is closely connected to an external phenomenon: the emergence of modern state interventionism. The former system rationality in "autonomous law" which was achieved in the interplay between a market-economy, a formal private law system, state taxation and bureaucratic administration, is undermined, as the political system increasingly takes over the responsibility for correcting market-deficiencies, for global economic policy, and for compensatory social policies (Habermas, 1975:33). The "rematerialization of formal

law" is the corollary development within the legal sphere. Law develops a substantive rationality which is characterized by particularism, result-orientation, an instrumentalist social policy approach and a broadening legalization of formerly autonomous social processes (Brüggemeier et al., 198o:32,71; Unger, 1977: 192; Eder, 1978).

So far, substantive rationality seems to possess a growing potential within a state-interventionist type of law. Habermas' point, however, is rather to demonstrate the limits to its growth. In his account, three tendencies to crisis are seen to emerge within the political system and to limit drastically the potential of a political-legal substantive rationality (1975:5o). A "rationality crisis" of state intervention arises by virtue of the fact that the control capacity of the political system cannot cope with the contradictory imperatives of economic crisis management. Eventually, this will pose threats to system integration and endanger social integration[22]. The complexity of socio-economic processes cannot be reflected in politico-legal control mechanisms and prevents a far-reaching substantive rationality of law and politics. Even more important is a second tendency, a "legitimation crisis" in organized capitalism. Due to processes of economic concentration and state-interventionist policies, the market mechanism loses its legitimating power as a source of "natu-

rally" justified distributive outcomes. To the extent that state intervention takes over the political responsibility for market-substitution and market-compensation, the political system becomes increasingly dependent on mass loyalty for its politico-economic decisions. The political production of legitimizing ideologies is unable to provide a way out of this dilemma, because -- according to Habermas -- it is confronted by insurmountable limits by the restistance of normative structures (1975:68). The inherent "developmental logic" of the cultural system thus necessarily creates a "motivation crisis" which sets effective limits to the substantive rationality of the welfare state (Habermas, 1975:75).

In Habermas' view, only a "discursive" rationality emerging from autonomous evolution processes in the normative sphere could finally resolve the legitimation problems of the modern state (1975:95). This view is based on a theory of political legitimation which asserts that due to irreversible developments in the normative sphere, modern principles of legitimation cannot be anything but procedural: "Since ultimate grounds can no longer be made plausible, the formal conditions of justification themselves obtain legitimating force. The procedures and presuppositions of rational agreement themselves become principles"(Habermas, 1976b: 184). According to Habermas, the subsequent question of institutionalization, i.e.,the question of which

organizational structures and which discussion and decision mechanisms can produce procedurally legitimate outcomes, depends on "concrete social and political conditions, on scopes of disposition, on information and so forth" (Habermas, 1979b:186). His own proposals to institutionalize procedural legitimation include the notion of "organizational democracy" in labor unions, public associations, and functional elites, participatory mechanisms in various social subsystems, mainly in the educational and cultural sector, and a "pragmatistic dialogue model" for an institutionalized cooperation between science, politics and the public (Habermas, 1962:228,269; 1969: 2o2; 197o:62; 1973:9).

This program for the "democratization of social subsystems" shows strong similarities to Nonet and Selznick's concept of responsive law.A broader political participation in the legal process, and the institu - tional design of organizations representing various interests, are the corresponding elements (Nonet and Selznick, 1978:95; Selznick, 1969:243). The crucial point, however, is that this parallel holds true only for those elements in responsive law involving what we have called reflexive rationality. Habermas' analysis suggests the following conclusion: If we use the idea of responsive law to try to deal with legitimation problems in post-modern society, we find its potential varies according to the circumstances.

In the dimension of substantive rationality, responsive law encounters the limits to interventionism. It suffers the various crises of the political system concerning the rationality of its control capacities as well as the public legitimation of its measures. In the dimension of reflexive rationality, however, responsive law can institutionalize a procedural legitimacy which -- in Habermas' account -- may represent the dominant organizational principle of a post-modern society.

According to Habermas' distinction between law as "medium" and law as "institution", procedural legitimacy requires a law which would not function as a socialtechnological "medium" which contradicts the communicative structures of the "life-world". It would require a law as an "institution" which is restricted to the "external constitution" of the spheres of socialization, social integration, and cultural reproduction. This type of law would not endanger but facilitate self-regulatory processes of communication and learning (Habermas, 1981).

2. Reflexive Legal Rationality in Functionally Differentiated Societies.

So far, we have examined the concept of responsive law in the context of "critical theory". If we translate our problem into the language of neo-functionalist system theory in which Luhmann pursues the Durkheim-

Parsons tradition, we will find that the same groups of problems reappear -- although in a more abstract and more comprehensive perspective. "Crisis tendencies in organized capitalism" are now interpreted as particular cases of a more general phenomenon. It is the very functional differentiation of society, which induces highly specialized subsystems to develop their own specific rationality to such an extreme degree that radical system conflicts are inevitable.[23] "Motivation crisis" -- in Habermas' terms the contemporary Grundwiderspruch between the logic of state-interventionism and the logic of cultural development -- now appears as rather marginal amongst a whole variety of equally or even more fundamental conflicts: universal social structures (economy, science) versus territorially bound political and legal structures, scientific planning versus economic production control, temporal requirements of social interdependencies versus slow-developing processes of education and institutionalization (Luhmann, 1971:374). Finally, the quest for responsive law, emerging from a crisis of formal legal rationality, is now seen in the context of one overriding problem: How does the legal system participate in and react to the secular processes of functional differentiation? (Luhmann, 197oa; 1972a:19o).

In this perspective, Max Weber's description of modern law as "formal rational" seems to be misleading since

the concepts of form and substance are almost interchangeable in the comparison between traditional and modern law (Luhmann, 1972a:17). Rather, the notion of "autonomous law" in Nonet and Selznick's sense points to the crucial changes of functional differentiation: increasing autonomy of the legal system, its separation from moral and scientific structures, and its relative independence from political processes. It is in these developments that the features of legal formalism emerge: strict rule-orientation, professional "artificial reasoning", prominence of procedure (Luhmann, 1972b:2o7). And the "crisis" of autonomous law is explained by this very phenomenon: law, particularly in its conceptual structures, has not yet adapted to the exigencies of a highly differentiated society. Legal doctrine is still bound to the classical "law application model" in the judicial perspective and has not developed yet a conceptual apparatus adequate for planning and social policy requirements in the interrelations between specialized social subsystems (Luhmann, 1972b:325).

"Substantive legal rationality" in Max Weber's sense, which "solves" the crisis by a re-moralization and re-politization of law, appears then as a clearly regressive tendency. A renewed fusion of the law with the scientific, moral, and political sphere, would destroy the specific juridical rationality without replacing it by a new one (Luhmann, 1974:31). In Luhmann's account -- which is in this respect quite si-

milar to Habermas' -- a thoroughgoing "re-materialization" of law would inevitably lead to a rationality crisis of the political-legal system. In the processes of functional differentiation, social subsystems have developed such a high degree of internal complexity that none of these subsystems -- neither politics, science, economy, morals, law, nor any re-combination of them -- could evolve the necessary control capacity. Thus, responsive law in its substantive dimension, if it were to become the dominant feature of law, would result in a regressive de-differentiation of society, rather than its re-integration.

Thus, the central question emerges: How is integration possible under conditions of extreme functional differentiation? (Wille, 1978:228; Turner, 1974:379). Luhmann's answer differs considerably from Durkheim's reliance on "organic solidarity" which is expressed in "restitutive law" (Durkheim, 1933:111). In Luhmann's judgment, organic solidarity still does represent a traditional mechanism since it counts on norms and values which are common to all subsystems, if highly generalized. However, for subsystems radically differing from each other, in external functions and internal rationalities, integration cannot be achieved by a(political-legal) prescription of uniform normative structures. As Luhmann puts it: "Under conditions of increasing complexity, society can less and less guarantee that all subsystems operate uniformly ac-

cording to uniform structures ... Rather, integration must be achieved so that all subsystems mutually provide intrasocietal environments for each other" (Luhmann, 1977b:243). It follows"... that they have to fulfill adequately not only their own function, but to stand in a meaningful relation of compatibility to the functions and structural achievements of other systems for which they form an environment" (Luhmann, 1974:88). Functional differentiation requires a displacement of integrative mechanisms from the level of the society to the level of the subsystems (Luhmann, 1974:88). Centralized social integration by political mechanisms -- as was achieved in stratified societies -- is effectively ruled out today and cannot be replaced by legal, economic, moral or scientific mechanisms. If integration under modern conditions means to avoid the maximization of the rationality of one subsystem leading to non-solvable problems in other functional systems, then a decentralized mode of integration is inevitable. "Corresponding restrictions must be built-in into the reflexion structure of every functional subsystem, insofar as they do not result directly from ongoing relations with its environment" (Luhmann, 1977b:245). Thus, "reflexion" structures seem to be the key to our question of how to determine the integrative role of responsive law in functionally differentiated societies. This needs some clarification.

"Intra-subsystem reflexion" is supposed to replace society-wide integrative mechanisms under conditions of

functional differentiation, insofar as subsystems develop contradicting orientations that can only be harmonized internally (Luhmann, 1977b:54). In Luhmann's theory, each subsystem can orient its selective operations towards three different system references: (1) towards the system of society in terms of its function; (2) towards other subsystems within the internal environment of the society in terms of input and output performances; and (3) towards itself in terms of reflexion (Luhmann, 1977a:36). The crucial point is that these orientations collide with each other and cannot be subsumed under a common purpose. In the political system, for instance, there is an inherent tension between its social function (formulation and execution of binding decisions) and its performance (care for power resources and for sufficient legitimation) which can be reconciled only internally by processes of political reflexion (focusing on its historical identity) (Luhmann, 1977a:38). In the same fashion,it is the job of reflexion structures in any social subsystem to resolve the conflict between function and performance by imposing internal restrictions on the capacities of the system "in the interest of being suitable as components of the environment of other subsystems"(Luhmann, 1977b:245). "Reflexion must mediate between performance and function, since for the subsystem, society represents the encompassing system as well as the social environment" (Luhmann, 1979:176). By reconciling tensions between

function and performance, reflexion structures within social subsystems become the main integrating mechanisms in functionally differentiated societies. Turning to responsive law again, we come to the conclusion that, viewed from this theoretical perspective, law needs to develop "reflexive dimensions" if it is supposed to work as integrative mechanism [24].

3. The Point of Convergence: Internal Reflexion and Discursive Democracy in Social Subsystems

It is precisely in the "reflexive" dimension of responsive law that we see a point of convergence between the theoretical approaches we have analyzed so far. Our translation of responsive law into the languages of neo-functionalism and critical theory has led us to a sceptical assessment of substantive legal rationality under modern conditions. In addition, in our interpretation of Nonet and Selznick's theory, we can trace a systematical connection between Habermas' procedural concept of legitimation and Luhmann's thoery of internal system reflexion. Our thesis is: On the one hand, reflexion within social sub-system becomes possible only insofar as democratization processes create discursive structures within these subsystems. On the other hand, the primary function of democratization of social sub-systems lies neither in increasing individual participation nor in neutralizing power structures but in an internal reflexion of social identity. In this context, reflexive legal struc-

structures might play an important role. Two complementary perspectives on reflexive law are available: While the neo-functionalist approach leads us to a new self-limitation of the legal order, critical theory points to the main potential of reflexive legal structures -- furthering internal democratic processes in social subsystems.

What this new legal self-limitation means, can be seen more clearly, if one applies the abovementioned threefold typology to the legal system itself: function, performance, reflexion. The function of law can be defined as its capacity to provide congruent generalizations of expectations for the whole of society (Luhmann, 1972a:94). Its performance is to resolve conflicts which are produced in other social subsystems and which cannot be resolved there. Both orientations overlap, but at the same time they tend to conflict. The production of congruent normative generalizations may not suffice to provide rules which are suited to resolve concrete conflicts. Seen the other way around, the legal system, by the processes of conflict-resolution, may produce norms which are not congruently generalizable. It is the role of legal reflexion to reconcile the inherent tentions between function and performance by imposing internal restrictions on the capacities of the legal system.

It is our thesis, that under modern conditions, this means mainly to restrict legal performance. Instead of

comprehensive regulation in terms of substantive legal rationality, legal reflexion would restrict legal performance to more indirect, more abstract forms of social control.

The crucial point is the structural correspondence between legal norms and the opportunity structure within social subsystems. Substantive legal rationality does not take sufficient account of this necessary correspondence. It attempts to regulate social structures by legal norms, even though these structures do not bend to legal regulation.

Aspects of the educational system and the social security system provide striking examples. In these fields, the current critique of legalization has shown again and again that material legal programmes obey a functional logic, and follow criteria of rationality and patterns of organization which are not adequate to the internal social structure of the regulated spheres of life. The consequences are ambivalent. Either law as a medium of the welfare state turns out to be ineffective or it works effectively but at the price of destroying traditional patterns of social life (Habermas 1981).

In contrast, a reflexive orientation would attempt to correct this deficiency by scrutinizing the chances of effectiveness of legal regulation. The guiding question cannot be any longer: Are there social problems to which the law must be responsive? Instead:

Are there social problems which represent a realistic opportunity structure for legal regulation and which at the same time would not irreversibly destroy accepted patterns of social life?

What could be the result of such a legal self-restriction? Can we plausible hypothesize the way in which an autonomous reflexion would define the role of law vis-a-vis other social subsystems? The result of legal self-reflexion need not necessarily be a policy of de-regulation, de-formalization of substantive law. Rather it would be a legal self-restraint to provide structural premises for self-regulation within other social subsystems. This means not only to legally guarantee autonomy for other social subsystems. These guarantees are important, but they do not exhaust the potential of reflexive law. It is rather Habermas' concept of "democratization of social subsystems" which -- with its stress on procedural legitimation -- shows the direction in which legal reflexion could develop. In his critique of legalization in the welfare state Habermas has introduced the important distinction between law as "medium" and law as "institution". While law as a technological "medium" of societal guidance endangers the communicative structures of the legalized spheres of social life, law as an "institution" which draws on the moral sources of a given society may even facilitate communicative processes if it is restricted to the "external constitution" of the communicatively structured social sphere Law as an "external consti-

tution" enables procedures of conflict regulation which are adequate to the structures of communicative interaction: "... discursive decision processes and consensus oriented procedures of negotiation and decision". If we use Habermas' notion of procedural legitimacy which can be reached by the installation of "discursive" structures within different subsystems of society, then the contribution of legal norms becomes apparent. The legal system can provide norms of procedure, organization and competences which would enable other social systems to achieve self-organization and self-regulation. Instead of authoritatively determining social functions of other subsystems, and instead of regulating their input and output performances, law must turn its attention to mechanisms which systematically <u>further the development of reflexion structures within other social subsystems</u>.

The crucial point is differentiation. It seems necessary to develop a theory of discourse which allows for specification according to the specific rationalities of social sub-systems. In the light of functional differentiation, it no longer makes sense to hope for universal legitimation structures, for a generally applicable morality of discourse, for a common procedure of reflexion. To generalize the seminar-model of scientific discourse and to apply it to legal, political, and economic systems fails to take account of a changing social context which fundamentally alters

the requirements of a theory of argumentation. Consequently, legal prerequisistes for reflexion processes in the economy or in politics differ greatly from those for the educational system.

The law would restrict itself to the sub-system-specific installation, correction and re-definition of democratic self-regulatory mechanisms instead of taking over responsibility for the outcome of the social processes themselves. The formal mechanisms applied would be "reflexive" in the sense of applying processes to themselves:[25] Instead of determining the factual decision itself, it would decide about decisions, would regulate regulations, would define structural premises for decisions to be made in the future in terms of organization, procedure and competencies. In short, our thesis is: Law realizes its own reflexive orientation insofar as it provides structural premises for reflexive processes in other social subsystems. That is what we mean by the integrative function of a contemporary responsive law.

4. A New Legal Self-Restraint: Developmental Chances in Modern Private Law

To be sure, the"result" we have reached so far is merely hypothetical in nature. That responsive law develops potentialities for a substantive and a reflexive rationality, and that this potential is differentially actualized under conditions of post-modern societies,

is nothing more than a hypothesis derived from theories of socio-legal development. Selectively exploiting "internal" variables (from the theory of responsive law) and "external" variables (from theories of post-modern society in critical theory and neo-functionalism), we have sketched a model of socio-legal interrelations and have arrived at the proposition that responsive law can respond to the challenges of post-modern society if it succeeds in developing a "reflexive" legal rationality. It is beyond any doubt that this hypothesis which builds on highly speculative (and debatable) theoretical assumptions, needs to undergo strong empirical testing before it might claim any "validity". However, we might lend some empirical support to our thesis to point to some recent legal trends in which we recognize developmental chances for "reflexive" legal structures, although we have to acknowledge that the "fallacy of misplaced concreteness" is almost inevitable.

Consider again the development of contract law. The well-known movement of "socialization of contract" by "public control over terms" obviously expresses trends towards substantive legal rationality (Friedman , 1959: 9o,1o6). Legislative definitions of minimal conditions and judicial control of the substantive agreement are the main features of materialization of contract law. If this movement is to become more than some marginal corrections of a formal law approach, the capacity

limits of the legal system are clearly visible today[26]. Labor law, in contrast, has invented to some degree a more abstract control technique in the field of collective bargaining in which we can recognize a "reflexive" potential. Without much control of specific content, state law regulates collective bargaining only indirectly by shaping the organization of collective bargaining, defining procedural norms, limiting or expanding the competencies of the collective actors. Thus, law attempts to balance their bargaining power, thereby controlling only indirectly specific results. Even more interesting than this rearrangement of social power through law are legal strategies to strengthen the "social responsibility" of the industrial conflict system. To be sure, it would be a legalistic naiveté to prescribe explicit norms of"public responsibility" either for the bargaining units or for the collective agreements as such. However, an effective facilitization of "reflexion" mechanisms might be expected from the legal regulation of organizational size and organizational structures. Comparative studies give some empirical support for the supposition that society-wide effects tend to be "reflected" to a considerably higher degree within the decision process of collective agreements, e.g. if labor law systematically favors a centralized "industrial union system" instead of a decentralized "shop steward" system with purely profession-oriented labor unions (Streeck et al, 1978; Streeck, 1979:2o6; Groser, 1979).

To be sure, collective labor law cannot provide an example with universal application in contract law. Corresponding efforts at constructing a system of countervailing powers have shown a rather low developmental potential, particularly in consumer protection law (Hart and Joerges, 198o:83). However, functional parallels might be found in the "artificial" creation of autonomous semi-public institutions (e.g. "Stiftung-Warentest"or"Verbraucherzentrale") which provide comsumer information and political-legal representation for non-organized social interests (Hart and Joerges, 198o). Again, the role of state law, in this respect, is not substantive regulation but procedural and organizational structuring of "autonomous" social processes. By virtue of organizational norms, the law forces specialized one-sided social institutions to take contradictory requirements of environmental social systems into account. With such an orientation "... the law would not authoritatively decide what constitutes the consumer's interest; it could restrict itself to define competences for the articulation of consumer interests and to secure their representation. It would neither be the task of the legal system to develop its own purposive programs, nor to decide goal conflicts between competing policies; it could restrict itself to guaranteeing coordination processes and to compel agreement." (Joerges, 1982:23)

Obviously, consumer law is a good example to point to the limits of the strategy we have called "external decentralization". This strategy necessarily fails if social asymmetries of power and information prove to be resistant against institutional attempts at equalization. Is it feassible that the law develops in itself "reflexive" structures which could compensate for inequality of power and information? Admittedly, it seems somewhat speculative to presume that certain legal structures - the so-called "general clauses" or "standards" -- possess a developmental potential in this direction. Consider, however, standards of "good faith" or "public policy". Usually they are regarded as serving as the main instruments of judicial interventionism in the sense of materialization of formal law. An alternative interpretation would look at them as means of "socialization of contract" quite different from the traditional meaning of state intervention. It means to use the "standards" to coordinate the dependencies of contractual norms from various social guidance mechanisms, the famous noncontractual elements of contract. Various levels of social organization demand different, even contradictory normative expectations from the contractual relation: the level of concrete interaction between the contractual partners, the level of market and organization, the societal level of the interplay between politics, economics, culture, law. To integrate these demands into contract is the function of the good-

faith clause. Such a procedure is "reflexive" insofar as the legal system itself "simulates" social self-regulating processes. That means on the level of interaction: In case of "interaction deficiencies" objective purposes and duties are defined authoritatively by virtue of law. On the institutional level: In case of "market deficiencies", commercial customs are replaced by the judicial definition of market behavior rules. On the societal level: In case of "political deficiencies", the judicial process defines standards of public policy. What these examples have in common is the logic of internal simulation. A deficiency of self-regulating mechanisms in the real world is presumed, and the general clause of " good faith" or "public policy" is interpreted as a command to simulate internally self-regulatory processes. Obviously, such a simulation has its own deficiencies. It can be perverted easily into a sheer moralistic appeal to the "reasonable man". And it is an open question if the quality of such simulation models can be increased in its cognitive and procedural aspects.

The law of private corporations may serve as a further example. Here again we find tendencies to " substantialize" the formal classical- liberal corporation law which was restricted to provide politically neutral forms for pivate associations. Today, judicial control and state regulation of corporate

behavior seem to reach the limits of their control capacity [27]. Our approach would guide us to search in quite different directions: to design legal structures which systematically strenghten "reflexion mechanisms" within the economic system. "Constitutionalization" of the private corporation might make the "corporate conscience" work if that means to force the organization to "internalize" outside conflicts into the very decision structure in order to take account of non-economic interests of workers, consumers, and the general public. Is it totally implausible that economic goal structures which have already undergone considerable change from profit-orientation to growth-orientation might change again by taking into account problems of ecological balance (Luhmann, 1977a:39)? Could this not even be the point where the law begins: "reflexive" control of corporate behavior (Stone, 1975) -- by transforming external social troubles into internal political issues?

In this context, "democratization of social institutions" transforms its traditional meaning. The main goal is neither power-equalization nor an increase of individual participation in the emphatic sense of " participatory democracy" [28]. Rather it is the deliberate design of organizational structures which make the institutions -- corporations, semi-public associations, mass media, educational institutions -- sensitive to the outside effects of their maximizing

the internal rationality. Its main function is to substitute outside interventionist control by an effective internal control structure [29]. To design structural preconditions for an "organizational conscience" which would reflect the balance between its social functions and its environmental performances -- this would determine the integrative role of responsive law.

5. Some Implications for "Sociological Jurisprudence": Legal Constructions of Social Reality.

These examples may have illustrated what it means for the law to orient its structures toward a reflexive rationality. Further questions arise concerning the "cognitive competence" of a reflexive legal system, an issue of importance in the theory of "responsive law" (Nonet and Selznick, 1978:78,1o4,112). This is a field where future research is needed. Here, it is only possible to sketch the lines of argumentation which needs to be developed in depth. If it is true that legal reflexion processes contribute to social integration insofar as they mediate between performance and function within the legal system, the structural conditions of this legal self-reflexion, particularly in their cognitive aspects, become of crucial importance. Among these conditions, "internal models of reality" play a central role. The relevance of such models -- containing descriptive as well as normative elements -- for guiding decision processes

has been increasingly acknowledged in decision theory as well as in legal theory [4o]. Dworkin, for instance, has developed the thesis that in the interaction of norms and principles, the judge utilizes -- implicitly or explicitly -- "political theories"in order to justify the decision of "hard cases" (Dworkin, 1977:81,9o). More generally, one can reconstruct certain "theories" of social reality out of legal norms, court opinions, and doctrinal considerations, which in turn serve as a kind of background information, -- to use the hermeneutical phrase -- a "pre-understanding" ("Vorverständnis") to guide an orient legal decisions (Esser, 197o). Legal models of contract, of association, of state-society relations, for instance, belong to these specifically legal perceptions of social reality which differ significantly from our day-to-day understanding of these phenomena as well as from sociological or economic theories. The differences are due to social context: In order to decide social conflicts under the guidance of legal norms, the legal system has to develop certain specific "social constructions of reality" in the strict sense of the word (Berger and Luckmann, 1966). From the perspective of legal conflict resolution, the law literally creates its own reality by abstracting highly selective models of the world thereby neglecting many of its politically, economically or socially "relevant" elements.

Obviously, these models change their character in the course of legal development, and there will be a co-variation between legal model construction and types of legal rationality. If "re-materialization" has forced formal law to change its perceptions of social reality, what kind of legal model-building then would be required by reflexive legal rationality?

"Sociological Jurisprudence" and related movements in legal theory (Freirechtsschule, Interessenjurisprudenz) should be interpreted as methodological corollaries of the re-materialization of formal law (Pound, 1910/11:591; 1911/12:140,489; 1943/44, 1; Heck, 1968). They attack legal formalism, not merely for its conceptualism, as a reading of their criticisms of "mechanical jurisprudence" might suggest, but for its very construction of social reality. While formal legal rationality had relied on autonomous legal conceptualization of the world, asserting that taking account of social , economic and political aspects was not a task for the "lawyer as such", substantive legal rationality has required a "re-scientification" of legal perceptions of reality. Precisely in what sense is the main methodological concern of sociological jurisprudence.[31]

This type of sociological jurisprudence, however, is bound to the crisis of substantive legal rationality which we have analyzed in the framework of neo-func-

tionalism and critical theory. If taken seriously such a sociological jurisprudence requires encompassing models of reality which have to integrate social science theories to such a degree that the law can take over responsibility for comprehensive planning processes. Legal analysis then tends to be transformed into a fully-fledged social policy analysis ranging from an adequate description of the real situation, over the perception of problems, the definition of goals, the selection of legal norms, to the implementation of norms in social reality[32]. Obviously, the complexity required for such legal models -- if it were to accomlish this successfully -- will rapidly surpass the cognitive competence of any existing legal system even if based on a profound interdisciplinary analysis (Luhmann, 1974:31).

It seems that sociological jurisprudence needs -- in a manner quite similar to what has happened in decision theory -- to develop a concept of "bounded rationality" in order to construct workable models of reality, which are of practical use for legal decision processes (Simon, 1976; March and Simon, 1966). Again it might be The very role of reflexion processes in the legal system to define a new legal self-restraint , but now in the context of legal model-building. Reflexive legal rationality requires the legal system to view itself as a system-in-an-environment, (Luhmann, 1979: 161; Assmann, 198o:333) to take account of its own limited capacity in its efforts to regulate the functions and

performances of other social sub-systems. Thus, its relation to social science knowledge is characterized neither by "reception" nor by "separation". Rather it is "translation" of social knowledge from one social context to the other according to certain translation rules, i.e., specific legal criteria of selectivity [33]. If it is true that law fulfills its integrative function by furthering reflexion processes in other social subsystems then the social knowledge required is very specific and the model constructions needed are much more limited than they would be in a comprehensive "planning" law. Reflexive law would have to utilize and to develop social knowledge of how to control self-regulatory processes in different contexts. Encompassing social policy models would be replaced by models of how to combine socio-legal analysis and interaction processes for social problem solving.

FOOTNOTES

1) For a general discussion of legal evolution in American legal sociology, see Friedman (1975, Ch. X); for recent examples of renewed evolutionalism in Germany, see Eder (1978:247); Eder et al. (1978); Zielke (198o: 85); Willke (1981: particularly Ch. II).

2) Cf. the interesting reformulation of formal rationality in the context of a modern argumentation theory, Eder et al. (1978: 11).

3) Explicitly Eder (1978). For an American account of materialization of law, Trubek (1972); Unger (1976: 192); for the German development cf. Wieacker (1967:514); as a recent formulation Wiethölter (1982); Assmann et al. (198o).

4) Habermas seeks a "view to structural possibilities that are not Yet (and perhaps never will be) Institutionalized".. This seems to be the ultimate goal of all these evolutionist models. They look at modern law from a problem-solving rather than a purely analytical perspective: They aim to help diagnose and cure the trouble that arise from the crises of formal legal rationality. Cf. Habermas (1976a).

5) Conventional is a morality which is justified by tradition, post-conventional refers to a justification by the interest of all participants; see Habermas (1976c: 26o; 1979a: 95).

6) This weakness is criticized by Luhmann (1972a: 1) and Schelsky (198o: 77).

7) As an illuminating example, Wagner (1976).

8) The concept of self-reference is employed in biology as well as in the social sciences, in order to identify a system that produces and reproduces by itself the elements of which it consists, see Luhmann (1981b: 33).

9) This is the core of Max Weber's concept of formal rationality, cf. Rheinstein (1954: 61).

1o) For an American account, Friedman (1973: 14); Trubek (1872).

11) For a systematical account, see Assmann et al. (198o: 32, 71, 187, 249); Eder (1978); Heydebrand (1982); Voigt (198o).

12) For a profound analysis, particularly in respect to "consequentialism" in purposive law, Luhmann (1974: 31).

13) For German corporation law and labor law, cf. the analysis by Wiethölter, in which he distinguishes three phases of modern legal change: formalization, materialization, proceduralization, see Wiethölter (1982). For parallel processes in contract law, cf. Schmidt (198o: 153, 155) and in consumer law, Joerges (1981). For an interesting parallel interpretation of American constitutional law, cf. Ely 6198o).

14) Durkheim (1933, Ch. 2 and 3); for a modern reformulation of Durkheim's theory of legal development cf. Turner (1974: 3).

15) For a recent systematic account of types of rationality in Max Weber's work, cf. Kalberg (198o: 1145).

16) As an American example for this interpretation, see Unger (1976: 192).

17) For Luhmann's theory of evolution in general cf. Luhmann (1975a: 15o; 1975c: 193; 198o). An English language version of his evolution theory can be found in Luhmann (1977a). Specifically for legal evolution (1972a: 1, 132; 197oa).

18) Cf. for a parallel conceptualization, Habermas (1976b: 97).

19) Cf. particularly their debate in Habermas and Luhmann 1971.

2o) Cf. Habermas' "descriptive model of late capitalism" which can be interpreted as a model of inter-system conflicts, (1975); Luhmann 1975d: 51).

21) Habermas uses explicitly the conceptual framework of systems theory (1975: 33; 1976b: 113).

22) It is important to note that in Habermas' account, rationality crisis tendencies while the third type, motivation crisis, reveals a necessary conflict between the political and the cultural system.

23) Cf. especially for the role of the economy in modern society, see Luhmann (197od: 232), for the concept of inter-system conflicts, (1972a: 19o).

24) For an elaborate account of this approach, cf. Assmann (198o, esp.: 122).

25) For an intensive discussion of the concepts reflexion and reflexive mechanism, see Luhmann (197oc: 92; 1975b: 72).

26) This is even recognized by authors who have argued emphatically for a de-formalization of modern contract law, cf. Wiethölter (1982: 5).

27) For a German account, cf. Mayntz (1979).

28) This refers to recent discussions in democratic theory, see Pateman (197o). For an elaborate account of "normative complex democratic theories" which overcome the controversy between elitist and participatory theories of democracy, cf. Teubner (1978b).

29) For a detailed analysis in the case of semi-public associations, Teubner (1978b, Ch. 5,6).

3o) For a "model-theory" in general, cf. Collins (1976); Stachowiak (1973). In legal theory, cf. Reale (197o); Teubner (1978a: 13); Assmann (198o).

31) "Re-scientification" of law and jurisprudence became a major intellectual movement in the last decade in Germany, cf. Rottleuthner (1973).

32) Cf. the "rational model" of social policy in Lindblom and Cohen (1979: 3o).

33) Cf. Teubner (1978a: 27); for a detailed application of model-theory to concrete legal problems, cf. Walz (198o).

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