SUBSTANTIVE AND REFLEXIVE ELEMENTS IN MODERN LAW

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The most comprehensive efforts to develop a new evolutionary approach to law are found in the work of Nonet and Selznick in the United States and Habermas and Luhmann in Germany. While these theorists are concerned with a common problem—the crisis of formal rationality of law—they differ drastically in their accounts of the problem and their vision of the future. This paper tries to resolve these differences by first decomposing and then restructuring the diverse neo-evolutionary models. Using a more comprehensive model of socio-legal covariation, the author identifies an emerging kind of legal structure which he calls "reflexive law." Reflexive law is characterized by a new kind of legal self-restraint. Instead of taking over regulatory responsibility for the outcome of social processes, reflexive law restricts itself to the installation, correction, and redefinition of democratic self-regulatory mechanisms. The author identifies areas of private law in which reflexive solutions are arguably emerging, and he spells out the consequences which a concern for reflexivity has for a renewed sociological jurisprudence.

I. NEO-EVOLUTIONARY THEORIES ABOUT LAW

We live in a time of increasing disenchantment with the goals, structures, and performance of the regulatory state. The political debate over "deregulation" (e.g., Breyer, 1982; Mitnick, 1980; Wilson, 1980) is just one manifestation of a much broader reappraisal of the systems of law and public organization.

* This article has changed from a one-man business into almost a transatlantic enterprise. It started at the Center for the Study of Law and Society at Berkeley, where I gave a seminar on comparative legal theory. In this challenging atmosphere, especially due to the presence of Philippe Nonet and Philip Selznick, I wrote the first draft, which then underwent critical examination by many colleagues, among them Richard Buxbaum, Johannes Feest, Wolfgang Fikentscher, Wolf von Heydebrand, James Nickel, and Rainer Walz. I have to thank the Deutsche Forschungsgemeinschaft for financial support.

On the other side of the Atlantic the paper met considerable criticism. My colleagues at Bremen especially and also elsewhere helped me with critical suggestions. I want to mention Gert Brüggemeier, Peter Derleder, Dieter Hart, Christian Joerges, Karl-Heinz Ladeur, Eike Schmidt, Klaus Sieveking, Helmut Willke, and Gerd Winter. Then the paper was exposed to the pleasant surroundings of Florence. I am grateful to the participants of the seminar on "New concepts of jurisprudence," particularly Werner Maihofer and Joseph Weiler, and I also received valuable suggestions from Marc Galanter and Niklas Luhmann. Presenting the paper to an American audience created the urgent need to "de-teutonize" it. David Trubek and Richard Lempert made extremely valuable suggestions regarding the final version. In fact, their cooperation was so intensive and their contributions went so far beyond usual editing activities that one can no longer speak of an individual article but of a collective

Recent debates in legal sociology mirror the more general concern with the effects of welfare-regulatory intervention. Thus, scholars have explored the causes and effects of the "legalization" of various spheres of social life (Voigt, 1980) as well as the sources and implications of movements for delegalization (Galanter, 1980) and informal justice (Abel, 1980; 1982). Attention has also been drawn to systems that might replace formal adjudication with various types of mediation and conciliation (Blankenburg *et al.*, 1980).

At this moment, society seems to be reassessing its commitment to purposive law and to the bureaucratic and legal structures that are associated with it. The classical models of law and the state which we inherited from the nineteenth century stressed what Max Weber called "formal rationality" (Rheinstein, 1954: 61,39). A formal rational legal system creates and applies a body of universal rules, and formal rational law relies on a body of legal professionals who employ peculiarly legal reasoning to resolve specific conflicts. With the coming of the welfare and regulatory state, greater stress has been placed on substantively rational law, i.e., on law used as an instrument for purposive, goal-oriented intervention (Rheinstein, 1954: 63,303). Since substantively rational law 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. They see it both as an inherent part of the program of the welfare-regulatory state and as a development that leads to the dissolution of formal rationality. Some see the new "materialization" of the law as a threat to important social values (Voigt, 1980). The trend may also threaten individuality by weakening the protections which formal law (at least in theory) provides against arbitrary state action while, at the same time, removing barriers to bureaucratic intervention in what have heretofore been largely localized or private domains of human interaction (family, neighborhood, school).

Legal sociology in Europe and the United States has provided some useful phenomenological accounts of the conflicting and contradictory tendencies in the current

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enterprise. To be sure, this does not mean collective responsibility; here we should stick to more old-fashioned notions of individual liability.

situation. But while we have become aware that there are movements towards and away from legalization, and shifts from formal to substantive modes of legal thought and practice, we do not know why this is occurring, nor do we know enough to predict the likely outcome of the current trends. Critics, who tell us that legalization cannot deal with the complexity and particularity of modern conflicts, argue for "alternatives" to law (see Blankenburg *et al.*, 1980). 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, 1980). Observers of the "rematerialization of law" note the pernicious effects of this process but are unable to answer critics like Kennedy (1976) who stress the impossibility of realizing the program of formal law.

Many see the current situation as a "crisis." But what is bringing it about? Are the debate over legalization and delegalization and the perceived tension between form and substance evidence of cyclical oscillations between arbitrary, yet antagonistic, principles of legal and social organization? 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 will 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. The theory shall be in the evolutionary tradition, for "neo-evolutionary" concepts provide a way of seeing the current situation in context. The evolutionary tradition is an old one in the sociology of law. It flourished in the early years of the discipline and then it fell into disrepute (Friedman, 1975). Now there is renewed interest in evolutionary approaches to explaining changes in law and society, both in the United States and in Europe (Brüggemeier, 1980; Buss, 1982; Eder, 1978; Eder *et al.*, 1978; Habermas, 1976c; Luhmann, 1970a; Nonet and Selznick, 1978; Schluchter, 1981; Tugendhat, 1980; Turner, 1974; Unger, 1976; Wiethölter, 1982; Willke, 1981; Zielke, 1980).

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 develop a new perspective on the process of legal and social change that permits me to point to a new "evolutionary" stage of law, which I call "reflexive law." This stage, in which law becomes a system for the coordination of action within and between semi-autonomous social subsystems, can be seen as an emerging but as yet unrealized possibility, and the process of transition to a truly "reflexive" law can be analyzed.

This analysis is a preliminary and tentative one. My goals are to show how one can create a theory which avoids the shortcomings of prior evolutionary models and to demonstrate the utility of such an account for a preliminary appraisal of our current situation. But the social theory I build on is itself incomplete, and my efforts to apply it to the current legal scene are at best partial and tentative.

The most comprehensive efforts to develop a new evolutionary approach to law are found in the work of Philippe Nonet and Philip Selznick (1978) in the United States, and Jürgen Habermas (1981) and Niklas Luhmann (1970a) in Germany. These three neo-evolutionary accounts seek to identify different "types" of law, show the progression from one type to another, and explain the processes of transition. While there are substantial differences among them, 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 to explain the situation.

To one degree or another each of these approaches harks back to Max Weber's formulation of the issues. Writing more than half a century ago, Weber both described the system of formal rationality and suggested the possibilities of a "rematerialization of law." Weber set forth a typology which included both formal and substantive rationality (Rheinstein, 1954: 61, 301; Schluchter, 1981: 87; Trubek, 1972: 720). He traced the sociological determinants of the shift from primarily material attributes of legal action (ethically determined, eudaemonistic, 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 in the legal system.[1]

Max Weber also pointed to some antiformal tendencies in modern legal development (Rheinstein, 1954: 303). 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 expediential rules, and political 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, economic, or ethical argument were to take the place of legal concepts" (Rheinstein, 1954: 320).

Weber thought that these trends were marginal when compared to the overriding process of formal rationalization, but contemporary evolutionary theories seem to attribute high significance to the "materialization of formal law" (see, e.g., Assmann *et al.*, 1980; Eder, 1978; Trubek, 1972; Unger, 1976; Wieacker, 1967; Wiethölter, 1982). The theories I shall focus on search for process models that explain the dissolution of formal rationality in terms of transformation, directionality, and evolutionary potential, and each theory posits a new type of rationality toward which post-modern law may be moving.

While the theories of Habermas, Luhmann, and Nonet and Selznick 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. Nonet and Selznick (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, Nonet and Selznick stress internal developments within autonomous law which erode the law's formal tendencies.

Luhmann and Habermas, on the other hand, ground their analyses in theories that treat the evolution of societal structures and processes of legal and social covariation. Luhmann, who follows the Parsonian-Durkheimian tradition

[1] For an interesting reformulation of formal rationality in the context of a modern argumentation theory, see Eder *et al.* (1978: 11).

and is the leading German exponent of "systems theory," employs a three-stage evolutionary scheme which distinguishes among (a) segmented, (b) stratified, and (c) functionally differentiated societies (1982). For each type of social organization he posits a corresponding type of legal order (1970a: 3; 1972a: 132; 1981a: 45). Following this analysis, Luhmann argues that the current crisis in law is generated by the transition from a stratified to a functionally differentiated society. This transition "demands" a parallel transition in the legal order. From this point of view, the current crisis in law results from the inadequacies of the received system of positive law, given the complexities of a functionally differentiated society. For Luhmann, what is needed is not the increased purposiveness and participation suggested by Nonet and Selznick but higher abstraction, functionalist thought, and "self reflection" of the legal system (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 attempted a "reconstruction of historical materialism" along neo-evolutionary lines (1976). Like Luhmann, Habermas identifies evolutionary stages in society and analyzes the relationship between these stages and moral-legal developments. Habermas' model develops stages of "social organizational principles" which arise out of the interaction of structures of social labor and communicative interaction.[2] In his model, law is presented as the institutional embodiment of an historical sequence of "rationality structures": preconventional, conventional, and post-conventional.[3] Formal law in Habermas' scheme embodies a conventional rationality structure: the present situation involves a transition to a very different form of social and legal rationality.

Given the conflicting nature of these models, can one derive plausible features of an emerging post-modern legal rationality? Rather than attempting to choose among the competing models on grounds of theoretical "rightness," I will seek to identify implicit agreements and tacit convergences.

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[2] 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 troubles that arise from the crisis of formal rationality; cf. Habermas (1976a).

[3] Conventional is a morality which is justified by tradition; postconventional refers to a justification by the interests of all participants; see Habermas (1976c: 260; 1979a: 95).

The goal is to transcend controversies between functionalism and critical theory and transform seemingly irreconcilable standpoints into complementary perspectives. I will attempt to construct an integrated model of legal evolution by decomposing the existing models into their elements and restructuring them in a different way. From this perspective, the three models do not really conflict but instead speak to different aspects of the same problem.

Nonet and Selznick, in order to explain legal change, rely strongly on variables "internal" to the legal system, while Habermas, as well as Luhmann, tends to stress "external" interrelations between legal and social structures. Our strategy shall be to combine "internal" and "external" variables in a model of their covariation. We shall be concerned with both the inherent developmental potentialities of the present legal system (Nonet and Selznick) and with the constraints and necessities of an emerging post-modern society (Habermas and Luhmann). In particular, we wish to explain how the internal dynamics of legal development described by Nonet and Selznick is likely to play itself out in the environment of societal transformation, which forms the basis of the theories developed by Habermas and Luhmann. We can do this with the aid of a concept of law which is similar to Nonet and Selznick's responsive law but differs from it in important respects. I call this concept, which identifies an emerging kind of legal structure, "reflexive law."

The argument proceeds as follows. In Section II, we look more closely at what Nonet and Selznick call "responsive law." Responsive law, as we shall see, involves two separate and potentially contradictory dimensions. Nonet and Selznick see the growth of "responsive law" as a unidimensional movement toward a more participatory *and* purposive system, but their analysis confounds two related but distinct trends in post-modern law, namely, the move towards greater substantive rationality and the emergence of reflexive rationality. Since responsive law includes substantive and reflexive elements, it turns out to be, on closer analysis, an amalgam of two different types of legal rationality. This discovery leads to the question of whether the legal structure Nonet and Selznick call "responsive law" is a stable or plausible "stage" of legal evolution or merely a moment in a transitional situation.

This question is central to this paper. But it cannot be answered within the framework of the evolutionary theory which Nonet and Selznick use since the only dynamic element

in their evolutionary model is *internal* change in law. To deal with it, one must develop more complex models of legal and social evolution, in which changes in the legal system are explained in terms that encompass both the internal dynamics of the legal order and the impact of changing social structure. I turn to this task in Section III, where I use insights from Habermas and Luhmann to develop basic principles of socio-legal evolutionary covariation. This preliminary analysis suggests the importance of two concepts: "socially adequate complexity" and "organizational principles of society." Organizational principles, according to Habermas, emerge from the interplay of evolutionary processes in the moral and the social sphere of society. Fundamental legal norms incorporate those organizational principles of society and thus define the learning *niveau* (level) of a given society. The principle of socially adequate complexity, derived from Luhmann, states that the legal order in post-modern societies must have mechanisms that allow it to operate in a complex environment of functionally differentiated, semi-autonomous subsystems. 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 social subsystems.

In Section IV, I use these principles to address the question of whether the amalgam of substantive and reflexive rationality contained in Nonet and Selznick'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 than are the purposive or substantive aspects of responsive law. Therefore, even if responsive law accurately describes the current situation in law, the amalgam it describes is unlikely to hold together. Indeed, reflexive law, now just an element in a complicated mixture of legal orientations, may emerge as the dominant form of post-modern law.

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

For Nonet and Selznick, responsive law, which combines a purposive orientation with an emphasis on participation in lawmaking processes, is an evolutionary advance over

"autonomous law," the stage which Weber referred to as formal rationality. In identifying this new type of law, and explaining its emergence, Nonet and Selznick make an important contribution to the reconstruction of the theory of legal evolution. To understand the nature—and the limits—of this contribution, we must see how they analyze the process of legal evolution. The key lies in what Nonet and Selznick call their "social science" strategy, and the way this approach differs from traditional jurisprudential and sociological approaches to law.

A. Autonomy of Legal Development

Nonet and Selznick consider a whole range of jurisprudential issues from the standpoint of modern social science (1978: 8; Selznick, 1969: 3; 1968: 50). Their approach to law is empirical rather than analytical; they define law as multidimensional rather than unidimensional; they treat the social, political, and institutional dimensions of law as variables that depend on social context; and they conceive of these dimensions as aspects of a system of interrelated elements which can take on only a limited number of evolutionary configurations. The resulting theory of responsive law goes 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.

This type of social science strategy avoids the fallacies of sociological reductionism (see Luhmann, 1972a; Schelsky, 1980: 77). Law for Nonet and Selznick is neither an epiphenomenon disguising more basic economic contradictions (see, e.g., Wagner, 1976), nor, as in some positivist approaches, is it reducible to a set of decisions determined by power relations, organizational structures, professional roles, and the like. Instead, law is an autonomous social institution, whose development depends on its own internal dynamics. In short, Nonet and Selznick offer us a theory of institutional constraints 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: 20). For example, the first of their three stages, repressive law, serves to legitimate power, but this very function generates

pressures within a repressive legal system that undermine its specific structures and lead to the emergence of a new type, autonomous law. Similarly, autonomous law develops internal modes of reasoning and concepts of participation which break the boundaries of formal thought and generate pressures for the transformation toward a more responsive type of law (1978: 51, 71).

This concept of an "institutional logic" of the legal order, central to Nonet and Selznick's neo-evolutionary approach, is strongly supported by their European counterparts. Habermas transforms "economistic" versions of the base/superstructure thesis into more abstract relations between "labor" and social "interaction" and provides for an autonomous "developmental logic" of normative structures. In Habermas' theory, the evolution of moral and legal consciousness follows its own autonomous pattern and cannot be reduced to a mere reflection of "developmental dynamics" in the basic social and economic structures (1979: 130). It is one of Habermas' major theses that the rationalization of the "life-world," in which moral and legal development take place, is not reducible to those processes that tend toward increasing complexity in the economic and political "systems."

Luhmann accounts for the autonomy of legal evolution by defining it as an interaction between different evolutionary mechanisms inside the legal system. Law's normative structures provide for variation; its procedural institutions fulfill the selection function; its conceptual abstractions represent stabilization mechanisms (1970a). Thus, despite substantial differences in the models offered by Nonet and Selznick, Habermas, and Luhmann, one finds a striking convergence in their view of the autonomy of legal evolution.

What does it mean to formulate a theory of legal change in terms of autonomous evolution? Is the development of the idea of an "institutional logic" within the legal system, which forms a central part of the three approaches we are analyzing, a step forward in theory? One might argue that to stress the autonomy of the law is to abandon a key insight of legal sociology, namely, the dependence of law on social factors, and to recreate the traditional division between jurisprudence and social science. But these dangers exist only if the legal system is conceptualized as a "closed" system, self-sufficient and independent from changes in the broader social environment. In the work we are drawing on it is not. For the neo-evolutionists, legal autonomy means that law changes in

reaction only to its own impulses, for the legal order—norms, doctrines, institutions, organizations—reproduces itself.[4] But in so doing, the legal system is not insulated from its environment. The key idea, central to the neo-evolutionary theories, is the "self-reference of legal structures." Legal structures so conceived reinterpret themselves, but in the light of external needs and demands. This means that external changes are neither ignored nor directly reflected according to a "stimulus-response scheme." Rather, they are selectively filtered into legal structures and adapted in accordance with a logic of normative development. Even the strongest social pressures influence legal development only insofar as they first shape "legal constructions of social reality." Thus, broader social developments serve to "modulate" legal change as it obeys its own developmental logic.

The concept of the self-reference of the legal system is a vital aspect of neo-evolutionary thought. It presents the legal system as, at the same time, both a "closed" and an "open" system. In this way, neo-evolutionary thought avoids the fallacies of theories which see legal change as either purely internal and independent or exclusively the result of external events. Legal and social changes are, for the neo-evolutionist, related yet distinct processes. Legal change reflects an internal dynamic, which, nevertheless, is affected by external stimuli and, in turn, influences the external environment.

The concept of self-referential legal structures 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 (Trubek, 1977: 540). Sociologically, we can recognize and analyze the differences between legal doctrines and scientific theories, between legal constructions of reality and social science constructs, between doctrinal legal research and sociological empirical research, and between a specific juridical type of rationality and the rationality of other social subsystems.

Most importantly, the concept of self-referential legal development provides the basis for a perspective on social and legal co-evolution that allows us to understand more fully the current crisis. By focusing on this dimension, we can gain new insights into the issues raised by the debate over the "rematerialization of the law" and see how a new form of

[4] 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 Hejl (1982: 189).

rationality may be emerging. But to do this, we must go beyond the analysis that Nonet and Selznick offer. We must first see that their concept of "responsive law" actually incorporates *two* different types of legal rationality. Then, we must transcend their purely internal account of the dynamics of legal evolution.

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

Nonet and Selznick's description of the emergence of responsive law is in many respects similar to European ideas about the "rematerialization of formal law." However, they have developed a more coherent and systematic model of autonomous legal change to show the consequences of this transition. Nonet and Selznick assert that legal formalism undergoes a crisis, from which a new substantive orientation—sovereignty of purpose—emerges. The rise of purposiveness transforms fundamentally rigid normative structures into "open-textured" standards 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" that parallel changes in the modes of legal participation ("legal pluralism") (1978: 84, 96, 106). Moreover, materialization of law corresponds to totally new institutional and organizational structures: it demands "regulation, not adjudication" carried out by non-hierarchical "post-bureaucratic organizations." Outside of the legal system, its boundaries need to be redefined with respect to the political and social environment. Substantive rationality requires an "integration of legal and moral judgment and of legal and political participation" (1978: 104, 108, 110).

Much of what Nonet and Selznick say about the transition from autonomous to responsive law is based on their view—shared by many Europeans—that the legal order has shifted from formal to substantive (purposive) modes of rationality. But there is a crucial difference between Nonet and Selznick and others who have discussed the "materialization" of the law. For Nonet and Selznick's idea of responsive law not only includes elements of substantive rationality; they also include in the category elements which seem to be based on very different principles. At least two elements of responsive law—

"institutional design" and "politicization of law"—obey a different form of rationality than other aspects of the concept. Although the authors subsume these elements under the principle of "substantive justice"—as opposed to those of "procedural fairness," which governs autonomous law, and "raison d'état," which dominates repressive law (1978: 16)—we can upon close analysis perceive a significantly different orientation. Indeed, the place that institutional design and politicization occupy in the theory of responsive law suggests the germ of a new type of legal rationality.

Consider first "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 should produce a "harmonious fit" between institutional structures and social structures rather than influence the social structures themselves. Instead of giving substantive guidance to behavior, these norms are directed toward organization, procedure, and competence. Instead of taking over responsibility for concrete social results, the law is restricted to structuring mechanisms for self-regulation such as negotiation, decentralization, planning, and organized conflict. Where substantive rationality requires comprehensive regulation, "institutional design" aims at "enablement and facilitation" (1978: 111).

The same can be said about other features of responsive law. The politicization of law, for instance, as suggested by new modes of political participation (social advocacy, class actions, representation of group interests, etc.) (1978: 95), imports a different set of social conflicts and integrates different interests into the legal process. Yet it does so without commanding the specific results a substantive rationality would require.

What this suggests is that Nonet and Selznick's description of the transformation of autonomous law (legal formalism) incorporates a move from formal rationality to two different types of legal rationality: the "substantive" rationality of results, and the "reflexive" rationality of the process-oriented structuring of institutions and organizing of participation. But what does it mean to speak of these three "types" of legal rationality (formal, substantive, reflexive)?

C. A Neo-Evolutionary Model of Legal Rationality

Legal rationality is a compact concept. In order to define the specific rationalities of formal, substantive, and reflexive

law, we have to break the concept of rationality up into different dimensions. This can be done by using the dimensions Habermas (1976: 262) uses to analyze modern formal law and then applying them to substantive law and reflexive law. Habermas' 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 these features mark only one dimension of legal rationality. Internal rationality 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 the 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. For the moment, we shall ignore the systematic connections between these dimensions and consider only how this scheme may be used to describe the different types of modern and post-modern law. Applying this formal model to our analysis yields the following three dimensions:

(1) justification of law ("norm rationality");
(2) external functions of law ("system rationality");
(3) internal structure of law ("internal rationality").

The *formal rationality* of modern law is defined by a historically specific configuration of these dimensions:

(1) The justification of formal law lies in its contributions to individualism and autonomy and so rests on the continued validity of these values (Kennedy, 1976). The contribution occurs because formal law restricts itself to the definition of abstract spheres of action for the autonomous pursuit of private interests. In doing so, it guarantees a framework within which substantive value judgments are made by private actors. Thus, "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; cf. Heller, 1979: 187). The corollary elements of formal law are: conventionality, legalism, and universalism (Habermas, 1976: 264; cf. Unger, 1976: 204).

(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 for the action of private actors. Thus, it contributes to the mobilization and allocation of natural resources, which is a necessary concomitant of a developed market economy (Habermas, 1976: 264; 1981: 352).[5] Put another way, the "semantics of decentralization" which arises out of the systematization of subjective rights is the adequate legal form for the functional differentiation of an autonomous economic system (Luhmann, 1981a: 80). At the same time formal law fulfills legitimizing functions: "A logically formal legal order appears to be a neutral and autonomous source of normative guidance, and this very neutrality and autonomy of law forms one basis for the claims of political systems in capitalist societies to legitimate authority" (Trubek, 1977: 540).

(3) It is by the interplay of both these elements that we can explain the internal structure of formal law. Internally, law is formally rational to the extent that it is structured according to standards of analytical conceptuality, deductive stringency, and rule-oriented reasoning (Habermas, 1976: 263; 1981: 348). A highly developed rule-orientation results in norms whose legal consequences depend on precise definitions of factual situations. Professionalization is an additional element: legal experts are masters of a body of esoteric knowledge which they are trained to apply in a universalistic way (Friedman, 1973: 14; Trubek, 1972).

The trichotomy of norm, external function, and internal structure may be applied 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 (Assmann *et al.*, 1980; Eder, 1978; Heydebrand, 1982; Voigt, 1980). In these developments, law loses its formal characteristics on all three dimensions.

(1) In its "norm rationality," substantive law shifts the focus from autonomy to regulation. The justification of substantive law is to be found in the perceived need for the collective regulation of economic and social activities to compensate for inadequacies of the market. Instead of delimiting spheres for autonomous private action, the law directly regulates social behavior by defining substantive

[5] This is the core of Max Weber's concept of formal rationality; cf. Rheinstein (1954: 61).

prescriptions. In doing so, law becomes increasingly oriented to social roles and statuses (Rehbinder, 1967).

(2) The change in norm rationality is accompanied by a change in the functions that law fulfills. Substantive law demonstrates its "system rationality" by the contributions it offers to political intervention by the welfare-regulatory state. As the political system takes over responsibilities for defining goals, selecting normative means, prescribing concrete actions, and implementing programs, substantive law assumes increasing importance. It is the main instrument by which the state modifies market-determined patterns and structures of behavior.

(3) Insofar as substantive law takes over this new function and develops a regulatory justification, its internal structures change so that 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 trend toward purposive law has grave consequences for the conceptual construction of doctrinal legal systems. There is today considerable dispute about the degree to which legal thinking and legal practice can cope with the cognitive consequences of consequentialism.[6]

Reflexive rationality has emerged only recently in the crisis of the welfare state. It is as yet an undeveloped and not fully defined alternative to the regressive tendencies of the reformalization of substantive law. It shares with substantive law the notion that focused intervention in social processes is within the domain of law, but it retreats from taking full responsibility for substantive outcomes.

(1) The justification for reflexive law is to be found neither in the perfection of autonomy nor in the collective regulation of behavior. Rather, it is justified by the desirability of coordinating recursively determined forms of social cooperation. In this "norm rationality," reflexive law resembles liberal and neo-liberal concepts of the role of law. To the extent it supports social autonomy, it relies on invisible hand mechanisms. But reflexive law does not merely adapt to or support "natural social orders." Quite to the contrary, it searches for "regulated autonomy." It seeks to design self-regulating social systems through norms of organization and

[6] For a profound analysis of the implications of "consequentialism" in purposive law, see Luhmann (1974: 31).

procedure. Reflexive law, unlike formal law, does not accept "natural" subjective rights. Rather, it attempts to guide human action by redefining and redistributing property rights.

(2) The external social functions of reflexive law are different from those of substantive law. The role of reflexive law is to structure and restructure semi-autonomous social systems (Galanter, 1980: 21), by shaping both their procedures of internal discourse and their methods of coordination with other social systems. Thus, reflexive law shows elements of "system rationality" insofar as it facilitates integrative processes within a functionally differentiated society (Willke, 1981). What is important is that to facilitate integrative processes does not, for reflexive law, mean to prescribe authoritatively ways and means of social integration. It means to create the structural premises for a decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems.

(3) The "internal rationality" of reflexive law is represented neither by a system of precisely defined formal rules nor by the infusion of purpose-orientation through substantive standards. Instead, reflexive law tends to rely on procedural norms that regulate processes, organization, and the distribution of rights and competencies. The new procedural orientation characteristics of reflexive law can be observed in different legal fields as an emerging alternative to formal as well as substantive rationality.[7] Under a regime of reflexive law, the legal control of social action is indirect and abstract, for the legal system only determines the organizational and procedural premises of future action (Luhmann, 1970a: 92, 72).

Table 1 summarizes the basic characteristics of formal, substantive, and reflexive law that I have outlined above. To better appreciate what these characteristics mean, consider a concrete example. Take contract law, for instance. If a contractual obligation is disputed, formal law looks only to see if certain formal, general, and objective conditions are met—e.g., whether there was a "meeting of the minds." It is indifferent to the social effects which the formal law allows contracting parties to create. Substantive law, on the other

[7] For German corporation law and labor law, see the analysis of Wiethölter (1982), in which he distinguishes three phases of modern legal change: formalization, materialization, proceduralization; cf. as well Brüggemeier (1980: 60); Ladeur (1982: 74); Winter (1982: 9). For examples of parallel processes in contract law, cf. Schmidt (1980: 153, 155) and in consumer law, Joerges (1981). For a similar interpretation of American constitutional law, cf. Ely (1980).

hand, is concerned with outcomes and is characterized by the direct intervention of legislatures and courts in setting and altering contract terms. Reflexive law approaches the contract relation very differently. It seeks to structure bargaining relations so as to equalize bargaining power, and it attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of various externalities. However, within the limits of the arena that has been so structured, the parties are free to strike whatever bargains they will. Reflexive law affects the quality of outcomes without determining the agreements that will be reached. Unlike formal law, it does not take prior distributions as given. Unlike substantive law, it does not hold that certain contractual outcomes are desirable.[8]

As I have already noted, Nonet and Selznick's concept of responsive law includes elements of reflexive as well as substantive rationality. It does not, however, sufficiently distinguish between them. Distinguishing between the two elements is important because reflexive legal rationality requires institutional legal structures, cognitive models of reality, and normative characteristics quite different from its substantive counterpart. Furthermore, only by distinguishing between the two elements can we assess the extent to which the potential of responsive law can be realized. This is because Nonet and Selznick's focus on autonomous internal legal evolution, which is the major theoretical advance of their particular social science strategy, may draw attention away from the systematic interplay between legal and social evolutionary processes. Yet, social developments outside the legal system drastically limit the potential of substantive law while they systematically favor the reflexive type of legal rationality. To put this thesis into Selznick's conceptual framework: It is reflexive rather than substantive rationality that represents the "conceptual readiness" of responsive law to

[8] Another example of a reflexive law "solution" to the inadequacies of both substantive and formal law is the idea of "external decentralization," which is emerging in the European literature as an alternative to the neo-conservative "solutions" of deregulation, reformalization, and privatization (Gotthold, 1982; Lehner, 1979: 178). External decentralization induces the delegation of "public tasks" to semi-public or private institutions under certain constraints designed to ensure that political responsibility prevails. The law, for example, in authorizing a local task-oriented association may mandate certain rights of participation or procedures of decision making. The state also monitors the behavior of such organizations and is ready to step in and further alter institutional arrangements, should the desired degree of social accountability not be achieved.

take advantage of the "opportunity structures" emerging in post-modern society (Selznick, 1968: 50, 55, 57; 1969: 243).

Table 1. Types and Dimensions of Modern Legal Rationality

Dimensions	Types		
	Formal	Substantive	Reflexive
Justification of Law	the perfection of individualism and autonomy: establishment of spheres of activity for private actors.	the collective regulation of economic and social activity and compensation for market inadequacies	controlling self-regulation: the coordination of recursively determined forms of social cooperation
External Functions of Law	structural premises for the mobilization and allocation of resources in a developed market society and for the legitimation of the political system.	the instrumental modification of market-determined patterns and structures of behavior	structuring and restructuring systems for internal discourse and external coordination
Internal Structures of Law	rule-orientation: conceptually constructed rules applied through deductive logic	purpose-orientation: purposive programs of action implemented through regulations, standards, and principles	procedure-orientation: relationally oriented institutional structures and decision processes

III. "ORGANIZATIONAL PRINCIPLES" AND "SOCIALLY ADEQUATE COMPLEXITY": COVARIATION OF LEGAL AND SOCIAL STRUCTURES

A. Law Without Society?

We turn now to the relationship between legal and social structures in the evolutionary process. Our goal is to understand the relationship between changes in law and changes in society. An "evolutionary" or developmental theory cannot merely assert that certain types of law covary with features of social, economic, and political organization. It must also account for the relations between legal and social structures and help us understand how transformations come to occur.

Let us start with the model developed by Nonet and Selznick. Their analysis of the process of legal change assigns a central role to the "internal dynamics" of the legal system. Changes which occur *within* law set in motion forces that, themselves, alter the characteristic configurations of the law (1978: 20). For example, universalism in legal thought—a major feature of autonomous law—leads ineluctably to purposive modes of reasoning. This development, in turn, brings about changes in the nature of legal obligation and modes of legal advocacy (1978: 78).

The Nonet and Selznick model does not, however, overlook entirely the role of external social forces. It explicitly recognizes that such factors play a role in legal development (1978: 21, 23, 16), but the place their developmental theory assigns to them is marginal. The external environment is seen not as *bringing about* changes in law, but as serving principally to block or facilitate the realization of those developmental potentials generated by the internal dynamics of law. Broader social structures encourage or impede the "actualization" of legal potential, determining the stability of an evolutionary stage and the probability of progress and regression (1978: 18, 23, 116). But it is from its internal dynamics that the legal system gains its developmental potential, and this potential defines exclusively the system's pattern of growth and decay. In this respect we seem to have a law without society.

The limited role that Nonet and Selznick assign to external social factors is, in my view, inadequate. To combine their notion of legal autonomy with a satisfactory account of the interrelationship between autonomous legal evolution and broader social developments requires a model in which law and society are treated as separate yet interdependent aspects of an overall system. We must, in other words, model legal and social covariation.

In addition, an adequate model must contain a theory of the developmental "crisis" since notions of "crises of development" are central to evolutionist thinking. Here again, Nonet and Selznick provide a promising beginning, but their model requires further elaboration. In noting the existence of specific internal crises in repressive as well as in autonomous law, they seem to be advancing two rather different ideas. On the one hand, there is the idea that crises in law derive from the inability of law to respond to the need for "*system* integration" in the sense that the legal structure does not provide the conceptual and action resources needed for the

maintenance of the overall social 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), fits nicely into such a functionalist systems approach. On the other hand, there is the idea that the problems of both repressive and responsive law may be diagnosed as legitimation crises. The problems here involve "*social* integration," *social* identity, and the dissolution of *social* norms (Habermas, 1975). Perhaps Nonet and Selznick are deliberately refusing to be forced into making a clear-cut distinction between social and system integration. Their concept of crisis contains elements compatible with both. But, since we cannot equate social integration with system integration, we need to clarify the relationship between *rationality crises*, which concern the social-engineering capacities of the law, and *legitimation crises*, which relate to social identity and social norms.

Let us reconsider the crisis of formal legal rationality. Does it stem from a deficiency of abstract, general, and formal control mechanisms or from the inability of legal formalism to take into account questions of substantive justice (Habermas, 1979: 184)? How one answers this question has important consequences for the concept of responsive law. The challenges to which responsive law responds can be analyzed in terms of an "internal" legitimation crisis, an "external" rationality crisis of autonomous law, or some combination of the two.

I have tried thus far both to emphasize the promise of Nonet and Selznick's approach and to show specific areas where their model is lacking. My basic point is that by shifting the focus of the argument from a theory of internal legal growth to one of socio-legal covariation (e.g., Tugendhat, 1980), it may be possible to pursue the classical goals of a comprehensive socio-legal analysis without sacrificing the insights into the "internal dynamics" of legal evolution that Nonet and Selznick have given us.

A good place to begin our discussion of the covariation of legal and social structures is with the work of Habermas and Luhmann. Both Habermas and Luhmann acknowledge the autonomous nature of the development of norms within the legal system and examine systematically the relationship between law and its social context.

B. Habermas: "Organizational Principles" of Society

Habermas argues that post-Darwinian theories of social evolution which rely on the interplay of evolutionary mechanisms (variation, selection, stabilization) cannot account for the characteristics of societal stages of evolution or for the potential to learn from historical experience. These can only be analyzed in terms of "social consciousness" (Habermas, 1976a: 226). In order to identify the autonomous "developmental logic" of normative structures (moral and legal consciousness), Habermas borrows from models of individual moral development in the Piaget-Kohlberg tradition. The resulting "social organizational principles" form logical sequences of "structured wholes" characterized by the common features of irreversibility, structured hierarchy, and directionality (Habermas, 1979: 98).

In Habermas' evolutionary theory, these highly abstract social organizational principles—which include legal institutions (Habermas, 1976c: 266)—designate the "learning level" (*niveau*) of a given society (Habermas, 1971: 270; 1979: 17; 1976a: 200; 1976b: 92; 1976c: 260; 1976d: 129; 1979a: 95; 1979d: 130). The learning level imposes limits on the variation that is possible with respect to types of social integration (social identity, consensus on values) and with respect to system integration (the capacity for control of a society) as well.

Organizational principles emerge as the result of a double learning process that can be explained—according to Habermas—by combining two models. These principles are forms of social patterning that allow a society to deal with its characteristic problems. As such, their capacity to cope with system problems is ordinarily open to functional analysis. But in crisis situations, another mode of analysis, which Habermas calls "rational reconstruction," is needed. Crises occur, according to Habermas, when developments in the social sphere render the governing organizational principles inadequate to meet systemic needs. In such situations, new forms of social learning emerge in the cultural sphere through internal processes that do *not* obey a functional logic. These developments lead to a *normative* evolution which obeys a specific "developmental logic" analogous to the logic of moral evolution that Piaget and Kohlberg identify. This developmental logic can only be interpreted through "rational reconstruction" (Habermas, 1979a: 98):

> These structural patterns depict a *developmental logic* inherent in cultural traditions and institutional change.

> This logic says nothing about the *mechanisms* 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 *dynamics*, 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.

The interplay between the logic and the dynamics of the development of norms can be seen in the following sequence of explanation:

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

(2) *Evolutionary Challenge*: Changes in social structure create system problems which surpass the adaptive and learning capacities of the society so long as it is confined by the existing organizational principle. Example: economic problems (international trade and monetary economy) arose that could not be dealt with within the framework of the organizational principle around which medieval politics was structured.

(3) *Experimentation*: Cognitive potentialities which have developed autonomously in the cultural sphere according to an internal logic are used for social organization in an experimental manner. In this way, normative concepts are institutionalized as models for strategic action. Example: the ideas of the market and rational bureaucratic organization emerge and are tried out.

(4) *Stabilization*: If successful, the new organizational principle is institutionalized throughout society and is incorporated in fundamental legal structures. Example: a relationship among the economy, the taxing power of the state, and modern administration emerges, and complementary systems of contract, property, tax, and administrative law are created.

What makes this concept of the "organizational principle" useful for our purposes is its focus on the relationship between the legal and social structures. Fundamental legal structures—seen as incorporating organizational principles at an

institutional level—are analyzed in terms of an interplay between normative structures and broader social structures. This model is consistent with Nonet and Selznick's notion of autonomous legal development, since it assumes that normative structures develop according to an autonomous evolutionary logic that can be analyzed by rational reconstruction. It adds to their theory the idea of a system/environment model that can show the influence of the dynamics of social evolution. The result is a more comprehensive model of socio-legal covariation which tells us "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 . . . [higher stages] is embodied" (Habermas, 1981: 261). 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 in terms of both legal autonomy and social dependency.

It is from this combination that one gains the three-dimensional concept of legal rationality that we used in our preliminary definition of reflexive law (see Section II). Now we are able to more fully understand the bases of the distinction among the normative, social, and cognitive dimensions of legal rationality that we set forth there. Habermas' idea of "rational reconstruction" leads to a concept of "norm rationality" which determines the possible norms and values within a given moral and legal order. His functional or "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 social control. Finally, norm rationality and system rationality together determine the constraints on the internal conceptual, procedural, and organizational structures of the legal system, thus defining the "internal rationality" of legal concepts.

C. Luhmann: "Socially Adequate Complexity"

The question of how societal organizational principles are "translated" into legal structures is left more or less open in Habermas' theory. Habermas tells us to expect to find co-variation between social and legal organizational principles, but he doesn't tell us how this congruence comes about. Luhmann's concept of the "socially adequate complexity" of legal systems is of some aid here.

By rejecting the key concepts of classical evolutionism—and in particular those of unilinearity, necessity, and progress—Luhmann (1970a; 1972a: 1, 132; 1975a: 150; 1980; 1982) develops a minimalist version of an evolutionary model. His model makes three basic assumptions regarding the dynamics, mechanisms, and directionality of systemic evolution. The dynamics of evolution derive primarily from a fundamental difference in complexity between system and environment (Luhmann, 1972a: 136):

> Evolution presupposes . . . an overproduction of possibilities in regard to which systems can be selectively maintained by structures and, on these premises, it renders probable otherwise improbable systems of order. The impulse and regulation of evolution is the complexity difference between system and environment.

This difference in complexity between a social system and its environment produces changes in the social system. Adaptation for a social system requires the development of specific evolutionary mechanisms for variation, selection, and stabilization (Luhmann, 1975a: 150). In the case of the legal system (Luhmann, 1972a: 140):

> 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.

Socio-legal evolution, in Luhmann's account, is characterized by the interplay between the legal system's "endogenous" evolutionary mechanisms and the "exogenous" evolution of the society at large (Luhmann, 1972a: 132; 1970a: 7). Law, in following its internal evolutionary logic, has to adapt to specific levels of social differentiation.

Luhmann identifies three organizational principles which have dominated society at different times: segmentation, stratification, and functional differentiation. Each creates particular configurations of the legal system, and each can lead to specific "bottlenecks" of legal evolution (Luhmann, 1970a: 16).

In segmented societies, which are characterized by a "poverty of alternatives," "archaic law" faces the problem of providing for an adequate variety of normative structures. Stratified societies, organized on a hierarchical basis, have

solved this problem by producing a greater variety of norms, the resulting law of pre-modern high culture. But the procedures by which decisions are made remain problematic. Finally, in functionally differentiated societies there is a massive overproduction of norms, and the corresponding "positive law" is characterized by sophisticated selection mechanisms (of which legislation is preeminent), but the law's stabilization mechanisms are still bound to traditional doctrinal concepts. Because the status of legal doctrine remains undeveloped in functionally differentiated societies, a crisis of positive law emerges (Luhmann, 1973: 130, 142; 1974: 49). The rigid normative character of modern positive law hinders the emergence of a socially adequate "learning" law. What is missing, according to Luhmann, is a "conceptual system oriented towards social policy which would permit one to compare the consequences of different solutions to problems, to accumulate critical experience, to compare experiences from different fields, in short: to learn" (Luhmann, 1970a: 19).

D. Reinterpretation of Stages of Legal Evolution

Now, having briefly described what Habermas means by the "congruence of organizational principles" and what Luhmann means by "socially adequate complexity," we shall integrate these concepts into Nonet and Selznick's concept of the "internal dynamics" of legal systems and spell out the consequences for each evolutionary stage of law. Because our particular concern is with modern legal rationality, we shall treat "repressive" and "autonomous" law only briefly.

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 Luhmann, "repressive law" would represent a rather modern type of legal order, reflecting the social organizational principles of an advanced "political society" (Habermas, 1979d: 161; Luhmann, 1972a: 166). This suggests that Nonet and Selznick's typology needs to be expanded by the introduction of a pre-modern type of legal order—"archaic law"—(Luhmann, 1972a: 145), the characteristics of which cannot be subsumed under repressive, autonomous, or responsive law. Archaic law, unlike repressive law, reflects the organizational principle of segmented societies. Such societies are characterized by the predominance of kinship relations and have no state structures as such (Luhmann, 1972a: 145; cf. Habermas, 1976b: 97). Retribution

and reciprocity are the main principles of archaic law, which, principally through forms of sacred law, develops concrete and rigid norms, employs ritualistic forms of procedure, and stresses expressive rather than instrumental functions (Luhmann, 1972a: 154). Archaic law will be transformed into "repressive law" only if system problems emerge which surpass the control capacity of the kinship organizational principle and lead to the development of a distinct political organization or state (Habermas, 1979d: 162).

With the emergence of a new social organizational principle (Luhmann: "stratification," 1982: 229; Habermas: "political class domination," 1979d) comes the need for the legal structure to change its character. Nonet and Selznick analyze in detail the intimate connections between the construction of systems of political power and the emergence of "repressive law" (1978: 29). Their account corresponds to Luhmann's account of "high cultural law," the structure of which reflects the supremacy of the political order in stratified societies and the corresponding hierarchical form of domination (1972a: 166). In this transition, 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 that occurs in stratified societies (1972a: 171). Habermas' analysis of the organizational 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 based on the idea that behavior ought to be in accordance with preexisting rules can replace its preconventional predecessor (1979d: 161):

> 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 intersubjectively 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.

The law that emerges in stratified societies, Nonet and Selznick's repressive law, will, as law and society change, experience both an internal "legitimation crisis" (Nonet and Selznick, 1978: 51) and an external "system crisis" (Habermas,

1976a: 242; Luhmann, 1972a: 190), each of which contributes to the development of a more "autonomous" type of law.

"Autonomous law," as Nonet and Selznick define it, meets the Weberian requisites of formal legal rationality: the separation of law and politics, legal professionalization, strict rule-orientation, universality and precision, "artificial reasoning," and procedural justice (1978: 53; Rheinstein, 1954: 61, 301; Schluchter, 1981: 89). Autonomous law also appears to obey a specific "system rationality" as well as a specific "norm rationality" (Habermas, 1976a: 262). Its conventionality, legalism, and formality allow it to contribute to the mobilization and allocation of natural resources, a normative imperative in a developed market society. At the same time, in its universalist elements, law begins to institutionalize a postconventional norm rationality. Norms must be justified by reasoning via universal principles.[9] To explain the crisis of this modern type of law, its internal dynamics which result in pressure for increased responsiveness (Nonet and Selznick, 1978: 70) needs to be related to inadequacies of legal complexity (Luhmann, 1972a: 190) as well as to an emergent crisis of the dominant organizational principle (Habermas, 1976a: 242).

This tentative reformulation of "repressive" and "autonomous" law suggests the explanatory value of our proposed synthesis. To combine the "congruence of organizational principles" and "adequate social complexity" with the theory of "law and society in transition" requires considerable modification of the latter model. In addition to adding "archaic law," we have had to reassess "repressive" and "autonomous" law in terms of their external functions and internal structures as well as in terms of their inherent crisis tendencies. The increased richness of the resulting model should be obvious, but we must still show how this synthesis improves our understanding of "responsive law."

IV. "REFLEXIVE LAW": A NEW PROCEDURALISM

In order to show how this synthesis improves our understanding of responsive law, we must first confront the problem of how normative integration can occur in modern

[9] From Luhmann's perspective, it appears that "autonomous law" develops adequate complexity with respect to the principle of functional differentiation largely due to the phenomenon of "positivity" and the separation of judicial and legislative procedures (Luhmann, 1970b: 176; 1972a: 190).

society, given the ubiquitousness of disruptive conflicts between the different rationalities of highly specialized social subsystems (cf. Habermas, 1975; Luhmann, 1982). The efforts of Habermas and Luhmann to deal with this problem in the context of legal evolution can be interpreted so as to complement each other. On the one hand, Habermas' account of the tendency towards crisis in organized capitalism fits into the general framework of a systems theory that describes the inherent conflicts between the different rationalities of the political, economic, and cultural subsystems. On the other hand, the integrative mechanisms that Luhmann proposes for highly differentiated societies can be seen to play a role in Habermas' theory: they represent mechanisms of system integration which, in Habermas' account, need to be supplemented by mechanisms of social integration (Habermas, 1975: 113). Thus, an appreciation of Habermas and Luhmann suggests that ideas drawn from both critical theory and neo-functionalism can be used to assess the chances for the realization of responsive law.

A. Substantive Legal Rationality and the Crisis of the Interventionist State

Habermas (1975) has developed a theory of legitimation problems within organized capitalism, which can be systematically linked to the concept of responsive law. The theory argues that organized capitalism is characterized by a series of successive crises shifting between different social subsystems. Those which are economic in origin are partially resolved by state intervention, but this leads to a crisis within the political system. The emerging political legitimation problems lead, in turn, to a politicization of the cultural system with consequent cultural crises that can be resolved only by fundamental changes in normative structures (Habermas, 1975: 33). Within this framework, the crisis of formal legal rationality is closely connected to an external phenomenon: the emergence of modern state interventionism. The system rationality of Nonet and Selznick's "autonomous law," a result of the interplay among a market economy, a formal private law system, state taxation, and bureaucratic administration, is undermined as the political system increasingly takes over the responsibilities 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 characterized by particularism, result-orientation, an instrumentalist social policy approach, and the increasing legalization of formerly autonomous social processes (Brüggemeier, 1980: 32, 71; Eder, 1978; Unger, 1976: 192; Voigt, 1980).

Habermas' analysis of the changing role of the state in capitalism helps us understand the forces that bring about the "rematerialization of law" and contribute to the rise of substantive rationality in law. However, the trend toward substantive law is not necessarily a stable one, nor is the program of substantive legal rationality certain to be fully realized. For, according to Habermas, the trend toward substantive law encounters significant limits that make it unlikely that law can ever become fully purposive. These limits arise out of three interrelated crises which drastically limit the potential of political-legal substantive rationality (1975: 50).

First, the program of state intervention encounters what Habermas calls a "rationality crisis." This occurs because of the complexity of socio-economic processes, the contradictory imperatives of economic crisis management, and the cognitive limits of our mechanisms of political-legal control. Social processes and economic arrangements are simply too dense, complex, and potentially contradictory to be adequately accounted for in the kinds of interventionist control mechanisms that have been created. Legal and bureaucratic structures cannot incorporate models of social reality that are sufficiently rich to allow them to cope effectively with crises of economic management and similar challenges. This "rationality" crisis, which ultimately poses a threat to system integration and could endanger social integration, limits the possibilities for substantive rationalization in law and politics.[10]

Related to this is the emergence of a "legitimation" crisis in organized capitalism. Because of the growth of monopoly power and the increased role of the state in managing the economy, the market mechanism loses its power as a device which legitimates what once were portrayed as "naturally" 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

[10] It is important to note that in Habermas' account, rationality and legitimation only identify crisis tendencies while the third type of crisis, the motivation crisis, reveals a necessary conflict between the political and the cultural system.

politico-economic decisions. However, the political production of legitimizing ideologies is limited, according to Habermas, by the resistance of normative structures (1975: 68). The inherent "developmental logic" of the cultural system thus necessarily creates a third problem, 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 evolutionary 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 irreversible developments in the normative sphere mean that modern principles of legitimation must be procedural (Habermas, 1976b: 184):

> 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.

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). Habermas' 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 among science, politics, and the public (Habermas, 1962: 228, 269; 1969: 202; 1970: 62; 1973: 9).

This program for the "democratization of social subsystems" has substantial affinities with Nonet and Selznick's concept of responsive law. Responsive law, they tell us, requires broad political participation and institutional redesigns that ensure the adequate representation of various interests in the core organizations of society (Nonet and Selznick, 1978: 95; Selznick, 1969: Ch. 7). However, the affinities between Habermas and Nonet and Selznick exist only with respect to those elements in responsive law that involve what we have called reflexive rationality. If we accept Habermas' analysis, the capacity of responsive law to deal with

legitimation problems in post-modern society varies according to the circumstances.

To the extent that responsive law is based on the expansion of substantive rationality, it must encounter the limits set by the crises of rationality, legitimacy, and motivation. These render it unlikely that the substantive or purposive dimension of the responsive law amalgam will ever be realized.

The reflexive rationality component is the strong point of responsive law. As we have noted, reflexive rationality in law obeys a logic of procedural legitimation. This orientation, Habermas suggests, reflects the emerging organizational principle of post-modern society. In a recent publication Habermas (1981) makes an important distinction between law as "medium" and law as "institution." As a medium, law, in a sense, is an independent socio-technological decisional process which replaces the communicative structures that exist within the "life-world" of social subsystems, and so allocates goods according to its own criteria. As an "institution," law functions merely as an "external constitution" for the spheres of socialization, social integration, and cultural reproduction. When it serves as an "institution," law facilitates rather than endangers the self-regulatory processes of communication and learning. Since this facilitative role is congruent with emergent forms of discursive rationality, reflexive law, with its procedural orientation, seems well-suited to the legitimation problems of post-modern society.

B. 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 the neo-functionalist system theory that Luhmann has developed in the Durkheim-Parsons tradition, we find that the same set of problems appears—although in even more abstract and comprehensive perspective. "Crisis tendencies in organized capitalism" are now interpreted as particular cases of a more general phenomenon. The functional differentiation of society, so Luhmann tells us (1972a: 190; 1982), induces highly specialized subsystems to develop their own specific rationality to such a degree that radical system conflicts are inevitable. "Motivation crisis"—in Habermas' terms the contemporary *Grundwiderspruch* (basic contradiction) between the logic of state-interventionism and

the logic of cultural development—now appears as marginal among a variety of equally basic or even more fundamental conflicts. These clashes include those between universal social structures (economy, science) and territorially-bound political and legal structures, between scientific planning and economic production control, and between the temporal requirements of social interdependencies and the 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, 1970a; 1972a: 190)?

In this perspective, Max Weber's description of modern law as "formally rational" seems 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: the increasing autonomy of the legal system, its separation from moral and scientific structures, and its relative independence from political processes (Trubek, 1977: 540). It is in these developments that the features of legal formalism emerge: strict rule-orientation, professional (artificial) reasoning, and the prominence of procedure (Buss, 1982: 114; Luhmann, 1972b: 207). The "crisis" of autonomous law exists because 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 model of law as a body of rules enforceable through adjudication. The legal order lacks a conceptual apparatus adequate for the planning and social policy requirements that arise in the interrelations among specialized social subsystems (Luhmann, 1972b: 325).

"Substantive legal rationality," in Max Weber's sense of the term, is supposed to solve the crisis by a remoralization and repoliticization of law, but it appears from this perspective 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 with a new one (Luhmann, 1974: 31). In Luhmann's account as in Habermas', a thoroughgoing "rematerialization" of law would inevitably lead to a rationality crisis of the political-legal system since the various social subsystems in a functionally differentiated society have developed such a high degree of

internal complexity that none of them—whether politics, science, economy, morals, or law, either alone or in combination—could evolve the necessary control capacity. Thus, if the substantive dimension of responsive law were to become the dominant feature of the modern legal order, the result would be a regressive dedifferentiation of society, rather than its reintegration.

To achieve integration under conditions of extreme functional differentiation, the different subsystems must, according to Luhmann, be mutually supportive. "[T]hey have not only to fulfill adequately their 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, 1982: 229). Centralized social integration is effectively ruled out today and cannot be achieved by legal, economic, moral, or scientific mechanisms. A decentralized mode of integration is inevitable because to maximize the rationality of one subsystem is to create insoluble problems in other functional systems. To avoid this, "*corresponding restrictions must be built into the reflexion structure of every functional subsystem, insofar as they do not result directly from ongoing relations with its environment*" (Luhmann, 1977: 245). Thus, "reflexion" structures are the key to determining how responsive law can play a role in functionally differentiated societies. The matter needs some clarification.

In Luhmann's theory, each subsystem has open to it three different orientations: (1) towards the entire social system in terms of its *function*; (2) towards other societal subsystems in terms of input and output *performances*; and (3) towards itself in terms of *reflexion* (Luhmann, 1982: 229). It is the incompatibility of these orientations which is crucial. They cannot, Luhmann tells us, be subsumed under a common purpose. In the political system, for instance, there is an inherent tension between social function (the formulation and execution of binding decisions) and performance (the guarding of power resources and the promotion of legitimation) that can be reconciled only internally by processes of political reflexion (focusing on what politics is all about and so imposing limits on what may be done in the name of rendering decisions and preserving power) (Luhmann, 1982: 229).

It is the task of reflexion structures in any social subsystem to resolve conflicts between function and performance by imposing internal restrictions on given subsystems so that they are suitable as components of the environment of other subsystems (Luhmann, 1977: 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 integration mechanisms in functionally differentiated societies. From this theoretical perspective, responsive law needs to develop "reflexive dimensions" if it is to work as an integrative mechanism (Assmann, 1980: 122).

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

The theoretical approaches that have concerned us thus far converge on the "reflexive" dimension of responsive law. Our translation of responsive law into the languages of neo-functionalism and critical theory has led us to assess skeptically the viability of substantive legal rationality under modern conditions. At the same time, our interpretation of Nonet and Selznick's theory allowed us to identify an important connection between Habermas' procedural concept of legitimation and Luhmann's theory of internal system reflexion. Putting the various elements we have discussed together, our theses are: (1) Reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems. (2) The primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutralizing power structures but in the internal reflexion of social identity.

Before dealing with the role that reflexive law has to play vis-à-vis other subsystems, let us consider the role of reflexion and the limits it imposes within the legal system. This can be most easily seen by considering how the threefold typology, function, performance, and reflexion, applies to the legal system. 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 (Bohannon, 1967). These

orientations both overlap and conflict. The production of congruent normative generalizations may not suffice to provide rules that are well-suited to resolve concrete conflicts, and the legal system, by the processes of conflict resolution, may produce norms which cannot be congruently generalized. It is the role of legal reflexion to reconcile the inherent tensions between function and performance by imposing internal restrictions on the capacities of the legal system.

It is our thesis that law can best do this by imposing restrictions on the legal performance dimension. Instead of the comprehensive regulation of substantive legal rationality, reflexive law restricts legal performance to more indirect, more abstract forms of social control.

What is crucial 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 always or easily bend to legal regulation.

Aspects of modern educational and welfare systems provide striking examples (Voigt, 1980). In these fields, the current critique of legalization has shown again and again that substantive legal programs obey a functional logic and follow criteria of rationality and patterns of organization which are poorly suited to the internal social structure of the regulated spheres of life. In consequence, law as a medium of the welfare state either turns out to be ineffective or it works effectively but at the price of destroying traditional patterns of social life (Habermas, 1981: 542).

A reflexive orientation does not ask whether there are social problems to which the law must be responsive. Instead it seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irreversibly destroying valued patterns of social life.

This brings us to the question of how autonomous reflexion imposes limits on the scope of legality and defines the role of law vis-à-vis other social subsystems. One possibility in vogue today is the policy of the deregulation or reformalization of substantive law. Another one is the policy of proceduralization under which the legal system concerns itself with providing the structural premises for self-regulation within other social subsystems (cf. Moore, 1973: 720; Galanter, 1980: 21). What is involved here is not only the guarantee of autonomy for other

social subsystems, but also Habermas' concept of the "democratization of social subsystems," which—with its stress on procedural legitimation—shows the direction in which reflexive law can develop.

Recall Habermas' distinction between law as "medium" and law as an "institution." Although law as a "medium" of societal guidance endangers the communicative structures of the legalized spheres of social life, law as an "institution" rooted in the core morality of a given society may facilitate communicative processes by guaranteeing the "external constitution" of the communicatively structured social sphere. Law as an "external constitution" can promote "discursive decision processes and consensus-oriented procedures of negotiation and decision" (Habermas, 1981: 544). It does so by providing norms of procedure, organization, and competences that aid other social systems in achieving the democratic self-organization and self-regulation which, according to Habermas, are at the heart of procedural legitimacy. Reflexive law, in other words, will neither authoritatively determine the social functions of other subsystems nor regulate their input and output performances, but will foster mechanisms that systematically *further the development of reflexion structures within other social subsystems*.

However, in the light of functional differentiation, one can no longer hope for universal legitimation structures, for a generally applicable morality of discourse, or for a common procedure of reflexion. The legal prerequisites for reflexion processes in, for example, the economy or in politics differ greatly from what will be required by the educational system. Thus, law must act at the subsystem-specific level to install, correct, and redefine democratic self-regulatory mechanisms. Law's role is to decide about decisions, regulate regulations, and establish structural premises for future decisions in terms of organization, procedure, and competencies. Specific outcomes in other subsystems will be influenced by law's role in setting the parameters for decision making, but they will not be legal mandates, for law would not have determined them. This vision of the legal order may be summed up in a sentence: *Law realizes its own reflexive orientation insofar as it provides the structural premises for reflexive processes in other social subsystems*. This is the integrative function of contemporary responsive law.

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

To be sure, the "result" we have reached 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 the differing conditions of post-modern societies is nothing more than a hypothesis derived from theories of socio-legal development. Borrowing "internal" variables from the theory of responsive law and "external" variables from concepts of post-modern society in critical theory and neo-functionalism, we have sketched a model of socio-legal interrelation 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. This hypothesis rests on a number of highly speculative (and debatable) theoretical assumptions. It must withstand strong empirical testing before it might claim any "validity." However, we can lend some empirical support to our thesis by pointing to recent legal trends in which we can recognize the outlines of "reflexive" legal structures, although we have to acknowledge that the "fallacy of misplaced concreteness" is almost inevitable.

Consider again the development of contract law. A trend towards substantive legal rationality is obvious in legislative definitions of minimal conditions and judicial concern with the substance of agreements (Friedman, 1959). Yet, if this trend is to involve more than marginal correction of the formal approach, it will encounter conditions that impose limits on the capacity of the legal system, some of which are already visible today.[11] Labor law, in contrast, is, with respect to collective bargaining, characterized to some degree by a more abstract control technique in which we can recognize a "reflexive" potential. The legal regulation of collective bargaining operates principally by shaping the organization of collective bargaining, defining procedural norms, and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results.

Corresponding efforts at constructing systems of countervailing powers in other spheres, particularly in consumer protection law, have not fared so well (Hart and

[11] This is recognized even by authors who have argued emphatically for a deformalization of modern contract law; cf. Wiethölter (1982: 5).

Joerges, 1980: 83). However, functional parallels might be found in the "artificial" creation of autonomous semi-public institutions (e.g., in Germany the "Stiftung-Warentest" or "Verbraucherzentrale") which provide consumer information and political-legal representation for unorganized social interests (Hart and Joerges, 1980). The role of state law is, again, not substantive regulation but the procedural and organizational structuring of "autonomous" social processes. Organizations are fostered to give consumers a voice. To paraphrase Joerges (1981: 23): the law does not authoritatively decide what constitutes the consumer's interest; it restricts itself to defining competences for the articulation of consumer interests and to securing their representation. The task of the legal system is neither to develop its own purposive program nor to decide goal conflicts between competing policies. It is to guarantee coordination processes and to compel agreement. To these observations one may add the fact that the law can help resolve inter-system conflicts by arbitrating claims across sectors and settling boundary problems.

Perhaps consumer law provides a shaky example of reflexive law at work because it is an example of the limits of the strategy we have called "external decentralization." This strategy necessarily fails if social asymmetries of power and information can resist institutional attempts at equalization. One solution is for law to develop in itself "reflexive" structures which can compensate for inequality of power and information, thus supplementing the operation of decentralized systems through modes of compensatory legal logic. It is possible to interpret the developments of certain "general clauses" or standards as evidence of a reflexive logic within doctrine. For example, even though standards like "good faith" or "public policy" are usually regarded as instruments of substantive judicial interventionism, they might be seen as a means of "socialization of contract" quite different from what is traditionally thought of as state intervention (Teubner, 1981). Using standards like good faith and public policy to compensate for irreducible inequities at, for example, the level of concrete interaction between contractual partners or the level of market and organization, as well as at the societal level, where there is an interplay among politics, economics, culture, and law, is "reflexive" insofar as the legal system itself "simulates" processes of social self-regulation. This means that, in the case of "interaction deficiencies" between contracting parties, objective purposes and duties are defined

authoritatively by virtue of law; in the case of "market deficiencies," commercial customs are replaced by the judicial definition of market behavior rules; and in the case of "political deficiencies," the judicial process defines standards of public policy. Common to these examples is a logic of internal simulation. An actual deficiency in subsystem mechanisms of self-regulation is presumed, and the general clause of "good faith" or "public policy" is interpreted as a command to simulate within the legal system self-regulatory processes—as they might exist—internal to non-legal subsystems. Obviously, such a simulation has it own deficiencies. It can be perverted easily into a sheer moralistic appeal, and its cognitive and procedural adequacy is unclear.

The law of private organizations provides a further example. Here again we find tendencies to "substantialize" the formal classical-liberal law, which was restricted to providing politically neutral forms for private organizations. Today, judicial control and state regulation of associational behavior seem to reach the limits of their control capacity. Our approach suggests a quite different strategy to deal with the deficiencies of the current system, namely, the creation of legal structures which systematically strengthen "reflexion mechanisms" within the organization. "Constitutionalization" of the association might make the "organizational conscience" work if it effectively forces the organization to "internalize" outside conflicts in its own decision structure (see Stone, 1975). In this context, the traditional meaning of the "democratization of social institutions" is transformed. The main goal is neither power-equalization nor an increase of individual participation in the emphatic sense of "participatory democracy." Rather, it is the design of organizational structures which makes the institutions—corporations, semi-public associations, mass media, educational institutions—sensitive to the outside effects of their attempts to maximize internal rationality. Its main function is to substitute for outside interventionist control an effective internal control structure (Teubner, 1978b).

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

These examples are intended to illustrate what it means for the law to orient its structure 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, 104, 112).

This is a field where future research is needed. Here it is only possible to sketch lines of argumentation that need to be developed in depth. If it is true that legal reflexive 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, are 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 (Assmann, 1980; Collins, 1976; Galanter, 1980: 12; Reale, 1970; Stachowiak, 1973; Teubner, 1978a). 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, 90). More generally, one can reconstruct "theories" of social reality out of legal norms, court opinions, and doctrinal considerations, which in turn serve as a kind of background information, or, to use the hermeneutical phrase, a "preunderstanding" ("Vorverständnis"). For example, legal concepts of contract, of association, or of state-society relations are rooted in peculiarly legal perceptions of social reality. These perceptions differ significantly from our day-to-day understanding of these phenomena as well as from sociological or economic theories. The legal system develops certain specific "social constructions of reality" (Berger and Luckmann, 1966) in order to decide social conflicts under the guidance of legal norms. In creating its own reality from the perspective imposed by the exigencies of conflict resolution, the legal system abstracts highly selective models of the world, thereby neglecting many politically, economically, and socially "relevant" elements.

Obviously, these models change their character in the course of legal development, and there will be covariation between legal model construction and types of legal rationality. Thus, there remains the question of how "rematerialization" has forced formal law to change its perceptions of social reality, and we must also identify the kind of legal model-building required by reflexive legal rationality.

"Sociological Jurisprudence" and related movements in legal theory (Freirechtschule, Interessenjurisprudenz) should be interpreted as methodological corollaries of the rematerialization of formal law (e.g., Heck, 1968; Pound, 1910/11:

591; 1911/12: 140, 489; 1943/44: 1). 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. Formal legal rationality and sociological jurisprudence were *fundamentally* incompatible because the former conceived of legal actors as abstracted from the world, thus allowing the assertion that taking account of social, economic, and political aspects is not a task for the "lawyer as such" (Windscheid, 1904: 101).

Substantive legal rationality has required a "rescientification" of legal perceptions of reality precisely in the sense which formed the main methodological concern of sociological jurisprudence. This type of sociological jurisprudence, however, is bound to the crisis of substantive legal rationality that we have analyzed in the framework of neo-functionalism and critical theory. If taken seriously, such a sociological jurisprudence requires encompassing models of reality which have to integrate social science theories to a degree that enables the law to take over responsibility for comprehensive planning processes. Legal analysis then tends to be transformed into a full-fledged social policy analysis, which requires an adequate description of the real situation, the perception of problems, the definition of goals, the selection of legal norms, and the implementation of norms in social reality (cf. Lindblom and Cohen, 1979: 30). Obviously, the complexity of the underlying models that would be required for the law to achieve these ends will rapidly surpass the cognitive competence of any existing legal system, even one based on a profound interdisciplinary analysis (Luhmann, 1974: 31).

It seems that sociological jurisprudence—like decision theory—needs to develop a concept of "bounded rationality" in order to construct workable models of reality that are of practical use for legal decision processes (March and Simon, 1966; Simon, 1976). Perhaps an additional role of reflexive processes in the legal system is to define legal self-restraint in the context of building models of social reality.

Reflexive legal rationality requires the legal system to view itself as a system-in-an-environment (Assmann, 1980: 333; Luhmann, 1979: 161) and to take account of the limits of its own capacity as it attempts to regulate the functions and performances of other social subsystems. Thus, its relation to social science knowledge is characterized neither by "reception" nor by "separation." Instead, the relationship involves the "translation" of social knowledge from one social

context to the other according to certain translation rules, i.e., specific legal criteria of selectivity (cf. Teubner, 1978a: 27; Walz, 1980). If it is true that law fulfills its integrative function by furthering reflexive processes in other social subsystems, the social knowledge required by the legal system is very specific and the need for model construction is much more limited than it would be in a comprehensive "planning" law. Reflexive law needs to utilize and develop only that knowledge necessary to the control of self-regulatory processes in different contexts. Thus, encompassing social policy models may be replaced by models of how to combine the insights of socio-legal analysis and the dynamics of interaction processes for social problem solving. If the analysis of this paper is correct, the generation of such models is an important next step in the evolutionary development of law.

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