ETHICAL RATIONALIZATION AND "JURIDIFICATION" - HABERMAS'S CRITICAL LEGAL THEORY

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In Habermas's voluminous and wide-ranging body of work, the two volume "blockbuster" *The Theory of Communicative Action*, of which the original German version appeared in 1981, stands out as his central achievement. It is in this work[1] that Habermas uses his theory of communicative rationality, which he has developed over several decades, to come up with both an intricate theory of social evolution and an analysis of modern "social pathology", in the form of an account of "rationalization", which should supersede the theoretical achievements of great predecessors such as Marx, Weber and Durkheim in this area. In the process Habermas presents an account of the rationalization of law, which could provide a theoretical basis for critical legal theory.

I

Habermas believes that Weber and the other great theorists did not give an adequate analysis of rationalization, and did not come to grips, analytically, with the modern social pathology which he has called "the colonization of the Lifeworld", mainly because they remained imprisoned within a certain philosophical paradigm - the epistemology based on the Cartesian subject-object dichotomy which he calls the "philosophy of consciousness" - and a concomitant narrow idea of rationality.

From the beginning of his academic career Habermas has protested against what he used to call a "positivistically truncated Reason", that is the idea that "rational", that "scientific" procedures can only be legitimately applied to observable and quantifiable aspects of reality and

that, ultimately, only sense impressions can be decisive in the quest for truth.

In this view, the knowing subject is regarded as a "solitary ego" who can have, basically, only two sorts of relations with the objects confronting him/her: s/he can *know* them and s/he can *manipulate* them. Each subject has a sensory apparatus which allows him/her to know the object directly and to come up with observational statements. The knowledge of reality is based on the agreement in these observational statements. Thus, in this view of our processes of cognition, the subject-object relation is put central, as it was during a considerable part of the history of modern philosophy since Descartes. The quality of knowledge, and rationality as such, is deemed to be dependent on the quality of these subject-object relations and the observational statements based on them. By contrast Habermas proposes another philosophical paradigm, that of communication theory, in which knowledge is ultimately dependent on subject-subject relations. In this paradigm, in which language is seen as the necessary vehicle for all knowledge, rationality is acknowledged to have the various dimensions found in a proper analysis of communicative action, which is basically a process of negotiation of "validity claims" between ego and alter. These "validity claims" do not only refer to an objective world of matters of fact, but also to a social world of legitimately regulated interpersonal relations and a subjective world of inner states and feelings. The possibility of conducting rational discourse about these worlds is not limited to the objective world.

Habermas's idea that it is subject-subject relations rather than subject-object relations which are at the heart of Reason's appearance in history does not imply that a formerly rational preserve is now opened up to the irrationality of daily life. Neither does it mean that the idea of truth has been given up. On the contrary. Rather than stressing that the realm of rationality is not as vast as we once thought it was, he has emphasized that it is, in fact, far more extensive than most of us were originally inclined to believe. Rather than accepting that the arbitrariness allegedly found in the realm of norms and values has now also penetrated the realm of science, he has claimed that, potentially, norms too can be a subject of rational discourse, as can be inner states and feelings. In short, Habermas has argued for a far broader concept of rationality.

It is mainly on this point that he criticizes Weber's account of rationalization in general and his analysis of the rationalization of law in particular. Habermas's own account of this latter process has a negative and a positive side. The negative side involves a detailed criticism of Weber's sociology of law, while the more "positive" side has to do with his own sketch of "juridification", the four basic historical shifts in this process and its present role in contemporary social pathology. Here we will look first at Habermas's criticism of Weber.

II

In looking at Weber's general rationalization thesis, Habermas is guided by the distinction between society, culture and personality - the three elements, in his view, of a rationalized "Lifeworld". If one wanted to hazard a summary of his view of Weber's thesis in the shortest possible form, keeping these distinctions in mind, one could say that to Weber rationalization was in the first place (a) a process of *cultural rationalization* consisting of the differentiation of the three value spheres of science, art and universalistic views of law and morality. It was these last views which were (b) central to the *rationalization of society* because they were at the basis of the development of modern law as a means of organization and found (c) their correlate on the level of the *personality* in the systematic conduct of life, on the basis of professional ethics, of modern economic entrepreneurs and civil servants (Habermas 1981:I 234-238).

Habermas's main point of criticism of this thesis is that Weber narrowed his concept of rationality down unduly in his study of the transition from cultural to societal rationalization. According to Habermas, Weber mainly focused on one particular aspect of this transition, viz., the development of universalistic views of law and morality. By doing this he allegedly ignored the actual and possible rationalization of other spheres of life. Moreover, his analysis of the rationalization of Western law is erroneous in the sense that it conceives of this process as mainly an institutionalization of goal-rationality. Here again it was allegedly Weber's too narrow conception of rationality as predominantly goal-rationality, a conception based on the Cartesian paradigm, which induced this error.

It is well known that to Weber ethical value judgements only expressed subjective dispositions and could not be the outcome of rational discourse. However, the fact remains true, of course, that modern society operates with a large body of rules which are, ultimately, based on value judgements, viz., the rules contained in law. Weber, who was originally trained as a legal scholar, knew more about this than most sociologists ever will. How then did he combine his extensive knowledge of this body of rules and its development with his alleged inclination to discount what is to Habermas one of the forms of the unfolding of reason, viz., ethical rationalization?

Let us look here at Weber's famous thesis that Western society might eventually be housed in an "iron cage of servitude". He held that the Western process of rationalization (*also* the rationalization of law) would, ultimately, lead to a loss of meaning and a loss of freedom. In the words of one German commentator: "Humanity's becoming rational ... by an internal logic triggers historical processes which tend to depersonalize social relationships, to desiccate symbolic communication, and to subject human life to the impersonal logic of rationalized,

anonymous administrative systems - historical processes, in short, which tend to make human life mechanized, unfree, and meaningless" (Wellmer 1985:43). He saw this development, says Habermas, by playing down the analogy between the rationalization of law and the development of morality, and by regarding law, in the first instance, as an enterprise which, like economics or politics, is liable to be formally rationalized- that is, developed as a morally neutral body of rules which only derived their meaning from being instrumental in the attainment of a number of goals which had not been specified in this body of rules itself. In other words: the development of modern law was characterized by goal-rationality.

Though we cannot go into details here, we should point out, at this stage, that we do not agree with Habermas's claim that Weber virtually equated the rationality of law with goal rationality and that Weber's rather negative views on attempts to introduce elements of substantive rationality into law should be explained from this equation. Weber did not identify the formal and substantive rationality of law with, respectively, goal and value rationality. It is clear that formal rationality can be regarded as an ends-means rationality only if it is conceded that here the goal is set *within* the law, namely in the form of an immanent requirement for its logical consistency and what Weber called "deductive stringency". This does not imply, of course, that formally rational law cannot be used in a goal-rational fashion. In fact, its precision and systematization make it often eminently suitable for calculating the chances of those to whom the law is applied; Weber pointed out repeatedly that such calculability is an important element in economic and bureaucratic rationalization. However, the "deductive stringency" of law could also lead to results that are deeply disappointing for those who have turned to the law for the solution of some concrete problem.

We will elaborate on these points below and limit ourselves here to quoting a statement of Weber in which he compares law with music. This statement makes it very clear that, in his view, formal rationality could be far removed from any utilitarian considerations, and thus from goal rationality:

> in the case of music, the tension between expressive or pragmatic (e.g. cultic) musical rationality on the one hand and "pure" rationality devoted to perfecting tone systems and *techniques* on the other; in the case of law, the tension between "material" [i.e. substantive - A.B.] rationalization emerging from legal interests and corresponding to extant ideas of justice on the one hand, and a "formally" rational perfection based on traditions in thought and the needs of legal specialists on the other (quoted in Treiber 1985:844).

III

Weber's position here cannot be well understood without some information on developments in the very convoluted but interesting scene of nineteenth century German jurisprudence. The history of this branch of intense nineteenth century German scholarly activity also provides us with the concepts which enable us to specify Weber's and Habermas's respective positions on this particular point. The history of nineteenth century German jurisprudence is, in part, that of a change in the appreciation of two forms of juridical activity. It is the story of the transformation of what were once called "lower" and "higher" jurisprudence into "jurisprudence of interests" (*Interessenjurisprudenz*) and "conceptual jurisprudence" (*Begriffsjurisprudenz*), and the increasing esteem for the former at the expense of the latter, once "higher", activity. If one wanted to place Weber and Habermas in terms of these concepts one could say that what divides them is the fact that Weber believed that a general and uncompelled consensus about a hierarchy of general interests was, in principle, not possible, whereas Habermas believes it is. It is exactly also on this point that Habermas accepts a wider concept of rationality and possibility for the application of rational procedures than Weber does.

Let us elaborate on this by looking somewhat more closely at the historical details of this change in the relative appreciation of two branches of juridical activity. We can do so most conveniently by looking at the transformation in the work of the great nineteenth century law scholar Rudolph von Jhering. When von Jhering started publishing as a young man, in the early 1840s, he was still deeply influenced by the romantic-organic view of law of the historical school. In his second period there was an interesting transformation. It is then (1852-1865) that his famous four volume work *The Spirit of Roman Law* (*Geist des römischen Rechtes*) appeared. In this work von Jhering attempted, in the first place, to liberate the historical school from the purely nationalistic interpretation of the concept of "folk mind", the alleged source of law, and to replace this by the idea that law owed its origination to universal cultural laws (such as that of "assimilation and adaptation"). Roman law only owed its influence, according to him, to the fact that it did have this universal character: "the world historical significance and mission of Rome is, summarized in one word, the overcoming of the principle of nationality by the thought of universality" (quoted in Dooyeweerd n d:46).

It is, however, for the purpose of our argument, the third and fourth volumes of von Jhering's work which are of the greatest interest. In the third volume he developed the distinction between lower and, genuinely scientific, higher jurisprudence. The attempt to make at least part of the activity of legal scholars appear to be of a really scientific character had been triggered off by a notorious attack on law as a discipline, some ten years earlier (1847) by the philosopher J.H. von Kirchmann. In his pamphlet *On the Worthlessness of Jurisprudence as a*

Science von Kirchmann argued that law could not be a scientific discipline because its object was fortuitous and coincidental, namely the always changing products of the legislature. For von Kirchmann only the natural sciences, with their search for "invariable" "eternal" laws, were genuine sciences. This type of argument impressed people in the nineteenth century. It impressed von Jhering and induced him to come up with a rather bizarre naturalistic interpretation of the "higher jurisprudence", in which positive law was considered as an organism in which juridical concepts could have intercourse and produce, together, in a form of logical fornication, new law. This "conceptual jurisprudence" was contrasted with the "lower jurisprudence", which was merely a matter of the interpretation of existing laws.

In the course of the nineteenth century, the distinction between "higher" and "lower" jurisprudence gave place to that between "conceptual jurisprudence" and "jurisprudence of interests". By the time this distinction was established, however, the position of "conceptual jurisprudence" had suffered a decline. To what extent could be seen in the fourth and last volume of *The Spirit of Roman Law*, which appeared in 1865. This volume contained a crushing criticism of conceptual jurisprudence - once, as we saw, deemed the higher activity by von Jhering, but now criticized by him for the fact that it could, on occasion, just ignore the genuine existence of a state of affairs because it was deemed to be logically impossible. Von Jhering now wanted to find the basis of the creation of law in the factual evaluation of interests (cp. Langemeier 1970:123-124 and Van Eikema Hommes 1972:461 ff). This "jurisprudence of interests" enjoyed a considerable vogue. To what extent can be seen in the introduction to the work of that other great Romanist, Rudolph Sohm, on the history of Roman civil law, which was for a long time a standard textbook on the topic not only in German, but also in Scandinavian and Dutch universities. Sohm stated there, as if the matter no longer brooked any contradiction: "Only jurisprudence of interests can decide on the contents of law, never conceptual jurisprudence". Law should serve life. Juridical propositions should not be in the service of dialectics, but promote justice (Sohm 1917:38). Yet Sohm also declared here that it is the formal element in law which is the genuine subject for conceptual jurisprudence and that it is in fact this formal element which is the typically juridical, since the matter of substantive justice is also dealt with in other social sciences, such as economics (1917:38-39). In fact what jurisprudence of interests did, of course, was to open the doors of the "house of law" for the social sciences. Its most important representative, Philipp Heck, believed that the law could not be applied meaningfully without knowledge of the social, moral, economic, cultural and other interests involved. This view meant an open invitation for the sociology of law (cp. Franken 1983:113).

The first question that comes to the fore in questions of substantive justice, in "jurisprudence of interests", is: whose interests exactly should provide the guiding thread for the interpretation and creation of law?

This question could only be evaded by turning "jurisprudence of interests" into a purely historical discipline which tried, in the interpretation of law, to trace the interests which had been formative in its creation. This, however, could hardly be a guideline in the creation of law. Sohm talked here of a general interest of the people as such. Justice was what was in the interest of the people: "Only singular interests and mere class interests are contrary to justice and can, without any doubt, never be in the long run the source of law" (Sohm 1917:33).

But would it ever be possible to have "interest" as a source of law and yet see the cause of justice served? It is on this point especially that Weber and Habermas differ in opinion. For Weber society is, in the last analysis, an arena for the struggle between various interest groups. The interests involved he believed to be rooted in values which were often inherently incompatible. On this point Weber remained a Neo-Kantian. The realm of value and that of being were distinct and separate, though the human agent could link them up in value oriented action. This is, however, not Habermas's position. Values are, for him, a matter of human creation and can be the product of rational procedures. Far from being inherently incompatible (Weber's "value collision") they can find their unity on the level of reason. Habermas speaks, in this context, of the "procedural unity" of reason. We will have to say more about this later, but we will now look at the specifics of Weber's view.

IV

We spoke above of the late nineteenth century division in German legal scholarship between "jurisprudence of interests" and "conceptual jurisprudence". Weber touched on issues of this nature in his mainly historical disquisition on the rationalization of law along the lines of what he calls formal and substantive rationality. He formulated this distinction in the following way. The creation and administration of law was to him rational in a substantive sense to the extent that it involved, and drew on, clearly formulated general principles, for instance, religious or ethical principles. Islamic law, for instance, was substantively rational to the extent that it was based on the commands of the prophet. Weber (and in the context of Habermas's argument it is essential to be aware of this) did not identify substantive rationality with value rationality. He was not referring to the consistent working through of general ethical principles in substantively rational law. The principles substantively rational law drew on did not have to be of an ethical nature; they could, for instance, also consist of the clearly formulated strategy of certain power politics.

One could perhaps defend the thesis that both the substantive and formal rationality of law were, to Weber, forms of goal-rationality. The difference between them was that in substantive rationality the goals were *external* to the law whereas, in formal rationality, they were

internal to it. The formally rational character of law had to do with the goal of its *internal logic* which was served by deductive stringency on a high level of abstraction. Or, as Weber put it elsewhere: in the case of substantive rationality the implementation of law took on the character of administration, whereas, when formal rationality had the upper hand, the reverse was the case (Weber 1922:485).

The distinction between formal and substantive rationality cannot be entirely equated with that between conceptual jurisprudence and jurisprudence of interests, which was discussed above. Formal rationalization also served specific non-juridical interests in that it made the judicial apparatus function as a "technical rational machine" which gave interested parties a maximum of freedom of movement, especially because it allowed a rational calculation of the juridical consequences of goal-rational action (Weber 1922:468). But, since economic power was always unequally divided, this freedom of some interested parties, guaranteed by formal justice, would always lead to a situation in which certain substantive postulates of religious ethics or political principles appeared to be violated. Yet it was not only the economically powerful who were interested in the abstract character of law but also those who were spurred on by an ideology which advocated maximum liberty for the deployment of individual competences against the effects of authoritarian power or irrational mass instincts. Formal justice was for them a guarantee of liberty (1922:469). When formal justice became a matter of conceptual jurisprudence, a matter of a complex of norms which had to be entirely without gaps or inner inconsistencies, the danger for interested parties was the serious application of the proposition that what could not be juridically construed did, indeed, not exist. Roman legal thought in its historical setting was not subject to this danger, since, though it was analytical, it was also strongly historically conditioned. The danger occurred when it was transplanted to an entirely different context (1922:491-492). Those who had an "external" interest in the administration of law were oriented to its economic utilitarian significance. From the legal-logical point of view this economic utilitarian significance was irrational. Weber gave here the example that, according to legal logic, basing itself on the traditional concept of theft, the theft of electricity could not exist. Matters such as these, said Weber, were not the consequence of some special juridical foolishness but, rather, of the discrepancy between the immanent logic of formal legal thought and the economic utilitarian orientation of those who wanted the law to be administered for some external goal.

Thus we were dealing here with a special case of what was to Weber the general paradox of rationalization, namely that it led to "irrationalities". So, for instance, striving for gain purely for the sake of gain was specifically irrational. In the process of rationalization there was a tendency for "means" to become ends in themselves - just as "conceptual jurisprudence" could become an end in itself (1922:505).

Yet Weber did not seem to see any way out of this dilemma. Any application of concepts such as "exploitation" (in the law against usury) was for him based on anti-formal norms "which have not a juridical or conventional or traditional, but a purely ethical character and which claim substantive justice instead of formal legality" (1922:506). The desire to have, above positive law, a body of more basic principles, only invited Weber's scepticism. Natural law had been discredited by historical and legal-positivistic criticism. A surrogate for it could be found in natural law on a (Catholic) religious basis or in the attempts to find objective criteria through deduction from the "essence" of law. This type of resistance against the formal character of law easily assumed an irrational, anti-historical character. Weber pointed out that attempts to escape from the ever increasing body of codified law also had to do with the professional interests of academic jurists who felt their creative role and freedom of movement threatened (1922:507-508).

V

These and similar remarks of Weber lead to Habermas's view that there is in Weber's sociology of law a general underestimation of its value-rational development. The substantive rationalization of law, says Habermas, is not pictured as rationalization in the realm of ethics but as a disturbance in the cognitive-instrumental rationality of law. In general, progress in the development of law is judged from the point of view of formal rationality. Weber did not sufficiently recognize, says Habermas, that the rationalization of law could only take place on the basis of a "post traditional" development of moral consciousness, which came about through the rationalization of the normative aspect of world views. Habermas disagrees with Weber's view that such rationalization only takes place in a religious context. He points to various historical facts which Weber, allegedly, more or less ignored and argues that Groethuysen's inquiry into the origination of the bourgeois world view in France demonstrated that a principle guided ethics could also come about and exist in a secular context. Furthermore, according to Habermas, it is simply not true that rationalization as such is incompatible with the ethics of brotherhood and that its conjunction, in the West, with the unbrotherly "salvation particularism" of Calvinism provided not merely the only historical but also the only "logical" combination. Habermas points here to an historical attempt to push the ethics of brotherhood beyond the confines of the family group in a consistent fashion, namely that of the anabaptists. (He is probably referring here to the radically egalitarian and "anarchist" religious movement which originally conquered Münster and then, in 1535, was drowned in blood. Its egalitarian principles survived in the far less radical Baptist Church founded by Menno Simons.)

Weber allegedly "missed" these things because of his tendency to identify rational with goal-rational action. This is related to his

conviction that ethical value judgements are a matter of choice between often incompatible absolutes and thus ultimately a matter of "decisions". Habermas's position is, of course, that "communicative rationality" not only plays a role in discourse concerning the truth of factual propositions, but also in that regarding the "rightness" of normative statements. We will say more about this below.

The point stressed here is that the social world had to be conceived of as the totality of "legitimately regulated interpersonal relations". The individual had to feel that he or she *had the right* to act in a purely goal-oriented fashion, within certain legal limits, and, at the post traditional stage of moral consciousness, could "ideally" only feel so when law was seen, not as divinely inspired or traditionally given, but as the free creation of, in principle, free and equal people who could, in freedom, decide which norms should attain, retain or lose validity. Does this mean that Habermas pleads for the basic identity of "morality" and "legality"? No, it doesn't. He does recognize that modern law operates with an idea of legality which has little to do with morality, but he stresses, at the same time, that it can only do so because the body of law *as a whole* is conceived of as having a moral basis. The necessity for the moral foundation of law has been shifted, and therefore *apparently* removed, for wide ranges of the law but it has not been eliminated. The body of law *as a whole* still has to be seen as having a moral basis. This does not mean that the basic legal institutions which render legitimacy to the body of law as a whole, such as a modern constitution, cannot be criticized for the way they are sometimes tied up to particularistic interests, say certain class interests, rather than general interests. But this criticism can only have a basis exactly when it is presupposed that there *should be* this moral basis for modern law.

In Habermas's interpretation, Weber was not blind to the fact that there is such a thing as "legitimacy" in modern law, but he saw this "legitimacy" as a purely technical requirement, closely tied up to certain procedures in the formulation of law, rather than the fulfilment of the need for the moral foundation of the body of law as a whole. To Habermas, Weber's perspective on this matter was closely linked to the fact that the latter saw morality as based on subjective disposition and decision rather than on "communicative rationality", that is on the wide-ranging discourse of free and equal partners in discussion. We have already remarked above that, in the last analysis, the difference between Habermas and Weber on this point is found in their contrary opinions on the possibility of establishing a general interest.

This is now the place to indicate in greater detail the difference between Weber's "value collision" and Habermas's "procedural unity of reason". Weber held that in the process of rationalization the various "spheres of life" – religion, art, science, etc. – became more and more distinctly separated from each other and that, at the same time, the irreconcilable difference between the various value spheres became

apparent. In his last great public speech on "scholarship as a vocation" he put it this way:

> If anything, we realize again today that something can be sacred not only in spite of its not being beautiful, but rather because and in so far as it is not beautiful. ... we realize that something can be beautiful, not only in spite of the aspect in which it is not good, but rather in that very aspect. ... It is commonplace to observe that something may be true although it is not beautiful and not holy and not good. Indeed it may be true in precisely those aspects. ... the ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion (1948:147-148,152).

So what was necessary here was a choice - the reasoning came after, namely in the analysis of the implication of what one had chosen.

Habermas too conceives of rationalization as an increasingly clearer separation of different "spheres", but with him these are, in the first place, the three formal world concepts to which the various validity claims offered and accepted or rejected in "communicative action" refer: the world of objective reality (referred to by claims to truth), the world of values and social norms (referred to by claims to rightness) and the world of inner states and feeling (referred to by claims to sincerity or authenticity). According to Habermas it is not only the claims to truth, referring to the world of objective reality, which can be provided with a foundation through argument. The claims referring to all three of these worlds can be dealt with in argument which, though it refers to different things, has basically the same form. Habermas speaks in this context of the "procedural unity of reason" and rejects Weber's notions on value collision. It is this "procedural unity of reason" which constitutes the cornerstone of what he calls a discourse-ethics. The basic principle of this ethics is that only those norms can claim validity which can be acknowledged as valid by all those concerned in the process of participating in a practical discourse. The "rule of argument" for this practical discourse is that, for norms to be valid, the results and side-effects which would issue from a general following of the norm for the satisfaction of the interests of each individual involved, should be acceptable to all without compulsion (Habermas 1985:1041). We will not elaborate on this but have merely touched on it to elucidate further the differences between Weber's and Habermas's notions on legitimacy. Weber indicated that legitimacy was bestowed by the following of certain procedures in the formulation and administration of law, but could not say what then rendered legitimacy to these procedures. In other words, he was caught in a vicious circle here (we are still following Habermas's interpretation). What is the way out of this circle? Habermas's answer is: "the procedural Unity of Reason". In legal argument too, of whatever kind, validity claims are dealt with in a manner which is not

basically different from the way argument related to the other world concepts is conducted.

It is interesting to note that the question which Habermas directs at Weber, viz. if certain procedures bestow legitimacy what gives legitimacy to these procedures, can, in a slightly different fashion, also be put to Habermas. If, in the last analysis, laws have legitimacy because they do stand up in argument conducted in accordance with certain procedures, the question then remains: what gives these particular procedures their legitimacy bestowing power? Habermas's answer to this is based on what can be called the "central intuition" informing his work. To put it succinctly: being human implies the possession of the "communicative competence" to express "communicative rationality" in "communicative action" in and through language; the thrust of this communicative rationality is towards the achievement of consensus in a situation in which all participants in discourse are free to have their say and have equal chances to express their views. This situation is called the "ideal speech situation" and to Habermas this is the "counterfactual ideal" underlying the very use of language.

Genuine knowledge, also that of general interests, is reached in procedures which are prescribed by the use of language in communicative action. These are inherent to our existence as social beings. We have already remarked above that the difference between Weber's "value collision" and Habermas's "procedural Unity of Reason" is, in the last analysis, that between the neo-Kantian belief in the existence of a separate realm of values which could, for Weber, be incompatible and a form of the philosophy of language for which being coincides with its linguistic expression. (Admittedly, Habermas is not consistent on this point, hence his wavering between a consensus and correspondence theory of truth: cp. Brand 1986:52 n 21.)

VI

Does Habermas then judge the development of law as basically "value-rational" and intrinsically favourable to the matters he holds dear? No, he doesn't. Though he has emphasized the importance of moral developments in the evolution of law, he has also pointed to the increasing split between morality and legality. Though he believes that, even today, in the last analysis legitimacy still requires a moral basis, he has also analysed the process in which law as a medium, rather than being the outcome of "communicative reason", comes to threaten this. Habermas calls this process "juridification" and, to him, this is part and parcel of the general pathology of late-capitalist society which is characterized by what he has dubbed the "colonization of the Lifeworld". Habermas analyses society in terms of two basic concepts: Lifeworld and System. Social evolution is a matter of "rationalization", first of the Lifeworld and then of the System. Though the System can only come

about on the basis of a rationalized Lifeworld, it undergoes itself a process of rationalization which ultimately reacts back adversely on the Lifeworld. Functional reason penetrates into the Lifeworld as a colonial overlord and comes to threaten communicative reason. Juridification is an important aspect of this process of colonization. Let us look at these matters in greater detail.

For Habermas the basic type of social action is "communicative action" which is orientated to shared understanding and which provides the basis for the co-ordination of action on the basis of motivation-through-reason. Communicative action is a matter of the Lifeworld. It takes place against the background of an enormous fund of non-explicit, taken-for-granted, notions, which have great influence on the interpretation of explicit utterances. Following a phenomenological tradition in philosophy and sociology, Habermas uses the term "Lifeworld" to indicate this background. Though this "Lifeworld" has great influence on the endless range of interpretive activities which constitute social life, we cannot become conscious of it as a whole and sum it up in a series of neat propositions. There is here always an horizon behind an horizon. Agents draw on their common Lifeworld to seek shared understanding about something in the objective, social or subjective world. In using elements of the Lifeworld they also renew and change it.

Habermas does not, however, regard the Lifeworld as just a storehouse of frameworks of interpretation. In this view, which in sociology goes back to Schütz and, more recently, Berger and Luckmann, the theory of society has been entirely transformed into a theory of knowledge. For Habermas communicative action, which takes place in the Lifeworld, but also sustains and continues it, is more than just a process of reaching agreement on claims referring to the objective, social and inner world. It is also a process in which agents "confirm and renew their belonging to social groups as well as their own identity" (Habermas 1981:II 211).

In the process of rationalization, the world views implicit in the Lifeworld are made more and more explicit. They differentiate and get "split up" and embodied in various realms of knowledge and institutions. The more the structural components of the Lifeworld are differentiated, the more interaction becomes dependent on rationally motivated shared understanding "that is on a creation of consensus which is based, in the last instance, on the authority of the better argument" (1981:II 218). Ultimately this process reaches a point at which such heavy demands are put on the interpretive capacities of agents that whole areas of action, mainly in the field of economics and government administration, "drop out of language" as it were. These areas are then no longer integrated via communicative action but rather via impersonal and "de-linguistified" steering media such as money and power.

In action areas such as government administration and the market, co-ordination comes about, in the first instance, through ego motivating alter empirically, rather than rationally (via validity claims) performing certain actions – in the market through offering a certain sum of money and, in the sphere of the government, through the implicit or explicit threat of sanctions. Action consequences are intertwined in the system on a level which is not directly accessible to everyday social "pre-understanding". Agents relate to such action systems as they would to a piece of nature. The System, containing these new forms of integration, splits off from the Lifeworld. Yet, in the first instance, it depended for its development on the rationalization of the Lifeworld, because System differentiation requires institutional anchorage in the Lifeworld, through recognized status, office authority or civil law. Such institutionalization requires an appropriate developmental stage of law and morality.

Habermas distinguishes several stages in the development of system complexity, a development which ultimately leads to the uncoupling of System and Lifeworld. The new subsystems consist of organizations which function via institutionalized media, such as money and power, and are no longer dependent on the norms and values of producers and clients (which are reproduced via communicative action). The possibilities which the rationalization of the Lifeworld creates for System differentiation, but also the limits it imposes on that differentiation, are very much a matter of the development of law and morality. Let us have a closer look at Habermas's sketch of this.

VII

In his presentation of these matters, Habermas refers inter alia to Durkheim's view that, in the evolution of law, morality and law become more abstract and general and, at the same time, differentiated from each other. He also uses Schluchter's diagrammatic representation of Weber's views on the various stages of the development of law in order to present and elucidate his own views.

Schluchter's diagram is as follows:

Stages in the Development of Law

Stages of moral consciousness	Basic social-cognitive concepts	Ethics	Types of law
pre-conventional	particularistic expectation of behaviour	magical ethics	revealed law
conventional	norm	legal rule ethics	traditional law
post-conventional	principle	ethics of intention and ethics of responsibility	formal law

(quoted in Habermas 1981:II 260)

The separation between morality and law is clearly represented here. At the last stage morality is so de-institutionalized, says Habermas, that it is only still to be found as an internal control on behaviour in the personality system. Meanwhile law becomes a matter of authority imposed from outside. Legitimate orders depend more and more on formal procedures in the establishment of norms.

We saw already above that, according to Habermas, the coming about of higher levels of integration in social evolution depends on the formation of legal institutions which embody the moral consciousness of the conventional and post-conventional stages. From the pre-conventional point of view not the motives but the consequences of action, and restitution of damage, are relevant for law. At the conventional stage, however, crime appears as an offence against intersubjectively acknowledged norms, for which the culprit can be held personally responsible. It is then the function of a judge to preserve the integrity of a legal order. His own authority is based on this order rather than on status derived from descent. Political authority can develop around the office of judge, because it is in itself a source of legitimate authority.

Though the political order is then constituted as a legal order, this only envelops a society of which the core is not juridically organized. It is traditional morality rather than codified law which is the basis for social integration. This changes in modern societies, in which, with the

economy, an ethically neutral action system comes about which is institutionalized directly in private law. This is dependent on the continuous functioning of the legislature, on professional legal administration and, furthermore, on a legitimate administration which has juridical schooling.

Civil society becomes the sphere of the "juridically domesticated" permanent competition between private parties, while the state provides the level at which stubborn conflicts can be solved. The paths of legitimation lengthen. Legality becomes a matter of formally correct procedures, but now the *whole* system of law needs anchorage in basic institutions which bestow legitimation. "In the bourgeois constitutional state these are, in the first place, constitutional rights and the principle of popular sovereignty; in these we find post conventional structures of consciousness embodied. They constitute, together with the moral-practical basis of civil and criminal law, the bridge between, on the one hand, an externalized sphere of law, with no basis in morality, and, on the other a de-institutionalized and internalized morality" (1981:II 266).

One of the main aspects of Habermas's theory of communicative action is his analysis of the pathology of modernity, which he calls the "colonization of the Lifeworld". The colonization of the Lifeworld is basically a matter of functional imperatives for the rationalizing subsystems penetrating into the Lifeworld and submitting action areas, which can only be socially integrated via communicative action, to systemic integration via the media of money and power. The vehicle for this penetration is law. In a process which Habermas calls "juridification", action areas which were communicatively integrated are increasingly formally organized on the basis of ever more refined codified law. Juridification shows up in the always increasing body of codified law. Habermas distinguishes here between the extension and the greater density of law. The extension of law involves the increasing juridical formalization of social situations which were thus far regulated informally. The greater density of law has to do with the specialistic splitting up of global juridical situations into their components.

It is in his analysis of the dynamics underlying the "colonization of the Lifeworld" that Habermas still identifies himself as a Marxist, even though he differs most notably from Marx in the emphasis he puts on juridification. "Juridification" is, after all, the consequence of the steering medium of power penetrating into the Lifeworld, and this is exactly the aspect of "colonization" Marx ignored in his exclusive attention to monetarization. Let us have a closer look at Habermas's views on Marx to get this point clearly into focus.

Habermas finds a lot to criticize in Marx's approach - so much, in fact, that one wonders why he has called the final chapter of his book on the theory of communicative action "From Parsons via Weber to Marx". To him this title is apparently justified by his main thesis

concerning the cause of the colonization of the Lifeworld, which refers to the containment, through welfare state measures, of class conflict in the industrial societies of the West. This, says Habermas, "has triggered off the dynamics of a completely capitalistically conditioned, but increasingly non-class specific thingification of communicatively structured realms of action" (Habermas 1981:II 448).

Before we have a closer look at this thesis, we will summarize Habermas's main comments on Marx. He lauds Marx's theoretical strategy found in the double-sided character of his analysis of the "commodity form". This analysis enabled Marx to look at the development of capitalist societies both from the systems perspective of the observer and from the Lifeworld perspective of those potentially involved. From the observer's systems perspective, society appeared as the steering mechanism of a self-regulating process of reproduction, in which variable capital was exchanged against labour power. From the participants' Lifeworld perspective, it appeared as exploitative, conflictuous interaction between social classes. In terms of Habermas's concepts, the imperatives of systemic and social integration coincided in Marx's analysis of labour power. Labour power was expressed in the concrete action of the Lifeworld producer but it was also an abstract achievement within the functional whole of the capitalistic enterprise and the economic system as such. The transformation of labour power into abstract labour was concomitant with a change in the co-ordination of interaction which now no longer took place via norms and values but over the medium of exchange value. Participants in this interaction adopted for themselves, and assumed in others, an objectivating disposition and transformed social and intrapsychic relations into instrumental ones.

To Habermas the strength of Marx's approach is that it allows for the translation of propositions concerning the system (of anonymous value relations) into historical ones (the interaction between social classes). Problems of system integration can be related to the dynamics of class conflict. For Marx this was a critical approach because it allowed him to denounce the process involved in the upkeep of the economic subsystem as a dynamics of exploitation which was made unrecognizable by reification.

However, Habermas also finds basic flaws in this approach, because it remained wedded to the philosophy of history in which both System and Lifeworld, though analytically distinguished as far as their mutual relations were concerned, were yet seen as parts of a whole of which the separate elements were destined to disappear. Translated into concrete terms, this philosophy of history allocated to the revolutionary proletariat the role to take the economic system back into the Lifeworld. This was the famous transition from the "realm of necessity" into the "realm of freedom".

Habermas confronts Marx's view that the abolition of private property in the means of production would lead to the disappearance of capitalism, and the total democratization of economy and state, with Weber's much more accurate prognosis that the abandonment of private capitalism would in no way bring about the destruction of the iron cage of modern industrial labour. Also, Marx was allegedly blind to the fact that the development of the economic subsystem was not only a matter of the dynamics of exploitation but an evolutionary gain, a matter of increased societal steering capacity. The belief that this system could be taken back within the horizon of the Lifeworld was a matter of romantic nostalgia, which coloured his concept of "alienation". Habermas's main objection against this concept is that it is just not analytically distinct enough to serve as an instrument of critical theory. Marx used it to express the idea that in capitalism Life was no longer lived for its own sake but just served to bring about the externalization of labour power. But the concept of life remained in this context too abstract to serve as a critical standard. In Habermas's view, what critical theory should indicate is how the conditions for social integration, that is for integration via communicative action, have been negatively affected in the process which he calls "colonization". It should, therefore, be able to distinguish between rationalization as a process which involves the *differentiation* of the Lifeworld, and its (ultimate) "*thingification*", with its Lifeworld appearance of exploitation and repression, through the functional imperatives of the System. With Marx's concept of "life", with its overtones of a romanticized past, one simply could not make this distinction.

An even more decisive flaw in Marx's theory was, according to Habermas, that it did not offer the theoretical scope to analyze the submission of the Lifeworld to system imperatives not only via the destructive expansion of the medium of money but also via that of power. In Marx's theory of value there was only attention to the medium of money, to the monetarization of labour power. Marx did not notice that the conditions for social integration via communicative action were negatively affected by the penetration of money as well as that of power into the Lifeworld, because he, like Weber and Parsons, did not think in terms of communicative action. Marx's fundamental category, that of labour, and his neglect of the difference between labour and interaction, made him consider action as an instrumental goal oriented activity from the start. Thus the fact that, through the penetration of power into the Lifeworld, communicative action was increasingly replaced by strategic and instrumental action, remained invisible to him.

For all these reasons Marx was not able to analyze the "colonization" of the Lifeworld, which is a matter of the exchange between it and the political system. In this exchange new balances are created, which prevent alienated labour and "neutralized" political participation from leading to class conflict. The state's attempt to neutralize the Lifeworld expressions of crises in the economic system

leads to the extension and greater density of formally organized realms of action. The thingification effects of this are non-class specific. "Juridification" is the direct expression of and vehicle for the penetration of the steering media of money and power into the Lifeworld. It provides the legal framework for the formal organization of realms of action.

We find juridification especially where the more and more intensive penetration by the subsystems of economy and state into the symbolic reproduction of the Lifeworld touches directly on areas of cultural reproduction, social integration and socialization, which have been drawn into the dynamics of economic growth. Habermas mentions here specifically family law and juridical provisions for education.

The family and the school are not, by themselves, formally organized realms of action. Rather they are, or were, basically dependent on communicative action oriented towards shared understanding. The formalization of relations within these institutions leads to a situation in which those concerned meet each other in an objectivating disposition. For the functional disturbances this allegedly brings about, Habermas refers to studies on the effect of new legislation in the area of family law in the German Federal Republic. The emancipation of individual family members, which this aimed at, is paid for with a new dependency - this time on the state. The people involved become objects of negotiations between judges and youth services. What is becoming clearer and clearer is that judges can do very little with their specifically juridical means. These do not facilitate their communication with the children involved or enhance their understanding of the factors which are important in their development. Habermas claims that it is the medium of law itself which violates the communicative structures of these action areas. To replace the judge by the therapist is not an improvement, since the social worker is only another expert, who cannot liberate the client of the welfare state from his/her object position (1981:II 540-544).

The situation is not very different in the schools. The protection of parents and students against untoward effects of tests, arbitrary behaviour by teachers etc. is again acquired at the price of bureaucratization and juridification. The relevant norms hold without regard for specific persons, their needs and interests and endanger the pedagogic freedom and initiatives of the teacher. Here too Habermas refers to studies which point to depersonalization, the diminution of responsibility, immobility, the lack of innovation etc. as the negative effects of juridification.

Habermas sees here as a prime political task "to protect areas of life, which are functionally dependent on social integration via values, norms and processes, aimed at the achievement of shared understanding, against systemic imperatives of the dynamically growing subsystems economy and administration", which cause these areas of life to be

increasingly integrated, via the medium of law, in a manner which is dysfunctional to their communicative structure (1981:II 547).

VIII

There are, according to Habermas, four distinct stages in this whole process of juridification. The first of these was that of the bourgeois state, coming about in Western Europe during the time of absolutism. The second was that of the constitutional state, for instance, the German monarchy during the nineteenth century. The democratic constitutional state, coming about in Western Europe and North America in the wake of the French Revolution, constituted the third stage. Finally, the fourth stage can be found in the social democratic constitutional state, which was brought about through the organized struggle of the European labour movement.

If this historical development is indicated in terms of Habermas's theoretical system it looks as follows: with the coming about of the bourgeois state a political order was created in which formally free and equal legal persons were free to enter into contracts and to act instrumentally within the limits defined by law. Codified law guaranteed the calculability of all action which was covered by it.

In the constitutional state, coming about in the second major stage of juridification, the citizens were also given clearly specified rights vis-à-vis the government, though they could not influence the government's action directly. The freedom acquired during the first stage, that of the coming about of the bourgeois state, had a far more ambiguous character, because freedom was then also the freedom of capital to buy labour power in a process leading to the proletarization of the worker.

The modern state and its medium power subsequently found further "anchorage" in an institutionalized Lifeworld, when the creation of law was tied up with parliamentary procedures and public debate. With this coming about of the democratic constitutional state, citizens acquired the right of political participation. The juridification of the process of legitimation found expression in the granting of general and equal voting rights as well as freedom of organization for political associations and parties. Juridification of legitimation does not, as we saw in Habermas's comments on Weber, do away with the dependency of power on the Lifeworld. Ultimately it is only a structurally differentiated Lifeworld which remains the source of legitimation for the modern state.

Thus during the second and third stages of juridification we see the unambiguous protection of the freedom of the citizen against the government, and with it the protection of the Lifeworld. What now is the fate of the Lifeworld during the fourth and final stage of

juridification, that of the coming about of the social democratic constitutional state? Does juridification imply the protection of freedom here? On the one hand it seems that the Lifeworld is indeed being protected against the unbridled expansion and dynamics of the economic system, via the legal regulation - concerning specifics of working hours, dismissal procedures, unionism, social insurance etc. - of the exchange between capital and labour. On the other hand this same legal regulation implies the "constitutionalization" of the power relation implicit in the class structure. The costs of this constitutionalization for the Lifeworld are that areas of life which can only be integrated via communicative action are now being formally organized. Concrete situations, which fit in an individual life story, have to be forcibly put into abstract terms so that they can be "administratively digested". The bureaucracy has to work selectively here because "undigestible" cases have to be left aside. Also, the inadequacy of monetary "solutions" for problems that often cannot be redefined in terms of consumption is compensated for by the therapeutic help of social services. These put their clients into a relation of dependency.

Juridification implies monetarization and bureaucratization of core areas of the Lifeworld. These are split off from action co-ordination via shared understanding and re-integrated via the media of money and power. Parts of law can become a means of organization for the system, when legitimation is merely a matter of correct procedure and a substantive justification of its implementation appears, from the perspective of the Lifeworld, impossible or even meaningless. Law then functions, itself, as a medium. This is, for instance, the case with large tracts of commercial and administrative law. This is why Habermas can regard formal organization as a criterion for the demarcation of Lifeworld and System. "I call all those social relations, occurring in media steered subsystems, formally organized to the extent that they come about through positive law" (1981:II 458). Juridification creates possibilities for a strategic treatment of norms and leads to the "drying up" of processes of spontaneous creation of opinion and will.

Other parts of law, especially the basic principles of constitutional law and criminal law, remain tied up with the Lifeworld, because they need substantive justification. Legitimation through correct procedure is impossible here (1981:II 536-537).

The "pacification" policy of the social democratic welfare state must use law as a medium. In that form it is applicable to realms of action which are systemically integrated, though it extends to areas which are embedded in informal Lifeworld contexts. Juridification does mean a threat to the symbolic reproduction of the Lifeworld. It constitutes one aspect of the way in which formally organized realms of action, which come about with the differentiation and development of the steering media of money and power, become indifferent towards the various aspects of the Lifeworld such as culture, personality and society. As far

as the personality is concerned, organizations make themselves independent from the concrete dispositions and particular goals, in general from the personal background, of their members. An historical instance of this is the separation between the capitalistic enterprise and the household of the entrepreneur. Organizations also make themselves independent from the cultural tradition and only use cultural elements for purposes of self-legitimation. Finally, an historically important example of their neutralization against society is the separation between the secularized state and the church.

IX

Thus Habermas ends up with a form of legal dualism. On the one hand, law as an institution remains part of the Lifeworld (from which the political system still has to be legitimated); on the other, law as medium provides the main link between the economic and administrative subsystems and the Lifeworld. Both parts of law are subject to further rationalization. The principles involved in the (further) creation of these various parts of law are those of procedural legitimation (*Satzungs-prinzip*) for law as a medium and substantive legitimation (*Begründungsprinzip*) for law as an institution in the Lifeworld. The further rationalization of law as medium can produce the undesirable effects of juridification which show up as the destruction of communicative structures in the Lifeworld. In the Lifeworld law should function only as an institution, not as a medium.

Habermas's legal dualism has been subjected to criticism by legal scholars. Van der Burg argues that the distinction between law as a medium and law as an institution is not tenable because both procedural as well as substantive legitimation remain, ultimately, oriented to shared agreement, and for Habermas this orientation is one characteristic of the integration of the Lifeworld. Van der Burg argues, furthermore, that law retains a linguistic character which cannot be said of the steering media money and power. In the last analysis action within legal proceedings remains communicative action (Van der Burg 1985:15-16).

Van der Burg supplements this "immanent" criticism by references to Lon Fuller's views on the morality of law, developed in the book of that title. The internal morality of law is for Fuller a matter of eight principles: generality, public announcement, no retrospective force, clarity, consistency, avoidance of the impossible, permanence in time, agreement between official action and established rules. The question whether these requirements really have substantive normative implications is avoided here. What Van der Burg wants to highlight is that they, in any case, imply that law makes its claims to rightness explicit and therefore subjects itself to discussion and criticism. This means that there always remains a distance, however minimal, between law and power, so that law can provide the basis for critique (1985:16-17). There is, so Van der

Burg believes, an inherent dynamic within law which provides a thrust in the direction of the realization of the "rule of law". However, he believes with Nonet and Selznick that the ultimate stage of this development is not that of a completely autonomous realm of law, but on the contrary, that of "responsive law" in which law is flexible and open to social needs. Law enters into a synthesis with politics in the form of a "polity". Hence this picture is different from that of Habermas for whom the Lifeworld is adapting to the System rather than the reverse (1985:19-21).

The Belgian legal theorist Koen Raes has commented on Van der Burg's criticism of Habermas. He agrees with the latter that Habermas has the tendency to reify the distinction between law as institution and law as medium. However, he finds unacceptable Van der Burg's view that law has a linguistic character and is therefore orientated to the same "telos" as communicative action (namely "shared understanding"). Apart from the fact that Raes doubts Habermas's views on the immanent "telos" of language in general he also rejects Van der Burg's views on the linguistic character of law. "Each contract in language is accompanied by a substantive power and exchange relation." Criminal procedure is not exactly an example of "domination free communication". It has beside communicative quite a few other aspects: ritual, dramatic, symbolical, political and economic. Why should we a priori accept that any of these is more important than the others? Raes quotes with approval Luhmann's statement that the secret theory on which criminal procedure is based is that the personality can be caught, transformed and forced to the acceptance of decisions by being trapped into a role play (Raes 1985:124).

Raes believes that Habermas has signalled an important phenomenon with his analysis of "juridification" but, in contradistinction to the latter, he doesn't want to regard this as the infiltration of the System into the Lifeworld. According to Raes, "juridification" is at least partly a reaction to developments in the Lifeworld itself. This implies that "de-juridification" cannot be regarded as always serving the expansion of communicative action and the decrease of strategic-rational action. Raes refers here to the "economic imperialist" School of Public Choice of Buchanan and Tulloch which advocates the increase of privatization and the abolition of as many juridical-administrative regulations as possible. This type of "de-juridification" would promote the further expansion of strategic-rational action rather than its decrease. It would, in other words, contribute to the increasing domination of economic rationality over more and more forms of life.

Furthermore, juridification can serve the cause of equality and emancipation also in those areas where Habermas sees it as being mainly destructive of communicative relations, e.g. the domain of family law. Juridification has ensured here the greater equality and the rights of women and children. In addition, one can argue here that "shared understanding" is not really a practical aim of conflict solution. Time

and again it is shown that practical solutions can only be found in the monetary sphere. One can also point, in this context, to the monetary compensation system in industrial relations. An important aspect here is that the delivery of strategic-economic goods can be much more easily compelled than that of ethical-communicative goods. Often the only real option, also for emancipatory movements, is strategic action.

The real difference between the views of Van der Burg and Raes can still be indicated in terms of the conceptual distinction of which we highlighted the historical aspect above, the distinction between "conceptual jurisprudence" and "jurisprudence of interests". Van der Burg believes in the immanent meaning and inherent developmental tendencies of law. Raes emphasizes its social embeddedness. Accordingly he acknowledges that, also where juridification seems to amount to emancipation, one can look at these matters in quite a different way. He refers here to the view of Therborn that democratic political forms were not a consequence of inherently emancipatory tendencies in society and/or law, but a matter of compromise which also served the interests of dominant groups in nipping more radical tendencies in the bud or orienting them to another goal. The juridification of industrial action provides another example in this context. Raes compares Belgian and Dutch practice on this point. In Belgium the "right to industrial action" legally does not exist; in the Netherlands it does. But it could be argued that, for this very reason, Dutch industrial relations have been "tamed" far more effectively than is the case in Belgium.

How does Habermas's critical theory of law compare with those critical legal theories which do not advocate the exclusive reliance on immanent criticism, on the confrontation of bourgeois society with the implications of its own legal order, but emphasize that critical theory can only be developed from the really existing forms of resistance in society? This form of critical legal theory does not develop theory by taking the immanent meaning of law as its point of departure. It sees legal theory as only a branch of general social theory. In other words: it advocates a critical form of "jurisprudence of interests" as against a critically applied "conceptual jurisprudence". Raes refers here to elements in Habermas's earlier work, which have not been explicitly abandoned by him, to argue that, when it comes to the crunch, Habermas is on the side of critical jurisprudence of interests. His concept of knowledge guiding interests should prevent a merely idealistic interpretation of the "essence" of law. His emphasis on "self reflection" is, really, an emphasis on the importance of the confrontation of social normative systems with actual praxis.

We have elaborated so extensively on the partly conflicting comments of two European legal theorists on Habermas to demonstrate that his recent work provides by no means a "watertight" set of concepts for the study of social reality, including the juridically relevant aspects of this. However, it seems fair to say that Habermas's work has proved

itself again to be, in this field as well, what it has been from the beginning: a repository of powerful stimuli for further debate.

Endnote

1. On which see my The Force of Reason: an Introduction to Habermas's Theory of Communicative Action (forthcoming) Allen & Unwin: Sydney, London & New York.

References

Brand, A., "The 'Colonization of the Lifeworld' and the Disappearance of Politics - Arendt and Habermas" (1986) 13 Thesis Eleven 39.

Burg, W. Van der, "De Rechtstheorie van Jürgen Habermas" (1985) 11 Recht en Kritiek 1.

Dooyeweerd, H., "Het Positivisme in de Encyclopaedie der Rechtswetenschap" in Encyclopaedie der Rechtswetenschap (n.d.) Amsterdam.

Eikema Hommes, H.J. Van, De Elementaire Grondbegrippen der Rechtswetenschap (1972) Kluwer, Deventer.

Franken, H., In (Leiden) tot de Rechtswetenschap (1983) Quint, Gouda Arnhem.

Habermas, J., Theorie des Kommunikativen Handelns 2 vols (1981) Suhrkamp, Frankfurt.

Habermas, J., "Moral und Sittlichkeit. Hegels Kantkritik im Licht der Diskurskritik" [1985] Merkur (no. 12) 1041.

Langemeier, G.E., Inleiding tot de Studie van de Wysbegeerte des Rechts (1970) (2e) Tjeenk Willink, Zwolle.

Raes, K., "Kommunikatief Handelen en Juridisering" (1985) 11 Recht en Kritiek 2.

Sohm, R., Institutionengeschichte und System des Römischen Privatrechts (1917) (15th) Duncker und Humblot, München & Leipzig.

Treiber, H., "'Elective Affinities' Between Weber's Sociology of Religion and Sociology of Law" (1985) 14 Theory and Society 809.

Weber, M., "Science as a Vocation [Wissenschaft als Beruf]" (1918) in H.H. Gerth and C.W. Mills (eds.), From Max Weber (1948) Routledge & Kegan Paul, London.

Weber, M., Grundriss der Sozialökonomik, III Abteilung, Wirtschaft und Gesellschaft (1922) Mohr, Tübingen.

Wellmer, A., "Reason, Utopia and the Dialectic of Enlightenment" in R.J. Bernstein (ed.), Habermas and Modernity (1985) Polity Press, Cambridge.