EUI – Series A – 5
Daintith/Teubner (Eds.), Contract and Organisation:
Legal Analysis in the Light of Economic and Social Theory

European University Institute
Institut Universitaire Européen
Europäisches Hochschulinstitut
Istituto Universitario Europeo

Series A

Law/Droit/Recht/Diritto

5

Badia Fiesolana – Firenze

Contract and Organisation:

Legal Analysis in the Light of Economic and Social Theory

Edited by

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1986

Walter de Gruyter · Berlin · New York

Library of Congress Cataloging-in-Publication Data

Contract and organization.
(Series A--Law = Droit ; 5)
Bibliography: p.
Includes index.
1. Law--Economic aspects. 2. Contracts--Economic aspects.
I. Daintith, Terence. II. Teubner, Gunter. III. Series: Series A--Law ; 5.
K487.E3C66 1986 343'.07 86-4267
ISBN 0-89925-172-2 (U.S.) 342.37

CIP-Kurztitelaufnahme der Deutschen Bibliothek

Contract and organisation: legal analysis in the light of economic and social theory / ed. by Terence Daintith and Gunther Teubner. - Berlin ; New York : de Gruyter, 1986.
(European University Institute : Ser. A, Law ; 5)
ISBN 3-11-010705-8
NE: Daintith, Terence [Hrsg.]; Instituto Universitario Europeo ⟨Fiesole⟩: European University Institute / A

Dust Cover Design: Rudolf Hübler, Berlin. – Setting and Printing: Wagner GmbH, Nördlingen.
Binding: Verlagsbuchbinderei Dieter Mikolai, Berlin.
Printed in Germany

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Acknowledgements

This book is part of a larger research project of the European University Institute in Florence on the general theme of "Law and Economic Policy: Alternatives to Delegalisation" which has been conducted over the last three years under the direction of the two editors of this volume. The project aims to make a contribution from the legal standpoint to the current debate on the capacities and limits of the welfare state. This kind of work requires an interdisciplinary approach, and in particular an orientation of legal analysis towards economic and sociological theory. This perspective not only offers insights into the capacities of law to regulate social fields, but also demonstrates how legal norms can be changed if one incorporates social knowledge into legal analysis.

In a seminar series on the theme "Social Science Contributions to Legal Analysis" we asked distinguished scholars in law, economics and sociology from different countries to discuss with us their views on a possible transfer of knowledge from the social sciences to legal thinking. We invited them to present their specific "model" of the relations between law and the social sciences *in abstracto* and then to demonstrate the application of their model in the fields of Contract and Organisation. This book shows the results of the intensive discussions between these external experts and internal members of the Institute. The final versions of the papers have been considerably influenced by these discussions. We want to thank all participants, among them especially our doctoral students, for their valuable contributions.

The interdisciplinary method used in this book reflects a characteristic feature of the Law Department in the European University Institute. "Law in Context" is a specific approach to legal problems which is shared by all its members. In contrast to the technical and doctrinal style of legal analysis this approach insists on analysing legal phenomena in their social, political and economic contexts. General departmental discussions along these lines were of great help to our project, and we are especially grateful to Mauro Cappelletti, Werner Maihofer, Yves Mény, Patrick Nerhot and Joseph Weiler for their intellectual support.

We would like to thank Iain Fraser for his sensitive translation of the texts of some of our French and German contributors. For thorough and precise editorial assistance our thanks go to Thomas Abeltshauser, Tony Curran, Anne-Lise Strahtmann, and Elizabeth Webb, as well as to Brigitte Schwab, the Institute's Publications Officer, for her professional help in the final publication process.

Firenze, September 1985

Terence Daintith and
Gunther Teubner

I.
Introduction

Sociological Jurisprudence and Legal Economics: Risks and Rewards

Terence Daintith
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Firenze

Introduction

Contract and Organisation – these are two key concepts which link law and the social sciences. In contract law we find the legal reconstruction of economic exchange relations while at the same time, the legal principle of contractual liberty and the elaborate rules of contract law are the prerequisite for the development of complex economic market transactions. In an analogous fashion, the invention of the legal person, the variety of legal forms for associations and corporations, the complicated legal network of organisational competences and decision procedures have both reflected the emergence of organisations in the social and economic sphere, and decisively shaped the development of the "organisational society". Yet despite these interdependencies, the formation of legal concepts in the fields of contract and organisation was in the past an autonomous process in the legal system, whatever its socio-economic premises and consequences. The definition of principles, rules and concepts was the essential concern of legal processes: of court rulings, legislative procedures and doctrinal refinement. Questions about the appropriate rules governing contract and organisation had to be addressed to the professional lawyers. This monopoly of lawyers is effectively challenged today. Institutional economics, sociology of organisation, the theory of private government, the political economy of labour relations – just to name a few – make their claims on contract and organisation, not only in terms of empirical-analytical description, but of normative prescription as well.

If lawyers take up this challenge, not just as a threat to their professional identity, but rather as a chance for intellectual enrichment and practical improvement, then they should scrutinise the potential contributions of social science thinking to legal analysis of contract and organisation. More concretely, the question becomes twofold: (I) How does social science thinking in this field change the quality of legal argumentation? What are the methodological implications if one incorporates economic and sociological models in legal doctrine? (II)

What are the substantive legal results for contract and organisation? How do legal economics and sociological jurisprudence influence legal concepts, policies and rules relating to contract and organisation?

These are precisely the questions to which we give some tentative answers in this book. In order to reflect the broad spectrum of the discussion, the book presents various competing approaches to socio-legal thinking. All, however, concentrate on these two issues. Each analysis contains a distinct model of the relationship between legal and social science thinking. The models range – to give them somewhat fashionable labels – from "legal economics" via "law and society" to "legal critical studies". At the same time, in each contribution, the model is applied to problems in contract law, organisation law, or both, with the aim of elucidating concepts, interpreting rules, or formulating policies.

1. Social Science Models in Legal Doctrine?

1.1. Two Basic Approaches

In their programmatic statements, Hans Albert and Rudolf Wiethölter set the stage for a confrontation which is repeated throughout the book: social technology through law versus lawyers' reflection on law in society, legal incrementalism versus legal fundamentalism, instrumental rationality versus reflexive rationality. Albert presents a clear-cut socio-technical interpretation of law which opens the door to the instrumental approach in the social sciences. Rejecting the analytical and the hermeneutical tradition in modern legal theory, he proposes to redefine legal doctrine as a set of propositions concerning social effects of legal norms. Social knowledge thus becomes extremely important for legal argument: "Anyone wishing to define the meaning of the law must *ipso facto* do so thinking on the effects intended by it and the order it is aimed at. Such considerations necessitate the use of nomological knowledge, for the control effects of laws and interpretations are not simple logical consequences of the statements concerned". Law, as social technology, is supposed to design institutional arrangements that channel individual interests and motivations in such a way that certain social functions are realised.

This model of rational jurisprudence is strongly contested by Wiethölter. Legal socio-technics representing nothing but a "sociological natural law" have no effect whatsoever on legal practice. This is due to the self-definition of the legal *proprium* by the law itself. According to Wiethölter, legal practice has proved to be resistant to the challenges of the social sciences, although at the same time, legal practice is intrinsically committed to respond to the challenges of social development. The way out of this paradox is legal self-reflection. "Theoretical programmes applied reflectively must here always – reconstructively – follow up developments that have led to crises and – prospectively – investigate the possible conditions for overcoming the crises". Social science models become important in this process, but in a more indirect and complicated way. It is not so much the calculation of social consequences of norms that informs legal practice and theory but the interpretations of the world offered by

"grand theories" in the social philosophical tradition, interpretations that challenge and respond to the "legal constructions" of social reality. The relationship between law and social science is, according to Wiethölter, "a relationship between autonomy and heteronomy about which, however, the law has still a co-determining role to play".

The basic tension between these two clearly defined positions is present – at least implicitly – in many (if not all) of the contributions to this volume. Some of them side with social technology, some with legal self-reflection. A third group tries to bridge the seemingly irreconcilable differences. David Trubek's contribution illustrates a possible synthesis. Dealing with the contemporary American debate in legal theory, the debate between "law and society" and "critical legal studies", he is concerned with the same basic issues of instrumental versus reflexive rationality, although the American fronts of the debate are not exactly the same as their European counterparts. Trubek proposes to infuse the empirical law and society research with critical consciousness and to ground the critical scholar's speculations upon some empirical foundation. He argues for systematic empirical analysis in order to identify properly the relation between legal constructions of social reality and the "law in action", its effects on social action in general. This seems to be a reasonable position similar to other attempts in this volume to mediate between the two extremes. Gotthold, for example, strongly criticises the normative implications of legal economics, but recommends the use of their methods in comparative studies.

Here we try neither to solve this controversy nor to find a synthesis between the antithetical positions. Instead we try a differentiating approach. Firstly, we seek to differentiate the ways in which "models" are constructed in legal doctrine, and in sociological and economic theory. This leads us to reject propositions of a simple transfer of scientific knowledge to law and to formulate the relations between law and the social sciences in a somewhat more complicated fashion. Secondly, we seek to differentiate various "levels" of legal analysis. This will allow us to spell out requirements for the collaboration of law and social sciences more clearly, defining a limited role for both instrumental and reflexive rationality. The contributions in this book show a large variety of methodological approaches to the cooperation of law and the social sciences which justifies such a differentiating explanation.

1.2. The Different Selectivity of Law and the Social Sciences

Most, if not all, of the authors in the volume agree that the relation between law and the social sciences cannot be seen as a simple transfer of "scientific" knowledge into the legal system. In particular, Gotthold points to the limited ability of scientific inquiry to assist in legal policy matters where moral questions are at stake. He thus criticises as illegitimate the imperialistic claims of social science models, especially in the "new" legal economics. Farjat, rejecting outmoded "scientism", defines scientific models, as well as legal doctrinal concepts, as competing "constructions of reality" none of which can claim superiority.

In our view, these considerations suggest that the different selectivity of law

and the social sciences be taken into account. Selectivity refers to the fact that any scientific or practice-oriented model construction has to choose a limited set of variables which are supposed to grasp the "relevant" elements of "reality". The basically different selectivity of *social science research* on the one hand and of *decision-oriented legal doctrine* on the other brings about such a difference in the selection of the elements of models, construction procedures, the securing of information, verification and criteria of certainty, that the simple transposition of sociological or economic models of the outside world into legal analyses is excluded in principle (cf. Stachowiak 1973; Luhmann 1974; Krawietz 1978). Instead, the process should be analysed as a complicated "translation process" as shown by Joerges, whose translation rules have to be designed in function of the different contextual conditions of social science on the one hand and legal doctrine on the other (Teubner 1985). This distinction makes it possible to determine how to do justice to their differing selectivities, how to change, indeed to "manipulate", social science theories, thought patterns, concepts and methods in order to make them applicable to questions of legal doctrine.

It would thus be erroneous to describe the relation between social science models and legal models as a contrast between social reality and lawyers' ideology. There is no direct access to social reality, there are only competing system models of reality (Stachowiak, 1973:97). Therefore, one has to see this as a problematic relation between legal and social models of reality, each having its own rightful claims (Farjat). There is a fundamental difference between the analytical-empirical approach in science, with its more or less severe methodological restrictions, and the social constructions of legal practice and theory, which have quite different restrictions based on their orientation toward conflict resolution (Wiethölter).

The same holds true for the dynamics of motives. The motives and value premises of legal constructions of reality (e.g. case-orientation, principle of equality, procedures of legal evidence) are different from those of scientific constructions (e.g. scientific rationality, experience orientation, scientific discourse procedures). That means we have to accept different "cognitive conditionings" (Stachowiak, 1973:97) as premises of operational processes in law and in science. In general, the differences between scientific theories and legal models refer to the selection of the model variables, the procedures of model construction, the methods of testing, the criteria of certainty and the requirements for success. For example, it is not by chance that the rules of legal evidence differ from the rules of empirical research in social sciences and that there is no equivalent in science for the legal principle of *res iudicata*.

This implies complications for the relationship between scientific theories about law, and law's own models of reality. Though some would argue to the contrary, historical accounts of social developments, economic models of legal relations or results of empirical sociological analyses are not by reason of their closer access to social reality intrinsically superior to legal conceptualisations of law in society. Of two models, the one which is structurally and materially closer to the original is not necessarily better. In particular, science is not in a position to define authoritative models of external reality. Science produces only hypo-

thetical models which can be tested in their capacity for strategic purposes. Science can serve only as stimulation not as notification (Habermas, 1976:107). In a precise sense, one cannot speak of a legal reception of social sciences. Rather, one has to see them as competing constructions of reality which allow for comparison of their relative strength.

It is possible to see this relation as a problem of power: who has the power to force his construction of reality upon others? (Farjat; Hejl, 1982:320). We, however, would prefer to see it as a problem of compatibility, of possibilities of drawing analogies and of mutual learning. Legal economics and legal sociology produce results which may either be rejected by lawyers or which may lead to profound changes in legal model construction. At best, there is a productive mutual exchange in the sense of social science "subsidies" (Luhmann, 1981:134) of legal concepts or vice versa.

The likelihood of mutual influence depends much on the congruence of the models' selectivity. Joerges raises this point when he observes that different economic theories have a differential chance of getting accepted in legal reasoning. Neo-classical competition theory and the individualism of the "new" economic analysis of law can much more easily be transformed into legal concepts and administered by the legal system than can concepts like that of workable competition. It is important to realise that this is not only a fortunate coincidence and a promising chance for interdisciplinary cooperation but also a "distortion of competition" between rival approaches. This leads to the conclusion that the transformation of theoretically grounded concepts into legal decisions must itself be made the object of interdisciplinary research. Another conclusion is that the social organisation of such a translation process is a matter beyond merely scientific interest: it becomes a matter of political concern.

The difference in selectivity has two main dimensions. One is empirical: what model variables are selected as relevant to describe social reality? The other is prospective: what social purposes are chosen to organise social knowledge? In both dimensions, the choices made by legal and social science may differ widely, and thus create problems for the translation process. Legal economics is a good example of such different choices in both the empirical and the prospective dimension. Schanze refers to the first dimension when he describes problem-prone interfaces between model and reality:

> Important limits to the economic model are in the conception of the individual wealth maximizer (who has in fact to deal with bounded rationality), in the problem of the initial assignment (or distribution of rights), and in the relative vagueness of the magic term of preferences which can be used not only to analyze, but also to justify odd ends. The price system does not always work. If it is brought to work under more complicated and more realistic model assumptions than those of complete information, free competition and costless transaction, results are frequently imprecise . . .

Other authors refer mainly to the second dimension when they contrast the concept of economic efficiency with other legal values such as distributive justice or other non-efficiency related values. (Harris and Veljanovski; Romani; Gotthold). In particular, Buxbaum is quite explicit on this point. He demonstrates striking differences between an economic and legal analysis of the same object

with the result that a legal analysis has to take more complex value considerations into account than just economic efficiency. It is very often the case that the law postulates political values to be balanced against economic values; sometimes it even postulates the primacy of political values. Buxbaum's assessment of economic theory in relation to law can easily be extended to any social science theory:

> It can be an aid to understanding, and thus to the proper formulation of good doctrine; it can also be an aid for mystification, and thus to the legitimation of good, bad or indifferent doctrine. The one thing it probably cannot do is itself to prescribe the good; but at its most useful it should assist the law-maker and the law-applier in transforming the prescribed value into the prescribed action.

2. Levels of Socio-Legal Cooperation

Our second thesis also aims at transforming the somewhat rigid alternative between social technology and legal self-reflection into a differentiated approach. The thesis is that the conditions for making use of the social sciences in the law cannot be defined in general terms, but that it is only when different levels of the process of forming the law can be separated that the various requirements which the "translation" of economic and sociological models has to meet can be specified.

A number of varying approaches towards differentiation (Luhmann, 1974; Hopt, 1975; Hoffmann-Riem, 1977), can be developed further into a *multi-dimensional model of the integration of legal and social sciences.* Within this framework requirements for interdisciplinary work can be specified. Our distinction would pitch the translation processes on two main levels and then distinguish among several sub-levels: that of legal action, as expressed both by the formulation of general legal rules and by their activation in the form of specific legal decisions or actions, and that of the construction of fundamental concepts, where highly abstract relations are established between the development of society and the development of the law.

On the first main level, law can utilise the instrumental quality of the social sciences, their descriptive, explanatory and predictive potential. It is here that we can look to see what is the capacity of social science theories to generate indications for the content of legal action. On the second level it would be the social sciences' role to offer the potential of "grand theories" for the orientation of fundamental legal concepts. It has to be kept in mind, however, that both levels influence each other in the sense that decisions about rule formation and law application will have an impact on fundamental concept construction and *vice versa.*

2.1. Guiding Legal Action

We look first, then, at the contribution of social science theories in guiding legal action. This is an appropriate perspective in which to judge the utility and interest of these contributions: it is a familiar observation, touched on here by Albert, that *legal* analysis has as an essential feature the production of applicable results. This is most obviously the case where laws, regulations or existing

judicial decisions are being analysed in the course of judicial process with a view to reaching a correct resolution of a dispute between litigating parties, but the same is true of most practical legal analysis, whether in the context of extra-judicial dispute settlement, dispute avoidance, or the framing of legal rules to govern a relationship between parties. The precise nature and object of the analysis will vary according to the circumstances and to the role of the lawyer involved. The judge will be concerned to reach a just decision which is in accordance with a correct interpretation of the relevant texts. In the context of a settlement negotiation, the professional legal adviser will be looking for texts and interpretations most favourable to the negotiating claims of his client; in the context of the design of legal relationships, he will be involved in the straightforward application of basic rules and the avoidance of pitfalls and ambiguities previously disclosed by litigation, practice, or doctrine. In all these cases, however, specific desired or undesired results constantly structure and guide the analysis.

Less obviously, perhaps, the same preoccupation with concrete results also guides and structures legal analysis connected with legislative activity. The legislator may normally be viewed by the lawyer as engaged upon the task of collective resolution of indefinite numbers of hypothetical future "cases", in a sense different from that which would, or might, obtain without his intervention. This is achieved through the introduction of a new and appropriately designed rule into the corpus which lawyers will be analysing in the course of the different individual legal activities (litigation, negotiations etc.) above described. It is worth stressing, perhaps, that we are not suggesting that legislation is necessarily designed with an eye to the litigation context: the aim may rather be one of providing facilities for more economical or productive private legal arrangements. In laying down new rules of conduct, or reshaping or reassigning rights or duties, the legislator's aim will be to avoid rather than foster litigation, producing a rule which is sufficiently clear, and which harmonises sufficiently well with the existing rules of the legal system, existing practice of its professionals and (perhaps) with existing perceptions of what is just or economically or socially acceptable to its addressees, to banish litigation about its interpretation to the extremes of its intended spectrum of application. To achieve this the legislator must be armed with the same kind of legal analysis – in terms of accurate interpretation of the relevant existing rules of the legal system, and accurate appreciation of their likely practical application – as must the individual practitioner, albeit on a wider scale.

For the normal purposes of the legislator, however, this kind of harmony and clarity, and the legal analysis that permits their attainment, are not enough. The legislator's interest in a changed result in a given range of cases may be purely qualitative, in the sense that his aim is confined to securing that as often as the circumstances envisaged in the new law arise, the new rule is applied or the new legal facilities offered are considered. His interest may also – and perhaps this is now the normal case, given today's penchant and possibilities for the statistical measurement of welfare – be quantitative in nature: that is to say, the motivations of the legislation will include some conception of the quantitative impor-

tance, in economic or social terms, of the range of cases addressed, and of the size of the aggregate change in the resolution of this range of cases that it is desirable to bring about. In this latter case, the legislation may appear simply as the instrument (or as one of several instruments) for the achievement of the relevant change in economic or social aggregates. Where the concerns are qualitative, and *a fortiori* where they are quantitative also, the analytical apparatus of the legislator needs to include some procedure for assessing whether the application of the new rule may not be vitiated, and if so in what measure, by irrelevance or by adaptive behaviour on the part of those to whom it is addressed. Irrelevance may occur because the legislator's understanding of the relevant social or economic circumstances is weak, or because the legislation is based on a false theory of social or economic action. Adaptive behaviour may involve such strategies as avoidance of the impact of the legislative provisions or the passing on of their benefits or burdens in unexpected directions. Traditional legal analysis of the interpretative and experimental type can say nothing about questions of relevance and provide only a small part of the solution to the problem of adaptive behaviour: it may indicate what scope the whole body of law, including the new rule, offers for adaptive behaviour, but by itself this is unlikely to be useful information. Unless the regime is truly draconian (as in Western societies is normally now only the case with tax laws) such scope will be virtually boundless in legal terms, being limited rather by economic and social factors which must be evaluated in order to identify the legal rules (if any) which will bear on the issue; and the legal analysis cannot in any event indicate how far the legal limits of adaptive behaviour, if constraining, will in fact be respected.

Here it is worth remarking that the needs of judge and legislator in this respect are not as different as might at first sight appear. Even under the appearance of deciding single cases, the judge may, of course, be acting as legislator. This is patent where the judge is entrusted with functions of legislative review, on a constitutional basis, as in the United States (Buxbaum), or on some other basis, such as that of international treaty, as in the case of the European Communities. It is less obvious, but no less true, where individual decisions are endowed with some determining authority over future cases under some version of the doctrine of *stare decisis*. Whether such judges will feel any consciousness of the inadequacy of traditional legal analysis for the discharge of their decision-making functions will depend, perhaps, on whether they view their legislative role as developmental or purely declaratory in nature. Whenever the judge needs more than pure legal analysis, so too do those lawyers whose activities involve the understanding of judicial decisions.

Even leaving aside the judge-as-legislator, problems of the actual effects of individual judicial decisions may arise. Parties may refuse, or be unable, to abide by the terms of decisions addressed to them, or may use the decision simply as a basis for further negotiations. Again, this step, between formal decision and effective result, can hardly be traced out through legal analysis alone, but demands resort to other techniques, which parties, or their advisers, will need to have mastered.

The inadequacy of traditional legal analysis to meet the lawyer's needs for

understanding the economic and social fabric on which the law operates means that any legal system conceived of by its operators as being capable of change and development must, for the purposes of such development, have recourse to other types of analysis, such as those furnished by the social sciences which are the subject of this volume.

Acceptance of this requirement does not entail accepting that specific bodies of social science knowledge may be drawn upon by lawyers so as to produce "correct" results. One striking feature of the papers in this volume is that while most of them share the legal professional's interest in concrete results, the general tendency of this majority of papers is to warn against facile borrowings from social and economic theory, by drawing attention to restrictive assumption of such theory (Schanze), to their defective elaboration or application (Gotthold), to their inconsistency and consequent inability to suggest practical solutions (Joerges), to their capacity for "mystification" and concealment of real decisional premises (Buxbaum), or to the failure of results to conform to theory predictions (Teubner). If we put to one side the papers of the economists Romani and Schmid, we find that optimism about learning lessons for application in legal analysis is, to say the least, restrained. Only in the paper of Harris and Veljanovski do we find anything like an open espousal of a specific body of normative theory – in this case, welfare economics – as a guide to legal decision-making. The papers of Schanze and Daintith may also be characterised in terms of qualified optimism, rather than qualified pessimism, about the utility of economic theory. In using these terms, however, we are not so much identifying the intellectual propensities of the authors as the level and direction of the critique their papers contain. The optimists implicitly or explicitly criticise traditional legal analysis, indicating how decision-making may be improved by the application of social science knowledge; the pessimists assume that such knowledge will be applied, and address their critique to its selection and application.

With these caveats in mind, we can ask what these papers contribute to our understanding of the results of legal actions and decisions, whether on the part of legislators, judges or parties. The answer can best be ordered by reference to the extent to which, and the level at which, the various contributions aspire to indicate desirable results to actors in the legal system. For this purpose three broad approaches may be distinguished, each corresponding roughly to a different function of social science theory. The approaches overlap and we shall see that most of the relevant contributions contain elements of all three, but the distinctions are nonetheless valuable for the purposes of the translation process already described.

The first approach involves the descriptive and explanatory use of theory to produce empirical analyses of legally-regulated sectors of social or economic life. The German term *Normbereichsanalysen* ("norm area analyses", Müller, 1966) catches the essence of the enterprise. The aim of such analyses is to furnish empirically tested or testable theoretical statements about social structures, functions and developmental tendencies in such sectors and thus to clarify inter-relations between legal norms and social structures. In Selznick's language (1966,

1969), it is an institutional analysis which relates the "opportunity structure" of a social field to the "conceptual readiness" of the legal norms therein. The exponent of this approach thus holds back from offering explicit statements either of likely or of desirable legal action within the relevant field, making no assumptions about the values or objectives of legal actors. Implicit policy recommendations, based on the degree of fit disclosed between the regulated social sector and prevailing legal arrangements, may however often be discernible.

The second approach, that of legal impact analysis (*Folgenanalyse*, e.g. Rottleuthner, 1979), addresses itself explicitly to legal and social results. It is essentially socio-technical in character, in that it assumes that legal rules are designed to serve social and economic objectives and compares the intended effects of the rules with actual consequences and unintended side effects. The analyst may go on to make suggestions for the reinterpretation or reformulation of legal rules in the light of this demonstration, but does not question the objectives which the law sets out to serve. Here the translation process from social science to legal thinking is relatively easy, in that impact analysis works with the same assumptions as legal analysis but goes further: while the practitioner of the traditional legal approach would be content to interpret legal norms in the light of their purpose, the impact analyist explicitly seeks the social and economic consequences of legal arrangements which should, in principle, be open to empirical testing. In offering theoretically grounded explanations for discrepancies between legal purposes and actual or projected results, impact analysis utilises both the explanatory and predictive capacities of social and economic theory, offering employment for what Friedmann (1953) has termed "positive" as opposed to normative theory. Such theory may nonetheless incorporate powerful model assumptions: legal economics in fact tends to analyse legal institutions as economic incentive structures and employs the assumption of rational wealth maximisation in examining their impact on social behaviour. In contrast, sociological analyses of social functions and effects of legal norms rely predominantly on empirical research methods guided by some theoretical constructs like those developed in organisation theory, exchange theory etc. The difference, however, is only one of degree. Sociologists may make use of economic models, and economists of sociological research.

A third approach which it is helpful to distinguish for the purpose of characterising the contributions here is that of policy analysis (*Politikanalysen*, Hart and Joerges, 1980). Such analyses respond to or develop social policy conceptions and construct doctrinal statements from them. Unlike impact analyses, they are not primarily concerned with the economic and social consequences of specific legal arrangements, but rather analyse prescriptions of social and economic theory and attempt to draw out their legal implications. This kind of analysis is used when lawyers scrutinise the implications for law of competing theories, for example, theories of democracy. What are the institutional consequences of the elitist-pluralist concept of organisational democracy? How does law respond to a more participatory approach? Can a more complex concept of organisational democracy, grounded in systems theory, be translated into legal

arrangements? This policy approach is used in a particularly highly developed form where legal concepts of competition law are influenced by the discussion of economic policy conceptions (e.g. Moeschel, 1975; Reich 1977), or where legal reform programmes are developed through the efficiency criteria of welfare economics (e.g. Posner, 1977).

As already indicated, these approaches are not tidy boxes within which to fit the relevant contributions here, particularly since only some of the papers set out to be examples of such approaches or combinations of them: others aim rather to survey or criticise such approaches over the whole or parts of one of our chosen fields of study. Let us try to summarise our view of the significance of these contributions, in terms of their approach and indications for substantive results.

In the sphere of contract, it is Romani on the one hand, and Harris and Veljanovski on the other, who tackle the fundamental economic issues, explaining how the legal enforceability of contracts (in particular, wholly executory contracts) promotes voluntary exchange productive of economic welfare (Romani), and how the existence of a body of contract law facilitates and simplifies the task of parties in making agreements. Both papers accept the argument that contract should function so as to offer parties the correct incentives to efficient behaviour in contractual formation, performance and non-performance. While Romani adopts what may be termed an orthodox stance, defending on economic grounds the enforceability of executory agreements and the non-enforceability of gratuitous promises, Harris and Veljanovski are more critical particularly of the literature which offers an economic concept of "efficient" breach of contract. They argue that this discussion neglects the external effect of general loss of confidence in contractual formulation of promises, and the fact that most contractual disputes are settled out of court, a factor which gives advantages to the breaching party which the law should take into account. They suggest that the legislative development of contract law in the United Kingdom in recent years has neglected this factor, introducing explicit judicial discretions which, while they may assist judges to do justice in the relatively few cases actually brought before them, add a further element of uncertainty to the many already existing, all of which work in favour of the breaching party in out-of-court negotiations. Specific alterations to contract law are suggested as a means of offsetting this imbalance, though at this point it becomes unclear whether the argument has moved from efficiency to distributional grounds.

The approach to the use of economic theory that these papers describe is essentially that of impact analysis, strongly tinged with normative elements. It is analysis of a rather specialised kind: with the exception of Harris and Veljanovski's discussion of out-of-court settlements, most of the work described involves little empirical investigation, but rather postulates consequences of legal rules and institutions – ranging from the very concept of enforceable contract to specific contractual remedies – by deduction from economic models of human behaviour. The comparison it is concerned to make is not so much between these consequences and the objectives of such rules and institutions – indeed what meaning is there in talking of the "objectives" of such basic common law rules? – as between the consequences and the results indicated by economic theory,

employing these same models, as "efficient". One can see that the distance in such cases between a positive and a normative economic analysis of legal rules is small indeed.

In contrast, when judges or legislators set out to make specific changes in contract law with express policy objectives in view, legal impact analysis can occupy itself, more conventionally, with the confronting of intended with actual, or theory-predicted, results. This is what Harris and Veljanovski do in their section on the "out-of-court" aspect of contractual dispute resolution, as well as in a brief reference to contracting around the law, a theme taken up, in the same area of landlord and tenant law, by Schmid in a case-study of Michigan housing legislation. His study shows how landlords adapt their contracting behaviour to legislation protective of tenants. Experience and intuition would probably alert practising lawyers (though maybe not legislators) to this possibility in any event: what Schmid adds is an explanation of this adaptive capacity, and indications for its measurement, based on general economic concepts such as information costs. This, he argues, should make it easier for legislators to design rules which will be hard to circumvent and thus more likely to achieve their objective. Here an impact analysis is offered as an application of a general theory which will predict the impact and substantive consequences of alternative allocations of property rights. For Schmid, this is a better tool in the hands of legislators than reliance on the process of learning through experience which eventually brought the Michigan legislature to the same result.

Joerges might disagree. His paper on quality control law shows his scepticism about the capacity of economic theory to help in finding solutions to specific problems: such theories may be associated with given bodies of law, such as competition law, or consumer protection regulations, but when practical problems arise for resolution the relevant legal principles may themselves be in conflict. His example of car sales agreements in Germany shows how the protection of the consumer's interest depends not only on the legal regulation of the relationship between consumer and dealer but also on that between dealer and manufacturer and that the law offers possibly competing frameworks for determining the effective content of such regulation: competition law (restraints on vertical restrictions of competition); self-regulation (recognition of inter-organisation agreements); or general principles of contract law ("fairness" in manufacturer/dealer relationships). In thus stressing the complexity of legal decision-making and the partial character of economic as of other forms of social science analysis, Joerges indicates that all types of legal actors confront choices in the making, application or use of law, for whose guidance specific experience of the results of previous decisions is as important as predictions based on social theory. "Practice 'discovers', under the pressure of its needs to make decisions, paths to solutions where theory has got stuck in the search for concepts." He proposes a reformulation of the whole policy approach, which should no longer be seen as an exercise in pure interdisciplinary analysis, but as a socio-political process relating action and knowledge in the real world.

Returning for a moment to Schmid's paper, we may also see it as exemplifying the kind of institutional analysis which constitutes the first of our approaches.

His key concept is the "situation." Analysis of the "situation" (here, landlord-tenant relationships in a university town) reveals the type of social interdependence there existing and hence allows us to choose between legal alternatives: "It is the inherent features of goods which influence how one person's acts can potentially affect another. The instrumentality of law depends on the source of the interdependence." Schmid develops a typology of different "situations," which he has presented in more elaborate form elsewhere (Schmid, 1978), and here, as already noted, shows how it may serve as the basis for an impact analysis of a particular legislative initiative.

Another situational analysis is Daintith's study of long term contracts in the iron ore market. Daintith analyses the incidence and performance of these contracts in a concrete market and uses this material to discuss theoretical propositions by the economist Williamson and the sociologist Macaulay: what are the incentives for choosing long term contracts, instead of transitory contracts on the one side and organisational solutions (the purchase of ore mines by steel companies) on the other? What is the actual role of formal contract law in relation to economic practice? How did the parties adapt their legal regime to the abrupt changes in the market? While the primary aim of the paper is to carry out empirical tests of descriptive theories of contractual design and performance, it may also, by an inversion of perspective, be seen as offering an impact analysis. Unlike the studies so far discussed, the subject here is not the general (State) law relating to contracts, but the contract rules these parties have made for themselves, whose effects are examined at the level both of individual party behaviour and at that of the market as a whole.

Our contributors in the field of the law relating to organisations show considerable ambivalence in regard to the concrete results following from or to be expected of social science theory. The more specific the indications given by a contributor of points at which social science theories have influenced legal development, the more mistrustful he appears to be of their purposeful use to indicate legal results. Farjat, who like Harris and Veljanovski frames his contribution as a critical survey, devotes its first part to a number of examples of how economic science has reshaped the law relating to the enterprise: the redistribution of rights within it, the treatment of creditors and workers on bankruptcy, its competitive relationships with other firms. Yet in the "critical balance sheet" that follows he, like Joerges, stresses the competitive constructions of reality offered by different social science theories, and warns the lawyer against over-ready acceptance of any of them. It is still the lawyer (or law-maker) who is confronted with the necessity of choice, and theory cannot dictate results.

Farjat's point about the legitimising role of economic theory for legal development is driven home by Buxbaum in his policy analysis of U.S. Supreme Court decisions on corporation law. Using the rather less kindly epithet of "mystification" for the role of theory, Buxbaum analyses in detail the normative implications of three economic theories relevant to company law under federalism: the efficient capital market and corporate control market hypotheses, and the applications to economic federalism of public choice and public finance theory. He shows both that these bodies of theory have been applied by the Supreme

Court in rulings on State takeover statutes, and that their invocation may disguise shifts in the position of the Court on issues of division of legislative competence which are not, in his view, capable of determination by reference only to economic criteria.

The other four contributors on organisation law all tackle the theme of the "constitution of the firm", that is, the legal organisation of decision competences and income rights in the economic firm. All four are from West Germany, and the issue of co-determination either is their subject (as with Gotthold and Teubner), or looms large in their treatment of more general issues (as with Krause and Schanze). Albert, too uses this example to illustrate his general methodological point: his social technology programme includes sociological analyses which would elicit the effects of the regulations on the control of what happens in society and on the life situations of those concerned, as well as economic analyses which examine the efficiency of the institutional incentive structure. This combined socio-economic research programme avoids many of the shortcomings which one can find in purely economic or purely sociological analyses.

The pair of contributions by Schanze and Krause offer interesting contrasts. Both set out to offer general analyses of the firm. Both are generally optimistic about the applicability of economic theory, including its normative or policy applications. Schanze, the lawyer, seems the more cautious of the two. He argues both that economic analysis in general offers us "rules of prudence" in our evaluation of legal phenomena and, more specifically, that the theory of transaction costs suggests certain normative desiderata of an efficient legal system – equilibrium in the variety and standardisation of institutions, clear definitions of entitlements in decision-making units, a bias in institutional arrangements towards the inclusion of total costs of transacting (internalisation). In a section devoted to what he terms "extrinsic analysis" he goes on to use the first of these ideas as a means of legitimising the German co-determination law, arguing that it opens up new choices in the market for organisational forms for business activity. Proceeding, however, to an "intrinsic" analysis of the structure of the firm, Schanze offers only "a concept of positive inquiry" which might demonstrate the explanatory potential of economic analysis in the form of a refined version of property right theory. Once complete, however, Schanze's analysis could clearly have normative implications, at least in suggesting appropriate institutional designs to cater for a variety of enterprise needs. One might guess, however, that his preference would be to leave it to the market to test the appropriateness of the institutional structures proposed rather than to make forced marriages by legislation.

Krause, while he shares some of the same starting points – in particular, a reliance on property right and transactions costs theory – has a much more explicitly normative approach. Krause accepts efficiency as the primary goal for corporate organisation, operationalising it as profit-seeking in the service of consumer interests, and considers how this may be attained using an approach which, like Schanze's, is "neutral" as between different kinds of inputs into the organisation – and in particular, as between physical and human capital. This

leads him to enunciate a series of normative propositions about which property right holders should be treated as "members" of organisations, about types of membership and the control rights that should attach to memberships of different types. Co-determination, seen as a "dualistic" approach because it recognises different kinds of interests in the firm as opposed to the single interest – the resources-based property right – recognised by Krause (hence his "monist" approach), is criticised as inefficient: among other things, it is likely to prejudice consumer interests and to absorb excessive productive energy in favour of interest mediation or social peace. Yet while the style is prescriptive, Krause insists that this is just a theoretical foundation and that he can give no guidelines on practical implementation, thus apparently leaving the way open for the interposition of non-economic values between theoretical prescription and practical results.

The treatments of co-determination in the contributions of Gotthold and Teubner shift the argument away from efficiency considerations towards questions about the distribution of power within the firm (Gotthold) and to its socio-political significance (Teubner). En route, however, these papers offer further insights about the uses lawyers can make of economic and social theory, about contrasts within and between the approaches we have outlined. Gotthold devotes the bulk of his paper to a sustained attack on the unrefined property right approach of Furubotn (1981): he raises objections as to its empirical foundation, its tautological character, and its selection of variables, and doubts whether it can be fruitfully used as a basis for a legal impact analysis of the co-determination phenomenon. At the same time, however, he suggests at one point that co-determination *can* be supported by reference to efficiency considerations, and is ready to draw on the descriptive resources of economic theory (adapting, as did Schanze, a "contractual nexus" model of the firm) to lay the basis for dicussion of distributive aspects of the topic.

Teubner, finally, sees the chief significance of co-determination in its functioning as an element of a neo-corporatist scheme of integration of a society increasingly differentiated along functional lines. After discussing empirical findings which suggest that co-determination has not achieved its intended effects of increasing individual worker satisfaction, and arguing, from theoretical premises and empirical evidence, that it has in fact redistributed power and provided more effective conflict-resolution procedures at enterprise level, he goes on to claim that at the societal level, co-determination performs a vital function of re-integrating political and economic systems, which it links – at the level of the firm – without subordinating either one to the other. This non-subordination is vouched by the fact that, in Teubner's view, co-determination contradicts both the political conception of class conflict and the economic rationality of the market. For him the question then becomes one of how the law may be formulated so as to exploit to the full this integrative potential. Ultimately, Teubner shows the same scepticism as do Farjat and Joerges about the capacity of established bodies of economic, social and political theory to furnish, of themselves, blueprints for adequate legal rules and organisation: but while Farjat is content to register this fact, and Joerges puts his faith in the

capacity of lawyers to learn by experience in combining and balancing theoretical lessons, Teubner is looking for new theory which can itself guide this selection process.

2.2. Constructing Legal Concepts

We move now to the second level on which a process of translation between economic and sociological models on the one hand, and legal models on the other, needs to be conducted: that of the construction of fundamental concepts. Here we may distinguish two dimensions: basic doctrinal concepts of contract and organisation; and concepts of legal rationality.

Basic legal concepts of contract and organisation cannot, according to Wiethölter, be formulated without at least an implicit recourse to "grand theory". For him, the formation of legal concepts is inevitably committed to fundamental issues of historical and social philosophy, in models of the social world. "Using them, ideas can be related to interests in such a way that by *comparison* (with other models, with past reality, with limits of possibility, with the present as a future past or as a past future) historical and social consciousness can be brought into "constitution" no less than can social reality and the legal forms that define it and are defined by it." Wiethölter makes a rough distinction between different grand theory approaches which can be found – as the foundation of different concepts of contract and organisation – throughout this book: politico-social (substantive) programmes that challenge the developmental quality of law (e.g. Trubek), functionalist (systems theory) programmes that judge concepts by reference to their social adequacy (e.g. Teubner) and methodological programmes that test for scientific rationality (e.g. Albert).

Trubek represents the first tradition. Critical legal studies – in his analysis – interpret legal concepts as embedded in a "defensible scheme of human association" (Unger, 1983:565), in a coherent view about the basic relations between persons and the nature of society. This school of thought focusses on the structure of legal ideas, seeking to identify the deep principles of meaning that lie behind them and to relate these principles to social action and order. At the same time it offers a critical perspective. It identifies the legal system in capitalist societies as reification, presenting as essential, necessary and objective what is contingent, arbitrary and subjective. Capitalist legal systems are identified as hegemonic, that is they serve to legitimate interests of the dominant class alone. In this perspective, any legal operation can be analysed in terms of being part of a total world-construction and criticised in terms of its failure to keep the promise of universality, equality and freedom.

In contrast to these claims of human emancipation, the critical standard of a functionalist system analysis is "social adequacy" of legal concepts. Basic legal concepts like contract and organisation are seen as the result of a connected evolution of law and other social subsystems. Concepts are socially adequate if they satisfactorily reconcile the internal requirements of legal consistency with the external social demands on the legal system. (Luhmann, 1974; 1981:388). This school of thought analyses the function of legal concepts and institutions in relation to various system references. Teubner's paper is an example since it

analyses the function of co-determination through law on different system levels: interaction, organisation, social subsystems, society in general. The theory of functional differentiation serves as a background to interpret the meaning of legal institutions, illuminating, in the case of co-determination its role as a "counter-institution" to the prevailing principle of economic rationality.

Finally, a scientific reformulation of dogmatic concepts is the goal of methodological programmes like that developed by Albert. Albert proposes to give up natural law versions as well as hermeneutical interpretations of fundamental legal institutions – like contract and institution – and to define them as a set of incentive devices the effects of which can be studied by the social sciences. Thus, a pervasive socio-technical conception of law would fundamentally alter the normative meaning of legal concepts in the direction of an instrumentalist view of the social world.

While Wiethölter stresses the embedding of legal concepts in models of social order, Farjat demonstrates the remarkable resistance to change shown by legal concepts once accepted as part of the lawyer's toolkit. The fact that specific changes to French company and commercial law are today, as he shows, consistently inspired and shaped by economic concepts of the firm or enterprise, has not led in France – or for that matter elsewhere – to the displacement of the legal concept of the company or corporation by a new legal concept of the firm. Rather, the old concept continues to be used, albeit with adjustments and extensions which permit its use in a way responsive to the changing economic and social demands being made on law. There may come a point where these adaptations are so profound that the original concept becomes a mere fiction, and can be sloughed off to reveal the new, coherent, concept that lies beneath; but the point is unlikely to be quickly reached.

In the case of the firm, a further restraint on a change of concept is suggested by Farjat's point that the economist's concept of the firm depends heavily in its turn on the legal concept of artificial personality – legal autonomy is what economists regard as the surest criterion of the firm. We might, indeed, be tempted to generalise on this insight and to see legal concepts as basic building blocks at least for economic theory. Support for this idea can be found in the way some economists find it helpful to decompose the firm into a set of contracts (Fama, 1980, Alchian and Demsetz, 1972), thus drawing on one legal concept – contract – even as they attempt to dispense with another – incorporation. The reservations to and refinements of this approach suggested by Gotthold and Schanze leave untouched this legal foundation. Further reflection on the papers in this volume will show that this is not a one-way process, either as between contract and organisation or as between legal concepts and economic theory. Fields of law may be reconceptualised in the light of economic or social theory, and to understand contracts we may need to theorise from organisational concepts like hierarchical authority (Macneil 1980; Williamson 1979, cf. Daintith). It does, however, appear that were we to invert the general question of this volume, and to ask what contributions legal theory can make to economic and social analysis, we might light first on the utility of basic legal concepts as

shorthand descriptions of key social and economic relationships. Here again, it is important to remember that the process is one of translation, not of simple transposition (Aubert 1983:98). While the lawyer needs complex concepts, capable of practical application in a wide variety of familiar and unfamiliar circumstances, the economist or social theorist is interested in the core properties of such concepts, or perhaps in one only of such properties.

However, the very fact that lawyers have to shape their concepts in situations of practical decision-making furnishes them with a specific link with social reality
which makes them appealing to social scientists. There are only a few social scientists in the field of contract and organisation who explicitly use legal conceptualisations in building theory (Selznick, 1969; Coleman 1974, 1982:69; Vanberg 1982:105). They are all aware, however, of the specific potential legal analysis can offer to social science analysis. Since the law has to deal with the factually emerging problems of social organisation, since it has to offer models of conflict resolution and for human cooperation, one can expect that legal concepts reflect typical structural problems of social reality. The problem-oriented case approach of lawyers to life offers them specific aspects of social reality which are not open in the same way to the theorising or fact-gathering social scientist. In this sense legal concepts of contract have recently been used to enrich exchange theory in the social sciences (Lempert, 1966), the concept of the legal person has been exploited for theories of collective action (Coleman, 1974, 1982, 1985) and legal distinctions in company law have aided in designing a sociological theory of "resource pooling" (Vanberg, 1982).

The final dimension of socio-legal cooperation concerns *legal rationality* – a concept which has been developed to describe the unity of internal structures of law, its external legitimation and its social functions. Drawing on Max Weber's famous analysis of formal rationality (Weber 1978), it has been proposed elsewhere that we distinguish three types of legal rationality: formal, instrumental and reflexive rationality (Teubner, 1983, 1985). To give a brief definition: formal rationality of law refers to setting a legal framework for autonomous social and economic action; instrumental rationality refers to socio-technology through legal norms; reflexive rationality refers to legal facilitation of discursive communication. In this volume, one can find many references to legal rationality, some explicit, some only implicit.

A large part of the contributions to this volume deal with instrumental rationality of law. In one form or another, they more or less follow the socio-technological approach to law which is programmatically circumscribed by Albert. Law is analysed as a device of social guidance which can be instrumentalised by political action to reach political goals. This is true for the legal economics describing legal norms as incentives for economic action, as well as for politically oriented approaches to law stressing more strongly the aspect of political purposes and goal conflicts.

Some elements of reflexive rationality can be found in the contributions by Trubek, Joerges and Teubner. To different degrees they stress the role of legal norms in facilitating processes of social discourse. However, there are remarkable differences among them. Joerges and Teubner have as a common starting

point the problems instrumental law encounters in its efforts to regulate social life. Teubner argues for a retreat to a position where the law does not intervene directly by means of substantive regulation of behaviour, but relies on indirect means of control, as an internal stimulation of organisational self-reflection. In this sense, the law regulating the decision processs of the large organisation, sets rules for social discourse processes in which interests of different actors are weighed. Joerges, in contrast, focusses on the "reflexive" potential of the legal decision-making process as such. Since the social sciences have only a limited capacity to guide regulatory law, lawyers look to different sources of information. In this process a social co-operation emerges which Joerges calls "practice as a discovery process". The pressing legal and political problem becomes to organise this discovery process in such a way that claims to rationality can be fulfilled. In Trubek's analysis, a fundamental critique of legal concepts is supposed to set free the emancipatory potential of "reflection and a valid source of knowledge". Critical legal studies assume "that if the contradictions are uncovered, the "incoherences" demonstrated and the denied material brought to light, then the society can be transformed."

Finally, in a different fashion, the concept of reflexive rationality is elaborated by Wiethölter who opts for "legal reflection" in a context of theory of science, sociology of knowledge and history of science: "This reference triangle is mutually related: the social theory question of social action, taking into account the subject and object positions of (not solely academic) actors who all at the same time have their histories; the question from the theory of science as to the preconditions and effects of this work of discovery and interpretation, codetermined by both history and society; and the question from historical theory as to the possible meaning, possible goals, possible progress of social and scholarly action".

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II.
General Framework