ISSN 0281-2584

tidskrift för
RÄTTS SOCIOLOGI

VOL 6 1989 NR 1/2

REDAKTÖR
Antoinette Hetzler

ANSVARIG UTGIVARE
Per Stjernquist

REDAKTIONSSEKRETERARE
Kjell E. Eriksson

ADRESS
Bredgatan 4, S-222 21 Lund. Tel 046-10 88 10

PRENUMERATION
Pris per volym om fyra häften; för enskilda SEK 100:-,
för institutioner, bibliotek etc SEK 140:-. Inbetalas på postgiro
6 96 88-0, Tidskrift för rättssociologi

LÖSNUMMER
SEK 40:- inkl. moms (dubbelnummer SEK 70:-)

ANNONSERING
Annonspriser meddelas av redaktionssekreteraren,
tel 046-10 88 10

PRODUKTION
Produktion Infografen Desktop, Lund
Tryck Wallin & Dalholm Boktryckeri AB, Lund 1989

TIDSKRIFTEN UTGES MED STÖD FRÅN
HUMANISTISK-SAMHÄLLSVETENSKAPLIGA FORSKNINGSRÅDET

TIDSKRIFT FÖR RÄTTSSOCIOLOGI Volym 6, 1989

REDAKTÖR

Antoinette Hetzler

Ansvarig utgivare Per Stjernquist
Adress Bredgatan 4, S-222 21 Lund
Tel. 046-10 88 10
Produktion Infografen Desktop
Tryck Wallin & Dalholm Boktryckeri AB, Lund 1989

Tidskriften utges med stöd från Humanistisk-Samhällsvetenskapliga Forskningsrådet
ISSN 0281-2584

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Innehåll

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Inledning

Vi lever i en tid av stora och omskakande förändringar. I Västeuropa försvagas nationalstaten genom tillkomsten av överstatliga konventioner och förbund. Vi är alla ögonvittnen till den dramatiska utvecklingen i Öststaterna, med historiska förändringar som väl ingen trodde var möjliga för bara tio år sedan.

På hemmaplan är dramatiken mindre påtaglig, som vanligt, men i det tysta pågår ett omfattande förändringsarbete som på sikt tycks syfta mot en omdaning av rättssystemet på förvaltningsrättens område. Samtidigt har folkhälsan, inte minst, men inte heller enbart, i ljuset av alarmrapporter om ökande sjukskrivning och kostnader för sjuk- och arbetsskadeförsäkringarna, blivit ett centralt mål för riktade insatser på bl a forskningens område.

Att rättssociologer på alla dessa fronter står högst upp på barrikaderna – iakttar, undersöker, försöker förstå och förmedlar insikterna till alla som vill och bör lyssna – det är inget att förvånas över. Lika naturligt är det att *Tidskrift för rättssociologi* i ett och samma nummer kan täcka in de olika skeendena och utvecklingstendenserna.

Vissa saker tycks emellertid aldrig förändras, och detta är inte minst sant när det gäller *Tidskrift för rättssociologi*. Priset, t ex, är oförändrat; tyvärr gäller det också periodiciteten. Årets första nummer kommer sålunda ut i november, vilket vi livligt beklagar. Och

vi arbetar med att komma ikapp – som vanligt. I väntan på att det ska bli verklighet kan vi i alla fall presentera en fullmatad och spännande utgåva av tidskriften.

Den franske sociologen Yves Dezalay öppnar numret med en bred exposé över de senaste årens utveckling på den internationella affärs- och skattejuridikens område. Mera precist är Dezalay intresserad av juristprofessionens läge i en tilltagande internationalisering av kapitalet och, i samband därmed, olika finansiella serviceverksamheter, samtidigt som det magiska årtalet 1992 närmar sig och "Europas förenta stater" börjar ta form.

Med grund i Bourdieus sociologiska teorier tar Dezalay ett nytt och fräscht grepp om en klassisk sociologisk forskningsinriktning, professionssociologin. Med en övergripande metafor lånad från militärstrategisk teori följer han de senaste årens "kamp" mellan affärs- och skattejurister å en sidan, och å den andra de yrkesgrupper som gjort dem rangen stridig inom finansservicesektorn: finanskonsulter, revisorer, bankekonomer. De senare grupperna håller för närvarande på att kolonisera ett Europa som plötsligt blivit en högintressant finansmarknad; de är välorganiserade i stora företagsgrupper med huvudkontor på Wall Street och med årtiondens erfarenhet av stora företagsfusioner och offensiva finansiella strategier.

De europeiska juristerna är tagna på sängen – i Storbritannien, i Tyskland, i Frankrike. Riktigt illa tycks det vara just i Dezalays hemland, Frankrike, där han förutspår en mycket mörk framtid för den traditionellt konservativa juristkåren. Kampen om att få sälja konsulttjänster till de multinationella företagsjättarna är i praktiken en strid om miljarddollarkontrakt, men i det långa perspektivet är det företags- och skattejuristernas fortsatta existens som profession som står på spel. Dezalays artikel är vetenskapligt nydanande, samtidigt som den är ett stycke spännande och god undersökande journalistik.

Bo Carlssons artikel kan ses som en ovanligt sansad kommentar till den senaste tidens alltmer frenetiska angrepp på det sociala skyddsnätet, i synnerhet de hårda utfallen i Dagens Nyheter mot förtidspensioneringen. Mot kraven på social nedrustning ställer han de ofta berättigade kraven på effektivisering och förbättring av socialförsäkringssystemet. Ett aktuellt förslag i det sammanhanget går ut på att medel ska överföras från sjuk- och arbetsskadeförsäkringen till rehabiliteringssidan.

För att få styrsel på denna i stora delar förvirrade och av okunnighet präglade debatt, analyserar Carlsson förtidspensioneringens roll och funktion utifrån två skilda perspektiv: dels som en systemrationell aktivitet från försäkringskassornas sida – där förtida pensionering är en naturlig fortsättning på ett sjukpenningärende när arbetsoförmågan blivit bestående, eller där den används som ett arbetsmarknadspolitiskt instrument, dels som en individorienterad åtgärd – där förtidspensionering subjektivt upplevs som en förbättring av livskvalitet, förstärkt social trygghet och en betoning av andra värden.

Carlsson visar att antalet nybeviljade pensioner varje år, vars storlek väckt sådan oro på senare tid, rymmer såväl pensionering av arbetsmarknadsskäl och sjukbidrag som är tidsbestämda och förväntas kunna upphöra i samband med arbetsåtergång, som halv förtidspension som möjligen innebär lönearbete på halvtid, och hel förtidspension. Han konstaterar vidare att frågan om huruvida förtidspension är av godo eller av ondo till stor del beror på rådande konjunktur när frågan ställs.

Utvecklingen i Polen under 80-talet präglas av två förhållanden. Dels har den ideologiska kampen böljat fram och tillbaka mellan Solidaritets demokratiska frihetskrav och den socialistiska regimens stelbenta diktatur. Dels har den polska ekonomin gradvis försämrats, så att landet idag i västeuropeiska bedömares ögon nästan fått status som u-land.

Dessa två förhållanden manifesteras i införandet av kraftiga restriktioner för den inhemska konsumtionen i början av 80-talet. I sin artikel om rättvisa i ransoneringstider tar sig de polska rättssociologerna Malgorzata Fuszara, Iwona Jakubowska och Jacek Kurczewski an ett teoretiskt mycket intressant problemkomplex, omfördelning som en grundprincip i socialistiska samhällen och problemet att uppnå distributiv rättvisa. Utgångspunkt för artikeln är en enkätstudie som genomfördes efter införandet av köttransonering i Polen i augusti 1980.

Det kanske mest slående resultatet av enkäten är den höga moraliska nivå som den polska befolkningen besitter i en sådan pressande situation. Ransoneringen upplevs som en moraliskt riktig åtgärd därför att dess princip är fullständig rättvisa. Samtidigt visar enkätsvaren på svagheter i systemet och en mångfald förslag till förändringar som förstärker rättvisan. Artikeln ger en djup och nyttig inblick i rättvisebegreppets innebörd för befolkningen i en situation med materiell knapphet.

Den viktiga diskussionen om ramlagar förs för närvarande i många olika sammanhang. Inte minst har rättssociologer ägnat sig åt frågan både från teoretisk och empirisk utgångspunkt, ofta med målet att utveckla nya styrningstekniker för den fortsatta utvecklingen av välfärdssamhället. Också tillämpningsproblemen i samband med ramlagar har studerats i nyare rättssociologisk forskning. I denna situation känns det angeläget att ta del av en jurists syn på ramlagar.

I sin artikel om ramlagarna och förvaltningen analyserar Torsten Bjerkén från en rättsvetenskaplig synvinkel olika explicita och implicita definitioner av ramlag, och han tycker sig finna ett visst mått av begreppsförvirring. Bjerkén själv argumenterar för en snäv definition av ramlagsbegreppet, där den grundläggande texten skall innehålla huvudregler med mål och inriktning och i normalfallet kompletteras med en eller flera texter av lägre valör.

Bjerkén tar också upp den viktiga diskussionen om förarbetenas betydelse för avvägningar mellan olika intressen. Sådana avvägningar, menar han, bör göras redan i själva lagen eller dess förarbeten och inte överlämnas till lägre organ i genomförandeprocessen att föreskriva. Och med detta är författaren inne i den centrala problematiken, med decentralisering av beslut och undernormers validitet, undernormer som i många fall handlar just om intresseavvägningar. Ramlagsproblematiken har blivit en problematik om ramlagsförvaltning.

Vi förväntar oss att detta kontroversiella ämne kommer att bli föremål för uppmärksamhet också i fortsättningen, och vi välkomnar bidrag till diskussionen om ramlagarnas vara eller icke-vara, om deras för- och nackdelar.

Numret bjuder i övrigt på ett inpass om generalprevention i den kriminalpolitiska debatten, en recension av en nyutkommen dansk bok om rationalitet, välfärd och rättvisa, samt några notiser under "Aktuell information".

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Putting Justice "Into Play" on the Global Market: Law, Lawyers, Accountants and the Competition for Financial Services

Yves Dezalay

Centre de Recherche Interdisciplinaire de Vaucresson, France

The "independence of Justice" or "the law of the market place". "Competition and the pursuit of profit" or "the defense of rights and freedoms". Such were the terms employed by the British Bar to launch their campaign against the reforms proposed by the Lord Chancellor, Lord Mackay. Their vehemence is as violent as the proposed upheavals that aim at nothing less than the suppression, in the short term, of the age-old barriers separating the professions – between barristers and solicitors but also between jurists and accountants, or other professionals such as financial advisors and estate agents. The objective is the more rapid development of large law factories on the model of those already flourishing in the City, that aim to dominate the international market of corporate and financial legal advice (*The Economist* 1989).

Unlike British barristers who claim they are ready to defend their traditions to the bitter end, leaders of the Parisian Bar have, it would seem, wagered on modernity. With only minor discord, most appear in favour of a radical remaking of the professional model. They propose nothing less than the abolition of intra-professional barriers within the heart of a 'grande profession'. They are harrying their peers to put aside their old aristocratic prejudices against trade,

which up until recently have kept them from the world of business (Karpic 1988). The new model to follow is that of the American Lawyer, entrepreneur in legal services, jurist in the service of entrepreneurs (Soulez-Laviviére 1988).

In the United States, because of the prosperity and political weight of lawyers, a reform of the professional model has not so far appeared on the agenda. However, the commercial success of these practitioners has provoked soul-searching debates on "the decline of professionalism, the loss of collegiality and the new market aggressiveness". Moreover, signs such as the development of subsidiaries by law firms (Fitzpatrick, 1988) suggest that there too the professional model could undergo serious transformations in the near future.

Thus, across the Western world, business justice has provoked practitioners – normally a discreet group – into public confrontations on the question of the transformation of the professional model, as if this sudden prosperity of business law was challenging the division of legal tasks as well as the definition of legitimate competence and professional excellence For some, the practice of law precludes the use of the market rules valid for the mere merchants. Others, again, believe that remaining in this ivory tower cuts practitioners of law off from the rest of the business community and from other providers of corporate services. They believe that this isolation runs a substantial risk of weakening the law and lowering the status of its clerks, to the benefitof new competitors in this field of expertise.

As the business community discovers justice and vice versa, it suddenly appears necessary to call into question – and may eventually be necessary to radically modify – the internal rules and institutions that define the market of law and limit competition between clerks. Is this only a coincidence? If not, does the remaking of the professional field at a time when Western economies are undergoing the most serious restructuring of their history not invite a reassessment of the old debate on relations between law and economy?

With this objective in mind, one should first clarify the relationship between the major changes affecting the sphere of production and trade – that is, the globalization and the "financialization" of economy – and those observed in the market of business law. During this process, if one does not wish to fall back into outdated schemas of law that simply reflect economic change, it is necessary to pay particular attention to mechanisms that help create new rules and institutions likely to contribute to the security and stability indispensable to trade and economic production.

In the field of business law, according to McBarnett (1984), practitioners play a central role in this continual redefinitions of legal norms. Through their intermediary, in day to day practice, the interests of clients are inscribed into law. But these intermediaries are not machines acting out the letter of the law. They have a specific history behind them and specific interests that determine the ways in which these social interests are translated into the language of the law. And these structures are not immutable. They are endlessly transformed to suit the strategies of the practitioners, and are subject to their ambitions and positions, as much in the field of law as in that of business. The dual membership and the dual role played by business lawyers serve as a buffer and a porous membrane between the law and the economy whereby each overlaps tightly while preserving its autonomy.

If, as Thompson (1975) suggests, the law does not simply reflect the interests of the dominant class, it is because legal transformations are primarily the product of a transformation of these professionals who define the law and put it into practice. The redefinition of legal forms and institutions comes to pass through a continual redefinition of professional structures. In other words, the development of business law is a by-product of the commercialization of legal practice, and by the same token, in the field of legal practice, trade values have "juridicalized" the market. Traders have rediscovered the law because, simultaneously, lawyers have rediscovered competition and profit. This 'discovery' is thus a deliberate strategy responding to, and even anticipating, a transformation of their market. These presuppositions dictate the researcher's choice of terrain and work methods: a structural analysis of the transformation of the field of the business professionals which takes into account the dual role of these practitioners – in the field of law and in the field of economic power – in order to explain their strategies.

Our hypothesis is in effect that confrontations about the professional model – to varying degrees observed everywhere – are related to the rapid emergence of an international market of business services, which is in itself one of the components of the globalization of the financial market. The restructuring of economies has as its corollary the restructuring of the consulting market. Homologically, the internationalization of trade has brought in its wake a questioning of barriers raised by different groups of practitioners in order to protect their specific territories on a national or categorical basis (Abbott, 1988). The rise of the demand for expertise and me-

diation has sharpened the appetites of newcomers who have jostled the habits of the "gentlemen" of law and of finance. This competition has opened the doors to new markets and professional know-how. At the same time, it has remodeled the professional system and its modes of legitimation.

Competitive and complementary strategies are turning law into an instrument of financial power and are simultaneously introducing trade imperatives into the field of law. However, before describing – or at least outlining – the concatenation of these strategies, we must review the previous research in order to clarify our problem and to distinguish our particular approach from others which have attempted to analyze the same phenomena.

From a positivist to a structuralist approach

Preceded by practitioners and the legal press (Nader, 1907; Gordon, 1985), academic jurists have at last entered the debate on 'the commercialization of law'. Their approach is two-fold. On the one hand it strikes the observer by its apparent modesty. Current studies, as of yet few in number, are mainly concerned with first isolating, then describing different facets of the phenomenon: the growth of law firms and business litigation, the transformation of careers and the like. The rare tentative interpretations remain for the present extremely guarded, disallowing any 'grand theory'. But paradoxically, this approach, from the outside pragmatic and positivist (Sarat, Silbey, 1988) is tied, implicitly or explicitly, to a moralistic concern. Researchers are not satisfied with the position of outside observers who can be objective because they are disinterested. In line with North American academic traditions they have adopted a critical perspective on these new developments in the field of business practices (Gordon, 1988, Trubek, Nelson, 1988).

This dual role played by teacher-researchers is a sign that they are not, and cannot remain, neutral within this debate which touches the fundamental, policy orientations of the legal field in effect, as the European example demonstrates, current upheavals are not limited to corporate law; the whole professional edifice as well as its social legitimacy has been thrown into question by recent evolution. It is understandable that academics, who since time immemorial have been the "guardians of the temple", cannot now disengage them-

selves: their attitudes are neither surprising, nor reproachable. However, it must be noted that this engagement contradicts the positivist, scientific approach (Sarat, Silbey, 1988) which implies the observer's neutrality and exteriority. One could ask, in this case, whether the concern on the part of researchers for objectivity (in spite of, or rather because of, their implication) might not lead to a certain tunnel-vision: in order to produce quantitative, objectively measurable (sic) data, researchers are obliged to isolate this or that aspect of a phenomenon whose main characteristic is precisely its globality – a globality researchers refuse to take into account. For if they did, they would have to think the legal field out in political and strategical terms – thereby destroying their claims of a positivist and objective science.

We have only to look at the Wisconsin University team, certainly the most advanced in this particular train of thought (see also Nelson, 1987; Spangler, 1986). Their research has followed two parallel tracks. In one, Galanter, Rogers (1988) have interpreted the growth of business litigation as the aftermath of the transformation of markets and, more generally, methods of governing enterprise. The "juridicalization and the judicialization" of business disputes – that is, the taking of business disputes into the legal fora – are therefore a consequence of the disappearance of long-term relationships, an idea proposed in the past by Macaulay. In the other track, Galanter and Palay (1989) view the growth of law firms as induced in a quasi-mechanic way to a mode of organization – the partnership. According to them, the maintenance of profit-level, in an organizational form such as the partnership, requires exponential growth of a type whose cumulative effects have only been apparent these last twenty years.

To our minds, there are a number of objections to this approach. Without denying that these hypotheses are pertinent to a degree and thereby merit further study, it is difficult to discern, using this model, the fundamental reasons underlying the 'commercialization of law'. Such a model, like many statistical models, confuse correlation and cause. This is because of two analytical blind spots. The first tends to ignore the international and intra-professional dimension necessary to explain these phenomena which are limited neither to practitioners of law nor to North America. The second blind spot is more fundamental and is characteristic of a positivist approach. These studies postulate implicitly that legal authorities and jurists have contented themselves with passively recording the ef-

fects of the changing demands society has made upon the law. Moreover, these studies postulate that legal authorities and jurists are the victims of the mechanical logic of a self-imposed mode of organization – a mode of organization which only after half a century, are they beginning to realize, is driving them inexorably towards concentration and gigantisme.

We find a mechanistic vision of relations between jurists and their market or their structures of production rather simplistic. This ultra-positivist approach tends to negate the very existence of policy choice within the legal field. This denial is paradoxical since it concerns a group of policy-minded professionals who have long sought, not only personal autonomy, but the right to manage affairs of the community. It is not necessary to go far back in history to find examples of lawyers trying to influence the rate of litigation or the organizing of legal and judicial work (Harrington, 1985). Lastly, is it not contradictory to deny the existence of policy strategies in the field of law when researchers, who implicitly adopt this position, actively participate in debates in which the main objectives are the redefining of professional practices?

Such contradictions are serious because they drive these studies towards relative myopia. Unable to clarify and integrate into their considerations their own positions and strategies within the political and professional game, they are obliged to limit drastically the field of their research, thus running the risk of excluding important variables essential to the understanding of the phenomenon under study. In this manner, they render invalid a scientific approach whose apparent positivism imperfectly masks its actual subjectivity. In the long run, their concern with statistical rigor cannot replace epistemological coherence. The confusing of genres, if not lucidly analysed as such, risks not only the invalidation of their scientific approach but also damage to the credibility of the political strategies they follow. The atomistic nature of this sort of approach renders it particularly fragile, enabling critics to tear it apart and expose it for what it really is: subjective and tactical.

For an enlargement of the field of observation

To do justice to the vastness and complexity of the phenomenon, it is necessary to find a "structural" explanation that by itself can account for the competitive or complementary strategies which aim to preserve or modify not only the distribution of roles at the core of the legal field, but also the position of these professionals within the social field (Bourdieu, 1986).

This types of political sociology of the legal field implies a considerable broadening of the observed terrain to include different professional categories which influence the evolution of business law practices, although they are not part of it. By emphasizing legal politics, this sociology reintroduces in the analysis the academic debates where the choice of terrains and research hypotheses are determined. Academic lawyers are far from being strangers to or neutral towards the question of the commercialization of law. It is they who assure the reproduction of practitioners. They feel thus entitled, not only to regulate the supply of producers of law, but to redefine professional competence. This broadening should also take into account the interests and strategies of other professional groups such as accountants, investment bankers, consultants, who compete with lawyers in the market of business consulting, and who preceded them on the path towards diversification, and aggressive marketing of their product (Stevens, 1981, 1985). As Abbott (1988) has shown, it is within this inter-professional competition that not only the practices, but also the institutions and knowledge of a specific profession, are continually redefined in order to improve their positions on the market. Here lies, in fact, one of the central hypotheses of our study: because of the upheavals brought about by the internationalization of the financial market, each professional group has tried to broaden – or at best, preserve – their share of the market and the area of competence reserved to them within the framework of the nation-state. It is not by accident that the professional 'big bang' is following closely behind the financial 'big bang'.

A structural approach cannot leave aside the effects of class that combine with professional positions to redefine the strategies of different actors during this restructuring of the field of practices. Different sectors of the legal group whose specific characteristics and antagonistic interests make up the diversity of the field also corre-

spond to sectors of society whose profile and politics are strongly determined by the paths of their members through society. This diversity and these internal struggles allow the legal field to transform from within in accordance with changes in the political climate.

In concrete terms, this means one cannot understand the new commercial practices of business jurists without relating them to the social characteristics and scholastic achievements of the rising generation of practitioners. The relative democratization of recruitment is as much a cause as an effect of the growing hierarchy in the division of labour. If competition on the advice market has rendered democratization obligatory, it has also been encouraged by the opening of educational doors to middle-class children, giving access to careers until recently reserved for the dominant class. If, as according to a much quoted saying, "law firms resemble less a gentlemen's club and more a business like any other", it is also because they are open to newcomers who have neither the resources nor the civic aspirations of their predecessors. The behavior and career strategies of a 'yuppie lawyer' (Auchingcloss), the pure product of a scholastic meritocracy, differ in every way from those of the 'heir of a WASP dynasty', whose position and class traditions demand, and at the same time allow, the simultaneous pursuit of aristocratic dilettantism and a vocation for public service – a characteristic of the "gentleman lawyer".

If the economic crisis, the deregulation and internationalization of markets favor calling into question the internal rules limiting inter- and intra-professional competition, the arrival of new generations of practitioners, whose qualities and appetites differ vastly from those of their seniors, serves to accelerate this process of generalized reconstruction of the professional field. Here again, comparison with the "Big Eight" cannot be ignored with impunity. New generations of auditors and business consultants, on the strength of their revalued expertise have played – and continue to play – a major role in this transformation of the system of professions. Their desire for expansion, their political aggressiveness in the conquest of markets is justified, in their eyes, by their ambition to dethrone jurists from their positions as privileged advisors to the economic powers (A.T.H., 1985). Individual and collective opportunism is thus one of the driving forces of the commercialization of business professions, which can be viewed as "technocratization" as much as "vulgarization". It is by no means one of the lesser paradoxes of the academic debate that the eclipse of the meritocratic and technocratic

components came about in the course of transformations for which they are, in large part, responsible. This blindness to their own role is not the least of the imperfections of their analysis.

Lastly, as has already been suggested, an analysis of these phenomena cannot afford to ignore the international dimension. The commercialization of business justice is in large part the result of its internationalization. For law firms such as the "Big Eight", the desire for a 'global strategy' is a prime motivation in the process of the policy of concentration (Stephens, 1985:99; Labaton, 1988).

Above all, one of the advantages of a comparative approach is to demonstrate the limitations of mechanical interpretations which are by far too simplistic. Indeed, if this process of 'commercialization of law' affects all legal cultures in industrialized countries, it does not affect them in the same way. To interpret the more blatant differences that can be observed between Germany, France, Great Britain and the United States one only has to draw upon the structural history of their national legal systems.

What strikes one at first is the similarity in long-term evolutions in the field of business law as contrasted to the discord between the ideological and political stances that provoked these evolutions. Wherever one looks, the market for legal advice is booming. Everywhere, the business world seems to have lost its old reserve towards the courts. Indeed everywhere, this vogue for business law is accompanied by a surge of concentration and renewed competitions between professionals. On the other hand, the range of reactions is more varied. Broadly speaking, whereas in Europe – with some exceptions such as the English Bar – professional authorities tend to 'fan the flames' to varying degrees and incite their colleagues to become legal entrepreneurs, across the Atlantic one rather has the impression that their North American counterparts are increasingly preoccupied with the risks of superheating the legal products market and are busy setting up a guardrail to contain an overflowing process they fear they can no longer control. It is true that if the evolutionary trend is to a degree similar everywhere, expansion and the restructuring of the market of business law has not reached the same level in each country. Europeans, on the continent in particular, are only beginning to discover a phenomenon which, in the States, is already two decades old. Therefore they feel that in order to catch up with the U.S. they have to run up the stairs two steps at a time. Because of their "third world attitude" they feel, rightly or wrongly, that the "excesses" and "overconsumerism" of legal products deplored in the States does not concern them.

The comparative approach thus provides the researcher with an enormous advantage: a sort of "flashback" which allows the simultaneous observation of several historical stages in the development of the modern market of business law, and thus allows an opportunity to reexamine the linkage of events. The vehement ideological debate that, in Europe, goes hand-in-hand with the emergence of this new market proves how utterly important these structural transformations are in bringing the new market about. This vehemence also throws into relief the fact that practitioners are not content to be the more-or-less passive beneficiaries of a renewed interest in law by the business world; they have abandoned their old reserve to throw themselves into far more aggressive marketing strategies; they have also put pressure on their professional authorities to ratify this new division of labour and these new legal structures without which competition in the new business consulting market would be impossible.

Lastly, this comparative approach enables an analysis of how diachrony and synchrony are combined in the transformation of legal justice. The belated (sic) arrival of the European legal professions to the forefront of business law, the result of political history which for a long time kept them on the sidelines of the field of economic power, is only relative. If today's professional authorities are so anxious to copy the American model of the corporate lawyer and the corporate law firm, or even to take reforms of legal institutions and practices further, this implies a question of survival. The field of European business law might well be in full bloom, but at the time of writing, profit has gone mainly to Wall Street law firms; European jurists fear either colonization or relegation to the level of dealing justice out to the poor. Diachrony and synchrony feed on one another in the pursuit of business justice transformation. The institutions that in Europe stabilize the division of legal tasks, encourage the expansionism of North American firms. On the other hand, fear engendered by this expansionism pushes radical reforms, such as the 'mixed practice'. The European legal landscape is thus particularly heterogeneous: if it still contains characteristic features of pre-industrial legal craftsmanship, it could in the long run become a laboratory producing a futuristic model of both trans-national and transdisciplinary professional practices.

For a reflexive sociology

Since we have criticized positivist approaches as being incapable of taking into account the role of producers of expert law within these transformations, as well as the strategies deployed in this field, the model we propose should fill in the gaps by integrating these aspects into its analysis. On the other hand, this is not merely an epistemological precaution. Keeping in mind that there exist, beyond their antagonisms, a true complementarity between theorists and legal entrepreneurs which reflects division of labour in the field of law, reflexive sociology highlights an often hidden aspect of current transformations: the fact that this 'commercialization' of legal practices also produces 'pure law' and the legal rationality (Nelson, 1987:286). This invasion of law by market and trade does not necessarily, as detractors say, herald the end of law, but foreshadows a political repositioning and shifting of the process of the social legitimation of law.

Ongoing debates on the 'decline of professionalism' never fail to evoke the eternal quarrel between ancients and moderns. One half deplores the defiling of professional ideals of collegiality and civism, the other retort that the aristocratic dilettantism and social authority of these 'legal notables' disguises only their incompetence and lack of dynamism. The intervention of academics into this debate is in keeping, it has been said, with their personal choices and professional functions. Their intervention also responds to the demands of professional authorities (Rehnquist, ABA Commission of professionalism). Because they are the self-appointed guardians of the collective symbolic capital which the public image of the profession represents, they are uneasy about the paradoxically disastrous consequences of the corporate law firms' sudden rise in fortunes. The very success of recourse to legal and judicial instruments in the management of business disputes jeopardizes the delicate balance the profession has tried to maintain between its image of defender of the social conquests of the dominant class, and its service to the tenants of economic power, in the same way as, when during the 'belle epoque', the Cravaths flourished in the shadow of the "robber barons" (Hobson, 1984), the rapid expansion of corporate practice calls for a new promotion of 'ideals in the law' (Gordon, 1984). At a time when the tabloid press shamelessly features hit parades of the best-paid lawyers engaged in the biggest deals (Powell,

1987) it seems urgent to remind the public that practitioners of law are not only 'hired guns' at the service of 'Wall Street sharks', but that they are still "sages" and "scholars" before they are business people.

Obviously, this is a difficult task; but an indispensable one for a profession whose autonomy, power and prestige relies upon that delicate balance it has managed to maintain up until now between market, expertise and State. The fortunes of legal culture are due, in great part, to the equal distances this professional milieu has managed to maintain between business, academia and politics, thereby creating a necessary pathway between these various poles of the dominant class. Holding the middle ground is the basis of the roles it plays: as an antechamber allowing access to various areas of power, and as neutral terrain where 'professional brokers' can claim legitimacy in their management of tensions between the various components of the ruling class.

Such equilibrium is, by definition, precarious and requires unceasing collective cooperation. This is even more true during times of political or economic upheaval which more often than not call into question social compromises. In such instances, dispute is aimed not only at legal rules and institutions that express and crystallize previous political compromises. In such instances, dispute is aimed not only at legal rules and institutions that express and crystallize previous political compromise, a crisis also calls into question the role of counterforces of the different legal factions. Political upheaval has as its corollary readjustments in the professional field. Distribution of roles and equilibrium between factions are affected particularly by political ferment as it is only through this last that social and economic evolution can be inscribed in legal texts and institutions.

Internationalization of the market – and its corollary the invalidation of the welfare state institutions which characterized Fordian-type economic regulation (Boyer et.al., 1986) – affect the legal world in two ways: current law changes, but these changes are brought about through radical recomposition of professional structures and a redefinition of the images that contribute to the regulation of the legal game.

Transformations are not so much imposed from outside as generated from within through internal competition between different legal factions, each claiming the role of "spokesperson for the law" for various social forces. However, the actor-foremen of new legal

edifices change according to period and circumstance. If the New Deal was, according to Auerbach, a lawyer's deal, it is because Roosevelt used factions until then dominated by, if not excluded from, the professional group, to give his reforms the shape and legitimacy of the law. Today, because organized social forces are absent from the international scene in which financiers and business people play a cardinal role, cracks in the legal edifice are filled in by business lawyers. This distribution of roles between both complementary and antagonistic sectors allow jurists, no matter what the political circumstances, a quasi-monopoly on the shaping of social relations. Each era, each new power struggle finds its particular expression in law because the dominant interests of the moment can avail themselves of representatives, privileged and entirely devoted intercessors who, nevertheless, due to their recognized legal status, can mobilize the accumulated legitimacy of preceding generations on behalf of their clients. Paradoxically, this is valid even for predecessors who might have been part of a completely different system of political alliance. In this way, the legitimacy and know-how acquired by jurists who built the nation-state inscribing conquests and social reforms into law, allow today's big business consultancies to play a major role in building the new international economic order – upon the rubble of that very same nation-state. This division of roles which enables social plurality to be inscribed into law makes the business lawyer a necessary intermediary in breaking down the old order and ratifying new rules in the economic game.

This sort of strategy is only possible because it responds to potential demands of economic agents. These result, in part, from obsolete rules and institutions supporting economic activity conceived and elaborated during "the glorious 30's" – an era of unprecedented production. In the context of such expansion, competition between firms was conducted primarily in the field of technological innovation and the conquest of new markets. Public institutions and professional organizations on their part provided the essential dispute prevention or resolution. The disorder, if not the complete collapse, of these mechanisms of self-regulation provoked a renewal of activity for these intermediaries and professional brokers: the lawyers. Business people and economic actors in general can no longer rely on rules and institutions, more or less acceptable to all, for prevention, or even for routine resolution of the thousand-and-one daily problems arising from economic production and trade: they are constantly obliged to call upon professionals to manage disputes – after the fact and on a case-by-case basis.

Thus, in the short term, by calling upon them to manage potential disputes, or in the long term by providing them with the possibility of remaking rules, the new economic order opens a fabulous market to the producers of legal and judicial services. However, the market's infatuation with law and lawyers has a corollary: precisely that which the 'guardians of the temple' denounce as 'the commercialization of justice', that is to say, the invasian of trade imperatives into the stifled atmosphere of the legal world where, until recently, competetiveness was frowned upon as was maximization of gain. In the same way as towards the end of the nineteenth century capitalism invented the 'law factory' in response to demands of industrialists, international trade and the globalization of the financial market implies the transformation of methods of producing legal forms. Revived competition, and nebulous, diversified practices do not so much presage the dissolution of law into the market, as certain ill-humoured wits are inclined to fear, but may be a stage in the process of reconstructing professional space; a temporary deregulation indispensable in aligning the legal system with the new capitalist order.

Law in the financial game

Even if boosted from within by professional factions making common cause with innovation, these transformations can only arise in particular economic and political contexts. As we have already said, Europeans, like North American businessmen, appear to have discovered the courts. This is hardly surprising when it is a case of "war without mercy" such as a hostile take-over where every conceivable tactic is mobilized by both camps; it is more surprising when the judge is called in to settle common or garden-variety business disputes. This milieu has always been characterized by its concern with settling its disputes in private, far from the public courts. How can we explain such a convergence that affects all modern economies?

Certainly in Europe the level of litigiousness is still well below that of North America, but converging signs show clearly that there too the taboo on using courts is gone. As against this, judge and trial are being transformed and adapted to suit the needs of their new clientéle. Europe in its turn has been introduced to 'litigotiation' (Ga-

lanter), or the overlapping of negotiation and legal recourse that has long characterized American justice.

The introduction of American-style behaviours into the business world is not as widespread as one might think. In the absence of objective indicators, it seems that this new phenomenon affects financial relations more than industrial and commercial relations as such. Or at least, this tactical use of law is more frequently found in companies and sectors concerned by financial restructuring. Thus, the introduction of new legal and judicial practices is a consequence of the 'financialization' of economy.

What is particularly striking on the European scene is that the differences introduced by new juridico-financial behaviours are not so much quantitative as qualitative. Not only do judges intervene more frequently at the demand of economic agents, they intervene in a different fashion. Amicable arrangements on the fringes of the Courts where the letter of the law is loosely interpreted is now out of the question; in fact, big juridico-financial disputes are hyper-legalized: every procedural resource is mobilized, the minutest legal detail is argumented. In brief it would seem that the business world has suddenly decided to take law very seriously indeed. A fact that merits some thought.

Of course, industrialists in the past and more so in the future have taken and will take their suppliers to Court, and vice versa. But in commercial relations of this nature, referral to law and the intervention of a judge is reasonably marginal. The parties prefer the formulas of commercial arbitration or other methods ('mini-trials' etc) of ruling on commercial dispute in the shadow of law and its jurisdictions. The success of these forms of 'private justice' is such that legal authorities were tempted to adopt similar strategies such as monetary authority when they faced the euro-money boom: a "semi-deregulation of the courts", offering thus "a la carte justice" to a clientéle that otherwise might seek justice elsewhere. These various forms of legal mediation from the arbitrator-judge to the judge acting as a friendly third party aim, according to their promoters, to combat the development of private justice by encouraging recourse to the judge by litigants – particularly firms – in dispute management. This counter-attack results in a sort of semi-privatization of state justice which will provide the parties with a free choice of judge and of law, thereby avoiding the inconveniences of a public trial (Dezalay, 1989c).

If industrialists and traders persist in their preference for 'Shadow Justice' (Harrington, 1985) which operates discreetly, it would seem that financiers, or at least the new category of financiers who appeared during the restructuring phase, are not of the same opinion. When these new protagonists of the financial game submit to justice, they want all its pomp and ceremony. They are not looking for a conciliating mediator who ignores procedural rules and jurisprudence. Here, top level legal armies, under the floodlights of the press, debate in a very procedural and legalistic manner. In the largest cases with their multitude of developments that draw on every possible legal resource the practitioners' inexhaustible imagination can summon, we are without a doubt on a terrain of law where Charles Dickens would feel quite at home. Lawyers and justice are in their element.

The giant law suits that appear on the front pages of newspapers, that mobilize the resources of the most eminent judges, the best lawyers and the most prestigious law firms, take place around financial struggles whose outcome is finally the internationalization and restructurization of capital (Rice, 1989). As a rule, mergers and acquisitions, even when friendly, can become veritable soap operas where the developments and 'coups de theâtre' are as much legal as they are financial. With 1992 looming ahead, the ambitions and fears of European economic rulers have driven them towards adopting this modern juridico-financial offensive and defensive weaponry – junk bonds, LBOs, the poison pill and so on – invented, (Powell, 1987) then exported by Wall Street experts. These new offensive tactics in the service of a strategy of external growth spread like wild-fire thanks to wide publicity and the example set from on high. These juridico-financial techniques were historically the domain of "Sharks of Wall Street". Today, recourse to these techniques, as sophisticated as they are aggressive, is not only acceptable but highly valued as the sign of a modern businessperson's efficiency (sic). These new practices are contagious and spread progressively across the whole of the business community. In the light of this commotion within the managing community, small shareholders – traditionally the 'silent members of the capitalist system' – have discovered they have a voice and exercise it to the full before the judge as they contest management. The phenomenon has grown to such proportions that the latter are buying insurance to protect themselves from financial responsibilities. These new expertise practices have become so successful they are boomeranging – re-

cently, in what was known here as the "Petit Bateau" case, a firm turned on its own financial advisor following an unfortunate acquisition. Lastly, we might mention that the sudden prosperity of business justice has invaded the penal domain. In juridico-financial concert, the penal judge and government watchdogs of the market, slow in coming to the fore are now making themselves heard – witness the wave of scandals that have struck the major financial markets.

Thus everywhere, to varying degrees, the market – or at least the financial market – has rediscovered justice, just as the law has rediscovered the market. What is novel is that business justice no longer finds a quiet existence in the margins of jurisdictions acceptable, as used to be the case for commercial arbitration. The importance of financial stakes permits and demands mobilization of the professional elite who naturally take recourse to the most sophisticated instruments: the high courts and learned legal debate. Thus business justice is no longer on the margins of the law, but right at the core – a fact that cannot be ignored.

The growth of business law and the redefinition of the state

Understandably, commentators' eyebrows are raised in question at such change. But interpretations advanced here differ from those current across the Atlantic – perhaps because, as has been suggested, this process affects only the greater industrial and financial groups in Europe. Unlike Wisconsin researchers who favour micro-economic models stressing governance and commercial relations, European commentators attach more importance to macro-political evolution: according to them, the States' retreat, accelerated by a decade of neo-liberal politics heralds a strong market come-back and thus the reinforcing of the role of the judge and the law in economic and social regulation (Cohen-Tanugi, 1985, 1988; Soulez-Lariviere, 1988). Following this logic, the transformation of management, notably the rise of the firm lawyer is more an effect than a cause of these current changes.

That these authors are almost business practitioners themselves and call for an evolution they hope to be a part of detracts nothing from their lucidity. Of course, their diagnosis conforms to the legal and political interests of the professional faction they belong to and

the clientele they represent; but the success of the strategy they have helped define bears witness to the pertinence of an analysis that cannot be rejected under the pretext of non-neutrality. Trial by action overrides a myriad of learned scientific models. Moreover, such models are openly presented as professional and political strategies. This modernist faction of the Bar is close to the big international law firms whose blue-chip clientele, until now, tightly overlapped the civil service; for this reason these renovators are amongst the main beneficiaries of the state's industrial and financial withdrawal; their prosperity is in consequence to the loss of influence of national bureaucracies. Trade's expanding internationalization – which makes state intervention increasingly difficult – appears thus to be one of the keys to an understanding this new infatuation with the law, giving hope to these commentators that the "nineties could well be the decade of the lawyers" (Cohen, Tanugi, 1988).

Though in part self-promotional, their dossier does contain objective arguments. The construction of a quasi-federal Europe constitutes an important impetus for legal development. At least two hundred European 'directives' are expected before the end of 1992. And, as in any federal-type organization, lawyers are expected to play a major role in resolving the legal and jurisdictional disputes that cannot but increase. The market of European law is universally thought to be in full expansion, its annual growth-rate is in the order of 20-30%, and *The Economist* valued it at $200 million. The wave of industrial and financial restructuring, in anticipation of the creation of a large market, has contributed greatly to feeding this growth. As a practitioner said: "the environment of discussion between Siemens and Plessey is of necessity legal" (Jézégabel, 1988).

This growth of legal services benefits the entire field. It would be foolish to see nothing more there than tactical and 'aggressive' use of law, a 'manipulation of justice' by economic agents. The logic of litigation is to give birth to a jurisprudence; recourse to lawyers and the courts during financial struggles helps clarify and formalize rules of the game; it produces law; it also encourages the emergence of institutions producing law. The judicialization of hostile take-overs gave rise, nearly everywhere, to their regulation, or at least, their self-regulation through semi-autonomous institutions such as the take-over panel or the COB (Commission des Opérations de Bourse, the French equivalent of the SEC). Because of the increa-

singly trans-national character of these mergers and acquisitions, the laws and institutions operate on an increasingly supra-national level. One can see the first steps on the ladder to a unified Europe, where the commission in Brussels has just instituted a procedure for preliminary judgements destined to play an important role in the regulation of industrial concentration. But this phenomenon could go further. Consider the recent Minorco-Gold Field take-over battle which finally ended up in the American courts, leading the *Financial Times* to emphasize the "need of a trans-national law for trans-national mergers" (Herman, *Financial Times* 1989-03-28). By encouraging the growth of trans-national legal practices, the internationalization of trade helps bring forth an international trade law, this "lex mercatoria" that lawyers have prayed for because it represents the acme of their art and their best marketing argument.

When one asks oneself the reasons for this growth of legal services, it is impossible to distinguish between client demand and "know-how" promotion by producers. The logic – and the strength of the legal field – is that commercialization of law produces pure law: by producing precedents, principles, doctrine or institutions lawyers reinforce their position in the market of trade services.

Business lawyers do not escape this logic of the legal field which leads them to be the main beneficiaries but also the main victims of their own making. The efficacy of business law, its credibility in the eyes of business people, and the authority of its mediators implies, as Gordon (1984) has demonstrated, that practitioners believe – at least to a certain extent – in the existence of an "ideal in law" that they help forward. Because it is more difficult for corporate lawyers than for others to distance themselves from the economy, the money, and the compromises with conscience that form the foundations of the social legitimacy of law and lawyers, they must contribute more than others to constructing legal rules and institutions that will guide their clients and themselves as well.

In a well known text, Galanter (1974), analysing the economy of the production of law demonstrated that companies, as 'repeat players', contributed to the production of jurisprudence more than individuals. The resulting growth and complexity of jurisprudence and rules in the field of business law also benefit the practitioners who are its agents and without whom legal strategies could not be devised and implemented. Thus their interests are interlinked. The growing complexity of legal texts applied to business demands greater specialization on the part of practitioners; in turn, the

existence of these highly-qualified specialists produces ever "keener" and more specific knowledge, barring entry to this market of sophisticated products, and protecting them from competing general practitioner lawyers and other professionals. This cumulative process, in which complexity of technical knowledge and specialization of certain practitioners reinforce one another, need only encounter a lucrative opportunity – which currently exists as internationalization boosts economic restructuring – and it cannot help but set in motion and accelerate a new field of competence and a new category of professionals claiming autonomy.

New markets and rationalization of legal instrument

Infatuation with law and the awakening of the market are simultaneous because both lead to the opening of economic as well as professional frontiers. The redividing and recombining of the legal field through which the international expert on company law achieves autonomy, are but the counterparts and the consequences of the restructurization of economic trade circuits. The two phenomena work hand in hand and it would be fruitless to say that one was the cause of the other.

Bourdieu reminds us that "degrees of codification vary as do degrees of risk" (1986). The formalization and codification produced by these experts is necessary for groups who need things to be spelled out clearly and who are incapable of managing critical or conflictual situations on tacit understanding. The growth of international trade signifies the arrival on the scene of numerous new actors – which by itself makes personalized and informal business management impossible. The commercialization of law is both the effect of and the context for the opening of international trade to a greater number of actors.

The evolution of financial markets is a dramatic example. The time has passed when City brokers and jobbers could – and should – know their colleagues individually. The opening and expansion of financial markets, culminating with the 'big bang', have destroyed self-regulation by the 'private club', where personal trust reigned – "my work is by bond" – and formalization was out of the question (Kynaston, 1989). Within this "citadel", out of bounds to strangers,

the happy few were by definition, in the strictest sense of the term, the initiated. Access was through recommendation – or best of all, birth. Because of rigorous pre-selection, the privileged information circulating in this private world – without which the stock market could not have functioned – was managed collectively. The recent growth of financial 'scandals' is nothing more than a sign of this professional group's growing incapacity – because of the rapid arrival of newcomers – to continue informal self-governing. On the other hand, intrusion by state justice has further splintered this social circle, which remain in many ways a "family-based cottage industry", thus contributing to the institution of new rules better adapted to the technologies and stakes of a global market.

The same could be said of that other area of business practice where professionalism and juridicalization are developing on parallel lines – the restructuring of companies, better known as mergers and acquisitions (M&A). Historically these operations were the prerogative of a small group of business notables (bankers in larger cases, minor local notables in smaller cases) who, between themselves, discreetly managed the process of concentration and devaluation of capital, in other terms, the lateral growth of companies through marriage or their eventual death in bankruptcy. The accelerating process of industrial restructuring, brought on by the oil crisis and then, internationalization, has been translated into the professionalization and the technicalization of this sector of activity in which investment banks, as well as large law and audit firms are the main competitors (Dezalay, 1989a).

These observations could be extended to cover all international economic activities, be they commercial or financial. Previously they were the prerogative of a small group of operators who cultivated tightly-knit, personalized relations to suit the risks in question. Braudel, it should be remembered, saw international capitalist relations as a domestic rather than a trade system. Today they are the chosen domain of big international firms of experts who function as go-betweens in these new financial or commercial trade networks. The upsurge of inter-professional competition is a consequence of the commercialization of international trade relations – a sphere where competition was, for the most part, excluded by domestic or family networks and long-term relationships. International financial-services conglomerates are replacing the cosmopolitan diaspora of Jewish, Chinese, Lebanese merchant bankers who were for so long the backbone of international economic exchange.

The internal market itself has not come out unscathed by these transformations. The large, post-war firms, based on the Fordian model, sure of their market, with no other objective in mind than maintaining a profit-level thanks to the price-salary inflation spiral, have had to convert and readapt to a mobile, uncertain, economic environment. If, as some have suggested, "long-term business relationships" have lost their importance it is because, broadly speaking, the long term no longer exists in economic relations. Production and manpower management is not enough. Provisions have to be modified and production strategies readjusted – with one eye on new third-world or European competitors, clients, suppliers, and the other on technological innovations or financial or political fluctuations that can brutally change markets. Companies whose direction cannot, or will not, adapt to this new unstable, global market are doomed, thus accelerating the restructurization of the industrial web. The only likely survivors are those skilled enough to manage new information, and flexible enough to readapt endlessly. The decade of the economic crisis, inaugurated by the oil shock has not only thrown millions out of work, it has also profoundly traumatized management and turned its world upside-down.

Professional strategies on the market of advice

One sector, however, views these brutal transformations optimistically: that of corporate consultants whose market is displaying extraordinary prosperity, with an annual growth of between 20-30%. The "Management Consultancies Association" whose members represent two-thirds of the British consultancy market claim that their business turnover increased by 36% in 1986 and nearly as much in 1987 (*Financial Times* 1987-10-26).

In this context of crisis and general uncertainty, management has turned to outside advisors for information and the elaboration of new commercial or financial strategies. Thanks to trans-national networks set up by practitioners during the fifties – in particular by the "Big Eight" – modern-day advisors are indeed in a privileged position to provide information, advice, or even to serve as go-betweens in a market that has become world wide. In other respects, the semi-permanent economic and financial restructurization envi-

ronment – with, on the one side, cessation or reorganization of activity, and on the other, accelerating concentration – represents a "juicy": a nearly inexhaustible source of activities for these professional intermediaries. It is not simply a matter of evaluating, formalizing, authenticating commercial or financial exchange; today, whole companies are put on the market, either after having problems, or, the opposite, because of internal expansion. This restructurization affects small and medium-sized companies who must attain international stature in order to survive, as well as the big groups who, having opted for diversification to form the conglomerates of the 70's, are today doing an about-face to concentrate on a particular activity or series of products they are attempting to control on a world scale. This permanent monopoly creates endless problems of all natures – financing, marketing, tax, personnel management – that are, effectively or potentially, within the area of competence of these various professions advising companies.

Opening new territories to the 'know-how' of experts and the transformation of the professional system

The perspectives offered by this new market are such that different professional categories willingly redefine their 'know-how' or change their image in response to potential demand. They system of professions has not only expanded, it has also undergone a fundamental internal modification of the ways in which these so-called liberal professions are practiced. Specialization, diversification, concentration are just so many facets exacerbating competition; it happens within professional categories that can no longer control competition through an ideal of collegiality and public civism. It happens also between different categories – engineers, accountants, lawyers or financiers – less hesitant about poaching on others' preserves in the name of a "supermarket" (Noyelle, Nutka, 1986) strategy of growth at any price. Profit and efficiency are the new watchwords of this "religion of growth" that nobody escapes, under pain of extinction.

The gigantic restructurization phenomenon which affects industrial and commercial companies has a counterpart in the field of professions. As during the grand period of colonial expansion, the

opening of new territories has aroused a formidable appetite for power. To take the colonial analogy further, such conquests are susceptible to numerous ups and down, tactical alliances, uneasy armistices, as excessive competition imperils credibility. Competition is as much intra-professional as it is inter-professional. Depending on local circumstances, each tends to valorize his own anteriority and experience and to discredit the pretensions of newcomers. On the other hand, one would value one's independence, if it became necessary to encroach upon an established and, therefore, suspect competitor who can accordingly be dismissed as overly implicated and vested in the game to give impartial advice. Lastly, these strategies of conquest, even if they appear slightly eccentric in relation to the entire field of practices which defines one or the other profession, can have serious repercussions. To conquer desirable positions, these new entrepreneurs of services are only too happy to modify dramatically their 'know-how' and more broadly, the traditional image of the profession. Furthermore, these innovations are not necessarily contained within the business field from which they originated. Even if they represent but a fraction of the professional body, the position and the resources big consulting firms can mobilize permit them to ensure that these new practices are sanctioned and ratified by professional authorities. Thus it is obvious that reform projects under study in Europe, be they the 'mixed practices' proposed by Lord Mackay, or the 'grande profession', are in great part the spin-offs of the big business consultancies' concentration strategies which need to expand and diversify in order to remain competitive on the international market of service to enterprise. But in this huge game of musical chairs which affects the entire system of professions, the accountants – previously 'under-dogs' and thus with the most to gain in the general upheaval – gave the signal to begin.

Since the early 1960's, auditors – traditionally limited to certifying ex post facto the veracity of the firm's business transactions – have begun to lay claim to higher professional positions as advisors on future transactions.

To back their ambition, they can avail themselves of a precious advantage – their knowledge of tax law and their familiarity with tax bureaucracy. Indeed, in the increasingly competitive economic environment where margins are reduced, in the last resort profitability can depend on the cleverness of tax constructions. The diversity and complexity of national legislations offer the director of a big

conglomerate various escape routes (Picciotto, 1988) if he has available a good tax advisor when structuring new commercial transactions. By leaning on their skill (cf Stevens, 1985:120ff.) to bypass tax laws, by playing around with the letter of the law (McBarnett, 1989), ex-accountants have managed bit by bit to raise themselves to the privileged position of advisors to big business. Present at the beginning of a transaction they have helped structure, they are well placed to serve the other marketing, financial or organizational needs that inevitably crop up. This technical knowledge is thus the basis of a powerful position with multiple payoffs, be they in terms of fees, prestige or influence. Indirect or intangible profits cannot be ignored in an area which relies on a capital of human relationships to attract new clients or to recruit personnel. The two elements are inseparable and cumulative in a manpower industry: for instance, the "Big Eight", to attract talented, ambitious, well-born recruits, flaunts its relationships with the most prestigious clients; in return, the fortunes of and reception given to big firms in the economic power field depend upon their capacity to gather the 'best and the brightest' – those individuals capable of transforming technical expertise into symbolic capital (Bourdieu, 1986) of social influence. Obviously these strategies of diversification and valorization work reasonably well: the "Big Eight" boasts an increasing annual growth rate of 20-30% (Riley, 1986). Better still, their "corporate restructuring" departments which represent the peak of this strategy, show on their part an annual growth of 50% or more!

Diversification and the systematic occupation of this new terrain could hardly be viewed with indifference by the legal or financial professions, whose alliance strategy had assured them a quasi-monopoly of the role of intermediary in the field of economic power. But before going into the details of their counter-attack in which internal factors – demographic and educational – played as serious a role as external factors, some of the dynamics of this inter-professional competition should be gone over in detail.

It is even more necessary since a large part of all professional ideologies deny the existence or even the possibility of such competition. How could there be any competition between an accountant and a lawyer since their respective areas of expertise appear to overlap so little? A lawyer is by definition an advocate defending his client's interests whereas the auditor claims to be a neutral expert providing a technical and objective point of view. Each in his specific area responds to a well-defined social need. According to this

view, the present overflow is but the sign of a temporary upset, easily correctable if public authorities feel like calling the offenders to order. Indeed, only recently the French Bar, now claiming to be an organization of professional intermediaries, brought forth a plan to defend the legal advice market against the encroachment of the 'big anglo-saxon accountancy firms that have launched a veritable OPA on legal advice (le conseil en droit?) in Europe (de Ricci, 1988).

Research cannot allow itself to become tied up in this sort of ideological argument. It would ignore, as Abbott (1988) reminds us, that the "jurisdictional" links between a professional group and its terrain of activity are the product of its history and as such are repeatedly questioned. The various professions try to construct, or more precisely to reduce social problems to, a need which requires exactly the sort of treatment only they can deliver, because only they have the required knowledge. However, while each profession defines its own territory from the complex of polymorphic and changing social problems, and tries to control the territory exclusively by assuming that jurisdictional links are natural, these links are in fact contingent, artificial and precarious.

Certainly, when practices are defended by a legal monopoly, as is the case for audit or litigation, inter-professional competition is impossible. But this is relatively exceptional and a domain such as corporate consulting abounds with examples of ambiguous situations where boundaries are contested because they are imprecise or have been displaced by the course of history. Certain 'problems' or 'needs' have disappeared, or have become transformed by technological or political evolution. Thus, computer technology has made accounts ledgers obsolete, hereby obliging Dickensian accountants to convert to other practices. Other domains have more or less consciously been put out to pasture by the professions to which they theoretically correspond. Such is the case of tax which, having been long scorned by the legal profession, has almost been taken over by accountancy firms.

Lastly, some tasks are, by definition, more difficult to localize and appropriate in the name of a specific knowledge, either because various 'know-hows' are squabbling over it, or because a particular social group will not let it go. Such is the case with respect to the intermediary function in the sense that he can, thanks to his relationships, play the role of mediator or broker who helps resolve disputes or social problems by drawing together individuals or groups. As we have said, this was for a long time the prerogative of a sort of

business nobility where bankers or the employers of family concerns were highly-placed. In disputes they were called upon, and from their ranks, arbitrators were chosen. Justice was, in a manner of speaking, one of the attributes of a position of authority in the field of economic power. Merchant banks were the first to try to professionalize intermediation but their intervention was limited to the domain of large companies or international financial relations. Apart from the senior partners of big Wall Street law firms who conquered this position at the end of the 19th century, the professionalization of the market of intermediation is relatively recent: it coincides with the crisis which not only rendered a fair number of corporate world structures obsolete, but also made necessary the establishing of new communication structures more suitable to an international global market of economic trade. The recent emergence and rapid development of this new professional market explains why, today, it is so violently fought over by lawyers, investment bankers, and accountants.

Indeed, this type of territorial dispute, ever latent, becomes particularly acute where new territories are opened, or when traditional markets develop rapidly. Since in the beginning at least, possession is nine-tenths of the law (first come first served!), the various applicants are engaged in a race against time. The prime objective is to occupy a maximum of terrain by relying as much on technical competence as upon the relationship network one can mobilize. Ex-accountants, late-comers in this race for power, fall quite naturally into the strategies of their banker or lawyer forerunners: collaborating in the development of a complex system – on the stock exchange or in tax collection – then selling one's services both as expert and as mediator.

In the fashion of New Deal lawyers who, having put public regulatory agencies on their feet, joined the Wall Street firms, bringing with them inside knowledge of the workings of these bureaucracies, tax officers of today are joining the "Big Eight" in droves. Because their expertise is unanimously recognized, these big advice firms are frequently consulted by government agencies when tax reforms are being prepared. They are thus extremely well-placed to act as intermediaries between their clients and State bureaucracy. This allows them to sell their services at a premium when companies, before concluding a transaction, want administrative approval in the form of a "private ruling" on the legality of the juridico-fiscal construction they have set up (Stevens, 1981:150).

This intermediary activity is not limited to relations between the private sector and State bureaucracy; it spreads to the professional partnerships these firms collaborate with. Thus for example, having served in the first instance as auxiliaries to investment banker firms to whom they brought, en masse, needed, qualified manpower, the "Big Eight" is, in its turn, by exploiting its experience and familiarity with the Wall Street world, entering the market of financial advice to small and medium-sized firms. Thus, they are operating on three levels: that of providing prompt technical services to investment bankers, that of 'go-between' vis-a-vis strangers in need of introduction to the financial institutions, and lastly, they offer their own financial services – the finding of partners for mergers and acquisitions, the preparation of financial plans.

This triple-role that characterizes these service firms might, a priori, seem surprising. But in fact such practices are widespread in the advice market. It could even be said that this is one of the main components of the power of these experts, who, from the starting point of technical 'know-how', ascend to the key position of 'power-broker'. And, it can't be repeated enough, the "Big Eight", often attacked on this point, by no means monopolizes such practices. Before them, big Wall Street or Washington firms carried such practices to a fine art. Arnold Porter, to cite but one example, occupies a similar position in the political world where it simultaneously operates as neutral and objective expert, as advocate, without forgetting the role of go-between, in offering services to the government and/or to individuals.

Understandably, this sort of triple role cannot be protected by a strict definition of tasks: its fortune comes precisely from the constant transgression of frontiers to establish links between the respective fields of politics, knowledge and economy. The division of tasks and the defense of territories are no less so, but are organized on a more informal and personal level. If these practitioners often cash in on their 'go-between' services, it is because access to these circles of power is closed to the non-initiated. One must be introduced, and introduction is personal. Boundaries exist, but they are based on criteria of the size, rather than the nature, of a problem; areas of competence are defined mainly by the importance of the stakes, which are in turn related to the social and economic position and the quality and renown of the practitioners. The stratification of this 'go-between' market is a reflection of the various factions of the economic ruling class. The 'know-how' of these professionals is

inseparable from their capacity to mobilize networks of stratified relations where the 'big' mingle rarely, if at all, with the 'small', as an interview with a New York investment banker specializing in mergers and acquisitions pointed out.

> Big deals and small deals are not the same thing. From a certain size up, the nature of the problems change completely. The little boutiques and the large firm don't belong to the same world. Looking after M&As for twenty years at Toche Ross doesn't help when you want to attack the big hostile take-over market. The rules of the game are very different. The people to mobilize or convince – bankers, businessmen, politicians – not only are they not the same, they don't know each other. If you want to work top level, on the biggest deals, you have to have made the grade. You don't learn all this in school... You have to be introduced.

Partitioning off and segmenting the intermediation market by no means protects it from competition. Frontiers between big deals and small are not defined once and for all. Furthermore, the renewal of the business ruling class, in particular as it accelerates thanks to the take-over wars, offers new-comers to the professional world the chance of ascending to the market's highest echelons. This strategy is explicitly that of the accountancy professions, traditionally on the sidelines of ruling circles; the social-climbing ambitions of these newcomers leans on the competence and familiarity they acquire when sub-contracting big transactions. In effect, if big deals remain the monopoly of an elite composed of a small network of investment banks and large legal firms, these, by the nature of things, are obliged to have recourse to the high pool of manpower and technical services of all the types that the "Big Eight" represents. But these great conglomerates of financial services are no longer content to play a supporting role in a market they entered by the back door.

The accountancy professions: An all-azimuth expansion to suit the ambitions of these newcomers

The strategy of these conglomerates is to become increasingly indispensable through the variety of expert services they offer and their implantation in the main financial and commercial centers.

This politic of internationalization goes back a long way, seeing that these firms, British for the most part, became involved in the North-American market at the end of the last century as they followed-up on clients' investments. After this basically Anglo-American first phase, the globalization process as such began towards the end of the 1960's. The local offices of Coopers & Lybrandt grew from 35 to 352 between 1950 and 1979, while its personnel increased from 1000 to 22500 employees (*C & L Journal*, 1979). It responded then to the demands for an increasingly trans-national clientele. Thus, one could estimate that at the end of the 70's, 40% of clients audited by Price-Waterhouse operated on a multi-national scale (Leyshon, Daniels, Thrift, 1986:18). And this phenomenon is accelerating.

> More and more, bidders with the strongest presence in all the world's commercial centers win the multinational accounts. For this reason there is a great pressure... to expand internationally by passing money and talent into overseas offices or by merging with established firms in Europe, Asia and the Americas. (Stevens, 1981:70)

Under these conditions, inter-professional competition must pass more and more through trans-national competition.

> The financial services revolution has obliged the big firms to strengthen their international links. Medium-sized partnerships are in danger of being squeezed and the industry's professional structure, too, face the need to adapt. Globalization is the most powerful theme within the financial services industry today and accountants are scrambling to improve their international capabilities. The challenge is to develop a range of services which can be delivered almost anywhere in the world. (Riley, 1986).

Within this competition, the simple fact of their size and the earlier birth of their strategy of horizontal concentration means that the "Big Eight" are in a prime position.

> As more traditional financial services firms struggle (or abandon the effort) to become global financial services groups, the big accountancy firms have almost made it. (...) The accountants have a better geographic spread than most financial services firms. KPMG has offices in 115 countries; Citicorp in only 90. Most banks and stockbrokers who had 'global' ambitions have had to settle for making money at home and hoping to break even abroad: 99% of Japan's big securities houses' profits are homegrown. But accountants have had more success in expanding away from their Anglo-Saxon bases. Europe contributed $1.7 billion of KPMG's income last year only $140m less than America. European fees are growing at 25% a year – twice as fast as America's. Asian and African fees grew even faster in 1988, by 28% to $320m. These new markets are also more profitable. (*The Economist*, 1988)

The peak – so far! – of this globalization strategy was the merger of Peat Marwick with Klynveld Main Goerdeler (KMG) at the end of 1986 which resulted in the setting-up of the number one audit firm – KPMG – with its 5,200 partners and its $2,350 million turnover. The principal argument for this merger was the geographic complementarity of the two partners, Peat Marwick was only weakly implanted in Europe whereas KMG's position was more solid; on the other hand, this network of European firms considered itself insufficiently represented by Thomson McLintock on the North-American market (cf Stevens, 1985:17).

So far relatively unexploited, European and Asian markets are a terrain of expansion – and of privileged competition for all those aiming at a lead position in a – from here onwards – global market.

> Building the right links in Continental Europe and the Far East (mainly Japan) is a process likely to sort out the leaders from the laggards in the next decade. The European dimension has only recently become of major interest to the large international firms. Closed national audit markets kept them out in the past: the likely relaxation of these rules and the likely growth of business within the European Community when economic barriers be-

> tween member states are dismantled have brought a flurry of activity. 'We are going to give a far more integrated service around Europe. One has to move down the road of closer cooperation' says Mr John Bullock, senior partner of Deloittes." (Waters, 1987).

It is in the interests of the European market as well to allow these conglomerates to infringe upon the division of tasks that in North America confine them to narrowly-defined, subordinate, technical tasks:

> Across the Atlantic the 'big eights' are careful not to infringe upon the division of tasks. As soon as there is a legal problem they call in a law firm. When they arrived here, their politic was the same from the beginning since they soon realized there was nobody in front. Therefore, as the audit market is saturated and they want to expand, well, they occupied the terrain.. Today they employ 2000 lawyers and they have entire departments looking after legal management. Each year they take on some sixty youngsters, choosing the best. And these young lawyers, not sure of making partnership are tempted by the salaries they offer. They have already conquered the area of everyday legal management of firms. They have solid bridgeheads in tax thanks to the 'conseil juridique' firms they control and they are ogling more sophisticated and juicy legal products such as the M&A market etc... (Interview with a Parisian advocate).

One can understand that faced with this menace, Parisian lawyers, like British solicitors, consider the "Big Eight" their main enemy. "English accountants are far more of a threat to English solicitors than U.S. lawyers" says Max William, senior partner of Clifford, Turner, one of the ten big city law firms, and ex-President of the 'Law Society'; (cited by Campbell-Smith, 1985b).

Indeed, internationalization and diversification are but complementary aspects of this policy of expansion which characterize these conglomerates of services of all natures to a business clientele – the multinational financial services conglomerates. These giant consultancies' rapid growth rests on a systematic politic of new market conquest: the old departments, "old-timers" such as audit whose near-saturated markets can assure them only relatively slow growth, serve to finance high investments in terms of the recruit-

ment, training and marketing necessary for opening the new markets which are likely to pull the firm's growth up in the future.

Evidently, this diversification strategy is oriented upwards. Accountants try to develop more sophisticated products, giving them direct access to the top management. To get to be known, and highly thought of, by the decision-makers means more sizable fees and control over the regular supply of multiple services. Based on their size, the "Big Eight's" systematic approach has been to add value to their products by passing progressively from routine tasks such as accounts, to more prestigious and better-paid tasks like auditing. Now they are involved in 'in-depth investigation' where the balance sheet specialist will pass global judgement on a firm, its past management, and its future prospects. In the same manner, from less glorious tasks like tax advice, or the managing of failing firms, the "Big Eight" have developed into financial and restructuring consultancies. In these top-level specialities that flourish in corporate finance departments, or mergers and acquisitions (M&A), accountancy professionals, renamed "industrial and financial restructuring experts", lean simultaneously on their techniques of investigation and objectification – in-depth auditing – and the control of an international contact network to gain admittance – if only through the back door – to the very private financier 'go-betweens – club (Dezalay, 1989a).

The politic of diversification thus preceded that of internationalization. Some even consider it the main ingredient of these firms which, from the beginning, defined themselves as practitioners in the service of the business community willing to resolve the immediate problems of the day, no matter what they were (*The Accountant*, 1984). In fact, between the 1870's and the 1880's, management of failing firms represented 75% of the fees of the forerunners of Ernst & Whinney's. It is true that the market was flourishing: nearly a third of firms founded between 1856 and 1883 were being liquidated (Jones, 1981). Tax advice is also long standing, since the Finance Act of 1903 already authorized British accountants to plead in tax matters. It was not until after 1945 that this activity became significant by surpassing 19% of global fees. The growing complexity of tax legislations from the 60's onwards, and today, the financial restructurization, are the main driving forces of this activity (Leyshon, Daniels, Thrift, 1987:21; Tinker, 1984).

Thus, even if there were precedents, systematic diversification really only began towards the end of the 50's. At this period the first

Management Accountancy Services, (MAS) appeared: Touche Ross in 1952, Coopers in 1954, Peat Marwick and Arthur Andersen in 1957, Arthur Young in 1961 (Leyshon, Daniels, Thrift, 1987:14). This diversification policy benefited from the relative drying up of the audit market – in part because of technological innovations (systems experts) but mostly from violent competition that forced them to bring their prices down. From the 70's onwards, MAS became the activity driving these conglomerates. It had the strongest growth, attracted the best elements, generated the highest profits and transformed the professional model. The breaking down of advertising restrictions was thus justified by competition with other non-professional consultancy firms. To a large extent, this diversification took off from a politic of outside recruitment, to the extent of buying of other management consulting firms. Today, the "Big Eight" towers over the market, seeing that, of the twelve original firms. seven are divisions of the "Big Eight" and Arthur Andersen occupies the enviable leader position.

For those multi-disciplinary professional conglomerates who call themselves 'financial services supermarkets', the development of 'corporate financing departments' – since the 1980's – represents the ultimate development of this strategy of diversification and re-evaluation of tasks. The modalities of this progressive transformation into financial intermediaries – best illustrated by Deloitte Haskins & Sells (Waters, 1989) – varies according to country and tactical considerations. In london, the "Big Eight" have created corporate finance divisions and they intervene directly for firms wishing access to the Unlisted Securities Market (USM). On the other hand in Wall Street, Price Waterhouse has created a 'joint venture', PW & Partners, with four investment bankers to provide a similar service. However, despite tactical nuances, the objective is clear. Indeed, as has been said, these supermarkets do not – yet? – have access to the big deals which still remain the prerogative of the highest-rated Wall Street law firms and investment banks that call themselves 'boutiques de luxe'. Furthermore, their partnership structure hinders their access to necessary capital resources in order to provide a full range of services already assured by investment banks, such as the sponsoring and underwriting of hostile take-overs. But, despite such handicaps, these conglomerates are trying to increase their share of the market by every available means. They cut down on prices and try to develop a pool of promising young entrepreneurs who they hope will not be ungrateful towards the firm

that helped them at the beginning of their career. Their ambition is to gradually push their way into the well-protected market of big deals. The go-getting ambition of these new-comers is putting increasing pressure on the transnational and transdisciplinary market of supply of expertise.

> A lot of clients have told me they find investment banker fees prohibitive. So they've gone to see what accountants or consultants can do for them, people who can offer them a nearly identical service at a much lower price. The pressure of competition is such that no one would dare present a bill like those Flom or Wasserstein sent to Carl Icahn. To keep their clientele, law firms and investment banks are more and more driven to providing a whole range of services, rather like sub-brans at inferior cost. The product is virtually the same, the difference being that the professionals are less well-known, therefore the whole thing is cheaper..." (Interview with a Wall Street investment banker).

The legal professions: Counter-attack strategies all the more radical when the obstacles or handicaps to overcome are important

Obviously, when faced with this attack from all directions, the legal professions cannot but react. But this reaction is influenced by the local positions they occupy in the field of economic power. The greater the handicap, the more radical the solution to change their image in the eyes of a clientele they want to conquer or reconquer. From this stems the serious differences that can be observed in different nations. The main line of demarcation is that which separates Europeans from North-Americans. The absence or weakness of the European legal professions in the business market puts them in a dramatic position where their only chance of survival is through a radical "aggiornamento" strategy. The case is not the same for their North-American counterparts. Through their founders' alliance with the "robber barons of triumphant capitalism", the big Wall Street firms stole a march on these new competitors. All the same, even if these "boutiques de luxe" are not aimed at the same clientele as the new supermarkets, they cannot ignore the new ambitions ignited,

outside, as well as within, the legal professions, by the rapid growth of the business consulting market.

In this increasingly open game, the big legal firms occupy an intermediate position, jammed between the tiny elite of 'freelance' investment bankers monopolizing the highly-remunerative positions of 'go-betweens' and 'deal-makers' on the one side, and on the other, those industrious, but ambitious, "big eight" armies of technicians. So on both sides, competition is closing in. The huge European or Japanese commercial banks compete more and more against investment banks on the strictly financial terrain. In reaction, the latter are falling back on the role of financial intermediary by presenting themselves more and more as professional consultants. This evolution engenders tensions within the bosom of these establishments; tensions that can even lead to splits such as the one between Wasserstein and Perella with First Boston. These slighter new structures can function at lesser cost, which obviously attracts companies watchful of spending during the financial crisis. Such newcomers on the financial intermediation market are the more aggressive and inventive due to the strong pressure on the employment market. Since October 1987, Wall Street has thrown hundreds out onto the streets, so there exists a mass of professional manpower ready to seize, even to create, new opportunities. A lot of people are jostling one another to get to the same spot – that of the professional go-between, business broker who combines technical competence and social know-how. Competition has intensified around prices or products; everyone is trying to jump off the beaten track to find fresh sources of activity and profit, and in the process are breaking down the barriers between previously separated skills. Outside of the big supermarkets, new 'boutiques' are constantly springing up with the same objective of bringing together various specialists to offer their clients the specific multi-disciplinary package that fits their needs. This transgression of frontiers by no means spares the private hunting grounds the law firms had set up. Some of these 'boutiques' thus offer, directly or indirectly, legal services that go hand-in-hand with the financial or tax restructuring they offer their clients.

Because of this increasing competition hammering at their doors, law firms have had to abandon the aristocratic dilettantism that in former times allowed them a near-monopoly of the advice-to-firms field. From now on they have to battle on two fronts: towards the top by offering to the small 'rain-maker' elite the level of income

close to what they would get by joining the ranks of investment bankers; to lose that 'class' of elite practitioners would mean exclusion from the big deal-making circle. Through their close contact with top management, these 'super-lawyers' bring prestige, influence and profit to the firms that employ them. But at the same time, these large law firms have to fight on ground level to keep their portion of the technical expertise market by maintaining competitive prices in comparison to those of the "Big Eight". This dual pressure has engendered a stretching out of the hierarchical ladder, a further rationalization of the division of tasks, and a rising exploitation of that manpower at the bottom of the pyramid which executes routine and technical tasks. The rationalization has as its corollary an increased stratification between those associates destined to make partner due to their combined technical and social competence, and those destined to remain simple technicians. These transformations into a two-tiered structure have been adequately described elsewhere (Spangler, 1986; Nelson, 1987) and it is unnecessary to go into them further here.

Running parallel to these internal reorganizations (we shall see later on why they were only possible because they coincide with the transformation of the legal profession's mode of reproduction) the law firms' counter-attack has been deployed on two complementary levels: the enlarging of their market (Fitzpatrick, 1988), and an over-investment in legal rationality. As we mentioned earlier apropos the growth of business litigation, this second strategy corresponds to the fluctuating demands of economic agents. We shall go into some detail on endeavors to extend their market, because they have accelerated transformations in Europe.

The logic of counter-attack implies the use of the arms and tactics employed by the assailant. Concentration and rationalization of labour goes hand-in-hand with growing concern about marketing and profitability as they try to turn this new generation of law firms into a commercial enterprise like those with which they hope to compete. The legal world does not escape from practices such as dumping, outbidding where fees are concerned, concentrations through mergers or absorptions – even bankruptcy which now characterizes the professional world as keeping with an elitist strategy, the strategy of concentration is more geographical than vertical. Growth relies on the opening of new offices, the conquest of fresh markets. However, this orientation might be in the process of changing, initiatives of diversification are increasing, or in prepara-

tion, and it is doubtful that the legal profession will, in the long term, leave the monopoly of inter-professional poaching to its competitors (Fitzpatrick, 1988).

The internationalization of Wall Street firms is not a recent phenomenon, but it has made a quantitative and qualitative jump these last ten years thanks to the financial market's internationalization. As for the "Big Eight", the Far East and Europe are prime targets. The logic lying behind this form of colonization is the same: clients or businesses that are increasingly trans-national have to be followed – or preceded; the 'big bang' and the preparation for 1992 have thus provoked a veritable disembarkation in London, Paris and Brussels. "Where commerce flourishes, law must flourish too" (Davies, 1985; also Labaton, 1988; Rice, 1989, Pollock, 1989). But it is also a question of taking advantage of the weaknesses of the European legal professions to grab their market. Poaching, is, therefore, rather transnational than inter-professional. At the moment, Wall Street law firms are in a dominant position in Europe. They are leaders in the key markets: hostile take-overs, mergers and acquisitions and privatization of state-owned companies. It has been said that the turnover of 400 American and some British lawyers established in Paris represents, from figures given by the 'Direction Generale des Impots', the equivalent of that of 7000 French lawyers registered with the Parisian Bar (Logeart, 1987). By reaching way beyond their original territory, these 'mega-firms' are helping to accelerate this spreading phenomenon of legal practice commercialization (*The National Law Journal*, 1987). The broadcasting of a dominant economy's legal practices can as easily give an impression of mimicry, when the same logic – that of the contesting of established orthodoxy by 'young wolves' – is at work within the various legal cultures. The more ambitious or more motivated local professionals are careful to imitate the 'know-how' and methods of their foreign competitors and thus precipitate the homogenizing of the international market of professional services. If they cannot defend their territory, at least they can cash in on their present position by selling themselves – and their portfolios of local contacts – to the invaders, under various formulas like bilateral agreements, subsidiaries or franchising. The big international firms are usually only too happy with such solutions because they ease local implantation and the spreading of their market without serious inroads on their own human and financial resources. French lawyers and legal advisors seem inclined to follow this direction, taken before them by the elite

of the accountancy professions. The main question is, which sphere of national autonomy can be preserved by this sort of strategy.

In effect, the underlying logic of this form of counter-attack implies sacrificing institutional Maginot lines, behind which the Continental legal professions have sheltered from competition, or at least try to restrict it to the less prestigious categories of professionals like the process-server, the notary or the conseil juridique (Dezalay, 1986). In France as in the UK, hierarchy and the strict definition of functions was supposed to preserve the professional aristocrats – barristers and advocates – from the contamination of competition in advice, legal representation, and the registration of legal acts, so that they could dedicate themselves entirely to the process of legal rationalization and legitimation. Strict rules limited the size and territorial expansion of the legal services enterprises. These various provisions channeled competition into the terrain of pure law. Lawyers were prevented from ever being tempted to become legal entrepreneurs. Their only path to success was to acquire knowledge and fame, and thus reinforce the legitimacy of law through the rationalization and the permanent updating of legal tools. Precisely these measures partitioning off law from the market, are those that current transformations aim to break down, to permit free market play within law (Rice, 1989b) – the counterpart and condition of legal intervention in financial market regulation. The importance of the stakes implies that the business community can avail itself of the services of the leading practitioners whom they control to a large degree because of the size of the fees offered. As Weber (1968:880) noted, the advantages of those in power are less their capacity to escape from, or bypass, legal rules, as to benefit from a sort of 'made to measure', 'private justice' – where men as well as rules take into account the specific needs of business.

On this condition, only, will the business market open its doors to law and agents of the law. Graham Whybrow (1987) thus defined

> the new approach of lawyering (as) working more closely with business clients, paying more attention to commercial realities rather than legal niceties, overcoming the traditional lawyer's aversion to figures and company accounts. (...) It therefore needs new attitudes to recruitment: legal ability, though vital, is not enough without social skills and negotiating flair (...) You can't have boffins who blink in the sunlight, you've got to feel happy about leaving them at Warburgs.

This last reference was not accidental since the bank created by Sigmund Warburg, long considered an 'outsider' by City gentlemen, has finally managed to impose its new conception of merchant banking and is now one of the leaders on the market of financial restructuring.

Business law practitioners are all the more conscious of the need for a "forced march" modernization in that the careful distance kept for years by the professional elite from trade, has left the door open to upstart professionals less finicky in their attitudes towards the world of money. British, French and German lawyers have openly and unanimously presented their reform projects as a counter-attack against what the 'President du Comite Consultatif des Barreaux Europeens' (CCBE) calls an "invasion by the new dinosaurs". According to this author, these "new monsters" are the "big Anglo-Saxon accountancy firms who have launched in Europe a real raid on legal advice" in order to take over "an extraordinary source of potential profit which up till now has hardly been tapped" (de Ricci, 1988). The naming by these practitioners of the "Big Eight" as 'the enemy', comes from the fact that they are caught in a 'pincer movement': Wall Street banks and firms have skimmed the cream off the big deal market, but by definition, this market is limited, and, in particular, out of the reach of local professionals lacking the required expertise and contacts for 'top level legal services'; inversely, the market of small and medium-sized firms upon which they could reasonably have hoped to fall back is being devoured by these advice 'supermarkets' which attract their smaller clientele through the reflected glory of their familiarity with the big business world, and through their ability with tax problems; lastly, 'one-stop-shopping' is an attractive proposition for small entrepreneurs more concerned with professional service costs than juridico-financial sophistication, and quite happy to deal with one general practitioner rather than a whole group of specialists. For the time being, the European legal profession hopes to reconquer this "small fish" clientele as their sort of apprenticeship to the business world, which remained rather foreign to them: the old adage "judex non calculat" expresses their aloofness from money and figures. Of course, old-world European lawyers are envious of the Wall Street law firms' prestige and prosperity, but even if the latter have the biggest and best share of the European legal cake, they are still thought of as role models rather than adversaries.

The objectives of this counter-attack strategy express both the modalities and main themes of the proposed counter-reform. Unlike what the ongoing debate in Britain would lead one to think, the force of this aggiornamento movement has been not so much imposed from outside, as impelled by the practitioners themselves – or at least, the sub-group most likely to gain from this potential market opening to legal instruments and services. Political intervention comes only during a second phase, once reform has steadily – and probably irreversibly – begun, and is used to authenticate, sanction and legitimize these transformations. During the same process, the more recalcitrant practitioners are brought to heel – i.e., those remote from the business world, or perhaps of the older generation who feel invested with the role of 'temple guardians'.

The vehemence of the debate raised by Lord MacKay should not hide the fact that City law firms began their moulting process some years ago (Campbell-Smith, 1985a). They may all the more remain quietly behind the scenes in that today they are in a position of force in the professional field where they attract the best recruits: 60% of the most qualified graduates claim they want to join them. Furthermore, the "big bang" and the Financial Services Act has opened a near inexhaustible market for them (Hampton, 1988). Lastly, the policy of mergers between big firms has permitted them to attack the Continental market where they deal with the medium-sized affairs which have been neglected by the Wall Street 'boutiques de luxe' and which French or German practitioners have been behind hand in dealing with (Hughes, 1987). Time is thus on their side; whatever the outcome of Lord MacKays's projects, the process of transformation is here to stay and their speedily departure in the race towards modernity and the market has given them a good few lengths in advance of their potential competitors. As John de Forte wrote in *The Times* (1989-03-28), "The battle to make lawyers into businessmen is over. The struggle to convert them into entrepreneurs has begun".

In part, the current debate is serving these ends: it is playing a near therapeutic role by 'delivering' the new professional model. A formal announcement is being made to a potential clientele that the past, no longer corresponding to the present demands of the international financial market, has been broken with. And within the professional field debate serves to propagate these innovations. In Britain as on the Continent, some of the transformations proposed by the reformists are already under way. Even prior to formal authori-

zation, innovators have found complex formulas that allow them to offer their clientele the 'global' geographic cover, the 'full service' and the specific treatment they require, while at the same time providing the new sources of financing rendered necessary by rapid growth.

The simple fact of debating these innovations publicly has brought about their circulation because nobody wants to be left behind in the race towards modernization. This is valid as much within the legal profession as beyond their perimeters. The recognition of the "mixed practices" and the transformation of legal firms into companies has allowed the "Big Eight", like the investment banks, to play openly in the market of legal services; people in Britain as well as on the Continent are busily preparing for this eventuality by recruiting young lawyers, and even taking on whole departments (Waters, 1989). It has been reported in Paris that the "Big Eight" has boasted that they shall "in the short or medium term buy up the Bar by apartments or entire buildings..." (Soulez-Lariviere, 1988). The immense backing and ferocious appetites of these new competitors has made pressure rise high, as much on the clientele market as that of professional recruitment. The 'consulting' sector is a manpower industry, and the future distribution of parts between the various competitors – lawyers, accountants or bankers – depends to a large degree on their capacity to attract qualified manpower, as much from their strictly technical abilities as from their renown or the social relations. The European professional landscape towards the end of the 80's looks rather like the pack groups of a cycle race where everyone is eyeing his neighbor for fear he might thrust to the fore.

This cumulative imitation waxes even more where internal deontological codes, which until now assured the group's homogeneity lose their strength through being publicly challenged and are made to appear like vestiges of the past, doomed to oblivion. It thus becomes easy for these specialists in structuring and formalizing business deals to work out formulas to bypass rules as solidly implanted as those that vetoed 'contingency fees', or prevented all moves towards concentration. For instance, in Germany where multipostulation is still in theory illegal, two big Frankfurt and Düsseldorf firms have given the go-ahead for what will inevitably be a vast movement of local office regrouping, thus giving birth to Europe-scale firms (*Manager Magazin*, 1989). In the same manner, slightly underhanded formulas of franchising or joint agreements al-

ready allow banks, accountancy or legal firms to offer their clientele a complete range of the tax, accountancy, financial and legal services required by the majority of industrial and financial restructuring operations. The only limits on this widespread inter-professional poaching come, not from formal rules but from a sort of 'gentlemen's agreement' which moderates competition between the main operators. To 'go to far' is to risk retaliation. This new market's growth has been so rapid, open conflict has been unnecessary; for the moment at least there is still room for everybody. But strategies to annex new territory, although discreet and muffled, are very real. For the moment, the most widely spread model is that of organizations with a dominant activity – legal, financial, or accounting – upon which they build their notoriety and which they use as a leader for more routine tasks, with the implication that other 'knowledge', perhaps on a less sophisticated level of competence, are available. When very big cases are being dealt with and the most renowned professionals of varying disciplines have to be mobilized, a number of service firms will collaborate to provide an ad hoc team. All the same, this does not exclude a degree of competition, for, as one of these practitioners said: "as soon as a bunch of musicians playing different instruments get together, you need a conductor..." And of course, everyone wants this role where profits and prestige are at a maximum.

Essentially, these rather muffled competitive struggles are played out on the level of recruiting experienced practitioners who have an already established clientele. But this inter-professional mobility is checked for the time being by its official nature which prevents the most prestigious practitioners from publicly joining firms controlled by another category of professionals. They would risk loosing in status and endangering their career. However, it does happen and increases pressure for the formal recognition of 'mixed practices' which will allow the 'elite' greater mobility and greater career possibilities. The breaking down of barriers preventing the free inter-professional circulation of the best endowed individuals might help the most talented lawyers to make a particularly brilliant career within other professions, as is the case in Germany for those who enjoy the dual qualification of Wirtshaftprufe and Rechtsanwalt, or of Banker and SyundicusAnwalt; it can also open the door to the transformation of legal consultancies into simple sub-contractors for investment banks or advice consultancy supermarkets. As a "Big Eight" senior London partner said during an interview: "When we

recruit a first class barrister by offering him a very attractive proposition, he is marvelously efficient for the first six months; but then, he becomes sort of like a fish out of water: he has lost most of his contacts with his peers and therefore most of his value. He no longer represents lateral legal authority. For this sort of recruitment to be profitable in the long term, one would need, not just an isolated barrister, but at least one, if not more, 'chambers' to constitute a viable nucleus...". The game is open in a dual sense and the outcome depends especially on the respective strengths of the various organizations in question and the professional and social fame of the personalities fighting under their banner.

Even if most of the European legal professions share more or less the same objectives and the same business market conquest strategies, all are fare from being equally advantaged.

The English are a few lengths in advance by the simple fact that they were forced onto the international and inter-professional competitive scene earlier, and that reformers can dress their projects in the colors of Thatcherite politics of deregulation. They also benefit from London's situation and influence. But, again, they have to deal with fierce competition on the part of the "Big Eight", or Wall Street firms that are firmly implanted in the City. They are also handicapped by the traditional image of the solicitor more competent in the estate market than in the economic or financial consulting market (Abel, 1986)). As a 'Times' journalist remarked: "the quality and legal renown of a firm like Clifford Chance is not quite up to the level of its size." Hence the strategic interest in all the stakes of current reform projects.

For their part, German lawyers are handicapped by professional rules that have very efficiently controlled foreign competition, but which have also prevented the creation of big legal business firms by limiting the number of partners, preventing geographic concentration and furthermore, prohibiting hourly fees (Rueschemeyer, 1973, 1986). Because of this latter rule, banks and big companies have developed the habit of managing their legal problems through their own legal departments. Also, for a long time, the Rechtsanwelte handed over the key sector of tax law to the Wirtschaftprufe or the Steuerberate, thus finding themselves in an outsider position. As one of them admitted, "*we are lagging behind in the race for the international consulting market and we'll really have to hurry if we want to catch up*".

However, in contrast to their British counterparts, they hold a major trump card: the solidity of the positions held by the legal elite, a much within the field of economic power as within that controlled by the State. As in the States, legal culture is the link between the dominant classes' various components. This is true for public administrations as well as for large companies – particularly the big banks that dominate German economy. It is even valid within the accountancy profession where, as has been said previously, practitioners with dual qualifications are, in a sense, disproportionately represented in leading circles. Moreover, the fact that there are only 10,000 'Wirtshaftprufe' in comparison to at least 50,000 'jurists', seriously limits their possibilities of growth. Lastly, the dominant class's homogeneity and solidity renders foreign invasion into the German home market next to impossible. For these reasons, despite all, these late arrivals in the race to the international legal market have a good chance of winning a fairly honorable position in the 1990's European professional landscape. This might explain why the German professional group does not feel the same need for a radical revolution as did the French and the British; the professional elite's major concerns seem to be to arrive at an accepted necessary modernization through methods, both discreet and continuous, that will not upset the compromises nor the equilibriums that characterize the professional edifice.

French lawyers are in a far more delicate position (Coulon, 1988). They have the handicaps, but none of the advantages of their British and German counterparts. They share the English 'legal aristocracy's' disdain for trade, tax and figures in general. In addition the division of practitioners into multiple hierarchical categories, separated by immutable barriers, weakens the position of legal professionals on the consulting market. The 'grande profession' reform project is meant to remedy this situation by openly introducing into France the 'lawyer' and the 'law firm' model, thus offering the whole range of consulting services, from tax advice to litigation. But will this sort of sacred alliance, which the Bar adamantly refused to hear of when it was proposed by the public powers twenty years ago, be enough to open the business market to lawyers?

It is doubtful for various reasons. First of all, because North-American, and now English or Dutch competitors are solidly implanted, not only in the international, but also in the internal market. Public powers as well as big firms give priority to these foreign consulting firms. One has to admit that French lawyers, apart from a

tiny minority, are still very 'provincial'; witness the fact that only about 10% of the younger generation speak today's business world's "lingua franca" – English! And then, as opposed to what we have seen as regards Germany, law faculties no longer give access either to power within the State, or within big business. Economic and State power remain the private hunting grounds of the "noblesse d'Etat" of the 'grandes écoles' (Bourdieu, 1985, 1989). This is a major weakness of their position: as has been said above, if one is to play the role of intermediary in the business world, a capital of social relations is as important as strictly technical knowledge. It is not by chance that Arthur Andersen prefers to recruit amongst the old boys of a 'grande école' like HEC (leading French business school), rather than from the law faculties, even if afterwards they have to provide them with the necessary legal technical knowledge. For all these reasons, and despite the radical character of the proposed reforms, one might remain a little sceptical of the success of this aggiornamento strategy, which, as they acknowledge themselves, these professional authorities have engaged in "a little late in the day and with their backs to the wall". Even if these reforms do pass, as they have in England, they are far from being welcomed unanimously. And there is a serious risk that not only will they not open the door further to allow the French Bar access to the international market of advice to companies, they might even leave the home-front law market wide open to big, international consultancies. Admittedly, these latter are already holding the fort seeing that they all have 'conseil juridique' status and that they could, if the reform sees the light of day, offer their clientele a complete range of legal services by recruiting the litigation specialists they so far lack.

Thus, in these three countries, the breadth and radicalism of these reforms are in proportion to the handicaps to be remediated, and by no means do they guarantee success.

Overbidding on the terrain of law based on the scholastic abilities of the newcomers

With varying fortunes but the same objective in mind, the legal profession of the Western World has tuned into the market. Rationalization, marketing, and profitability have become watch-words in the

counter-attack to make up for lost ground – or to avoid loosing even more in the market of business consulting. Traditional values such as collegiality and public civism have been sacrificed on the altar of competition. Does this mean, as some have suggested, that legal services have become commodities, similar to any other? Or worse still, possessed by demon ambition, the legal world is losing all that gave it its ideals and character?

This sort of conclusion would seem a little premature. It would be to forget that even the more aggressive legal entrepreneurs are well aware that they draw most of their symbolic authority in the business world from their status as clerks of the law. Because the survival of law and their own survival is in question, competition on the market place also means competition within the law, for the law. At most one could say that the system of legitimization has been displaced: the gentleman lawyer's moral authority has been replaced by the technocratic ability of the new generation selected and trained by schools. This shift – the effects of which, on the political front, are far from negligible – could be ascribed as much to the transformation of the 'jurist reproduction process' as to the commercialization of business justice.

Caught in the jaws of such merciless competition, the gap between modern law firms and the 'gentleman-club model' which the 'distinguished, socially aware, dilettante patricians' felt obliged to put forth, was widened. The rather schizophrenic (Gordon, 1984) co-existence of moral and civic virtues demanded of the man of law with all the inevitable compromises that service to capital requires is the price that had to be paid to maintain credibility. Rupture of this delicate balance means reconversion. To conserve the legal legitimacy which is their prime capital, these new generations of law firms and lawyers are driven to over-invest in the terrain of knowledge and technical authority to compensate for lost moral and civic authority.

Competition in the services market provokes overbidding on the judicial terrain. Recourse to the judge, the placing of dispute onto a judicial terrain is one of the best defense strategies in the increasingly open, competitive consulting market. Within the perimeters of courts, the ability of legal clerks has no equal; their non-specialist competitors on the ordinary legal consulting market of routine tasks are obliged to take a back seat. They alone are qualified in the last instance to set the norm that transcends particular, local or technical norms. Thus they are assured a choice position when high stakes

justify recourse to all the armory of tactical argument. The revalorization of the place held by in-house lawyers in the hierarchical structures of management, the weight and the value of legal practitioners on the consulting market are thus related to the permanent renewal of the learned debate within the law, on issues of jurisprudence. Whatever their visible antagonism, or the distance separating them, the 'law merchants' and the 'temple guardians' form a united front. The commercialization of law reinforces legal rationality and autonomy.

This strategy of territorial defense also represents, as has been said above, an excellent marketing strategy at a time when economic agents are concerned with reconstructing the rules of the international game without which production and trade cannot be stabilized. This new law of economic relations, produced through and by market forces is also, to a degree, the law of the survival of the fittest. It ratifies rather than corrects power struggles and trade logic. The high costs of judicial and jurisprudential strategies reserves them for the dominant faction, which is thus in a position to impose new rules of the game, sanctioned by the judge, on their less fortunate competitors.

Above all, it is an optimum strategy for the use and profitability of all the resources of the big law firms. As Galanter (1983) suggests, "mega-law" requires "mega-firms" and vice-versa. In effect, this is the perfect terrain upon which to deploy all the hierarchical machinery they have built, meaning as much the logistic, documentary and human material, as the concentration of top-level specialists that only they can afford. It is also an area of activity where they can put to full use the scholarly type knowledge acquired in the big law schools by the younger generation from among whom they pick the best elements.

If this litigation strategy has progressively gained ground, it perhaps corresponds to the new needs of the various operators on the legal consulting market, but it has also only been made possible through the changing of methods of training producers of law that have in turn transformed the characteristics of the people these law firms employ.

The conjunction that can be observed all over the Western world between the post-war demographic boom and the widespread distribution of secondary education to the middle classes has not been a negligible factor in the evolution of the supply of jurists and the definition of professional excellence.

Traditionally, the formation of these clerks belonged more, even in codified law countries, to a model of quasi-aristocratic reproduction based on apprenticeship, social selection and a rigorous *numerus clausus* policy. The dissemination of the scholastic model has favoured a more meritocratic approach where social relation and social 'know-how' are being replaced by technical abilities (Dezalay, Sarat, Silbey, 1989). Thus, in the last twenty years the more powerful Western countries have known a new generation of lawyers, made distinct from their elders by the nature of their social ambitions and the resources they have at their disposal; they rely less on familiarity and complicity, the classical characteristics of the muffled law world of yore, and proclaim themselves expert-technicians, sure of a competence they have every intention of employing in order to carve out their place in the sun. The ambitious driving force of these new professional generations fed the aggressive marketing techniques of the 70's law firms, which helped them survive a far more competitive market. Thanks to them, law notables, propped up by these young 'parvenus' to whom they had opened their ranks could react against the invasion of the 'newcomer' accountants. Simultaneously, the scholastic ability brought in by these new-comers helped bring up to date the process of the social legitimation of the law from a civic to a technocratic model.

For generations, the big law firms recruited their members almost exclusively from amongst the inheritors of the WASP dynasties who, certainly, had been carefully educated in schools and colleges endowed by their fathers (Baltzell, 1958, 1964). It is obvious however, that their careers depended less on acquired scholastic achievement, than on the inherited social ease and contact networks their social origins automatically provided for them, and that allowed them quite naturally to play the role of 'go-between' between the political and the business world.

> The first circle of the power-elite also includes professionals of law or of finance belonging to the big law factories or investment banks. They play the role of professional go-between in all deals that simultaneously touch the political, the economic, the military and thus help unify the elite in power" (Domhoff, 1967:60).

> "Often, one of the more characteristic traits of the lawyer is his cosmopolitanism: not only must he tear down the veils of legal mystery, he must also have access to individuals or social circles

> too exotic for his provincial client. (...) Wall Street lawyers, for instance, were familiar with the European banking milieu and often served as 'go-betweens' between North-American industrials and the old continent's merchant bankers (Gordon, 1988).

This professional elite of corporate lawyers – which formed with their principal clients, the investment banks, the inner circle of a business aristocracy – boasted of their distaste for abstract syllogisms of pure legal reasoning (Baltzell, 1958:146) or the arcane of legal procedure that they left willingly to such 'upstarts' as Jewish lawyers who made up for the 'indignity' of their origins with scholastic achievements. In the professional world, 'Ivy League' law schools were more a private club where young 'gentlemen' were prepared for a professional life based, too, on the model of a club for

> distinguished patricians desirous of maintaining elitist legal practices within a private club for the right sort of people – meaning individuals enclosed within the rites of traditional business practices, that, however, were not too demanding upon the time of any adult, male WASP worthy of the name, thus allowing him to take his share of other social responsibilities his rank allotted to him" (Gordon, 1988:69).

And so, up to the Second World War, corporate law remained the prerogative of a small minority of heirs for whom (apart from a tiny minority of Jewish students) scholastic knowledge was not the main prerequisite. The situation began to change in the 50's, with, notably, the establishments of financial assistance programs that allowed veterans to enroll in advanced education.. But the greatest visible changes began in the 60's under the combined effect of the 'Baby Boom' and federal scholarship programs when the professional field was progressively transformed into a scholastic meritocracy. In 1960, the number of students enrolled in law school was approximately the same as in 1927, but nearly all had a college degree and were full time students in establishments approved by the American Bar Association (Abel, 1986:383). The base of the structure of the field of scholastic law thus broadened considerably, and increased in amplitude – in 1960 there were 44,000 students whereas in 1974, their numbers grew to 110,000. The prestigious East coast law schools by no means escaped from the meritocratization tidal wave.

Places became even more sought after (ten candidates for one place whereas the normal ratio was three to one (ibid p. 387)). The aristocratic model of the gentleman-lawyer-dilettante-heir rounding out his education in a sort of prestigious finishing school, where the establishment of a network of contacts was as important as the knowledge transmitted, could not resist the expansion of selection and competition engendered by this influx of hungry newcomers whose qualifications were in accord with their ambitions.

The development of scholastic competition by favouring the arrival of experts owing their position less to kinship ties than to educational endeavor, allowed the legal professions their counter-attack on the field of legal rationality. Simultaneously, the arrival of all these newcomers, selected by and through competition helped introduce competition to the field of legal practices where the 'gentle-men' lawyers had tried, if not to banish it, at least to control it. A competition, we have attempted to demonstrate, that was taking place in other professional areas, fed by the opening of new markets to professional 'know-how', because of the internationalization of the economic power field.

In their professional practice, the "heirs" played on their vast social contact network and that bank of 'trust' fostered by the freely-adopted contract to "respect the unwritten rules of the club" under pain of exclusion. The newcomers, their only capital their school diplomas, have no other choice, if they do not wish to remain mere executors of technical tasks in the wings of economic power, than to pioneer new territories abandoned, or ignored, by the 'gentlemen' as being too risky or contemptible. It is through no accident that a certain Jo Flom, born of Russian immigrants, but achieving a Harvard Law School diploma began his career in 'proxy fights', practices considered rather dubious and held in contempt by the big Wall Street firms (Nora, 1987:94). The same could be said of all the "barbarians" who launched their attack against big firm management, be it the raiders themselves, or the 'hired guns' they employed to do their dirty work.

The period of financial restructuring increased possibilities for brilliant young people whose ambition was fed by the accumulated frustrations and resentments of the middle classes against the gilded heirs of the country clubs. When T. Boone Pickens proclaimed himself the defender of small share holders against top management's exorbitant privileges, his resolution should not be dismissed as so much rambling hogwash. The strength of financial and eco-

nomic restructuring comes – at least in its beginnings – from the fact that it fed class rivalry between members of the establishment and those beyond the pale. If this basic need for social revenge is not taken into account, it is impossible to understand how much of the characteristics of this new field of professional practices owe to middle-class pushiness: from the non-stop pace of these 'workaholics' to the technical ingenuity of juridico-financial innovations invented by "eggheads": junk bonds, poison pills (Powell, 1988) etc.

The feeling of enforced exclusion and the desire for revenge which motivated many of these new practitioners can be ignored even less in that it helps explain professional collaborative links formed in this new field of practice between operators like Milken, Wasserstein, Flom, Lipton, who constantly and amicably call on one another and thus can be found playing in every episode of the juridico-financial power-struggle serial; all, or nearly all, consider themselves at war with the establishment, and boast of being the first generation of professionals to have come out of the garment industry (Bruck, 1988:23). These new-style "angry young men" have built up their own network of knowledge and professional relationships, a sort of "go-getters club" weapon against the "old boy country club network" that excluded them.

This conflict between "gentlemen" and "upstarts" runs through the ongoing debate on the decline of traditional professional ethics. Professional morality is a luxury reserved to those members with a rightful entry to the politico-financial establishment; rather like good manners, it can only be acquired with time. It constitutes thus a formidable protective defense for the "heirs", against the "upstarts" who have no other solution than to play, in one form or another, at "ambulance chasing". The upstarts are thereby obliged to somewhat dirty their hands, at least for a time, by performing tasks held in disdain by White Shoe firms – such as proxy fights, bankruptcy, hostile take-overs or junk bonds. That is, practices where the codes of honor and decency, and the good manners of 'gentlemen', are out of place. However, there is a degree of risk. The more skillful – or more fortunate – "convert" in time, such as Marty Lipman who has become, henceforth, a defender of the establishment against "predators", or Jo Flom whose firm now tried to present itself as a champion of "pro bono" work. The others, such as Ivan Boesky or Michael Milken end up in the role of scapegoat and are brutally called to order by financial and professional boards of

ethics – despite the fact that the innovations they introduced are adopted by the general body of the milieu whose practices they have helped modernize.

The gradual integration – or brutal elimination – of "young Turks" revitalizes the ruling class by a renewal of elites that happens simultaneously in the fields of enterprise and of the professions. This phenomenon is not limited to the small world of Wall Street. Everywhere, the expansion of the consulting market has opened doors to the children of the middle classes and feeds off the ambitions, the technical knowledge and the labour of this scholastic meritocracy. It is true for the law firms that have considerably broadened their recruitment criteria; it is even more so for the "Big Eight" whose expansion is closely associated with the promotion of the professional world's "poor relations" – those former "Dickensian" accountants (Jones, 1981:137). More broadly speaking again, financial and industrial restructuring, of which these experts are the professional operators, favors the access to economic power of the new generations of entrepreneurs brought forth by the business schools, the "MBAs" – also considered by many as "parvenus".

It is this homologous effect (Bourdieu, 1989) between the field of law and that of economic relations which opens the door to all sorts of simplistic explanations, that sees causality where there is only an effect of simultaneous evolution and mutual reinforcing of co-related factors. But, as has been said above, to do justice to the various facets of this phenomenon, the producers of learned discourse should "put their own house in order" by questioning their own role in this "commercialization of law", inseparable from the transformation of the methods of reproducing these professionals.

* * *

The main difficulty of such a subject stems from the phenomenon's multiple dimensions which call for, despite a certain risk sounding repetitive, an endless travelling back and forth between the different levels of its structural history. It also lies in the fact that, the current process being as yet far from stable, it is virtually impossible to come to a firm conclusion. Thus, the outline presented here not only lacks precision, it is incomplete. So, instead of a formal conclusion, rather than play the tricky game of predicting eventual possibilities,

we can only recall to mind the main dynamics and strategies that have helped contribute towards a remodeling of the professional fields.

The opening and broadening of markets is coupled with the growing complexity of available legal instruments which promote professionalism in business relations. These professionals in their turn strive to consolidate and rationalize the new management technology and trade networks they have contrived to establish. If this strategic objective is shared by all the groups of experts addressing the consulting market, the tactics followed by each category concerned depends much on the positions they previously occupied in the field of economic and political power. On this level, differences are considerable, not only between disciplines, but between nations. The two variables interact strongly with each other.

The breadth of reforms envisaged in Europe and the violent confrontations they have caused is in proportion to the gradually widening gap between practitioners of law and economic ruling circles. This is a serious handicap reformers hope shortly to correct using an "aggiornamento" policy as hardy as these practitioners who feel they are playing their all. In effect, they have nothing to lose and everything to gain: taking advantage of their absence, other competitors have claimed 'squatters rights' on the terrains of legal and tax consulting for firms, and of business intermediation, that the European 'jurists' claim today.

Confrontations about 'mixed practice' (in Britain) or the "grand profession d'avocat-conseil" (in France) are but so many local episodes of the restructuring of the market of professional services which affects all developed economies and challenges, not only national boundaries, but the redistribution of tasks – and profits – between different categories of professionals: jurists, accountants, financiers, consultants. Each of these experts whose separate 'know-how' are as competitive as they are complementary strive to occupy the privileged position of advisor to economic power: a place the great Wall Street lawyers have assumed since the turn of the century by becoming the right arms of those "robber barons" like J.P. Morgan or J.D. Rockefeller. This is a situation their continental counterparts have never enjoyed, but that the most ambitious of them are eyeing as the internal market of 1992 approaches.

The success of the American model is above all that of concentration and that the division of legal tasks adequately conform to the expansion of industrial capitalism. This early start has allowed Wall

Street lawyers and investment bankers to be at the forefront of the internationalization process – and at the same time to be its greatest beneficiaries. It is thus also on the other side of the Atlantic that we have seen the first signs of the legal system's implosion beneath the twin effects of multiplication of producers and the transformation of demand. Formed to respond to the needs of trade and traders, the law firms model was predisposed to evolve at the same time as the market of corporate legal services. The quantitative growth of business and producers has provoked qualitative mutation: trade imperatives have invaded the terrain of law. The explosion of the legal services and legal market have extended beyond the limits of internal mechanisms controlling competitions and concentration; it has also given birth to the "mega-law" firms which still dominate the consulting market – even if they have to defend their territory inch-by-inch today against the newcomer accountants by deploying the latter's weapons.

The eruption of competition on the terrain of legal practice – which thus loses its characteristic "gentlemanliness" is not a mere deregularization induced by the gradual decay of institutions and professional morality. It would thus be pointless to attempt amelioration through the ceremonial reassertion of traditional codes of ethics. If it is not understood that this is the product of the field of power's restructuring thanks to the internationalization of the financial market, which at the same time is inseparable from the transformation of methods producing experts in the service of economic power, one is condemned to a simplistic reading of these phenomena and hence, to political powerlessness. If, despite all the learned exhortations addressed to them, the new generations refuse to behave like "gentlemen", it is because, first of all, they are no longer 'heirs', meaning individuals born with social advantages predisposing them to play "gentlemen of law" on the terrain of economic relations. From now on they have to fight, first in school, and later on, in their practice, to conquer the position of expert, among others, which now belong to them and which corresponds to imperatives of rationalization within economic space as well as on the terrain of law.

This article has been translated by Bernice Cleeve and edited by Gina Ké. The research has been funded by the Commissariat au Plan.

The author wishes to thank the following fellow researchers, who have, in various ways, been helpful in the development of the article: Eliot Freidson, Marc Galanter, Terry Halliday, Christine Harrington, Sol Picciotto, Dave Trubek and Ulrike Schulz.

Finally, a special expression of gratitude to Bill Felstiner, Director of the American Bar Association Research Center, and to Volkmar Gessner, Director of the Zentrum für Europäische Rechtspolitik.

References

Abel, R. (1986) "The Transformation of the American Legal Profession", in *Law & Society Review* XX:1

Abel, R. (1988) *The Legal Profession in England and Wales* Oxford: Basil Blackwell

Abbott, A. (1988) *The System of the Profession: an essay on the division of expert labor* Chicago: University of Chicago Press

The Accountant: A review of financial services in London 1984-04-26

A.T.H. (1985) *L'empire des chiffres* Paris: Fayard

Auchincloss, L. (1986) *Diary of a Yuppie* New York: St Martin's Press

Baltzell, E. (1958) *Philadelphia Gentlemen: the making of a national upper class* New York: Free Press

Baltzell, E. (1964) *The Protestant Establishment: aristocracy & caste in America* New Haven: Yale University Press

Blankenburg, E., Schultz, U. (1988) "German Advocates: a highly regulated profession", in Abel, R., Lewis, P. *Lawyers in Society. Vol 2: The Civil Law World* Berkeley: University of California Press

Bourdieu, P. (1986) "La force du droit: éléments pour une sociologie du champ juridique", in *Actes de la Recherche* n° 64

Bourdieu, P. (1987) "Variants et invariants: éléments pour une histoire structurale du champ des grandes écoles", in *Actes de la Recherche* n° 70

Bourdieu, P. (1989) *La noblesse d'Etat: grandes écoles et esprit de corps* Paris: Editions de Minuit

Bourdieu, P., de Saint Martin, M. (1978) "Le patronat", in *Actes de la Recherche* n° 20-21

Boyer, R. (1986) *Capitalismes fin de siècle* Paris: PUF

Bruck, C. (1988) *The Predator's Ball: the junk bond raiders and the man who staked them* New York: Simon & Shuster

Campbell-Smith, D. (1985a) "The Rise and Rise of a New Breed of Lawyers", in *Financial Times* 1985-05-16

Campbell-Smith, D. (1985b) "The Legal Profession: facing up to the global challenge" in *Financial Times* 1985-07-15

Cohen-Tannugi, L. (1985) *Le droit sans l'Etat* Paris: PUF

Cohen-Tannugi, L. (1988) "La décennie du droit", in *L'express* 1988-12-16

Coulon, J.C. (1988) *Les professions juridique de service aux entreprises dans l'Europe de 1992* Rapport pour le Commissariat Général du Plan, Novembre 1988

Davies, R. (1985) "Invasion Of City Increases: overseas lawyers in the UK", in *Financial Times* 1987-05-15

de Ricci, M. (1988) "Les nouveaux dinosaures", in *Gazette du Palais* 1988-09-22--24

Dezalay, Y. (1986) "From Mediation to Pure Law: practice and scholarly representation within the legal sphere", in *International Journal of the Sociology of Law* 14

Dezalay, Y. (1987) "'The Forum Should Fit The Fuss': the economics of negotiated justice". Paper presented at the Amherst Seminar, Amherst 1987-12-04

Dezalay, Y. (1989a) "Le droit des faillites: du notable à l'expert. La restructuration du champ des professionnels de la restructuration des entreprises", in *Actes de la Recherche* N° 76-77

Dezalay, Y. (1989b) "Putting Justice Into Play on the Global Market: law, lawyers, accountants and the competition for financial services". Paper presented at the Law & Society Annual Meeting, Madison, Wisconsin 1989-06-09

Dezalay, Y. (1989c) "Negotiated Justice as a Renegotiation of the Division of Labour Within the Field of Law: the French case", in Meschievitz, C., Plett, K. (eds) *Beyond Disputing: exploring legal cultures in 5 European countries* Baden-Baden: Nomos

Dezalay, Y., Sarat, A., Silbey, S. (1989) D'une démarche contestaire à un savoir méritocratique. Esquisse d'une histoire sociale de la sociologie juridique américaine", in *Actes de la Recherche* N° 78

Domhoff, G. (1967) *Who Rules America?* Englewood: Prentice-Hall

Domhoff, G. (1978) *The Powers That Be: processes of ruling class domination in America* New York: Vintage Books

The Economist (1988) "Accountancy Firms: Plum Pudding" 1988-12-17

The Economist (1989) "Big Bang For The City's Law Firms" 1989-09-09

Eymard-Duvernay, F., Thevenot, L. (1983) *Les immobilisations de forme pour l'usage de la main d'oeuvre* Paris: INSEE

Fitzpatrick, J. (1988) "Legal Future Scock: the role of large law firms by the end of the century". Paper presented to the Symposium on the Growth of Large Law Firms, Indiana University School of Law, Bloomington 1988-03-09

Galanter, M. (1974) "Why the 'Haves' Come Out Ahead: speculations on the limits of legal change", in *Law & Society* Fall 1974

Galanter, M. (1983) "Mega-Law and Mega-Lawyering in the Contemporary U.S.", in Dingwall, R., Lewis, P. (eds) *The Sociology of the Professions* London: Macmillan

Galanter, M., Palay, T. (1988) *The Growth of Law Firms* Madison, Wisconsin: Institute of Legal Studies

Galanter, M., Rogers, J. (1988) "The Transformation of America's Business Disputing? Some preliminary observations". Paper presented to the Law & Society Annual Meeting, Vail, Colorado 1988-06-12

Gordon, R. (1984) "'The Ideal and the Actual in the Law': fantasies and practices of New York City lawyers, 1870-1910", in Gawalt, G (ed) *The New High Priests: lawyers in post-civil war America* Westport: Greenwood Press

Gordon, R. (1985) "Introduction to the Symposium on the Corporate Law", in *Stanford Law Review* 37

Gordon, R. (1988) "The Independence of Lawyers", in *Boston University Law Review* 68:1

Hampton, C. (1988) "A Breath-Taking Growth Rate", in *Financial Times* 1988-10-20

Harrington, C. (1985) *Shadow Justice: the ideology and institutionalization of alternatives to court* Westport: Greenwood Press

Hobson, W. (1984) "Symbol of the New Profession: emergence of the large law firm, 1870-1915", in Gawalt, G (ed) *The New High Priests: lawyers in post-civil war America* Westport: Greenwood Press

Hughes, R. (1987) "The Legal Profession Paddling with the Tide", in *Financial Times* 1987-10-15

Jones, E. (1981) *Accountancy and the British Economy 1840-1980* London: Batsford

Jezegabel, M. (1988) "Avocats d'affaires contre 'lawyers'", in *Dynasteurs* 1988-12-16

Karpik, L. (1988) "Lawyers and Politics in France, 1814-1950: the state, the market, the public", in *Law & Social Inquiry* 13:4

Kynaston (1989) "Farewell to the City", in *Financial Times* 1989-03-25--26

Labaton, S. (1988) "U.S. Law Firms Axpand To Reach Global Clientele", in *New York Times* 1988-05-12

Leyshon, A., Daniels, P., Thrift, N. (1987-88) *Working Paper on Producer Services: (Vol 2) Large Accountancy Firms in the UK: operational adaption and spatial development; (Vol 3) Internationalization of Professional Producer Services: the case of large accountancy firms* St Davids University College, Lampeter, and University of Liverpool

Logeart, A. (1987) "Defence des droits de l'homme et rendez-vous europeen", in *Le Monde* 1987-10

McBarnet, D. (1984) "Law and Capital: the role of legal form and legal actors", in *International Journal of the Sociology of Law* 12

McBarnet, D. (1988) "Law, Policy and Legal Avoidance: can law effectively implement egalitarian policies?" in *Journal of Law and Society* 15:1

Manager Magazin (1989) "Ohne sie lauft nichts" February 1989

Nader, R. (1970) "Law Schools and Law Firms" in *Minnesota Law Review* 54

The National Law Journal (1987) "American Attorneys in Paris" 1987-06-22

Nora, D. (1988) *Les possédés de Wall Street* Paris: Denoel

Nelson, R. (1987) *Partners With Power: the social transformation of the large law firm* Berkely: University of California Press

Nelson, R., Trubek, D. (1988) "Lawyer Professionalism and Its Discontent: from arenas of words to arenas of work". Paper presented at the American Bar Foundation's Conference on Professionalism, Ethics and Economic Change in the American Legal Profession, Evanston, Ill. 1988-09-22

Noyelle, T., Dutka, A. (1986) "The Economics of the World Market for Business Services", in *University of Chicago Legal Forum* Vol 1986

Picciotto, S. (1988) "The Control of Transnational Capital and the Democratization of the International State", in *Journal of Law and Society* 15:1

Pollock, E. (1989) "US Law Firms, Catching 1992 Fever, Bet They'll Gain Edge In United Europe", in *Wall Street Journal* 1989-09-26

Powell, M. (1987) "Professional Innovation: corporate lawyers and private law making". Paper presented to the Law & Society Annual Meeting Washington, D.C. 1987-06-12

Rice, R. (1989a) "Growing Use Of Law In Attack And Defense", in *Financial Times* 1989-07-13

Rice, R. (1989b) "Lawyers Come Face To Face With Competition", in *Financial Times* 1989-07-17

Rice, R. (1989c) "US Firms Pioneer The Route To Global Practices", in *Financial Times* 1989-09-25

Riley, B. (1986) "Globalization Strains Structure", in *Financial Times* 1986-12-15

Rothfeld, C. (1989) "Law Firms Are Moving Rapidly Into New Businesses", in *New York Times* 1989-06-09

Rueschemeyer, D. (1973) *Lawyers and Their Society* Cambridge: Harvard University Press

Rueschemeyer, D. (1986) "Comparing Legal Professions Cross-Nationally: from a professions-centered to a state-centered approach" in *American Bar Foundation Research Journal* 3

Sarat, A., Silbey, S. (1988) "The Pull of the Policy Audience", in *Law & Policy* X:2-3

Soulez-Lariviere, D. (1988) *La réforme des professions juridique et judiciaires.* Rapport pour le Conseil de l'ordre, Paris

Spangler, E. (1986) *Lawyers For Hire* New Haven: Yale University Press

Stevens, M. (1981) *The Big Eight* New York: Collier

Stevens, M. (1985) *The Accounting Wars* New York: Collier

Tinker, T. (1984) *Paper Prophets: a social critique of accounting* Eastbourne: Holt, Rinehart and Winston

Thompson, E.P. (1975) *Whigs and Hunters: the origin of the black act* London: Allen Lane

Tutt, N. (1988) "Bar sans frontières in Brussels", in *New Law Journal* 1988-09-31

Waller, D. (1989) "The UK Takeover Scene: a crucial role for lawyers", in *Financial Times* 1989-07-13

Waters, R. (1987) "Accountancy: it's business that matters", in *Financial Times* 1987-11-20

Waters, R. (1989a) "Old Order Give Way To New In Accountancy", in *Financial Times* 1989-02-16

Waters, R. (1989b) "High Noon Clash for Firms and Regulators", in *Financial Times* 1989-05-18

Weber, M. (1968) *Economy and Society. Vol 2* Berkely: University of California Press

Whybrow, G. (1987) "Working With Figures", in *Financial Times* 1987-10-15

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

"Helan och Halvan": Processer och föreställningar kring den ökade förtidspensioneringen

Bo Carlsson

Rättssociologiska institutionen, Lunds universitet

1. Inledning

Nyligen utkämpade en stor del av Sveriges lokförare en kamp, en vild strejk, mot arbetsgivare, järnvägsinspektionen och deras eget fackförbund för att bibehålla pensionsåldern vid 60 år. För att erhålla en rad löneförmåner hade lokförarnas fackförbund, Statsanställdas förbund, varit villigt att gå arbetsgivaren till mötes och avtala bort den nuvarande pensionsåldern för lokförare (och även för brevbärare). Lokförarna var av den uppfattningen att lönekampen inte kan utkämpas på de sociala rättigheternas område. Vad man hävdade var att försämringar i den sociala tryggheten inte kan kompenseras av reella lönelyft, och att en utökning av den aktiva åldern till 65 år vore en risk såväl för allmänhetens säkerhet som för lokförarnas hälsa. Lokförarna fick bl a stöd av medicinsk expertis (David Ingvar) som hävdade att pensionsåldern och förhållandet mellan arbete och sjukdom är så pass allvarligt att det i grunden inte kan vara en avtalsfråga för marknadens parter.

Lokförarstrejken är över för den här gången (28/8-89), och minst 1 200 lokförare kommer att stämmas inför Arbetsdomstolen för arbetsvägran. Men kraven från lokförarna ligger kvar och brevbärarna

har kommit med en mängd stöduttalanden. Vad man kan säga är att strejken på ett påtagligt sätt har rest frågan om pensionsålder och pensionsvillkor. Och inte minst frågor om arbetsvillkor, arbete och sjukdom.

Den föreslagna höjningen av lokförarnas pensionsålder är bara ett exempel på marknadsorienterade aktörers vilja och strävan att utöka arbetarkollektivet och därmed den tillgängliga arbetskraften. Svenska arbetsgivareföreningen (SAF) har även talat om en generell höjning av pensionsåldern eftersom dagens pensionärer har blivit allt friskare. I dagens läge vore en lämplig ålder 67 år, enligt SAF:s förmenande. (Blir framtidens pensionärer ännu friskare får man väl höja pensionsåldern ytterligare. Det får tydligen inte finnas en möjlighet att man är frisk när det blir aktuellt att sluta förvärvsarbeta!) Förslaget har avvisats av pågående pensionsberedning. Ett mer seriöst förslag har inriktat sig på att skapa en rörlig pensionsålder som kan göra det möjligt för den som så önskar att fortsätta arbeta på äldre dar.[1]

Ett annat förslag från förtidspensioneringsinstitutets kritiker bygger på idén att frikoppla resurser från sjukförsäkrings- och rehabiliteringssystemet. Dessa resurser skulle i stället gå till företagen i syfte att göra det företagsekonomiskt möjligt att anställa "arbetskraft med nedsatt arbetsförmåga".

Den bakomliggande tanken i de olika förslagen bygger på uppfattningen att det är nödvändigt och att det går att med enkla medel effektivisera pensions- och socialförsäkringssystemet. De som ställt sig kritiska till de framförda förslagen har allmänt varit av den uppfattningen att förslagen snarare innebär en "nedrustning" av sjukskrivnings- och pensionsvillkoren och vårt lands välfärdsprogram, än en effektivisering och förbättring.

De sociala rättigheter som kommit allt mer i skottgluggen och som blivit allt mer kritiserade är dels sjukförsäkringen, på grund av den allt mer omfattande sjukskrivningen, dels förtidspensioneringen, på grund av ökningen av nybeviljade förtidspensioner. När det gäller förtidspensionen och dess konsekvenser talas till och med om den "absurda förtidspensioneringen", med vilket man avser att "den som blir förtidspensionerad *definitivt blir avkopplad från förvärvslivet*" (*DN* 1989-08-10). I detta sammanhang hävdas det att i stället för att satsa stora resurser på förtidspensionerna borde man omprioritera och satsa resurserna på tidiga rehabiliteringsåtgärder som gör det möjligt att få tillbaka den sjukskrivne, alternativt den utslitne, i förvärvslivet.

Samtidigt som försöken att höja pensionsåldern och arbetets värde för såväl äldre arbetstagare som för arbetskraft som hamnat i gränslandet mellan sjukskrivning, rehabilitering och förtidspension har intensifierats, förekommer det olika processer i motsatt riktning. Arbetstagarna har blivit allt mer uppmärksamma vad gäller arbetsmiljö och dess inverkan på hälsan. Allt fler ansöker om, och erhåller, kompensation för nedsatt arbetsförmåga (Hetzler & Eriksson 1982). Vidare har antalet *quitters* ökat, de som säger upp sig utan att ha något annat arbete att gå över till och som därmed under en period avstängs från arbetslöshetsersättning (Eriksson 1989). Dessutom beviljas årligen mellan 45-50 000 förtidspensioner. Frågan är om detta relaterar sig till faktiska processer i arbets- och samhällslivet (utslitning, stress och uppkomsten av andra värden än arbete) eller om det är avhängigt ett ineffektivt, och rent av orättvist, socialförsäkringssystem. Den första frågan kan belysas i termer av motivations- och legitimitetskriser, den andra i termer av rationalitetskriser (Habermas 1976; Offe 1984). Välfärdsstaten har kommit att allt mer balansera mellan dessa kriser. Offe talar om "crisis management" och om välfärdsstatens två motsägelsefulla uppgifter: att både reglera och reproducera marknaden (se nedan, avsnitt 5.)

Denna uppsats har som syfte att studera den ökade förtidspensioneringen – en av våra mest kritiserade socialförsäkringar. Frågan kommer att relateras till en strukturell kontext: marknadens olika konjunkturkänsliga krav, välfärdsstatens olika rationalitets- och legitimitetskriser, den moralisk-praktiska utvecklingen samt arbetets värde och olika utslitningsprocesser i arbetslivet.[2] Vidare kommer uppsatsen att redovisa statistiska data från Riksförsäkringsverket som visar att förtidspensioneringens ökning är betingad av två olika utvecklingsperioder där *halv* förtidspension kommit att få en allt större omfattning. Halv förtidspension kan vara av speciellt intresse i och med dess koppling till både arbetslivet (produktivitetskrav) och socialförsäkringen (social trygghet). En fråga är om utvecklingen av pensioneringsgrader (hel respektive halv förtidspension) motsvarar verkliga behov, och i så fall vilka.

2. Förtidspension – en bakgrund

Försörjning genom arbete var tidigare den enda möjligheten för den enskilde individen, åtminstone om man inte tillhörde de besuttna

klasserna eller hade rätt till ålders- eller invaliditetspension (infördes 1913). Förslitning av kroppen upplevdes mer eller mindre som normalt, som ett pris arbetaren var tvungen att betala för att ha ett arbete. Staten ingrep endast sporadiskt och då för att kompensera för onormalt stora lidanden. Efter andra världskriget har det skett en rad viktiga förändringar vad gäller pensionsvillkor och synen på pension. Efter en politiskt stormig tidsperiod med folkomröstning och riksdagsupplösning antogs 1959 lagen om försäkring för allmän tilläggspension (ATP).

Den moderna välfärdsstaten har kommit att agera mer aktivt. Numera har individen en rättighet gentemot samhället att få försörjning, och om möjligt arbete i enlighet med principen om full sysselsättning. När det gäller arbetarens rättigheter i fråga om försörjning har utvecklingen kommit att peka i riktningen mot en ökad användning av socialförsäkringssystemet både som ett komplement och ett alternativ till arbete.

Begreppet förtidspension kom in i svensk lagstiftning först år 1963. För att förtidspension skulle komma i fråga krävdes en medicinsk bedömning av "arbetsoförmågans" varaktighet samt vilka rehabiliteringsåtgärder som var möjliga att vidtaga. En rad reformer och förändringar har sedan dess genomförts när det gäller rätten till förtidspension (bl a 1970, 1972, 1973, 1974, 1975, 1976, 1977 och 1979), vilket inneburit att kretsen av pensionsberättigade successivt har vidgats.

I *Vår trygghet 1988/1989,* en handbok om våra sociala rättigheter utgiven av Folksams sociala råd, kan man läsa att den som är mellan 16 och 65 år kan få förtidspension eller sjukbidrag om förmågan att arbeta är nedsatt med minst hälften. Arbetsoförmågan ska vara medicinskt betingad, d v s sjukdom eller annan nedsättning av fysiska eller psykiska prestationsförmågan. Det bör noteras att "om inte arbetsförmågan och därmed inte heller arbetsinkomsten har försämrats genom handikappet, lämnas ingen förtidspension – även om invaliditeten är mycket allvarlig" (s 62). Som villkor finns en arbetsoförmåga, en arbetsinvaliditet. När rätten till förtidspension ska bedömas för äldre förvärvsarbetande är det medicinska kravet inte av samma dignitet.

Det förekommer tre olika pensioneringsgrader. Förtidspension (och sjukbidrag) kan ges som:

a) hel förtidspension, till den vars arbetsförmåga är nedsatt med minst 5/6,

b) 2/3 förtidspension, till den vars arbetsförmåga är nedsatt med minst 2/3 men inte 5/6, samt
c) 1/2 förtidspension, till den vars arbetsförmåga är nedsatt med minst 1/2 men inte 2/3.

När rätten till förtidspension utreds av försäkringskassan och bedöms av socialförsäkringsnämnden vid kassan tas även hänsyn till förhållanden på arbetsmarknaden. Fast det finns lediga arbeten kan det vara svårt t ex för en handikappad att få arbete. Om det visar sig efter några år att det är svårt att finna ett lämpligt arbete kan hel förtidspension beviljas trots att en del av arbetsförmågan finns kvar. Hemarbetande make eller maka kan även erhålla förtidspension. Härvidlag bedöms om och i vilken utsträckning han eller hon skulle kunna förvärvsarbeta utanför hemmet, samt om det finns möjligheter att erbjuda lämpligt arbete. Den framtida arbetsmarknaden är även av stor betydelse för äldre förvärvsarbetande som blir arbetslösa vid företagsnedläggelser. Här måste bedömningen ta hänsyn till "länsarbetsnämndens möjlighet att tämligen omgående skaffa annat lämpligt arbete utan att de behöver omskolas eller flytta från orten" (s 62). Den som fyllt 60 år kan också få förtidspension om han eller hon har blivit utförsäkrad från erkänd arbetslöshetskassa och om han eller hon förväntas bli arbetslös. Samma möjlighet gäller för de som fått kontant arbetsmarknadsstöd i 450 dagar. Det bör även noteras att den som fyllt 60 år och som har 2/3 eller 1/2 förtidspension kan få hel förtidspension när han eller hon lämnar skyddat arbete eller särskilt beredskapsarbete för handikappade.

3. Förtidspension – en ständig källa till kritik

Förtidspension som en social rättighet har ständigt ställts under debatt och dess sociala och humana värde har ifrågasatts. Kritiken har varit relativt motsägelsefull eftersom den har kommit från olika håll. En del har varit kritiska mot den, i deras tycke, alltför vidgade *möjligheten* att få förtidspension vilket enligt denna form av kritik lett till en alltför stor ökning av antalet förtidspensionärer, vilket i sin tur, hävdar man, inneburit en betydande och onödig inskränkning i den tillgängliga arbetskraften. Andra har varit kritiska mot *risken* att bli förtidspensionerad. Denna kritik kan dels ha sin ut-

gångspunkt i de eventuella individuella problem som en förtidspension kan innebära (sysselsättning och fritid, social integration). En annan variant av kritiken mot bruket av förtidspension har haft systemkritiska undertoner och baserat sin kritik på en strukturalistisk-marxistisk uppfattning om statens funktioner i det kapitalistiska samhället (se Poulantzas 1970). Det som har hävdats är olika varianter på temat att förtidspension kan av staten användas för att hantera arbetsmarknadspolitiska problem, som ett sätt att dölja arbetslöshet (se Furåker 1976). Inom detta område är en strukturalistisk-marxistisk kritik relativt vansklig, åtminstone empiriskt. Kritiken har svårt att hantera det faktum att förtidspension av den förtidspensionerade och utslitne arbetstagaren kan upplevas som en social trygghet och innebära andra värden och en ny livskvalitet. Balansgången mellan å ena sidan förtidspension som en systemrationell aktivitet och å andra sidan förtidspension som en social rättighet och en individuell trygghet blir i praktiken mer eller mindre omöjlig att upprätthålla i den strukturalistisk-marxistiska forskningen. Det systemrationella tar överhand. Denna typ av systemkritik glömmer att den enskilde individen kan betrakta förtidspensioneringen som en lättnad. Här vore marxismen betjänt av en större förståelse för individorienterad analys (se Weiss 1986). Förvisso har förtidspension använts, och används fortfarande i stor utsträckning, som ett arbetsmarknadspolitiskt instrument då det gäller att hantera äldres sysselsättningsproblem efter enskilda företagsnedläggelser. (När det gäller nybeviljade förtidspensioner på grund av arbetsmarknadsskäl varierar antalet mellan 1 700 till 10 700 fall årligen.) Ett klargörande av detta oomtvistliga faktum får dock inte innebär att man mer eller mindre negligerar att förtidspension kan betyda en ny livskvalitet för många människor med medicinska eller psykiska problem.

Inriktningen på kritiken och vilka som dominerar debatten torde vara avhängigt rådande konjunkturläge. När det föreligger arbetslöshet tycks de marknadsorienterade aktörerna betrakta förtidspensionering som ointressant, eller rent av som acceptabelt. I varje fall är kritiken minimal. I detta läge är det systemkritiken som ljuder högst. Vid högkonjunkturer tycks situationen vara annorlunda. När det finns ett stort behov av arbetskraft framför olika marknadsorienterade kritiker förslag till inskränkningar i möjligheten att erhålla förtidspension och vill i stället satsa de ekonomiska resurserna på att rehabilitera långtidssjukskrivna och presumtiva förtidspensionärer – man har behov av arbetskraft. Numera hävdar dessutom dessa

kritiker att kostnaderna för socialförsäkringssystemet har nått sin topp, att ökningen till över 50 000 nybeviljade förtidspensioner årligen (1985-1988) är en summa som välfärdssamhället inte har råd med, eftersom tanken är att det trots allt behövs arbetskraft för att bygga upp välfärden och socialförsäkringssystemet. Gränsen mellan hur många som måste arbeta och hur många som kan erhålla försörjning via socialförsäkringssystemet (sjukskrivning och förtidspension) framställs som kritisk. Det rör sig såväl om latenta legitimitetskriser som om påtagliga rationalitetsproblem, problem som aktualiserats och som torde påskyndas av behovet av arbetskraft.

En viktig fråga i detta sammanhang är huruvida den som blivit förtidspensionerad över huvudtaget skulle kunna arbeta, och i så fall i vilken utsträckning, och med vad. Är det på det viset att det går människor förtidspensionerade som skulle kunna ha åtminstone en fot i arbetslivet? Ekonomer som representerar Landsorganisationen (LO) menar att ett mål borde vara att minska antalet nybeviljade förtidspensioner med 1/5. Men, hävdar de, det förutsätter att regeringen vågar investera i rehabiliteringsåtgärder (*DN* 1989-09-15). Det bör dock betänkas att en förtidspensionering inte dyker upp som en blixt från klar himmel; de som blivit aktuella för förtidspension har säkerligen genomgått en lång process av sjukskrivning och behandling. Förutom tidigare och effektivare rehabiliteringsinsatser krävs det förmodligen radikala omkonstruktioner av en del arbetsplatser och andra krav på arbetsmiljön om målet att sänka antalet nybeviljade förtidspensioner med 1/5 ska kunna förverkligas.

Möjligtvis kan det diskuteras huruvida rehabiliteringsåtgärder aktualiseras för sent p g a långa sjukhusköer, och att dessa köer skulle kunna minskas genom överflyttning av resurser från socialförsäkringssystemet till sjukvården (*DN* 1989-09-15). Men rehabiliteringsåtgärder behöver i sig inte automatiskt innebära rehabilitering och anpassning till arbetslivet och produktionen, utan rehabilitering till ett drägligt liv och en normal ålderdom.

4. Olika studier av förtidspension

Det har förekommit en rad empiriska försök till att förklara varför antalet förtidspensionärer har ökat. En del förklaringar tar sin utgångspunkt i ny lagstiftning, en liberalare syn på vilka som kan få förtidspension och att det har blivit "lönsammare" att vara förtids-

pensionär. Andra menar att förtidspensioneringen motsvarar en bristande överensstämmelse mellan krav i arbetssituationen och arbetsförmågan hos den förvärvsarbetande befolkningen (Eriksen 1980). Härvidlag har arbetsmiljön, såväl den psykiska som den fysiska, en avgörande betydelse. En annan förklaring till den ökade förtidspensioneringen hänför sig till sociala fenomen som inte har någon explicit koppling till arbetslivet men som har en negativ inverkan på folkhälsan. Det rör sig här om alkohol- och narkotikamissbruket (ibid).[3]

De flesta forskare som har studerat förtidspension har utgått från att den blivande förtidspensionären själv ansökt om förmånen och att ökningen beror på att arbetskraften i högre grad har blivit medveten om möjligheten att erhålla förtidspension och i förlängningen i allt högre grad utnyttjat sin rätt att ansöka om förtidspension. Det bör noteras att de flesta som själv söker förtidspension erhåller förtidspension.[4] En del av dessa forskare har menat att orsaken till att en del av arbetskraften i ökad utsträckning har kommit att luta sig mot denna möjlighet beror på en uppluckring i arbetsmoralen, i synen på arbete. Andra har hävdat att den ökade tillströmningen av *egna* ansökningar om förtidspension kan vara betingat av ett mer allmänt erkännande av arbetsskada som sjukdom. Dessa förklaringar utesluter inte varandra. Men de visar bara en sida av myntet. Den andra sidan utgörs av en systemrationell myndighetsaktivitet där försäkringskassorna tar egna initiativ till förtidspensionering och använder sig av pensioneringen för att hantera långtidssjukskrivningar. Denna aktivitet från kassornas sida har sin grund i 16 kap 1 § Lagen om allmän försäkring. Enligt 16:1-paragrafen kan försäkringskassan, "utan hinder av att den försäkrade inte gjort ansökan därom tillerkänna honom förtidspension" (Hetzler & Eriksson 1981:5). Härvid ska försäkringskassan "göra en bedömning om sjukdomstillståndet hos en person efter en längre tids sjukskrivning har övergått till en permanent nedsättning av arbetsförmågan (varvid förtidspension utgår) eller nedsättning för avsevärd tid (i vilket fall sjukbidrag blir aktuellt)" (ibid). Det bör noteras att sjukpenning vid sjukskrivning utgår med ett högre belopp än vad en förtidspensionär kan erhålla i pension. Vad Hetzler & Eriksson har visat är att tillgänglig statistik pekar på att den ökade andelen av nybeviljade förtidspensioner under deras undersökningsperiod faktiskt tillkom på kassans initiativ: 1971 motsvarade 16:1 fallen 38,2% av samtliga nybeviljade pensioner, 1978 var motsvarande andel 58,5% (ibid s 6). Andelen 16:1-fall 1988 är svårare att uttala sig om.[5] Det bör

uppmärksammas att den bakomliggande orsaken till de långa sjukskrivningarna kan vara dålig arbetsmiljö.

5. Rationalitets- och legitimitetskriser i relation till förtidspension

Resonemanget i avsnitt 1, 3 och 4 gör det lämpligt att särskilja på två typer av kriser som präglar "välfärdsstatens motsägelsefulla funktion" (Habermas 1976; Offe 1984). Det är rationalitets- respektive legitimitetskris. Hanteringen av dessa problem har betydelse för förtidspensioneringssystemets utveckling (rationalitet och legitimitet).

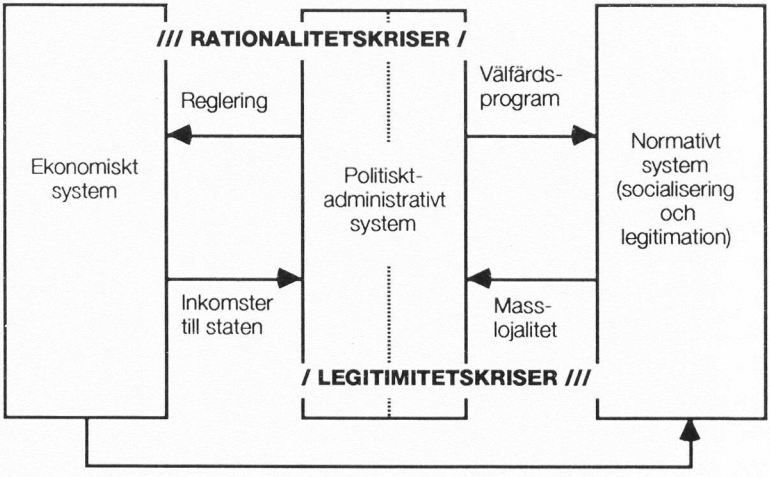
Synen på förtidspension är i mångt och mycket betingad av konjunkturläge samt av välfärdsstatens finansiering av socialförsäkringssystemet och planering av åtgärder i fältet mellan å ena sidan krav på arbetsmiljö (krav på arbetsgivaren) och å andra sidan rehabilitering av sjukskrivna (krav på sjukvården). När det gäller den allt tydligare uppfattningen att kostnaderna för socialförsäkringssystemet har nått sin topp och när det gäller nuvarande finansiella underskott i socialförsäkringssystemet, kan man tala om latenta rationalitets- och legitimitetskriser som "kan skapa en prekär politisk och ekonomisk situation" (Dagens Nyheter 15/9-1989). Problem kring planeringen och policy ger utrymme för administrativa rationalitetskriser. Att enbart satsa resurser på rehabilitering av sjukskrivna hjälper inte i ett längre perspektiv om arbetsmiljön är densamma.

Kopplingen till konjunktursvängningar innebär att välfärdsstatens tillämpning av sociala rättigheter till stor del kan komma att bli avhängigt marknadens utveckling och dess rationalitetskriterier (jmf Preuss 1986; Hetzler 1989). Preuss har dessutom hävdat att transformationen av trygghetsbehovet till att gälla en rätt till försörjning är präglat av samma utvecklingsdynamik som marknaden följer (Preuss 1986:169).

Samtidigt som välfärdsprogrammet är kopplat till det ekonomiska systemets utvecklingsdynamik pågår processer i arbetslivet och dess vardagsverklighet som gör välfärdsstatens uppgift och dess koppling till marknadens krav svårare. Det ställs högre krav såväl på insyn och medbestämmande som på arbetsmiljö och arbetsvillkor. Vidare uppfattas arbetet inte som något självklart, som en

självklar trygghet, i varje fall inte om man upplever sig utsliten eller arbeta i en dålig arbetsmiljö. Sociala rörelser och moralisk-praktiska utvecklingsprocesser inom det normativa subsystemet ställer allt högre krav på deltagande i beslutsprocesser, och på hälsa och social trygghet (Habermas 1976; se not 2). Kan inte det politiskt-administrativa systemet trovärdigt svara mot dessa processer finns det grund för legitimitets- och motivationskriser. Den vilda lokförarstrejken är ett bra exempel och ett uttryck för dessa värderelaterade processer. Problematiken och de två olika kraven på välfärdsstaten kan sammanfattas i följande figur:

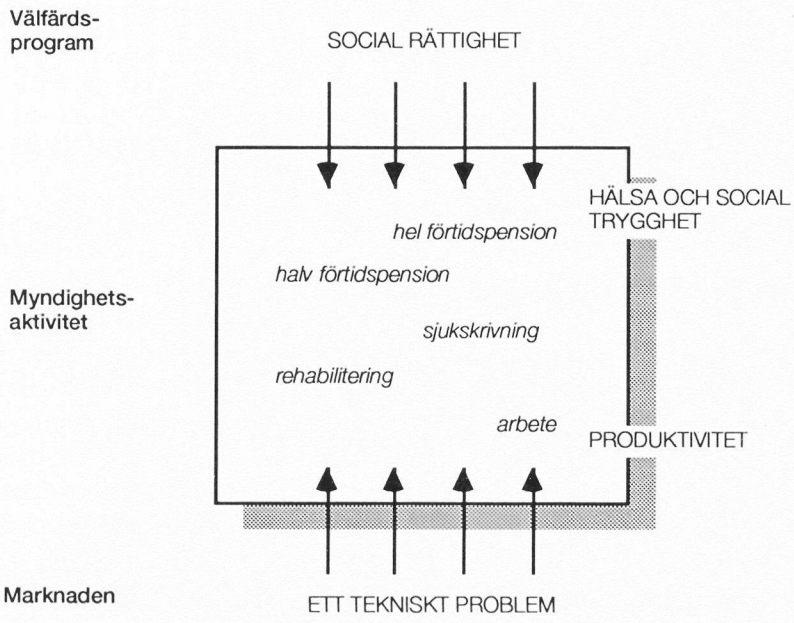
Figur 1 *Det differentierade samhällets tre subsystem och dess problem (efter Offe 1984:52)*



Det har hävdats att såväl statens reglering av marknaden via avsiktsorienterad lagstiftning som dess välfärdsprogram stöter på stora problem. Uppfattningen är att välfärdsstatens ideala rationella modeller av verkligheten stämmer dåligt överens med faktiska komplexa ekonomiska och sociala processer (Teubner 1983). När det gäller välfärdsstatens förhållande till marknaden präglas deras uppgift av en rad *planeringssvårigheter*. Konjunktursvängningar gör det omöjligt att förutse marknadens behov (ska man behöva hantera arbetsbrist eller arbetslöshet?). När det gäller välfärdsstatens välfärdsprogram (sociala rättigheter) har det hävdats att den byråkratiska strukturen har omyndiggjort människorna eftersom byråkratin "ständigt omdefinierar och påminner klienterna om deras *egentliga behov*" (Keane 1984). Vid vissa tider är det rehabilitering och an-

passning till arbetet som gäller (produktivitet), vid andra tillfällen är det ideologin kring hälsan och social trygghet som är grunden för myndighetsaktiviteten. Detta ger utrymme för olika behov och för ett spelrum där ett problem kan hanteras utifrån kriterier som baserar sig på sociala rättigheter (hälsa och försörjning) eller utifrån premissen att det rör sig om ett teknisk fråga (sjukhusköer, rehabiliteringsmöjligheter och hur arbetsplatsen är eller kan vara konstruerad).

Figur 2 *Förtidspensioneringens utveckling i spelrummet mellan marknad och välfärdsprogram*



Det bör noteras att "produktivitet" utgör en av hörnstenarna i den sk *arbetslinjen.* En annan är antagandet om en positiv koppling mellan arbete, "självförverkligande" och "trygghet". (Jmf. Lafargue [1880/1988] och hans uppfattning om den misär och det sociala elände som följt i spåren av hyllningar till arbetet.) Arbetslinjen hänför sig till idén om den fulla sysselsättningen och bygger på två paradoxala premisser:

(1) man *måste* arbeta eftersom vår välfärd är betingad av en god produktivitetssutveckling, och

(2) man *bör* arbeta eftersom det är utvecklande för den enskilde individen.

En fråga är huruvida programmen och myndighetsaktiviteten inom spelrummet överensstämmer med och är ett svar på faktiska sociala processer i arbets- och samhällslivet. Är den ökade förtidspensioneringen en *indikation på faktiska processer i arbetslivet* eller rör det sig om ett *absurt socialförsäkringssystem*?

I det följande ämnar jag belysa några statistiska uppgifter som kan sätta den "ökade förtidspensioneringen" i en kontext som kan utgöra en grund för vidare empiriska studier. Totalt finns det 346 931 individer som är förtidspensionerade eller som har sjukbidrag vid årsskiftet 1988/89. Frågan är vem som blir förtidspensionerad, vid vilken ålder det sker och med vilken pensionsgrad.

6. Den ökade förtidspensioneringen – form och innehåll

Arbetsmarknadsskäl, diagnos och rehabiliteringsmöjligheter

A. Under de senaste fyra åren har antalet nybeviljade förtidspensioner per år legat över 50 000. Det är ett antal som inger respekt och som har avskräckt en mängd debattörer. När det gäller dagens debatt i dagstidningar så tycks *Dagens Nyheter* vara ett ledande forum för offensiven mot vårt socialförsäkringssystem, och på ledarsidan talar man om den "absurda förtidspensioneringen" (se ovan).

Frågan är vad som döljer sig bakom siffrorna, om det är en allvarlig utvecklingstendens eller om det i stort sett är en normal process och att kritiken i så fall bygger på vaga antaganden och skeva föreställningar. För att skapa en uppfattning om vad det är för anledningar som gör att vissa individer blir förtidspensionerade kan det vara värt att inledningsvis studera de tre senaste årens nybeviljade förtidspensioner.

I tabell 1 redovisas de tre främsta skälen till förtidspension under 1986-1988. Vid en jämförelse av diagnoser – bakomliggande orsak till förtidspension – mellan åren 1986, 1987 och 1988 framgår det att *rygg- och ledskador står för den markanta ökningen* (tabell 1). Även i lägre åldrar har den fysiska diagnosen kommit att spela en allt större roll i slutet av 80-talet (se tabell 2). Vidare tycks det finnas en någorlunda konstant påtappning av förtidspensionärer med psykiska problem. Detta faktum kan klargöras utifrån två aspekter: För det första *producerar* arbetsmarknaden och dess arbetsmiljö (allt från mobbning och samarbetssvårigheter till stress och pres-

Tabell 1 *En jämförelse av olika diagnoser under tre år (1986, 1987 och 1988). Samtliga fall.*

År	Diagnos			
	Rygg- och ledskada	Psykisk sjukdom	Arbetsmarknadsskäl	Totalt
1986	18 603 37,1%	8 002 6,0%	7 502 15,0%	50 106
1987	21 526 41,6%	8 301 16,1%	5 904 11,4%	51 691
1988	24 462 45,2%	8 204 15,2%	5 424 10,0%	54 135

Källa: Riksförsäkringsverket, Statistikinformation Is – I 1989:23

tationsångest) varje år en grupp som brottas med neuroser eller psykoser. För det andra har arbetsmarknaden svårt att *hantera* psykiska problem som kan ha sin grund i andra sociala och individuella problem utanför arbetslivet.

Ett annat fenomen som är värt att notera är att arbetsmarknadsskäl som grund för förtidspension är på tillbakagång, i varje fall i jämförelse med 1984- och 1985- års toppnoteringar på över 9 000 pensionärer. Trots att andelen förtidspensioner betingade av arbetsmarknadsskäl ligger på en anmärkningsvärt hög nivå (10% 1988) är "arbetslöshet" som orsak till förtidspensionering på sakta tillbakagång, och det vore konstigt annars med tanke på "marknadens behov av arbetskraft". Det kan dock med rätta ifrågasättas om marknaden generellt är intresserad av denna till synes svårplacerade äldregrupp, trots marknadens nuvarande behov av arbetskraft. När det gäller äldre lokförare, som kan fara land och rike runt, tycks intresset finnas, men när det gäller äldre varvsarbetare torde intresset vara tämligen svalt. Den enskildes vilja och dennes fysiska förutsättningar framstår i detta perspektiv som ointressant, eller åtminstone som marginellt, i varje fall när det gäller aktualiserandet av en rörlig pensionsålder. Frågan är snarare determinerad av marknadens växlande behov. Det rör sig om behov som kan ge vissa grupper en möjlighet till rörlig pensionsålder. Det är här inte tal om *rättighet*, utan snarare om en *betingad möjlighet*.

I det följande ska vi ta upp frågan kring medicinska diagnoser och rehabiliteringsmöjligheter. Av naturliga skäl berör denna fråga inte förtidspension som hänför sig till arbetsmarknadsskäl. En dylik förtidspensionär har varken varit sjuk, i den bemärkelsen att det

skulle föranleda förtidspension, eller varit aktuella för rehabiliteringsåtgärder. Dessutom har kritiken mot den "absurda förtidspensioneringen" inte uppmärksammat denna grupp och dess ökning under 80-talet, utan det är förtidspensionering av långtidssjukskrivna som ifrågasätts.

När det gäller långtidssjukskrivna har det hävdats att det förtidspensioneras allt för slappt. Som en fortsättning på detta antagande har det framförts idéer om att det är möjligt att sänka antalet nybeviljade förtidspensioner med 1/5 om den långtidssjukskrivne erhöll effektivare rehabiliteringsåtgärder på ett tidigare stadium. Föreställningen baserar sig på att det finns arbetskraft förtidspensionerad som egentligen skulle kunna arbeta, i varje fall i någon form, alternativt om det gavs bättre rehabiliteringsmöjligheter. En närmare studie av 1988 års nybeviljade förtidspensioner med hänsyn till deras ålder och *medicinska diagnos* ger vid handen att nästan 75% av de som erhåller förtidspension är äldre än 50 år och 60% är äldre än 55 år (tabell 2).

Tabell 2 *Förtidspension/sjukbidrag, ålder och fördelning på psykisk sjukdom eller rygg- och ledskada, år 1988. Ej arbetsmarknadsskäl.*

Ålder	Samtliga sjukdomar (n= 48 711)		Därav: Psykisk sjukdom (n= 8 204)	Rygg- och ledskada (n= 24 462)
16-19 år (n= 643)	1,3%[1]	1,3%	53,8%	2,2%
20-24 år (n= 392)	0,8%	2,1%	66,6%	8,7%
25-29 år (n= 784)	1,6%	3,7%	60,6%	15,4%
30-34 år (n= 1 387)	2,8%	6,5%	49,7%	27,7%
35-39 år (n= 2 206)	4,5%	11,0%	38,9%	36,8%
40-44 år (n= 3 560)	7,3%	18,3%	31,9%	44,0%
45-49 år (n= 4 586)	9,4%	27,7%	21,8%	51,4%
50-54 år (n= 7 107)	14,6%	42,3%	14,7%	56,4%
55-59 år (n= 12 817)[2]	26,3%	68,6%	10,4%	55,1%
60-64 år (n= 15 229)[2, 3]	31,3%	100,0%	6,9%	53,2%
Samtliga åldrar (n= 48 711)	100,0%		16,8%	50,2%

1 I gruppen 16-19 år har t ex 8,1% diagnosen "medfödda missbildningar" och 10,2% är förtidspensionerade p g a öronsjukdomar.

2 I åldersgrupperna 55-59 år och 60-64 år är diagnosen "cirkulationsorganens sjukdomar" (hjärtproblem) av betydelse: 13,8% respektive 18,4%.

3 Till denna åldersgrupp tillkommer 5 424 nybeviljade förtidspensioner betingade av arbetsmarknadsskäl (se tabell 1). Det innebär att i 10% av samtliga fall 1988 förtida pensionering kan betecknas som ett arbetsmarknadspolitiskt instrument. Motsvarande andel 1986 var 15%.

Källa: Riksförsäkringsverket, Statistikinformation Is – I 1989:23

Det framgår vidare av tabell 2 att orsaken till äldres förtidspension till stor del (55%) kan spåras till någon form av fysisk utslitning (rygg- och ledskada), vilket kan jämföras med gruppen 20-34 år där över 60% av förtidspensioneringen är bestämd av en psykisk sjukdom.[6] När det talas om rörlig pensionsålder bör det nog beaktas att en del arbeten troligen har en högre "fysisk utslitningsfaktor" än andra arbeten, vilket gör att pensionens aktualitet torde komma tidigare. Dessutom har det talats om individuella skillnader när det gäller fysiska resurser (David Ingvar) och förmågan att undvika att bli utsliten.[7]

Förutom psykiska problem och skador i rygg och leder som grund för förtidspension bör framför allt hjärtbesvär och andra av cirkulationsorganens sjukdomar omnämnas. Hjärtbesvär svarade för 11,8% av de medicinska diagnoserna (därav var 50% över 60 år och 80% över 55 år). En annan diagnos som lett till hel eller halv förtidspension är "andningsorganens sjukdomar", t ex bronkit (3,5%; därav 70% över 55 år). Vidare har några tumörer medfört sjukbidrag (2,3%). Dessutom, vilket bör uppmärksammas, förtidspensionerades 1 595 arbetare enbart 1988 p g a "skador genom yttre våld och förgiftning" (3,3%).

Såväl andnings- och hjärtbesvär som rygg- och ledskador ställer stora krav på rehabilitering och vila. Ifall "rehabiliteringen till arbetslivet" förefaller vara positiv ställer detta sedermera en rad krav på såväl arbetsplatsens konstruktion som på arbetstidens omfattning. Detta behov bör inte negligeras när möjligheten att sänka antalet förtidspensionärer diskuteras.

B. Fram tills nu har min genomgång av den ökade förtidspensioneringen enbart relaterat sig till de tre senaste åren, och visst låter det mycket med 50-54 000 nybeviljade förtidspensioner årligen under denna period, speciellt om man jämför med 1983 då motsvarande siffra var 43 338.

Låt oss i fortsättningen belysa den senaste tidens ökning i ljuset av förtidspensionssystemets utveckling och olika skiftningar under perioden 1971-1988. Ifall den pågående, och i många fall besinningslösa, offensiven mot förtidspensioner ska tas på allvar måste det empiriskt framgå att *förtidspension p g a långtidssjukskrivning* blivit ett allt större problem och att det nu finns vinster att göra.

Om vi bortser från den kraftiga men temporära ökningen 1972 och 1973 har antalet nybeviljade förtidspensioner varierat mellan 40 000 och 45 000 fram till 1984. Därefter har antalet skjutit fart. Under perioden 1984-1986 kan denna ökning hänföras till arbets-

Tabell 3 *Antalet förtidspensioner/sjukbidrag betingade av arbetsmarknadsskäl eller av en medicinsk diagnos, under åren 1971-1988. Samtliga fall.*

År:	Totalt	Arbets-marknads-skäl	Medicinska diagnoser, summa	Därav sjuk-bidrag[1]
1971	43 984	566	43 418	27,0%
1972	52 371	3 014	49 357	27,7%
1973	52 148	3 263	48 885	28,1%
1974	45 931	2 979	42 952	28,1%
1975	45 457	3 126	42 331	29,4%
1976	45 306	2 876	42 430	32,1%
1977	46 350	1 688	44 662	35,4%
1978	45 144	2 050	43 094	37,2%
1979	44 278	2 602	41 676	37,0%
1980	45 289	3 604	41 685	37,7%
1981	43 615	3 464	40 151	38,7%
1982	42 286	3 690	38 596	39,3%
1983	43 338	5 484	37 854	38,0%
1984	47 792	9 124	38 668	35,7%
1985	51 009	10 663	40 346	34,6%
1986	50 106	7 502	42 604	33,4%
1987	51 691	5 904	45 787	32,3%
1988	54 135	5 424	48 711	32,3%

1 Sjukbidrag förekommer av naturliga skäl endast vid medicinska diagnoser.

Källa: Riksförsäkringsverket, Statistikinformation Is – I 1989:2

marknadsskäl. Det är först 1987 och 1988 som de medicinska diagnoserna har fått en allt större betydelse när det gäller den årliga ökningen av antalet nybeviljade förtidspensioner.

En sammanfattning av utvecklingen under 1971-1988 visar att det årligen föreligger ett spelrum på 40 000-45 000 nybeviljade förtidspensioner med medicinska diagnoser. Det är först 1988 som ökningen av av rygg- och ledskador gör sig gällande. I ett dylikt tidsperspektiv torde det vara omöjligt att dra den slutsatsen att antalet förtidspensioner betingade av långtidssjukskrivning kommer att öka ännu mer, om ingenting görs. När det nu dessutom talas om effektivare rehabiliteringsinsatser och dess förutsättningar bör det beaktas att ökning av förtidspensioner på 80-talet till stor del består av utslitna och svårrehabiliterade ryggar och leder, om vi bortser från arbetsmarknadsskäl som grund för förtidspension.

Vidare kan det vara värt att notera att andelen sjukbidrag ökade något under slutet av 70-talet och i början av 80-talet, för att sedermera sjunka något. Skillnaden mellan förtidspension och sjukbidrag

ligger både i synen på rehabilitering (t ex behandling av psykisk sjukdom), och i framtida arbetsmöjligheter. Förtidspension betraktas som ett permanent tillstånd medan sjukbidrag ges temporärt. Sjukbidrag ges i hög grad till yngre arbetskraft och till individer med psykiska problem. Tabell 3 visar att ungefär en tredjedel av tidigare långtidssjukskrivna uppbär sjukbidrag och förväntas eventuellt, åtminstone i teorin, kunna återvända till arbetslivet efter sitt tillfrisknande. Det innebär att en tredjedel av förtidspensionärerna med medicinsk diagnos inte med enkelhet kan betraktas som *definitivt avkopplade från förvärvslivet* (se ovan; *DN* 1989-08-10).

Pensioneringsgrad och dess förändring

Trots 1988 års ökning förefaller det vara vanskligt att i ett utvecklingsperspektiv tala om en tendensiell ökning vad gäller förtids-

Tabell 4 *Nybeviljade förtidspensioner/sjukbidrag med medicinsk diagnos och dess pensioneringsgrad, under 1971-1988. Ej arbetsmarknadsskäl.*

År:	Totala andelen förtidspensionärer med medicinsk diagnos	Pensioneringsgrad[1]		
		1/1	2/3	1/2
1971	43 418	37 536	3 132	2 750
1972	49 357	42 991	3 030	3 336
1973	48 885	42 402	2 948	3 535
1974	42 952	36 829	2 427	3 696
1975	42 331	35 959	2 193	4 179
1976	42 430	34 944	2 133	5 353
1977	44 662	35 437	1 951	6 657
1978	43 094	33 250	1 741	7 453
1979	41 676	31 783	1 612	8 281
1980	41 685	30 396	1 581	9 708
1981	40 151	28 194	1 393	10 564
1982	38 596	27 117	1 305	10 174
1983	37 854	28 216	1 219	9 509
1984	38 668	28 483	958	9 227
1985	40 446	29 970	756	9 720
1986	42 604	31 607	749	10 248
1987	45 787	34 519	674	10 594
1988	48 711	36 506	623	11 582

1 2/3 och 1/2 förtidspension eller sjukbidrag torde undantagslöst hänföra sig till medicinska diagnoser. Det kan dock finnas undantag, t ex att förtidspensionären under en längre tid gått arbetslös på halvtid, och sedermera blivit utförsäkrad från sin halva arbetslöshetsersättning.

Källa: Riksförsäkringsverket, Statistikinformation Is – I 1989:23

pension med medicinska diagnoser under perioden 1971-1988. Däremot är det mindre riskfyllt att blottlägga en utvecklingsprocess i anknytning till förtidspensionens pensioneringsgrader (hel, trekvarts eller halv förtidspension).

När det gäller pensioneringsgrader och dess förändringar kan det inledningsvis vara värt att notera att förtidspension med trekvarts grad successivt har kommit att upplevas som en onaturlig form. Den har därmed mist sin betydelse.

Om vi bortser från åren 1972-1973 är det möjligt att statistiskt spåra två olika steg då det gäller pensioneringsgradernas utveckling och relationen mellan hel och halv förtidspension:

(1) Under perioden 1974-1981 var andelen nybeviljade förtidspensioner mer eller mindre konstant. Det fanns i varje fall ingen direkt trend (minskning eller ökning). Samtidigt minskade andelen nybeviljade hela förtidspensioner konstant under samma period. Jämför man 1974 och 1981 blir den rätlinjiga minskningen ungefär 8 600. Att andelen förtidspensioner, trots minskningen av hel förtidspension, legat någorlunda konstant beror på en rätlinjig ökning av den halva förtidspensioneringen från närmare 3 700 år 1974 till över 10 500 år 1981. Trots att det inte föreligger några större förändringar i den kvantitativa utvecklingen av förtidspension under 1974-1981 (en minskning på 2 800) har det skett påtagliga förändringar vad gäller pensioneringsgrader. Halv förtidspension har under denna period blivit allt vanligare.

Åren 1982-1984 kan betecknas som "likformiga". Antalet hela förtidspensioner är mer eller mindre konstant. Detsamma gäller halv förtidspension.

(2) Det andra (och pågående) utvecklingssteget tog fart 1985. Detta steg innebär att ökningen av halv förtidspension inte har samma betydelse som tidigare. Visserligen ökar antalet något, men det tycks mer röra sig om en "konfirmering" av ökningen under 1974-1981. En annan stor skillnad från det första steget är att det totala antalet nybeviljade förtidspensioner har ökat. Jämfört med 1985 där antalet nybeviljade förtidspensioner var ungefär 40 500 ligger nivån år 1988 på något över 48 700. Ungefär 80% av denna ökning kan spåras till ökningen av hel förtidspension.

Under hela 80-talet har halv förtidspension utgjort omkring 25% av det totala antalet årligen nybeviljade förtidspensioner. En empirisk studie av denna grupp kan vara av ett speciellt intresse, speciellt om undersökningen teoretiskt relateras till idén om den fulla sysselsättningen, till arbetets status och värde, till utslitningsproces-

Tabell 5 *Andelen med medicinsk diagnos som inte blivit helt förtidspensionerad eller som inte erhållit helt sjukbidrag, fördelat på år. Ej arbetsmarknadsskäl.*

År	2/3	1/2	Totalt	År:	2/3	1/2	Totalt
1971	7,2%	6,3%	13,5%	1980	3,8%	23,3%	27,1%
1972	6,1%	6,8%	12,9%	1981	3,5%	26,3%	29,8%
1973	6,0%	7,2%	13,2%	1982	3,4%	26,4%	29,8%
1974	5,7%	8,6%	14,3%	1983	3,2%	25,1%	28,3%
1975	5,2%	9,9%	15,1%	1984	2,5%	23,9%	26,4%
1976	5,0%	12,6%	17,6%	1985	1,9%	24,0%	25,9%
1977	4,4%	14,9%	19,3%	1986	1,8%	24,1%	25,9%
1978	4,0%	17,3%	21,3%	1987	1,5%	23,1%	24,6%
1979	3,9%	19,9%	23,8%	1988	1,4%	23,8%	25,2%

Källa: Riksförsäkringsverket, Statistikinformation Is – I 1989:23

ser och till moralisk-praktiska utvecklingsprocesser i arbetet (t ex generell förkortning av arbetstiden och rörlig pensionsålder), till rehabiliteringsmöjligheter, till kassornas systemrationalitet, samt till teorier om social trygghet och till värden som hälsa.

Som avslutning på min genomgång av den ökade förtidspensioneringen tänker jag belysa några betingelser som kan vara av betydelse för förståelsen och analysen av halv förtidspension. En första fråga är vad som ligger bakom halv förtidspension. Denna fråga kan belysas utifrån två dimensioner: systemrationalitet eller individorientering.

(1) *Den systemrationella infallsvinkeln* har tidigare behandlats av Hetzler och Eriksson i deras studie av 16:1-fall (se ovan). Deras resultat visade att kassorna i stor utsträckning under 70-talet använt sig av förtidspension, troligen för att göra sig av med en mer kostsam långtidssjukskrivning. Frågan är om kassorna sedermera även hanterat halv långtidssjukskrivning utifrån samma överförings- och rationalitetskriteria?

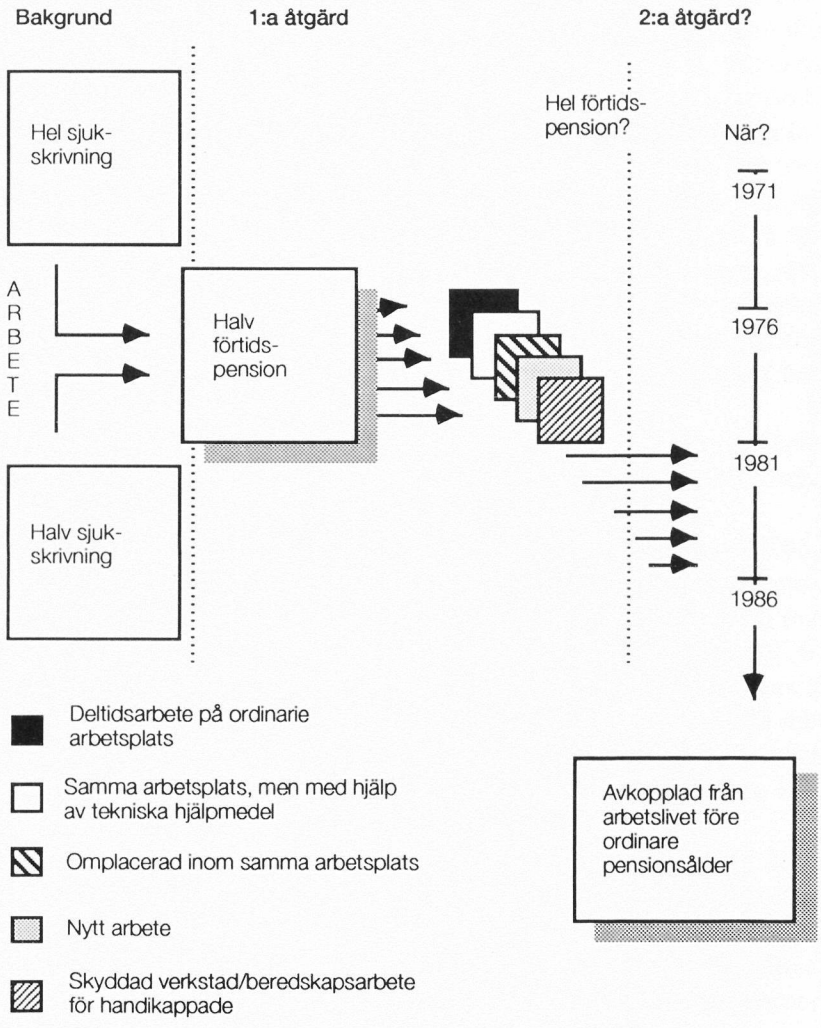
(2) *Den individorienterade infallsvinkeln* bygger på den premissen att den som blir aktuell för halv förtidspension tidigare har varit helt sjukskriven och att rehabiliteringsinsatser har genomförts till den graden att läkarna anser det möjligt för förtidspensionären att förvärvsarbeta i någon form. Därav beslutet om halv förtidspension. Frågan är om den halva förtidspensionen motsvarar förtidspensionärens förväntningar eller om det är en strategi från försäkringskassans sida som, i kombination med rehabiliteringsåtgärder, syftar till att lindra olika individuella problem (balansen mellan ar-

bete, trygghet och hälsa) samtidigt som marknadens behov av arbetskraft kan tillgodoses – åtminstone till hälften.

En mer långsiktig fråga är om halv förtidspension endast är en etapp före hel förtidspension (den andra gränslinjen i figur 3), eller om det tvärtom rör sig om en lyckad rehabilitering och en återgång till arbetslivet i någon form. Resonemanget sammanfattas i figur 3.

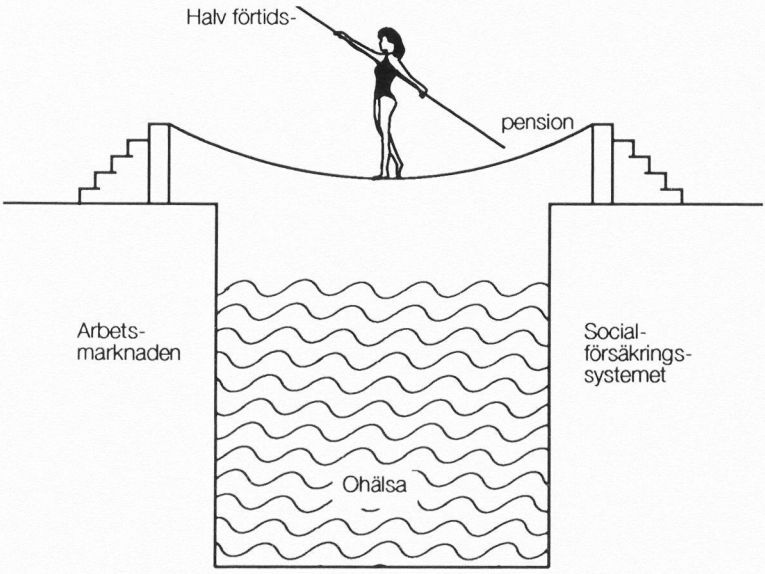
De som uppbär halv förtidspension/sjukbidrag är förmodligen tillgängliga för arbetsmarknaden, om det inte är på det viset att de

Figur 3 *Ett flödesschema som utgångspunkt för en empirisk studie av förhållandet halv förtidspension/deltidsarbete och hel förtidspension.*



även går halvt sjukskrivna. Halv förtidspension har med andra ord en speciell karaktär eftersom pensionären i någon form har kvar sitt ena ben i arbetslivet. Det andra benet står i det sociala trygghetssystemet. Denna balansgång har en problematisk natur eftersom sjukdom (vilket är den bakomliggande orsaken till den halva förtidspensionen) kan framstå som *ett mellanliggande hot* (se figur 4). I detta sammanhang kan det även vara av intresse att systematiskt studera de halvt förtidspensionerades *karriärer*; deras arbetsbakgrund, deras medicinska diagnos och genomförda rehabiliteringsinsatser. Ett rimligt antagande är att halv förtidspension i regel är ett alternativ som kassorna använder när det rör sig om yngre människor och vid psykiska problem.

Figur 4 *Den halva förtidspensioneringens koppling till marknaden och till socialförsäkringssystemet. En balansgång.*



Resonemanget kring halv förtidspension visar att en empirisk och teoretisk studie kring denna pensioneringsgrad kan bidra till att öka förståelsen för välfärdsstatens dilemma i vårt moderna samhälle. Samtidigt som välfärdsstaten, i enlighet med marknadens behov av arbetskraft, hävdar idén om den fulla sysselsättningen (med dess latenta utslitningsprocesser) institutionaliseras värden som hälsa och trygghet genom vårt socialförsäkringsprogram. Halv förtidspension

har en speciell karaktär och ett särskilt undersökningsvärde i och med dess balanserande fotfäste i båda systemen – såväl det marknadsorienterade systemet (ekonomi och rationalitet) som det moraliskt-praktiska systemet (socialisation och legitimitet).

6. Sammanfattning

Mer eller mindre dagligen kommer vi genom massmedia i kontakt med frågor kring förvärvsliv, hälsa, rehabiliteringsåtgärder, arbetsförmåga och pensionsålder. Det finns en rad olika kopplingar. Lokförarstrejken är som nämnts ett exempel där frågan om arbetsvillkor, prestationsförmåga och ålder blivit framlyft. Ett annat exempel är när läkare framträder i TV och hävdar att det i vårt datoriserade samhälle måste vara fel att förtidspensionera handikappade. Självklart är det av stor vikt att även handikappade och individer med nedsatt arbetsförmåga kan erhålla en meningsfull sysselsättning – oavsett konjunkturläge. I detta sammanhang kan förtidspensioneringen betvivlas. Att på detta sätt koppla bort denna grupp från arbetsmarknaden ter sig såväl orimligt som orättfärdigt. Detta tvivel får dock inte medföra att man bortser från att de som erhåller *hel* förtidspension p g a medicinska diagnoser till närmare två tredjedelar tillhör en fysiskt utsliten och till arbetslivet svårrehabiliterad äldregrupp, vars problem kan spåras till rygg och leder. Att det uppenbart föreligger svårigheter att rehabilitera och att anpassa denna grupp till arbetsmarknaden innebär inte att rehabiliteringsåtgärder är onödiga. Målet med rehabiliteringsinsatserna måste även ta sikte på förutsättningarna för en dräglig ålderdom för den tidigare fysiskt hårt arbetande arbetskraften.

Jag har i denna uppsats visat att en relativt stor del av förtidspensionen är betingade av arbetsmarknadsskäl, vilket faller utanför frågan om rehabilitering. När det gäller förtidspensionärer med medicinska diagnoser uppbär ungefär en tredjedel sjukbidrag vilket innebär att de förväntas eventuellt kunna bli arbetsförmögna i framtiden. De är därför inte definitivt avkopplade från förvärvslivet – i varje fall inte uttryckligen. Vidare har uppsatsen påvisat att halv förtidspension fått en större betydelse. Ungefär en fjärdedel av de som är förtidspensionerade med medicinska diagnoser uppbär halv förtidspension eller halvt sjukbidrag. Eftersom den halvt förtidspensionerade deltidsarbetar i någon form, om de inte är sjukskrivna, kan

denna grupp inte heller betraktas som definitivt avkopplade från förvärvslivet. Frågan är dock om halv förtidspension är en lyckad pensioneringsgrad i det avseendet att det motsvarar pensionärens psykiska eller fysiska förutsättningar och dennes förväntningar, eller om det endast är en etapp mot hel förtidspension. Givetvis kan man ställa sig frågan om halv förtidspension motsvarar faktiska processer i arbetslivet, om det förutom individuella behov även motsvarar mer allmänna behov som t ex en arbetstidsförkortning generellt eller för enstaka grupper. I den avslutande delen av uppsatsen har jag poängterat att halv förtidspension har en speciell karaktär i och med dess balansgång mellan två olika subsystem: dels marknaden och idén om den fulla sysselsättningen och dels socialförsäkringssystemet och värden som hälsa och social trygghet. Detta förhållande gör att det här föreligger ett teoretiskt spännande fält som kan göra en empirisk studie av halv förtidspension betydelsefull för förståelsen av den moderna välfärdsstatens rationalitet och legitimitet. Dessutom kan man ställa sig frågan om halv förtidspension är en pensioneringsgrad betingad av systemrationellt handlande (kassornas hantering och överföring av halvt långtidssjukskrivna till pensionsrullorna) eller ifall konstruktionen bygger på utvecklingsprocesser på arbetsmarknaden (såväl krav på arbetsmiljö som marknadens olika behov) och individorienterade aspekter (rehabilitering). Dessa frågor kräver empirisk forskning för att kunna tillfredsställande besvaras.

Efterskrift: Lokförarna vann!

Lokförarna gick till slut segrande ur konflikten om pensionsåldern (30/9 1989). Statens arbetsgivarverk ger med andra ord upp tanken på att få igenom ett nytt pensionssystem och en höjning av pensionsåldern. Eftersom pensionsfrågan väckt så starka känslot till liv tvivlar dessutom ordföranden i Statsanställdas förbund på att frågan kan bli aktuell i nästa avtalsrörelse. Det lär med andra ord dröja innan det åter blir aktuellt att ta upp tanken på sänkt pensionsålder. Men så är det ofta med sociala rättigheter: lika svårt som det är att få igenom dem, lika svårt är det att ta tillbaka dem.

Noter

1 I en intervjuundersökning 1983 visade det sig att 19% av tillfrågade 65-åringar och äldre önskade fortsätta att arbeta på hel- eller deltid. 7% hade även kunnat förverkliga denna önskan. Arbetare som haft tungt arbete saknade samma motivation. Långa arbetsdagar hade inte samma inverkan på motivationen, utan 25% av de som haft långa arbetsdagar ville även fortsätta efter pensionsåldern. Utredarna förklarar detta med att långa arbetsdagar visserligen upplevs negativt, men kan dock vara kopplade till andra positiva upplevelser som t ex intressanta arbetsuppgifter (SOU 1983:62 s 63).

2 *Moralisk-praktisk utveckling*: När Jürgen Habermas talar om utveckling gör han en distinktion mellan produktivkrafternas utveckling och den normativa interaktionsstrukturens utveckling. Till produktivkrafternas utveckling hänför han det instrumentella och avsiktsorienterad handlandet vilket styrs av strategiska och tekniska regler. Utvecklingen av den sociala interaktionsstrukturen (kultur och moral) kommer till stånd genom en utvidgning av kommunikationen. Det är hans uppfattning att de olika dimensionerna har olika rationalitetskriterier (funktionalitet respektive värderelaterat handlande) och att de inte kan reduceras till varandra. Vad vår tid kräver, skriver Habermas, är ett utvidgat rationalitets- och förnuftsbegrepp, ett begrepp som kan hantera såväl den institutionella (t ex rättsliga) och kulturella utvecklingen som den teknologiska och ekonomiska utvecklingen (Habermas 1976 och 1979).

3 Ang. alkohol- och narkotikamissbruk: En relativt stor del av förtidspensionärer som har blivit pensionerade med diagnosen psykiska problem hänför sig till detta *sociala* problem (Carlsson & Roslund 1982). Studier gjorda av medicinare har, tvärtom om vad man egentligen trott, visat att förtidspensionärerna dricker mindre alkohol efter det att de har blivit pensionerade. Vid en närmare granskning torde det röra sig om förtidspensionärer som druckit alkohol för att dämpa smärtor i rygg och leder. Att de slutar dricka kan bero på att smärtan, om den inte avtar helt, så i varje fall dämpas i och med pensioneringen.

4 Andelen som får avslag på sina ansökningar om förtidspension torde årligen ligga mellan 2 och 5%. En empirisk studie av vilka som får avslag, varför de ansöker om förtidspension, deras behov och förväntningar skulle kunna vara av intresse då det gäller att belysa institutionaliseringen av sociala rättigheter och dess konsekvenser.

5 En studie av förtidspension betingade av 16:1-paragrafen under 80-talet försvåras av att Riksförsäkringsverket inte längre har en uppdelning av förtidspension i kategorierna 16:1-fall respektive egna ansökningar om förtidspension. Härvidlag måste man gå till de enskilda kassorna, vilket förlänger tiden för datainsamling avsevärt. Riksförsäkringsverket räknar dock med att 50% av förtidspensionerna hänför sig till kassans initiativ och 50% är betingade av den blivande förtidspensionärens eget initiativ.

6 När det gäller de yngre förtidspensionärerna (20-34 år) och deras psykiska status kan man i ett sociologiskt perspektiv tala om *rotlöshet* och att arbetet inte är den rot och det värde som den varit för den nu äldre arbetskraften. Det kan även röra sig om andra sociala fenomen som *mobbning* och *stress*. Mobbning på arbetsplatser har blivit ett allt vanligare fenomen (Leymann 1988).

7 Det förekommer en rad olika modeller att mäta förhållandet mellan kvalifikationer, fysiska arbetskrav, arbetsmiljö, utslitning och individens egen värdering av sina villkor. Det talas bl a om LISREL-modellen (Tåhlin 1987).

Referenslitteratur

Carlsson, Bo & Roslund Mats (1981) *Förtidspensionärerna: Arbetsmarknadens fallfrukter: En studie av myndigheternas användning av 16:1-paragrafen AFL* Rättssociologiska institutionen (stencil)

Eriksen, Tor E (1980) *Den ökade sjukfrånvaron – en statistisk analys* Delegationen för Social Forskning, Rapport 1980:1

Eriksson, Kjell E. (1989) *Quitters in Sweden: Beyond Law* (Paper presented at the 25:th Annual Meeting of the Law & Society Association in Madison, Wisconsin)

Furåker, Bengt (1976) *Stat och arbetsmarknad* Lund: Arkiv

Habermas, Jürgen (1976) *Legitimation Crisis* London: Heinemann

Habermas, Jürgen (1979) *Communication and Evolution of Society* London: Heinemann

Hetzler, Antoinette (1981) "Work and Sickness: Ideology and Law" i *Acta Sociologica* nr 1-2.

Hetzler, Antoinette (1989) *Administrative Justice and Social Rights* (Paper presented at the 25:th Annual Meeting of the Law & Society Association in Madison, Wisconsin)

Hetzler, Antoinette & Eriksson, Kjell E. (1981) *Ökad förtidspensionering* Lund: EKNA.

Hetzler, Antoinette & Eriksson, Kjell E. (1982) *Beslutsprocessen i arbetssjukdomsärenden* Lund: EKNA

Keane, John (1984) "Introduction" i Claus Offe *Contradictions of the Welfare State* London: Hutchinson

Lafargue, Paul (1880/1988) *Rätten till lättja: En vederläggelse av Rätten till arbete* Stockholm/Lund: Symposion

Leymann, Heinz (1988) *Ingen annan utväg* Stockholm: Wahlström & Widstrand

Offe, Claus (1984) *Contradictions of the Welfare State* London: Hutchinson

Poulantzas, Nicos (1970) *Politisk makt och sociala klasser* Mölndal: Partisan förlag

Preuss, Ulrich (1986) "The Concept of Right in the Welfare State" i G Teubner (ed) *Dilemmas of Law in the Welfare State* Berlin: Walter de Gruyter

SOU 1977:88 *Förtidspensionering: Två forskningsrapporter.*

SOU 1981:70 *Arbete eller pensionering*

SOU 1983:62 *För gammal för arbete?*

Teubner, Gunther (1983) "Substantive and Reflexive Elements in Modern Law" i *Law & Society Review* nr 2

Tåhlin, Michael (1987) *Arbetets värde och kostnader* (ak avh) Stockholm: Almqvist & Wiksell

Weiss, Johannes (1986) *Weber in the Marxist World* London: Routledge & Kegan Paul

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Justice in Times of Rationing[1]

Malgorzata Fuszara
Iwona Jakubowska
Jacek Kurczewski

Institute of Social Prevention and Resocialization, Warsaw University

As regards Points: Ten, which reads, "Supplies of food to the home market should fully satisfy the needs, and exports should concern the surplus only"; Eleven, which reads, "Specially raised prices and sale for foreign currency (the so-called home exports) should be abolished"; Thirteen, which reads, "Rationing of meat and meat products should be introduced (and should remain in force until the market situation can be controlled)", the following has been agreed:

The supply of meat for the population shall be extended before December 31, 1980, as a result i.e. of increased profitability of agricultural production, reduction of meat exports to the necessary minimum, additional imports of meat. Also before the above date, a programme shall be put forward of extension of meat supplies for the population, including if necessary the introduction of rationing. Scarce articles of daily use produced in Poland shall not be sold for foreign currency in "Pewex" stores. The society shall be informed about the decisions and steps concerning market supplies before the end of this year.

The Inter-Factory Strike Committee moves for the abolishment of special shops where meat is sold at raised prices, and for regulation and unification of meat prices at a medium level

Official record of the agreement negotiated by the Government Commission and the Inter-Factory Strike Committee in Gdansk Shipyard on August 31, 1980.

Art. 31.1. The Council of Ministers may pass a decree introducing a full or partial rationing of the basic articles of food and of certain other articles.

Decree of December 12, 1981, on martial law, Journal of Law No 29, item 154.

In the post-war history of Poland, as well as in the history of mankind on the whole, rationing of necessities is not a novelty. In Karl Polanyi's outline of the basic types of economic systems, it serves as an example of the mechanism of redistribution which has been practiced from time immemorial by the centralized "Asiatic" systems; that mechanism replaced the principles of reciprocity only to give way to market mechanisms in the Western conditions.[2] According to Zsuzsa Ferge, redistribution is the basic economic and social mechanism in the socialist systems. This is consistent with the opinion about the collective social system which prevails since the first socialist and communist utopias. Leon Petrazyski who was the first to outline the model of centralized economy – before Stammler and the doctrinal disputes of 1950's – treated redistribution in the discussed social system as the basic mechanism to satisfy living needs. The supposed distinguishing mark of the socialist redistribution is the principle of egalitarianism as the substantial rule of a just distribution of goods and services.[3]

Ferge points to the fact that in real socialism, redistribution failed fully to supersede the market mechanisms and the principle of reciprocity which still governs the "border-line" and the family economies, despite the expectations to that effect cherished during the revolution. Nevertheless, such market elements are surrounded and dominated by redistribution, just as the elements of redistribution found in the economy and social policy of modern capitalism are surrounded by the dominating market mechanism. Whenever the supply of a certain type of goods exceeds the perceptible demand, direct redistribution through various allocations, allowances, coupons and ration cards is replaced by free sale. This trend is not the subject of sociological thought and is treated as obvious. Redistribution is assumed to be abnormal from the natural point of view of a member of the socialist society: what is normal, is the possibility to freely buy and sell goods and services on the market. The redistribution mechanism is also assumed to be abnormal from the economic point of view, and the market mechanism to be normal. The latter assumption is historically wrong; the former, on the other hand, has never been submitted to a reliable empirical study. Treating rationing and redistribution in general as abnormal and transient phenomena, we have never given to them the attention they actually deserve. In the socialist society, redistribution is to play the role of the basis of social life (planning being just a means), and its imperfect functioning is the everyday problem of the mass of citizens.

The contractual character of prices, treated as a weak point of the centralized system is a logical component of a system based on redistribution. In the socialist system, social conflicts concentrate on a struggle for a share in redistribution which would be the most profitable for a given social group or category.

The rationing of meat and other basic food products which was introduced following the events in August 1980 is a good example of the above-mentioned theses: in the period from August 1980 till December 1981, overt actions of separate groups of interest were noticeable.

"From the society's point of view, coupons were to guarantee a just distribution of goods and help reduce the lines. From the point of view of the authorities and the economic policy, they were to become an efficient instrument of balancing supplies and demand."[4] The rationing of meat, forced by the strikers on the Coast, expressed both their dissatisfaction with the hitherto employed indirect forms of redistribution through a double, if not triple, system of sale, and their belief in the possibility of creating a more egalitarian redistribution. The insistent demand on rationing alarmed most economists who perceived it to be a threat for the economic reform that was to introduce market instead of redistribution. From the government's point of view, rationing proved to be an effective step: it helped meet the social demands with the overall amount of meat for distribution unchanged, nay reduced. This solution had already been tested for that matter in 1974, when the rationing of sugar was introduced due to the profits then derived from the sale of Polish sugar abroad.[5]

The rationing was introduced during an acute political and economic crises. As Hagemejer wrote in the summer of 1981,

> the market situation gives rise not only to mutual hostility among the population and to hostility towards those in power, but also to conflicts between whole social groups, the regional and professional above all. The central distribution lists that were to secure a "just" distribution of a limited amount of goods all over the country break down. Tendencies can be found in the separate regions to distribute everything that is manufactured in their respective territories and to prevent any exports of such products to other regions; the introduction of local rationing promotes such tendencies. Barter develops between the separate plants where scarce market goods are manufactured. *The system of rationing*

> *of meat created conditions in which the separate professional groups rival one another trying to win the recognition of their work as particularly hard and thus to obtain a larger ration...* (authors' emphasis) On the one hand, the universal mistrust in the presented balance resulted in the negotiating of ration norms which allowed for no reserves to cover fluctuations of purchase and irregularities of supplies; on the other hand, the adopted principle of allotting different rations depending on the character of work brought about the frequently successful demands for differentiating rations, voiced by the separate professional groups. [6]

The outcome of that struggle was not obvious. On the one hand, the trend towards equalization of supply norms of the separate regions improved the situation of those living in small towns and agricultural regions to the disadvantage of the hitherto privileged agglomerations of manufacturing industry. On the other hand, a regional structure of the strongest trade union facilitated local corrections through the above-mentioned closing and autarchy of provinces and towns. The economic needs soon led back to a privileged position for certain categories of workers such as those performing harder work, the special miners' privileges – the bone of contention in the disputes between "Solidarity", departmental trade unions, miners, and the authorities – were left out of account here. Undoubtedly, for redistribution of this type to be introduced, the central authorities must be strong in relation to the lower levels. Before December 1981, the Polish government was too weak to realize that task. (Incidentally, also the national leaders of "Solidarity"were too weak to force the separate plants, professional groups, departments and regions to observe the adopted principle of egalitarianism). Just as the local centers of public and economic power tried to avail themselves of the situation and to win over definite circles, also the latter tried to exert a successful pressure on the local authorities in order to obtain larger shares

Market or redistribution?

The demand for rationing of meat and other food products, formulated most clearly in the days of negotiating of agreements, was usually given either of two different interpretations. The first of

them stresses the society's belief that rationing would lead to the disappearance of lines. According to the other one, the demand for rationing resulted from the society's reluctance towards the system of many different markets, operative before August 1980, which created privileges for certain categories owing to their social position (the Party and State machine) and for certain persons with higher incomes (who could buy goods in special stores paying raised prices). Both of these interpretations can be found in the above-quoted article by Hagemejer. However, the findings of studies carried out after August 1980 make it possible to include still another and more essential motivation.

The Institute of Domestic Trade and Services carried out two studies of an incomplete and yet rather interesting sample of households. The first of those studies was made in November and December of 1980, this actually preceding the introduction of rationing (n = 2715 persons)[7]; the second one took place in April and May of 1981 (n = 2326 persons)[8] during a time of great confusion connected with the introduction of rationing. To begin with, nearly a half of the examined persons (48 per cent) believed that rationing would secure better supplies of meat and meat products for their households, 18 per cent thought it would only make matters worse, and 25 per cent were of opinion that no changes would result from the introduction of coupons. Five months later, a half (50 per cent) of respondents found rationing to have resulted in better supplies, 25 per cent thought the opposite, and 21 per cent thought coupons had brought about no changes in their households. At the end of 1980, as few as 37,5 per cent of respondents hoped that rationing would help abolish lines; instead, as many as 70 per cent thought that rationed meat would still be scarce enough to sometimes make it impossible to buy the entire amount allocated against coupons. Five months later, only 33 per cent stated that the introduction of rationing had reduce lines, and a half (50 per cent) quoted instances of shortage of rationed meat. None the less, most respondents (59 per cent) believed rationing to have guaranteed a just distribution of meat, and only 24 per cent thought the opposite. Furthermore, while as few as 25 per cent were for the rationing of other articles besides meat at the end of 1980, the proportion went up to 66 per cent in April and May of 1981.

These data, as well as the answers to our questionnaire lead to the conclusion that most people are for rationing in the face of scarcity of various goods. This attitude does not result from practical

reasons – e.g. from a hope for full supplies of rationed goods or for disappearance of lines – but is a matter of principle. Rationing has a moral value above all. It satisfies the social sense of justice, creating equal chances of buying the necessary goods. Namely, the approval here concerns egalitarian rationing, the actual contents of that rationing are not necessarily obvious or uniform for all; this problem will be discussed below.

Our questionnaire survey was carried out in November and early December of 1981. The sample was drawn randomly and included 150 inhabitants of Warsaw; the imposition of martial law on December 13, 1981 made it impossible to examine the entire planned sample of 300 persons. The questionnaire included several questions concerning the above-mentioned problem. The first of them (Question IX) concerned the principles that ought to govern the rationing of necessities and their distribution between individuals and different social categories. As few as 19 per cent of respondents declared themselves against the rationing of necessities. A decided majority (78 per cent) were for rationing. The greatest proportion of them (60 per cent) thought that rations should be differentiated according to needs, e.g. of the various age groups of persons who perform a harder vs easier work. The second question (No XXIII) concerned the principles of sale of non-rationed articles. Only 10 per cent of respondents were for unlimited sale of such goods. The greatest proportion (41 per cent) thought that a uniform principle should be introduced here, with the amount of each commodity sold to one person defined in advance (e.g. one bottle of shampoo or one pot, etc). About one third of respondents (31 per cent) left the decision about the amount sold to one person with the salesman who knows both the amount delivered to the shop and the demand for a given commodity. 10 per cent were of the opinion that those who stand in a given line should decide how much they should buy. Thus only an explicit minority (from 10 to 19 per cent) insist on the preservation, or perhaps introduction of market mechanisms to replace any forms of redistribution. The latter statement is of importance since we have hitherto discussed rationing as a form or redistribution, and treated the distribution of coupons as the only form of rationing. Meanwhile, as follows from a more careful analysis, coupons should be treated as what we have decided to call *universal* rationing, while various other socio-economic phenomena connected with the so-called lines are in fact specific forms of rationing; such rationing will be called *situational* in the present paper.

One should bear in mind in this connection that a "line" is not necessarily connected with unbalanced supplies of and demand for certain goods: instead, in its pure form, it concerns the problem of satisfaction of needs at one and the same time. Its point of departure is the distribution of time and not of other goods. The basic principle of "line justice" – Prior tempore, potior iure, that is first by time, first by right or first come, first served – does not necessarily mean that only those first in line can buy at all, and the amount they want at that. A line is formed whenever it is impossible to serve all customers at one time. In such a "pure" line which is possible also when the supply generally exceeds the demand, what is rationed is not the commodity but the time the salesman has at his disposal. But if it is the demand that exceeds the supply, which is the case in a vast majority of situations in Poland, a line has a different sense. The position in line determines the very chances of buying a given good. Thus, whenever the supply is greater than demand, sale based on the first come, first served principle may indeed be treated as a form of redistribution of commodities and services according to the amount of time passed waiting to be able to buy. This redistribution is situational since it is enough to change the time and situation for the chances for acquiring a commodity or service to also be changed. At the same time, such a situation of purchase is in accordance with the market mechanism as the customer is allowed to buy what he wants and as much as he wants to buy. No changes of this situation would be necessary had the supply remained greater or at least equal in relation to demand; however, with the actual redistribution done by the salesmen the trade has changed into a normal market situation which it de iure is.

Long before August 1980, however, still another model of line situation was shaped which might be called situational rationing sensu stricto. In the face of scarcity of goods, the necessity of rationing of commodities was recognized quite soon on a nation-wide scale, in the separate localities, and in shops (e.g. one loaf of bread, two bottles of vodka, or one tin of preserved meat per person). This principle is situational since the would-be buyer may simply go to another shop and line up for the same commodity there. Moreover, he may even line up again in the same shop, provided the commodity in question is still being sold. What connects this kind of rationing, the principles of which can be determined by trade administration, by salesman, or by the customers concerned, with the universal rationing, is the mechanism of redistribution of goods among the greatest possible number of persons who want to buy those goods.

Approval of various forms of rationing was also revealed in the answers to other questions we asked. One of those questions described a situation where great amounts of dressing materials, vitamin tablets, and baby preparations were bought up by one person. All those commodities together constituted a monthly allowance for the entire town. The articles concerned are not rationed through coupons, hence we deal here with a normal transaction of sale from the legal point of view. Yet in our story, the police caused those commodities to be returned to the drugstore despite the fact that their purchase had been legal. It turned out that nearly all of the examined persons (93 per cent) approved of the steps taken by the police. As few as 7 per cent were against a police intervention in such cases. If the possibility of buying a given commodity is to be secured for the greatest number of persons possible, nobody can purchase an unlimited amount of that commodity. Such was the justification given by most respondents. The interest of other consumers and their right to get their share of the redistributed goods is the most frequently quoted motive for accepting a police intervention in the discussed case. What is worthy of attention here is the fact that the respondents are but seldom motivated by a fear of the phenomena frequently quoted on such occasions by the mass media (e.g. as few as 11 per cent were prompted by a belief that the person who bought the commodities up was a profiteer). The Polish society justifies a limitation of the right to buy commodities by referring to the other person's right to buy at least the minimum amount of goods that are in short supply.

Therefore, the arduous scarcity of goods induces the Poles to accept rationing of virtually all commodities, and, as was also found in our study, to demand punishment of those who break the rules of rationing. An emphatic majority of respondents declared themselves in favor of punishing persons who buy up commodities in such a situation (79 per cent). Nearly a half (47 per cent) believed that both parties to the transaction should be punished, while one fourth thought that a penalty should be applied against the salesman. The most frequently proposed penalties were: fine (35 per cent) and admonition (21 per cent) but there were also some respondents who mentioned very severe penalties, e.g. imprisonment (nine persons, 6 per cent). Those more inclined to declare themselves for punishing persons who buy up commodities are women, persons with elementary education, those who define themselves as workers, and those living in worse conditions, both objectively (who actually less often

have meat for meals) and subjectively (who perceive their situation as worse than the average). Among those who were against punishment were a greater proportion men, persons with secondary and higher education who defined themselves as members of the intelligentsia, those whose living conditions were objectively better (who had meat more often), and those who described their own living conditions as average or better than the average.

The above-quoted opinions can be arranged into a consistent system: a prevalence of demand over supply results in a trend towards the rules of rationing which would be known in advance and towards a limitation of the right to buy goods in some cases so as to make it possible for others to exercise their rights. Transgressions of those rules should be punished and the penalty applied towards both parties to the transaction, the salesman and the customer, or only towards the salesman as the disposer of commodities. Among the most punitive persons were above all those for whom the scarcity of goods on the market was particularly painful (the poor, women). The range of proposed penalties was rather broad and included the most severe ones such as imprisonment. Although such acts are not penalized, the transgression of the rules of rationing of scarce goods, infringing other persons' right to their share of redistributed goods, became an offense in the social consciousness: those guilty of such acts should therefore be punished, nay imprisoned.

The questionnaire included another example of conduct inconsistent with the norms of times of rationing. A situation was described where a customer helped himself to a chocolate bar, sold only against children's sugar coupons, and left money on the counter – the equivalent of that bar's price. This situation is unclear from the legal point of view: on the one hand, the customer had no coupon and thus was not entitled to buy; yet on the other hand, there were no provisions to prohibit the purchase of the chocolate bar or to impose a penalty on the person who buys it, and the discussed situation can hardly be interpreted as theft. The opinions about the described conduct proved to differ from one another. A little more than a half of respondents (57 per cent) condemned the purchaser, and nearly a half (42 per cent) expressed no disapproval. In this case, like in the one described above, the norms of the times of rationing were also transgressed: the transgression, however, did not result in an explicit reduction of the rights of others which probably influence the lack of uniformity of the respondents opinions. Only

one trait proved to have an important connection with the opinion expressed: persons with higher education were more inclined to condemn the customer in the discussed situation.

In this case just as before, the respondents were asked about the proposed reaction towards the customer. The most frequently mentioned reactions were admonition (29 per cent) and restitution (of the chocolate bar and of money, 28 per cent). Most respondents (62 per cent) believe that a person who notices such a situation should notify the salesman; 25 per cent would let the customer get away with what he did; and 13 per cent proposed other types of reaction. It appeared that persons with higher education, despite their disapproval of the described act, more frequently proposed reactions other than notifying the salesman or restraint from any reaction. Above all, they mentioned a private intervention: a rebuke etc.

However, the respondents' opinions are generally consistent: those who condemn the customer declare themselves more often for notifying the salesman and for the imposition of penalties sensu stricto on the perpetrator of the described deed, the penalties above all including fine (in this case, imprisonment was suggested by only one respondent). These correlations made it possible to construct an index based on which persons were most vs least tolerant towards the customer in question could be distinguished. As shown also by other studies, young persons with a secondary or higher education and living in objectively better conditions are most tolerant.

As shown by the findings quoted above, the respondents aimed at a limitation of the right to buy commodities to the extent which would make possible the exercise of those rights by as large a number of persons as possible if not by all concerned. It sometimes happens, however, that the observance of this principle leads to a reduced usefulness of the purchased commodity. Our respondents were asked to give their opinion about such a situation which concerned the sale of an Hungarian hair preparation. Since there were many customers, each of them was allowed to buy one bottle despite the fact that three bottles are necessary in order for the treatment to brir g good results. Most respondents (89 per cent) believed the salesman's decision in this case to be wrong; according to them, it would be better to sell the necessary amount of the preparation to a smaller number of customers. Thus it appeared that the trend towards a just redistribution of goods and towards making it possible for the greatest number of customers to buy commodities is kept within the limits of common sense, marked out by the usefulness of

a given commodity for its purchaser. Nearly a half (48 per cent) of the respondents are of the opinion that decisions concerning the amount of goods sold to one customer in such situations should be taken by the competent domestic trade organization. Instead, the proportion of those willing to leave such decisions to the people standing in a given line was the smallest (19 per cent); according to the respondents, this was due to the fact that the interests of those first and those last in line clash which makes it difficult to reach a decision that would be acceptable for all. Thus, despite the uniformity of opinions in the discussed case, the respondents do not believe in the possibility of the customers' common sense prevailing in a given "line situation".

The question asked in the title of the present section was: market or redistribution? It may be stated based on the findings quoted above that the majority of the Polish people are for redistribution of commodities in the present situation of a total economic crises. With demand greatly exceeding supply which is strongly felt in the society, redistribution is to be carried out through various forms of rationing. The so-called necessities should be included in universal rationing, with situational rationing applied in the case of other articles where the demand exceeds their supplies. Among the forms of the latter type of rationing, there is sale based on principles agreed and known in advance (e.g. one loaf of bread or one pot per person). Another form involves the situation where the salesman or those in line (which occurs less often) decide about the amount of commodities per customer according to the relation between demand and supply in a given case. Infringement of those unwritten laws that are in force in the period of scarcity of market goods meets with disapproval; whenever the principles of just distribution are glaringly infringed, the Polish society is for punishment for those guilty of such infringement.

To end the present section, the problem should be considered of the degree to which the legal regulation of rationing agrees with the society's opinions in this respect. At the time of investigation, uniform rationing involved the sale of some articles only (e.g. meat and sugar). The rationing of other articles differed in the separate provinces (for instance, vegetable fats were sold against coupons only in some regions). In those days, the provinces enjoyed a rather large extent of freedom in deciding about rationing and about the introduction of the so-called interchangeable products (e.g. coffee instead of alcohol, sweets instead of cigarettes etc.). Universal ration-

ing on a nation-wide scale resulted from the subsequent resolutions of the Council of Ministers. The lack of a uniform regulation, the changing provision norms, the different interchangeable goods, the diversified interpretation of provisions, and the differences in the rationing policy from one province to another – all of those factors together made the customer's situation unclear, despite the coupons, both for himself and for the salesman whose interpretation of those factors frequently determined the kinds and amount of goods sold to the customer. At the moment of this writing, the principles of universal coupon rationing are regulated by the resolution of the Council of Ministers of December 12, 1981, "on the rationed sale of commodities". (Resolution No 264, "Monitor Polski" No 32/1981). The Resolution provides for nation-wide uniform norms of sale of the separate commodities which agrees with our respondents postulates, as does the differentiation of those norms in the case of separate groups according to their respective needs related to age or the effort put into the work they perform. The respective findings will be presented in the next section of the paper. The introduction of a uniform regulation is not, however, tantamount to the disappearance of all doubts and to a just distribution of commodities. The recurring shortages of certain goods bring about a situation where a successful purchase of a given article depends not only on coupons and the expenditure of time, but on other factors as well (such as the supplies of definite sorts of meat to a definite shop, the salesman's decision as to the amount of better sorts of meat to be sold to the separate customers etc.). As shown by this and many other examples, despite the trend towards unification, the system of universal rationing is still far from meeting the demand for a just distribution of necessities. Moreover, the question cannot be settled explicitly whether the government, when issuing the so-called coupons, at the same time assumed the duty to secure supplies which would cover the norms it determined itself. As shown by the creation, through a resolution of the Council of Ministers, of a special Interdepartmental Group for Rationing of Commodities tasks of which include supervision of supplies to cover the norms, the government indeed assumed the above-mentioned duty. Had this question been interpreted in a different manner, the whole of the universal rationing system would for that matter be nonsensical.

Situational rationing is obviously more difficult to regulate. There are legal grounds for the use of one of its forms, the rationing done by the salesman: the order of the Ministry of Domestic Trade

and Services which entitles the shop manager to limit the amounts of commodities sold to the separate customer (1978). It should however be added that in some situations the form of rationing was approval where the amount of commodity is determined by order of superior authority (the trade organization in our example of the hair preparation). Yet we failed to find legal grounds for this kind of rationing. Moreover, which seems rather important, while accepting situational rationing done by the salesman, the respondents nevertheless made many reservations in this respect, postulating the salesman's honesty and supervision of his decisions by a "line committee" which would check the invoices of the delivered commodities and supervise the fairness of the principles of sale established by the salesman. Today, due to the fact that the creation of line committees has been banned, the customers are at the salesman's mercy to a much higher degree than before. It is difficult to tell whether this would influence any changes of those customers' opinions about who should establish the principles of situational rationing. There are, however, no legal grounds based on whether such decisions could be vested with the customers.

Egalitarianism, the privileged, and the handicapped

In times of rationing, not only the norms of sale were changed but also certain rules that govern the very order of that sale. There are signboards in all shops providing information that certain categories of persons (the disabled, pregnant women, women with babies in their arms) shall be served before others. The interpretation of this principle is unclear in times of rationing. Two lines were formed in shops: the first one composed of those who enjoyed no privileges, and the other one of persons entitled to be served before others. Therefore, an additional *metarule* of sale had to be accepted. At the time of investigation, a custom was formed in the Warsaw shops according to which five persons from the line of the unprivileged and one person entitled to be served first were served alternately. It should be added here that the related order of the trade authorities gave a much more detailed definition of the privileged categories and of their required certificates as compared with the above-mentioned signboards, but was at the same time most vague as regards

the principles of conduct "if a longer line of the privileged is formed"[9] The norm established in the social practice was both precise and simple: it provided for two classes only, of the privileged and the unprivileged, and one proportion, 1:5.

The bulk of the respondents (76 per cent) accepted that social norm. The justness of the 1:5 principle was usually motivated by the interest of other customers, that is by the fact that if those unprivileged would have to stand in line for too long another principle would have been accepted (38 per cent of answers) and by the fear that there would be an insufficient amount of commodity for the remaining customers in that case (21 per cent).

As can be seen, the solution accepted already under martial law by the Ministry of Domestic Trade and Services, according to which one privileged and one unprivileged person should be served alternately is inconsistent with the customers' opinions. One should bear it in mind here that the existence of persons entitled to be served first has different consequences for the remaining customers contingently upon the relation between demand and supply. The rules according to which pregnant women, cripples etc. should be served first have a different sense in the normal market conditions as compared with the situation of scarcity of goods. "Normally", we let persons recognized as weaker do their shopping before us in order to lighten their effort connected with shopping. In such a case, the rules granting privilege mean that the privileged persons' expenditure of time spent in line (and the related effort) does not influence their chances of buying the article they line up for. Such rules are sensible if there are in principle enough commodities, that is if all those involved in a given situation of sale can buy: if not on that particular occasion, then at least soon and in another shop which is reasonably close to the original one. Instead, with the working assumption that demand greatly exceeds supply, those privileged in respect of the expenditure of time and effort related to standing in line become privileged also as regards the chances of buying the necessary article. It is impossible in the Polish conditions to draw a strict borderline between the two situations described above. However, this can hardly be the only reason of the quantitative relations found here. The smaller the supply in relation to demand, the less the chances of buying the necessary article at another reasonably close place and time. The greater the extent to which a given position in line determines the very chances of satisfying an important need, the greater also the importance of privileges for the weak who

are perceived as a threat and as rivals by the remaining persons standing in line, and the smaller the role played by the rule that grants privileges in respect of time and effort. It seems that the role of time spent while waiting to be able to buy grows small as compared with normal situations. The possibility of joining several lines at the same time, the specific "turns of duty" in lines reservation of positions and lists of those in line seem to speak for that assumption.

Due to the specific character of a normal situation of sale, it is impossible today to differentiate the customers according to their respective rights resulting from various needs, merits, or faults; what differentiates people are instead the most visible features such as pregnancy, disability or special papers which anyway can only be produced with difficulty in a crowded shop. Hence the principle of strict objective egalitarianism (the same portion for everyone) is easier implemented in line situations than other versions of justic.[10] Of course, the situation of buying rationed goods is in reality much more complex, as at least three principles are in force here: 1) all customers are entitled to buy the same amount of goods; 2) the chances of exercising that right depend on the person's position in line according to the principle: first come, first served; and 3) these chances are slightly bigger for certain preferred groups, e.g. disabled etc..

The principle of objective egalitarianism, however, leaves a whole range of the separate customers' needs out of account. A single young man may buy the same amount of commodities as a mother of seven. One can hardly demand that appropriately authenticated papers be produced by the customers, thus making the differentiation of needs, otherwise quite obvious to the people, objective. Moreover, the situational character of rationing (what we mean here is not sale against coupons) makes such a strict objective egalitarianism harmless: shopping can be continued in another situation. Thus as follows from the above, the definite rules of justice accepted in the conditions of situational redistribution should be different from those in the situation of universal rationing. Central redistribution through coupons should secure to everybody the right to buy a definite amount of goods; it is assumed here that the person concerned cannot supplement that amount (such supplements being actually possible through own breeding, trade and gifts, e.g. from abroad). What is more, differentiation of needs can, nay should, be taken into account in the conditions of universal redistribution as

the centre that carries that redistribution into effect through the distribution of rights to buy definite shares of the overall amount of commodities is better qualified to define the differentiated needs both on the universal nation-wide scale and for individuals, through the establishment of appropriate parameters of persons entitled to participates in the distribution.

When asked about the principles that should govern the rationing of various necessities and their distribution between individuals and different social categories, most of the respondents (69 per cent) professed the principle of relative egalitarianism, according to which all people should get more or less equal amounts, but with their different needs taken into account related, e.g. to age or physical strain necessary for performance of work. As few as 10 per cent of the respondents professed the principle of objective and absolute egalitarianism according to which *all persons should get exactly the same amounts*, of soap or sugar, for example. As has already been mentioned above, 10 per cent repudiated the very principle of rationing in general. The acceptance of relative egalitarianism means that the examined persons accept a certain differentiation of allowance beforehand. As concluded in the study carried out by the Institute of Domestic Trade and Services,

> Basing on the obtained data, the socially accepted principles of a just distribution of meat may be supposed to result from the existence of twof criteria of distribution of goods. The first criterion is that of "biological" needs, and its application in the case of rationing of meat results in a belief which prevails in the society, that larger allowances should be granted to groups such as pregnant women, breast-feeding mothers, or those performing hard physical work. The other criterion seems to follow from the existence of negative social attitudes toward those whose behavior infringes on the accepted principles of conduct. The reduction of rations for groups such as prisoners or persons who neither work nor learn, postulated by most respondents, may be supposed to be a form of punishment. The fact that smaller amounts of meat are conceded to farmers is another problem.[11]

The groups that proved to be most rigorous in this respect in the study carried out by the Institute of Domestic Trade and Services were inhabitants of big cities, white-collar workers with the highest income, and those with higher education. It should be added that

also the negative selection, which is to determine who should have no right to buy or who should get smaller rations, can be carried into effect more easily (though but seemingly) in the conditions of universal as compared with situational rationing. As shown also by our study, only 39 per cent of respondents were of the opinion that a ration of necessities should be secured for all; as regards the proposed groups which should be deprived of rations according to the respondents, the most frequently mention (49 per cent answers) were the so-called "parasites": adult healthy men at productive age who neither work nor study. Instead, as few as 9 per cent were for exclusion from the rationing system of those whose income greatly exceeds the average, and 10 per cent mentioned other categories of persons deserving discrimination.

With supply problems deepening, those proposed exclusions might be expected to broaden to include also other social categories. It is also apparent that the prevailing relative egalitarianism, adopted to individual and group needs and to their external indices, is also related to merits. To all according to their needs, but also to the their work – is the most popular canon of justice according to which the ration should depend on work. A general conclusion may also be drawn here: that in the conditions of crisis, redistribution and its rules create an opportunity to change the "privileged" into the "handicapped" and vice versa. A person who does not work or who has easier access to food is a privileged person – and thus one whom redistribution should handicap. The handicapped, in turn, are those who perform hard work or have particular biological needs – the mechanisms of redistribution should therefore privilege them.

At the beginning of the present paper, the regional, or generally speaking, the territorial conflicts have already been mentioned that are connected with the access to the rationed or non-rationed goods. Most of the inhabitants of Warsaw who answered our questionnaire (84 per cent) thought that the principles of rationing should be the same in separate localities. As regards, however, another and outwardly most similar problem, that of the outsiders' right to buy commodities in a locality they visit, the respondents' opinions were greatly polarized. 49 per cent believed the ban on sale to the outsiders, in force in many localities, to be unjust, while 41 per cent accepted that ban as resulting from the local differences in the living conditions and supplies. The convergency coefficient between the repudiation of limited sale on the one hand and of local differentiation of the principles of rationing on the other hand was, however,

high enough (Yule's Q= 0.74) to justify the assumption that in both cases we deal with the action of an egalitarian attitude.

The related summary index of absolute egalitarianism consisted of four items in the questionnaire (Nos VIII, X, XI and XII). Persons who scored highest in that index were those who declared themselves for equal ration norms throughout the country; equal rights to buy commodities for the locals and outsiders; rationed necessities for all without exception; general validity of a rule according to which the urban population would be provided with household equipment and the like in exchange for meat rations for farmers, in case of such an agreement being negotiated by the competent trade unions. Such an extreme egalitarianism concerned 16 per cent of the respondents, while 6 per cent gave no egalitarian answers whatever. The distribution of value of the egalitarianism index shaped similarly to normal distribution which adds to our trust in its value. One should, however, bear in mind when analyzing that index that the highest score fails to reflect the attitude which was most popular among the respondents: not only "equality according to needs" but also "equality according to expenditure of work". Namely, egalitarianism failed to include the most popular opinion that norms should correspond with the needs, and the somewhat less popular one according to which the so-called social parasites should be excluded from rationing. Both these opinions could be found in persons with low or medium index values.

Our next move was to compare with one another the divided categories of respondents, characterized by different index values of egalitarian attitudes, in respect of distribution of their traits; in that comparison, we used the various possible dichotomies and Yule's convergency coefficient Q:

women = 0.22
younger persons = 0.13
the less educated = 0.26
workers = 0.26
incomes below the median = 0.00
medium incomes(quartiles II and III) = 0.00
meat consumed exceptionally = 0.12
material conditions bad in own opinions = 0.00
material conditions average in own opinion = 0.35 [12]

As shown by the examined relations between the respondents' socio-economic status and their egalitarianism, just one of those relations, and a weak one at that, is significant at the accepted level of

0.05. Those who believe their own and their family's living conditions to approximate those of an average Polish family are more inclined to show egalitarian attitudes, while inegalitarian attitudes can more frequently be found in categories with extreme (negative or positive) opinions about their own situation. This finding may seem inconsistent with the popular sociological knowledge according to which egalitarianism can be found in those least privileged: but the index of egalitarianism concerns not exactly the absolute egalitarianism but rather its definite forms. In conditions of a serious threat, the general principles, such as e.g. egalitarianism, are reduced to certain more detailed postulates connected with the given living conditions. One should bear it in mind here that the highest score in the egalitarianism scale means that the person in question accepts a number of opinions: that any agreements on the exchange of manufactured goods for meat rations between those living in rural and urban regions should concern *all* citizens; that rations of necessities should be provided for *all* citizens irrespective of their work or income; that ration norms should be uniform throughout the country since identical conditions must be created for *all*; and that there should be no differences between the locals and outsiders as regards chances for buying goods, again because identical conditions must be created for *all*. If we take a closer look at the above-mentioned opinions, it becomes apparent that what connects them with one another is not egalitarianism in the broadest sense in which it functions as a social principle. This form of egalitarianism may be identified with the principle of universal rationing. A person who is for the above-mentioned principles thus declares himself for a universal validity of the principle of rationing, *and* for all citizens' equality before those rules. The latter element – universal equality before the rules of rationing – seems best to characterize the contents of the discussed attitude and of the index used in its measurement.

The rules of private turnover of necessities

At the time of writing, most necessities have been rationed for several months. This creates an entirely new social situation and forces people to develop new patterns of interaction and new principles of justice to regulate mutual conduct. In the situation where many

people need help in acquiring necessities to satisfy their basic needs, it seems particularly important to investigate the principles that govern the rendering of that help, that is the transmission to others of the goods they need.

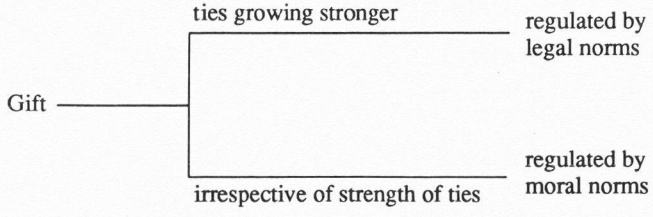
Most respondents (69 per cent) consider it wrong to waste the goods they do not need if those goods might be used by somebody else. Some of them even consider it to be their duty to give such goods to those who need them: not against payment or within direct exchange, but as a gift (47 per cent). The principles that govern donations and possibly return services vary according to the strength of ties between the person who has goods and the one who needs them. The duty to give becomes more bounden with the increasing strength of ties between the parties to the interaction. With the passing from the family to more distant circles, the duty to help those who expect to be helped weakens. In the present interpretation, that "expectancy of help" possesses the character of a claim: a person's right to expect help is tantamount to his right to demand help. Such a right to claims is granted to those in need much more frequently if their ties with the donor are strong. In other words, the stronger the ties between the parties to interaction, the more they are entitled to expect donation. Thus a person in trouble first asks help of his next of kin believing such help to be his due; it is only afterwards, if need arises, that he approaches others, counting on their readiness to oblige. The situation shapes differently if the duties and rights concern a return service and not a gift. Both the duty to requite a gift and the right to expect requital are independent of the strength of ties between the recipient and the donor.

The following data show how strongly the principles concerning gifts and return gifts are connected with the kind of interaction between the partners. If the duty to help a person in trouble is imposed on the disposer of goods no matter how distant the relationship between him and that person, it is bound also to be imposed if the person who needs help is a member of the disposer's family or his close friend. Those who consider it their duty to help a stranger in need, feel even more so obligated to help a next of kin. The most frequent opinion here (45 per cent) is that a person who can help is obligated to help irrespective of the nature of his relationship with the person in need of help. The situation is similar in the case of the right to claim help. If that right is granted to a person whose ties with the potential donor are but weak, it is automatically also granted to those who are in close relationship with the donor, but never

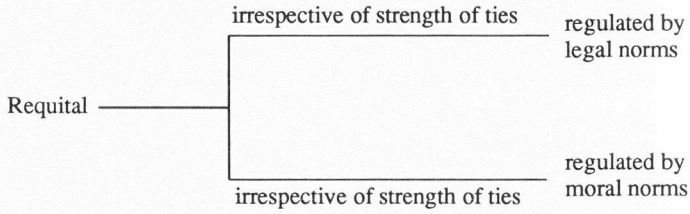
vice versa. Those who demand help from a stranger who can help them, always demand help from their next of kin as well. Most respondents, however (50 per cent), think they have no right to demand help from anybody: helping is a matter of good will.

The same trends can be noticed in the case of the principles that govern requital. Those who expect requital from a next of kin, also, and more so, expect distant acquaintances to reciprocate. Yet the bulk (59 per cent) believe they have no right to claim any form of reciprocation. Those who feel obligated to requite a next of kin for his help, believe that this duty concerns also the situations when the person who helped them was just a distant acquaintance. According to most, however (83 per cent), requital is not obligatory, irrespective of the closeness of relationship between them and those who helped them.

We shall now discuss the normative regulation of principles that govern a private turnover of goods according to the strength of ties between the parties to the interaction. These principles may be based both on moral norms, i.e. on imperative norms of unilateral validity, and on legal, i.e. imperative-attributive norms. The former impose the duty to help on one party, but do not entitle the other party to claim help, while the latter – imposing the duty to help on one party – at the same time entitles the other party to claim help.[13] Legal regulation of the principles of rendering help is more frequent if the parties are in close relationship to each other (41 per cent) as compared with the situation of weak ties between them (21 per cent). As we pass from the family to more distant circles, the role of the legal motivation decreases. People more frequently feel obligated to help and themselves demand help when in need, in the interactions with their family members than with the members of the other groups they belong to. Instead, the moral regulation of the principles concerning gifts occurs with the same frequency irrespective of the strength of ties between the parties to the interaction (26-27 per cent). This can be presented as follows:



As concerns the principles that govern requital, opinions shape differently, both the legal and the moral regulation found with equal frequency irrespective of the strength of ties between the parties. Thus the duty of requital and the right to claim requital is not thought to depend on who has helped or who has been helped.



Private turnover may be regulated by the principles of direct exchange and of gift. We deal with direct exchange if the duty of donation is accompanied by that of requital, and with gift, if there is no duty of requital to accompany that of donation.

Private turnover is governed by the principles of donation more frequently, if there are strong ties between the parties to the interaction. As we pass from the family to more distant circles, the importance of donation decreases with that of exchange growing.

We shall now compare the rights and duties imposed on oneself and on others in identical situations. The rights granted to oneself and to others are in principle the same. What is significant, instead, is that people impose a much greater number of duties on themselves than on others (the difference amounting to about 30 per sent irrespective of the strength of ties) in analogous situations, but they do not consider themselves entitled to expect any form of reciprocation. The principle of positive reciprocity – "something for something" – does not apply here; nor does the one of negative reciprocity, "nothing for nothing". It is considered a person's moral obligation to help others; this obligation is added to by the belief that other people are not thus obligated which may also increase the sense of responsibility for others in need. The imposition on oneself of the heavy moral duty of helping others unselfishly if they need help is in accordance with the principle of love of ons's neighbor – caritas.

In times of economic crisis, struggle and competition for the means that make existence conformable to the human needs and

habits possible, are said to prevail. Yet despite the endless deterioration of living conditions, charitable attitudes are still widespread irrespective of the chances of getting a requital from the person who is helped. Help is frequently impersonal, for that matter; for instance, people return the coupons they do not need to the office for further distribution among those in need; coupons can also be given away to a stranger who needs them. As may be supposed, the acceptance of the norm of caritas results from the belief in reciprocity in another sense: namely, in a society the bulk of which are charitable, anybody in need can expect others to help him, too. It should be stressed here that reciprocity in this interpretation is not contradictory to unselfishness of helping and thus to the principle of caritas. In this sense, reciprocity does not involve the element of reckoning which is inherent in the direct positive exchange "something for something". In the former case, we count on others to help us in need basing our hopes on a trust in their kindness and unselfishness only, and not because we expect them to requite us for what we have given them before.

General presentation of findings

We shall now present a summary analysis of the structure of attitudes to and opinions about the questions included in our study, done by means of summary indices, which may be treated here as an outlined answer, so to say, to the separate questions. We realize at the same time that an analysis of relations between simple indices – even if those indices include most of the closed questions of the questionnaire, as was the case in our study – cannot replace a deeper and more detailed analysis of relations between the separate questions and the respondents' social and material standing.

Irrespective of the various aspects of the respondents' attitude towards charitable behavior and the functioning of the principle of reciprocity, a system has been shaped in the social relations of connections between the remaining summary indices we used in the preliminary treatment of the findings. We shall now leave connections that are weak or medium as measured by the Q convergency coefficient out of account and discuss those of the found relations which are significant at the level of at least 0.05. The number of such relations was rather small. The strongest one found was the

symptomatic relation between anxiety and caritas (Q=0.81). The respondents' acceptance of carita as unconditional obligation and belief in automatism of charitable actions and inclinations goes hand in hand with their feeling of safety and lack of anxiety in social contacts. One should bear in mind in this connection, that in our sample of randomly chosen inhabitants of Warsaw anxiety and sense of threat were relatively rare, and the belief in unconditional validity of the rule of caritas was very strong instead. This statement is rather important inasmuch as the findings concern the period immediately preceding the imposition of martial law in Poland. The study confirmed our introductory hypothesis, according to which – in the situation of a total economic crisis when it is evidently impossible to work out a system of rationing of goods in short supply which would meet all the individual and group needs – the norm of mutual help grows more and more important which makes a further redistribution of some goods possible according to individual needs and powers. Our study justifies the assumption that what played the decisive role in the process of informal redistribution were not exactly the mechanisms of market but those of unconditional help (caritas) and general reciprocity.

The charitable attitudes are also significantly related to another two summary indices. Firstly, the growth in the index of charitable attitudes, and secondly that of pro-consumer attitudes going up. Despite its weakness (Q=0.37), this relation between caritas and consumerism helps explain the interdependence between the separate components of the consumerism index. The conviction that we all ought to help one another to the best of our ability is connected with another, namely, that – with scarcity of goods that are not centrally rationed – the will of those directly involved ought to be respected, the needs of all groups of customers taken into account through appropriate settlements by compromise. Thus the pro-consumer attitudes result not exactly from a denial of the principle according to which those best informed as to the global needs and abilities should carry out a rational distribution of goods. What produces such attitudes is rather the opinion that the possible inequalities as regards the access to goods that are in short supply might be mitigated through a further redistribution of commodities, based on the principles of charity, done by those who own greater amounts of goods. Still another opinion leading to the pro-consumer attitudes is that it should first of all be made possible for the greatest number of those who directly needs certain goods to buy them, provided such

persons at all apply for the goods they need. The other equally obvious weak relation (0.36) could be found between caritas and the index of egalitarianism. Egalitarianism whose elements concern the rules to be accepted on the macro-social scale in universal rationing is actually a counterpart of charitable and pro-consumer attitudes at the level of society as a whole. In our sample, however, the relation between consumerism and egalitarianism proved very weak and insignificant. This may result from the character of the questions asked. The contents of questions about universal rationing, that is the rationing on the macro-social scale, directly concerned circumstances and problems other than those described in questions about various conflicts taking place in shops and about what we called situational rationing. Another explanation would involve a direct assumption that the accepted rules of situational vs. universal rationing differ to some extent, while caritas in general adds to the egalitarian character of those rules in both cases. This explanation is acceptable due to the above-mentioned differences between the questions used for each of the discussed indices.

Finally, the remaining two relationships found in our study should be mentioned. Egalitarianism is very strongly related (0.63) to intolerance of persons who infringe the rules of rationing. This relationship becomes quite clear if we realize that a tolerant attitude towards such transgressions is actually tantamount to tolerance of infringements of the rules that provide for a possibly equal distribution of goods which is therefore also equitable or at least as close to equity as possible. Another problem is the connection between two indices which failed to enter into relationship with those hitherto discussed. With the growing approval of the centralized mechanism of universal rationing introduced by the authorities, also the approval increases of what we have given a working name of "enlightened rigorism" and what can also be called the opinion according to which some rules have to be adopted in the situation of crisis – just any rules will do as long as we do not let things take their own course or leave everything to individual consumers to decide (0.38). Admittedly, centralism and rigorism are highly independent from each other; what connects them, however, is that they both oppose the principle of laissez faire as socially undesirable.

To sum up the problems discussed above, the following can be stated. Rationing of goods, both universal and situational, won a broad acceptance of the Polish society. That rationing was to be based on the principles of egalitarianism. What was meant here,

however, was not absolute but relative egalitarianism with the rations differentiated to some extent. The differentiation was based on the criterion of biological needs and on another criterion resulting from negative social attitudes towards those whose conduct infringes the accepted rules (to all according to their work). The basic canon of justice as regards universal rationing is: to all according to their needs, and to all according to their work.

In the society's opinion, the following principles of justice should govern situational rationing: all those standing in line, irrespective of the order in which they have joined that line, should have equal rights to decide about the rules of situational rationing; it should be made possible for the greatest number of customers to buy the minimum amount of goods, that amount being sufficient, however, to satisfy the customer's needs; a just distribution of commodities should take the expenditure of work into consideration which a given person put into his attempts to acquire a given commodity.

The people believe that the above-mentioned canons of justice will be best carried into effect if decisions concerning the rationing of commodities are taken centrally, with the least possible participation of those directly involved in individual situation. This way the probability of maintaining social order is enhanced. What is indispensable, however, if decisions are to be taken in this manner, is a permanent and efficient system of social supervision exercised by all trade unions, to prevent any deviations from the accepted rules.[14]

Presumably, the society's acceptance of the rationing of basic goods according to the principles of egalitarianism was due to the fact that such rationing increases the felling of safety in the conditions of a total crises. Owing to rationing, the right is secured to everybody to buy at least the minimum amount of the necessary goods irrespective of that person's dexterity or shrewdness. The sense of threat and dissatisfaction resulting from the scarcity of desired goods was presumably recompensed with the confidence in mutual help in difficulties and in unselfishness of those who own goods they do not need and would be willing to give those goods to others whose need is more pressing. The inclusion of individual different needs, impossible in the situation of universal rationing, is made possible owing to the mechanisms of exchange and the prevalence of charitable attitudes among the citizens. Thus the principle of caritas, both in the shape of informal and institutionalized activities (e.g. of the Church) proves to be an additional support of the rationing system in its practical functioning.

Footnotes

1 The article presents a study carried out by the Division of Sociology of Law and Crime of the Department of Sociological Problems of Social Prevention and Resocialization, Institute of Social Prevention and Resocialization, Warsaw University. The research material was gathered mainly in November 1981 as part of the theme "Pathology of Social Contracts" within the interdepartmental research project MR 18 entitled "Social Pathology", co-ordinated by the Institute of Social Prevention and Resocialization, Warsaw University. Detailed findings have been included in a report (MS) on the study of 1981.

2 See Polanyi, K., *The Great Transformation. The Political and Economic Origins of Our Time* New York 1944, London 1945; Polanyi, K., Arensberg, C.M., Pearson, H.W. (ed.), *Trade and Market in the Early Empires: Economies in History and Theory* Glencoe, Ill. 1957; Dalton, G. (ed.), *Primitive. Archaic and Modern Economies. Essays of Karl Polanyi* New York 1968.

3 See Ferge, Z., *A Society in the Making. Hungarian Social and Societal Policy 1945-75* Harmondsworth 1979; Petrazycki, L., *Teoria prawa i Panstwa w zwiazku z teoria moralnosci* (The Theory of Law and State in Relation to the Theory of Morals), Vol. II, Warsaw 1960; J Kurczewski, J., *O badaniu prawa w naukach spolecznych* (The Study of Law in Social Sciences) Warsaw 1977.

4 Hagemejer, K., "Spoleczenstwo w kolejce" (The Society in Line), *Ruch Zwiazkowy* 1981, No 1, p. 150

5 Rakowski, M.F., *Rzeczpospolita na progu lat osiemdziesiatych* (The Polish Republic on the Treshold of the Eighties) Warsaw 1981, pp 113-114

6 Hagemejer, op cit, pp 148 and 151

7 Sobiech, R., *Kartkowy system sprzedazy miesa w opinii spolecznej (wyniki badania ankietowego)* (Rationing of meat in the society's opinion, Findings of a questionnaire survey), Institute of Domestic Trade and Services (undated manuscript)

8 Sobiech, R., *Kartkowy system sprzedazy miesa w opinii spolecznej (wyniki badania ankietowego)* (Rationing of meat in the society's opinion, Findings of a questionnaire survey). Institute of Domestic Trade and Services, May, April 1981 (manuscript).

9 According to Order No 16 of the "Spolem" Warsaw Consumers' Co-Operative of June 10, 1981, "In all establishments of retail trade with the exception of shops and departments selling alcohol, the following groups of persons shall be equally entitled to be served before others: disabled soldiers and civilians, pregnant women, women with babies in their arms, old people, cripples and other persons with limited locomotive faculties, sisters of the Polish Red Cross and the Polish Committee for Social Aid and other persons in charge of the disabled and chronically ill who need help with shopping... If a longer line of the privileged is formed, those most disabled shall be served first; if the number of privileged is greater, those privileged and those unprivileged shall be served alternately."

10 See Eckhoff, T., *Justice. Its Determinants in social Interaction* Rotterdam 1974. The author distinguishes the following ways of distributing goods: (1) equality in respect of the object; (2) random distribution; (3)distribution in respect of priority in time or distance; (4) distribution in respect of needs, sacrifice, or suffering; (5) distribution in respect of qualifications; (6) distribution in respect of rights, merits, and duties; (7) distribution in respect of status.

11 Sobiech, R., *Kartkowy system sprzedazy miesa w opinii spolecznej (wyniki badania ankietowego)* (Rationing of meat in the society's opinion, Findings of a

questionnaire survey), Institute of Domestic Trade and Services (undated manuscript), pp 26-27.

12 Significant at the level of 0.05 according to the X^2 test.

13 See Petrazycki, op cit, Vol 1/II, Warsaw 1959/1960. Petrazyski distinguishes between two kinds of "imperatives", norms and moral principles. Norms of the first kind do nothing but authoritatively define the obligatory conduct. Petrazycki calls them the "imperative" norms. Norms of the other kind perform a double function. On the one hand, they make a certain conduct obligatory, while on the other hand, they grant what is required of the obligated person to somebody else as his due. Petrazycki calls the latter norms imperative-attributive. The attributive norms are legal norms, and those unilaterally imperative moral norms. According to Petrazycki, differentiation between the legal and moral norms takes place in the human consciousness. A norm is legal, not if it prescribes something, at the same time granting somebody else the right to definite claims, but if it is perceived as connected with a bilateral, imperative-attributive emotion. According to Petrazycki, the imperative-attributive consciousness, emotions and motives are more important in the social life from the point of view of preventing individuals and masses from doing what is socially noxious and inducing them to do what is socially needed and useful.

14 Among other things, this may explain the fact that of a similar sample of inhabitants of Warsaw examined a year later, as many as 52 per cent were against any rationing of necessities.

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Ramlagarna och förvaltningen

Torsten Bjerkén

Juridiska fakulteten, Stockholms universitet

Inledning[1]

"Ramlagarna och förvaltningen" är ett stort och aktuellt ämne. Det har behandlats i pressen och i statliga utredningar och det har också i viss utsträckning blivit föremål för rättsvetenskaplig behandling. Håkan Hydén, rättssociolog i Lund, har skrivit en rapport åt statkommunberedningen med rubriken "Ram eller lag? Om ramlagstiftning och samhällsorganisation" (Ds C 1984:12). Syftet med rapporten sägs i skrivelsen till civilministern vara att analysera ramlagstiftningens "särskilda förutsättningar och konsekvenser" (s 1). Jag kommer inte att lämna ett referat av vad Hydén skriver. Den som är intresserad kan ju lätt ta del av hans rapport. Jag tänker i stället ta upp några frågor som blir aktuella, när man diskuterar ramlagstiftningen. Jag vill förutskicka, att jag tyvärr inte har haft tid och tillfälle att ta del av all den litteratur som Hydén och andra författare på området drar fram. Särskilt illa orienterad är jag om den utländska diskussionen. På det sättet är f ö Hydéns rapport bra, att den innehåller en litteraturförteckning.

Jag har på känn att ramlagstiftningen upplevs som ett speciellt allvarligt problem här i Sverige. Vi har ju en stark tradition både när

det gäller kommunal självstyrelse och självständighet för (centrala) statliga verk gentemot regeringen och regeringskansliet. Traditionen av självständighet kan tänkas medföra att förvaltningsmyndigheterna i särskilt stor utsträckning är benägna att utnyttja ramlagstiftningens möjligheter till ett agerande som inte står i överensstämmelse med riksdagens – och regeringens – intentioner. Ramlagstiftningen skulle således här i landet upplevas ge alltför stor självständighet åt redan förhållandevis självständiga organ. De kan därigenom följa en egen politik som är svår att påverka för riksdagen, och även för regeringen. Men detta är bara en gissning eller om man så vill en hypotes, som möjligen skulle kunna bekräftas genom systematiska studier.

Jag har formulerat fem rubriker för den fortsatta framställningen, nämligen: (1) Begreppet ramlag och dess användning; (2) Är ramlagar oundvikliga i det moderna samhället?; (3) Vilka är fördelarna och nackdelarna med ramlagar?; (4) Vilka krav bör man ställa på ramlagstiftningen?; slutligen tänker jag säga något som avslutning under rubriken (5) Ramlagar och förvaltningen.

1. Begreppet ramlag och dess användning

Ett problem som inte har diskuterats speciellt ingående, vare sig av Hydén eller andra författare, är vad termen ramlag skall stå för, eller med andra ord hur begreppet ramlag bör bestämmas.[2] När man studerar Hydéns framställning i inledningen till rapporten och andra rättsvetenskapliga författare – jag syftar på Ivar Agge, Stig Strömholm och Jacob Sundberg – så blir intrycket att begreppet ramlag ursprungligen användes i en mer *snäv* betydelse. Agge avsåg "i och för sig fullständiga huvudregler", *ramnormer*, som utfylldes med "ytterligare regler, delvis av förklarande, delvis av kompletterande beskaffenhet", *undernormer*.[3] Vad Agge avsåg var således att föreskriftsmakten delegerades i vissa hänseenden. Det var emellertid hela tiden fråga om "texter" – författningstexter. Stig Strömholm synes ansluta sig till Agges ramlagsbegrepp i mer vältaliga än pregnanta formuleringar i sin stora lärobok i allmän rättslära från början av 1980-talet.[4] Så gör också Hydén i ett tidigare arbete.[5] Sundberg har emellertid gett en mer *vid* betydelse åt termen ramlag i en uppsats i *Förvaltningsrättslig tidskrift* 1982.[6] Sundberg definierar ramlagstiftning på följande sätt: "Med ramlagstiftning förstås en

lagstiftning som innehåller allenast grundregler som kan utfyllas med specificerade föreskrifter. Ramnormerna är mer konstanta och av grundläggande natur: de uppställer mål och ger riktlinjer."[7]

Som Hydén konstaterat (s 1), innebär Sundbergs definition en utvidgning av begreppet. Ramlagen kan "kompletteras med föreskrifter från annat håll än genom central förvaltningsmyndighet", t ex "avtal mellan berörda parter eller på annat sätt". Den behöver emellertid inte kompletteras alls enligt Sundbergs definition, såsom den tolkas av Hydén. "En lag kan vara ramlag i den meningen att den skapar ramförutsättningar för en verksamhet som i övrigt utvecklas utan rättslig styrning." (Hydén s 2)

Sundbergs definition ansluter till den användning som termen ramlag fått i det politiska språkbruket. Sålunda har exempelvis hälso- och sjukvårdslagen (SFS 1982:763) betecknats som en ramlag i propositionen.[8] I detta fall kan det i huvudsak inte ha varit meningen att den grundläggande lagtexten skulle utfyllas med supplerande texter. Snarare har syftet varit att åstadkomma en lagtext som ger de tillämpande myndigheterna så stor frihet som möjligt och som ger de grundläggande förutsättningarna – "ramen" – för verksamheten. Ur statsvetenskaplig synpunkt förefaller den Sundberg-Hydénska definitionen måhända tillfredsställande. Den pekar otvivelaktigt på en tendens i modern lagstiftning. Men frågan är, om definitionen tillfredsställer de anspråk på precision som man brukar uppställa inom rättsvetenskapen. Frågan är alltså, om termen är användbar i rättsvetenskapen, när den får en så vid definition som Sundberg och Hydén ger den. Med denna vida definition synes beteckningen ramlag passa in på snart sagt all lagstiftning som på något sätt anger ramen för någonting. Att exempelvis beteckna giftermålsbalken eller avtalslagen som ramlagar förefaller emellertid något långsökt, men är förenligt med Sundbergs och Hydéns definition. Hydén betecknar f ö den detaljrika aktiebolagslagen (1975:1385) som en ramlag (s 84).

Om termen ramlag skall användas i rättsvetenskapliga sammanhang bör den enligt min uppfattning definieras snävare än Sundberg och Hydén gör. Agges karakteristik kan därvid tjäna som utgångspunkt. Men man bör starkare betona att den grundläggande texten, ramlagen, skall innehålla huvudregler som vanligen anger mål och inriktning. Denna grundläggande text kompletteras i normalfallet med en eller flera texter av lägre konstitutionell valör: regeringsförordningar och författningar samt allmänna råd utfärdade av centrala förvaltningsmyndigheter.

En lag kan knappast betecknas som en ramlag i rättsvetenskapliga sammanhang, därför att den kompletteras med myndighetspraxis. Snart sagt alla lagar kompletteras på detta sätt, i varje fall om man räknar domstolspraxis till myndighetspraxis. Enligt min uppfattning kan inte normbildning genom praxis i anslutning till en lag medföra att lagen bör betecknas som en ramlag. Inte heller bör avtal mellan enskilda som på ett eller annat sätt anknyter till lagen i regel medföra detta. Här skulle jag emellertid vilja föreslå ett undantag för kollektivavtal på arbetsrättens och kanske också hyresrättens område. I dessa fall är det fråga om avtal som principiellt gäller för ett kollektiv, inte för två eller flera enskilda. Avtal mellan myndighet och enskilda som supplerar en lag, kan medföra att det är ändamålsenligt att beteckna lagen som en ramlag. Jfr t ex de branschöverenskommelser som KO träffar med organisationer av näringsidkare m fl i anslutning till marknadslagstiftningen.

Det sagda innebär att jag förordar Agges och -Strömholms definition med tillägg att kollektivavtal och liknande kan tjäna som undernormer. Däremot anser jag inte, att det räcker att en lag anger "ramförutsättningar" för en verksamhet för att den skall betecknas som ramlag i rättsvetenskapliga sammanhang, om inte övriga rekvisit är uppfyllda. Jag anser vidare att det är karakteristiskt för en ramlag att den anger mål och inriktning, men detta behöver inte alltid vara fallet.[9] Jag delar f ö Sundbergs uppfattning att de viktigaste problemen i fråga om ramlagstiftning hänför sig till de centrala förvaltningsmyndigheternas supplerande normgivning. Mer därom i det följande.

2. Är ramlagar oundvikliga i det moderna samhället?

Svaret på den frågan är inte givet. Det beror bl a på hur man definierar begreppet ramlag. Om man använder den snävare definitionen som lägger huvudvikten vid delegation av föreskriftsmakten till lägre nivåer än riksdagen, är svaret att det, kanske, är tänkbart att eliminera en hel del av ramlagstiftningen. Det synes emellertid ogörligt att helt eliminera delegation till regeringen av föreskriftsmakt. Jag tror inte heller att det finns något land i världen där normgivningsmakten helt kunnat förbehållas folkrepresentationen, vare sig formellt eller reellt. Men det är enligt min uppfattning möjligt att i

ganska stor utsträckning eliminera normgivningen på verks- och kommunal nivå. Dels kan av riksdagen stiftade lagar och därtill hörande regeringsförordningar göras mer detaljerad än hittills, dels kan avgörandet av deltaljfrågor i stor utsträckning överlämnas åt praxis. Jacob Sundberg synes plädera för den sistnämnda lösningen.[10]

Det finns f ö ett konkret exempel på att denna lösning medvetet eller omedvetet har valts. Socialtjänstlagen (SoL) har betecknats som en målinriktad ramlag. Regeringen har utfärdat en förordning med huvudsakligen verkställighetsföreskrifter i anslutning till lagen. Enligt 67 § SoL kan vidare socialstyrelsen utfärda "allmänna råd" till ledning för tillämpningen av lagen. Dylika allmänna råd har ej karaktären av bindande föreskrifter, men får ändå antas ha en betydande genomslagskraft. Nu har vare sig regeringen eller socialstyrelsen utfärdat några föreskrifter eller detaljerade allmänna råd beträffande nivån på bistånd enligt socialtjänstlagen. Detta viktiga problem har överlämnats åt praxis i förvaltningsdomstolarna. (Inte heller förarbetena ger klara besked.)

Här finns det anledning att göra en liten utvikning. Det hävdas ofta att ramlagstiftningen är något som hör de senaste decennierna till, främst 1970- och 80-talet. Ur formell synpunkt är detta sannolikt riktigt. Men man glömmer då gärna bort att en hel del av lagstiftningen förr ej behandlades av riksdagen: Kungl Maj:t hade som bekant en vidsträckt ekonomisk och administrativ lagstiftningsmakt enligt RF 1809 § 89. Denna makt hade visserligen successivt inskränkts, men har t o m fått nedslag i 1974 års RF i form av den s k restkompetensen (RF 8:13). Överhuvudtaget har ramlagstiftningens genes hittills fått en mycket styvmoderlig behandling. Likaså saknas komparativ bearbetning av problemen.[11]

Enligt min uppfattning finns det således ett alternativ till ramlagstiftning som består i att problem överlämnas åt praxis. Om så sker får detta emellertid viktiga konsekvenser. Sålunda får i enlighet med svensk tradition förarbetena en än större betydelse än hittills.[12] Vidare innebär det att den enskilda i många fall får svårare att erhålla ett auktoritativt besked om reglerna i förväg. Ett annat, radikalt alternativ till ramlagstiftning är naturligtvis att avreglera vissa områden, eller hålla dem utanför reglering i skriven lag. Ett exempel på det sistnämnda förfarandet är den översiktliga fysiska planeringen, som hittills till stor del inte varit lagreglerad alls, då föreskrifterna i 1947 års byggnadslag till stor del inte tillämpats.[13]

Om ett problem överlämnas åt praxis bör man också bestämma sig för om det skall finnas besvärsmöjligheter. I Sverige är vi vana vid att viktiga, slutliga beslut på lägre nivå kan överprövas av någon högre instans. Men i motsats till vad som är fallet i de anglosaxiska länderna samt Danmark och Norge m fl länder har vi i regel ej möjlighet till domstolsprövning i allmän domstol. Om man överlämnar åt ett stort antal myndigheter att slutgiltigt träffa avgörande i samma ärendetyp är risken mycket stor att praxis utvecklar sig olika hos olika myndigheter, vilket bl a uppfattas som orättvist av berörda enskilda.

Hittills har vi i Sverige arbetet med ett "kombinerat" system. Vi har haft ramlagar som utfyllts med undernormer och därjämte besvärsprövning som omfattat såväl laglighet som lämplighet. Slutinstans har mestadels varit regeringsrätten eller regeringen. Utvecklingen synes gå i den riktningen att besvärsmöjligheterna mer och mer inskränks och att de centrala ämbetsverk som beslutar om normerna också blir sista instans för besvärsprövningen. Ämbetsverken blir på så sätt i vissa fall på en gång lagstiftare och domare.[14] Detta innebär på sätt och vis en återgång till ett äldre stadium i den offentliga rättens utveckling. Kungl Maj:t var i äldre tid på en gång lagstiftare och domare. Man skulle kunna tala om en decentraliserad primitivism i den mån ämbetsverken får denna roll.[15]

3. Vilka är för- och nackdelarna med ramlagar?

Håkan Hydén räknar upp och diskuterar en rad för- och nackdelar (s 8 ff). Under rubriken "Nackdelar" tar han upp Okontrollerad regelproduktion, Styrnings- och tolkningsproblem, Rättssäkerheten, Konstitutionella frågor, Oklara beslutsvägar och Oklart kostnadsansvar. Under rubriken "Fördelar" tar han upp Flexibilitet, Administrativ utveckling, Kanalisering av problem och Organisatorisk funktion.[16] Jag tänker kommentera en del av det som Hydén anför.

En viktig nackdel med ramlagar är, att de medför risk för okontrollerad regelproduktion på lägre nivåer. Risken kan förverkligas både såtillvida som att regelproduktionen blir alltför omfattande och därmed svåröverskådlig, och såtillvida som att innehållet inte står i överensstämmelse med riksdagens intentioner. Hydén ger ett par exempel på omfattande regelproduktion: arbetsmiljölagen och skolla-

gen utfylls båda med synnerligen omfattande undernormer. Det kan starkt ifrågasättas, om dessa regelverk fyller ens blygsamma krav på överskådlighet och klarhet. Jag tänker inte ta upp tolkningsproblemen. De vore värda en betydligt mer ingående analys än den som Hydén består dem. Enligt Hydén består rättssäkerhetsproblemet främst däri, att det kan vara oklart vilken status de texter har som beslutas av de centrala förvaltningsmyndigheterna. Frågan är ibland i vad mån de är bindande.[17] Det finns anledning att fråga sig, om det inte innebär risker ur rättssäkerhetssynpunkt att delegera normgivningsmakten i alltför stor utsträckning. De myndigheter som utfärdar normerna kan t ex vara benägna att alltför mycket ta hänsyn till snäva myndighetsintressen, på ett sätt som inte överensstämmer med riksdagens intentioner och inte heller med vad som i andra, jämförbara sammanhang uppfattas som rimligt och rättvist.[18]

Tyvärr har jag inte möjlighet att här närmare gå in på de konstitutionella problem som ramlagstiftningen medför. Hydéns framställning som bara omfattar en sida i rapporten, behöver kompletteras i åtskilliga hänseenden. Klart är, att ramlagstiftning, som Hydén också säger (s 13), kan innebära att riksdagens lagstiftningsmakt urholkas på ett sätt som inte överensstämmer med vår författning. Ramlagstiftningen ger också upphov till konflikter som den som återspeglas i rättsfallet RÅ 1983 1:85 I. I målet prövades om en kammarrätt i visst fall var bunden av riksförsäkringsverkets verkställighetsföreskrifter till lagen om allmän försäkring. Regeringsrätten ansåg att så var fallet.

Att oklara beslutsvägar kan leda till konflikter synes givet. Jag skall inte närmare kommentera denna fråga. Under rubriken Oklart kostnadsansvar behandlar Hydén en fråga som har stort praktiskt intresse. Man har sökt motverka tendenser till kostnadsökningar som beror på normgivning på verksnivå genom den s k begränsningskungörelsen (1970:641; senare ändrad).[19] Ändå kan det ifrågasättas om inte det ymniga bruket av ramlagar medför okontrollerade kostnadsökningar. Å andra sidan skulle ju en av undernormer obunden praxis vara ännu mer svårkontrollerad i kostnadshänseende.

Detta om nackdelarna. Vilka är då fördelarna? En viktig fördel anses vara att ramlagar är flexibla. Det går snabbt att ändra på normerna, om det skulle visa sig erforderligt. som Hydén också påpekat, kan det emellertid visa sig att ett regelsystem som byggts upp under lagnivån är förhållandevis svårt att ändra.[20] Administrativ utveckling anses bli underlättad om inte proceduren detaljregleras i lag. Den viktigaste "fördelen" med ramlagstiftning tror jag emeller-

tid är den som knappast framhålles explicit i någon regeringsproposition eller liknande officiellt uttalande, nämligen att problem som är svårlösta på riksdagsnivå flyttas ner till en nivå där de kan lösas lättare; om det är detta som Hydén avser med "Kanalisering av problem och organisatorisk funktion" (s 17) förefaller ovisst. Framställningen är mycket dunkel i detta hänseende. Det kan diskuteras om ett sådant sätt att lösa problem är legitimt, sett ur folkstyrelsens synpunkt. I en del fall är det nog så att ramlagstiftning är till för att sopa motsättningar under mattan i riksdagen. Det kan också förhålla sig så, att en del beslut är obehagliga för alla riksdagspolitiker och därför gärna överlämnas till en lägre nivå.

4. Vilka krav bör man ställa på ramlagstiftningen?

Håkan Hydén har i sin rapport behandlat frågan om vilka krav man bör ställa på ramlagstiftning främst i avsnitten "Slutsatser" (s 104ff) och "Sammanfattning" (s 109ff); se också s 83ff och passim. Hydéns framställning rör sig på en hög abstraktionsnivå. En grundtanke är, att det finns tre olika "motivationssystem inom vilket (!) den samhälleliga aktiviteten äger rum. Dessa tre samhällsorganisatoriska system utgörs av:

- självreglerande system
- intervenerande system
- planerade system" (s 12)

Hydén ger exempel: ett självreglerande system är varumarknaden, ett intervenerande system är miljöområdet och ett planerat system är sjukvården. Här är det emellertid såvitt jag förstår fråga om Weberska arketyper. Systemet kan knappast renodlas på ett för praktisk tillämpning fruktbart sätt. En del av oklarheterna i Hydéns framställning beror också på det mycket vida ramlagsbegrepp som han arbetar med. Hydéns begreppsbestämning medför som förut nämnts att snart sagt alla lagar kan betecknas som ramlagar. Om man använder ett snävare ramlagsbegrepp, eller i vart fall koncentrerar uppmärksamheten på frågan om ramnormer och undernormer, anser jag att intresset bör riktas på ramlagens och undernormernas tillkomst och på ramlagens och undernormernas innehåll.

Här i Sverige tillmäts förarbetena till lagstiftning utomordentligt stor betydelse, dels för tolkningen av lagtexten, dels som utfyllning

av lagtexten. Redan en blick i någon av de senaste årgångarna av Regeringsrättens årsbok ger besked om förarbetenas betydelse på förvaltningsrättens område. De åberopas ofta i domskälen. Det finns inget som talar för att förarbetenas betydelse skulle minska. Det är inte alltid som man tänker på att förarbetena utgör en viktig del av riksdagens ställningstagande i ett lagstiftningsärende. Förekomsten av normer beslutade på lägre nivåer kan betyda att förarbetena får mindre betydelse; det kan förstås också betyda att förarbetena får ökad genomslagskraft, om nämligen undernormerna troget återspeglar intentionerna i förarbetena.[21]

En ramlag bör vara försedd med utförliga förarbeten även på kontroversiella punkter, ja inte minst på sådana punkter. Riksdagen bör tvinga sig till att fatta även "obehagliga" beslut. Vad jag främst syftar på är att principiellt betydelsefulla avvägningar mellan olika intressen bör göras redan i ramlagen eller åtminstone i lagens förarbeten. Sådana avvägningar bör inte överlämnas till föreskrifter som utfärdas av lägre organ och framför allt inte av lägre organ än regeringen. Jag tror också att man bör iaktta försiktighet när det gäller att delegera viktiga beslut om myndighetsorganisationen. Värdet av en någorlunda enhetlig organisation inom exempelvis den kommunala sektorn upptäcks troligen först när man upphävt enhetligheten. Sanktioner vid överträdelse av föreskrifter bör också bestämmas av riksdagen. Enligt min uppfattning är det tvivelaktigt om man, som nu sker, exempelvis bör överlämna åt riksåklagaren att fastställa en taxa för ordningsbot för bl a trafikförseelser (RB 48:14; RÅ:s beslut SFS 1981:716).

Det finns skäl att kräva en omsorgsfull behandling även av beslut om undernormer. Det bör påpekas att gängse rättssäkerhetsanspråk också gäller för tekniska specialområden. Vare sig ramnormer eller undernormer bör ändras alltför ofta. "Der motorisierte Gesetzgeber" utgör ett hot mot rättssäkerheten, främst därför att förutsebarheten minskar, men också därför att risken för handläggningsfel ökar.[22]

Undernormer, särskilt sådana som utfärdas av lägre organ än regeringen, bör i normala fall endast innehålla rena verkställighetsföreskrifter. Normer angående avvägningar som supplerar lag bör inte bestämmas på verksnivå. I fråga om exempelvis riksskatteverkets anvisningsverksamhet i anslutning till skattelagarna är det tvivelaktigt om detta krav är uppfyllt. RSV torde i en hel del fall ge normer som går utöver vad som rimligen kan innefattas i begreppet verkställighetsföreskrifter.

5. Ramlagarna och förvaltningen

Två vetenskapliga författare har på senare tid behandlat frågan om ramlagarna och förvaltningen ur rättslig synpunkt. Jag syftar på Jacob Sundberg och Daniel Tarschys. I den i inledningen omtalade uppsatsen med titeln "Om prejudikatens betydelse på förvaltningens område" i *Förvaltningsrättslig tidskrift* 1982 myntar Sundberg uttrycket "ramlagsförvaltning". Förvaltningen har enligt Sundberg "fått en ändrad funktion samtidigt som dess omfattning och inflytande växt" (s 55).

Enligt Sundberg var förvaltningens funktion tidigare att handlägga inkommande ärenden i närmast judiciella former. "Ramlagstiftning innebär däremot att förvaltningsmyndigheterna ägnar sig åt styrningsprocesser genom en hierarki av normerande instrument: förordning, föreskrifter och råd m m" (a st).

Som framgår av det sagda har Sundberg koncentrerat sig på frågan om prejudikatens betydelse i en "miljö" som präglas av ramlagstiftning.[23] Sundberg anser sig kunna urskilja tre problemkomplex (eller med hans egen terminologi "problemtyper"): 1) möjligheterna att överklaga ramlagsförvaltningens beslut om utfärdande av föreskrifter; 2) karaktären av förvaltningsmyndigheternas tolkningsverksamhet; 3) relationen mellan prejudikatbildningen och den normbildning som är det dominerande inslaget i ramlagsförvaltningen. Sundberg nämner då särskilt regeringsrättens funktion som prejudikatinstans. Han berör bl a hur stadgandet i RF 11:7 skall tolkas. Stadgandet innehåller att regeringen m fl "inte får bestämma, hur förvaltningsmyndighet skall i särskilt fall besluta i ärende som rör myndighetsutövning mot enskild eller mot kommun eller som rör tillämpning av lag". Sundberg säger: "Bestämmelsen avser klart beslut i särskilda fall. Däremot framgår ingenstädes att bestämmelsen även skulle gälla i fråga om normbeslut" (s 57).

I betänkandet "Politisk styrning – administrativ självständighet" (SOU 1983:39) behandlar Daniel Tarschys förhållandet mellan regeringen och förvaltningsmyndigheterna. Han uppehåller sig därvid främst vid de centrala ämbetsverkens förhållande till regeringen. Tarschys berör inte explicit frågan om förhållandet mellan RF 11:7 och normbeslut. Tarschys allmänna inställning är emellertid som bekant att de svenska förvaltningsmyndigheternas självständighet är en myt, särskilt ur statsrättslig synpunkt. Man torde därför kunna utgå ifrån att Tarschys delar Sundbergs uppfattning om tolkningen av RF 11:7.

För egen del ansluter jag mig till Sundbergs uppfattning: den i RF 11:7 föreskrivna självständigheten för förvaltningsmyndigheterna sträcker sig inte till normbeslut. Regeringen torde sålunda kunna bestämma innehållet i exempelvis ett centralt ämbetsverks föreskrifter. Att så är fallet torde motsättningsvis kunna utläsas av lagtexten och motsäges inte av förarbetena. Men det är nog mycket svårt att finna exempel på fall där regeringen på eget initiativ öppet har ingripit och gett direktiv om ändring i ett normbeslut som en förvaltningsmyndighet har träffat, eller där regeringen öppet har gett föreskrifter om innehållet i ett kommande normbeslut. Det bör vidare påpekas, att det är regeringen in corpore som beslutar. Ingripanden av enskilda statsråd saknar normalt rättslig relevans eftersom den svenska författningen inte erkänner ministerstyrelse i formell mening, annat än i vissa undantagsfall.[24]

Sundberg och Tarschys inriktar sig uppenbarligen på var sin relation. Sundberg behandlar förhållandet mellan den enskilde och myndigheterna, medan Tarschys huvudsakligen inriktar sig på förhållandet mellan regeringen och förvaltningsmyndigheterna. Det är betecknande att Sundberg överhuvudtaget inte nämner budgetfrågorna medan Tarschys ägnar ett avsnitt åt rambudgeteringen. För Tarschys som statsvetenskapsman är det väsentligt att den politiska styrningen av förvaltningen fungerar; för Sundberg som rättsvetenskapsman icke oväntat att förvaltningsdomstolarnas m fl styrning genom prejudikatbildning inte äventyras.

Det kan naturligtvis starkt ifrågasättas, om problemet om ramlagstiftningens förhållande till förvaltningen överhuvudtaget kan behandlas på det generella sätt som Sundberg och Tarschys gör. Om man emellertid skall föra en så generell diskussion, anser jag att Sundbergs sätt att framställa problemen är berättigat. En viktig fråga är, om lagstiftningen också auktoritativt skall uttolkas gentemot den enskilde av dem som själva skrivit de utfyllande normerna. Om man decentraliserar beslutanderätt från regeringen till lägre nivå på det sätt som för närvarande är aktuellt, så innebär det i stor utsträckning att de centrala ämbetsverken blir både normgivare och normtolkare, därtill normtolkare i sista instans. Detta får flera konsekvenser. En sådan konsekvens är, att det får stor betydelse i vad mån normbesluten kan överprövas av regeringen – och i vad mån regeringen verkligen är beredd att göra en ingående prövning. En annan konsekvens är, att resningsinstitutet kan få ökad betydelse. Eftersom regeringsrätten är den instans som avgör resningsärenden kommer den högsta förvaltningsdomstolen kanske att få en betydelse i det decentraliserade systemet som man knappast tänkt sig från början.

Noter

1 Denna uppsats bygger på en seminarieinledning i oktober 1985. Den publicerades ursprungligen som nr 11 i Förvaltningshögskolans vid Stockholm universitet rapportserie (Stockholm 1985). Den publiceras nu i oförändrat skick.

2 Beträffande förhållandet term—begrepp, jfr Å Frändberg: "Till frågan om de juridiska begreppens systematik", i *Tidskrift for rettsvitenskap (TfR)* 1985 s 80f

3 Agge, I: *Kompendium i allmän rättslära för propedeutiska kursen i juridik av professor Ivar Agge* Stencil Sthlm 1963

4 Strömholm, S: *Rätt, rättskällor och rättstillämpning. En lärobok i allmän rättslära* Sthlm 1981 s 244

5 Hydén, H: "Ramlagstiftning inom arbetsrätten", i *Perspektiv på arbetsrätten. Vänbok till Axel Adlercreutz* Lund 1983 s 200

6 Sundberg, J: "Om prejudikatens betydelse på förvaltningens område", i *Förvaltningsrättslig tidskrift (FT) 1982*

7 a a s 55

8 Prop 1981/82:97 s 1: "Den nuvarande detaljerade lagstiftningen ersätts av en målinriktad ramlag."

9 Jfr Strömberg, H: "Måltänkandet – en troslära i tiden" i *Skrifter tillägnade Gustaf Petrén* Sthlm 1984 s 183.

10 *FT* 1982 s 51, 64, 67.

11 Jfr Hydén i Ds C 1984:12 s 28ff. Jfr också Bernt, J F: "Rammelovgivning – et juridisk-historisk øverblick", i Bernt, Christiansen, Hetzler, Olsson: *Ramlagstiftning* Sthlm 1985.

12 Strömholms i not 3 omnämnda arbete s 319.

13 Om riktlinjerna i den fysiska riksplaneringen jfr KCirk 1973:15 och numera prop 1985/86:2 (naturresurslag). Om nuvarande formell och informell fysisk översiktsplanering, se bl a prop 1985/86:1 (PBL) s 71 f. – Om avreglering, se bl a Sundberg, F: "Att avreglera. Ett bidrag till frågan om bättre lagstiftning" i *Skrifter tillägnade Gustaf Petrén* Sthlm 1984 s 209.

14 Detta gäller f ö redan nu i den mån ämbetsverk är besvärsinstans och tillika har rätt att utfärda supplerande normer.

15 Problemet tycks ej ha diskuterats i arbetet med delegation av regeringsärenden. Jfr Malmquist, B: "Att delegera regeringsärenden", i *FT* 1985 s 67. Den svenska regeringens traditionellt omfattande befattning med besvärsärenden som slutinstans torde f ö vara ägnad att göra problemet mindre tydligt.

16 Den rättssociologiska terminologin är inte alltid lättbegriplig. Hydén förklarar inte sin terminologi i rapporten.

17 Större klarhet på denna punkt kommer måhända att råda i framtiden. Bernitz, U: "Näringslivets normer", i *Finna rätt – Juristens källmaterial och arbetsmetoder* Sthlm 1985 s 143 f

18 Jfr Sundberg i *FT* 1982 s 56.

19 Om begränsningskungörelsen, översynsförordningen (1981:305) m m för att begränsa lagstiftningen och förbättra den ur systematisk synpunkt, se min uppsats "Efforts to Curb Law Inflation in Sweden" till International Association of Constitutional Law:s konferens i Warszawa, okt 1985.

20 Hydén s 16

21 KU 1983/84:25 s 8.

22 Redan Carl Schmitt behandlade problem avseende alltför snabbt tillkommen och alltför omfattande lagstiftning i avsnittet "Der motorisierte Gesetzgeber" i "Die Lage der Europäische Rechtswissenschaft (1943/44)" publicerad i *Ver-*

fassungsrechtliche Aufsätze aus den jahren 1924-1954 Berlin 1958. – Jfr om "Lidbommeriet" i Sundberg, J: *Agges huvudpunkter av den allmänna rättsläran* 3 uppl Sthlm 1980 s 67 f.

23 Sundberg använder inte ordet miljö, men anlägger ett mycket brett perspektiv som torde kunna betecknas på det sättet.

24 RF 7:3. Jfr RF 11:6 första st Betr formell ministerstyrelse, se Petrén, G – Ragnemalm H: *Sveriges grundlagar* 12 uppl Sthlm 1980 s 159.

(Verksledningskommitténs huvudbetänkande (SOU 1985:40), som innehåller vissa uttalanden om ramlagstiftning, var ej tillgängligt för mig då denna seminarieinledning utarbetades.)

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Inpasset

Tabu mot generalpreventionen i debatten om kriminalpolitiken

Margaretha Rolfson

Rättssociologiska institutionen, Lunds universitet

I ett tidigare arbete har jag systematiskt gått igenom hela årgångar av två vetenskapliga tidskrifter och en debatt- och facktidskrift med avseende på tongivande signaler i den kriminalpolitiska idédebatten. De aktuella tidskrifterna har varit *Nordisk tidsskrift for internationel ret* (upphörde år 1983), *Tidsskrift for kriminalvidenskab* och *Tidskrift för kriminalvård* (startade år 1946). Min genomgång börjar med årgång 1930, utom beträffande den sistnämnda tidskriften, och slutar 1988.

Beträffande den förstnämnda tidskriften, *Nordisk tidsskrift for internationel ret*, hade den sitt främsta värde i att där klart dokumenterades de europeiska samarbetssträvandena, även beträffande kriminalpolitiken. Tydligast kommer detta till uttryck efter krigsslutet 1945.

I *Nordisk tidsskrift for kriminalvidenskab* kan man tydligt se individualpreventionens genomslag i debatten. De artiklar som för fram allmänpreventivt inriktade frågeställningar spelar en alltmer underordnad roll medan intresset för individualpreventiva frågor ökar stadigt under hela efterkrigstiden. Intensiteten synes nå en kulmen 1978/79. Det tycks som om företrädarna för den allmänpreventiva sidan av brott och straff saknade bärande argument gentemot

dem som försvarade den individualpreventiva sidan. Efter 1980 förs dock knappt någon debatt överhuvud. Idédebatten i *Tidskrift för kriminalvård* följer i stort samma mönster som den i nyss nämnda tidskrift.

Frånvaron av en debatt i generalpreventiva termer påpekades också på 1960- och 1970-talen av Andenæs och Christie. Enligt Andenæs kan effekten av generalpreventionen avläsas i straffets avskräckning. Men generalpreventionen är inte detsamma som avskräckning. Den innehåller också faktorer som moral eller socio-pedagogisk påverkan genom straffet.[1] Generalpreventionen har spelat en substantiell roll i kriminallagsfilosofin. Den nämns i den grekiska filosofin och är grundläggande i Beccaria, Benthams och Feuerbachs arbeten. Generalpreventionen har också spelat stor roll i lagstiftningen och i domstolarnas beslut. Däremot är, omkring 1971, generalpreventionen nästan helt förbisedd inom kriminologin och sociologin.[2] Det gäller även inom rättssociologin. Vad beror detta på? Andenæs räknar upp en rad antaganden om olika missförstånd rörande generalpreventionen. Som t ex att strafflagen inte verkar avskräckande på brott, att generalpreventionen vilar på en ohållbar rationalistisk teori om beteendet, att rättshistorien visar att generalpreventionen alltid varit överskattad, att hot om straff har föga inflytande och att generalpreventionen bara innebär att man accepterar brutala straff.[3] Följden har blivit att forskarna inriktat diskussionen om generalpreventionen på dödsstraffets effekt på brottsligheten.[4] *Man har däremot inte undersökt hur vård och behandling påverkar generalpreventionen.*[5] Det är just det slags forskning Andenæs efterlyser. Andenæs menar att kontinuerlig forskning om behandling som straff är nödvändig. Outvecklade forskningsmetoder för analys av generalpreventionen är inget skäl som kan accepteras. En viktig anledning till att generalpreventionen utgör ett viktigt forskningsobjekt är dess långtidsverkande effekt på moral[6] och, vill jag tillägga, normbildning. Jag instämmer helt i Andenæs uttalande efter att ha genomfört en longitudinell verksamhetsundersökning på straffverkställigheten, dvs kriminalvården. Det motstånd jag mött under arbetets gång, både beträffande metodvalet och själva ämnesvalet kan bara motiveras med att undersökningar rörande generalpreventionen varit och är tabubelagda. Något rationellt skäl varför ämnet och metoden tabubelagts står inte att finna, vilket förtjänar en egen undersökning.

Christie har också aktualiserat problemet rörande bristande kunskap om generalpreventionen i en artikel i *Lov og rett* 1971:2. Från

domstolarnas sida sett ger de facto varken generalpreventivt eller individualpreventivt inriktad forskning den information som skulle behövas inför ett domslut. Forskningsresultaten från individualpreventivt inriktad forskning ligger dock närmast till för domstolarna eftersom domarna beaktar just den räcka variabler, som ingår i den individualpreventiva forskningen.[7] Den generalpreventiva frågan huruvida sex eller tio månaders fängelse kan antas ge bäst preventiv effekt är trots allt inte relevant. Den relevanta men för den aktuella situationen icke förhandenvarande frågan är däremot huruvida straff eller icke-straff ger bäst brottspreventiv effekt. Här ger generalpreventivt inriktad forskning inget svar. Däremot finns en uppsättning antaganden om generalpreventionens verkan genom yttre social kontroll.[8] Trots detta ojämna kunskapsläge mellan individualpreventionens och generalpreventionens faktiska effekter menar Christie att domaren anser sig besitta mer nyttig kunskap om generalpreventionen än om individualpreventionen, eftersom den senare enbart givit övervägande negativ kunskap om dess effekter.[9] Christies konklusion är att avskriva uppdelningen individual- och generalprevention för att därmed komma åt nyckelproblemet brott och straff. Rättfärdighet och rimlighet utifrån den aktuelle eller presumtive gärningsmannen bör istället vara den punkt kring vilken rätten bör balansera.[10] I sak betyder det ett ställningstagande för individualpreventionen. Fängelsestraffkommittéen i Sverige valde sedermera att avskriva begreppen general- och individualprevention i domstolarnas motivering för en viss påföljd.

Med Christie har vi fjärmat oss från problemets kärna, som Christie dock själv pekar på i sin artikel men som han inte följer upp, nämligen "...det relativa styrkeforhold mellom individualprevensjonen og almenprevensjonen ...".[11] Skall vi någonsin få ett helhetsgrepp om den sociala kontrollens verkningar i samhället, är vi rättssociologer tvingade att formulera just det problemet och, vilket är en förutsättning, utveckla en adekvat metod. Vi närmar oss nu den infallsvinkel som jag själv åberopar, den som Tushnet och Eder efterlyser för att komma åt det metodologiska problemet, nämligen att inrikta analysen på idéströmningarnas och teoribildningarnas genomslag i praktisk kriminalvård. På denna punkt får jag också stöd av Andenæs och Christie, som båda efterlyser den sortens forskning.[12]

Slutsatsen måste emellertid bli att det rått *tabu* mot att framföra allmänpreventiva argument i debatten och mot att göra undersökningar om generalpreventionens funktion i samhället. Vi kan också

uppfatta ett idévakuum under 1980-talet efter en intensiv plädering för individualpreventionens genomslag i kriminalpolitiken, och även i socialpolitiken.

Det är mot den bakgrunden jag vill fästa uppmärksamheten på två debattartiklar som nyligen publicerades i *Nordisk tidsskrift for kriminalvidenskab*. Båda artikelförfattarna lägger i dagen en vilja till självrannsakan i synen på den markerat individualpreventivt inriktade kriminalpolitiken. Författarna har helt olika kriminalpolitiska förebilder men efterlyser båda en mer aktiv kriminalpolitik. Den ena artikeln är skriven av riksadvokaten George Fr Rieber-Mohn i Oslo och har titeln "Straffutmålingsnivået ved voldsforbrytelser". Rieber-Mohn redogör här för ett rättsfall, där en 16-åring yngling helt utan anledning blir anfallen av en grupp ungdomar, tilldelas en karatespark och trots att han faller till marken och blir liggande orörlig, fortsätter gärningsmannen att sparka honom. Utgången av det hela blev att 16-åringen avled senare samma dag. Det som upprört Rieber-Mohn var det ringa straff på 8 månaders fängelse som domstolen utdömde. Rieber-Mohn gör i sammanhanget en jämförelse mellan de nordiska ländernas straffnivåer vid dråp och finner att strafftiderna varierar mellan 12 och 16 års fängelse (i Danmark) och sex års fängelse (i Sverige). Rieber-Mohn anser att

> ...nordiska velstandssamfunn er inne i en *verdikrise*, hvor tradisjonelt solid forankrede normer er i ferd med å miste sitt feste i bredere miljoer... Om vi ikke makter å danne moral hvor den på forhand ikke finnes, og kanskje heller ikke å styrke en eksisterende moral, må vi *også* ved straffloven hjelp iallfall søke å opprettholde den verdibevisshet i vårt folk som er resultat av en lang sivilisatorisk process. Sagd på en annen måte tror jeg det er fare på ferde om den indifferente, opplosende og autoritets-slappe holdning som synes å prege mange i dagens foreldregeneration, også skal avspeiles i straffelovgivningen, og strafferettssystemet for ovrig. I dette perspektiv er det ikke likegyldig hvilken pris straffeloven og domstolene setter på menneskelivet, målt ved det straffutmålingsnivå som etableres ved forsettlig drap. Når viktige samfunnsinstitusjoner som f eks hjem, skole og kirke befinner seg på defensiven i formidlingen av en virkelig, forpliktende verdibevissthet hos de oppvoksende generasjoner, blir det strafferettslige system en viktig siste skanse. Og det blir en nødplattform før en ny offensiv fra enkeltpersoners og samfunnets side i retning av å fastolde og styrke respekten for andres liv, helse og eiendom[13]

I sin helhet är artikeln ett generalangrepp på Mathisenskolans antistraffteori och en uppmaning till lagstiftaren om initiativ till normbildning genom strängare straff.

Den andra artikeln är skriven av professorn i rättsvetenskap i Berlin Erich Buchholz, och har titeln "Straffrätt och kriminalpolitik i DDR". I denna artikel uppehåller sig Buchholz vid straffets uppfostrande funktion. Buchholz framhåller inledningsvis att straffrättens syfte i DDR är att inskärpa personligt straffrättsansvar (StGB 5 §). I DDR skiljer man mellan brott som beivras av åklagaren och som vid åtal leder till rättslig huvudförhandling vid domstol, och brott, som handläggs av de samhälleliga domstolarna eller åtgärdas på annat sätt. Enligt Buchholz har såväl praktisk erfarenhet som vetenskapliga resultat visat att varken straffet, straffmätningen eller verkställighetsformen ensamma åstadkommer personligt straffrättsansvar. Det förutsätts dessutom att vissa villkor av personlig och social natur är uppfyllda. Straffet är med andra ord inte det primära i brottsbekämpningen, menar Buchholz.

Enligt min mening, skriver Buchholz,

> ...kan vi uppnå en ny nivå först då vi överger uppfattningen att uppfostran utgör en ensidig och enkelriktad påverkan som den (enskilde) individen, som uppfostras utsätts för från uppfostrarens (en individ eller institution) sida. Uppfostran skall istället utgöra en komplex social interaktionsprocess, en omvälvning av tidigare vedertagna sätt att handla, en förändring av tidigare förhållanden och tidigare mänsklig verksamhet. Det som tidigare utgjorts av särskild uppfostran (vare sig genom straff eller enskilda uppfostringsåtgärder) skall utgå och ersättas av en produktiv social samverkan för att därigenom utbildas till en verklig social integration".[14]

Buchholz' kriminalpolitiska svar på brott är en motbild till Rieber-Mohns. Enligt Buchholz kan straff användas i uppfostrande syfte men endast om den "...ingår i en komplex social process av kollektiv produktivitet och utgör ömsesidig uppfostran av kollektivet, dvs då straffet ej längre utgör ett specifikt, isolerat ingrepp som kommer utifrån".[15] Buchholz avslutar sin artikel med att ange den princip efter vilken landets strafflag är skriven, nämligen att "...brottslingen inte skall utstötas ur samhället utan att strävan alltid bör vara att reintegrera honom i det samhället för att åter låta honom bli en fullvärdig, jämlik aktiv samhällsmedlem".[16]

Den teoribildning som präglar straffrätten i DDR och som försvaras av Buchholz är utan tvekan la Défense Social. Det som skiljer min vision om kriminalpolitiken från såväl Rieber-Mohns som Buchholz' är att jag vill se en utveckling av klara stopptecken *utanför* straffrättens område som talar om vad som är socialt acceptabelt och icke acceptabelt. Med klar normbildning inom det som jag har kallat den socialiserande dimensionen av den sociologiska problemdefinitionen, får rättsmedvetandet fastare grund och rättskänslan blir den inre varningsklocka som skall ringa när egna eller andras handlingar kränker den. Med klar normbildning blir avståndet till strafflagen och aktivering av straffrättsliga åtgärder större. Men en följd blir också att straffet bör bli förhållandevis mer kännbart när det väl gått så långt att bara straff återstår för att markera samhällets avståndstagande från handlingen i fråga. Tydlig normbildning ger säkrare rättskänsla och ökad medvetenhet om eget ansvar.

Noter

1 Andenæs, Johannes "The General Preventive Effects of Punishment", *University of Pennsynvania Law Review* Volume 114 No 7 1966, p 950
2 ibid p 951ff
3 ibid p 955ff
4 ibid p 968
5 ibid p 971
6 ibid p 974
7 Christie, Nils "Forskning om individualprevensjon kontra almenprevensjon". *Lov og rett. Norsk juridisk tidsskrift* 1971:2, s 55
8 ibid s 55
9 ibid p 57
10 ibid s 59
11 ibid s 53f
12 ibid s 67
13 Rieber-Mohn, Gerog Fr "Straffutmålingsnivået ved voldsforbrydelser. En strafferettsteoretisk tilnaerming" *Nordisk tidsskrift for kriminalvidenskab* 1988:3, s 193, 196f, 202f
14 Buchholz, Erich "Straffrätt och kriminalpolitik i DDR" *Nordisk Tidsskrift for Krimihnalvidenskab* 1988:3, s 211ff, 214
15 ibid s 216
16 ibid s 216

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Recension

Heine Andersen
Rationalitet, velfærd & retfærdighed
188 sidor
København:
Nyt Nordisk Forlag 1988

Heine Andersen tar ett nytt grepp om vetenskapen i sin bok *Rationalitet, velfærd & retfærdighed* genom att läsa dess historia så att säga på tvären. Han har valt ut några centrala samhällsvetenskapliga begrepp och försöker spåra dessas övergångsformer, transformation, bakåt i tiden. Med denna teknik rekonstruerar Andersen en teori, som vi känner igen som den *kritiska teorin*. Andersen har härmed lyckats sätta in den kritiska teorin i ett större sammanhang, som ett led i en teoriutveckling och teoribildningsprocess.

Andersen har valt begreppen rationalitet, välfärd och rättvisa. Alla tre begreppen tillhör nyare tidens tankevärld. Det var upplysningsfilosoferna som vidgade våra perspektiv utanför det medeltida skolastiska, och det är hos dem vi finner källorna till vår tids stora idéströmning, nämligen utilitarismen. För samhällsvetenskapens del har utilitarismen betytt att det vetenskapliga tänkandet fått en social och politisk riktning. Lyckomoral, ändamålsenlighet och rättvisa, dock inte i moralisk mening, blev nyckelbegrepp hos denna idéströmning.

Andersen upptäcker ganska snart att det är svårare att finna analyser av rättvisebegreppet än av rationalitets- och välfärdsbegreppen. Anledningen härtill antar Andersen vara det vetenskapliga kravet på värde-

ringsfrihet. Enligt Andersen är det otillfredsställande utrett varför subjektiva värdeomdömen skulle vara mer påtagliga i begrepp som rättvisa än i begrepp som rationalitet och välfärd. Detta är i själva verket Andersens problemställning i boken. Det han gör är att analysera begreppet rationalitet i dess olika historiska former, vilket leder honom rakt in i den kritiska teorins generering.

Enligt Andersen kan vi följa rationalitetsbegreppets transformation genom såväl idéströmning som teoribildning de senaste 2-300 åren. Begreppet finns i utilitarismens nyttobegrepp, det finns i strukturfunktionalismens systemteori, det finns hos Marx och i historiematerialismen. Framförallt finns det hos Marx' uttolkare, hos Popper, samt hos Marcuse, Habermas och andra företrädare för den kritiska teorin.

En fruktbar utgångspunkt finner Andersen i våra normers legitimitet. Vad är bestämmande för norminnehåll? Hur tillskrivs detta förpliktigande och bindande kraft för den enskilde individen?

Funktionalismens svar på frågan, enligt Andersen, är att det sker genom utveckling av roller och inrättande av institutioner, vilka motsvarar de budskap de aktuella normerna står för. Utilitarismens svar på samma frågor är att normerna bestäms av dessas positiva eller negativa konsekvenser på samhället som helhet.

Den kritiska teorin ger ytterligare ett annat svar. Dess företrädare hävdar att vi skulle vara involverade i en framåtskridandeprocess i fråga om vår moral- och rättviseuppfattning. I detta ligger något annat än det som beskriver målrationalitet. Habermas menar att det finns en annan dimension av rationalitetsbegreppet, som inte är egocentrisk till sin innebörd. Han försöker visa oss hur rationaliteten är förankrad i institutionerna och i historien. Men begreppen är inte bara teoretiskt användbara abstraktioner utan är i högsta grad en del av människors tankevärld. Det är vår tankevärld, som den kritiska teorin försöker utforska och rekonstruera. Habermas använder begrepppet *kommunikativ rationalitet*, med vilket han vill säga att det finns ett slags rationalitet vid sidan av den målrationella och det är den som är objektet för den kritiska teorin. Genom språklig kommunikation förmedlar vi vår självreflexion, vilken är vår bearbetning av den kollektiva inlärning vi alla är delaktiga i. Vi är en länk i en samhällelig inlärningsprocess genom språklig kommunikation, och internaliserar härigenom inte bara normer. Vi tillägnar oss också ett självmedvetande och stimuleras i vår förståelseutveckling av omvärlden.

Men detta är inget fullständigt svar. Svagheten i Andersens analys är att han jämställer idéströmning med teoribildning. Kontaminationen verkar förvirrande, när han ställer funktionalismen och utilitarismen mot varandra som likvärdiga abstraktioner på samma nivå. Utilitarismen är en idéströmning medan funktionalismen är en teori, i likhet med t ex marxismen. Analyserar vi förhållandet dem emellan skall vi finna tydliga inslag av utilitarismen i t ex funktionalismen.

Begreppet målrationalitet kan ha, men behöver inte ha, en social aspekt. Det har ofta en rent strategisk och instrumentell innebörd. Målrationalitet är förenat med en

mekanisk samhällsuppfattning. Om och när detta synsätt tillåts dominera samhällspolitiken leder det till ett tillstånd där stat och ekonomi vävs samman på ett funktionellt sätt, som till slut framstår som ett samlat och självständigt målrationellt system, med ett innehåll som ligger utanför människors livsvärld.

Livsvärlden består enligt Habermas av de tre huvudkomponenterna kultur, samhälle och personlighet. Livsvärlden är vårt förråd av bakgrundskunskap och förhandstolkningar av verkligheten, som möjliggör vår identitet och ger vår handlingsberedskap en riktning. Livsvärlden är också vårt förråd av etiska och juridiska regler. Det är genom dessa vi får möjlighet att erkänna samhällsordningens legitimitet och genom dessa skapas vår motivation.

Begreppet livsvärld har antropologisk och sociologisk tradition och återfinns i den funktionalistiska teorins begreppsapparat. Habermas' definition av begreppet är emellertid inte funktionalistisk. Hos Habermas är livsvärld inte bara ett uttryck för samhällets överlevnad och funktionseffektivitet utan också underkastat en kritisk granskning av sina egna förutsättningskrav.

Den målrationella varianten av begreppet rationalitet är förenat med ett pris. Ett målrationellt utformat samhälle får som konsekvens att livsvärlden så att säga koloniseras av systemet. Det innebär att de socialt verkande mekanismerna, som ger mening, identitet och tilltro till systemets förmåga att tillfredsställa den enskildes behov av rättvisa sugs upp eller koloniseras av systemet.

Förhållandet mellan begreppen *system* och *livsvärld* kan beskrivas så att handlingar skapar strukturer, som i sin tur skapar förutsättningar för handlingar. Denna dialektik eller dubbelhet försöker Habermas utnyttja i sin teori om system och livsvärld, där kommunikativ rationalitet blottlägger just detta förhållande.

Med sin kritiska teori skjuter Habermas in sig på den politiska styrningen av samhället. Inte så att han anser att inga styrningsmedel och styrningssystem borde finnas överhuvudtaget. Men han menar att institutionerna bör omformas så att det blir möjligt med en dialog mellan styrande och styrda – *utan* att det för den skull sker en kolonisering av livsvärlden, pga ett snävt målrationellt perspektiv. Det Habermas vill ha istället är ett samhälle byggt på kommunikativ rationalitet. Genom att analysera rationalitetsbegreppet över tiden kan Andersen se hur begreppet målrationalitet hos funktionalismen transformeras till kommunikativ rationalitet hos den kritiska teorin.

Den stora förtjänsten med Andersens bok är att han sätter in den kritiska teorin i ett vetenskapshistoriskt sammanhang. Den kritiska teorin är emellertid ytterligare ett exempel på utilitarismens inflytande på teoribildningen. Tidigare har vi sett funktionalismen, interaktionismen och andra exempel på dess styrka. Dessa sistnämnda teorier har utsatts för hård kritik från marxistiska samhällsforskare. Kritikens inre kärna äger en konsistens som det är möjligt att knyta samman just i den kritiska teorin. Upphovsmännen är förvisso flera men Marcuse och Habermas framträder kanske som de klaraste idékällorna. Men

även om Frankfurtskolan med Marcuse och Habermas i spetsen bidragit till en spridning och genomslag av den kritiska teorins förklaringsmodell, så har ingen före Andersen knutit upp kritisk teori till en utveckling av vetenskapsteorin självt, satt in den i ett större sammanhang och genom analys av främst rationalitetsbegreppet i sällskap med begreppen välfärd och rättvisa påvisat en inre dynamik i det mänskliga tänkandet och att detta har en alldeles bestämd men omedveten riktning.

Andersens analys och slutsatser hade emellertid blivit ännu klarare i konturerna om han inte blandat samman idéströmning och teoribildning.

Margaretha Rolfson

TIDSKRIFT FÖR RÄTTSSOCIOLOGI VOL 6 1989 NR 1/2

Aktuell information

TILLBAKA TILL RÖTTERNA

Law & Society Association återvände för sitt årsmöte detta år till Madison, Wisconsin, där föreningen grundades för jämnt 25 år sedan. Jubileet satte sin prägel på hela årsmötet, som för övrigt satte nytt deltagarrekord; över 600 forskare hade kommit till Madison, varav 63 från utlandet.

Redan vid registreringen påmindes deltagarna om det högtidliga jubileet genom att alla fick en keramikmugg med Law & Society-logotypen och texten "25 years, 1964-1989". Ytterligare en påminnelse var den flotta banketten som juridiska fakulteten vid universitetet bjöd deltagarna på, med god mat, mycket dryck och flera hyllningstal.

Föreningens egen bankett på konferensens sista kväll var om möjligt ännu festligare, med en tipsrunda med frågor ut den egna 25-åriga historien, med ett jazzband, en isskulptur av staten Wisconsin och en jättelik födelsedagstårta med L&A-logotypen i marsipan ovanpå. Flitiga(ste?) besökare på dansgolvet var lite till åren komne **Jerry Skolnick** som föredrog långsamma "tryckare" med yngre kvinnliga forskare, och **Erhard Blankenburg**, som klarade alla rytmer och flög omkring över parketten som hade han fått dispens från tyngdlagen.

THE SWEDISH EXPERIENCE

Speciell anledning att fira hade de svenska deltagarna; för första gången i L&As historia representerades skandinavisk rättssociologi med en egen session med inte mindre än fem svenska bidrag. Uppsatser pre-

senterades av **Bo Carlsson, Antoinette Hetzler, Ingela Kåhl, Sven-Erik Olsson** och **Kjell E. Eriksson.** Antoinette Hetzler presiderade, och opponent var **Klaus A. Ziegert** från Sidney, Australien.

Intresset för de svenska uppsatserna var stort och alla tillgängliga kopior försvann blixtsnabbt. Publikens frågor handlade mycket om välfärdsstatens problem och om svensk hälso- och sjukvård. Tidskriften *Law & Policy* erbjöd sig genom **Keith Hawkins** att publicera samtliga uppsatser i ett temanummer, och Ziegert har infört uppsatserna som kurslitteratur på juridiska fakulteten i Sidney. Det finns uppenbarligen ett behov av kunskaper om den svenska modellen, inte som propagandanummer utan som objekt för kritiska vetenskapliga studier.

En svensk utgivning av uppsatserna är inte aktuell för närvarande, åtminstone inte i samlad form.

Forskargruppens medverkan i Madison, och dess verksamhet som grupp över huvud taget, har möjliggjorts av en satsning från Delegationen från social forskning på långsiktig kunskapsuppbyggnad i området välfärdssamhälle, socialförsäkring och arbetsliv.

I ÖVRIGT

var det blandad kompott som bjöds deltagarna, i form av sessioner och uppsatser. **Yves Dezalays** omfångsrika uppsats om finansiella tjänster publiceras som huvudartikel i detta nummer av tidskriften, och är ett bra exempel på den genomgående höga kvalitet som de olika uppsatserna höll.

Vi ska också titta närmare på en intressant uppsats om rättigheter som presenterades av **Joel Handler**, jurist från UCLA. Handler har i flera år forskat om socialpolitik i USA och argumenterat för en tolkning som innebär att man accepterar som ett faktum att det inte finns någon socialpolitik i USA. I stället har de grupper som har störst behov av sociala förmåner tvingats gå omvägen över de i författningen garanterade medborgerliga rättigheterna och i domstolsprocesser försökt hävda tolkningar av författningen som innebär socialpolitiska ställningstaganden till sakfrågor.

Handler menar emellertid nu att de olika minoritetsgrupper som främst agerat enligt denna strategi börjar, med rätta, omvärdera rättigheternas betydelse. Och det är just detta perspektiv en kritisk analys av rättigheter måste anlägga, nämligen de nationella minoriteternas perspektiv. Minoriteterna i USA ser sig själva som "neutrala" i förhållande till rättigheterna, och möjligheterna att påverka deras levnadsvillkor genom rättslig kamp i domstolar med rättigheterna som vapen betraktas som minimala. Tvärtom måste man först och främst ställa frågorna om, hur och när det ens är meningsfullt att ingå i en diskurs om rättigheter.

Den nya strategi som Handler förespråkar kallar han "counter-hegemony". Rättigheter är resultat av maktkamp. De avspeglar inte bara intressen utan också organisationssätt. En fokusering på nationella författningar eller tillgången till domstolar är fel sätt att förstå multiplexiteten i rättighetsbegreppet. Man måste finna både det kollektiva och det individuella i begreppet.

Med sitt inlägg ville Handler göra upp med en dominerande riktning i synen på medborgerliga rät-

tigheter, vars centrala frågeställning är om rättssystemet erkänner ett visst behov eller inte.

UTBILDNING I "RÄTT OCH SAMHÄLLE"

Law & Society Association hade inför Madisonmötet samlat in kursplaner och kurslitteratur för kurser som ges i ämnet Rätt och samhälle över hela USA. 13 kurser presenterades på detta sätt i kompendium. Fyra hade rubriken "Rätt och samhälle", rätt och slätt. Bland de övriga fanns "Rättssociologi", "Kultur och konflikt", "Författningen och samhällsvetenskapen", "Rätt och samhälle i Japan" och "Psykologi och rätt".

Det är intressant för svensk rättssociologi att på detta sätt få möjlighet att jämföra sig med utländska motsvarigheter, och roligt att kunna konstatera att man står sig gott i konkurrensen. Detta senare påstående gäller dock inte i jämförelse med **Gunter Teubners** speciella kurs för doktorander inom juridik och samhällsvetenskap under hans gästår vid University of Michigan. Vi citerar ur kursplanen:

> The seminar will deal with the three main representatives of contemporary European theories of law: post-structuralism, critical theory, and theory of self-referential systems. It analyzes the role of law in **Michel Foucault**'s discourse formation, the conditions of communicative rationality of law in the work **Jürgen Habermas** and the interplay of legal closure and legal openness in **Niklas Luhmann**'s theory of autopoiesis.

Det blev nog inte många pauser för de stackars doktoranderna. Å andra sidan kan man hoppas att Teubners insats kan bidra till att ändra den splittrade bilden av amerikansk forskning inom rätt och samhälle idag.

CLS I UNGERN

ECCLS, European Conference on Critical Legal Studies, hade sitt årliga möte i Budapest den 13-16 oktober. Deltagarantalet var lågt, men det fanns ett antal skandinaver på plats, däribland från Rättssociologiska institutionen **Lars Ericsson** och **Håkan Hydén**. Enligt rykten sammanfattade en av de finska deltagarna fleras intryck med den vitsiga sentensen "borta bra men Budapest".

För några år sedan dominerades ECCLS-mötena av öppen konflikt mellan akademiker, som tolkade gruppens uppgift som att utveckla teoretisk och empirisk forskning i linje med den kritiska teorin, och praktiker, som ville använda "Critical Legal Theory" som en plattform för ideologiskt färgad kritik av existerande rättssystem. Denna motsättning har inte lösts, men väl upphävts, genom att en Critical Legal Conference avhölls i England i september 1989, med följden att antalet deltagare minskat på ECCLS-mötet.

Nästa årsmöte äger rum i Bryssel. Vi återkommer med mer information senare.

NYHETSBREV

Ett *Socio-Legal Newsletter* har nått oss. Det är utgivet av Socio-Legal Group och The Centre for Socio-Legal Studies i England, och har som mål att etablera ett nätverk mellan människor som utbildar och forskar inom rättssociologi och rätt

och samhälle i England och på kontinenten. Det första numret är till bredden fyllt med information om forskning på gång, kortare debattinlägg, nyutkommen litteratur.

Nyhetsbrevet avses att utkomma två gånger per år. Den som vill få nyhetsbrevet kan skicka namn och adress (till jobbet) till The Socio-Legal Newsletter, Centre for Socio-Legal Studies, Wolfson College, Oxford OX2 6UD, England.

SOFI OPEN

Walter Korpi har hunnit avhålla sitt höstseminarium, som vanligt under DSFs auspicier. Seminariet hade samlat rekordmånga deltagare till vackra Skytteholms kursgård på Ekerö, däribland **Birgit Arve-Parés** från DSF. Walter presiderade själv, som vanligt, och som vanligt med **Robert Erikson** som bisittare.

SOFI Open har numera etablerats som ett mycket viktigt inslag i svensk sociologi. På två dagar avhandlas ett stort antal "papper" i skilda ämnen. Kritiken haglar, ibland ganska hårdhänt, men stämningen är god och ingen tar illa vara. Vi är ju trots allt där för att hjälpa och få hjälp...

Bland bidragen denna gång noterar vi bl a ett papper om Sjöbo och flyktingomröstningen av **Björn Fryklund** och **Tomas Peterson**. Opponenten **Stefan Svallfors** var inte nådig i sin kritik, men respondenterna blev honom inte svaret skyldig.

Bo Rothstein gav ett papper om **Gustaf Möller** och framväxten av modern svensk socialpolitik. Rothsteins tes var att individen betyder mycket för historiska skeenden, och han kritiserade bl a Walter Korpi och **Göran Therborn** för att de i sina analyser tenderar att överdriva strukturella drivkrafter i det samhälleliga förändringsarbetet. Rothstein utgör ett fräscht och spännande inslag i samhällsvetenskaplig debatt i Sverige, både som författare och som kritiker; tveklöst svarade han för det flesta (och längsta) inslagen i den fria debatt som avslutade varje session.

Rättssociologiska institutionen i Lund representerades av **Kjell E. Eriksson** med ett papper om *quitters*, dvs arbetstagare som självmant säger upp sina anställningar utan att ha någon ny att övergå till. Opponenten, **Bengt Erikson** från Sociologen i Göteborg, hade flera kritiska synpunkter, men frågan är om inte författaren främst fäste sig vid formuleringen "ett elegant papper"...

Tre papper hade sitt ursprung i det sk Katrineholmsprojektet, som leds av **Rune Åberg** från Umeå. Katrineholmsprojektet är en kopia av **Torgny Segerstedts** Katrineholmsundersökning som genomfördes för 40 år sedan, och som publicerades på 50-talet under titeln *Människan i industrisamhället.*

Att döma av reaktionerna på seminariet till de papper som presenterades kanske det är mindre lyckat att göra identiska uppföljningsstudier efter så lång tid och så genomgripande förändringar av samhället. Det bestående intrycket är att detta projekt kommit till stånd som en trevlig jubileumsidé, utan att man i någon högre grad reflekterat över svårigheterna med och värdet av en studie av detta slag.

MÄNSKLIGA RÄTTIGHETER

Ett internationell konferens om mänskliga rättigheter i tredje värl-

den ägde rum i Lund under två veckor i augusti. Under Håkan Hydéns ledning och med medverkan av ett tjugotal forskare och praktiker från hela världen diskuterades olika aspekter på människorättsproblematiken. I nästa nummer av tidskriften hoppas vi presentera en mer ingående redovisning av konferensen, som arrangerades av Rättssociologiska institutionen i Lund med medel från SAREC.

Skuggor ur det förflutna

BAKNUMMER AV TIDSKRIFT FÖR RÄTTSSOCIOLOGI TILL LÅGA PRISER.

kelnummer SEK 25:-, dubbelnummer SEK 40:-. Beställ genom att sätta in beloppet på pg 6 96 88-0, Tidskrift för rättssociologi. Ange önskade nummer på talongen.

1 1983/84 Nr 1
Stjernquist: En aspekt
i rättssociologisk forsk-
ng
is Eder: Collective
earning Processes and
ocial Evolution; Towards
Theory of Class Conflict
Modern Society
inette Hetzler: Policy-
mplementering genom
g; Arbetsskadeförsäk-
ngens tillämpning
Bleiklie: The Selective
oviders; Organization
d Distribution Effects
Public Service Provi-
on

1 1983/84 Nr 2
TSÅLD

1 1983/84 Nr 3
ald R. Cressey: Honesty
the Best Policy; Self-
egulation as a Strategy
r Maximizing Corporate
ofit
-Erik Olsson: EKO-
mmissionen och kam-
n mot den ekonomiska
ottsligheten
inette Hetzler:
ättssäkerhet eller
tsskydd

1 1983/84 Nr 4
sander Peczenik:
ridiska data; Ett bidrag
l rättens ontologi
s Aarnio & Jyrki Uusi-
o: Paradigm i rätts-
gmatiken; Mot en teori
n förändring och fram-
g inom rättsveten-
apen
ar Bergholtz: Skäl och
saker i samband med
tsliga avgöranden
n Hydén: Kausalanalys
en endimensionella
klaringsmodellen

1985 Nr 1
Akalu: En aspekt på
tsantropologisk forsk-
g
-Axel Månsson: Kärlek
h kulturkonflikt

Cs. Varga: From Legal Customs to Legal Folkways
Per Stjernquist: Socialpolitik och jämlikhet
Göran Hermerén & Tore Nilstun: Hydén och kausalanalysen
Håkan Hydén: Kausalsamband men inte kausalanalys

Vol 2 1985 Nr 2
Susan B. Long: The Impact of Information on Law Enforcement
Karin Widerberg: Världens bästa reformer -en fråga om perspektiv? Den svenska föräldraledighetslagstiftningen i rampljuset
Klaus A. Ziegert: Kvinnor och kvoter; Hur effektiv är rätten?

Vol 2 1985 Nr 3-4
Bo Carlsson: En rationell diskurs; "Tillbaka till Rousseau"
Romano Bettini: The Sociology of Law and Empirical Research
Aster Akalu: The Condition of Women and the Land Nationalization Law in Ethiopia
Erhard Blankenburg: Research Concepts for the Study of Implementation
Lars Ericsson: Ramproblem
Sven-Erik Olsson: Bör kvinnofrågan frigöras?

Vol 3 1986 Nr 1
Olle Rimsten: Om rättsligt beslutsfattande i Arbetsdomstolen
Ugljesa Zvekic: Professionalism Scale; An Empirical Assessment of Judges' Professional Ideology
Hans Petter Graver: Den rettslige beslutningsmodell og indentitetsmessige forandringer

Vol 3 1986 Nr 2
Henrik Belfrage: Nymoralismen i svensk straffrättsdebatt

Roger B.M. Cotterrell: Critique and Law: The Problematic Legacy of the Frankfurt School
Bo Carlsson & Åke Isacsson: Vård på lika villkor eller Vad är kvalitet i hälso- och sjukvården?
Bo Carlsson: Habemas' teori om den kommunikativa kompetensen
Karin Widerberg: Zimbabwe – kampen om rätten

Vol 3 1986 Nr 3-4
Csaba Varga: Macrosociological Theories of Law
Christian Joerges: Amerikanska och tyska traditioner inom sociologisk rättsvetenskap och kritisk rättsteori
Antoinette Hetzler: Frivillig arbetslöshet - ett rättssociologiskt problemområde
Sigridur Stefansdottir: Trygghetsförsäkring vid arbetsskada

Vol 4 1987 Nr 1
Jan Anderberg & Håkan Gustafsson: Skatteflykt och rättssäkerhet
William Miller: Making Sense of Development
Henrik Belfrage: Begreppet "jämställd med sinnessjukdom" i svensk straffrätt
Karen Leander: Kritiska kriminologer konfererar

Vol 4 1987 Nr 2
Boaventura de Sousa Santos: Rätten – en karta för felläsningar. Mot ett postmodernt rättsbegrepp
A. Bancaud: Sociologen och rätten eller Frestelsen att skända
Ella Ödmann: Vem bryr sig om portalparagrafer? Om naturresurslagen och plan- och bygglagen

Vol 4 1987 Nr 3-4
TEMA: Professuren i rättssociologi

Vol 5 1988 Nr 1
Antoinette Hetzler: Handikappersättning
Mike Oliver: Social Policy and Disability
Lars Ericsson: Civil ohörsamhet

Vol 5 1988 Nr 2
Thor Øivind Jensen & Jan Froestad: Interest Organizations: A Complex Answer to Political Poverty
Ingela Kåhl: Demokratin i Hasselapedagogiken
Malgorzata Fuszara: The Law: A Special or Normal State?

Vol 5 1988 Nr 3/4
Carl-Martin Roos: Föräldrars ansvar för barnens skadegörelse
Klaus A. Ziegert: Legal Education at Work: The Impossible Task of Teaching Law
Jon T. Johnsen: Professional and Common Legal Understanding
Bo Carlsson: Rättens kommunikationsskapande kvalitet
Håkan Gustafsson: Rättssäkerheten, moralen och "socialsäkerheten"