Dilemmas of Law in the Welfare State

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The Transformation of Law in the Welfare State

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In the recent discussion on the crisis of the welfare state, increasing attention has been given to the "juridification" of the social world (Gütlner, 1980; Vogel, 1980, 1983, Abel, 1986, 1982; Kühler, 1984). The relation between these two phenomena - welfare state and juridification - is the core theme of this book. How does the emergence of the welfare state influence the law's structures and functions? How is the juridification of social fields connected to the political instrumentalization of the law? The contributions focus in particular on the problems with the law facts when the societal guidance intentions of the welfare state seem to reach their limits, and they analyze the potential of an emerging "post-interventional" law.

Among lawyers, juridification has been criticized predominantly as a quantitative phenomenon. The rising growth of legal regulation has been labeled as a "legal explosion" (Bastian, 1975) or as a "flood of norms" (Hilfierer, 1978; Vogel, 1979). This is perhaps not a suitable starting point since, in many respects, it limits the discussion too narrowly. "Flood of norms" stresses the quantitative aspect of the multiplication of legal material which could certainly be coped with by simplifying the law or by technical improvements in legislation. Attention should, rather, be directed towards the qualitative aspects: what substantial changes in legal structures have brought about the (alleged) crisis of juridification. The term "flood of norms" is, moreover, historically unspecific; juridification processes should instead be studied under the specific conditions of the modern welfare state (the interventionist state) and the reappropriation of legal structures in relation to different social areas. Finally, abstraction should be made from the national specificities of the "flood of norms", and a comparative approach taken so as to isolate the universal characteristics of juridification processes and the problems that result from them. It is for these reasons that, in this book, the usual approach to juridification as a problem of quantitative growth is avoided and replaced by the following guiding questions:
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1. Materialization of Formal Law
In modern legal development different trends towards jurisdiction can be distinguished. In his contribution to this volume, Habermas (205 infra) identifies four episodic "jurisdiction phases", each involving specific features of legal functions, norm structures and institutional differentiation. These jurisdictional conflicts are connected to the emergence of different forms of the state: the bourgeois state, the Reichstaat, the democratic state and finally, the welfare state. Such an historical perspective avoids the fallacy of dealing with jurisdiction in general as the extension and densification of law (Voigts, 1958). Instead, it allows us to concentrate on one historical type of jurisdiction. The most pressing current problem is probably how to cope with the jurisdiction thrust typical of the welfare state in which the law is institutionalized as a guidance mechanism for the interventions and compensations of the welfare state. It is important here to keep to Max Weber's distinction between formal and material rationality, and not to ask what processes in the different area of law have remained or superimposed a material, welfare-state orientation onto the formal rationality of the classical rule of law (Max Weber, 1968; see also Asher, Wuthrich). Putting it another way: Does a comparative perspective in different legal areas show a trend away from "autonomous" law towards "responsive" law (Nuss and Schmitt, 1978)?

The different contributions to this volume demonstrate that the application of the formal/material conceptual scheme to various sub-areas has far-reaching results. They pursue the consequences of materialization tendencies as far as possible of normative structures, methods of interpretation and application of social knowledge to legal doctrine. Our contributors agree to a great extent on the identification of new functions and structures of law in the welfare state; they differ widely, however, in assessing the causes and consequences of these developments. Asher provides a detailed catalogue of the new functions of law in the welfare state as opposed to those of the liberal state. His formula "from prevention to promotion" is paralleled by Broekman's and Israël's concept of "socialization of law" and by Lubmann's analysis of "social engineering as a political approach to law" and to a certain degree by Heller's reference to the "positive state". This instrumentalization of the law for welfare state purposes has a clear impact on the emergence of normative structures which are related to the new functions of law. Felsenthal uses the distinction "constitutive versus regulative" rules in order to analyse the change from formal-rational orientation towards a network of compensatory regulation. Others describe these structural developments in terms of "socialization" and "specification" of legal norms (Habermas) and of a stronger reliance on "purposive programs" (Lubmann, Wilke). Furthermore, the functional and structural changes reveal a trend toward a new legal rationality: "This rationality defines a policy of law wherein the latter appears as an element in the sociological administration of society. There is a zero conflict - balance - settlement" (Feslenthal 63 infra).

While Fischman's central thesis that "legal culture" has to be seen as the intervening variable between "social change" and "legal change" would probably find agreement among the various authors, disagreement arises when it comes to explaining the causes of the legal transformation. What are the structural social changes that "determine" recent legal change, or better, that co-varies with it? Basically, theories of economic political crisis compare with theories of functional differentiation. On the one hand, the new function of the interventionist law are explained by the compensatory measures on the part of the state in reaction to economic crises (Habermas, Broekman, Wuthrich, Heller, Perillo). In these approaches emphasis is put on the dialectic attempts of the political system to "socialization" the economic system. On the other hand, the emergence of the welfare state and its legal concomitants is related to processes of functional differentiation. "Inclusion" is the main problem posed for the political system which results in unforeseen consequences for the role of law (Lubmann, 1981). A related phenomenon is "organizational differentiation"; the emergence of the organizational society which challenges the classical role of the state and the state's law. In the context of functional differentiation, social subsystems apparently develop such a high degree of autonomy that the political system is forced to experiment with new forms of legal regulation (Wilke, Wehsier).

Disagreement is even stronger when the social components of "legal instrumentation" are examined. Does this imply a profound change of the relationship between law and society or is only a surface phenomenon involved that leaves the deeper structures and basic principles of society unaffected? According to Habermas, Wuthrich, and Perillo materialization of formal law leads to fundamental changes in the social structure. Lubmann, in turn, analyses far-reaching changes within the legal system. The "political" usage of law alters its internal structure, particularly its
internal balance of normative closure and cognitive openness, to a degree that its autopoietic organization is overstrained. Brockman and Heller contest both these positions. They insist that the new socio-technological role of the law in the contemporary system represents nothing more than a surface phenomenon. The deep structure of law and society reveals that this modern type of law shares the same "structural grammar" as its classical counterpart did. For Brockman, it is not only the "Corpus dogmaticum" of the law but also legal subjectivity as the basic value of law that resists fundamental change. In his view, the deep structure of law and society sets effective limits to legal instrumentalism.

2. Limits to Legal Instrumentation

There are, however, competing attempts to account for the limits of a political instrumentalization of law. The diverse explanations of the limits of legal instrumentalism (Weber/Cher) represent the jurisprudential variant of the general debate on the limits of the welfare state (e.g., Leiby, 1979).

Four points of criticism emerge:

(1) "Ineffectiveness.": To what extent is the law unsuitable as a control mechanism (Ziegler, 1975) because it simply runs aground on the internal dynamics of the green social area? Although particular programs are seen as political guidelines which are superior to the classical conditional programs, they cannot cope with the fast that complex systems behave counter-intuitively. One explanation is to relate this phenomenon to the growing tension between the increasing guidance load and the decreasing guidance capacities of the state faced with organizational differentiation (Willke, 1983). Another is the autopoietic organization of the welfare state which inevitably leads to political law as a "regulatory relativity" (Stuhler, 1984:331 and infra).

(2) "Colonialization": Is the price of justification the destruction of organic social structures because the law is based on quite different modes of functioning and of organization? According to Borchman, the ambivalence of guarantees of and denial of freedom has adhered to the policies and the law of the welfare state from its beginning. It is the structure of justification itself that endangers the freedom of the beneficiaries. Instrumental legal programs under functional logic and follow criteria of rationality and patterns of organization which are contradictory to those of the regulated spheres of life. In consequence, law as a medium of the welfare state either turns out to be ineffective or it works effectively but at the price of destroying traditional patterns of social life. Furthermore, as Pechner shows, welfare state law with its symbolic representation of "feeling," bureaucratic organization, and systems produces a social situation which weakens the potential for critical opposition.

(3) "Decontextualization": Does the legal system have substantive cognitive, organizational and power resources which might enable it to respond to the new tasks as it is assigned? The result extension in legal practice contributes additively to an overstretching of the legal system (Lubomir). The "over-socialization" of law in the welfare state necessitates such radical changes in legal structures that its very autonomous organization might be endangered (Trubetj).

(4) "System conflict": How far does instrumental law define its own rationale by its interaction with other systems, especially the political and the economic system? This problem is raised by Friedes in dealing with the contradiction between the law's independence and its social responsiveness as well as by Brockman who points to the limits of "socialization of law." Aubert argues that the aims of the interventionist state clash with the rule of law as an ideal, while at the same time conflicts are continuously engendered by government policies as well as by general social and economic development. Pechner analyses the tensions between the classical "law" and the modern "norm." Pechner speaks of a "nonautonomic entrepreneur" inherent in the welfare state's participatory mechanisms which makes autonomous thought and authentic dialogue logically impossible and which sets effective limits to "law as critical discussion." Pechner deals with the contradictions between the static structure of legal subjectivity and the economic fluctuations which limit the welfare state's capacity.

For Pechner the dilemma of law in the welfare state is due to the fact that distributive rights are based on the abstraction of interests from the underlying socio-economic situation. On a more general level Pelpherso describes this system of conferees as conducting constitutive rules of different social games which cannot be resolved by the rules of a "metagame."

3. Perspectives of Legal Development

Depending upon how positively or negatively legal instrumentalism is evaluated and what problems are perceived as relevant, very different types of development are perceived as relevant, very different types of development are perceived as relevant, very different types of future perspective are arrived at. Three possible solutions can be distinguished: increasing effectiveness, deregulation and legal control of self-regulation.

In principle one holds to the overall control task of the law, the main problem of justification will be the question of effectiveness. The point has thus to strengthen the cognitive, organizational, and power resources in such a way that the law can cope in practice with its central function.

In this sense, legal doctrine will have to shift its orientation from norm application to legal policy (Nonet and Schur, 1978; Podgorzecy, 1974; Wilde, 1979). The precisely opposite strategy aims at an orderly extract of the tasks from the "colonialized" areas of life, either by a complete deactivation of its regulatory function ("de-legalization") in the strict sense, or by concentrating in cases within the second bastions of formal re-legalization ("re-legalization"), Grimm, 1989). Finally, as alternative solutions
social modernity. He offers a series of structural components—procedure, citizenship, legal discussion, society as process, de-legitimization, legitimacy to depth—which support the role of law as a demystifying force in modern society.

The ambivalence of all these perspectives on legal development is perhaps best pointed out by Broekman. He contrasts changes in the legal structure with a thorough internalization of social justification structures. “Only a contextually sufficient justification, secondly, the deep justification and lastly the justification of the basic principles of law and society” (94 infra). For Broekman, attempts to formulate new perspectives on law, especially “alternative” doctrinal figures aimed at a change in terms of deep justification are bound to produce only changes in terms of a contextually sufficient justification. “They do not bring about changes in the sense of the basic principles of law and society” (94 infra). This is a strong argument formulated from a reconceptualization position which questions the central theories of system-functionalist and critical theory. If one re-formulates Broekman’s assertion as an open equation, it may capture the central preoccupation of many if not all authors in this book on justification and welfare state: Are we in a position to identify the fundamental structural changes which would make possible the institutionalization of reflection processes in law and society?

References


The Welfare State and its Impact on Law