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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 (Galanter, 1980; Voigt, 1980, 1983; Abel, 1980, 1982; Kübler, 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 which the law faces when the societal guidance intentions of the welfare state seem to reach their limits, and they analyze the potential of an emerging "post-interventionist" law.

Among lawyers, juridification has been criticized predominantly as a quantitative phenomenon. The irritating growth of legal regulation has been labelled as a "legal explosion" (Barton, 1975) or as a "flood of norms" (Hillermeier, 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 appropriateness 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:

(1) Materialization of Formal Law: To what extent do juridification processes in different areas show a transition from classical formal law to the guidance intentions of the interventionist and compensatory welfare state and what are the consequences for the internal structures of law?

(2) Limits to Legal Instrumentalism: Can limits to the political instrumentalization of law be discerned to the extent that particular juridification processes prove inadequate to the social structures which they regulate and/or overstrain the law's capacity to control and/or disintegrate basic legal values and the unity of the legal system?

(3) Perspectives of Legal Development: Can alternatives to juridification be seen which are more adequate on the one hand to the special problems of each social area and on the other to the internal capacities of the law?

1. Materialization of Formal Law

In modern legal development different trends towards juridification can be distinguished. In his contribution to this volume, Habermas (205 infra) identifies four epochal "juridification thrusts", each involving specific features of legal functions, norm structures and dogmatic systematization. These juridification thrusts are connected to the emergence of different forms of the state: the bourgeois state, the *Rechtsstaat*, the democratic state and finally, the welfare state. Such an historical perspective avoids the fallacy of dealing with juridification processes in general as the extension and densification of law (Voigt, 1980). Instead, it allows us to concentrate on one historical type of juridification. The most pressing current problem is probably how to cope with the juridification thrust typical of the welfare state in which the law is instrumentalized 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 legal rationality, and to ask what processes in a particular area of law have replaced or superimposed a material, welfare-state orientation onto the formal rationality of the classical rule of law (Max Weber, 1968; see also Aubert, Wiethölter). Putting it another way: Does a comparative perspective in different legal areas show a trend away from "autonomous law" towards "responsive law" (Nonet and Selznick, 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 questions 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.

Aubert 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 Ewald's concepts of "socialization of law" and by Luhmann'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. Febbrajo uses the distinction "constitutive versus regulative" rules in order to analyse the change from formal framework orientation towards a network of compensatory regulation. Others describe these structural developments in terms of "individualization" and "specification" of legal norms (Habermas) and of a stronger reliance on "purposive programs" (Luhmann, Willke). 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 series: conflict – balance – settlement" (Ewald 63 infra).

While Friedman'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-variate with it? Basically, theories of economic-political crisis compete with theories of functional differentiation. On the one hand, the new functions of the interventionist law are explained by the compensatory measures on the part of the state in reaction to economic crises (Habermas, Broekman, Wiethölter, Heller, Preuß). In these approaches emphasis is put on the dilemmatic attempts of the political system to "constitutionalize" 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 (Luhmann, 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 (Willke, Teubner).

Disagreement is even stronger when the social *consequences* of "legal instrumentalism" 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 unaltered? According to Habermas, Wiethölter, and Preuß materialization of formal law leads to fundamental changes in the social structure. Luhmann, 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. Broekman and Heller contest both these positions. They insist that the new socio-technological role of the law in the interventionist state represents nothing more than a surface phenomenon. The deep structure of law and society reveals that this modern type of law obeys the same "structural grammar" as its classical counterpart did. For Broekman, it is not only the "corpus dogmaticus" 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 Instrumentalism

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 (Wiethölter) represent the jurisprudential variant of the general debate on the limits of the welfare state (e. g. Lehner, 1979). Four points of criticism emerge:

(1) "Ineffectiveness": To what extent is the law unsuitable as a control mechanism (Ziegert, 1975) because it simply runs aground on the internal dynamics of the given social area? Although purposive programs are seen as political guidance instruments which are superior to the classical conditional programs, they cannot cope with the fact that complex systems behave counter-intuitively. One explanation is to relate this phenomenon to the growing tensions 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 regulated subsystems which inevitably leads instrumental law into a "regulatory trilemma" (Teubner, 1984:313 and infra).

(2) "Colonialization": Is the price of juridification the destruction of organic social structures because the law is based on quite different modes of functioning and of organization? According to Habermas, the ambivalence of guarantees of and denials of freedom has adhered to the policies and the law of the welfare state from its beginning. It is the structure of juridification itself that endangers the freedom of the beneficiary. Instrumental legal programs obey a 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 Peters shows, welfare state law with its symbolic representation of officialdom, bureaux, organization, and system produces a social consciousness which weakens the potential for critical opposition.

(3) "Overstrain": Does the legal system have sufficient cognitive, organizational and power resources which might enable it to respond to the control tasks it is assigned? The result-orientation in legal practice contributes unavoidably to an overburdening of the legal system (Luhmann). The "over-socialization" of law in the welfare state necessitates such radical changes in legal structures that its very autonomous organization might be endangered (Teubner).

(4) "Systems conflict": How far does instrumental law deflect its own rationale by its interaction with other systems, especially the political and the economic system? This problem is raised by Friedman in dealing with the contradiction between the law's independence and its social responsiveness as well as by Broekman 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. Ewald analyses the tensions between the classical "law" and the modern "norm". Peters speaks of a "bureaucratic entrapment" inherent in the welfare state's participatory mechanisms which makes autonomous thought and authentic dialogue literally impossible and which sets effective limits to "law as critical discussion". Preuß deals with the contradictions between the static structure of legal subjective rights and the economic fluctuations which limit the welfare state's capacities. For Preuß 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 Febbrajo describes these system conflicts as conflicting constitutive rules of different social games which cannot be resolved by the rules of a "meta-game".

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 future perspective are arrived at. Three possible solutions can be distinguished: increasing effectiveness, de-legalization and legal control of self-regulation.

If in principle one holds to the overall control task of the law, the main problem of juridification will be the question of effectiveness. The point will then be to strengthen the cognitive, organizational and power resources in such a way that the law can cope in practice with its control function. In this sense, legal doctrine will have to shift its orientation from norm application to legal policy (Nonet and Selznick, 1978; Podgorecki, 1974; Wälde, 1979). The precisely opposite strategy aims at an ordered retreat of the law from the "colonialized" areas of life, either by a complete withdrawal of its regulatory function ("de-juridification" in the strict sense), or by concentrating its forces within the secured bastions of formal rationality ("re-formalization", Grimm, 1980). Finally, as alternative solutions

transcending the distinction between formalization and materialization of the law, strategies are discussed that amount to more abstract, more indirect control through the law (for the recent discussion on post-interventionist law, see Brüggemeier and Joerges, 1984). The law is unburdened from direct regulation of social areas and instead given the task of dealing with self-regulatory processes (e. g. Lehner, 1979; Gotthold, 1983).

The perspectives offered in this volume fall to a greater or lesser degree within the third category. If they neither remain sceptical as to any prognosis (Friedman) nor argue for the impossibility of bridging theoretical analysis with legal practice (Heller), they refer to the necessity of "regulation of self-regulation", with, however, important nuances among them.

Probably the most cautious perspective is developed by Luhmann. He argues for a legal self-restraint in the direction of legal self-reflection. "Possibly doctrine merges with legal theory specializing in reflection. Its domain could be the self-observation and self-description of the system" (125 infra). This means moving away from the idea of direct societal guidance through a politically instrumentalized law and restricting it to cope with social self-regulation. The perspectives of "relational program" (Willke, 1983 and infra) and "reflexive law" (Teubner, 1983 and infra) build on Luhmann's theory but attempt to go further and to re-formulate the role of the law in relation to other specialized social sub-systems. They see the role of the law in structuring inter-system-linkages and institutionalizing reflection processes in other social systems. These reflection processes would internalize external negative consequences into the system's structure.

The perspectives developed by Wiethölter, Habermas and Peters are normatively more ambitious. Wiethölter offers "proceduralization" as a formula for the role of the law in promoting and controlling the setting up of "social systems with a learning capacity". He identifies two types of proceduralization. One is a system-game of guidance and control which coordinates collective actors by a "concerted action" of mutual limitation of their autonomy ("Vernetzung von Freiheiten"). The other, and that which he prefers, is to institutionalize a societal "forum" in which social transformations are reconstructively and prospectively negotiated. This comes close to Habermas' concept of an "external constitution": Although law as a "medium" of societal guidance endangers the communicative structures of the legalized spheres of social life, law as an "institution" rooted in the core morality of a given society may facilitate communicative processes by guaranteeing the "external constitution" of the communicatively structured social sphere. Law as an "external constitution" can promote "discursive processes of will-formation and consensus oriented procedures of negotiation and decision-making" (218 infra). Relying explicitly on Habermas' concept of "herrschaftsfreier Diskurs", Peters develops a model of "law as critical discussion" and relates it to theories of

social modernity. He offers a series of structural components – procedure, citizenship, legal discussion, society as project, de-reification, legitimacy in depth – which support the role of law as a democratizing 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 threefold stratification of social justification structures: "firstly, 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" dogmatic 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 structuralist position which questions the central theses of system functionalism and critical theory. If one re-formulates Broekman's assertion as an open question, it may capture the central preoccupation of many if not all authors in this book on juridification 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?

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II

The Welfare State and its Impact on Law