Dilemmas of Law in the Welfare State

Edited by

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Foreword

This book ist part of a larger research project of the European University Institute in Florence. "Alternatives to Delegalisation" is the general theme of this project which has been conducted in the last three years by my friend and colleague Terence Daintith and me. The project aims at making a contribution, from the standpoint of law, to the current debate on the capacities and limits of the Welfare State. This debate reveals an increasing disenchantment with the goals, structures and performances of the Regulatory State. The political movement of de-legalization is just one manifestation of a much broader reappraisal of the systems of law and public organization, to which we want to contribute from both the standpoints of legal theory and legal practice.

One part of the project was oriented towards questions of legal theory. In a seminar series on the theme of "The Functions of Law in the Welfare State" we asked leading legal and social theorists from different countries to discuss with us the dilemmas which result from the transformation of the law in the Welfare State. This book reflects the results of the lively and stimulating discussions we had in the "jurisprudence group" under the guidance of the Institute's President, Werner Maihofer. It represents a continuation of earlier activities at the Institute on law and welfare state, especially the work on "Access to Justice in the Welfare State" carried out by Mauro Cappelletti and Joseph Weiler.

Given the variety of languages, cultural backgrounds and intellectual traditions, the editing process for such a book is not an easy task. Constance Meldrum who was heavily engaged in the editing process, especially with the linguistic problems, was faced with the problem of attempting to strike a balance between authenticity and accessibility, especially in the cases of French structuralism and German critical theory. Iain Fraser who translated some of the texts had similar experiences. I would like to thank both of them for their dedicated work. For thorough and precise editorial assistance my thanks go to Thomas Abeltshauser, Regina Etzbach and Elizabeth Webb, as well as to Brigitte Schwab, the Institute's Publications Officer, for her professional help in the final publication process.

Firenze, January 1985
Gunther Teubner

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I

Introduction

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

Legal Culture and the Welfare State

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Rapid social change is an obvious fact of modern life. Change affects every aspect of society, including law and government, systems which make up the very framework of organized society. Indeed, the structure of the state itself, in our times, seems new, seems dramatically different, compared to the structure of past societies, or societies outside the "developed" world.

This peculiar form of 20th century state is usually called the "welfare state," or, more broadly, the welfare-regulatory state. Basically, it is an active, interventionist state. Government is ubiquitous. It collects huge pots of tax money, and commands an enormous army of civil servants. It distributes billions in the form of welfare payments. In many countries, it runs the railroads, the postal service, the telephones; in others it has banks, steel mills and other enterprises in its portfolio. (Some of these may even make a profit.) It also controls the economy (or tries to). It has its hands on the money supply. It instructs businesses on what they can and cannot do. Its range of intervention is vast: on the one hand, it regulates mergers between giant corporations, on the other, it limits the number of people who sell candy and gum on street corners. It also tries to instil some sort of order in a crowded, busy society — it sets speed limits, controls access to television channels, makes up rules about who gets into state universities, and restricts the legal sale of aspirins and drugs.

Above all, it is sheer volume and scope that distinguishes the welfare-regulatory state from "government" in, say, medieval France, or in a New Guinea tribe: the number of rules and regulations, the size of the bureaucracy, the boldness and sweep of what the state tries to do. The state, in other words, is a giant machine for making and applying *law*. It is a giant machine of social control, but social control which is exercised through law. Hence the modern legal system evokes, quite naturally, the curiosity and interest of scholars. They worry about the state's capacity for providing justice — social justice as well as justice of the ordinary sort. They ask, what kind of legal system does a welfare-regulatory state generate? What is the role of law in this sort of society? How is it different from the role of law in other kinds of society? How can it be improved?

What is the future of law – and of justice – in the complex world of the welfare state?

These questions are not asked idly. There are important theoretical reasons for asking questions about law in the welfare state, and important practical and policy reasons too. One theoretical problem concerns the precise relationship between this form of state, and its legal system (see especially Aubert, Heller, Habermas and Wiethölter infra). One of the classic questions in legal sociology concerns the so-called autonomy (or lack of it) of the legal system. Simply put, the question is, where does one start, in trying to explain how legal systems behave? One extreme position is to look exclusively to social forces – social pressures from outside. Some scholars assume that the system is entirely controlled by these forces, whatever lawyers and others on the inside may think. Another starting point is to assume that the system is *autonomous*, that is, under its own control, and following its own logic, that it is not the creature of outside influence. Its development is explained in terms of habits of thought and concepts that operate strictly *within* the system, that is, inside the heads of lawyers and jurists. The system, in short, is "autonomous," insulated from the outside world, somewhat impervious to it, perhaps stubbornly so (for an exposition of this view see particularly Luhmann, Teubner infra).

An autonomous system is not necessarily a good one; and the same can be said for a "responsive" system, sensitive to the outside world. Indeed, both autonomy and dependency have their plusses and minuses, if we can judge by current debate (Teubner, 1983; Nonet and Selznick, 1978). The negative side of autonomy is formalism and dogged resistance to change. An autonomous system may be hide-bound, conservative, it may stick to old ways long past their time. Many people, of course, feel that law shows exactly these traits. Formalism, too, may be a mask for privilege: the rules favor the status quo, but in a disguised way; they pose as neutral norms, or as "legal science."

There is also something to be said *for* autonomy. An autonomous legal system is, or can be, one that asserts its own values, and resists the state, pressure groups, the howling mob, transient majorities, the selfishness of elites, the dogmatism and intolerance of voters – whatever. An autonomous system can preserve human values, can protects minorities and the rights of the citizen against Leviathan and Leviathan's public.

The arguments for and against a socially-responsive legal system, as one might guess, go exactly the opposite way. On the good side is sensitivity to policy, to social needs. On the bad side: helplessness against the power of the state. Obviously, the issue is central to our times (and most other times as well). The very power and scope of government throw the question of the power and scope of law into sharp relief. Scholars search for some middle ground, some reasonable posture between pure "autonomy" and

the pure servant of the state. They look for some way to protect human values, without crippling government, or impairing efficiency.

To put it another way: the problem is how to balance two principles. One principle is the rule of law — needed more than ever in a dangerous, complex world. The other principle is function: government, after all, has to work. Public business must go on — efficiently, quickly, and sensibly too. The welfare and regulatory state is a state committed to *programs*. Government is a problem-solver, as well as the guardian of law (see also Aubert 35 infra).

As one can see, there is a lively debate about how legal systems *should* behave, what balance they should strike between the two basic principles. There is also a question of fact: how do systems actually behave? Are they autonomous in fact, whatever the theory?

Scholars do not agree on the answer. Nobody thinks that the legal system is totally one way or the other. My own view is that on the whole, law in the real world is far from autonomous. On the contrary, it seems quite naked, quite exposed to outside influence, and at every point in time. But this proposition, put this way, is hardly self-evident. Most social scientists and jurists, of course, assume that the outside world has *some* influence on the legal system — how could it not? But many scholars argue, rather powerfully, that the system is basically autonomous, and even that its autonomy is increasing. This means that it follows, in the main, its own logic of development (Teubner, 1983 and infra). It receives and processes material from outside, but through its own "filtering" system, which alters and converts the incoming influences (Luhmann, 1969:59 and infra).

One reason reasonable people can hold such different views of the subject is because they are basically looking at rather different animals. The key (I think) is the mental picture which the word "law" conjures up. If you think of "law" as a rather abstract network of formal doctrines, concepts that jurists play with and law students study, nice questions which scholars chew over; and if you further conceive of "legal institutions" as consisting mainly of courts (and legislatures only insofar as they enact general codes), then the legal system certainly *seems* on the whole fairly autonomous. It is in part like a windowless room, in which a little bit of light at most shines in from the outside world; in part, it behaves like Luhmann's system, carefully fitting and processing selected inputs from outside. If, on the other hand, you think of the *whole* legal order, especially today, you get a different impression. It is hard to avoid the conclusion that the "outside" played a dominant role in creating the huge apparatus of the modern welfare state, and the complex machinery for regulating business. When one considers *all* branches of law, and all institutions, including the police, that make and apply norms, not to mention the work of lawyers in shaping

business transactions, one sees far less "autonomy" than if one looked only at the little corner defined as "law" by law schools and jurists.

Our assumption, then, is that the legal system, as a whole, has only limited autonomy. A second assumption is that the debate about autonomy is somewhat misguided. Some jurists seem to equate an *autonomous* legal system with an *independent* legal system; but these are quite separate and distinct. When we think about protecting minorities, or preserving human values against the power of the state, we usually have *independence* in mind. By this we mean that courts (or other institutions) carry on their work free from domination by the regime; they go their own way, pursue their own values and goals. An independent legal system *may* be autonomous, but it does not have to be.

The United States Supreme Court provides an excellent illustration. The court has thwarted the government, time and again; time and again it has defied the will of the majority (insofar as we can measure it), on behalf of racial and religious minorities, prisoners, poor people on welfare, and many others. Yet the court has not been "autonomous," whatever its pretenses, if by autonomous we mean to suggest that the court is not heavily influenced by outside events and opinions. The court discusses policy sometimes quite frankly, and there is little about its recent work that is deductive or formalistic. The court has moved markedly in the direction of "policy," of substantive rationality, and away from conceptualism and formal rationality.

An independent legal system, in other words, pursues its own brand of policy. This is usually based on current social opinion, at least as held by "enlightened" or "liberal" members of society. The modern welfare state badly needs true independence in its legal system (or at least in some parts of the system), to curb or counterbalance the power of the state. Whether "autonomy" in the sense of formal rationality is good for anything is a serious question. My own hunch is it is not. Of course, those scholars who defend the "autonomy" of the legal system in modern times do not equate autonomy with formal rationality. They insist the two are quite different. But it is hard to see what development in terms of the "inner logic" of the law would mean, if did *not* mean formal rationality in Weber's sense.

The starting point here, then, is an expansive view of law. The starting point is also a group of societies, that have, on the whole, *independent* judiciaries (although some are more independent than others). Other important segments of the legal system also have structural independence. This is notably true of a good deal of the work of the civil service. Consider for example, an administrative agency charged with deciding whether or not to allow food companies to add a certain chemical preservative to food products. In most countries, the agency will decide on technical and economic grounds, largely free from the control of the central regime.

But these "independent" parts of the legal system are not, in any sense, "autonomous." To the contrary. Western societies are relatively open societies; thus all parts of the government are (more or less) exposed to electoral influence, public opinion, interest groups, and so on. The decisions do not take place in a vacuum, even if they are not crudely subject to state coercion. "Independence" is a relative term. It means, basically, discretion to choose among a range of means and ends. It means that no boss can fire the decision-maker simply because the decision does not suit the boss' fancy. But public policy notions affect the decisions nonetheless. And all modern systems try to balance control and discretion, independence and accountability, with more or less success. (There seems to be no way to avoid the *general* problem.)

The legal system, in short, is a ship that sails the seas of social force. And the concept of *legal culture* is crucial to an understanding of legal development. By legal culture, we mean the ideas, attitudes, values, and beliefs that people hold about the legal system (Friedman, 1975:194). Not that any particular country has a single, unified legal culture. Usually there are many cultures in a country, because societies are complex, and are made up of all sorts of groups, classes and strata. One should also distinguish between *internal* legal culture (the legal culture of lawyers and judges) and *external* (the legal culture of the population at large). We can, if we wish, also speak about the legal culture of taxi drivers, or rich people, or businessmen, or black people. Presumably, no two men or women have exactly the same attitudes toward law, but there are no doubt tendencies that correlate systematically with age, sex, income, nationality, race and so on. At least this is plausible. It is also possible that the legal culture of Germany as a whole is different from the legal culture of Holland, in ways that can be intelligibly described; and even more so compared to Honduras or Chad.

Social scientists, approaching the legal system, begin with a master hypothesis: that social change will lead, inexorably, to legal change. This of course puts the matter far too simply. If one asks, *how* social change leads to legal change, the first answer is: by means of legal culture. That is, social change leads to changes in people's values and attitudes, and this sets up chains of demands (or withdrawals), which in turn push law and government in some particular direction. How the first step takes place, what the mechanism is, remains obscure. We know that social change correlates with deep, mysterious changes in ways of looking at the world. The industrial revolution went along with a massive change in consciousness. How the two were related is a question best left unexplored, at least by jurists.

In this paper, I propose to modify somewhat the usual way of explaining legal change. Ordinarily, the legal historian or social scientists goes directly (and somewhat mysteriously) from an event or series of events in the

outside world (the invention of the railroad, say) to change in the behavior of the legal system (shifts in the law of accidents, for example). Here I add one step in between: change in legal culture. I look for specific changes in legal culture, which might be of use in explaining certain aspects of the welfare state — that is, how and why social change translated into specific sorts of legal change.

There is, naturally, a serious problem of method and evidence. The habit (or vice) of taking opinion surveys is pretty recent. There is no way to measure attitudes toward law in the past in any systematic way. Opinion surveys, however imperfect they are today, simply did not exist. Hence much of what is said here is basically guesswork. Still, it is worthwhile to put forward a few ideas, which might at some time be followed up by deeper explorations in the sources.

Public Law and Private People

This paper began by pointing out what is surely the most striking aspect of the modern state: its size. The state is big in every dimension. It has the money, it has the people, it has the jobs. Anywhere from a quarter to half of the gross national product flows to and through the central government. In most Western countries, a solid majority of the population either works for the government or gets some sort of money benefits — a pension, a family allowance, welfare. Thus most people, at some point in their lives, will get paychecks from public funds. Moreover, the power of the state is limitless (or seems that way). It has the police, the tanks, even the hydrogen bomb. There also seems no limit to the areas of life the government can touch. Thumb through the pages of law-books, codes and statutes: the range of activities grounded in law, and centered in government, is truly incredible. Nothing seems immune (see also Brockman infra).

What is the source of all this growth? Certainly, at one level, it must be true that the increase in scope and power has been in response to demands from society itself. The state did what people wanted it to do ("people" here meaning whoever had influence or power). To take one simple example — product safety: how did it come about the the government regulates food products, that it decides what chemicals can be added to cans of soup or vegetables? Clearly, pressure from the public — elites and ordinary people alike, in this instance, so that one does not have to assume, naively, that laws of this sort are the result of sympathy for the common man. The rich are as unwilling to trust the market to get rid of poisoned foods as anybody else.

Technological and social changes in society, of course, lie behind the rising demands. There was no canned soup in the middle ages. All societies

are interdependent, but in modern industrial society there is a new, peculiar form of interdependence. *Strangers* are in charge of important parts of our lives — people we do not know, and cannot control (see also Ewald infra). We no longer always make our own soup; often we buy it. The same is true of our bread, our clothes, our furniture. The people whose hands and machines create the conditions of life we depend on are totally invisible to us. We never see in person the people who make and repair automobiles, busses, trains, and airplanes. We never see in person the people who make sure the water we drink is pure and safe. But if these people are careless in their work, their mistakes can kill us. We cannot control the processes *personally*, cannot influence the outcomes. Yet the process *can* be controlled. Hence we demand norms from the state, from the collectivity, to guarantee the work of those strangers whose work is vital to our lives, which we cannot guarantee by ourselves.

Out of this cycle of demands, the modern state builds up a body of health and safety law. The rules become denser, more formal. *Informal* norms are effective in regulating relationships, for small groups, families, people in face to face contact, in villages, in tribal life. They are not good enough for relationships among strangers, who "meet" only in the form of a product that one group makes and the other consumes; or who "meet" in an auto accident. Informal norms do not work for many problems and relationships in large, complex, mobile societies, when the villages have shattered into thousands of pieces, only to form again into the great ant-hills of our cities. For such societies, and such relationships, people demand active intervention from the generalized third party, or, in other words, the law.

I have used health and safety regulation to illustrate this point, because it is easiest there to see how the process of building up law and the state goes on. But the same forces are at work in creating the social insurance programs that are the heart of the welfare state. No doubt feelings of humanity — a sense of kinship and sympathy with the poor — explains some of the great growth of welfare laws. But one usually gets further in explaining social processes (alas) by looking for rather selfish motives, or at least for mixed motives, than in relying on pure altruism. Most of these programs benefit the strong, active middle class in some way. Old-age pensions, for example, relieve the middle class of the burden of supporting their elderly parents, in a society where family ties are strained, and in which people live longer lives.

But the main point here is a somewhat different one. It is that, in fact, the same interdependence which led to health and safety regulation created demands for forms of social insurance. There was no "unemployment" in a medieval village. Starvation and poverty, yes, but not gangs of steel workers laid off because of foreign competition, or recession, or automation. Modern unemployment is felt psychologically as a catastrophe not

so very different from defective automobiles or poisoned soup. That is, mysterious strangers, who control economic process, seem to bring it about. It too evokes a demand for a social, that is, a legal solution — if not guaranteed jobs, then at least unemployment compensation.

Yet the more the state undertakes, the more it creates a *climate* that leads to still further increases in demand. This is because of a fundamental — and very natural — change in legal culture. State action creates *expectations*. It redefines what seems to be the possible limits of law; it extends the boundaries. After a while, what is possible comes to be taken for granted, and then treated as if it were part of the natural order. Taxes creep forward slowly, benefit programs are added on one at a time, programs of regulation evolve step by step. Each move redefines the scope of the system. The next generation accepts what its parents argued about, as easily as it accepts sunshine and rain. Expectations, then, have been constantly rising.

This is one reason why the welfare state is so sticky and inelastic; why movement always seems to flow in one direction: more. Patterns of expectation, like patterns of interests, are exceedingly difficult to change. This leads to a general theory of "crisis," a theory that the modern welfare state is "ungovernable" (for assessments and critique, see Lehner, 1979; Schmitter, 1981). Some scholars blame "ungovernability" on excessive expectations, or on the fact that the state makes too many promises (Brittan, 1975). Obviously, especially in hard times, the state has trouble keeping its promises; and population trends (too many old people on pensions) make things worse. All this has helped evoke conservative backlash, which such leaders as Reagan and Thatcher exploit. Conservatives want to cut back the welfare and regulatory state; more fundamentally, they are trying to change patterns of expectations. Most observers expect them to fail. Their policies have, in fact, only scratched the surface; the core of the welfare state seems remarkably solid, remarkably hard to change. There may be — and has been — some slight retrenchment; a pause in the movement, but so far nothing more.

I spoke loosely about levels of "demand." A demand is a kind of claim, which depends on a subjective feeling that there is some chance of getting what you ask for. Nobody asks the government for life after death or for good rain in the growing season. The state cannot provide these things, and everybody knows this. Demands on government in the 19th century were restrained by the feeling, in area after area, that there was nothing that could be done. People believed that the state was powerless to affect their lives in all sorts of ways, or to control the economy. This was in fact basically true. The government had about as much of a handle on the economy as it had on the weather. Nor could anybody in the early part of the 19th century do much about disease, for example. Public sanitation measures were primitive, and the causes of disease were obscure. Boards

of Health came into being only in the middle of the 19th century (for the United States, see Rosenberg, 1962).

Science and technical improvement are of course a large part of the story. The germ theory, for example, helped bring about a revolution in medicine, and today doctors are actually able to cure people. The expanded role of government in health policy was unthinkable before the expansion of modern medicine. Railroads, telephone and telegraph, airplanes, automobiles, air conditioners, computers — all of these inventions had an effect on society which is simply incalculable. What they have in common is that they increae human *control* over nature — and over other human beings. Who exercises this control? In large part, the government.

This, incidentally sheds light on the notion, already noted, that the modern state is "ungovernable," or that some sort of "crisis" has gripped modern society, which lacks "capacity" to solve its problems, and therefore cannot maintain "system integration" (Habermas, 1975:11). I tend to be skeptical about the idea of such a crisis. But in any event what is meant is some sort of imbalance. The system is out of whack. *Demands* increase faster than the system's ability to meet them (for the development of a similar view see also Preuß infra). After all, the *absolute* capacity of modern government is incomparably greater than ever before; on this score, there is simply no comparison between modern and pre-modern states.

This was because so little was expected from law, state, and government. Indeed, little was expected, in some ways, from life itself. It is important to remember the gross conditions of life in past centuries, even so recently as a hundred years ago. Life was overhung by a tremendous sense of insecurity. Uncertainty was part of the human condition. Death entered the houses of rich and poor, suddenly, unexpectedly, inescapably. Its favorite victims were small children, and women in childbirth; but no one was spared the danger of sudden death from plague and disease, scourges which could not be cured or controlled (Stone, 1979).

Modern medicine, with its vaccinations, its medicines, its antibiotics, has made a tremendous difference in the quality of modern life. Medicine and technology have transformed uncertainty into a sense of (relative) security. People no longer expect their children to die off; the shadow of death does not hang over women giving birth. When people get sick, they expect the doctors to cure them. We consider death before old age the exception, not the rule.

The overwhelming, ghastly uncertainty of life was not simply a matter of health and disease. Economic uncertainty was almost as great. Whether the Industrial Revolution made daily life harder for the mass of society, whether it made daily bread more painful, is a difficult question. But whatever the answer, it is clear that in, say, the middle of the 19th century, chance, fate, and accident governed the economic condition of millions of people, almost to the same degree as they governed life itself. There was

of course no such thing as unemployment insurance. There was nothing at all like the modern system of banking and currency. The government did not insure deposits in banks. When a bank failed — which happened with depressing regularity during the various crashes and panics — depositors simply lost their money. Fraud and the business cycle played havoc with investments. A merchant or storekeeper stood to lose everything if a ship sank, or creditors and customers went bankrupt, or a storm of financial distress swept over the community. Finance and commerce, like health, were completely out of control.

Of course the average person did not own ship-cargoes, or invest in stocks and bonds. The average person was a farmer, or farm laborer, a factory worker, or the wife of one of these. For all these people, there was not much security, though life was on the whole easier in some countries than in others. In the United States, economic opportunities were greater than they were in most European countries, and there was less outright hunger. But nobody had job security. In big city factories, when times got bad, the owner laid off workers or cut wages, or simply fired some men. Coal miners, railroadmen, textile workers lived from payday to payday. There were no private or public pensions to speak of. Life insurance was uncommon, and in any event few people could afford it in the 19th century (Zelizer, 1979; Keller, 1963). If the man of the house died of cholera, or lost his job, or was crushed by a machine at the factory, his wife and children might be left destitute, unless they had friends or family to support them. "Poor relief" there was, but it was poor indeed and little relief. Increasingly, after the early 19th century, "poor relief" meant the humiliation and squalor of the "poor house" or "poor farm." Nobody went willingly to these places — nobody, that is, of respectable background — except out of desperation, as a last resort.

The farmer was not much better off. There were no crop subsidies, no government programs that guaranteed him an income, or took excess butter and peanuts off his hands. If locusts ate his crop, if wind and weather destroyed it, if the price of wheat fell disastrously, the loss fell on him and his family, and on nobody else. Typically, the farmer's land was mortgaged to the hilt, to pay for farm machinery, extra land, or seeds and tools. If bad times came, the family stood to lose land and living, almost without warning (Friedman, 1973).

Life was, in short, a drama of infinite uncertainty, and this was so well known that people accepted it as the principal fact of human existence. The uncertainty of life must have had a profound effect on legal culture. People *expected* misfortune, and they expected "injustice" — not necessarily human injustice, but the injustice of an unjust world, a world so arranged as to strike out in capricious and unfair ways, or at any event, mysterious, unfathomable ways. Many people took refuge, as they always had, in

religion. Some trusted to chance or luck. But they did not look to law, or the state, for salvation.

In every period, there is a kind of short-run balance between demands on state and law, and the supply of reponses — the capacity of the system, in other words. This balance is fragile and easily broken, as the riots and revolutions of the 19th century attest. There was, in particular, an acute, growing demand for change in political structure. The right to vote spread to the middle classes, then to everyone, including women. But the demands for political reform did not imply demand for what one might call *justice in general.* There was no generalized expectation of justice. Nor was there a generalized expectation that society owed everyone some social minimum, or that the state would actively protect health and safety, in some general way. One barrier that stood in the way was ideology: 19th century laissez faire, and the theory of the night-watchman state. But the power of ideology as such has been, I suspect, vastly exaggerated. What really controlled the level of demands was quite a different aspect of legal culture: ideas about what the state *could* not do, rather than what the state *should* not do (see also Aubert, Wiethölter infra).

People also had low expectations as far as *private* obligations were concerned. No doubt people expected business bargains to be carried out, though insolvency or unforeseen events could always frustate plans. For personal injury, the situation must have been quite different. In a society with sudden accidents, and very little insurance, there was no *general* expectation that somebody would pay for a lost leg, or a worn-out lung, or a life snuffed out at a railroad crossing (Friedman, 1980).

In the contemporary world, the situation has turned upside down. A great revolution in expectations has taken place, of two sorts: first, a general expectation that the state will guarantee total justice, and second (and for our purposes more important), a general expectation that the state will protect us from catastrophe. It will also make good all losses that are not our "fault." The modern state is a welfare state, which is also an insurance state — a state that knows how to spread the risks (see also Aubert, Ewald, Preuß infra).

The relationship between technology and changes in legal culture are in one sense very simple, in another sense very complicated. Let us take, for example, the problem of kidney dialysis. This is a medical technique which saves the lives of people with severe kidney failure. Not long ago, these people were doomed. Today they can be kept alive; but it is an expensive business, and nobody but the very wealthiest people could possibly afford it without a subsidy. The government, then, has to pay for kidney dialysis. This is expected and (to be sure) it is the rule, embodied in positive legislation.

Obviously, without the medical discoveries, there would be no demand on the government for these large amounts of money. But technology does

not *create* demand; all it does is make demand possible. There is at least one more step in the process which has to be explained. If we had to guess, we might imagine something like this: the "cure" for a disease gives the victims hope; victims then have concrete institutions to blame if the "cure" is not made available. It is no longer luck, fate, or the finger of God, but a process under human control. And, in a society of strangers, only "the law" has the leverage to make the machinery move.

Reduction of uncertainty leads to increased demand for public action. It is, in a way, a chicken and egg proposition; but the stages in the process are apparent, at least in rough outline. Mortality is no longer the scourge it used to be. Mothers and fathers in Western countries do not expect their babies to die. Childbirth is no longer a major cause of death. Families can control much better the number of children they have. Economic life is also in some senses (of course not all) more secure. Nobody expects banks to fail. If they do, government insurance covers the depositor. This has been true for about 50 years in the United States. "Runs" on banks should no longer occur.

People, of course, still lose jobs. But they can at least collect unemployment insurance. This helps to tide them over, until they find another job. The general welfare system, whatever its faults, will keep them from sinking into complete destitution. Nobody starves. The currency is (relatively) stable. Life expectancy has increased. There are public and private pensions, and they protect most people in society. Doctors' bills, in many countries, are covered by state insurance. Even in the United States, people over 65 years have health protection (Medicare); and company or union plans protect millions of workers and their families. In some countries, medicine has been socialized outright, and disease is no longer an economic calamity at all, as it still is for many people in the United States.

The state, government, or legal system had little or nothing to do with changes that made some of these developments possible — the discovery of antibiotics, for example. The spread of life insurance and private pension plans also took place outside the formal apparatus of the state. Law had a lot to do with social insurance, of course, and with stabilizing currency and banking; the development of product liability, free public education, and subsidized medical care, also took place through law and the state.

Whether public or private, however, all these developments combined have radically transformed society — so radically in fact that we take these matters for granted. The insecure society is now the welfare society — life is still hard, still uncertain, but collective action has succeeded in cushioning the blows in important regards. Of course, people still face enormous uncertainty. In some regards, uncertainty may be *greater* than before. Think, for example, of the difference between a society of arranged marriages, and a society in which people are expected to find, and choose, and keep, all

on their own, and out of the millions in the world, the single best partner for their lives. Or consider the differences between traditional society, as it was before the Industrial Revolution, with its cushion of custom and habit, and the rootless life of so many people in great cities. I am not arguing that people are better off, or should feel that they are. These are different issues.

What I am saying is that the reduction of uncertainty in some areas of life is a fact; and to an astonishing degree; and that this leads to changes in cycles of demands and responses, in short, to a changing legal culture. (I am talking of course, about the so-called advanced countries. The peasant in Bangladesh still faces certain ancient uncertainties, that the Swiss or Swedish farmer never has to think of any more.)

To repeat: What is possible always affects what the population expects and demands. People do not suppose that government, even in Switzerland, can prevent an avalanche or cure a drought. People do not blame government for auto accidents or pneumonia. But in other regards expectations have drastically altered. As uncertainty — sudden death and sudden disaster — declines, the legal culture changes accordingly. There is a general demand for still further reduction of uncertainty; payment for losses, and social insurance to soften the blows of economic ups and downs.

People also expect health and safety regulation, and indeed this is demanded, to control and prevent all kinds of calamity. The citizen also expects tall buildings to be inspected. She expects that planes will not crash, that wheels will not come off busses, that trains will stay on the track. And more: that elevators will not break their cables, food products will be free of botulism, and pure water will come out when the tap is turned on. If these expectations are *not* met, then some agency of government, or some institution, is at fault, and somebody must pay and take the blame: the manufacturer, perhaps, or the government itself. And the legal system will provide — *must* provide — machinery to make sure all this happens, whether by way of prevention, or cure, and certainly by payment of damages.

The thesis here, in other words, is about *legal culture*. This, we suggest, is a key variable in explaining the rise and life-cycle of the welfare-regulatory state. I have pointed to some specific aspects of legal culture that are, I feel, directly relevant. It will no doubt strike some readers that we have left a great deal out of the story. Nothing much has been said about tradition, politics, ideology; about capitalism itself and its variants, or about the rise of various forms of socialism, to mention only the more blatant omissions. Surely these are part of any meaningful account of the modern welfare state.

And of course, they are. Moreover, there are great differences in the experiences of the various countries. They have started off in different places, and gone about their business in very different ways. The history

of the welfare state in America is, on the surface at least, strikingly different from its history in England; and both seem far removed from the experience of France or Germany, or the Scandinavian countries.

But it is all too easy to get lost in a forest of details. History is not usually written from a comparative perspective. It pretty much sticks to individual countries, and no wonder. The scholar needs all his skill to deal with (say) an account of the welfare state in England; it is too much to expect him, for comparative purposes, to cast his nets on Belgium or Italy as well, not to mention such exotic locales as Argentina or the United States. It is easy, too, to treat each country as unique. Bismarck's role in the rise of German social legislation (for example) is well known; and Bismarck of course cannot be duplicated anywhere else.

Yet it is also striking to see how individual histories do converge, in the long run. The question is: why? One way to explain this is in terms of cultural diffusion or intellectual influence. England sees social insurance in Germany and says "aha." The United States sees it in Britain. Important books get translated. Travelers bring back news, just as Marco Polo brought the noodle back from China. One country sneezes, and the others catch cold.

But cultural diffusion, as a tool of explanation, is ultimately inadequate. Societies copy what they want to copy, and what appeals to them. The question then is: why do they want to copy? It is at least as plausible (I think more so) to use similarities in *stimulus* to explain similarities in response. After all, modern medicine, the railroad, telephone, automobile and computer are common to all Western countries. Not that the welfare and regulatory state is a single, inevitable reaction to technological change. I am simply repeating the proposition I began with: social change leads to changes in legal culture, which in turn lead to legal change. A spiral of demands is characteristic of the welfare state; the spiral stems from specific changes in legal culture, which I have tried, rather briefly, to sketch out, and to relate to gross facts of social change in the modern world.

"Social change" is the first and most crucial term in the equation. New technology leads to social change. Technology does not explain everything that happens in modern society, but it is important, and must be taken into account. The countries of the West have been part of a single great adventure in social change. They have gone through the experience together, and it has had grossly similar effects on their legal cultures, hence on demands for law, hence on the system's responses. Of course, we deal here with interaction effects, not lines of cause running in a single direction. But the overall point is the same.

I used the word "equation," but this should not be taken literally. The terms are in no sense mathematical. They are statements (at best) of general correlation — *very* rough ones — and of probabilities. There is always static and noise in the data. We can explain, at most, only part of the

variance. The rest *is* local history and tradition, which is important in its own right. Nor does any single theory "explain" the experience of nations. All I have tried to do, in a preliminary way, is point up one factor, too often overlooked in the biography of modern states – the distinctive legal culture of our times. I have also tried to suggest, in a rough and ready way, some specific aspects of legal culture which help explain, at least from one standpoint, how the welfare-regulatory state came about.

But not, of course, where it is going, and what will become of it. I for one do not feel able to express opinions on this subject. It is rash to predict stability or revolution, or any combination. The past does *not* (I feel) give us strong enough clues for this kind of prediction. History is not much of a science. If there are "laws" of history, nobody has found them yet. History, someone said, teaches only one thing: that there is nothing to be learned from it. This goes a bit too far. But it is hard enough to find patterns in the past; nothing we know warrants projecting the past into the future.

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The Rule of Law and the Promotional Function of Law in the Welfare State

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Let me start by briefly indicating what I mean by law, and then present some of the various interpretations attributed to the concept of the rule of law. After then having enumerated the tasks (functions) of law, I shall consider some of the legal changes that have taken place during the last hundred years or so and which have shifted the emphasis of the law from a predominantly preventive mode to one which also includes promotion of economic growth and of welfare (Aubert, 1983:152).

What is Law?

I want to avoid an explicit definition of law. Such definitions are usually presented because of a need to distinguish normatively relevant rules and decisions from normatively irrelevant rules and decisions. Since the following presentation aims only at a description and analysis of phenomena that ought to be studied in their interrelationship with each other, no such restrictions are necessary. Illegal police activities are of interest to the sociologist of law, as are the efforts of legal counsel to propagate interpretations of customary or statutory law which may deviate from precedent and accepted legal doctrine.

Certain phenomena are by consensus and without hesitation considered legal, such as the activities of the courts and of the personnel which aid the courts in enforcing their decisions, such as the police and prison authorities. Also, the legal profession can be seen as "officers of the courts", although this does not cover all their activities or even most of them. However, legal training is another focal point for studies of legal phenomena, whereby a sociology of law may have occasion to study the possible impact of this professional training upon people who are managers of private firms or who fill non-legal posts in the civil service. Legislation is a third focal point. Here it is impossible to draw a clear line of distinction