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Juridification of Social Spheres

A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law

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Preface

The juridification of social spheres appears as a disquieting modern trend in several different national cultures. Although the large variety of national experiences with juridification cannot be summarized in a unifying formula, it is important to note that juridification is not to be understood primarily as a quantitative phenomenon of the growth of law and regulation. Rather, it has to be seen in its qualitative dimensions, that is, as the emergence of new structures of law to keep pace with the growth of the welfare state. To the degree that the law is used for the regulatory and compensatory purposes of the welfare state, extensive changes in the structure and function of law are involved. In addition, recent trends of crisis in regulatory law seem to be closely connected to the more general crisis of the welfare state. One fascinating aspect of the debate on the crisis of the welfare state and the law is the emergence not only of the concepts of delegalization and deregulation but also of alternatives to delegalization, that is, of forms of legal discourse which avoid certain fallacies of regulatory law without abandoning the idea of an active role of law in shaping social institutions.

The modern phenomenon of juridification was the central theme of a larger research project which Terence Daintith and I conducted at the European University Institute in Florence. The results of this project were presented in March 1985 at a conference on "Law and Economic Policy: Alternatives to De-Legalization". The contributions with an economic policy orientation are to be published separately in a volume on "Law as an Instrument of Economic Policy" edited by Terence Daintith; this volume instead concentrates on juridification in the fields of labor, industrial organization, antitrust and social security.

The book grew out of a close cooperation with the *Deutsche Gesellschaft für Rechtsvergleichung*. After a first workshop in Florence under the guidance of the European University Institute's President, Werner Maihofer, the Department of Fundamental Legal Research of the Comparative Law Association, directed by Friedrich Kübler, organized a session on juridification at its 1983 annual conference in Bonn. The results were published in a book by H. Zacher, S. Simitis, F. Kübler, K. Hopt and G. Teubner, *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität: Vergleichende Analysen,* Baden-Baden: Nomos, 1984. Subsequently the comparative and international aspects were systematically broadened with experts from several European countries and the United States being asked to compare their recent national experiences in juridification and to offer their theoretical interpretations. We have tried to provide a well-balanced selection of national approaches, but unfortunately, since the colleague invited from France had to cancel his participation at a late date,

French ideas on juridification will be expressed exclusively in more abstract terms in the general part of this book.

I would like to thank Eve Lerman, Constance Meldrum and Elizabeth Webb for their precise and thorough editorial assistance, and the Institute's Publications Officer, Brigitte Schwab, for her helpful activities in coordinating the publication.

January 1987 Gunther Teubner

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Bremen, Firenze

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1. Introduction

Juridification is an ugly word — as ugly as the reality which it describes. The old formula used to describe the excess of laws, *fiat justitia, pereat mundus*, at least had the heroic quality of a search for justice at all costs. Today we no longer fear that the proliferation of laws will bring about the end of the world but we do fear "legal pollution" (Ehrlich, 1976). The bureaucratic sound and aura of the word juridification indicate what kind of pollution is primarily meant: the bureaucratization of the world (Jacoby, 1969; Bosetzky, 1978: 52). To put it in the language of sociology: law, when used as a control medium of the welfare state, has at its disposal modes of functioning, criteria

of rationality and forms of organization which are not appropriate to the "life-world" structures of the regulated social areas and which therefore either fail to achieve the desired results or do so at the cost of destroying these structures. The ambivalence of juridification, the ambivalence of a guarantee of freedom that is at the same time a deprivation of freedom, is made clear in the telling phrase "the colonialization of the life-world", which was coined by Habermas. Social modernization at the expense of subjection to the logic of the system and the destruction of intact social structures is the essence of this idea (Habermas, 1981: 522; 1985: 203).

Expressed in this extreme, dramatic form, juridification describes a reality which is not merely a problem of jurists, nor a national phenomenon. *Verrechtlichung* does not only spring from the well-known Teutonic tendency towards overregulation, so the discussion of the problem is not confined to German jurisprudence. Although national divergences exist (see Daintith 1987) the phenomenon is universal, and the debate international and interdisciplinary. In the United States in particular a lively debate is going on about the "legal explosion", the "regulatory crisis" and "delegalization" — a debate in which not only lawyers and jurists but sociologists and economists are particularly involved[1]. If one attempts — and this is the aim of this introductory essay — to bring together some of the different strands in this discussion, the results may be instructive for all who participate in the debate. National peculiarities will then be able to be seen in the light of their universal elements. Sociological generalizations can be corrected when viewed from within the laws if they are set against specific legal material. On the other hand a dynamization of the strictly juristic perspective could be hoped for if extralegal modes of interpretation are actually taken up and not simply dismissed. However, one must remain sceptical about the possibility that such learning processes will actually lead to perspectives for solutions. The problem of "juridification" is too abstractly formulated for this and as such is perhaps even insoluble. What *can* be achieved is tentative answers to three questions: How and to what extent is the expansion of law into the social environment contingent and reversible or necessary and irreversible, and how is it connected to wider societal developments? How and where are the limits of legal growth becoming apparent? And can guidelines for a kind of legal growth which is less damaging to the social environment be given? For each of these complexes of questions a proposition can be elaborated. The first complex concerns the *definition of the problem* of juridification. In the current debate, the term has come to designate so many diverse phenomena that it must be carefully delimited before any sensible pronouncements can be made about it at all. It is scarcely illuminating to subsume all tendencies towards

[1] For previous discussion of "creeping legalism", cf. Fuller, 1969: 3; Shuklar, 1964; Nonet, 1969; Friedman, 1975; Galanter, 1980: 11, 1981: 147; Abel, 1980: 27, 1982; Mitnick, 1980; Wilson, 1980; Breyer, 1982; Stewart, 1985. Cf. the results of a German/American conference on regulatory control, Trubek, 1984.

proliferation of law or all legal evolution under the heading "juridification". In such a case one would have to be content with a mere stock-taking of contradictory and heterogeneous developments under the relatively arbitrary heading "Developments in Law in the World of Industry, Work and Social Solidarity". The phenomenon of juridification becomes a subject which is analyzable, interpretable and strategically appropriate only when — and this is the first proposition — it is identified with the type of modern "*regulatory law*" in which law, in a peculiar fashion, seems to be both politicized and socialized. This type of law must then be related to Max Weber's concept of "*materialization of formal law*". This will provide an analytical framework in which both naive delegalization recommendations of the "alternatives to law" movement and politically motivated "de-regulation" strategies can be adequately and critically assessed. Here the changes which law itself, in its function, legitimacy and structure, has undergone in the process of juridification also become clear.

The second complex of questions relates to limits to the growth of regulatory law. Is it possible to discern fundamental limits of juridification in so far as certain juridification processes prove inadequate in the face of regulated social structures and/or constitute an excessive strain on the internal capacities of law? The argument I would like to propose here is that this is not merely a problem of the implementation of law, nor of the use of state power, nor merely of the efficiency of law in terms of the appropriateness of means to ends, but it is a problem of the "*structural coupling*" of law with politics on the one hand and with the regulated social fields on the other. Once the limits of this structural coupling have been overstepped, law is caught up in an inevitable situation which I propose to examine more closely under the heading "*regulatory trilemma*".

If, thus, the "regulatory crisis" is adequately interpreted, the third question that arises is how to assess the various proposed therapies and alternative strategies. Are there alternatives to juridification which at the same time do justice to the social guidance requirements of politics, the special properties of the respective social areas and the inner capacities of law? The proposition I would like to put forward here is that neither the various suggestions on improvements in the implementation of law nor the numerous recommendations on delegalization take adequate account of the problem of structural coupling. Intellectual attention and institutional energies should be concentrated on a series of conceptions which go beyond materialization and reformalization and amount to more abstract, more indirect control by law. What these conceptions have in common is that they look for models of "socialization of law". Among the relevant terms here are: "semi-autonomous social fields" (Moore, 1973: 719), "negotiated regulation" (Harter, 1982: 1), "officially sponsored indigenous law" (Galanter, 1980: 26), "proceduralisation of law" (Wiethölter, 1982a: 38, 1982b: 7; 1985), "ecological law" (Ladeur, 1984), "reflexive law" (Teubner, 1983: 239ff., 1985: 299ff., 1986b), and "relationing programmes" (Willke, 1983a: 62); in short: *legal control of self-regulation* (Teubner, 1983: 239ff.). This term refers to different legal

programs which, sometimes more, sometimes less explicitly, define structural coupling as "legal self-restraint" and which, therefore, are appropriate as a means of reducing legal pollution.

2. Concepts

A precise use of terms and definitions is necessary, especially in the case of juridification, not just for the sake of terminological clarity but, as already indicated, to create a working framework in which to examine the complex phenomenon of juridification. Furthermore, when we are using a term as polemical as juridification it becomes clear that the term not only enables us to make definitions but also provides options. Options are empirical analyses of the historical situation on the basis of which evaluative assessments are made, strategies chosen and decisions taken (Luhmann, 1981: 118; Rottleuthner, 1985: 9ff.). Notions of juridification always contain a theory of the conditions in which it developed, an evaluation of its consequences and a strategy for dealing with it. A clarification of the term would therefore have to lay bare these three elements in the different ways in which the term is used. At the same time it would have to state the reasons why one of the options is finally chosen.

2.1 Legal Explosion

In legal discussion juridification is described primarily as a growth phenomenon[2]. Fear-laden terms such as "flood of norms" or "legal explosion" (Barton, 1975: 567) underline the disquieting effect which the rapid expansion of law has had on the legal profession and the general public alike. Especially in those areas of the law which cover the world of industry, labor and social solidarity — labor law, company law, antitrust law and social security law — the enormous quantitative growth of norms and standards is noted and criticized. From a certain threshold onwards, those involved are overtaxed. The enforcement of law is damaged, credibility suffers and a high level of dogmatic mastering of legal material becomes impossible (Heldrich, 1981: 814). In all four areas of law it can be observed from a comparative perspective that consistency control of norm and decision making material as well as the construction of conceptual structures — the two classical tasks of legal doctrine — is giving way to a new mode of thinking — "case-law-positivism" as Zoellner polemically terms it. This style of legal thinking is content to analyse developments in judicial decisions and to produce ad-hoc criticism of their "policies". As an observer from outside has noted: "The disastrous state of modern positive law lies in the incoherence of large numbers of norms which are produced procedurally in response to a particular situation and are

[2] Berner, 1978: 617; Boerlin *et al.*, 1978: 295; Hillermeier, 1978: 321; Weiss, 1978: 601; Vogel, 1979: 321; Starck, 1979: 209; Sendler, 1979, 227; Barton, 1975: 567.

then lumped together in disordered heaps. No adequate means of coping with this material intellectually has been developed" (Luhmann, 1972: 331; cf. also Hegenbarth, 1983: 67).

Of course with a term like juridification, if it is geared towards a crisis of growth, the therapy is implicitly contained in the term itself. Growth itself must be combatted. The prescription reads as follows: rationalize legislation, reduce the number of regulations, thin out the stock of laws — in short, simplify the law[3]. However, scepticism based on historical experience with such appeals is not unjustified, and perhaps makes one more receptive to the cynical proposal to try the exact opposite remedy: "growth-boosting hormone injections". The experiment has already been tried with weeds: acceleration of growth beyound an optimum level is a sure means of extermination (Luhmann, 1981: 73).

Yet it still seems too narrow an approach to concentrate on the expansion of legal material, on the extension and intensification of law. The current criticism of juridification processes under the general heading "flood of norms" scarcely seems an appropriate starting point because it limits the discussion in several respects. The term "flood of norms" merely stresses the quantitative aspect of the increase in legal material — a problem which could certainly be combatted by technical improvements in legislation. In fact, qualitative aspects are more important: what changes in the content of legal structures has the (alleged?) crisis of juridification brought about? The term "flood of norms" is also historically unspecific — throughout the centuries complaints have been made about the proliferation of laws and their intricacy (Nörr, 1974). Juridification processes should in fact be analysed in terms of the specific conditions of the modern social state, "the interventionist state". This at the same time excludes the law-centered and lawyer-centered perspective of the "flood of norms" school, which concentrates exclusively on the legal material as such. The problem to be addressed is broader in scope: the political and social appropriateness of juridification processes in various social areas (labor, market, company, and social security law). Finally, an attempt should be made to abstract from the national peculiarities of the flood of norms and, adopting a comparative perspective, to bring out the universal features of juridification processes and the problems which result from them.

2.2 Expropriation of Conflict

If one attempts to correct the myopia of the legal perspective by means of the optics of legal sociology juridification suddenly appears in a quite different light. The "politics of informal justice" in the U.S. and its European equivalent, "alternatives to law", come to the fore while problems of growth recede into the background (Abel, 1980: 27; Blankenburg *et al.*, 1980). Sociologists of law describe juridification as a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to

[3] Ehrlich, 1976: note 1. Cf. the references in note 2 supra.

legal processes. Juridification, as it were, is the expropriation of conflict. Christie (1976: 12) even uses the expression "conflict as property". This is certainly an extreme formulation, but it clearly indicates the direction of the analysis. Doubt is cast on whether law can fulfil what is generally regarded as its major function, the resolution of conflicts. Numerous socio-legal studies have pinpointed factors which constitute "obstacles to the adequate conflict resolution through law: barriers to access, fear of going to court, the length and cost of proceedings as well as processual inequality of chances of success" (Hegenbarth, 1980: 48). In this view juridification does not solve conflicts but alienates them. It mutilates the social conflict, reducing it to a legal case and thereby excludes the possibility of an adequate future oriented, socially rewarding resolution.

If conflicts are thus expropriated by juridification, the slogan of the delegalization movement is: expropriation of the expropriators[4]. As "alternatives to law", informal modes of dealing with conflicts are sought, modes which will take conflicts out of the hands of lawyers and give them back to the people. Certainly, the people will achieve a solution to the conflicts in the real social world, not only in the illusory world of legal concepts and procedures.

Institutional proposals and experiments (see Blankenburg, Gottwald, Strempel, 1982) range from reinforcement of the arbitration element in court proceedings[5] to the extension of out-of-court proceedings[6], to the establishment of "community courts" in big city neighbourhoods (Danzig, 1973: 1). Comparative legal and anthropological studies of Kbelle palavers in Africa, of arbitration phenomena in Japan and of social courts under real socialism are the inspiration behind these "alternatives to law".

These ideas of "communal law", as Galanter rightly terms it (Galanter, 1980), have been severely criticized in the socio-legal discussion. Abel provided the ideology-critical, Hegenbarth the conflict-theoretical and Luhmann the social-theoretical variants of this criticism (Abel, 1980, Hegenbarth, 1980; Luhmann, 1985). To put it briefly — a return to "informal justice" means, under today's conditions, surrendering conflict to the existing power constellations. Secondly, "alternatives to law" ignore crucial factors in dealing with conflict under modern conditions of role separation. Thirdly, they underestimate an indispensable function of law in functionally differentiated societies — which is to use the possibility of conflict in order to generalize congruent expectations throughout society. They may, of course, be able to formulate useful reform proposals which could certainly increase social potential for satisfactory conflict resolution, but they are scarcely appropriate as a general perspective for interpreting juridification and for

[4] A valuable analysis of the different directions in which the movements towards delegalisation is going is offered by Röhl, 1982: 15.

[5] E.g., active role of the judge, settlements, negotiations aimed at reaching an amicable agreement: see Giese, 1978: 117; Röhl, 1980: 279.

[6] E.g., arbitration courts, courts within companies and associations: see Bender, 1976: 193; Bierbrauer *et al.*, 1978: 141.

developing alternatives to dejuridification. This is ultimately because the current discussion in legal sociology has confined itself to the classical tasks of law (conflict regulation) and has only marginally concerned itself with the really explosive aspects of modern juridification (social regulation). Sociologists of law have concentrated their attacks on the unsatisfactory consequences for a continuation of harmonious social relations when human conflicts are delivered up to the court system. But how relevant is this criticism of the judicial system in face of the far more disquieting tendencies of a politically instrumentalized law, which threatens profoundly to change entire social spheres through its regulatory interventions. In comparison the legal-sociological formulation of the question seems somewhat harmless, and almost provincial.

2.3 Depoliticization

In view of these belittling definitions it is perhaps as well to look at the historical origins of the term. The word *Verrechtlichung* (juridification) was first employed as a polemic term in the debate on labor law in the Weimar Republic. Kirchheimer used it to criticize the legal formalization of labor relations, which neutralized genuine political class conflicts (Kirchheimer, 1933: 79). According to Fraenkel, juridification of labor relations means to "petrify" the political dynamics of the working class movement (Fraenkel, 1932: 255). Critical labor lawyers in West Germany have recently renewed this line of argument. The ambivalence of juridification — the guarantee and the simultaneous deprivation of freedom — is clearly worked out with examples from industrial relations law, codetermination, strikes and lockouts. On the one hand labor law protects and guarantees certain interests of employees and ensures that labor unions have scope for action. Yet on the other, the repressive character of juridification tends to depoliticize social conflicts by drastically limiting the labor unions' possibilities of militant action (Hoffmann, 1968: 92; Däubler, 1976: 29; von Beyme, 1977: 198; Erd, 1978; Voigt, 1980: 170). This kind of ambivalent juridification and its acceptance by labor unions is explained in terms of the interaction of the interests of specific trade union groups with state control interests: juridification reinforces "cooperative" trade union policies, just as it is reinforced by them. This interaction of course occurs at the expense of "conflictive" trade union policy (Erd, 1978: 19).

Here too, the counter-strategy is implied. Only when labor union policy changed to "conflictive" strategies and stressed autonomous representation of interests could juridification processes be reversed and labor conflicts repoliticized (Erd, 1978: 26, 251; Rosenbaum, 1982: 392). In fact this interpretation of the term has clear advantages over the lawyer-centred and judiciary-critical formulation of juridification. It takes account of the effects of the proliferation of laws on regulatory areas, stresses qualitative as well as quantitative aspects of change brought about by law, provides differentiated analyses of the ambivalence of the phenomenon and, with its concept of depo-