The Deluge of Norms

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by Andreas Heldrich**

I. GROWTH CRISIS OF THE LEGAL ORDER?

Max Horkheimer once remarked that freedom and justice were dialectical concepts: the more freedom, the less justice; the more justice, the less freedom. The incompatibility suggested by this slogan-like formula finds eloquent expression in contemporary discussions of the fundamentals of legal policy. The development of the social constitutional state in the Federal Republic of Ger-

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1. [The following discussion relies largely on G. DAIM, DEUTSCHES RECHT 299-302 (2d ed. 1963) [hereinafter cited as DAIM].

According to Art. 20 of the Basic Law (see note 18, infra), the German Federal Republic is a "democratic and social federal state." Grundgesetz [Basic Law] für die Bundesrepublik Deutschland of May 23, 1949, BUNDESGESETZBLATT [BGBl.] I, I [GG]. Article 28(1)(1) GG requires that the constitutional order in the Länder conform to the fundamental principles of a "republican, democratic and social Rechtstaat." The combination of these two articles makes the Federal Republic a "social Rechtstaat," a term which is difficult to translate, and which cannot be understood without reference to its constituent parts.

The term "Rechtstaat" has a long history. As a translation, "constitutional state" may serve as a shorthand, but "a state based upon the rule of law" is closer to the sense of the German. See N. JOHNSON, GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY 12 (1973) [hereinafter cited as JOHNSON]. The term "Recht" encompasses the idea of "justice" as well as "law." In the broadest, and earliest, sense, then, a "Rechtstaat" was a state which, in contrast to a totalitarian one, sought justice and fairness above all. By the nineteenth century, however, the word had come to be used in a narrower sense to designate a state in which the state itself was bound to obey certain legal norms. When these legal norms are procedural only, the formal Rechtstaat exists. The bases of the formal Rechtstaat are separation of powers, administration in accordance with laws, and independent court. Articles 19, 20 and 92 GG guarantee that the Federal Republic is a formal Rechtstaat.

The formal Rechtstaat may be preserved, however, even when the state promulgates arbitrary laws. It is here that the substantive idea of the Rechtstaat emerges. The substantive Rechtstaat looks not merely at the way laws are promulgated and administered, but has the freedom of the individual citizen as its goal. In this sense, the Rechtstaat presupposes the existence of fundamental and inviolable norms which the state must observe vis-à-vis its citizens. The idea of the substantive Rechtstaat enters the Basic Law in the enumeration of fundamental rights [Grundrechte] in Articles 1-19 GG. Thus the Federal Republic is a Rechtstaat in both the formal and substantive senses.

As noted above, the German Federal Republic is also a social state [Sozialstaat]. The exact content of this term is somewhat unclear, but it certainly includes such guarantees as equality of classes and professions, social justice, and the provision of help for those in need. The central meaning of the "social" in the Basic Law is that the state is thereby bound to "social activism." See Decision of December 19, 1951, I Bundesverfassungsgericht [BVERFG] 105. In addition, the clause makes clear that the basic law and other laws must, in doubtful cases, be construed "in accordance with the requirements of a social state." DAIM, supra at 301.

The ideas of the Rechtstaat and the Sozialstaat have sometimes been regarded as irreconcilable, and, in fact, the view that each takes of the individual is fundamentally different. The Rechtstaat, as an outgrowth of the bourgeois-liberal thought of the nineteenth century, sees the self-sufficient individual as central. The Sozialstaat, born out of the problems of industrialized society, sees individuals as in need of aid which only the social order can provide. The
many has apparently reached a point at which the public views legislative advances less and less as steps toward the achievement of justice and more and more strongly as dangers to freedom. Symptomatic of this is the widespread discontent with the wave of statutes that has broken over our society.

Lamentation over legislation is, per se, as old as legislation itself. Tacitus connects the number of laws with the moral decline of the Roman state: "... et corruptissima re publica plurimeae leges." The restriction of freedom affected one 'Jounded on the rule of law in which social and economic rights as well as the concomitant responsibilities of the lawyer's freedom of action.

To be sure, the accent then lay on the negative effects of legislation on the lawyer's freedom of action. A tradition-bound and proud profession whose goal is the attainment of practical justice through cautious development of the inherited body of law easily sees legislative intervention as interference. From this point of view, codification seems an unnatural break in an organic process. It is no coincidence that even in our own time lawyers are the loudest objectors to the flood of statutes. In the meantime, doubts as to the value of continued expansion of the legal order have seized even those politicians active in legislation.

Rechtstaat idea "seeks to protect the individual from the state; that of the Sozialstaat seeks to protect him through the state. One seeks to reduce government activity to a minimum ... the other to increase it through state care and planning." DAHM, supra at 302.

The Basic Law requires nevertheless that both ideas of the state be meshed. The type of state envisaged seems to be one "founded on the rule of law in which social and economic rights as well as the concomitant responsibilities of government are recognized." JOHNSON, supra at 28. The social Rechtstaat is, thus, a restrained welfare state in which the idea of the Rechtstaat and that of the Sozialstaat mutually limit one another.)


3. Annals 3.27.3, cited according to NöRRL, RECHTSKRITIK IN DER RÖMISCHEN ANTIK 64 n.14 (1974) ["Laws were most numerous when the commonwealth was most corrupt." Annals 3.27, in THE COMPLETE WORKS OF TACITUS (M. Hadad ed. 1942)]; see also the sources cited there on the "Topos" of the flood of norms; also see GAGNÉ, STUDIEN ZUR IDEENGESCHICHTE DER GESETZGEBUNG 29 (1960).

4. See Honsell, supra note 2, at 5.

5. On this point, see KASER, ZUR METHODE DER RÖMISCHEN RECHTFINDUNG 75 (1962): "Roman lawyers will, therefore, have thought less of written law, as we today do, as the core of their legal order, and viewed it more often as a barrier limiting the freedom of legal decisionmaking." Id.

6. This is the position Savigny took in the famous polemic "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft," (18). See also F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 391 (1967).

7. Cf. the references in Vogel, supra note 2, at 321 n. 1-2; MAASSEN, supra note 2, at 1473; and Honsell, supra note 2, at n.17.
II. NORMS OVERFLOWING

In fact, the production of norms in our society seems to have reached a hitherto nonexistent scale. Above all, the number of statutes and legal regulations is apparently growing exponentially. The Federal Minister of Justice recently reported on this in graphic detail. Thus, for example, the bulk of the Federal Statutory Gazette [*Bundesgesetzblatt*] (parts I and II) has, in the three decades from 1950-59, 1960-69 and 1970-79 swollen from 15 volumes, to 21 volumes, to 44 volumes. The amount of legal material finding its way into print in a single year today is, in terms of quantity, equal to the production of statutes and regulations it took an entire decade to produce 100 years ago. Even with this background, the absolute number of Federal German statutes (1480) and regulations (2280), a total of about 90,000 paragraphs in force as of February 18, 1977, is not yet a cause for anxiety. But this is only the tip of the iceberg. The number of valid state statutes and regulations is, without doubt, far greater. In this area there is substantial conflict of laws, resulting from the differing legal, geographical and historical origins of the individual federal states. In addition, there is the extraordinarily intense legislative activity of the European Community, as laid down in the Community's *Official Gazette*. From a purely quantitative point of view, the bulk of currently valid secondary community law does not lag far behind that of German federal law. This perspective is really skewed, however, since it ignores the relatively limited technical importance of this mass of laws which applies, for the most part, only to narrowly defined special areas and is hardly evident in general legal practice.

A realistic assessment of currently valid legal provisions cannot stop with a complete description of laws and regulations now in force, after the model of the revised collections of state and federal provisions. In the area of public law, particularly, the facts of legal life are largely determined by administratively promulgated administrative rules. The innumerable directives, circulars, instructions, memoranda, administrative orders and ministerial orders in the tax field should make clear how large the independent share of this "self-made administrative law" can be. The practical consequences of this almost opaque web of norms are scarcely slighter than those of the "laws" as more narrowly defined.

Finally, a true picture of the realities of our legal life cannot disregard the norm-making power of case law. In fact a substantial part of our legal order

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9. An expansion of the content of the law cannot, to be sure, be inferred from the size of the Federal Statutory Gazette alone. The republication of basically unchanged statutes, as well as of statutory appendices such as tables and charts, takes up a great deal of room. See Vogel, *supra* note 2, at 322.

10. *Id.* at 321, with reference to *Bundestagsdrucksache* 8/212 at 3.
consists of the precedents from judicial decisions. A glance into the legal commentaries will suffice to demonstrate the norm-creating achievements of the courts. In addition, the technique of setting out a syllabus by the court makes clear the general rules that issue from the cases. The courts have actually stepped into the shoes of the legislature, primarily by making general clauses more concrete, but also by conforming inadequate or antiquated regulations to the necessities of the present in such areas as the development of products liability, or the further evolution of the rights of the individual worker. But even the case law that has developed in this manner is — by its very nature — always growing. The total number of cases decided has also been increasing year by year, along with the number of judgeships. The situation varies, however, from jurisdiction to jurisdiction and from court to court. But the number of decisions being published is apparently rising along with the total number of cases decided. To be sure, the volume of published decisions by the highest courts has remained, all in all, relatively constant, as the rate of publication of the two official collections of decisions of the Bundesgerichtshof shows. The lower courts, on the other hand, seem to get more publication-happy year by year.

Altogether, then, an imposing, not to say threatening, mass of material has collected in our legal order. There can be no doubt, too, that working with this pile of norms places the lawyer in an almost impossible position.

11. For the problematics of this development see, e.g., Fischer, Die Weiterbildung des Rechts durch die Rechtsprechung (1971); Heldrich, Höchstrichterliche Rechtsprechung als Triebfeder sozialen Wandels, 1972 JRSozRtheorie 305, 359; Badura, Grenzen und Möglichkeiten des Richterrechts (Schriftenreihe des Deutschen Sozialgerichtsverbundes, v. 10) 40 (1973); Diederichsen, Die Flucht des Gesetzgebers aus der politischen Verantwortung im Zivilrecht (1974).

12. [In English in the original.]


14. “Until January 1, 1975 Amtsgerichte had been restricted to cases in which the amount in controversy had been DM 1,000 and then DM 1,500.” A. Von Mehren & J. Gordley, THE CIVIL LAW SYSTEM [hereinafter cited as Von Mehren] 129 n.169 (2d ed. 1977). This amount has increased to DM 3,000. “It was estimated that the increase would reduce the Landgericht case load by 33% overall and by 50% in traffic accident cases.” Id., citing Putzo, Aktuelle Änderungen des Zivilprozessrechts zum 1. 1. 1975, 1975 NJW 185.

15. The admission made by the Federal Minister of Justice during a budget debate in Parliament is characteristic: “It is really hard to understand that a country such as ours cannot answer the question: ‘What is the law in force’ at almost any point with any certainty. You have indices. You can search laboriously through them. But the question: What is in force from A to Z, not even the Ministry of Justice can answer today, let alone a department, and they know nothing at all of what is in force in the States (Länder) and Municipalities.” Quoted in Maassen, supra note 2, at 1473.
resolve for the time being whether Spiros Simitis' recommendation for the use of electronic data processing provides a suitable method for mastering this "legal information crisis." The automated documentation of federal law, now in preparation, is surely desirable.\(^9\) Similar initiatives should begin at the state level. But extending the storage of data to court decisions and legal literature would not be without its problems. There is much to be said for the proposition that the administration of justice would, in fact, collapse if every lawyer were continually confronted by every relevant bit of information on the state of the law. It is possible that a screening out of a portion of the pertinent information is the price to be paid if cases are to be settled within a reasonable amount of time. Conscious selection based on quality would, of course, be preferable to widely practiced screening based on ignorance. This problem could be solved by complete and always available documentation of all legal matter, in the broadest sense. But the pressure that would develop actually to view and sift the available profusion of material would consume a great deal of working time.

### III. CAUSES OF THE FLOOD OF NORMS

A therapy based on cause, one that would attack the evil at its roots, would, therefore, need to have a reduction of the flood of norms itself as its goal. It appears doubtful, however, whether this can be tried with any prospect of success. More closely observed, the continuing expansion of the law is an almost necessary consequence of both our constitutional order and the level of development of our society.\(^7\)

1. The Basic Law\(^8\) itself demands the broad promulgation of laws designed to fulfill the tasks of the state.\(^9\) This can be clarified by a catch-phrase: the principle of a state based on law\(^10\) demands that state action in justice and administration proceed according to formal statutes. As a consequence, Parliament must issue the basic rules governing important questions in the form of statutes. Restriction of the basic rights based on a special legal proviso also requires an act of legislation. Above all, the dynamics of equal protection push toward continued evolution of the laws in order to guarantee equal treatment in

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16. See Vogel, supra note 2, at 325. Maassen supra note 2, at 1476 is in agreement as is Starck, supra note 2, at 213.

17. With regard to the following, see Vogel, supra note 2, at 322; Noll, Die Normativität als rechtsanthropologisches Grundphänomen, in Festschrift Engisch 125, 135 (1969); Zweigert, supra note 2, at K8; Hug, Gesetzesflut und Rechtssetzungslehre, in Gedächtnisschrift für Rödig 3 (1978).

18. [The Grundgesetz or Basic Law of May 23, 1949, was first thought of only as a transitional statute which was to remain in force only until the German people could "freely choose a constitution." GG Art. 146. "In reality, the Basic Law determines the use of state power within the German Federal Republic just as any other constitution does." DAHM, supra note 1, at 274.]

19. For more on this point, see Starck, supra note 2, at 211. To be sure, the constitutional framework leaves enough room for a reduction of the production of statutes. See Maassen, supra note 2, at 1476.

20. [See the discussion of the Rechtsstaat, note 1 supra.]
equal situations. A comparable result follows from the constitutional principle of proportionality, which compels the legislature to differentiate among its measures so as to avoid unduly heavy interference in certain types of cases.\textsuperscript{21} On several occasions, the Federal Constitutional Court\textsuperscript{22} has also instructed the legislature to carry out needed legal reforms.\textsuperscript{23}

(2) The inner organization of the state itself promotes the tendency to formulate political decisions in the form of legal regulations. The entire apparatus of the judicial system and of administration is available to enforce the law. For this very reason, the promulgation of legal regulations has become the most important instrument for the realization of political goals. One could, of course, imagine other means for translating such goals into action, by attempting, for example, to win the public over to a particular position by use of the mass media. How little such extra-legal attempts at persuasion produce can be seen from the example of the federal government's calls for energy conservation. Apparently our state can only influence the attitude of its citizens effectively and lastingly with the help of the law and the organizations which enforce it. In this respect, an equally successful alternative to legislation is not in sight.

(3) In a certain way, the mere fact that legal rules exist creates an automatic need for more legal regulation. Above all, laws that are poorly drafted, too detailed or insufficiently thought out demand renewed legislative action.\textsuperscript{24} But changes in social and economic conditions also create a permanent compulsion to alter legislation accordingly. And the more the legislature attempts to deal with the multiplicity of life situations, the more the law it makes becomes casuistic and unclear, a perfect breeding ground for those seeking absurdities, or violations of the principle of equal protection, which then demand legislative correction once again.\textsuperscript{25} The lawmaking process thus displays its own dynamic which, once in motion, can scarcely ever be brought to a halt.

The necessity for constant change of the existing legal order also arises from the practical consequences of international entanglements. Above all, the fact that our country is part of the European Community has meant legislative efforts to conform the laws.\textsuperscript{26}

\textsuperscript{21} For more on this point, see Starck, supra note 2, at 211.

\textsuperscript{22} [The Federal Constitutional Court (Bundesverfassungsgericht) sits as the "guardian of the Constitution [Basic Law]." DAHM, supra note 1 at 288; see Decision of March 20, 1952, 1 BVERFG 195. Together with the administrative courts, the Constitutional Court guarantees full court supervision of the government's use of power, as required by Art. 19 GG. The court has the power of judicial review, and can set aside legislation incompatible with the Basic Law. See, VON MEHREN, supra note 13, at 137-141.]

\textsuperscript{23} [For example, the last paragraph of Art. 6 GG contained an injunction to the legislature: "illegitimate children shall, through legislation, be given the same conditions for their physical and spiritual development as legitimate children." When after several years no such legislation was forthcoming, the courts were ordered to ignore legislation in force if it conflicted with the Basic Law. Decision of Jan. 29, 1969, 25 BVERFG 167. The legislature then acted promptly. (August 19, 1969).]

\textsuperscript{24} HONSELL, supra note 2, at 14 and Maassen supra note 2, at 1474.

\textsuperscript{25} See Weiβ, supra note 2, at 608.

\textsuperscript{26} See Vogel, supra note 2, at 323; Vogel, 10 Jahre sozialliberale Rechtspolitik, 1980 Z.F. RPOL 1, 2.
(4) The increasing number of lawyers probably also promotes the expansion of the legal field as well. Despite fears to the contrary, the increase in the number of professional legal graduates in the last few years has not yet led to any substantial employment problems. Lawyers do not figure prominently in the unemployment rolls. This is, to be sure, based on the fact that legal education has long been the door to a multitude of careers, thus giving the graduate relatively great flexibility. Not a few young lawyers commence careers that have scarcely anything to do with applying the law. Still, a greatly increased number must seek genuine legal employment — and find it. This is mirrored in the increase in positions for judges in federal and state service as well as in the sharp increase in the number of practicing attorneys. It is clear that an increase in the importance society attaches to specifically legal components is linked with this increase in personnel. And a strong impulse toward the production of additional norms is sure to follow. Thus, the increase in the number of lawyers active in public administration in the last ten years has, of itself, led to a substantially greater production of draft statutes, draft regulations, ministerial releases, and so forth. The growth of the ministerial bureaucracy is not only a result of, but a concurring cause of, the flood of norms.

(5) The expectations of our society also make legal regulation increasingly necessary. Today the need to examine all of the decisions that touch us appears deeply rooted. No matter whether it concerns construction of a new highway, establishment of a new airport or the promotion of a student, whether it concerns parental measures for the education of children, or the decision of the referee in a soccer match — everyone appears inclined not to accept the decision of another uncritically, but to have these decisions reviewed by an independent body for error or whim. The judicial system is, above all available as this neutral body; but it cannot enter the field unless decisions of all kinds are incorporated into a legal framework that will make it possible for courts to review them. The "legalization" of the school system offers a vivid example of this evolution. The expansion of the legal system is also driven onward by a growing orientation to the standard of equality. Wherever this maxim becomes the guiding

27. The number of lawyers graduating went from 3,409 in 1970 to 4,926 in 1973, then gradually decreased to 3,763 in 1977. In 1975, a total of 1,349 lawyers was listed as unemployed. After a slight rise to 1,577 in 1976, the number declined to 1,180 in 1978. See 1 EMPFEHLUNGEN DES WISSENSCHAFTSRATS ZUM NEUNTEN RAHMENPLAN FUR DEN HOCHSCHULBAU 115, 126 (1979).

28. In the period from January 1, 1975, to January 1, 1979, the number of judges in land and federal service rose from 14,054 to 15,532 (STAT. JB 320 table 15.2 (1979)). This represents an increase of 10.52%. Using January 1, 1971, as a starting point (number of judges, 12,954, STAT. JB. 99 (1971)) the increase is 19.9%.

29. In the period from January 1, 1971, to January 1, 1979, the number of solicitors in the Federal Republic increased from 18,240 to 28,755 (STAT. JB 320, table 15.3 (1979)), an increase of 57.65%.

30. This is most true, of course, when the number and size of draft statutes serve as a badge of achievement for the department which drafts them, and as a basis for requests for new job positions during budgetary debates. See Maassen, supra note 2, at 1477.
principle of community life, legal explication of the preconditions and consequences of social phenomena appears unavoidable. Equal treatment in equal situations can only be guaranteed effectively through appropriate norm-making. The less inequality a society will tolerate, the more law it requires. Putting equal opportunity into practice in the educational system provides an illustration of this. Substantial regulation has been necessary, for example, in the area of access to higher education, or to universities. Also symptomatic in this connection is the proposed replacement by a statutory enactment of the practice of pardoning when a life sentence is handed down.

Greater demands for rational social development in such areas as environmental pollution and the use of earth resources or of new technology also place increased claims on the legal system. Instruments for future planning are required here, whose success can be guaranteed only if they are presented in the guise of statutes.

The requirement for social security has a force at least as great in the expansion of legal rules. Effective material protection against all of the risks of life requires that society allow demands to be made on institutions capable of providing that protection. The web of social security is, therefore, of necessity, a web of norms. As the social web expands and solidifies, an increased production of norms automatically follows. The constant development of social legislation demonstrates this, but also makes its proposed codification into a Social Law Code substantially more difficult. But the judicial development of the law of damages at the expense of the liability insurance companies belongs in this context as well.

This leads to another viewpoint. The objective situation of our society will not allow for a fading away of the requirement for norms. The more crowded and risky community life is, the more obvious the importance of clear delimitation of the rights of individual members of society and the protection of their sphere of interest becomes. With great concentrations of people, such as exist everywhere in the Bundesrepublik (not only in the cities) and at today's level of technological development, a tight and effective control system for protecting the needs of the individual is indispensable. This is especially true when common understanding as a consensus for community living vanishes.31 The dream of a society that can get by with a minimum of legal provisions may hold for the bucolic idylls of vanished cultures, but not for the vital problems of modern technical civilizations. The evolution of traffic laws, of data protection, or of products liability provides examples, selected at random, of some of these problems.

There is also a requirement for regulation when scarce commodities are to be divided. The overflowing of rationing rules which took place in recent German history remains fresh in our memories. The present has, fortunately, substantially freed us from this plague. Nevertheless, problems concerning the use of

31. See Starck, supra note 2, at 212. In this sense, the increase in legal material can be interpreted as a reaction to the collapse of extra-legal norms of behavior. See Vogel, supra note 2, at 322.
limited resources still find their way into legal norms today. One need only remember the stipulations concerning the admission of students to universities, based on the activity of the Central Office in Dortmund. There is reason to suspect that, in other areas as well, the problem of rationing has not altogether vanished from the agenda of the legal order.

IV. DANGERS OF THE DELUGE OF NORMS AND SOCIETAL COUNTER-REACTION

To be sure, the flood of norms in our society in the meantime started a reaction which seems to presage a change in direction. When more closely observed, however, the suggested remedies scarcely appear calculated to have any sustained effect on the continued expansion of our legal order. The appeal to the legislature, for example, that it should carefully test the question of need before making any new legal initiatives may, perhaps, lead to a certain checking of the production of statutes. In many cases, however, such “legal self-restraint” on the part of Parliament would only result in shifting the problem: the regulations the legislature abstained from making would then be developed by the courts or appear in the form of administrative rules. For the legal order as a whole, however, the form in which new norms appear is irrelevant. The refusal to promulgate new statutes would, therefore, hardly affect the quantity of additional legal provisions, but it would certainly affect their quality. Despite the entirely merited criticism of an occasional unfortunate statute, it is obvious that the legislative process generally leads to more considered and differentiated solutions than those reached by the courts, whose solutions are necessarily cut to fit far more concrete situations. At any rate, as opposed to the issuance of administrative rules, the passage of statutes has the advantage that the legal policy goals of the bureaucracy are subjected to legislative scrutiny. Besides, the use of the statutory form promotes the transparency of the legal order, whereas extra-statutory norms, such as judicial decisions or executive orders, may easily lead to an impenetrable thicket of legal provisions.

This is not the place for detailed examination of the question of how legal norms ideally arise. No matter what the form in which the necessity for legal norms in our society is satisfied, a greater expansion of our legal order appears practically unavoidable in any case. It is the price which must be paid for striving for a social order which satisfies the legitimate needs of every citizen. This price is certainly not negligible. Developmental tendencies which could threaten the continued existence of a free society are bound up with the expansion of the legal system.

32. This striking phrase is Maassen's, supra note 2, at 1476. [The phrase “legal self-restraint” is in English in the original.]

33. For examples of such shifts, see Zweigert, supra note 2, at K9; Vogel, supra note 2, at 324. Cf. Maassen, supra note 2, at 1478, who properly characterizes this as a mistaken development; similarly, Berner, supra note 2, at 624.
(1) Progressive legalization always has increased state action as a result. The mere production of legal rules is a sovereign act of state. Judicial control of their application leads to further increases in state duties. In many cases, the execution of regulations will also require the participation of public administrative authorities [Behörden]. Because of these facts, the rate of increase of the legal order means a further inflation in the number of government employees, which leads in turn to an increase in the percentage of the gross national product expended by the government. Above all, however, the increase in the state percentage is the inevitable consequence of those statutes that lay new burdens on the whole of society in such areas as public health and public assistance.

On the other hand, the increase in duties in the public sector is consistent with the disappearance of autonomous powers of self-regulation in the society. A state that guarantees the well-being of all citizens by means of a tight network of regulations leaves insufficient space for the development of private beneficence. The discussion concerning the most recent reform of family law in the area of parental rights and duties has also made clear the reciprocal effect of an increase in law, coupled with a weakening of the independence of the family.

(2) The promulgation of legal rules is often connected with a fixing of the current state of social development. Because of rapid social change, quite a few laws are obsolete at the very moment when, after extensive parliamentary debates, they enter into force. The law then becomes an obstacle, preventing necessary reforms and adaptations. The German law with respect to universities affords a current example of the loss of flexibility which results from statutes that are quickly out-of-date.

To be sure, a good part of our increased production of norms is to be ascribed to amending legislation or judicial lawmaking which attempts to adjust antiquated provisions as necessary to fit current social conditions. But no one should form an exaggerated idea of the possibilities for correction here. In general, years, if not decades, pass before an overdue reform of antiquated statutes can be completed, whether legislatively or judicially. A too rapid fluctuation in regulations in force could also lead to a critical loss of trust in the certainty of the law. The discussion of the flood of statutes has warned us of precisely this point; it is possible that in the future the legislature will exercise even greater restraint in effecting legal reform because of it. But, at the same time, this would increase the retarding effect of the laws already in force, which stands in the way of the free evolution of society. In such a case, relief could be expected only from

34. See Berner, supra note 2, at 621; Maassen, supra note 2, at 1476.
35. See Diederichsen, Die Neuregelung der elterlichen Sorge, 1980, NJW 1.
36. See Hochschulrahmengesetz of January 26, 1976, BGBl. 1, 185 and numerous state statutes enacted in accordance with it.
37. Berner, supra note 2, at 620.
the judiciary which has, in the past, played a substantial part in the modernization of our legal order.

(3) This leads to another problem. An expansion of the legal order is automatically connected to an increase in the legal competence of the judiciary which must apply, interpret and develop legal provisions. Especially when laws are full of loopholes, are "blanket norms" or general provisions, the judiciary is left considerable room for the development of its own ideas of order. The difficulty with this development lies not only with the oft-lamented perversion of the Rechtstaat into a state in which the courts, rather than the parliament and the government, make the major governing decisions (Justizstaat). More important than the shifting of the constitutionally mandated division of powers is the fact that the judiciary thereby acquires powers that lie outside its professional competence. It is enough to remember the example of the peaceful use of atomic energy to make this problem clear. In fact, the administrative courts have, in the last ten years, often had to pronounce the last word on exceedingly complicated technological developments. They were no better prepared for this than their professional training and practice would allow. That they could often count on the collaboration of experts is small consolation. The translation of legal questions into technical language is itself linked with substantial sources of error which even the most qualified judge cannot fully master.

Similar problems arise when a judiciary inadequately supported by the legislature must "switch tracks" by making fundamental decisions of principle in important social and political disputes; the federal labor court has been called upon to do so over and over again. The courtroom and the judge's chambers are not the right place to reach satisfactory solutions to social conflicts of far-reaching significance. After all, the chances for obtaining exact information about the underlying social conditions are insufficiently developed in the context of court proceedings. They are far less substantial than those sources of information available to parliament when it passes a statute. In addition, the spectrum of interests is often insufficiently revealed by the adversary scheme of trial. Particular problems are also created by the difficulty of controlling the social outcome of judicial decisions. To be sure, parliament, too, checks on the actual results of its lawmaking only in an extremely incomplete fashion. But the judiciary must, in a practical sense, leave reports on the success of the norms developed by it to chance.

(4) The increasing "legalization" of our society also results in the destruction of so-called law-free spaces. This cannot be grasped quantitatively, since there is no exact inventory available of those fields the legal order has spared. Legal schol-

38. See Weiβ, supra note 2, at 602.
39. See Maassen, supra note 2, at 1477.
40. For a description of law free spaces, see Comes, Der rechtsfreie Raum (1976); English, Der rechtsfreie Raum, 1952 ZugsStaatsW 385; Kaufmann, Rechtsfreier Raum und eigenverantwortliche Entscheidung, in Festschrift Maurach 327 (1972).
arship, in accordance with its tasks, concerns itself only with the positive substance of legal material, not with the negative reverse image of law-free space. For us, this area is still largely terra incognita. Measuring it exactly may also be impossible because there can be but few areas of life into which the law has not penetrated at all. As examples of this one could, of course, identify purely mental events such as thoughts, moods, feelings, opinions or religious beliefs. But the general forms of social intercourse often named in the same context have, at least when the blunders are gross, become subject to law, for example, in the matter of insult. The example demonstrates that the concept of a law-free space is essentially relative. In general, the question is not whether a certain area is exempted from the rule of law but whether the laws governing it are strong or weak in intensity. The expansion of the law is, therefore, accomplished less by its movement into social domains hitherto without legal norms, and more by a constantly tightening web of rules. This can be seen in the most recent new regulation of the consequences of divorce within the framework of so-called equalization of benefits.

It is clear that the gradual filling of law-free spaces can result in limitations on human freedom to act. To be sure, law often takes the place of extra-legal norms of behavior which have lost their binding force. Thus, a disintegration of the morality of the marketplace has required the intervention of the law in such areas as competition and consumer protection. In such cases, only a change in the form in which social norms appear in our society lies behind the expansion of the legal order. Such a change in form can, however, result in a substantial impoverishment of ethical standards: after awhile the citizen views the standards set by the law as the ordinary measure of human conduct. The far-reaching “legalization” of welfare work has possibly resulted in a gradual collapse of private philanthropy as a standard for social behavior: “the poor are referred to the public dole.”

In other respects, the liberty restricting aspects of a legal order that is constantly expanding are thoroughly ambiguous. One of the last law-free spaces in traffic regulation is the lack of a general speed limit on the autobahns. Here society has hitherto successfully managed to preserve its freedom of action — but the price paid can be gathered from the accident statistics. One needs to con-
sider, too, that a series of new laws is often directly intended to guarantee the freedom of the individual by regulating such areas as data protection, for example, or inquiries on the part of intelligence services. Here the primary focus is on limiting the liberty of the state in favor of the liberty of the citizen. Who would care to dissuade the legislature from this? Liberty may be threatened not only by the presence of laws, but by the lack of them. The amount of freedom a society preserves is less a result of the number of its laws than of their content. The previous discussion of the flood of laws has allowed this to be somewhat forgotten.

(5) We may take heart from yet another circumstance. The law is endangering its own effectiveness as it continues to grow in volume. The flood of norms has led to an as yet unresolved "crisis of information." The legal profession itself must often grapple with substantial difficulties when it tries to discover the law in force with respect to a particular case. Now more than ever, the great mass of legal innovations passes by the rest of the members of society without leaving a trace. For this reason, the law probably plays no prominent part even today in the average citizen's conception of the world. There may, of course, be a rude awakening when a house is to be bought, or even built, when a marriage runs into trouble, when one has too many moving traffic violations, or when the revenue service orders an audit. But aside from such critical situations, the vast majority of men manage to go through long periods of their lives avoiding any conscious confrontation with the legal system and its representatives. Fear of the freedom threatening aspects of an excess of law rests, thus, at least in part, on an exaggerated belief in the law's social importance.\[^{45}\] From the standpoint of public policy, an imperfectly effective legal system is certainly to be regretted. It is, nonetheless, paradoxically the foundation for the fact that an overregulation of our lives in society through the flood of norms cannot take place.

*Translated by J. Lee Riccardi*

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\[^{45}\] For more on this point, see Noll, *Gesetzgebunglehre* 146 (1973); Heldrich, *Möglichkeiten und Grenzen der Sozialgestaltung durch gesetzgeberische Maßnahmen*, in *2 Le Nuove Frontiere del Diritto e la Problema dell’Unificazione* 531 (1979).