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IDEOLOGICAL MOVEMENTS IN PRIVATE LAW

Hans GIGER

SUMARY: I. *Fundamental outlines*. II. *Information as a pivot especially according to the Legal recognition*. III. *Consequences of the ideological change*. IV. *Outlook*.

I. FUNDAMENTAL OUTLINES

Time after time, the relation between economics and law has been the cause of problems and controverses. Information is the pivot around which all interpersonal transactions revolve. Like a magic formula it can conjure up, or dispel, conflicts. History lets us know that there are periods of a strictly progressive socialization which later will convert, as a result of change in attitude, into contractual freedom controlled especially by individual responsibility. As a member of the International Academy of Consumer and Commercial Law (USA), I try to implicate the idea and necessity of free commercial activities. Due to the fact that European and American influences spread out in the Swiss market, it seems to me the right time to point out the risks of a threatening socialization of law. Therefore the introductory part of these concises reflections focuses on the problems of legislating more in a fundamental manner; reflections somehow which repeats thoughts already formulated in former publications. When charting the route between sensible social protection and excessive tutelage, the legislator should be coerced towards a non-dirigiste consumer protection based on the responsibility of the individual for his own actions. The new Swiss Consumer Credit Draft manifested new efforts of socialization (part II of the book). Social protection is increasingly characterized by the transfer of power and ultimately by tutelage. This could inevitably entail the socialization of the law and lead to difficulties of judgement, uncertainty on the part of the business community and of consumers, and to painful problems for trade and business - with the familiar effects on

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private, economic and, last not least, also social matters. Ultimately, it could cause the economy to slow down and unemployment to rise.

II. Information as a pivot especially according to the Legal recognition

1. *Information as an instrument of power*

Information has a wide reach: it constitutes the core of education and training, and, indirectly, of personality. It forges man's image of himself and of his surroundings, and it shapes his views and decisions; a factor with far-reaching implications. Man is an integral part of a social system; he participates in the world around him, and he communicates. As from a certain level he does so through the medium of language.[1] Information is the pivot around which all interpersonal transactions revolve. Like a magic formula, it can conjure up, or dispel, conflicts. Control and manipulation of information are stepping stones towards the levers of powers. The fundamental importance of the right, and the will, to process and disseminate undistorted information is, sooner or later, brought home to the citizens of all states to a varying extent, particularly when it comes to decisions in the areas of legislation and legal cognition. In the course of any decision-making process (which entails processing of information, followed by the development, declaration and implementation of an intention), information is susceptible to distortion because each individual judges according to his own standards and in the light of his particular education, environment and personality. The more scope he has for exercising his judgment, the more likely it is to be arbitrary. It was to eliminate this risk that man created systems of law designed to apply to all facets of human co-existence.[2]

2. *Legislation as a "snapshot" of the current status of human Existence*

The application of a specific law is concerned with the problem —inherent in every society— of creating a broad and effective system of laws for regulating conflicts. In a democratically governed state, the "theoretical order" devised for all citizens by themselves is derived from public opinion.[3] In other words, the individual members of society themselves set the rules

[1] Giger, *The defence of intellectual and moral habitat*, 477; Meese and Seiverth, Methods, 7.
[2] For details see Giger, Legislation and responsibility, 1 ff.
[3] Giger, *The protection of weaker parties*, 18 ff.

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under which they wish to live.[4] Public opinion thus represents the views held by all citizens of a state and expressed by their representatives, on the manner in which human co-existence, and more particularly legal attitudes, have to be regulated so as to ensure a minimum of friction. The creative act of legislating is nothing more than a "snapshot" of the current status of human existence, with all man's needs, wishes, knowledge, insights, beliefs and intentions. Judging by the present state of formal legislative processes, experience shows that the reality[5] has usually changed by the time the law is brought into line to satisfy a particular need for correction. Thus, the revised or newly created law represents a "theoretical system" *for a reality that has been superseded*.[6] "Reality inevitably encompasses the attitude towards the value that the individual citizen assigns himself in relation to the collective, a value which also defines his relation to the prevailing order with regard to material goods, possession, and autonomy in transactions. It is the work mentality of the individual, more than anything else, that ultimately conveys the appropriate recognition and labeling signals.

3. *Evolution from the competition-minded to the welfare state*

A. *Caracteristic marks of the competitionminded state*

Any state of affairs and any development are shaped by factors which can be reliably held to communicate what constitutes a society and what the underlying state of mind of this society is. They are indicators —hence signals— which characterize the stage reached in a particular process of development. They communicate the individual criteria of judgment. The typical hallmarks of the meritocracy are familiar ones: its sights are set on improving the quality of work and prosperity. To achieve this, certain traits are indispensable: commitment, dedication, sense of achievement, conscientiousness, diligence, avid pursuit of know-how, interest in work, creativity, insistence on quality as well as quantity - to mention only a few of the milestones that mark the thorny road to success and prosperity. Add to this a competitive nature, in which strengths are genuinely measured against

[4] This —as everyone knows— is, of course, fiction. Public opinion is determined according to the delegation principle in that it is actually formed by representatives of the people (parliament).

[5] Legislation to take account of a particular situation is often initiated decades before it actually comes into effect.

[6] See also Giger, *Analyses of the regulations on arrears in rent law*, 155 ff.

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those of the rivals at the highest possible level. Respect for the achievement of others, contempt for envy and jealousy,[7] and rewards for boldness and the courage of one's convictions, initiative and imagination are further essentials for the development and continued existence of the meritocracy. A society which evolves along such lines is shaped by a positive approach to work, making it prosperity-conscious and pro-business.

B. *Unlimited freedom as a principle*

The transition from meritocracy to an affluent society requires optimum competitive conditions. Entrepreneurial success can be achieved in many cases only through the relentless deployment of effective instruments. This presupposes a system of laws that guarantees more or less unlimited freedom of action. It is the rights of the powerful that have the upper hand.[8]The powerful are respected, honored, fostered and accorded privileges in the social hierarchies, economic structures; even in the laws and their application. The principles of the free market economy prevail. It is not regulated by a restrictive legislation. No limits are placed on innovation, and the resources that are mobilized to achieve success are solely limited by the imaginative scope of the entrepreneur. In this free play of forces, every decision constitutes an individual risk for which the entrepreneur bears the responsibility. He lives therefore in a constant state of tension between success and failure. His actions are, however, not shaped exclusively by his responsibility for them or by the fact that the rewards for his success accrue to him only slightly diminished and that he alone is answerable for any failures, which can even destroy him. Rather, society even accords him responsibility for others. Given the overriding goals of safeguarding supply and creating prosperity, he has, basically, to integrate himself with a minimum of friction into the world of production and sales. The boom of the 1970s showed that optimum economic conditions evolve in societies which are built up on the principles of freedom.

7 Envy and jealousy are cancers of society because they give rise to unfair competition so as to eliminate superior rivals through non-achievement oriented information and claims. For details see Giger, *The defence of the intellectual and moral habitat*, 469 ff., particularly 480 ff.; also Wilhelm Korff, Friedrich, *A study of envy*, 69 f.; Gonzalo Fernández de La Mora, *The leveling effect of envy*, 1 ff.

8 This was particularly true at the time of the first industrial revolution and the subsequent economic growth.

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C. *Necessity of checking the unfettered freedom by individual responsibility*

It gradually came to be realized that unlimited power in the hands of individuals could not be held in check by individual responsibility. The need for corrective measures[9] is evident wherever individual decisions encroach upon, and even harm, the interests of others. In response to this need, it was pointed out that everyone had the same rights when it came to competing for market shares in the broadest sense of the term.[10] The argument that unfettered freedom nullifies the general right to freedom because the weak are unable to assert this right against the strong was initially ignored. However, the almost reflex effect of untiring efforts aimed at ideological conversion led to qualification of the concept of individual freedom, and protection of the weak became more and more of a catchword.[11] That was not the end of it. The trend towards an imperceptible undermining of the commitment to freedom, re-inforced not least by the inflationary growth of new social rights,[12] found its way into the traditional system of laws, initially through individual laws and groups of laws, and later through actual systems of laws.[13] The specter of, for instance, *special treatment of certain categories of people* such as "consumers" was evoked in order to accord them a special position.[14] This set in motion a development that has not yet run its course,

[9] Giger, *The Limits of private autonomy in cartel law*, 11 ff.

[10] Giger, *Increased social protection*, 9 f.: concerning the model image of the independent consumer.

[11] Giger, *The protection of weaker parties*, 25 ff.

[12] Giger, The threat to contractual freedom in consumer credit law 489 f.: "I expressed my doubts about the KKGE (the draft of the law on consumer credit) because I felt it undermined principles on which our state and legal system were built up. It seems to be a foreign body in the Swiss Code of Obligations: a priori balance of power is being substituted for the free play of forces even where this is still effective. It also signals danger for our market economy, which is conceived, generally speaking, as being self-regulating. In view of the present difficulties, it needs to be stimulated, rather than trimmed, by legal regulations if it is to survive in the long term".

[13] Giger, *The planned consumer credit bill*, 18 ff.

[14] Bibliography of critical and other literature concerning restrictions on economic and contractual freedom: Blankenburg *et al.*: *Rechtsberatung. Soziale Definition von Rechtsproblemen durch Rechtsberatungsangebote*, Neuwied und Darmstadt, 1982. Boller Jürg, "Verhältnis zwischen Wirtschaft und Presse", in *Bilanz* No. 11, 1983, 187 f.; Botschaft des Bundesrates an die Bundesversammlung betreffend den Entwurf zu einem Bundesgesetz über den Konsumkredit 12.6.1978 (communication quotes); Brandau Bodo Walter, "Die Bestimmung des auffälligen Missverhältnisses aus den marktwirtschaftlichen Daten des Konsumentenkreditgeschäftes und der Schutzwürdigkeit des Verbrauchers", in *FLF* (*Finanzierung, Leasing, Factoring*), 30th year No. 3, Dortmund, 1983, 79 ff.; Bunte H. J.: "Probleme der Ratenkreditverträge", in *Wertpapier-Mitteilungen* (*Zeitschrift für Wirtschafts- und Bankenrecht*), Supplements Nos. 1-5, Frank-

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and the far-reaching implications of its destructive effect on progress are, for

furt a.M. 1984, 3 ff.; Canaris Claus-Wilhelm, "Schranken der Privatautonomie zum Schutz des Kreditnehmers", in *ZIP* (*Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*), No. 9, Cologne, 1980, 709 ff.; Dauner-Lieb Barbara, *Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher*, Berlin, 1983, 13 ff.; Giger Hans, "Bedrohung der Vertragsfreiheit im Konsumkreditrecht", in *Schweizer Monatshefte*, 63rd year Vol. 6, Zurich, 1983, 483 ff.; Giger Hans, "Freiheit und Zwang im Konsumkreditrecht. Überblick und kritische Würdigung der Gesetzesvorlage", in *Neue Zürcher Zeitung*, No. 232 (6.10.1978), p. 35; Giger Hans, "Grundsätzliches zum immateriellen Umweltschutz. Die Verteidigung des geistig-moralischen Lebensraumes", in *Schweizerisches Umweltschutzrecht*, Zurich, 1973, 467 ff. and 632 ff.; Giger Hans, "Massenmedien, Informationsbetrug und Persönlichkeitsschutz als privatrechtliches Problem. Neue Aspekte im Bereich des privatrechtlichen Persönlichkeitsschutzes", in *ZSR* (*Zeitschrift für Schweizerisches Recht*), NF 89, Basel, 1970, 33 ff. and an extended version (particularly as regards defensive measures and sanctions), in *Juristen-Zeitung* 26, Tübingen, 1971, 249 ff.; Giger Hans, *Ratenkredit als legislatorisches Problem. Ein Alternativentwurf, Band 9 der Schriftenreihe zum Konsumentenschutzrecht*, Zurich, 1982 (2nd ed. Zurich 1983); Giger Hans, "Rechtliche Stellung des Konsumenten in der geplanten Neuordnung", in *ZBJV* (*Zeitschrift des bernischen Juristenvereins*) 116, 1980, 199 ff.; Giger Hans, "Sozialschutzwürdigkeit - ein gesetzgeberisches Problem", in *FLF* (*Finanzierung, Leasing, Factoring*), 30th year, No. 5, Dortmund, 1983, 179 ff.; Giger Hans, *Systematische Darstellung des Abzahlungsrechts unter besonderer Berücksichtigung des Fernkurs-, Unterrichts-, Mietkauf- und Leasingvertrags*, Zurich, 1972; Giger Hans, "Überforderter Konsumentenschutz? Ein Beitrag zum Schutz des Schwächeren", *Schriftenreihe zum Konsumentenschutzrecht über "Wirtschaftsfreiheit und Konsumentenschutz"*, vol. 13, Zurich, 1983, 10 ff.; Giger Hans, *Une protection sociale renforcée - ligne directrice du législateur pour le nouveau droit du crédit à la consommation*, Berne, 1979; Hartwich, Hans-Hermann, *Sozialstaatpostulat und gesellschaftlicher status quo*, Cologne/Opladen, 1970; Hedemann, Justis Wilhelm: *Flucht in die Generalklausel*, Tübingen, 1933; von Heinemann Olgard, "Umfall auf Raten. Gedanken zum BGH-Urteil vom 12.3.1981", in *FLF* (*Finanzierung, Leasing, Factoring*), 28th year, No. 5, Dortmund, 1981, 186 ff.; Herzog, Roman, in: Maunz/Düring: Kommentar zum Grundgesetz, GG 20, VIII, Munich, 1980; Heusinger Bruno, *Rechtsfindung und Rechtsfortbildung im Spiegel richterlicher Erfahrung*, Cologne, 1975, 190; von Hippel Eike, *Der Schutz des Schwächeren*, Tübingen, 1982; Holzscheck *et al.*, *Die Praxis des Konsumentenkredits in der Bundesrepublik Deutschland - eine empirische Untersuchung zur Rechtssoziologie und Ökonomie des Konsumentenkredits*, Cologne, 1982; Kessler Roland, "Sittenwidrige Höhe von Darlehenszinsen. Anmerkung zum Urteil des Oberlandesgerichts Stuttgart vom 24.4.1979", in *BB* (*Betriebs-Berater. Zeitschrift für Recht und Wirtschaft*), No. 28, Heidelberg, 1979, 1423 ff.; Knauth Klaus-Wilhelm, "Entscheidung des BGH zum "Bender-Urteil", *in Die Bank. Zeitschrift für Bankpolitik und Bankpraxis* 6, Berlin, 1981, 299 ff.; Kochendörfer Heinz, "Sittenwidrige Höhe von Darlehenszinsen", in *NJW* (*Neue Juristische Wochenschrift*), No. 5, Munich, 1980, 215 f.; Larenz Karl, *Einführung zur Textausgabe des Bürgerlichen Gesetzbuches*, 27nd edition, Munich, 1983, 9 ff.; Leibholz/Rinck, *Grundgesetz für die Bundesrepublik Deutschland*, GG 20, 4th ed., Cologne, 1971, comment 12; Mayer-Maly Theo, *Das Bewusstsein der Sittenwidrigkeit*, Karlsruhe, 1971; Meese/Seiverth, *Methoden*, Munich, 1975; Münstermann Walter, "BGH contra OLG Stuttgart", *FLF* (*Finanzierung, Leasing, Factoring*), 28th year, No. 3, Dortmund, 1981, 101 ff.; Nef Hans, *Gleichheit und Gerechtigkeit*, Zurich, 1941; Olzen D., "Anmerkung (zum BGH-Urteil vom 12.3.1981)", in *JR* (*Juristische Rundschau*), Berlin and New York, 1981, 369 ff.; Ott Sieghart, "Zur Sittenwidrigkeit von Konsumentenkreditverträgen. Eine Stellungnahme zum Urteil des BGH vom 12.3.1981 - III ZR 92/97", in *BB* (*Betriebs-Berater*), Heidelberg, 1981, 937 ff.; Palandt/Heinrich, *Kurzkommentar zum Bürgerlichen Gesetz-*

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the time being, only a matter for conjecture.

D. *Change of the mentality structure*

Any social protection law integrated into our traditional legal system has an inherent tendency to change the mentality structure underlying our laws. This is partially due to the "proliferation mechanism" with which it is associated. But what does this actually mean? There is certainly no question of "contagion" in this connection. But the very existence of social protection laws inevitably leads by way of justice with its "leveling out" effect, the need for uniform legal structures and the pilot effect, to a steady expansion, and thus progressive socialization, of the law. If a piecemeal policy entirely shaped by practical needs is pursued, the insidious undermining of the tra-

buch, 40th ed., Munich and Berlin, 1981; Peetz Hans-Günther, "Konsumentenkredit und Restschuldversicherung in der Rechtssprechung des Bundesgerichtshofs", in *ZIP* (*Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*), Cologne, 1980, 605 ff.; Reifner Udo, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung. Realitätsverleugnung oder soziale Auslegung im Zivilrecht*, Neuwied und Darmstadt, 1979; Reifner Udo, "Die Rückabwicklung sittenwidriger Ratenkreditverträge", in *JZ* 39, 1984, 637 ff.; Rittner Fritz, "Der Beitrag zur Restschuld-Lebensversicherung und Darlehensvertrag", *Supplement DB* (*Der Betrieb*), No. 16, Düsseldorf, 1980, 3 ff.; Rittner Fritz, Zur Sittenwidrigkeit von Teilzahlungskreditverträgen. Die Grundsatzentschei-dung des BGH vom 12.3.1981 DB (Der Betrieb) (Düsseldorf 1981), 1080, in DB (Der Betrieb) No. 28 (Düsseldorf 1981) 1381 ff.; Saxer Lydia, "Missverständnisse im Kleinkreditsektor", *Wirtschaftsfreiheit und Konsumentenschutz*, Vol. 13, der Schriftenreihe zum Konsumentenschutzrecht über, Zurich, 1983, 128 ff.; Schluep Walter R., "Konsumentenschutz in Werbung und bei Vertragsabschluss", *Entwicklungstendenzen im schweizerischen Konsumentenkreditrecht*, Vol. 1 der Schriftenreihe zum Konsumentenschutzrecht über, Zurich, 1979, 185 ff.; Scholz Franz Josef, "Anmerkung zum BGH-Urteil of 12 March 1981", in *WM* (*Wertpapier-Mitteilungen. Zeitschrift für Wirtschafts- und Bankrecht*), No. 21, Frankfurt, a.M., 1981, 583 ff.; Scholz Franz Josef, "*Die* Praxis *des* Konsumentenkredits in der Bundesrepublik Deutschland?", in *FLF* (*Finanzierung, Leasing, Factoring*) 30th year, No. 2, Dortmund, 1983, 35 ff.; Scholz Franz Josef, "*Die* Praxis *des* Konsumentenkredits in der Bundesrepublik Deutschland? continued", in *FLF* (*Finanzierung, Leasing, Factoring*), 30th year, No. 3, Dortmund, 1983, 105 ff.; Scholz Franz Josef, "Der Ratenkredit als rechtswissenschaftliche und rechtspolitische Aufgabe", in *FLF* (*Finanzierung, Leasing, Factoring*), 31th year, No. 3, Dortmund, 1984, 75 ff.; Schulz Harald, "Kredit mit Restschuldversicherung in der Rechtsprechung des BGH zu § 138 BGB", in *FLF* (*Finanzierung, Leasing, Factoring*) 28th year, No. 4, Dortmund, 1981, 154 f.; Schulz von Thun Friedemann, *Miteinander reden: Störungen und Klärungen*. *Psychologie der zwischenmenschlichen Kommunikation*, Hamburg, 1982; Serick Rolf, *Eigentumsvorbehalt und Sicherungsübertragung*, III: Die einfache Sicherungsübertragung, 2. Teil, Heidelberg, 1970, 14; Watzlawick *et al.*, *Menschliche Kommunikation*, Bern, 1969; Weitnauer Hermann, *Schutz des Schwächeren im Zivilrecht*, Karlsruhe, 1975, 10 ff., especially 12 and 15; Zwanzig Jürgen, "Sondermacht für Teilzahlungsbanken im Konsumentenratenkredit?", in *BB* (*Betriebs-Berater. Zeitschrift für Recht und Wirtschaft*), No. 25, Heidelberg, 1980, 1282 ff.

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ditional system of law is in danger of being overlooked, as are certain basic aspects of the problem.

III. Consequences of the IDEOLOGICAL CHANGE

1. *Implications in fact consisting in a gradual snowballing effect*

The change in attitude itself is a reality and is nothing other than the result of a combination of factors, all of them operating in the same direction: the period following the first industrial revolution was marked by the resurgence of a current of thought for whose proponents the notion of equality of all citizens held a special fascination. Its adherents were intent on dismantling privileges both real and perceived, they sought a "more equitable" distribution of wordly goods, viewed hierarchies in whatever form as inimical and generally set out to establish a new order of priorities. The vanguard of the movement was no longer progress as such but the demand for equal rights. This aim, to begin with covertly expounded by discreet gatherings, gradually developed into a mass movement which vociferously pressed its demands at the work-place, in demonstrations and in other forms of public manifestation. The result was a gradual snowballing, as causes produced effects, and effects in their turn became causes again. Such a chain of cause/effect/cause[15] is notoriously hard to break and automatically creates its own momentum. Hence, the well-known pendulum effect, involving swings from one extreme to the other.

2. *Implications in the law leading to a socializing effect*

It takes a long time for changes in mentality in the social and —even more so— in the economic environment to percolate through into the system and especially into the law, and even then their substance is filtered and often diluted. Anyone seeking to measure the legal perceptions of a nation as reflected in its legislative output must make due allowance for this built-in time-lag. Individual and collective perceptions as well as convictions as to the right way to organize human coexistence are transformed in the democratic law-making process into set rules of conduct. A change in the collective mentality can, it is true, be discerned by making a comparative analysis between existing laws and new laws, but the adjustment itself has to take place over

[15] Like the well-known conundrum of the chicken and the egg.

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time. Thus, a change in the law can, by the time it is implemented, already have been overtaken by reality.

There is a further consideration which it is important to allow for in this context: the direction and quality of change depend largely on the character and frequency of the corresponding structures of legal rules. Within a given system, the individual is allowed a varying amount of free scope depending on the local or subject matter jurisdiction. This scope determines essentially whether a legal system is labeled "individualistic" or "collectivist" and, in view of their generic differences, separates —geographically— the Western from the Eastern Hemisphere. In the course of time, this classification has grown more difficult and has acquired another dimension. The outer form, the "packaging", is still based on the predefined scheme. However, the formal belief in a given system, under the pressure of exceptions which erode its basic principles, often suffers from e creeping change in substance due to a gradual swing in attitude with regard to the perception of right and wrong.

IV. Outlook

1. *General remarks*

In recent decades, not only in doctrine and practice but also in legislation, there had been a growing development in favor of subjecting legal activities and economic freedom to greater regulation.[16] It has supplied unmistakable signals that a change in the perception of what constitutes the "right law" derives from the analysis of existing legal rules. The change in mentality finds expression in the transition from the state based solely on the rule of law to the social state,[17] from the rules relating to the system and to protection to a system of social protection and from the rejection of to the advocacy of provisions embodying special rights and privileges.[18]

[16] Giger, Legislation and legal rulings in the year 2000 176: "It (the development, Ed.) is underlined and advanced by the activities of those parties who set themselves up as spokesmen for consumers and, instead of quality of work and prosperity, preach for an improvement in so-called quality of life. They demand shorter working hours, more free-time, longer holidays, more pay for less work, and thus undermine the very pillars of prosperity. Many of them will also openly admit to being hostile to business, to seeking to reduce performance and to rejecting prosperity. Such an attitude had to lead to a radical change in mentality, especially as it encountered little resistance".

[17] Giger, Commentary on the planned consumer credit bill 18 ff. (on the development); also Giger, The protection of weaker parties 32 ff.

[18] Giger, Increased social protection 29: "On peut très généralement comprendre sous le concept de législation de protection sociale tout système juridique d'exception

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2. *Turning-points*

Anyone who has been keeping track of legal developments in Switzerland, even if only from afar and through the intermediary to the press, cannot have helped noticing in the past few years growing signs of indignation at the plethora of laws[19] promulgated primarily in response to pressure for social protection. This is a reaction to what is clearly perceived to be an extreme development; a reaction not only confined to parliamentarians[20] but also visible in broad segments of the population[21] and one which has also mobilized scholars and academics.[22] There is widespread exasperation not just at the formal but also - and more so - at the material excesses perpetrated which have resulted in the citizen being progressively deprived of his legal capacity.[23]

(Sondersysteme) qui, lorsque certaines catégories particulières d'individus sont parties à un rapport de droit, limite impérativement leur liberté contractuelle par des normes plus sévères qu'habituellement, dans le but d'équilibrer une inégalité de fait entre les parties contractantes".

[19] The plethora of legal rules renders the instruments of the law progressively more complicated and impenetrable. The result is that the consumer cannot assert his rights —or only with difficulty— because he has no option but to rely on costly expert assistance. The regulatory mania thus has a boomerang effect. Cf. Giger, The deluge of laws as a time bomb p. 19 ff.

[20] Cf. in this connection publications by Bank Julius Bär, Increasingly shallow legislation 3: "In order to finally rid itself of the burdensome debate surrounding a given bill, a majority of the chamber will force the adoption of a provision which it knows perfectly well to be controversial in the secret hope that this "fateful clause" will prove to be lethal and bring about the bill's speedy demise when it is submitted to the plebiscite. And the fact is that many a bill thus presented to the people by a peevish parliament has been found by the voters with their at times surprisingly sound instincts to be wanting —and has come to grief— by no means to the detriment of the area it was supposed to have regulated".

[21] The attentive reader will detect the signals in the growing number of reports in the daily newspapers.

[22] Buser Walter, The deluge of Laws 6 ff.; Hirschi Fred, Do paragraphs destroy legal consciousness? 17 ff.; also Kopp Elisabeth, The "deluge of Laws" - another slogan? 34.

[23] Cf. on this point Giger, Tendencies towards a state credit policy 23; Giger, The creeping socialization of private Law 41; as well as publications by Bank Julius Bär. On the question of "hypertrophy" of legislative activity, 2: "Complaints about the overactive regulatory machinery of the state —at all levels, from laws, to decrees right down to the narrower bureaucratic area of implementing provisions, etc.— are today a common feature of contemporary analysis of public policy and indeed are justified. The sheer output of legal material and other standards is truly impressive and, were it not for those irksome "troublemakers" who sound the warning bell, the citizen might easily fail to perceive that he is being progressively robbed of his legal capacity. It is instructive here to recall the case of Sweden where even Conservatively minded people have had their natural resistance to government tutelage stifled by the overzealous social and fiscal embrace of the state".

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It took quite a while for the legislative authorities to react to these developments and take remedial action. This reaction manifested itself to begin with in the varying degrees of success with which they fended off the blatantly excessive demands of parliamentarians who are die-hard proponents of social protection.[24] During the various stages on their journey into the statute books, numerous bills were, however, "defused", and encroachments on economic and contractual freedom deemed to be unacceptable failed to receive legislative blessing.[25] The *desire for change* communicated by level-headed citizens and scholars to a responsible majority of parliamentarians reached its culminating point in the debate surrounding the Consumer Credit Bill.[26] The rejection of a bill after more than eight years of permanent and intensive parliamentary debate represents a milestone in the history of Swiss legal policy.[27] This event, the like of which occurs only

[24] Cf. the opinion voiced by Oehler Edgar in the context of the parliamentary debate on the Consumer Credit Bill: "I cannot escape the impression that in this type of contract as elsewhere the work of the legislator does not wholly correspond to the political realities. It is imperative to take account of the actual circumstances and future developments" (Minutes of the delibe-rations of the National Council Commission on 23 April 1985, No. 78.043, p. 907).

[25] During the legislative process, the draft of the Federal Anti-Trust Act (Message of 13 May 1981), for example, was watered down in those areas where it would have encroached unduly on freedom; the popular initiative "concerning protection of the conditions of notice in the law governing contracts of employment" and in favour of amending the provisions governing the employment relationship in the Swiss Code of Obligations (Message of 9 May 1984); the popular initiative for the "protection of tenants", on the amendment of the law governing rental and lease relationships in the Code of Obligations and on the Federal Act on Measures to Prevent Abuse in Landlord/Tenant Relationships (Message of 27 March 1985); also the Federal Unfair Competition Act of 19 December 1986 (Message of 18 May 1983).

[26] Consumer Credit Bill (Message of 12 June 1978); definitively rejected by parliament in the final vote on 4 December 1986.

[27] The dynamics of this development have been succinctly described by Saxer Lydia. On the slow death of the Swiss draft consumer credit bill (p. 46) in a retrospective comment entitled "The Slow Death of the Swiss Consumer Credit Bill". She sums up the main lessons to be learnt in this concluding paragraph: "The events surrounding the Consumer Credit Bill highlight typical dangers inherent in the process of political opinion-shaping. Following a situation where there had been too little legislation in the area of social protection, the pendulum swung back into the opposite direction: a veritable orgy of regulation that has left no scope for the free will of the individual, that as deprived him de facto of his legal capacity. The citizen —declared to be capable of making up his own mind and constantly called to the polling booths— should not just be protected from the dominance of a stronger contracting party, but especially from himself. The endeavors of the authorities to achieve perfection ended in a debacle. Within the population, there is widespread disenchantment with the state which finds expression among other things in the call for less government interference. Various political parties subscribe to the maxim 'More freedom - less government'. The observer consequently gains the impression that, by voting down the Consumer Credit Bill, a number of center-right parliamentarians sought to demonstrate that they were not just paying lip-

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every twenty or thirty years, was a shot across the bows for all those who still imagine that they can continue to undermine our fundamental freedoms with impunity. The result had been the EU-compatible Swiss Legislation of 8. October 1993. It seems to be a fact, that the new conception of the Federal Law on Consumer Credit, set in power the 1st January 2003, is unfortunately again founded on the conviction, that previous consumer protection law has shown an undue confidence in consumer's ability to make decisions for themselves.[28] Protection of mature consumers against abuse is no longer the guiding principle. Instead, the new law is far more interested in the legal tutelage of almost the entire population of discerning, capable adults, people which the Report condescendingly describes as "manipulated", and by implication unfit to exercise their own judgement.

REFERENCES

BLANKENBURG *et al*, *Rechtsberatung. Soziale Definition von Rechtsproblemen durch Rechtsberatungsangebote*, Neuwied und Darmstadt, 1983.

BOLLER, Jürg, "Verhältnis zwischen Wirtschaft und Presse", in *Bilanz*, Nr. 11, 1983, S. 187 f.

BRANDAU, Bodo Walter, "Die Bestimmung des auffälligen Missverhältnisses aus den marktwirtschaft-lichen Daten des Konsumentenkreditgeschäftes und der Schutzwürdigkeit des Verbrauchers", in *FLF* 3, 1983.

BUNTE, "Hermann-Josef, Probleme der Ratenkreditverträge, in: Wertpapier-Mitteilungen", *Sonderbeilage*, Nr. 1 zu Nr. 4, 1983, S. 3 ff.

BUSER, Walter, "Gesetzesflut – Tatsachen, Gründe und Hintergründe", in *Der Monat*, Nr. 10 (Basel 1986), S. 6 ff.

CANARIS, Claus-Wilhelm, "Schranken der Privatautonomie zum Schutze des Kreditnehmers", in *ZIP* 9, 1980, S. 709 f.

DAUNER-LIEB, Barbara, *Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher. Systemkonforme Weiterentwicklung oder Schrittmacher der Systemveränderung*?, Berlin, 1983.

FERNÁNDEZ DE LA MORA, Gonzalo, *Der gleichmacherische Neid*, München, 1987.

GIGER, Hans, *Grenzen der Privatautonomie im Kartellrecht. Interner und externer Kartellzwang in Boykottrechtsprechung und Kartellgesetzgebung*, Zürich, 1964.

service to the fight against overregulation but were actually turning words into deeds in order to preserve a free legal and economic order. For Switzerland's consumer credit sector, this demonstration represents a mark of confidence; for the future, however, it is also a commitment to pursue on a free-will basis a business policy acceptable for all parties".

[28] Accompanying *Report* 14/15.

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———, "Massenmedien, Informationsbetrug und Persönlichkeitsschutz als privatrechtliches Problem. Neue Aspekte im Bereich des privatrechtlichen Persönlichkeitsschutzes", in *ZSR*, NF 89, 1970, S. 33 ff.

———, *Systematische Darstellung des Abzahlungs-rechts unter besonderer Berücksichtigung des Fernkurs-, Unterrichts-, Mietkauf- und Leasingvertrags. Ein Beitrag zur rechtsso-ziologischen Grundlagenforschung*, Zürich, 1972.

———, *Grundsätzliches zum immateriellen Umweltschutz: Die Verteidigung des geistig-moralischen Lebensraums, in Schweize- risches Umweltschutzrecht*, Zürich, 1973.

———, "Freiheit und Zwang im Konsumkreditrecht. Überblick und kritische Würdigung der Gesetzesvorlage", in *NZZ*, Nr. 232, vom 6, Oktober 1978, S. 35.

———, *Une protection sociale renforcée – Ligne directrice du législateur pour le nouveau droit du crédit à la consommation*, Bern, 1979.

———, *Verstärkter Sozialschutz als Leitbild des Gesetzgebers im neuen Konsumentenkreditrecht, in: Band 1 der Schriftenreihe zum Konsumentenschutzrecht*, Zürich, 1979.

———, *Kommentar zum geplanten Konsumkreditgesetz, Band 2 der Schriftenreihe zum Konsumentenschutzrecht*, Zürich, 1980.

———, "Rechtliche Stellung des Konsumenten in der geplanten Neuordnung", in *ZBJV*, 116, 1980, S. 199 ff.

———, "Bedrohung der Vertragsfreiheit im Konsumkreditrecht", in *Schweizer Monats-hefte*, Heft 6, Zürich, 1983, S. 483 ff.

———, "Ratenkredit als legislatorisches Problem. Ein Alternativentwurf", *Schriftenreihe zum Konsumentenschutzrecht*, Band 9, Zürich, 1983.

———, "Sozialschutzwürdigkeit – ein gesetzgeberisches Problem", in *FLF* 30, 1983, 179 ff.

———, "Überforderter Konsumentenschutz? Ein Beitrag zum Schutz des Schwächeren", in *Schriftenreihe zum Konsu-mentenschutzrecht*, Band 13, Zürich, 1983.

———, "Gesetzgebung und Verantwortung unter besonderer Berücksichtigung des Konsumkreditrechts", in *SJZ* 81, 1985, S. 1 ff.

———, "Gesetzgebung und Rechtsprechung im Jahre 2000: Eine Zukunftsschau über Konsumentenkredit und gewerblichen Kredit", in *FLF* 32, 1985, S. 175 ff.

———, Tendenzen zu einer staatlichen Kredit-politik. Zum Sorgfaltspflichtmodell des geplanten Konsumkreditgesetzes, in *NZZ*, Nr. 220, vom 23, September 1986, S. 23.

———, "Kalte Sozialisierung des Privatrechts", in *NZZ*, Nr. 246, 1986, S. 41.

———, "Der zahlungsunwillige Mieter. Analyse der Verzugsregelung im Mietrecht", *Schriftenreihe zum Konsumentenschutzrecht*, Band 21, Zürich, 1987).

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———, "EG-Richtlinien zum Verbraucherkredit, Vereinheitlichungsprogramm im Sinne eines Minimalerfordernisses", in *Jahresbericht VSKF*, Zürich, 1989, S. 27 f.

———, "Der Gesetzgeber im Konflikt zwischen Verantwortung und Praktikabilität, in: Informations-Bulletin VSKF Nr. 3 (Zürich 1989), S. 9 ff.

———, "Begegnung von Psychologie und Recht in der Rechtsfindung", in *Grenzen – grenzenlos*?", Zürich, 1990, S. 33 ff.

———, "Information als Drehscheibe von Unter-nehmenspolitik und Recht, in: Unter-nehmenspolitik von Finanzierungsinstituten in veränderter Umwelt", *Beiträge zum 60. Geburtstag von Dr.rer.com. Guido Lanter*, Basel und Frankfurt a/M. 1995, S. 13 ff.

———, "Normenflut als Zeitbombe. Bedeutung der Informationsbewältigung im Bereich von Recht und Rechtsprechung", in *Wirtschaft und Recht im Würgegriff der Regulierer*, Zürich, 1996, S. 19 ff.

HARTWICH, Hans-Hermann, *Sozialstaatspostulat und gesellschaft-licher status quo*, Köln und Opladen, 1970.

HEDEMANN, Justis Wilhelm, *Flucht in die Generalklausel*, Tübingen, 1933.

HEINEMANN, Olgard von, "Unfall auf Raten. Gedanken zum BGH-Urteil", in *FLF* 5, vom 12, März, 1981.

HERZOG, Roman, In Maunz and Düring, *Kommentar zum Grundgesetz*, GG 20, München, 1980.

HEUSINGER, Bruno, *Rechtsfindung und Rechtsfortbildung im Spiegel richterlicher Erfahrung*, Köln, 1975, S. 190.

HIPPEL, Eike von, *Der Schutz des Schwächeren*, Tübingen, 1982.

HIRSCHI, Fred, "Zerstören die Paragraphen das Rechtsbewusstsein?", in *Reflexionen* 13, 1986, S. 17 ff.

HOLZSCHECK *et al.*, *Die Praxis des Konsumentenkredits in der Bundesrepublik Deutschland – eine empirische Untersuchung zur Rechtssoziologie und Ökonomie des Konsumentenkredits*, Köln, 1982.

JULIUS BÄR, Bank, "Gesetzgebung mit abnehmendem Tiefgang", in *Wochenbericht* Nr. 22, 1983, S. 2 ff.

KESSLER, Ronald, "Sittenwidrige Höhe von Darlehenszin-sen. Anm. zum Urteil des OLG Stuttgart vom 24 April 1979", in *BB* 28, 1979, S. 1423 ff.

KNAUTH, Klaus-Wilhelm, "Entscheidung des BGH zum Bender-Urteil", in *Die Bank* 6, Berlin, 1981, S. 299 ff.

KOCHENDOERFER, Heinz, "Sittenwidrige Höhe von Darlehenszinsen", in *NJW*, Nr. 5, 1980, S. 215 f.

KOPP, Elisabeth, "Gesetzesflut – ein Schlagwort?", in *NZZ*, Nr. 42, 1986.

KORFF, Friedrich-Wilhelm, "Keiner der Tüchtigste. Zu einer Studie über den Neid", in *NZZ*, Nr. 12, vom 16/17, Januar, 1988.

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LARENZ, Karl, *Einführung zur Textausgabe des Bürger-lichen Gesetzbuches*, München, 1983.

LEIBHOLZ and RINCK, "Grundgesetz für die Bundesrepublik Deutschland", *GG* 20, Köln, 1971.

LINDER, Willy, *Konsumkredit – ein Tummelplatz der Emotionen. Wo ist der unmündige Bürger geblieben*?, Zürich, 1996.

MAYER-MALY, Theo, *Das Bewusstsein der Sittenwidrigkeit*, Karlsruhe, 1971.

MEESE and SEIVERTH, *Methoden*, München, 1975.

MÜNSTERMANN, Walter, "BGH contra OLG Stuttgart", in *FLF* 20, Nr. 2, 1981, S. 101 ff.

OEHLER, Edgar, "Protokoll der Verhandlungen der Kommission des Nationalrates", *Votum*, vom 23, April 1985, Nr. 78.043, S. 907.

OTT, Sieghart, "Zur Sittenwidrigkeit von Konsumenten-kreditverträgen. Eine Stellungnahme zum Urteil des BGH", in *BB* 36, vom 12, März 1981, S. 937 ff.

PALANDT and HEINRICH, *Kurzkommentar zum bürgerlichen Gesetzbuch*, München und Berlin, 1981.

PEETZ, Hans-Günther, "Konsumentenkredit und Restschuldver-sicherung in der Rechtsprechung des Bundesgerichtshofs", in *ZIP*, 1980, S. 605 ff.

REIFNER, Udo, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung. Rea-litätsverleugnung oder soziale Auslegung im Zivilrecht, Neuwied und Darmstadt*, 1979.

REIFNER, Udo, "Die Rückabwicklung sittenwidriger Ratenkreditverträge", in *JZ* 39, 1984.

RITTNER, Fritz, "Der Beitrag zur Restschuld-Lebensversi-cherung und Darlehensvertrag", *Supplement DB* (*Der Betrieb*), Nr. 16, Düsseldorf, 1980, S. 3 ff.

———, "Zur Sittenwidrigkeit von Teilzahlungs-kreditverträgen. Die Grundsatzentscheidung des BGH", *DB* 28, vom 12, März 1991, 1981, S. 1080 ff.

SAXER, Lydia, "Wirtschafts-freiheit und Konsumentenschutz, Missverständnisse im Kleinkreditsektor", *Band* 13 der Schriftenreihe zum Konsumentenschutzrecht, Zürich, 1983.

SCHLUEP, Walter R., "Konsumentenschutz in Werbung und bei Vertragsabschluss", *Schriftenreihe zum Konsumentenschutzrecht über "Entwicklungstendenzen im schweizerischen Konsumentenkreditrecht"*, Band 1, Zürich, 1979.

SCHOLZ, Franz Josef, "Die" Praxis "des" Konsumentenkredits in der Bundesrepublik Deutschland?, in *FLF* 30, Nr. 2, Dortmund, 1983, S. 35 ff.

———, "Die" Praxis "des" Konsumentenkredits in der Bundesrepublik Deutschland?, in *FLF* (*Finanzierung, Leasing, Factoring*) 30, Nr. 105, Dortmund, 1983, S. 33 ff.

———, "Der Ratenkredit als rechtswissenschaftliche und rechtspolitische

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Aufgabe", in *FLF*(*Finanzierung, Leasing, Factoring*) 31, Nr. 3, Dortmund, 1984, S. 75 ff.

SCHULZ, Harald, Kredit mit Restschuldversicherung in der Rechtsprechung des BGH zu § 138 BGB, in *FLF* (*Finanzierung, Leasing, Factoring*) 28, Nr. 4, Dortmund, 1981, S. 154 f.

SCHULZ VON THUN, Friedemann, *Miteinander reden: Störungen und Klärungen. Psychologie der zwischenmenschlichen Kommunikation*, Hamburg, 1982.

SEIDL, Edit, "Management Coaching", in *Unterneh-mungspolitik von Finanzierungsinstituten in veränderter Umwelt; Beiträge zum 60. Geburtstag von Dr.rer.com. Guido Lanter*, Basel und Frankfurt a/M. 1995, S. 129 ff.

SERICK, Rolf, *Eigentumsvorbehalt und Sicherungs-übertragung*, III: Die einfache Siche-rungsübertragung, 2. Teil, Heidelberg, 1970, S. 14.

WATZLAWICK et al., *Menschliche Kommunikation*, Bern, 1969.

WEITNAUER, Hermann, *Schutz des Schwächeren im Zivilrecht*, Karlsruhe, 1975.

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