On the State of Legislation Studies in Europe

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A. Common Complaint: "Too Many Laws and Badly Drafted"

The complaint that there are too many and badly drafted laws is as old as it is widespread, in Germany as in all countries of Europe. Franz Schlegelberger, the former secretary of state [equivalent to a US undersecretary] in the German Justice Department, wrote in 1959 in the foreword of the 3rd edition of his book *Zur Rationalisierung der Gesetzgebung* [On the Rationalization of Legislation][1] that

> When, 30 years ago, I called for the rationalization of legislation, I spoke from my own daily experience. Today, I see things from outside, removed from events, rich in life experience. The picture that legislation presents to me has remained the same. The people are continually being showered with masses of laws that they cannot, for the most part, understand. Legislation no longer reaches the people.

The quality of law is equally controversial. The law is often illegible, a-systematic and ill conceived. If legal knowledge on the part of each citizen has in the past been an acceptable hypothesis, it is pure fiction today.

I. A Diagnosis: The Social and Democratic Constitutional State as a Legislative State

Thesis 1: Liberalization, Deregulation and More Competition

In all the countries of Europe, the torrent of laws is a function of the development of the social and economic system. The market economy has developed increasingly into a social market economy. History has made a regulatory decision in these years, for there has been an economic and socio-political paradigm determination of truly historic dimensions. Of the competing economic systems, the command market economy and the social market economy, the social market economy alone has remained. In the struggle between the market economy and the planned economy, between the liberal-democratic basic order – the quasi-official

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[1] F. Schlegelberger, Zur Rationalisierung der Gesetzgebung [On the Rationalization of Legislation] 3 (1959).

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designation of the post-War (West) German system – and command democracy, the democratically and constitutionally established social market economy has survived. But what does "social market economy" mean in this context? In his 1979 essay *Wissenschaft und Sozialismus* [Science and Socialism][2] Friedrich A. Hayek claimed that "social" was a "weasel-word." That small predator is known for its ability to suck the contents from an egg, so that only the empty shell remains – without one being able to tell by looking at it that the egg is empty. According to Hayek, "weasel-words" are words that, if one adds them to another word, rob that second word of its content and meaning. The weasel-word par excellence, he says, is "social." Nobody actually knows what it means; all one can say with certainty is that a social market economy is *not* a market economy, a social constitutional state *not* a constitutional state and social justice *not* justice. And he also fears that social democracy is *not* democracy. Certainly, he has sharpened his remark to illustrate his point.

The market economy has certain important and well-known societal prerequisites, of which only the seven most important are the rule of law; monetary stability; competition; property; openness of the markets; a social insurance system; and relatively low state intervention in the economy. The question is whether that is indeed our legal reality. In the fully developed market economy, the state acts at the interface between the market and social equalization. The welfare state activates the legislative branch.

The constitutional state, or the "state of the rule of law," is in its historical development primarily a "state of the security of law"; the social constitutional state brings forth new tasks. State intervention into the economy is diverse, and regulated by the legislative branch. Subsidies effect an adaptation of companies to the economic situation, or prevent it. There are strict rules for the scope of the entitlement state. Precise procedural rules are necessary for the implementation of managed justice. The network of basic rights is becoming ever tighter. Hence, the legislative branch is the key. The market economy needs relatively few laws. The more the social market economy emerges, the more laws are necessary. A mechanized legislative branch appears. But climate change is looming. The demand for deregulation, liberalization and more competition is becoming louder. In demand, too, this is a contribution by the legislation studies community for an explanation of how this is to be managed.

Liberalization means moving from a state-managed economy to a more strongly private-sector economy. The Frankfurt business law professor Franz Böhm once said that one could tell from the structure of a state court whether a planned economy or a market economy prevailed. In a planned economy, a court with four chambers would consist of three criminal-justice chambers and one civil chamber; in a market economy, there would be one criminal chamber and three civil chambers.

Deregulation means abolition of state regulations. Regulation is the traditional form of state control of commercial areas seen as exceptional in terms of

[2] F.A. Hayek, Wissenschaft und Sozialismus [Science and Socialism],Walter Eucken Institute, Vorträge und Aufsätze, No. 71, at 16 (1979).

competition policy: transportation markets, insurance markets, housing markets. Public regulation uses investment control, price regulation, fixed quantities, standardization, and quality regulations. Deregulation means the reduction of state intervention in markets and businesses. Deregulation aims to promote competition, and to open markets for more players. Liberalization, deregulation and competition are steps toward the liberation of markets and businesses from state control. The three steps appeared clearly in the case of the transformation of Deutsche Telecom. First came liberalization, the Federal Postal Service was reconstituted into three de-nationalized business units. They became public companies, 100% state-owned. They held ownership of their resources and their entrepreneurial functions. The privatized businesses entered the competitive market, at first still with a dominant market position. That constituted distortion of competition. The next step was deregulation. The state withdrew from Telecom, and sold its shares. Initially, its monopoly character was maintained; a true market opening was not achieved until 1998. Competition has emerged in full force since then, and has brought with it price drops of unexpected scope.

The path from liberalization through deregulation to competitive management is supposed to provide relief to the legislative branch. It follows that the development of the welfare state is a principal cause for the overburdening of that branch. But not the only one. The perfection of the democratic constitutional state provides further explanations.

Thesis 2: What Do We Expect of the Legislative Branch?

As in the welfare state, tensions exist in the constitutional state, and in democracy. In the constitutional state, which sees itself as liberal, the citizens would like to be bothered by the legislative branch as little as possible. On the other hand, they expect legally binding entitlements from the state. They would like a legal guarantee of their ability to demand the fulfilment of such entitlements. Democracy also is rich in tensions. The citizens desire an increasing voice in decision-making; ”participation” is the word. On the other hand, the parliament, as the representative of the citizens, is expected to make all “essential decisions.”

First of all to the constitutional state: The constitutional state, or state under the “rule of law”, is experienced by its citizens primarily as a state of *laws*. The concept of the rule of law was shaped much more by Hobbes than by John Stuart Mill. For there are two basic concepts regarding the question as to why law is necessary: Hobbes’ more statist concept and Mill’s more liberal one. Thomas Hobbes sees the law in an authoritarian, statist manner, as the enforceable command of the supreme ruler, who pretends to embody the public interest, and who creates good order. Law, according to John Stuart Mill, and to the idea of liberal government and economics, means something entirely different. The economy and society give themselves certain rules, that eventually, once it becomes necessary, become law. For Mill, the law is a method for the coordination of societal action, it is law shaped according to the principle of equivalence, ultimately by the principle of exchange, the principle of the fair compromise. Society and market economy

operate largely in a "law-less realm" Hobbes would say: "Let us leave to the people their harmless freedoms!"

Continental legal opinion tends more to follow Hobbes. From that has developed the principle of codification. The legislative branch creates legal structures as comprehensive as possible and formulates matters – and the social order – through the law. Anglo-Saxon law and legal opinion tend more to follow John Stuart Mill. The law forms legal islands in a societal sea of moral precepts and custom. Obviously, there are more continental laws than Anglo-Saxon statutes.

Thesis 3: Expansion of the Concept of Law

A discussion of the torrent of laws in the democratic constitutional state will require some comments on the development of democracy. The torrent of laws has been caused to a significant degree by the concept of democracy in Europe, and – one must add – by the development of the science of democracy. That development proceeded from the historic-conventional to the democratic concept of law, from the aristocratic state through the constitutionalism of the 19th century to the democratic state of the 20th century.[3]

In the aristocratic state, or the "state of the estates," law marked the measure in which society had been able to appropriate the state unto itself and was able to manage it. The "law" marked the area of authority of the estates. The law was a generally abstract norm. Since parliament was (and is) also involved in passing budgets and concluding treaties with foreign states, the differentiation between the concepts of material and formal law emerged, and is still familiar to us in present-day jurisprudence. The determining factor in the 19th century in Germany and in Europe was the development of the division of powers between the monarch and the parliament, and the development of basic rights. It was the interference with freedom and property that determined material law. In the 20th century, in fully developed democracy, law has become any generally abstract norm. What belongs in a law is determined by the "theory of the essential." Formal concepts like "statutes of special provision" or "single-case law" have largely lost their meaning. The study of legislation must address all these aspects of the function of law in the democratic and constitutional welfare state. Essentially, five areas of work the legislation studies can be identified today.[4]

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[3] Cf. U. Karpen, *Entwicklung des Gesetzesbegriffs in Deutschland*, [Development of the Term 'Law' in Germany], *in* P. Selmer & I. von Münch (Eds.),Gedächtnisschrift für Wolfgang Martens [Memorial Essay for Wolfgang Martens] , 137-152, at 139 *et seq.* (1987).

[4] U. Karpen, *Zum Stand der Gesetzgebungslehre in der Bundesrepublik Deutschland* [On the State of Legislation Studies in the Federal Republic of Germany], 1 Zeitschrift für Gesetzgebung 5-32, at 34 *et seq.* (1986); G. Müller, Elemente einer Rechtsetzungslehre [Elements of the Theory of Law-Drafting] 1 *et seq.* (1999), which also contains an up-to-date legislation studies bibliography (1999), at XV-XXII; U. Karpen (Ed.), Zum gegenwärtigen Stand der Gesetzgebung in der Bundesrepublik Deutschland – Zehn Jahre "Deutsche Gesellschaft für Gesetzgebung", Zehn Jahre "Zeitschrift für Gesetzgebung" [On the Current State of Legislation in the Federal Republic of Germany – Ten Years of the German Society of Legislation, Ten years of the Journal of Legislation] (1998).

Legal analytics is concerned with the law as a legal source. Law is understood to mean constitutional law, regulations, administrative rules, statutes, and also "judge's law," since it often has the "force of law." Legal tactics is concerned with external legislative procedure. Legal methodology has to do it with internal legislative procedure, the content of legal provisions. Legal technique is concerned with the formal rules of legislation, citation, the application of language, the structure and system of the legislative product, etc. Research of effectiveness, which examines the acceptance of laws, has increasingly gained significance. The German Association of Legislation[5] and the European Association of Legislation[6] address all these aspects of legislation.

II. The Treatment: The 'Lean State'

Thesis 4: How Many Laws Does the State Need?

The task of legislation studies is to analyze these facets of legislation and to penetrate them theoretically. It cannot stop there, however. It is also practical social science. It criticizes, proposes and offers instructions for action. Some practical suggestions involve the development of the welfare state, the constitutional state, and democracy.

First, legislative studies makes a contribution to the critique of the tasks of the state. How many laws does a state need? The fewer tasks a state fulfils, the fewer laws must it enact. But how many tasks can and should the state assume? Here, of course, is where the political forces favouring an expansive task-definition policy face off with the advocates of a contractive policy. And yet, there is a consensus that the end of the age of planning euphoria has arrived, that budget consolidation and personnel reduction are the order of the day, that many tasks of the state must be privatized: gas, water, waste disposal, and such businesses which support the state apparatus as horticultural facilities, laundries, cleaners, etc. There is an iron core of state tasks, an intrinsic realm of the state. These include the police, the judiciary, the tax administration, labour and social law, the support of science and research for the sake of the future. Other areas can be let go: these include, in addition to the railroads and the postal service, possibly a part of the school system (private educate). It is now time to examine all state tasks for possible de-bureaucratization, deregulation and the creation of a "lean state".

A standard for this examination is the magic word 'subsidiarity'. There are certain fashions in government studies. Big units were once "in", both in the state and in the economy. "Think big" was the slogan. Today subsidiarity is trump. Small is beautiful: lump-sum budgets for colleges and clinics; new control systems; means-ends-products descriptions in management; benchmarking according to figures: students per course, length of study, "A" test grades per hundred graduates. A strengthening of competition between political units is demanded: new public management; lean administration; total quality management. A market-oriented

[5] U. Karpen (Ed.), Deutsche Gesellschaft für Gesetzgebung e.V. (DGG), Materialien (1994).
[6] U. Karpen (Ed.), The European Association of Legislation. Statutes. Texts. Materials (1995).

contract state is to take the place of the bureaucratic hierarchical state. That should bring with it a significant relief of burden on the legislative branch.

Thesis 5: Does the Legislative Branch Overestimate its Power?

Legislative studies also addresses the question whether it is legitimate, in terms of the rule of law, for the legislative branch to participate in the de-regulation of the economy and of society. Can the state deregulate, is a simplification of the state regulatory structure possible? It must be possible. Presently, in the Federal Republic of Germany there are roughly 5,000 laws and ordinances with some 60,000 paragraphs. Such a mass of law cannot be comprehensively surveyed. The question is, however, where the task of de-regulation can begin. For example: how is the legislative branch to simplify a ten-volume tome of social-welfare law without dispensing with fair treatment for certain individual cases?

The legislative branch could have – to take another example – summarily determined that properties confiscated by the East German regime were to be returned, as far as practically possible. Then, however, exceptions were enacted: usufruct rights acquired under East German law are considered valid, investments have a priority: "investment before restitution." However, as soon as the priority of investment is established in favour of one group and the condition of *bona fide* acquisition in favour of another, the result, which has in fact come about, is inevitable: a wreath of legal paragraphs woven of ever more amendments.

Damming the torrent of laws means leaving the administration more discretion to make individual decisions. But since administrative decisions are subject to judicial review, judges track down ever more deficiencies of justice between the cracks of legal provisions and demand more legislative regulation. The question is whether one always needs a law. What is the real role of law in the system of state functions? State stipulations, from the constitution all the way down to the administrative regulation or the court decision, form a cybernetic regulatory circuit. Law is one – but only one! – important control mechanism, accentuated by its democratic legitimatization. The law is the Rock of Gibraltar of the democratic constitutional state. The law has specific tasks, but not everything needs regulation by law. The law has primarily three tasks: first, the law has the function of providing order, guarantees, and protection; it has the function of ensuring transformation and improvement; and ultimately, it has a planning and constitutional function, it integrates the state.

The law has a regulatory, integrative, rationalizing and anticipatory function. The implementation and application of the law in the cybernetic regulatory circuit is the task of the administration and the judiciary. The administration miniaturizes the law, and details it. The key decisions of the courts concretize the general clauses and uncertain legal concepts of the law.

The regulatory instruments of the state are interconnected in ascending and descending order. The *descending* regulation of the state proceeds from the constitution through the law to the judicial decision, in ever greater detail. Key court decisions have an *ascending* function, concretizing the law and often leading to amendments. It is precisely this all-penetrating function of the law that

leads to demands relief. No more a forestation of the state's legal stock, but rather less detail, more thinning out, and deregulation are needed. Integration into the European legal systems makes restraint on the part of national legislatures appear possible.

Thesis 6: The 'Active' Citizen

Finally, there is a democratic acceleration of legislation. The active citizen, who is at the same time dependent and assertive, is forcing the legislative branch to act. Here, a new approaches in government and administration studies can be put to use in the area of legislation: the principal-agent approach. The citizen is the client, the "principal", the "boss". The parliament is the representative ("agent") of the principal. The legislative branch focuses on the public interest. The voters have their interests, they push them through as members of interest groups. The interest groups make their influence felt on the concretization of the public interest by parliament. The "active" citizens exert pressure on the legislative branch. They are simultaneously dependent and assertive. First, they are dependent on the legislative branch.

They are more strongly than ever dependent on society, on the social function. The issues of the community are more important for the citizens now than ever before. The social realm has been de-individualized. The individual does not occur. What counts are groups. Socialization of individual needs is the rule. That is the flip-side of individualism, the dissolution of relationships in small groups. Society is corporatively structured. Unions, associations of government officials and associations of employers take care of the individual. The consideration in Germany of an "alliance for jobs" between government, business and the unions illuminates this development toward corporatism. State and major societal associations assume ever more tasks on behalf of individuals and interest groups. And the state and the interest groups just happen to need the legislative branch for the realization of social goals.

At the same time, active citizens are rising against creeping disempowerment, and are becoming more assertive. Efforts toward direct democracy and participation, the introduction of initiatives and referenda etc. lead first of all to new legal provisions. It is the age of the citizens' movements: politics is becoming bulkier, democracy more small-scale. The Baltic Sea freeway from Rostock through Lübeck to the Elbe crossing west of Hamburg, opposed by environmental movements, is one example, the efforts for reform of the Hamburg borough structures are another. These are NIMBY issues: industrial sites, yes, but please not here. Irrigation and drainage yes, but please not here. The process of legislation is becoming ever more difficult and drawn-out. The Baltic Sea freeway will ultimately only be able to be completed by means of a federal planning acceleration law. The new Hamburg harbor in Altenwerder, too, will only be authorized for expansion by means of a law.

If we are serious about the demand for deregulation and elimination of detail in legislation, if we truly want a leaner state, three things will be necessary: The citizens must stop expecting too much good from the state – hence, ultimately,

less. The state must give up fulfilling interest-group desires left and right, which would contradict the interest of a state ruled by parties which are in turn indebted to these interest groups. Parties that carry citizens' desires into the state organs must be told by the citizens that they can no longer call upon to their alleged expectations upon the state to justify these actions.

III. Suggestion for the Improvement of the Quality of Laws

Thesis 7: The Substantive Quality of Laws

Aside from complaints over the excessive quantity of laws, there is concern over the increasing deficiency of quality of the laws produced. There are some promising approaches in legislation studies toward the improvement of the quality of law. One noteworthy suggestion is to keep the term of validity of laws flexible. The products of the legislative process are viewed more soberly today. The focus is shifting from the consistency of justice to the dynamic development of reality. Not every law is worth to be chiselled in stone like Hammurabi's law.

Are laws valid forever, or only for a limited period? First of all, the instrument of trial-period laws is increasingly being used. Traditionally, laws are acquisitions, established quanta in the social and economic clash of interests. The Shop-Closing Time Law, which specifies closing times in order to protect small shop-keepers, is an example of that. Laws should have their trial period built in from the outset, however, and periodic checkups are usually necessary. The trial-period laws take up this suggestion. The amendment of the Judges Law to test single-stage legal training is a good example. Since the model for the new legal training did not prove itself in practice, it was simply deleted from the law.

Foreign legal systems have increasingly introduced review clauses. English laws, for instance, include the following final stipulation:

> The minister shall carry out a review of the operation and effectiveness of the Act as soon as it is practical after the expiration of five years from its commencement and, in the course of that review, the minister shall consider and have regard to, the effectiveness, the need for continuation of the functions of the law, such other matters as appear to the minister to be relevant. The minister shall prepare a report based on the review and shall as soon as practicable cause the report to be law before Parliament.

Thirdly, there are sunset clauses in laws in Great Britain, and also in the USA. Many laws lapse at the end of the legislative session, unless, they are passed again.

A new legislative method is the introduction of sunrise clauses. It has been applied to the constitutional drafting process in South Africa. The final constitution of the Republic of South Africa needed a long preparation of several years, but the constitutional process in some provinces – for instance in KwaZulu-Natal – was finished more quickly. Since it was at the start not yet finally certain how far the area of authority of the central state would go, some provinces laid out their expected areas of authority in a far-reaching manner, but took account of possible

restriction of these areas of authority by the national constitution. Some legislative and administration areas of authority, for instance in the areas of security and economics, have initially been defined as areas of provincial authority, but with a provision for possible restriction by the national constitution. That is done by a sunrise clause:

> Any provision of this constitution subject to Subsection Two, including the allocation of power and functions which is not consistent with the Constitution of the Republic, shall have no force and effect. The chapter shall remain in force until such time as the constitution is replaced by a constitution as envisaged.

Thesis 8: Could Constitutional Standards Enhance the Quality of Laws?

In the Federal Republic of Germany, and also in other countries, the question is being raised as to the extent to which the constitution includes standards for the content of legislation. There is a suspicion that the constitution is being overused as standard for the content of legislation. Not the least of the reasons for this overload of the Constitution as a standard for legislation in Germany is the fact that the Federal Constitutional Court has repeatedly been called upon to act as a substitute legislative branch. Cases in point have included judgments regarding Art. 3 of the Constitution, which bans racial and gender discrimination, §218 of the Criminal Code, in which the Court was called upon to regulate conflicting East and West German abortion law provisions, and tax legislation.[7]

In a number of decisions,[8] The Federal Constitutional Court has gleaned the obligation for optimal legislative procedures from the Constitution: the duty to certify facts; a duty to make a prognosis; a duty to weigh conflicting interests; an observation duty regarding effect; and a duty to rectify faults. Resistance is rising against this. Klaus Schlaich has said[9] in his constitutional law teachers' lecture: "The legislative branch owes nothing at all other than law." The current thesis of "optimal methodology of legislation as a constitutional duty" requires this to change. It seeks to impose a verifiable rationality of the process of decision-making upon the legislative branch. Such a duty cannot be derived from the Constitution. There is no "legislator" *per se*, of whom it might be said, that he had acquired expertise, "utilized the available empirical data and experience in a serious manner," undertaken the necessary weighing of interests. And that fact would still be true, even if Parliament itself were expressly to pass the rationale for such a law. Legislation is not administration, the representative elected for a term is not an official, neither in his job, nor in his relationship to the law, nor

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[7] U. Karpen (Ed.), Der Richter als Ersatzgesetzgeber [The Judge as a Substitute Legislator], Proceedings of the 14th Conference of the German Association of Legislation e.V., in cooperation with the State Legislature of Hamburg, 2 Mai 1994 (1995).

[8] Cf. only Constitutional Law VerfGE77.109 [Constitutional Court Ruling].

[9] K. Schlaich, *Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen* [Constitutional Judicial Authority in the Context of State Functions], 39 VVDSTRL 109 (1981).

in his responsibility. The control of standards cannot harness the legislator to a legislation-administrative procedural law derived from the literature and from court decisions.[10]

With reference to the Federal Constitutional Court's rulings on the Co-Determination Law, which gives workers a voice in plant management, and § 218 of the Criminal Code (the Abortion Law), Schlaich continues: "Do not these two examples yield advice to the legislative branch – in caricature form – to advise the representatives to remain silent in the face of complex issues and to appoint a commission of experts?". New standards for the legislative branch are contained in the stipulations of state goals for environmental protection, for factual equality of women, and in many state goal regulations in the constitutions of the new East German states. The social rights in the constitutions of the new states, too, will, once the state constitutional courts address them, become commands for new legislation. The same is true of the "magic quadrangle" – the quasi-sacred foundation of German prosperity (full employment, price stability, a balanced budget and steady growth).

The question also arises whether there should not also be constitutional barriers to the legislative branch, such as a debt ceiling, a duty to balance the budget, or perhaps a standard for tax reform, such as the introduction of a single-rate flat tax.

Thesis 9: On the Art of Writing Laws

Much has been said in the last decades on the art of writing laws. In almost all countries of Europe today there are legislation aids, "cookbooks", guidelines and check lists, from Austria to Switzerland, from Germany to Sweden. The Swiss guide for the drafting of federal decrees, published in 1995 by the Federal Department of Justice, runs to over 500 pages. The Koopmanns Working Group of the European Union has worked out guidelines for European legislation and for that in the member states, guidelines for the Commission, for the Council of Ministers and for the European Parliament. These guidelines envision an independent evaluation of bills.

Much has been written, too, about legal language. The technical language, which is not directed at the public at large, such as that in the Nuclear Laws, is very elaborate. Colloquial terminology is chosen for laws closer to the citizens, such as the Family Laws. The question has been discussed whether a law should be published in two languages, in an experts' version for the legal staff and in a popular version, a "people's code," so to speak. There are reservations. In Great Britain, there is a bill department, the Office of the Parliamentary Draftsmen. Sir William Dale[11] has explained how this office works, with reference to the British copyright law.

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[10] The same conclusion is reached by K. M. Meessen, *Das Mitbestimmungsurteil des Bundesverfassungsgerichtes*, 1979 NJW 833, at 836.

[11] Sir William Dale, Legislative Drafting. A New Approach. A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom 11 *et seq.* (1977); cf. also *id.*, *The Drafting of the Norm*, *in* U. Karpen & P. Delnoy (Eds.), Contributions to the Methodology of the Creation

In Germany, an agency for examination of standards is under consideration. It would check bills from the ministries for their worthiness to be passed by the Cabinet and introduced as legislation. Such an office would certainly be difficult to fit into the present constitutional structure, since its work would mean a restriction of Art. 65 Section 2 of the Constitution, according to which each Federal minister is responsible for his own department, within the guidelines set by the Chancellor.

One suggestion proposes imposing a burden of justification on the legislative branch if it wants to establish new state tasks. It would have to assess the consequences of its action.[12] In addition, it would not be enough to note on the cover sheet to the bill, as is often done: "Expenses: None". It is known that the social costs of legislation are high – but it is not widely known. In Hamburg it has been determined that medium-sized businesses must devote up to 30% in bureaucratic expenses in order to implement business laws, from the receipt of authorizations, the fulfilment of reporting duties, and the application for state funds and subsidies. The Independent Commission for the Simplification of Law and Administration (the Waffenschmidt Commission) published in 1994 a call for cooperation titled *Examination of the Administrative Duties of Businesses,* which sought answers to these questions. What legal duties exist for businesses: duties of public notification, duties of retention of records, duties of registration? What is the actual expenditure in time, effort and cost that the fulfilment of these duties necessitates? Which would be the consequences of dispensing with these duties? Are there simpler alternatives, with which the same purpose could be achieved? Are there simplification possibilities through the harmonization of several duties?

IV. Legislative Procedures and Legal Style

Thesis 10: A "Law on Legislation"?

Some countries have taken or are taking approaches to bring together these complex questions of the content and procedure of legislation in a "law on legislation". One example is the Bulgarian Normative Acts Law of 1973. This law has the goal of perfecting the drafting, promulgation and application of normative

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of Written Law, Proceedings of the First Congress of the European Association of Legislation in Liège, Belgium, September 9-11, 1993, EAL Publication No. 2, 35 *et seq.* (1996); R. Pagano, *Legislative Drafting Directives – Towards a Common Model of Legislative Techniques? in* U. Karpen & E.M. Wenz (Eds.), National Legislation in the European Framework*,* Proceedings of the Second Congress of the European Association of Legislation (EAL) in Rome, March 24-29, 1995, EAL-Publication No. 4, 203 *et seq*. (1998); H. Risse, *The Bundesrat in the Legislative Process of the Federal Republic of Germany, in* U. Karpen (Ed.), Role and Function of the Second Chamber, Proceedings of Third Congress of the European Association of Legislation (EAL) in Munich. October 9-10, 1997, EAL-Publication No. 5, 115 *et seq.* (1999); R. Bergeron (Ed.), Rules of Legislative Drafting, Letters to Ukrainian Drafters (1999).

[12] Karpen, *supra* note 4; U. Karpen, *Gesetzesfolgenabschätzung in der Europäischen Union* [Legislative Impact Assessment in the EU], 124 AöR 400-422 (1999).

acts. First of all it is specified which acts in the hierarchy of provisions fall under this law: laws, ordinances, implementation regulations. Then, there are rules on when the acts take effect and lapse, on repercussion, on the planning of laws, on their drafting and proclamation, and finally guidelines for interpretation by the Council of State, a law on presentation to the courts, etc.

In Poland, a bill on legislation has been debated since 1975. It covers the drafting, comparison, proclamation and control of laws, decrees, ordinances and administrative rules. The project has been broken off repeatedly and later resumed; presently a first draft is in progress. The *Camera dei Deputati* in Rome has specifically provided for a committee for the control of legislative acts, *Comitato per la legislazione*. The legal basis for its work is a rule of the House, not a formal law.

The goals of legislation are stated: "The principles of social justice and of equality before the law are the foundations for law-drafting acts of the Republic of Poland". In addition, principles of constitutional law and the reservation and priority of the law are listed. Art. 12 of the draft contains a necessity regulation: "A law-drafting act may only be carried out if current provisions are insufficient, and if there is reason for the assumption that the new provision will achieve the effect intended by society". A fundamental regulation must be involved: "A law-drafting act should particularly be carried out if there are reasons for the assumption that the provision will be the suitable method to have a legal effect upon the life of society for an extended period. It should, moreover, regulate as exhaustively as possible the entire realm of tasks of a certain area of the life of society". Principles that are relevant to the formulation of laws are legal subject, entitlement and obligation, triviality, definition, participation in legal acts, principle and subsidiary goals etc. Questions of the interrelationship between legal acts are also regulated, for instance power of attorney, delegation, and the promulgation of administrative regulations; also principles of legal validity, repercussion, and rules of interpretation. Finally, the individual steps of the law-drafting procedure are regulated separately. For instance, the rules of proclamation are set down in very great detail in seventeen of the total of 76 articles.

Thesis 11: The Style of Law

The European Association of Legislation (EAL) is currently sponsoring a project to examine the assumption of EU guidelines into the national law of the member states. Common law was originally case law, case-by-case judge's law, with the development of *stare decises* (standing jurisdiction) as prejudice. Statutes are more or less sporadic laws of opportunity; they are law of a second order. Exceptions are consequently to be interpreted narrowly and in detail, according to the standards of verbal interpretation. In civil-law countries, the standards of Roman law prevail. It is a dogmatic law. Terminology is strongly emphasized, the principle of codification provides the foundation, a relative freedom of interpretation prevails, with teleological interpretation methods and analogies.

The English legislation scholar Sir William Dale[13] has compared English and continental law. He states that English laws are long and dark. There were long sentences and paragraphs. There were many details, few principles. The legislature seeks an indirect approach to the object. It applies the method of subtraction: "subject to...", "provided that….". There is a certain wariness against decision-making. The legislature acts centrifugally. It flees from the central regulation toward regulation by definition and interpretation. The law is characterized by a meagre arrangement of the material. There were too many and too long lists. There is a prevalence of citations. Many laws copy European guidelines ("copy out"). On the European continent, by contrast, there is a clear formulation of law; a principle-based method of regulation; a broad approach, conceptual thinking; a clear concept at the first appearance of a term. Viewed country by country, Dale considers French law to be clear in principle and explicit in form and expression. The law is characterized by logical development, economy of expression, and brevity. As Mitterand once said, the French want things said and done plainly, on the basis of a comprehensive concept. Swedish laws stand out for their language that is easily comprehensible to a layman. Technical concepts appear in materials and in the preamble, not in the text of the law. In general, the "policy of law" is regulated in comprehensible language; the details are left to the special courts in the corresponding social field, for instance the labour and social courts. German legislation, according to Dale, places principle first, and then regulates the details with great precision. The laws are frequently long, but systematic. However, they often contain very long sentences, full of subordinate clauses. The laws are very elaborate; often they regulate maters that in Britain would be covered by an ordinance or an administrative regulation.

As for the comparison of the French and German styles of legislation, a quote from Heinrich Heine may be useful. In *Lutezia* (1854), his satirical and caricaturist collection of foreign correspondence, he wrote "that the clarity and ease with which the Frenchman arranges and handles his thoughts springs from an arid one-sidedness and a mechanical limitation that is much more unpleasant than the blooming confusion and clumsy overflow of the German journalist". Let others judge whether this dictum is applicable, and whether it has been transferred to legal writing. In any case, legislation should strive mightily both to emulate French clarity and ease, and also to avoid the blooming confusion and clumsy overflow of German laws.

Beyond this, there is a convergence of styles of legislation. In Britain, a relief of the legislative branch through the judiciary is observable. Whether Germany can still claim to pursue clear construction and sharpness of concept is at least open to question, especially if one views the new versions of two articles of the Constitution. Article 23, once a brief statement anticipating the accession of the East German states to the Federal Republic, is now a wordy profession to EU membership, while Article 16, which once said simply that "the persecuted have a right to asylum" now adds a whole paragraph of restrictions. In Sweden, too,

[13] *Supra* note 11; cf. also the 25 country essays in: U. Karpen (Ed.), Legislation in European Countries, European Association of Legislation (EAL), Publication No. l (1996).

the differentiation between technical and everyday language is increasing. The problems of nuclear energy and environmental protection have not left Swedish law untouched. For the development of European jurisprudence, the question that had to be addressed by the new East German states in their legislation will now face many new enlargement countries. Which procedure for legislation should they choose? What is the procedure of "receipt" of the laws of the former western states?

With regard to civil service legislation, many new states used this form of law-making. Should one "re-invent the wheel?" Some states have done so in their environmental legislation. Or should one proceed according to the "quarry method" – examine the legislation of all the states and select the best? This procedure was chosen for the higher education legislation of the state of Mecklenburg-Hither Pomerania.

As for European law-drafting, there are various procedures. The principle the "lowest common denominator". The transit guideline for gas pipes was drafted in 1990 according to this method. The principle of "slavish imitation" of national legislation. The legislation to prevent unfair competition used this procedure. The "cavalry-charge" method. The product liability guideline cuts loose from all national experience.

Thesis 12: Of the Power and Powerlessness of the Legislative Branch

The best law, perfect in form and content, passed in an orderly manner, is of no use if it is not obeyed, for it then does not become effective at all. Therefore, the question of the acceptance of provisions and their examination – to put it in old-fashioned terms, the examination of the obedience to the law – has increasingly moved into the foreground of legislation studies. Johannes von Kirchmann once said: "Jurisprudence has, like any other science, to do with an object that exists freely, autonomously and independently, in and of itself. That object is the law, as it lives among the people and is implemented by each individual in its purview".[14] Law must indeed be living law, law in action, in the sense of externally perceptible legal behaviour by those it addresses. Law in its social dimension is a component of objective reality. Quantifying this empirical reality is one of the tasks of the pollster's trade.

Research into effect is not so much interested in why people obey but rather whether, how and to what extent they obey. They observe the law if they by and large heed the legal provisions. They do not observe it if we read reports on corruption scandals, building occupations, blockades of transit routes for nuclear waste, contempt for drug laws, violent protest against a new runway at Frankfurt Airport, and the like. The reasons and motives for observation of the law (at the micro-level) include a basic attitude of legality; a fundamental feeling and ethic of legality; an awareness of, and faith in the law; a feeling of security of legality, a sense of justice; a conscience and morality of legality. Reasons for non-observance

[14] Substantiation in: J. W. Pichler & K. J. Guse, Rechtsakzeptanz, Schriften zur Rechtspolitik, [Acceptance of Law. Writings on Legal Policy] Vol. 6, at 13 (1993).

(predominantly at the macro-level) include problems of legitimatization; problems of external effects; internalization problems; implementation problems; communication problems; legal efficiency problems.

Some basic rules for the assessment of obedience to the law should be re-learnt. A law will only be obeyed if it is fair and guarantees legal security. The impossibility of a comprehensive survey of the body of law damages both the law itself and the obedience to it. A "mechanization" of the legislative branch damages legal security. Increasingly, one must keep an eye on the feedback on the effectiveness of law, i.e., the exploration of its acceptance. To this end, reports are necessary not only from the justice ministries, but above all from the courts and the lawyers. Some of the "powerlessness of the legislative branch" must be re-learned. The legislative branch damages the legal effectiveness itself, if it fails to observe certain important barriers. "The market overrides the law." Examples are smuggling, be it smuggled whiskey or smuggled cigarettes. Or part-time work and overtime: a cheap market overrides expensive law. Other examples: criminal measures against off-the-books work and against overtime will prove just as effective as the prohibition against baking and selling breakfast rolls on Sunday mornings was. "Social morals override the law." An example for that is §218, the Abortion Law. Another example is the circumstance that crimes against property and corporate crime are on the increase, with the public education of the last decades being not the least among the reasons for it. Law against human nature cannot be enforced. Socialism was a social and economic mistake. That is an argument for a humane natural law. The ever-enthusiastic, helpful, altruistic human being does not exist. An expropriating tax will not be paid. The citizen reacts to strangling taxes with capital flight. A human being will not let himself be exploited. Legislation that pushes welfare too close to wage levels leads to abuse of the welfare state. The human being is lazy by nature.

V. The Modest Realization: The Possibilities and Limits of Legislative Studies

Legislative studies are indispensable.[15] They will and must be regulated further. The idea of the "simple law" is a dream. There is no "dropping out". A reduction of the multiplicity of laws and amendments, improvement of the quality of law and recovery of "prescriptive distance" will lead to a stronger consolidation of the constitutional state. Legislation research can contribute to that.

The goal of legislative studies is the improvement of laws and their effect. This goal has not yet been reached. At least the technology has reached a good point, and in the methodology, the synthesis of already existing prior control of bills and administration-scientific post-investigation of the effect of law heralds a promising practice-oriented further development of legislation studies.

Nevertheless, one must remain conscious of the fact that legislative studies have their inherent limits. Legislative studies cannot achieve complete rationality: this is impossible according to the theory of science. Politics cannot be abolished, nor

[15] Karpen (1956), *supra* note 4, at 32.

are all the effective factors of laws predictable. And the human being will never observe a comprehensive plan. Legislative studies *should* not achieve complete rationality in any case: the complete control of effective factors of legislation, the integrated design and control of societal life through laws would mean a restriction of freedom and hence an unconstitutional totality of government control.

Nevertheless, an improvement of legislation is possible through legislation studies. The production of "absolutely good and effective" laws is not possible, but approaching the goal of "relatively good, better laws" can indeed be justified, nor is it hopeless.

B. Outline of a Model Training Course for Law Drafters

I. To Draft Good Laws Can Be Taught and Learned

1. Rule of Law, Legislative Drafting and Legislative Process

Laws of good quality, precise and transparent statutes, are essential elements of rule of law. This means participation of all governmental and parliamentary institutions in the drafting process and strengthening the knowledge of drafting skills and techniques. To reach this goal, one needs good coordination and organization of institutions and persons, a well structured drafting process and training courses for drafters.

Sometimes the process of good drafting is impeded by deficiencies. Parliament, be it in one or two chambers, is not in a position to create a strong secretariat responsible to examine the bills tabled in the House(s) and support the law making process. The office of the Chief of Government or the responsible ministries work drafts applying an ad-hoc method without being able to give due care to the technicalities of good drafts. There is a lack of coordination among different agencies and ministries, which are involved in drafting laws. There is a lack of cooperation with interest groups, organizations of the professions, a lack of participation of the public, which leads to a loss of information and makes later implementation of the law more difficult. Sometimes absence of resources and technical manpower is the main reason behind government's failure to establish a functioning legal drafting cell. Members of Parliament, who are supposed to deliberate on the law making process in their capacity of legislators, are overburdened, under time pressure, do not get enough assistance from the secretariat and simply don't know how to write good laws.

Most of these deficiencies may be eliminated or mitigated by better planning and structuring the legislative process, improving the coordination of drafting units and participants and by teaching and learning the methods of good drafting. Good quality of laws facilitates acceptance and implementation, poor quality creates problems of understanding, interpretation, and enforcement by executive authorities and the courts.

2. Learning, How To Draft Good Laws

Many countries, which suffer from the aforesaid deficiencies, introduce projects to strengthen rule of law by improving organization and procedure of law drafting and creating opportunities for preparing technically and conceptually sound legal drafts through expert inputs and appropriate consultative tools and methods. These countries offer learning opportunities to the representatives of the concern sectors in the area of preparing technically acceptable and workable law drafts. They sensitize the legislator and other actors, directly or indirectly involved in the lawmaking process, with various stages and forms of legislative process. They regularize the consultative and public hearing process in the formulation of legislation, and finally they establish a system for minimizing inconsistencies and ensuring the quality of legislative drafts through coordination among law drafting institutions.

In order to accomplish these goals, an outline of a legislative drafting course is developed, as follows. It is vital that the scope of actors and participants in this course is as wide as possible, including not only members of parliament, officials from parliamentary secretariats and governmental agencies, but administrators, members of the lawyers association and the judiciary, representatives of various organizations of economy, culture and other sectors of society (NGOs).

3. Proposal For a Training Course in Legislation

It is proposed to start training activities with a one year's action plan. For developing and carrying out that programme it is advisable to establish a joint Project Management Committee, consisting of Members of Parliaments, Government and other actors, as mentioned before. The programme will start with an Analysis Workshop to create necessary competent manpower in the drafting field for preparing the courses, nominate the teachers and seminar coordinators, design the curriculum and prepare materials. Secondly, an orientation programme (about 5 days) will acquaint a small group with the legislative process. In this stage of the programme the participants will examine the various steps of law-making process from drafting to promulgation and the role of various actors in this process. Thirdly, 2 or 3 important sample drafts of law prepared for tabling in Parliament will be placed for consultative exercises in order to analyze and examine the drafts both from the technical point of view as well as consultative (public hearings a.s.o.). Fourthly, coordination mechanism will be initiated through a common forum where all interest groups and institutions, including various Ministries and law enforcement agencies, will be invited to contribute in the draft preparation process. The project management committee will predetermine the indicators of accomplishment or failure, will assess and monitor the process and conduct an open, overall review ot the outcome of the project.

II. The Legislative Drafting Course-Details

1. Better Understanding of the Legal Systems and Legislative Techniques

Of course national legal systems are different. There are, however, general principles and techniques for drafting clear and concise legislation, which can be taught and learned and adapted to national legislative procedures. They apply not only to statutoy legislation, but to delegated legislation and administrative regulations as well.

The course will begin with an overview of the national legal framework. It will cover the unfolding of the relation between policy and law. The technical aspects of legislation will be demonstrated according to international standards. The item of Regulatory Impact Assessment (RIA), including the costs, has to be included. One focus of teaching should be the relation of laws to each other. Amendments of one law very often overlook consequences to other laws. Comprehensive codifications are preferable to one topic-laws. There are more general topics which apply to virtually every draft law, and more specific, which need to be taken into account if one writes draft laws for a particular sector of politics. The composition of participants of the workshop and seminars will take notice of this point.

2. Improving the Quality of Draft Laws

Improving the technical quality of draft laws is relatively straightforward – drafters can be taught drafting rules and conventions and can be given practical exercises to develop skills. Improving the substantive quality of laws is more complicated. Procedures must be developed so that drafters and legislators are able to obtain assistance from outside experts, as well as the views of interested parties, throughout the lawmaking process. Furthermore, procedures must be developed to maintain the quality of a draft law as it moves through the legislative process. It does very little good to develop a legally and technically sufficient draft law.

3. The Drafters

The implementation strategy of the proposed programme combines the technical and substantive aspects of legislative drafting and legislative process in a series of interconnecting seminars and workshops directed at three different target groups: key legislative actors, key people outside government who influence government policy, a core group of legislative drafters from the legislative and executive branches, and others outside the government (lawyers, NGOs, and interest groups).

The major effort must focus on developing a technically competent core group of legislative drafters. Training must rely heavily on practical exercises. For example, as a beginning exercise, each participant may be asked to observe one concrete action or prohibition to improve his or her neighbourhood and to draft one or two simple provisions to make the change happen. Individual drafts will

be discussed in the larger group to connect law and policy, to explore different options for achieving the same policy, and to examine the implications of each option. Similar practical exercises will be used throughout the course. This type of training is time consuming, but necessary if participants are to internalize relatively complex concepts involved in legislative policymaking.

Key government and non-government actors generally will not be involved with the technical aspects of drafting legislation. Their role is to define and decide policy issues and to examine the various options for implementing policy. These key actors are also busy people, and will not be able to devote long periods of time to this project. At the same time, key actors need to be aware of the resources that are being developed through the training of legislative drafters and to be able to effectively utilize these resources.

To accomplish these objectives, a series of seminars will be interspersed in the longer legislative drafting course to examine the various steps of the lawmaking process from drafting to promulgation, and the roles of the relevant actors at each step. In effect, this series of seminars for key actors will be a condensation of the major components of the longer technical legislative drafting course. The emphasis of the seminars will be on the role of legislative, executive and non-government actors in the legislative process.

4. Topics of Seminars

Examples of topics that these seminars might cover include an introductory workshop to sensitize key actors involved in the legislative process to understand the importance of drafting and the nature of issues and legal technicalities involved. One key objective will be to begin exploring the relationship between law and policy. Another objective will be to build support for the overall objective of the project. One useful topic to explore at this point might be a discussion of civil law and common law principles in the context of legislative drafting.

Public hearings and less formal public roundtables provide important sources of information for lawmakers, and give citizens and interested persons the opportunity to participate in lawmaking. One seminar with key actors might focus on how these public forums – and other methods for public participation – might be used in developing draft legislation. Other consultative exercises might focus on specific draft laws that have been tabled for consideration by the Parliament, or laws that are currently being drafted by some of the participating ministries.

Another seminar with key actors might explore how to implement a system of reviewing and scrutinizing all law drafts prepared by various agencies at various stages of the legislative process. The purpose of this system is to ensure that there is a uniform process for determining and maintaining legal and technical sufficiency of draft laws throughout the legislative process. Interested groups and institutions, including various ministries and law enforcement agencies, would be invited to contribute their views about how this process might work.

The purpose of the closing Seminar would be to examine the recommendations and some of the work products coming out of the workshop and seminars. This seminar might have panel discussions or small group discussions of draft

proposals for public participation in the legislative process, and for a coordination mechanism to ensure legal and technical sufficiency of draft legislation. Other topics might be explored in anticipation of the next steps in institutionalizing the rule of law through the lawmaking process. Specific topics might include the following: publication of laws after enactment, codification of laws, making laws accessible through internet or on CD-ROM; developing reports on legislation and developing legislative history of laws.

These seminars would be sequenced directly into the training of legislative drafters. Legislative drafters will attend the seminars and function as legislative drafters function in public hearings, roundtables, and parliamentary debates. That is, they would listen, take notes, and gather information that they need to incorporate in their drafting exercises. For example, following the first consultative exercise, legislative drafters might draft simple rules of procedure governing public hearings in the Parliament, or by ministries. Following the consultative exercises on specific draft laws, drafters would incorporate appropriate comments and recommendations into the draft laws themselves. Similarly, after the seminar on the coordination mechanism, drafters might draft rules to implement this procedure. Through these seminars and related exercises, drafters would be required to perform real life tasks of listening to views offered at the seminars and translating those views into specific rules.