

REFLECTIONS ON THE PREMISES OF THE LEGAL STATE



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for the development of
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Why is it so difficult to enforce human rights in a state where they have been guaranteed to all citizens as enforceable fundamental rights? The answer appears to be obvious – thinking of political parties or other groups which – by means of force, coercion or corruption – are capable of suppressing the functioning of the legal system, also referred to as the 'technical rational machine' by Max Weber. The inherent logic of the law thus still depends on other, external criteria to be able to develop at all. But what can be referred to, if not just one but all of the three powers (legislative, judiciary and executive) are infected by the virus of corruption?

The legal philosopher Ernst-Wolfgang Böckenförde formulated his famous dictum on this issue: 'The liberal secular state lives on premises that it cannot itself guarantee.' (Böckenförde 1976: 60) The sovereignty of the legal state thus rests not on a transcendent source but on the sovereignty of the people. The people delegate their political authority in part to the state and thereby justify its governance. But the state cannot extort its own basis – a democratic ethos – from the citizens, without becoming dictatorial at the same time. Also the 'wehrhafte Demokratie' (fortified democracy) is a venture that is based on 'the moral substance of individuals and [...] a homogeneous society'. (ibid.)

Especially the aspect of 'homogeneity', which already for Carl Schmitt was an attribute of democracy, can be interpreted very differently. It can mean both the adherence of all citizens to the values of Enlightenment and to human rights but also their belonging to a specific culture or religion. The two forms of 'homogeneity' should be distinguished. Commonly shared religious or cultural values may facilitate the process of forming a political will and decision-making. But they do not contain that essence, on which the liberal state relies. On the contrary: if cultural belonging is in fact the main condition of political participation, it is a question of a culturalism or neoracism. The latter is a form of racism, which is based on cultural attributes instead of biological ones.



© Kansas Sebastian | 'No law is stronger than is the public sentiment where it is to be enforced', Statue: 'Law', Archibald Garner's.

The term 'homogeneity' is highly inappropriate to express the common adherence to democratic values, because according to its root (Greek *homoios*: 'same' and *gígnomai*:

'emerge') it refers more to natural or cultural characteristics which the citizens should share a priori. In a democracy it is however a matter to make equal political action for every citizen possible, regardless of cultural, religious, ethnic, gender or other characteristics.

This claim is considered by John Rawls in his contractarian theory of justice. In a thought experiment he assumes that rational people in the 'original position' want to selfishly pursue their interests. At the same time they are surrounded by a 'veil of ignorance', which conceals all knowledge about themselves – their personality, character, social position etc.. All knowledge rational people have is of a general nature – for example scientific knowledge. Therefore people do not know whether they belong to a social minority, if they are subject to discrimination or whether they are rich or poor.

prodigal dog | 'Justice delayed is justice denied', Alexandria Court House.



SOURCES

- Arendt, Hannah (2003 [1958]): *Vita activa oder Vom tätigen Leben* – München.
- Böckenförde, Ernst-Wolfgang (1976): *Staat, Gesellschaft, Freiheit* – Frankfurt/M..
- Kersting, Wolfgang (1993): *John Rawls zur Einführung* – Hamburg.



mari-ll | Lady Justice – Blind for Justice – or blind to Justice?

The 'original position' is designed that way that the people will only agree with a constitution which guarantees fundamental rights for everyone, but also allows economic differences between the members of society.

Rawls tries to combine the claim to human rights with an acceptable socioeconomic inequality. The unequal distribution of wealth which is generated in a state can only be justified if it helps to improve the prospects of the person who benefits least. Therefore inequality should not only be useful to the beneficiaries. Wolfgang Kersting summarizes the connection of equal, fundamental rights and unequal socioeconomic success concisely: 'As equal as possible, as unequal as necessary.' (Kersting 1993: 67) The contract only legitimizes the values upon which the members of society agree, but in actual fact the result is already anticipated in the arrangement of the 'original position'.

Due to the fact that all rational people have the same general knowledge, they cannot contradict each other. Thus the contract idea is unnecessary, as Kersting states. (cf. *ibid.*: 105)

The idea of a 'veil of ignorance' may be helpful to find normative guidelines in situations of complex, political decision-making, but no foundation of moral claims is able to initiate, direct or control free political activity. The 'liberal secular state' can concede its citizens the possibility of political action by guaranteeing fundamental rights, but it cannot ensure that the citizens are really free by acting. The enforcement and observance of human rights do not only depend on the 'moral substance' of citizens or their social homogeneity, but on a political public sphere in which citizens articulate their experiences of injustice. In a public sphere the citizens are already making use of their freedom which they additionally want to be protected by law.

Therefore the positive political freedom depends not on the rule of law, but on the contrary the rule of law on the real event of political freedom. According to Hannah Arendt this freedom is rooted in the ability to make a new beginning (natality) and in the diversity of human beings (plurality). (Arendt 2003: 213ff.) ■