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The Structure of Legal Systems and Conceptions of Democracy

In legal systems, especially those which are structuring political orders such as, most prominently, State legal systems, the *structure* of the legal system is to an important extent determined by the underlying conception of democracy or of any other kind of view on political decision making.

Let us compare the structure of the legal systems of twentieth century Germany: the current *Bundesrepublik*, the former German Democratic Republic, the Third *Reich*, the *Weimar* republic and the *Kaiserreich*. Differences between those legal systems can hardly be explained by different traditions or religious backgrounds, as would be the case when comparing it, for example, to the legal systems of the USA, of the former Soviet Union or of the Taliban regime in Afghanistan. Differences between the legal systems in Germany in the 20th century could be explained by economic changes or changes in legal culture, but only to a limited extent, as the much less radical changes in other countries, such as France or the UK, over that period show. It cannot be denied that the dominant ideological and political views are the main explanation for the dramatic changes this country has seen during the twentieth century.

The most visible, but superficial, divergences are to be found at the level of terminology (e.g.: *Reich*/republic; *Reichsgericht*/*Bundesgerichtshof*). Less visible are the differences in structuring the rule-making powers. At first sight, indeed, those structures may seem to be rather comparable: parliaments drafting general rules, an executive power implementing them through its administration, and courts solving disputes. Overall, even procedural rules do not show radical differences. However, what has been typical for the least democratic regimes in twentieth century Germany was a *parallel circuit* of political and legal decision making through a very high concentration of power within a monopolistic political party (the 'national-socialist party' (NSDAP) in Nazi-Germany, the 'socialist party' (SED) in the GDR), thus creating a 'dual State'¹. Through an unlimited power to make, to change and to adjudicate the law (or not) the leaders of those political parties could completely disturb the traditional legal system at all levels. On the one hand there was a 'classic' legal system that could remain relatively unchanged over time; on the other hand, the scope and applicability of that system was limited by the ideology and interest of the ruling party. In the GDR, for example, the scope of private law was narrowed to a large extent, because whole areas, such as housing or labour relations, became 'public law'. In Nazi-Germany whole

1 See, as to Nazi-Germany, E. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford: Oxford University Press, 1941.

categories of citizen, such as most notably Jews, were excluded from almost any right that could be derived from the legal system. In practice, moreover, non-legal sources interfered directly with the adjudication of the law, *contra legem*, such as the political programme of the NSDAP² or Hitler's book *Mein Kampf* in Nazi-Germany³, or, to a lesser extent, the interest of the party or the political wishes of the Soviet Union in the GDR. In both cases the structure of the legal system at first sight seems to have remained unchanged, but is in reality subjected to another hierarchy in which the will of the political leaders is the final, overruling legal source. In Nazi-Germany it even went further than two competing hierarchies. It became largely anarchic to the extent that lower ranked officials and military men could take any arbitrary decision, referring to 'the will of the *Führer*', without any effective control or sanctioning of such abuses.

In current democratic States, including present-day Germany, on the other hand, the *structure* of the political and legal system is to a large extent determined by *substantive* democratic principles. The rule of law requires a separation of powers, to some extent at least between the legislator and the executive, and totally between these two branches of State power and sources of law-making, on the one hand, and courts on the other. The basic principles determining the structure of the legal system are, as a rule, laid down in a written constitution that cannot easily be changed. Law making is primarily carried out by legislative bodies that are elected on the basis of free elections that take place on a regular basis. Courts will check whether rules issued by lower ranking bodies are compatible with those enacted by higher ranked ones and will, the case arising annul or narrow the scope of the incompatible lower rule. A minimal pluralism combined with the equality principle entails some free space for private law-making through contracts, wills, constitutions of associations, and the like. It is revealing that the criticism on the 'democratic deficit' of the European Union is directly linked to the *structure* of the European legal system with, it is posited, too many law making powers with the executive (European Commission, Council of Ministers) and the judiciary (European Court of Justice) and too little with the only directly elected legislative body, the European Parliament.

Thus, when analysing the structure of legal systems we have to take into account this intertwinement of form and substance. The structure of legal systems cannot be studied in isolation from its content.

Moreover, when studying modern (State) legal systems we also have to take into account underlying conceptions of democracy or competing conceptions that are part of the public political debate within the society to which the legal system applies.

An example is the discussion about the future democratic shape of the European Union, although the underlying theories are not always clear and coherent, partly because many different discussions are mingled (cultural identity, economic development, democratic legitimation, etc.) and partly because the discussion hardly started and the theoretical positions are not clearly elaborated yet.

2 E.g. Hanseatisches Sondergericht 9 January 1940, *Deutsche Richterzeitung* 1940, 876 nog nazien: DR !

3 E.g. Reichsgericht 7 January 1938, *Reichsgerichtszeitung*, 1938, 157.

A better example, for our analysis, is the (mainly) American discussion between '*liberals*' and '*republicans*' and the third alternative, '*deliberative politics*', as proposed by Jürgen Habermas.

The discussion between '*liberals*' and '*republicans*' can also be worded in terms of an opposition between '*individualists*' and '*communitarians*' or between '*basic rights*' and '*procedural rights*', or '*substantivists*' vs '*formalists*', or, in more traditional jurisprudential terms, '*natural lawyers*' vs '*positivists*'.

An important feature of western legal thinking over the last two or three centuries is the emphasis on *human rights*, the idea that some rights are innate to any human being and not 'awarded' by some political body, however democratically legitimated it may be, let alone that they could be withdrawn by such a democratic majority. It is the conviction of the '*Liberals*' that one should prevent political bodies, including democratic majorities, from abusing their power and from infringing such basic rights of individuals or minority groups. This approach is deeply rooted in our tradition of natural law theories, which has taken different shapes since the Middle Ages, but has culminated in Human Rights Declarations at the end of the 18th century as a result of the rationalist natural law approach of Modern Times. Meanwhile it became part of positive law on a worldwide scale, in constitutions and international treaties.

'*Republicans*' have problems with this natural law flavour of rights. They consider rights to be ultimately "nothing but determinations of prevailing political will"⁴. What is important for democracy, according to the Republicans, is the creation of a 'public sphere', "within which persons can achieve freedom in the sense of self-government by the exercise of reason in public dialogue"⁵. Once this condition fulfilled, republicanism becomes a typical positivist theory of law:

"In a republican view, a community's objective, common good substantially consists in the success of its political endeavour to define, establish, effectuate, and sustain the set of rights (less tendentiously, laws) best suited to the conditions and *mores* of that community."⁶

According to this view there are no absolute rights. They may change according to the '*conditions and mores*' of the community. The outcome is democratically legitimated if the public debate and everyone's possible participation in it are guaranteed. This can be achieved through procedural rules that guarantee such a public dialogue.

Thus, for Liberals a legal system is primarily a structure of *rights*, whereas for Republicans it is rather a system of *procedures* for establishing such rights. For Liberals it is the *content* of the law that counts, rather than its form. For Republicans it is the best possible form, the procedures structuring the public dialogue and collective decision-making, which are the best guarantee for the best possible *content* of the law. For Liberals there are a number of (more or

4 F. Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights', 41 *Florida Law Review* 1989, 446.

5 F. Michelman, 'Political Truth and the Rule of Law', 8 *Tel Aviv University Studies in Law* 1988, 284.

6 F. Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights', 41 *Florida Law Review* 1989, 446.

less) eternal fundamental rights that exist independently of any political or legal system, whereas for Republicans, law and rights change according to place and time. Of course, Republicans cannot escape the acceptance of 'absolute' or 'undebatable' rights and principles, such as the *equality* of all human beings and, hence, their undeniable right to participate in the public political debate. We will not discuss this further here, but, as appears from the reciprocal criticism, both theories have to face weak points.

Being part of the Western legal tradition, it indeed is very difficult to deny the existence of basic rights and to leave it to political majorities to determine their existence and scope, as daily political practices all over the world seem to confirm. On the other hand, republicanism has a point too, by emphasising the importance of the public debate and the necessity to guarantee an open, free and equal dialogue, which can mainly be achieved through procedural rules.

On the basis of this conclusion, Habermas proposes his theory on '*deliberative politics*' as a way out of the inconveniences of both theories.⁷ He tries to offer a synthesis of form and substance, of rights and procedures, of individualism and collectivism.

Like the republicans, Habermas refuses to see the citizen as atomised individuals, cut off from a community, as bearers of individual rights which they could freely use, as money in an economic market. He agrees that the individual should be conceived as part of a community. However, unlike the Republicans, Habermas regards the political system "neither as the peak nor the centre, nor even as the structuring model of society, but as just *one* action among others".⁸ Moreover, he has a pluralist view on society, in which some rules and rights may be determined at the level of specific communities, whereas the political public sphere "sets apart an arena for the detection, identification, and interpretation of problems affecting society as a whole".⁹ 'Popular sovereignty' is not interpreted as a necessarily 'single will' of 'the people' but as an intersubjective communicative power, exercised, as also the Liberals argue, "by means of elections and voting and by specific legislative, executive, and judicial organs"¹⁰. For Habermas the liberal view offers too little guarantees for the legitimation of the law:

"On the liberal view, democratic will-formation has the exclusive function of *legitimizing* the exercise of political power. The outcomes of elections license the assumption of governmental power, though the government must justify the use of power to the public and parliament. On the republican view, democratic will-formation has the significantly stronger function of *constituting* society as a political community and keeping the memory of this founding act alive with each new election."¹¹

7 See, for this debate: J. Habermas, *The Inclusion of the Other. Studies in Political Theory*, Cambridge: Polity Press, 1999 (1st German edition: 1996), part V 'What is Meant by 'Deliberative Politics'', pp.237-264.

8 *O.c.*, 251.

9 *O.c.*, 251.

10 *O.c.*, 250, where Habermas refers to art.20, section 2 of the *Basic Law* (Constitution) of the German Federal Republic.

11 *O.c.*, 249.

According to Deliberative Politics 'rights' cannot only be approached as tools for strategic action that could be used as in the model of the economic market. They are partly constituted through *communicative action* through a public political debate. Individual rights and collective decision making are not opposites, as the Liberal-Republican discussion suggests. They are *interdependent*. According to Habermas, we have to combine private autonomy with public autonomy, private spheres guaranteed through individual rights co-exist with a public sphere that is organised through procedural rules:

"Each form of autonomy, the individual liberties of the subject of private law and the public autonomy of the citizen, makes the other form possible. This reciprocal relation is expressed by the idea that legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those rights which they are supposed to obey as addressees."¹²

The political public debate presupposes autonomous legal persons, but, on the other hand:

"There is no law without the private autonomy of legal persons in general. Consequently, without basic rights that secure the private autonomy of citizens there is also no medium for legally institutionalizing the conditions under which these citizens, as citizens of a state, can make use of their public autonomy."¹³

However, not everything can be organised through law. Deliberative politics can only function properly within an open political culture. The law may provide the best possible conditions for the development of such a culture, but it cannot *create* this culture. Law has its limits.

All this shows, firstly, to what extent the (perceived) structure of legal systems is dependent on underlying conceptions of law and democracy, and, secondly, that we need a theory that offers the best possible picture of legal practice. From this point of view it seems undesirable to limit the legal system to a pure set of 'rights' or a set of 'procedural rules' or even a set of 'norms'. Habermas' Deliberative Politics, and the communicational approach it includes, thus offers a richer theory (a) in that it accommodates both rights and procedures, primary rules and secondary rules, as mutually linked basic elements of legal systems and (b) in that it embeds law in its social and political context, which partly determines the very structure of law.

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12 *O.c.*, 258.

13 *O.c.*, 260-261.