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BETWEEN FACTS AND NORMS: AN AUTHOR'S REFLECTIONS

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What an author has actually said in and with a book, is up to interpretation. An intelligent reader will almost always know better than the author himself. The author only knows what he *intended* to say. With *Droit et Democratie* I think I have made specific contributions to six topics:

I. The form and function of modern law;

II. The relation between law and morality;

III. The relation between human rights and popular sovereignty;

IV. The epistemic function of democracy;

V. The central role of public communication in mass-democracy;

VI. The debate about competing paradigms of law.

I. THE FORM AND FUNCTION OF MODERN LAW

The first topic—form and function of modern law—issues from a sociological controversy about the function of modern law. The question is whether modern law is just a means for the exercise of administrative or political power or whether law still functions as a medium of social integration. In this regard I side with Emile Durkheim and Talcott Parson against Max Weber: Today legal norms are what is left from a crumbled cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces. Law stands in as a substitute for the failures of other integrative mechanisms—markets and administrations, or values, norms, and face-to-face communications. This integrative capacity can be explained by the fact that legal norms are particularly functional in virtue of an interesting combination of formal properties: Modern law is cashed out in terms of subjective rights; it is enacted or positive as well as enforced or coercive law; and though modern law requires from its addressees nothing more than norm-conformative behavior, it must nevertheless meet the expectation of legitimacy so that it is at least open to the people to follow norms, if they like, out of respect for the law. It is easy to see why this legal form fits the requirements of modern societies:

> Modern law is supposed to grant an equal distribution of *subjective rights* for everybody. Such liberties function as a protective belt for each per-

son's pursuit of her own preferences and value-orientations and thereby fits the pattern of decentralized decision-making (which is in particular required for market-societies).

Modern law is *enacted* by a political legislator and confers with its form a binding authority to flexible programs and their implementation. It thus fits the particular mode of operation of the modern administrative state.

Modern law is *enforced* by the threat of state sanctions and grants, in the sense of an average compliance, the "legality" of behavior. It thus fits the situation of pluralist societies where legal norms are no longer embedded in an encompassing ethos shared by the population as a whole.

Modern law grants, however, stability of behavioral expectations only on the condition that people can accept enacted and enforceable norms at the same time as *legitimate* norms that *deserve* intersubjective recognition. Law thus fits to a posttraditional moral consciousness of citizens who are no longer disposed to follow commands, except for good reasons.

II. THE RELATION BETWEEN LAW AND MORALITY

The second topic—the relation between law and morality—issues from the controversy between legal positivism and natural rights theories about the question, how to explain the specific validity of law. Both positions face well-known and complementary difficulties. To put it in a nutshell: positivists, on one side, conceive legal norms as binding expressions of the superior will of political authorities. Like legal realists, who treat legal norms just as the result of policy-decisions, positivists cannot explain how legitimacy can spring from sheer legality. Both positivists and realists (including proponents of the CLS movement) refuse to recognize any claim to legitimacy stronger than the kind of legal validity that terminates in formally correct enactment and efficient enforcement. Proponents of natural right theories, on the other side, derive the legitimacy of positive law immediately from a higher moral law. Positive law here figures as the lowest level in a hierarchy of laws, the top of which is occupied by natural law, which is explained in metaphysical or religious terms. Even if we leave problems of foundationalism aside, such an assimilation of law to morality blurs important differences between the two. Whereas moral norms primarily tell us, what we *ought* to do and what we *owe* each other, modern law is in the first place designed for the distribution of individual *liberties*—for the determination of private spheres where everybody is free to do what one wants to do. Moral rights, on the other hand, are derivative from other people's *duties* towards us, whereas in law, rights are duties, since legal duties only result from mutual constraints of equally granted liberties.

The complementary weaknesses of both positions leads us to the conclusion that legitimacy of law must not be assimilated to moral validity, nor should law be completely separated from morality. Law is best understood as a functional *complement* of a weak posttraditional moral-

ity, which is, beyond institutionalization, only rooted in the conscience of the individual person. From an observer's point of view, modern law can therefore compensate for the uncertainties of moral conscience that usually works well only in the context of face-to-face contacts; where as coercive law has an impact far beyond that. At the same time, positive law does not lose all moral content, at least not as long as it meets the legitimacy requirement.

III. THE RELATION BETWEEN HUMAN RIGHTS AND POPULAR SOVEREIGNTY

The third topic—the relation between human rights and popular sovereignty—issues from a longstanding controversy about the source of legitimacy. Because of the positivity of law, we must distinguish here the role of *authors* who make (and adjudicate) law, from that of *addresses* who are subjects of established law. The autonomy of the person, which in the moral domain is all of one piece, so to speak, appears in the legal domain only in the dual form of private *and* public autonomy. These two elements—the liberties of the subject of private law and the political autonomy of citizens—must be mediated in such a way that the one form of autonomy is not impeded by the other one. This is to say 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 norms, which they are supposed to obey as addressees. However, this intuition has never been quite convincingly explicated in Political Theory.

The republican tradition, which goes back to Aristotle and the political humanism of the Renaissance, has always given the public autonomy of citizens' priority over the prepolitical liberties of private persons. Liberalism, on the other hand, has always invoked the danger of tyrannical majorities and postulated the priority of the rule of law, as guaranteed by negative freedoms. Human rights were supposed to provide legitimate barriers that prevented the sovereign will of the people from encroaching on inviolable sphere of individual freedom. But both views are one-sided. The rule of law, expressed in the idea of human rights, must neither be merely imposed on the sovereign legislator as an external barrier, nor be instrumentalized as a functional requisite for the democratic process. In order to articulate this intuition properly, it helps to view the democratic process from the standpoint of discourse theory.

At this point I cannot summarize the complex arguments for the interdependence of both, human rights and popular sovereignty. Let me only make two remarks. The first suggestion is to conceive human rights as what is necessary for the legal institutionalization of the democratic process of self-legislation. That is, however, prima facie plausible only for those civil rights—the rights of communication and participation—that empower citizens to exercise their political autonomy. The suggestion is less plausible for the classical human rights that guarantee citizens' private autonomy. So it is further suggested to analyze the very grammar of the legal language which citizens must speak when they

of the legal language which citizens must speak when they wish to act *as* citizens. In other words, the legal code as such must be available as soon as we would wish to legally institutionalize a democratic process. We know from the analysis of the legal form, however, that we cannot establish any kind of legal order without creating placeholders for legal persons who are bearers of individual rights—whichever right these may be. But providing subjective rights means per se to provide a guarantee for private autonomy. This then is the core of the argument: Without basic rights that secure the private autonomy of citizens, there also would not be any medium for the legal institutionalization of the conditions under which these citizens could make use of their public autonomy. Thus private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart.

IV. THE EPISTEMIC FUNCTION OF DEMOCRACY

The fourth topic—the epistemic function of democracy - issues from the question why we may expect the legitimacy of law to emerge from the democratic process at all. The discourse-approach explains the legitimacy-generating force of the process with a democratic procedure that grounds a presumption of the rational acceptability of outcomes. Norms owe their legitimacy to a kind of recognition that is based on rationally motivated agreement. This assumption is stated in terms of the discourse principle: "Only those norms are valid to which all persons possibly affected could agree as participants in rational discourses." The contractarian tradition up to Rousseau and Kant has also referred to "reason" as a post-metaphysical base for legal and political orders. This mentalist conception of reason is now translated, however, in pragmatist terms and spelled out in terms of practices of reason-giving, i.e. as conditions for deliberation. Rational discourse is supposed to be public and inclusive, to grant equal communication rights for participants, to require sincerity and to diffuse any kind of force other than the forceless force of the better argument. This communicative structure is expected to create a deliberative space for the mobilization of the best available contributions for the most relevant topics.

"Deliberation" is broadly understood here and covers a wide range of reasons. Depending on empirical, technical, prudential, ethical, moral or legal reasons we distinguish different types of rational discourse and corresponding forms of communication. The rational acceptability of legal norms does not depend only, and not even primarily on moral considerations but on other kinds of reasoning as well, including processes of fair bargaining. Compromises form, after all, the core of politics. Anyway, this encompassing notion of 'deliberation' is to pave the way for a process-conception of legitimation. Legitimation depends on an appropriate legal institutionalization of those forms of rational discourse and fair bargaining that ground the presumption of the rational accept-

ability of outcomes. Deliberative politics is thus wedded to a complex notion of procedural legitimacy. There are three different kinds of procedures intertwined in the democratic process: first, the purely cognitive procedures of (various forms of) deliberation; secondly, decision procedures that link decisions to preceding deliberations (in normal cases the majority rule); finally, legal procedures which specify and regulate in a binding manner the material, social and temporal aspects of opinion- and will-formation processes.

V. THE CENTRAL ROLE OF PUBLIC COMMUNICATION IN MASS-DEMOCRACY

The fifth topic—the central role of public communication—is an obvious implication of the discourse-approach. From a normative point of view, structural features of political communication are more important than individual properties, such as the capacity for rational choice or good intentions or appropriate motivations. Public communication must be inclusive and selective at the same time; it must be channeled in such a way, that relevant topics come up, interesting contributions and reliable information come in, and good arguments or fair compromises decide on what comes out. This view is sufficiently abstract to bridge the gap between the normative idea of self-legislation and the stubborn facts of complex societies.

In virtue of the discourse-approach we can now disconnect the idea of popular sovereignty from its traditional bearer, "the people", which is a notion too concrete for present circumstances. On the normative level, another conception takes the place of the 'sovereignty of the people': the communicative freedom of citizens, which is supposed to issue in a public use of reason. Collective actors of civil society who are sufficiently sensitive and inclusive, can bother be instrumental for the perception problems of society-wide relevance, translate them into public issues and thus generate, through various networks, the "influence" of public opinions. Bust such "influence" is transformed into "power" only by an interaction of the informal and diffuse communications flows of the public sphere at large with formally organized opinion- and will-formation processes first embodied in the parliamentary and the judiciary complex. "Communicative power" is produced according to the democratic procedures of elected and deliberating bodies and the, in accordance with legislative programs and court decisions, transformed into the "administrative power" of the executive agencies, available for the purpose of implementation. This is, of course, only the normatively prescribed image from which the real circuit of power widely deviates. But it is an image that allows us at least to connect the normative self-understanding or constitutional democracy with its real practices.

VI. THE DEBATE ABOUT COMPETING PARADIGMS OF LAW

The last topic—the introduction of a new, proceduralist paradigm of law—issues from the hopeless competition between the two received

legal paradigms, the liberal and the welfare-state paradigm. The *liberal paradigm* counts on an economic society that is institutionalized through private law, above all through property rights and contractual freedom, and thus left to the spontaneous workings of the market. If, however, the legal capacity of private persons to own, acquire or sell property is supposed to guarantee social justice, then everybody must enjoy equal opportunities for making effective use of equally distributed legal powers. Since capitalist societies generally do not meet this requirement, proponents of the *welfare-state paradigm* argue for compensating growing inequalities in economic power, property, income and living conditions. Private law must be substantially specified and social rights must be reintroduced. On the other hand, unintended effects of welfare-paternalism indicate limitations of this alternative, too. It turns out that the traditional debate on deregulated markets versus state regulations is too narrowly focused on private autonomy, while the internal relation between *private and public* autonomy drops out of the picture. Between the two received paradigms, the only controversial issue is whether private autonomy is best guaranteed straightaway be negative freedoms, or whether the conditions for private autonomy must be secured through the provision of welfare entitlements.

One way out of this impasse is indicated by a third, a *proceduralist paradigm* that crystallizes neither around the private competitor on markets nor around the private client of welfare bureaucracies, but has its focus on the citizen who participates in political opinion- and will-formation. For private legal subjects cannot enjoy equal liberties if they themselves do not in advance exercise their civic autonomy in common in order to specify, which interests are at stake and which standards of evaluation are justified in the light of which cases should be treated alike and different cases differently. Citizens can only arrive at fair regulations for their private status if they make an appropriate use of their political rights in the public domain. They must be willing to participate in the struggle over the public relevance, the interpretation and evaluation of their own needs, before legislators and judges can even know what it in each case means to treat like cases alike. In highly differentiated societies with an intransparent diversity of interests, it is an epistemic requirement for the equal distribution of liberties for everybody that those citizens affected and concerned first get themselves the chance to push their cases in the public, and articulate as justify those aspects which are relevant for equal treatment in typical situations. Briefly, the private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy.