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## **The Modern Democratic Constitutional State as a Protective Order of Freedom**

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The modern democratic constitutional state sees itself first and foremost as the protective order of human freedom, as a guarantor of human rights. The state is at the service of freedom. That is why it is not the state, but man as a person and the society formed by him that is at the center of the political order. The democratic constitutional state, as the political organization of society for the attainment of the common good, must guarantee the freedom of society, i.e. the persons and communities of persons living and working together in it, and give it an order as good as possible.

I will try to explain this in four sections: A first section deals with three fundamentally possible concepts of state that have been discussed and

problematized in the course of the history of philosophy. In a second chapter, I take a look at the goals and tasks of the modern constitutional state, which is oriented towards the ethos of human rights. In a third chapter I will explain to what extent the state must always serve freedom. It is this, my last paragraph says, that makes it possible to speak of democracy as an order of peace.

In the appropriate places I will also talk about the appropriate role religion can play within a modern democratic constitutional state.

### **1. Three concepts of state**

Within our framework, I cannot develop a state philosophy in its entirety. That is why I refer to three historical strands of the European tradition of state philosophy, which are simplified for this context and characterised with appropriate accents.

#### **1.1. The state as “societas perfecta”**

The state is overtaxed in its tasks and powers when it follows the holistic and teleological concept of a *societas perfecta* that fulfils the human being in its essence, following on from Aristotle and Thomas Aquinas. The state is integrated into a uniform, metaphysical order oriented towards the insight into the purpose and nature of man and things, in which all social entities participate in their structures and tasks and in which the individual is necessarily involved in all areas of life. The freedom of the individual consists in living according to this

order, the lack of freedom against violating this order. Since there can be no conflicts of goals between individual social entities and they are also committed to the same truth, there is no need to distinguish between state and society. At de coincide. The sub-areas of the social (state, economy, family, economy, ideology) do not follow their own laws but are oriented towards the same truth. Be-cause the state, as the perfect social order structure, is thus ordered to truth, it does not only know what constitutes man's happiness and how it can be achieved. The freedom of the individual can then only consist in subordinating oneself to an existing order. For man is un-free when he offends against the existing, metaphysically and ideologically founded order. In the state, security is replaced by the right to be in possession of a common and unquestioned ethos that permeates all levels of human sociality. The *societas perfecta*, therefore, remains manageable in its order structures, its complexity is limited. Depending on how this concept of the state is developed, different versions of the educational mission of the state emerge. While for Plato the education of children is from the beginning and exclusively a matter of the community based on truth, because the descendants belong as it were to the state, in the medieval development of the *societas perfecta* the educational and educational mission of the community is perceived by the institution that gives meaning, the church. In both cases, individual and community education - although not according to the place, but

according to the idea and the execution - fall more or less into one, not least because education and training in all subsystems of the social are oriented towards the same goals and contents.

The conception of the state as *societas perfecta*, as it was characteristic not only for the Middle Ages but with modifications also still in modern times - for instance for the right-wing Hegelians - cannot suffice philosophically for many reasons. Even the insight he claimed into the true order of human coexistence, into the true happiness and well-being of the community and of the individual already falls victim to the nominalistic critique of insight into being practiced in the late Middle Ages, which according to him is to be doubted that there is an order subordinate to man at all, and that man, as a finite rational being, is able to insight into the "true" essence of things. Not to mention the irritating notion that the true perfection of man should lie in the state, and even more in an ideological unity state. The conception of the state as a *societas perfecta* thus not only overtaxes the state, it also diametrically contradicts our insight into the necessity of an ideological pluralism that secures freedom, into the irrevocable justification of different individual ideas of happiness and state-free individual and social design spaces.

## 1.2. The state as “*societas defecta*”

While the idea of the state as a *societas perfecta* overtaxes the state, it is underdetermined in its necessity and original performance in another conception. This can be seen in particular in the concept of a mere mechanistic state of intellect or necessity, which emerged from the Enlightenment and was critically understood by idealism (e.g. the early F. W. J. Schelling) as a concept of a mere mechanistic state, which is to be overcome as *societas defecta* by the consummating morality of human beings. This concept is clearly negative of the state and consequently provides for the abolition of the state at all. The state is nothing more than a historical transit station, a makeshift, an instrument for the assertion of social interests. In the speculative variant formulated by Fichte: The state must make itself superfluous if true morality is to prevail among people. For basically man is good by nature (Rousseau), it is the wrong social, cultural and societal conditions that do not allow this goodness to break through, and which must, therefore, be changed with the help of the instrument of power of state intervention. If the conditions are such that the actual morality and goodness of man can come to bear uninhibitedly and an ideal society of equals and mutually well-meaning people emerges, then the state loses its right to exist. Also in the Marxist-Leninist state doctrine, the state loses its necessity in the course of the metamorphosis from the stage of socialism to that of perfect communism, which was historically regarded as necessary. What all variants of this conception

have in common is that the state becomes the victim of social interests, the mere, albeit effective, executor and tool of which it is degraded. It cannot, therefore, have an original educational mission. Rather, school education takes place on behalf of society, on behalf of a higher morality and its visionaries. State education is, therefore, indoctrination and means of manipulation in the service of society.

From a philosophical point of view, this concept fails because of the lack of real-ity of his idea of human morality, in which a number of basic facts of human life experience are ideally hidden. The underlying optimistic anthropology also paints an exaggerated picture of the man, which - following a formulation of I. Kant - is carved from "crooked wood". While in the concept of a *societas perfecta* the state itself becomes a utopia that has no place anywhere, the state as *societas defecta* is sacrificed to the utopia of a peaceful society that can organize itself. But the state as an instrument of this utopia also loses its protective function for the individual, because society is everything, the state and the individual are subordinate to its objectives.

### **1.3. The state as “*societas imperfecta et incompleta*”**

In addition to these two concepts of state, the Kantian concept of a liberal constitutional state, which was not based on truth but on human freedom, fought for by the French Revolution and already established in enlightened absolutism, and which mediated by the great

revolutions, has established itself as dominant in modern political reality, namely the Western world, as a modern constitutional state. The underlying concept of the rule of law divided by violence, which as *societas imperfecta et incompleta* is a necessary condition for the free cultural self-development of its members, is based on the principle of the lawful self-limitation of freedom and on the separation of state and society. According to this concept, the first task of the state is to secure peace through law-making. In what sense, however, does the concept of the rule of law entail the necessity of domination, power and the state, and hence the necessity of state power?

## **2. Goals and tasks of the modern constitutional state oriented on the ethos of human rights**

The modern constitutional state, as it has established itself through the great revolutions in political reality, especially in the Western world, does not proceed from the insight into the true order of human coexistence, into the true happiness and well-being of the community and the individual, nor does it rely solely on the moral power of individuals, but on the recognition of the formally equal freedom of all. It is therefore not built on truth but on freedom. For, according to Immanuel Kant, "Freedom (independence from another's despotism), insofar as it can exist together with any other freedom according to a

general law, is this only, original, right due to every human being, by virtue of his humanity. (MSR AB 45)"

The human rights claim to freedom of the modern age is characterized by emancipatory reason. The idea of human rights becomes the basis of a new ethos (human rights ethos) and the political theory of liberalism. At its core it is about the following: The natural personal dignity of man as human being results in a claim to freedom under natural law. Or as Johan Locke puts it: "In order to understand political violence correctly and to derive it from its origin, we must consider in which state human beings find themselves by nature. It is a state of complete freedom, within the limits of the law of nature, to regulate their actions and to dispose of their property and personality as they see fit, without asking anyone for permission or being dependent on the will of anyone else. It is also a state of equality ...: Nothing is more plausible than that creatures of the same kind and rank, born without distinction to the enjoyment of the same advantages of nature, without subordination and submission, should live on equal terms with one another ..." (Two Treatises on the Government II, § 4)"

Therefore, human rights as natural rights differ in principle from those rights which were granted, granted or conferred as privileges by the ruler. Freedom law as a human right and natural law is based on the concept of man and is therefore superior to any positive legal and state order. At the same time, how-ever, this means that the legitimacy of



every positive legal and state order ultimately depends on the extent to which, as a system of freedom, it does justice

to this prepositive claim to freedom under natural law. Absolutism (even in its enlightened variant) had no chance of legitimizing itself against this claim.

The basic concern, which already determined the contract-theoretical thinking at LOCKE and KANT, is the following: The construction of the state is based on human rights as freedoms (primarily in the sense of negative status), which function as fundamental rights in the legal order. The state is to be constructed in such a way that it guarantees a maximum of formally equal freedom for all legally; it becomes the coordinate system of coexisting freedoms. As such, it is the institutional consequence in the political-legal sphere, which results from the human-rights ethos of modern times, the idea of human dignity and the indispensable and inalienable liberty rights of the individual founded therein. The legitimation of his goals and tasks, as well as the limits of state action and de-sign, must take this into account. This is concretized in a threefold objective of the state, which results from its necessity: it must be constituted in a constitutional, liberal-democratic and social state.

## 2.1. Peacekeeping through legislation: the rule of law

The necessity of the state and its tasks derived from it result from a realistic consideration which does not require further justification. It begins with the fact of the existence of a multitude of people, all of whom have the same claim to freedom and who pursue their quest for happiness as man's natural and indispensable guiding goal through actions, i.e. by intervening in their environment; and it further presupposes that the earth on which they live is a finite space with limited goods, so that the external spheres of action of the various individuals inevitably collide. Therefore, various conflicts arise, which can refer to external goods like economic resources, but also to immaterial claims like honor, respect, power, etc. Since these conflicts not only threaten the freedom of the individual but in principle even his life, a radical endangerment of man by man results from it. For the sake of survival, which is important to every living being, it sees itself forced to limit the spheres of its action by a common agreement: thereby to make peace, the safeguarding of which depends on the fact that the common agreement is binding for all and by a jointly established force also secured against transgressions. This is the, as it were, thoughtfully reconstructed, admittedly only sketchily reproduced justification of a state authority which ensures peace for the people by being able to enforce what has been agreed up-on together, the right.

If this consideration is followed, then the state is a necessary product of the self-restriction of freedom for the sake of freedom. Its primary function is to secure peace through law-making. The state is an instrument by which the creative development of individuals is restricted to a common right to be observed, but at the same time released on the ground of this recognized right. For the object of the free agreement which has become law and is to be enforced by the state is a voluntary partial restriction of freedom, which must be accepted in order to ensure peaceful coexistence. For the legal regulation of coexistence and the social coercion established as a result prove to be more advantageous than the renunciation of a regulated coexistence not only for some or for most or all of the collective, but for all without exception. For all have an original interest in securing peace through law-making, above all because the reciprocal renunciation of freedom is rewarded with a certain right to freedom which consists in no longer being at the mercy of the unlimited arbitrariness of others. The renunciation of freedom is, as it were, exchanged for a right to freedom. The advantage that arises for the individual, as a result, is elementary and no longer substitutable, i.e. it cannot be created otherwise than by the acceptance of the social constraint existing in the state, which consists in the law-making. And the state power must differentiate or "divide" itself within itself and legally specify this di-vision in order to exclude arbitrariness in the

political system, to establish control mechanisms and to guarantee legal security.

## **2.2. Securing liberty rights: the liberal democratic state**

The peace made possible by the renunciation of freedom, stabilized by legislation and reinforced by state power, however, is not to be striven for its own sake, but for the sake of securing elementary and indispensable freedoms of the individual. Man cannot seriously do without them because, in addition to the integrity of life and limb as the basic condition of freedom, they are the very condition of his freedom of action. Because of their indispensability, the individual has a claim to respect for the resulting rights to freedom. Therefore, these rights cannot be arbitrarily granted or denied to man, but oblige him to unconditional recognition regardless of the individual characteristics of being human. This recognition is therefore not only the moral duty of the individual, but also has institutional consequences for the state in the political-legal sphere, in that it constitutionally establishes these rights as fundamental rights, which are normatively prescribed for every positive legal and state order, and sees itself overall as a system of freedom. For the sake of citizens' freedom, the entire activity of the state must also be rationalized and legally regulated. This requires a constitution, a constitution, which fully establishes the conditions of

legitimacy of the state. All state action must be derived logically from these conditions of legitimacy in order to exclude the arbitrary exercise of state power.

The fundamental rights securing freedom can be differentiated into three human rights positions: On the one hand, they comprise (negative) liberty rights as rights of defense of the person against the "necessary arbitrariness" of the state or society. Defensive rights are about securing a formal scope for action of equal freedom for all. In cultural terms, for example, this includes freedom of opinion, religion, conscience, science, and teaching, art, the press, etc.; in economic terms, it includes freedom of property and contract. As a state not based on truth, but on freedom, it will necessarily have to permit a multitude of worldviews, designs of a successful life and ethos forms, as long as fundamental rights of others are not thereby restricted. It is ideologically neutral and characterized by the separation of state and society.

- Furthermore, the rights of freedom include (active) participation rights, on the basis of which the person actively participates in political action and in the conclusion of legal agreements; they include the right to political co-determination through active and passive voting rights, the right to form political unities, the right to demonstrate, etc. The recognition of participation rights sets the course for a democratic

state: all actions of the state require democratic legitimacy by the actual sovereign, the community of citizens (principle of democracy).

- Finally, freedom rights also include social rights as entitlement rights, in which the right to those opportunities and means is at stake that are necessary not only for the person to be formally free, but also for him or her to be given the opportunity to re-realize his or her freedom in the sense of a life plan worthy of human beings, and thus to follow his or her own idea of happiness and a successful life.

### **2.3. Safeguarding the real conditions of justice: the welfare state**

As the interpretation of freedom rights as claim rights in particular shows, the goals and tasks of the state cannot be limited to securing peace within a community through legislation and guaranteeing the freedom of the individual and society through recognition of defensive and participation rights. On the contrary, the modern constitutional state only lives up to its purpose if it also creates the social, economic-material, cultural and ecological conditions for the individual individuals or groups to be able to design and fill the freedom spaces recognized by the Basic Law. For a political community that is serious about human dignity and about the rights of freedom and participation must also take care of those generally valid empirical preconditions without which one cannot lead a dignified life at all and without which one cannot realize one's rights of freedom and participation at all or

only with difficulty. In this perspective it is an essential task of the state to stand up for social justice, i.e. to assume responsibility for those economic, social, cultural and political conditions which make it impossible, prevent or unduly complicate the realization of a humane existence as well as the rights to freedom and participation. In this respect, the state is a necessary condition of justice. It must therefore not only be free democratic and constitutional but also a welfare state. Only in the combination of these three aspects, which refer to the three groups of human rights, will the idea of human rights as a principle of political-social justice be satisfied.

It is therefore the task of the state, on the one hand, where it is indispensable, to make available to the public or regulate the use of those basic goods which everyone needs, which the individual can rely on himself and which he cannot produce, develop or enjoy of his own accord, but which are indispensable so that freedom spaces can be developed and shaped at all. It is the task of the state in this respect to create the social, economic, cultural, ecological and political framework conditions under which working conditions are determined, under which income, social position etc. are acquired, with the aim of enabling both the individuals and society as a whole to satisfy those basic needs which every human being has qua man and the satisfaction of which is the basic pre-requisite for the individual to be able to open up his or her freedom spaces at all and to shape them. These

framework conditions also include the basic safe-guarding of adequate well-being in all phases of life through social security systems, the expansion of the infrastructure for transport and communication, the health system, the protection of the environment, the general regulation of the housing situation and building activity, the promotion of science, research and cultural life, but also in particular - as we will see more precisely - the concern for the education and training of future generations.

#### **2.4. Institutionalization and subsidiarity: the limits of the state**

The unconditional moral obligations and legal duties reflected in fundamental rights and state objectives generally have a regulatory function, they are general normative criteria to which public action is bound. They are criteria in the sense of fundamental norms, according to which the corresponding political-social relations are to be perceived, assessed, designed and actually established or further developed, without already stating exactly what follows from them in detail for the educational system, the professional and working world, etc. They are also criteria for the development of the political-social relations of the individual. The completion of the effort for political-social justice is thus not yet given, but can only be found where the structures of society, the institutions etc. are shaped according to these guidelines. In order to stabilize its efforts in this regard and to ensure that everyone can participate equally in its use, the state will either



create and operate institutions itself that regulate these frame-work conditions (from ministries to offices to authorities), or it will define the rules under which the society itself can establish such institutions, whereby it can limit itself to supervising the observance of these rules. For it is the function of the state not to row, but to steer. These rules must be based on the rule of law (principle of the rule of law) and democratic legitimacy (principle of democracy) in the interest of the common good of the citizens. This can make it necessary to restrict the freedom of the individual in order to secure the freedom of all. Consequently, there must always be a strong interest in the common good, on the basis of which an intervention of the state in the individual's rights of freedom can be legitimized, and in particular it must be guaranteed that the individual, through the standardization oriented towards the common good, de-rives an advantage for his shaping of freedom, which would otherwise be denied him.

In order not to exceed its limits of competence and not to violate fundamental freedoms, any state action - like the action of social entities in general - is limited by the principle of subsidiarity. On the one hand it says that the ever larger or superordinate social entities must be in the service of the smaller and subordinate ones (principle of assistance), on the other hand it opposes the fact that the ever larger and superordinate social entity, by its restrictive action, deprives the ever smaller and subordinate ones of those competencies which they

them-selves can autonomously fulfill. For the state's commitment is not intended to replace social and individual competencies, but to promote their development and autonomy. The subsidiarity principle does not simply offer a recipe for state action, but a guideline whose concrete implementation depends on empirical conditions and thus opens up scope for political judgments.

### **3. The state in service of freedom**

The formal means by which the state does this is the law. Therefore, the state "as an ordered procedure", as a constitutional state, is first and foremost fundamental to the order of freedom. There must be no state activity that cannot legally legitimize itself. But the rule of law does not gain its legitimacy simply by setting any law but only to the extent that the law it sets does not contradict human dignity and the human rights derived therefrom, which must be formulated constitutionally as fundamental rights. In order to make this possible, the political fundamental value of freedom must be seen in its four different but internally interrelated dimensions:

#### **1.1. Freedom of the individual from the state**

The state must not "acquire competencies that restrict people's freedom and responsibility. What the individual citizen or the smaller community in each casenan do for itself, the state should not attract.

With these words, the Berlin Bishops' Conference recalls the "subsidiarity principle", known since the encyclical *Quadragesimo anno* (No. 79) as the most important socio-political principle of the church's social teaching and at the same time of the democratic constitutional state. There is thus a "space of the citizen free of state intervention" where the state has nothing to do but to guarantee the protection of the personal sphere of its citizens. This guarantee consists in principle in ensuring that the use of the freedom of one does not impair the use of the freedom of the other. For this purpose, the State has its authority, but at the same time, it is strictly limited. The state does not have to allocate freedom, but to recognize it, because it is not graciously granted by it, but is due to man as the original bearer of rights and duties. The man has "rights and duties in himself which arise directly and simultaneously from his nature," as John XXIII says in the encyclical *Pacem in Terris* (No. 9). Among the most important of these personal rights are: freedom of faith, conscience and opinion; and the right and duty of parents to care for and educate their children: "We need a school system which is free from ideological paternalism and which provides equal opportunities for access to educational institutions," note the Bishops of the Berlin Bishops' Conference. The school is not an event of the state, but of society, primarily legitimized by those who give life to children and entrust them to the school for coeducation. The state must ensure that everyone has equal access and

support and that they are all subject to the same organizational rules, nothing more. Its educational task is to convey the fundamental values of a free democratic and social order, without the State being able to guarantee its ultimate ethical justification. For this very reason, it is logical, precisely from the point of view of the democratic constitutional state, to give the churches, as guarantors of this establishment of fundamental values, a public-law position within the cultural field of education, from kindergarten to university.

### **1.2. Freedom of society in the state**

But freedom from the state is not only freedom of the individual, but also freedom of society in the state. Man is the social system. Freedom is therefore always also freedom of association, i.e. the right to unite in groups, associations and organizations of any kind without having to ask the state. This applies to all areas of culture: to religion and ideology, to school and education, to socially charitable services and not least to the economy. This is not an event of the state, but a dynamic result of the society.

### **1.3. Freedom of the individual and of society to the state**

The freedom to lead one's own independent life also includes the shaping of the political framework, i.e. the state. In this respect,

freedom to the state means democracy as a form of political rule. Here, too, the corresponding access rights must be individual and social, and both individual and political associations (parties, citizens' initiatives) must be respected with regard to their civil liberties. The liberal society must allow the political and social organization of different ideas of political correctness, of economic interests, of religions and world views, of lifestyles, admittedly always within the basic values that apply equally to all and within a legal order that is committed to human dignity. The claim of a political monopoly on truth by a party or movement fundamentally violates this. Of course, and this is already clear here and must continue to occupy us, freedom can also degenerate into anarchy. Political freedom as diversity is only possible if the people of a society are united in anthropological truth, in that which constitutes human dignity and which is indispensable to its social realization.

#### **1.4. Freedom of the State for the common good**

Only after these three dimensions of "civil" or "social" freedom have been accepted can and must one then also consider that their guarantee includes the freedom of the state to legally establish the order of freedom from the consensus of the citizens in legitimate authority and to guarantee it with the help of its power. It is, of course, extremely

important that this is done in the form of a division of powers, so as to place the state organs themselves under the sovereignty of the law to which they are to serve. Therefore the probably most important sentence of the pastoral letter of the Berlin Bishops' Conference in this matter reads: "Independent courts must guarantee the legal security". It is decisive that a constitutional court can also be invoked by anyone against the majority decisions of the parliaments and the administrative acts of the government, provided that citizens are of the opinion that their fundamental rights are endangered by state acts.

#### **4. Democracy as an Order of Peace**

Freedom, to the extent that people make different use of it, leads to a pluralistic society. How must a society be constituted in order to guarantee the legitimate development of freedom without causing a systemic struggle of all against all? In the democratic constitutional state, despite a pluralism of convictions, the unity of society must be brought about by the moral value of peace and the convictions which correspond to it. The English state philosopher Thaddeus Stevens (1792-1868) once summed this up in the formula: "In a democracy, people agreed to count the heads instead of smashing them".

"To count the heads" refers first to the majority principle as a democratic rule of pacification. But what are the conditions of

democracy as an order of peace, and how is it threatened? The naked majority principle can very quickly lead to the dictatorship of the majority, to the extreme that the majority abolishes freedom, as happened to us in 1933. But how does the democratic constitutional state prevent the dictatorship of the majority? On the one hand, the majority principle is indispensable if decisions are to be taken in certain cases; on the other hand, it is a principle of rule which can quickly degenerate into the rape of minorities. Democratic theory recognized this problem early on, and its history could be seen as a history of limiting the majority principle. Such limitations attempt to institutionalize the conditions of peace in the democratic constitutional state in two directions:

On the one hand, by keeping the necessity of state decision in general and the application of the majority principle in particular as small as possible, i.e. by granting citizens "self-government" in all matters where this is possible, in accordance with the principle of subsidiarity. This does not mean the dissolution of the unity of the will of the state, but rather the broadest possible distribution of power in a system of mutually limiting and controlling constituent powers, which only in their interaction lead to the necessary and binding decisions. This is the very core of Montesquieu's theory of the separation of powers. The democratic state knows of no authority that could "absolutistically" decide on its own sphere of competence. The most important form of

the division of power is between the constitutional legislator and the ordinary legislator. The most important institution of the separation of powers is thus a constitutional court ' which can check not only the legality but also the legitimacy of all state and administrative acts against the standard of human dignity and the fundamental rights associated with it. Further important aspects are: the division of legislative power into a central instance and sub instances, i.e. into the federal governments; the transfer of all political mandates on a temporary basis; the fundamental inviolability of the essence of fundamental rights and the constitutional principles of the rule of law, democracy and the welfare state. At the same time, it becomes clear that democracy as an order of peace is more than a system of formal rules that function beyond good and evil. Democracy as a majority decision is only possible on the basis of democracy as a consensus on the value of personal dignity, which no majority, however large, can possess.

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