

# RECHTSTHEORIE

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*Beiheft 15*

## Recht, Gerechtigkeit und der Staat

Studien zu Gerechtigkeit, Demokratie, Nationalität, nationalen Staaten  
und supranationalen Staaten aus der Perspektive der Rechtstheorie,  
der Sozialphilosophie und der Sozialwissenschaften

## Law, Justice, and the State

Studies in Justice, Democracy, Nationality, National States, and  
Supra-national States from the Standpoints of Legal Theory,  
Social Philosophy, and Social Science

Herausgegeben von / Edited by

Mikael M. Karlsson / Ólafur Páll Jónsson / Eyja Margrét Brynjarsdóttir

Vorwort von / Preface by

Mikael M. Karlsson



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## Preface

We live in exciting times — perhaps too exciting. At the focus of the excitement is the national state (a misnomer: I mean here, the modern state — states like Spain, France, Germany, and Italy — which are not really national states at all; but I shall continue to refer here to these large, heterogeneous entities as national states). In Europe, the national state, which has been the principal locus of social organization and political life since the late Middle Ages, is disintegrating in two directions. On the one hand, it is (perhaps) diffusing into the larger, supra-national assemblage which is optimistically styled the European Community. What form this inchoate union may ultimately take, and what form it would be desirable for it to take, are moot questions. On the other hand, the national state is condensing internally into smaller, nationalistic elements, some of which are emerging unexpectedly after a long hibernation, like bears in the spring.

A somewhat dramatized account of the situation (with which many would disagree) might go like this:

The European Community is a vision, which belongs to what I will call the New World. This world is international and futuristic, an entity created by long-distance travel, by television, by mobile capital and an ever-expanding network of world commerce. It is rootless, and on the move, its mother tongue is English as a Second Language, the successful version of Esperanto.

It understands people first and foremost as individuals, all inherently similar, secondarily as national citizens (this being primarily a matter of legal and organizational convenience), and lastly as representatives of a tribe or ethnic tradition. Consequently, it conceives of justice as fairness and equality, especially equality of opportunity, and its sentiments in this direction are expressed in terms of universal human rights.

The New World is largely a creature of the law, an artifact; indeed, a legal fiction — an agenda which is partially realized in a collection of treaties, laws, regulations, courts, commissions, and organizations. Ontologically, it is suspicious.

Ideologically, it is a symbol of hope, of future peace, of human rights, the brotherhood of mankind — one world.



Nationalism belongs to the Old World, as I will call it. This world is ethnic, traditional and quarrelsome. It is a product of social evolution. It stays at home, tells old stories, wears funny clothes and speaks its own languages, some of which you may never even have heard of.

It understands people first and foremost as representatives of clans and tribes (and thus as fundamentally dissimilar), secondarily as individuals, and thirdly as national citizens (this being primarily the historical result of the loss of tribal power to some central authority). Consequently, it conceives of justice as helping your friends and harming your enemies, and its sentiments in this direction are expressed in terms of getting what you deserve.

The Old World is a firmly entrenched natural phenomenon. We did not make it, and we cannot wish it away. Ontologically, it is tenacious — almost unbelievably so.

Ideologically, it is a symbol of culture, which may be assigned a greater worth than peace or life itself. Culture is taken here to be an expression or reflection of ethnicity; on this view, the idea of “international culture” is oxymoronic.

Despite the fact that the Old World and the New World are in many respects antithetical, Old World nationalists are generally supportive, at least for the time being, of New World agendas — those of the European Community and the United Nations, for example — because the immediate objective of these agendas is the weakening of the national state. In most of Europe, so-called national states were created through the conquest and repression of smaller, more tribal entities, which have continued to be repressed — culturally, linguistically and, in many cases, economically — to the present day. To the frustrated tribes of Europe, the Community may look like a welcome chance to escape the clutches of the state.

New World visionaries are not correspondingly tolerant of Old World nationalism. Indeed, insofar as they think of themselves as opponents of the national state (a much less heated issue for them than for nationalists), their opposition is based precisely upon its nationalistic aspects, which are inward-looking and self-interested: potential sources of irrationality, uncooperativeness, and war, of which Europe has surely had enough.

But the European Community has so far utterly failed to come to grips with nationalism. It rather seems to live in the pathetic hope that nationalism will simply melt away in the light of increased commerce, job- and educational mobility, multi-lingualism, and the time-consuming pursuit of Pareto-improvement. For example, in the ideology of the Erasmus Scheme — one of the most resoundingly successful efforts of the European Community thus far — there exists the concept of the “European Dimension”. This buzz-word betokens the bizarre idea that if a European university student spends half a

year or a year studying in another European country, he or she will suddenly stop thinking like a Greek or a Spaniard (not to mention like a Macedonian or a Catalanian) and assume the personality of a European.

This is to ignore not only the mundane lesson that may be taught by any leisurely tour around Italy or France, but the bloody and dramatic lesson of Yugoslavia, where Serbs, Croats, and Bosnians lived in close proximity for two generations, only to go for each other's throats as soon as the occasion offered. It does not matter in the least whether one is for or against nationalism: It will not go away. And a Community that fails to come to grips with the fact, and to find explicit and constructive ways to accommodate it, is dooming itself to failure or destruction.

But how can a Community of weakened national states accommodate Old World nationalism? Here is a job for social philosophy, social science and legal theory. For it is a simple fact that we do not understand nationalism very well, either sociologically, anthropologically or psychologically, and have only the vaguest idea how to build a legal or political framework around it. In general, it has either run rampant or has been brutally repressed, witness the before and after picture presented by the Soviet Union. Presumably, the New Europe is not meant to follow either of these time-worn paths.

A fundamental question concerns the value-structure of Old World nationalism. Are we convinced of the value of ethnic culture and identity? This is what the Old World nationalist is ready to fight for: the values that can trump material welfare and such abstract values as universal human rights (values which the nationalist of course also recognizes). Is there perhaps a fundamental conflict of value priorities between the Old World and the New World? Or is there actually no such conflict, but a way in which both nationalism and pan-nationalism can be harmoniously reconciled?

Even if some generally satisfactory value structure could be arrived at, how is it to be realized? The law, including constitutional law, establishes the basic framework within which common, or commonly recognized, values are to be pursued. What models do we have for a constitutional structure for the European Community?

The first model we have is that of the national state, one form of which is the federal republic and, doubtless, many people assume that if the European Community should ever go so far as to weld itself into a real political union, the structure of that union would be very much like that of present European federal republics — the United States of Europe, as some have called it — with the present Member States as the individual federated states.

Here, however, there is room for a lot of careful thought. In the first place, the present Member States are culturally and linguistically diverse to a much



greater degree than the federated states of Germany, for example, or the North American states and provinces. If we look at North America, in fact, there is one exception, and it is a sobering one: the Province of Quebec, which has not been successfully incorporated into the Canadian union despite more than one hundred years of effort and considerable creativity — so much so that the union is in danger of foundering. The national state, even in the form of a federal republic with partially autonomous member states, has not proved able to deal with the problem of Old World nationalism. Added to this, the Member States of the European Community have diverse political and legal traditions which have been in place for centuries. The idea that a successful federal union can be formed from these units is not very credible.

Even if we imagine away the cultural, political, and historical *diversity* of the Member States of the Community, a United States of Europe on the model of the United States of America does not appear very plausible, because of the different position of *culture as such* in European and American society. To the European, the United States is a culture-less nation; or rather, culture is present, but as a kind of imported museum piece. Another way of putting the point would be to say that culture, in the European sense, is not an element of daily life (here, I will be quick to admit, I am depending upon personal experience and not scientific research). To imagine Europe on the social model of the United States is to imagine Europe undergoing a kind of culture death. It is not only Old World nationalists who would rebel at this — for them it would be anathema — but Europeans generally. Europe wants the culture for which the Old World stands, and is therefore probably unable to dispense with nationality, irrational, stubborn and self-centred as that may be.

Well, but perhaps this has little to do with law and politics. Perhaps Europe could mould itself into an American legal framework without taking up daily life, American style. For my part, I doubt it. European political and legal systems incorporate, I believe, a different perspective toward national culture than the American legal system, and the differences make a difference. That is to say, what makes the American system work, after its fashion, in America would not produce a satisfactory framework for political and social life in Europe. At least, there is a serious question to be asked here.

Finally, we have another sobering model — a European one — for transnational union: the late, unlamented Soviet Union, which began just as idealistically as the European Community, as a state dedicated to universal justice and the brotherhood of man. From the very beginning, the Soviet Union proved unable to deal with Old World nationalism by any means other than brutality and repression, the traditional tool kit of the national state. Small

wonder that nationalism ran amok almost from the moment the repression ended. We must guard against building up another Soviet Union in the West — some people think that there is a tendency for Europe to move precisely in that direction, since its main political and legal model is the national state. Others think that free-market economics are proof against another nightmare version of the national state writ large (George Orwell was not one of them).

Perhaps there are other models to be considered, such as Swiss federalism: diluted central government with intensely localized control of a wide range of political, social and organizational matters. Switzerland has managed to harmonize two religions and four languages, a remarkable accomplishment which is no doubt due in large part to its unusual constitutional and legal system. But reconstructing Europe on the Swiss model would mean the micro-dissection of the existing Member States, which is presently not on the agenda. And there is also the question whether Swiss-style federalism could be made to work on a scale as large as that of Europe in its entirety — Switzerland as a super-power — or whether the actual Switzerland functions as well as it does partly because of its small size. The Swiss have actually studied this, by the way, thereby setting an example to be followed by anyone who pretends to be serious about the future of Europe.

Lurking in the background here is a much wider problem: the problem of the minority voice. Who speaks for those who by reason of economic, social or political disadvantage have difficulty in getting their problems and their values recognized by powerful decision-making bodies? Who speaks for children, for prisoners, for racial minorities, for women? How will the Icelandic nation — a nation of only 250,000 souls — be able to make its special needs understood, if it should ever join the European Community? The Danes got the ear of the Community, for a few months at least, by voting “no” on the Maastricht Treaty. But what of those who are never even asked to say “yes” or “no”? The problem of the minority voice is an old problem, but one that has not been adequately dealt with. Democracy, in the forms in which it has been institutionalized, has not insured humane prison conditions, equality of the sexes, satisfactory child protection, adequate legal representation, or minority rights; indeed, democracy is often advanced as an excuse for ignoring these issues. The problem of getting a fair and effective hearing for the small, the weak, the poor, and the disadvantaged still lies before us.

Such are some of the questions of law, justice and the state toward which the studies in this volume were meant to be directed. They are among the vital questions of our time, and not only in Europe. For too many decades, now, discussions in legal and political theory — insofar as they have tried to deal with actual, rather than historical issues — have been wrapped up in

questions of East and West, and this is strongly reflected in the discussions which have gone on within the International Association for Philosophy of Law and Social Philosophy (IVR). It is time to change our emphasis — indeed, it is pressing that we do so. We have to intensify the re-examination the concepts of justice and democracy and the ideas about law and politics, economy and the state, which have taken on the cast of slogans in the rhetorical atmosphere of the post-war period. We need to forge new ideologies, for the present as well as for the future, and for the West as well as for the East. It will hardly do any more to go on playing off Adam Smith against Karl Marx, unless we want to keep on living in the fitful dream-world of the nineteenth century.

As may be seen from the present collection of studies (all papers delivered at the 16th IVR World Congress in Reykjavík) many legal theorists, social philosophers and social scientists are alive to this situation. Excellent work is being done on the topics of nationality and nationalism, the state, the evolution of democracy, competing conceptions of justice, and ideologies and strategies for the future. Despite this, there may still be detected a certain fascination with the shadows of the past. The recent past is, it must be admitted, something to be taken stock of; for few of us of any persuasion are anxious to slide backwards, and to avoid doing so, it is instructive to examine our mistakes.

In addition to addressing issues pertaining especially to Europe, scholars and theorists must turn more seriously toward issues pertaining to other parts of the world, particularly the Third World. It is not only up to us — to organizations like the IVR — to bring Third World topics more forcefully into our repertoire. It is also up to us to help to develop theory and scholarship in the Third World itself. The IVR must make the same degree of effort to bring Third-World scholars to IVR Congresses that it has formerly made to bring scholars from Eastern Europe.

In most cases, the studies published here deal with issues which are actual, pressing, and subject to rapid change. Therefore, this volume has a different character than many of the past volumes of IVR congress proceedings. Taken as a whole, it is, so to speak, somewhat more journalistic than many previous volumes, even if the journalism is of a rather different order than what one finds in the newspapers. Papers from the 1987 Kobe Congress appeared in a special number of *Rechtstheorie* in 1991, four years after the Congress. To do the same with many of the papers in this volume would be simply to be publishing old news. (Imagine, for comparison, a collection of papers written in August, 1989 on the theme of “The Future of Eastern Europe” — and published in 1993!) Therefore, the editors have pressed the authors and themselves to make it possible to produce this volume in time to

deliver it to participants at the congress for which the papers were written — a tough programme for all concerned. This entails that the volume will have many shortcomings, despite all of our efforts; hopefully, these will be outweighed by the timeliness of the studies included herein.

*Mikael M. Karlsson*

I would like to thank my fellow editors, Ólafur Páll Jónsson and Eyja Margrét Brynjarsdóttir, for their exemplary efforts in helping me to produce this volume. In addition, the editors would like to thank Árni Finnsson, who did the page-setting, Barbara B. Nelson and Skia, who did most of the proof-reading and gave editorial advice, Oddný Sverrisdóttir, who proof-read material in German, and Einar Logi Vignisson and Ármann Halldórsson, who helped with the final preparation of the volume for the printers. We also thank those institutions which provided financial and technical assistance: the Central Bank of Iceland, the Institute of Philosophy of the University of Iceland, the University Press of the University of Iceland, and Duncker & Humblot, GmbH.



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## **Studies on Law, Justice, and the State**



THE EMPIRE STRIKES BACK  
LIBERAL SOLIDARITY IN A *EUROPE DES PATRIES*

Attracta Ingram, Dublin

In this paper I consider an old problem about political jurisdiction which I shall dub *Empire v. City*. The *Empire* idea is used to identify cosmopolitan liberalism and the defence of trans-national or multi-cultural jurisdictions. *City* stands for civic republicanism and the defence of local self-government and nationalism. The principle of *Empire* is individual fulfilment and mutual respect between persons. The *City* principle is community and solidarity with one's own.

Should political units aspire to be more like the *City* than the *Empire*? I discuss this question in the context of a tension in our thinking about European political union between the claims of local, regional, and national identities and those that would inevitably accompany a new European political identity. There is no agreement on the basis for citizen identification with a federal union, and consequently no account of what would move people of different nationalities to undertake military and taxation burdens for the sake of members with different identities. Traditional justifications of imperial rule often claimed that it improved local justice and even liberty (*Skinner* 1978, p. 17). Whatever the historical truth of these claims, some version of them is central to the willingness of people to identify with empire values. Citizens of member states of the European Community (EC) frequently appeal to the European Court of Justice to settle questions of individual rights against their own national states. Such appeals to higher authority reveal a liberal cosmopolitanism with respect to issues of fundamental rights which acts as a critical check on the practices of national governments and forces like racism and sexism which often accompany cultural and national chauvinism. At the same time, the principle of subsidiarity is widely interpreted as conferring powers on regional and national communities to uphold distinctive communal mores and norms for the sake of their cultural particularity, their distinctive identities, their heritages, and their boundaries.

For all that EC institutions of justice protect certain basic individual liberties it is as members of participating nations that citizens have standing in



the EC. The nation-state as collective agent is the fundamental unit of recognition and national and regional communities have strong interests in preserving their own cultural identities. Moreover, these states come together recognizing that each as a fact of history has built internal loyalties to construct its communal solidarity. Thus established national particularities are part of the given out of which a federal political union must be built.

Of course, national particularities are already shot through with *Empire* values. As signatories to the European Convention on Human Rights, and in most national constitutional arrangements, the nation-states of the EC subscribe to *Empire* values as part of their understanding of themselves as living sources of innovation and growth, criticism and reconstruction. So they appear to have some common basis for identification and integration into a European political community that is committed to both *Empire* and *City* principles. However, it is not clear how these apparently conflicting perspectives are to be reconciled. To the extent that the political community is enlarged and the nation state is de-centred as focus of allegiance the claims of localism are diminished in favour of more abstract ideals, such as representative democracy, the rule of law, freedom and equality, civility.

It is widely thought that liberal cosmopolitanism is destructive of, or anyway not sufficiently sensitive to, the value of moral and cultural particularity, and that liberal insistence on the priority of individual rights over calls of social duty undermines political allegiance or solidarity and even democracy itself. These assumptions underlie at least some of the significant worries about movement to a political union of EC states, an *Empire* construct that seems doomed for lack of the common non-political cultural ties that sustain political allegiance on the *City* analysis. I shall criticize these assumptions.

My strategy in this paper is to outline the main features of the liberal account of political community and some important arguments from its communitarian critics. I argue that the communitarian demand that we be true to our traditions requires rather than counts against liberal politics. I also indicate how liberalism is compatible with the defence of cultural rights, one basis, in a federal union, for *City* jurisdiction. Finally, I argue that a justice-based liberal solidarity is an attractive and feasible vision of EC political union.

### I. Liberal Solidarity and Its Critics

When the coercive regulation of human conduct is defended by reasons of community — typically appeals to a community's tradition or history, or its linguistic, religious or ethnic identity — a characteristic liberal response is to

ask whether the reasons advanced embody just and desirable standards for the treatment of citizens as free and equal persons. This response is connected with liberal insistence that coercively backed social arrangements be intelligible and defensible to every last citizen. The liberal legal order is voluntary in the sense of requiring legal arrangements to conform to standards of acceptability to free and equal persons. These standards are given in its theory of justice which distributes rights, liberties, and opportunities, in the light of what all could agree as persons moved by interests in giving justice to others and identifying and pursuing their own conceptions of a worthwhile life. Thus for the liberal the continuity of individual and collective identity is assured through a matching of the interest in justice of individuals as moral persons with the character of their society. John Rawls identifies this aspect of the liberal position:

[I]n the well-ordered society of justice ... citizens share a common aim ... of political justice, that is the aim of ensuring that political and social institutions are just, and of giving justice to persons generally, as what citizens need for themselves and want for one another. It is not true, then, that on a liberal view citizens have no fundamental common aims. Nor is it true that the aim of political justice is not an important part of their identity (*Rawls* 1987, p. 10, n. 17).

Rawls is here stating an ideal of integration of individual personality and political society that flourishes within a distinctively liberal order. The crucial point is that identification is a matter of sharing a concern for justice to others no less than to oneself. This concern is shown in the way the basic social structure is organised and maintained by a society in its collective political acts.

In 'Liberal Community' Ronald Dworkin has developed an account of what this means for the liberal. The collective life of a political community:

includes its official political acts: legislation, adjudication, enforcement, and the other executive functions of government. An integrated citizen will count his community's success or failure in these formal political acts as resonating in his own life, as improving or diminishing it. On the liberal view nothing more should be added (*Dworkin* 1989, p. 500).

Although these formal political acts exhaust the collective life of a political body Dworkin agrees with Rawls that their substantive point and justification is justice, that is, their success in treating everyone with equal concern (*Ibid*, p. 501).

Several features of this approach are worth emphasizing. The first is that liberal solidarity is built on something that citizens share despite their many differences, namely, an overriding interest in belonging to a society that gives them all an equal place in its concern and respect. The second is that the solidarity is not instrumental to individual interests. The justice of community so matters to individuals that they think of their own lives as diminished by social injustice, however well their own lives are going otherwise. Finally, the