

Democracy and the State of Law – For Whom?

Aleksander Peczenik

I. Defence Mechanisms of Civilization

Though the barbarians are close to us – perhaps a couple of generations ago, perhaps some thousands kilometres away – we are civilized. Two institutional mechanisms protect our civilization: the law and democracy. Western people of the beginning of 21st century firmly believe both in Democracy and in The State of Law.

These mechanisms cooperate successfully, but well developed law can exist in a non-democratic society. The Roman Emperor Septimius Severus gained his power by a civil war and established military dictatorship but who were his legal advisors? The greatest jurists of all times: Papinianus, Ulpianus and Paulus, who contributed to the greatest order of private law ever. Indeed, Law has been honoured from time immemorial, while democracy was regarded as rather controversial both in the Antiquity and in Middle Ages. Yet, today everybody estimates it highly, both in the West (honestly) and in such countries as the Democratic People Republic of Korea (for the sake of public relations).

However, to work well, both Democracy and The State of Law must follow the needs of people. In this article, I will try to say something about what people.

II. Predictability and Legal Certainty in the State of Law

What is the State of Law? The modern mind tends to answer this question by analysis of the term or the concept. The term is historically new – probably appeared the first time in 1813 – but one would expect that it has firmly established meaning. What meaning? Everybody would agree that the term “State of Law” implies that the use of public power is predictable on the basis of legal rules. Once this term is uttered, one associates it also with a series of platitudes such as “the rule of law, not of man”, “legitimate government”, “impartial courts”, “fair trial”,

“protection of citizens against the power-holders” and so on. Following Lon Fuller, one can add something about generality of legal rules and the bad effects of retroactive legislation. Following Herbert Hart, one can add something about a minimum of “natural law” (that is, minimum of morality), necessary for survival.

The State of Law thus requires formal legal certainty, which means that the exercise of public power is predictable on the basis of legal rules. But predictability is not enough. A German Jew in the Third Reich could read the law and predict that he would be discriminated against, it would be absurd to tell that he enjoyed legal certainty or that the Reich was a State of Law. A State of Law requires more than predictability. It also requires that the practice of legal officials is reasonably moral. Hence, we need the idea of material legal certainty which means that the exercise of public power is both predictable on the basis of legal rules *and* reasonably moral.

Ceteris paribus, legal certainty is better

- the more precise legal rules are;
- the better the rules express the ideal of equality before the law (non-discrimination);
- the slower the speed of change of the rules is;
- the more transparent the rules are for the public.

What happens if legal rules, although clear, are as complex and changeable as the Swedish tax law? Then the citizens face difficulties when rationally planning their actions. Certainly, very poor people have no money to use for planning to minimize the tax they have to pay. Equally surely, very rich people have easy access to skilful experts who help them to plan. But we average people become passive and hope that everything will be all right.

Significantly, not all jurists agree that a high speed of legislative change endangers legal certainty. In Uppsala, for example, a progressive law of procedure was advocated, which would help to adjust the law to dynamic changes of society. Yet, in my opinion, dynamic changes are a matter of politics. The law is a realm of stability. This implies that the State of Law is not always politically correct. Moreover, it implies that legitimacy of the law is not identical with legitimacy of the political system. The law has its own basic values.

III. Freedom and Justice as Basic Values of the State of Law

In addition to predictability of the use of public power on the basis of the law, the State of Law protects freedom and justice. The governments signatory to European Convention of Human Rights reaffirmed in the Preamble

[...] their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Moreover, the Preamble states that

the governments of European countries [...] are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law [...]

What is freedom? What is justice? Such terms tend to be controversial. Intellectuals often hope optimistically that the controversies can be dissolved by conceptual analysis. However, I am less optimistic as regards the potential of conceptual analysis. Instead of analytical exercise, one should rather study history. European history is full of examples of criticism of various tyrants for injustice and oppression. To understand what freedom and justice are, one must think about this tradition of criticism. One may also think about the tradition of advice, given to the rulers. One of them is: do not rely on legitimacy of your power. Even if you are a legitimate ruler, you may become a tyrant. One may think in this context about Spanish Visigoths of the 6th Century and their maxim *rex eris si recta facis, si autem non facis non eris*: You will be King; you do right things, but if not, you will not be it.

Discussing freedom, I restrict myself to negative freedom, that is, freedom of individuals from the oppression by the power-holders. The so-called positive freedom is a politically correct but dark *mixtum compositum* of different values, such as practical possibility to act, equality, wealth and so on.

Everybody knows that negative freedom and justice flourish better in democracy than in a dictatorship and that they profit from a decent catalogue of basic rights. However, it does not follow that Constitutional Law is the best protector of freedom and justice. Another protector of these values is even more important, namely Private Law. Contract Law, based on reciprocity and on the principle that contracts must be fulfilled (*pacta sunt servanda*) is at its core. Indeed, the big moral questions in contracts are commutative justice and negative freedom. The traditional

view of contracts rests upon the concept of commutative justice, holding that adjudication must follow considerations relevant to the parties and must avoid such broader moral and political issues as distributive justice. The Roman maxim *do ut des* (I give in order for you to give) captures an important aspect of commutative justice.

Freedom of contract has economic consequences. Ideally, it leads to Pareto optimality: A change in the distribution of resources is optimal and desirable if at least one person considers herself to be better off while no one becomes worse off. A perfect market would lead to Pareto optimality. To be sure, no market is perfectly competitive. There is behind contract law a much broader set of values. However, a state without contract law which is based on commutative justice and negative freedom would not be a State of Law.

Not only Contract Law but also Tort Law and Criminal Law are based on commutative justice. However, distributive justice plays a great role in the State of Law, as well. Its basic intuition is that like cases should be treated alike. But there are many criteria of likeness. Chaim Perelman defined abstract or formal justice as a principle of action by which everyone belonging to the same essential category should be treated alike. There are many essential categories. Thus, one may think it just to distribute goods equally to everyone, or according to each person's merits (or desert), work, needs, rank, or legal entitlement. A comment is necessary here on desert. There is an ancient tradition whereby justice consists in giving people what they deserve. Desert has recently been undermined or completely dismissed by liberal orthodoxy, to be sure, but it still is central to the sense of justice of ordinary people and, I will add, to the tradition of legal doctrine. Moreover, justice weighs all considerations. Thus, the German scholar, Nils Jansen has worked out the following formal conception of justice: Justice is the result of the right weighing of all principles of justice relevant in a situation.

Justice is a complex web of reasons weighed and balanced. Justice seeks to achieve as coherent a system of valuations on deserts, needs, and relations among parties as is possible in a given context. The relative weight of deserts, needs, and corrective justice is different in different parts of the law. Thus, in torts, one must balance such considerations as corrective justice, general deterrence, fair distribution of risks, and the victim's needs. Similar factors certainly play a big role in criminal law. A lot can be said here about the retributive, social-utilitarian, and reformative theories of punishment. In contracts, the principle *pacta sunt servanda* has obvious underpinnings in Kantian autonomy, but

then social considerations of needs such as consumer protection may dominate. Labour law must treat desert seriously. But we can trace the same components of justice in all parts of the law, though at each time in a different mixture or grouping. The overall situation is deeply contextual and pragmatic. But the state in which the law does not care about distributive justice at all would not be a State of Law. Neither would it be a State of Law, if it neglected the complexity of justice, and seriously attempted to replace it with one or another kind of fundamentalist egalitarianism.

In brief, justice is taking all considerations and principles of justice are defeasible.

Justice and freedom often enforce each other, but they also collide in some situations. Freedom is good, perhaps it is the highest value, but it can create injustice. Capitalism both presupposes and creates a high degree of freedom. Yet, it can also create enormously rich billionaires whose wealth is in no just proportion to their merits. One does not need to be a socialist to see this. The idea that justice is proportionality is Aristotelian rather than Marxist. On the other hand, justice is a great value but not the highest one. Justice to some often creates injustice to others, and no considerations of justice justify radical restrictions of freedom.

IV. Pluralism, Democracy and Common Ground

The ideal State of Law can keep freedom and justice in balance. But can weighing and balancing of these values – and of any values – be objective? Is not the point of *democracy* to provide institutional mechanism of mediation between different subjective weighings?

Democracy is the same as the power of the people. This is the main idea of democracy. To be sure, the expression “the power of the people” is vague. Nevertheless, a study of the political practice and language shows that it makes sense to proffer some facts as reasons for the conclusion that a state or a social order is democratic. These criteria of democracy make the central idea of the power of the people clearer. Inter alia, one may consider the following, partly overlapping, criteria: 1) political representation of the interests of the citizens, 2) majority rule, 3) participation of citizens in politics, 4) freedom of opinion, 5) some other human and political rights, 6) legal certainty, 7) division of power and 8) responsibility of those in power. Each criterion corresponds to a different value, which can be realized to a certain degree, more or less. It follows that there are degrees of democracy.

Majority Rule is essential for democracy. One can justify it, as follows. First, it is an approximation of the calculus of human preferences, often regarded as the core of morality. To decide what actions are morally good, one must thus pay attention to both the number of people having certain preferences and to the strength of the preferences. Second, political views compete with each other and it might be practically impossible to prove which the right one is. A majority decision is then a good means to achieve a peaceful solution. According to Hans Kelsen, democracy is thus a consequence of value relativism, though an objectivist can also be a democrat. Thus, pluralism of views is inevitable in the democratic society.

However, pluralism can degenerate to manipulation and chaos. Western democracies face the risk to convert into what in Spanish can be called *partitocracia*, that is, the rule of political parties, each protecting particular interests and neglecting the common social interest. In a *partitocracia*, all tricks are allowed to get power. An advisor of Bill Clinton allegedly said: don't try to be elected for good reasons, just try to be elected.

To prevent *partitocracia*, one must try to argue that there also is a common ground of moral valuations behind the law and politics. This common ground must be respected when the parties compete and fight each other. It must not be sacrificed for tactical gains. If it is, the democratic system becomes unstable.

Surely, values are relative but the relativity should not be exaggerated. Indeed:

There is no guarantee of reaching acceptable results, but the pressures towards objectivity and a right answer, even on the base of conflicting pluralistic values, are very strong wherever values come into practical conflict.

[...]

We should think of ourselves as responding to the multiplicity of values that historical traditions have presented us with, and should try to take the next step under the pressure of the search for coherence (Nagel 2001, 110-11).

In other words, modern societies display not only pluralism but also overlaps of values. We must deal with overlaps of cultures in the law, among other things, as well as in commerce, the media, and the World Wide Web. When speaking of pluralism and overlapping cultures, one may be referring to cultural pluralism within a society or to the cultures characterizing different societies.

However, the overlapping consensus concerns rather platitudes than precise valuations. In particular, Michael Smith has stated that there are different kinds of platitude surrounding our moral concepts. Some indi-

cate that moral judgment is above all practical. There are platitudes that give support to our idea of the objectivity of moral judgments. Others tell us about the supervenience of the moral on the natural others. Still others deal with the substance of morality, as by urging a concern and respect for the person. And then there are platitudes that deal with procedure, such as reflective equilibrium. Controversies first surface when one tries to convert the platitudes into abstract, precise, and content-rich intellectual structures. Let me add that consensus on the precise consequences of platitudes is defeasible. There are vague platitudes that define morality in general. Others, slightly less vague, define our morality in Western society; among these we have the platitudes about human rights. The core of human rights is perhaps universal but at the same time allows for historically evolving modifications. A good question is whether the universal core amounts to something more than platitudes.

This observation has far reaching consequences. One of them can be called “the danger of the folly of the wise”. The “wise” intellectuals try to achieve preciseness about social justice and other basic values. The more precise their theories become the less credible they are. In the end, the “wise” are perceived by normal people as a decadent elite, which creates an El Dorado for charlatans and demagogues.

V. State of Law – For Whom?

To proceed further, one may ask the question who needs the State of Law. The State of Law protects different interests. Different interests are typical for different types of persons. Let me call them *bonus pater familias* and *pauperrimus*.

The term *bonus pater familias* is well-known in private law. Interpreted very generally, it refers to a reliable and cautious person who can plan his life and take care of his family. He is not necessarily a businessman but he can do business if necessary. He must trust that contracts will be fulfilled, that the authorities will follow legal rules, that the contrahents and officials are reasonably honest, that the courts care about justice and that the media write the truth. He needs a private sphere protected by negative rights and freedoms. The state must not unreasonably restrict his freedom nor violate his property. He will lose the motivation to act if he discovers that the law stays on paper, that ownership is watered down, that justice is perceived as metaphysical nonsense and that the information he receives is often false. His ideal is success in work and success in family life.

In a society in which the *bonus pater familias* is no longer an attractive ideal, many individuals face the risk to convert into a *pauperrimus*. The word has been used in a Mexican context, referring to a very poor person who cannot profit from his rights in legal process. He has no money to employ an attorney. He has no knowledge of his rights. He cannot plan his life in detail. What happens to him depends in part on what other people decide, for example on social benefits granted by state officials, or on the benevolence of rich land owners. A big part of his life depends also on anonymous bureaucratic structures and other “invisible hands”. What the *pauperrimus* needs is first of all help and care. In welfare states, he trusts that the “society” takes care of him. He, too, needs honest officials and justice. But well functioning Contract Law and predictable courts are not so central for him as for the *bonus pater familias*. He needs predictable help rather than predictable solution of conflicts; he must simply trust that the “society” gives him bread and housing. Freedom is not essential for him either; he would prefer to be a slave than hungry. Finally, he does not care very much whether the media write the truth or the politically correct slogans. He needs positive rights – to work, to housing, to health care. His ideal is solidarity.

These two types of persons are merely idealisations-intellectual tools. In real life, people have mixed personalities, in part like *bonus pater familias*, in part like *pauperrimus*. But the simple ideals help us to think about the complex reality. One can ask, for example, whether citizens of rich Western states do not slowly evolve in the direction of *pauperrimus*. For example, opinion polls show that many Europeans would rather prefer high taxes and good social service than lower taxes and less social security. Another example is that private law has more and more protective mechanisms, such as consumer protection.

VI. Democracy – for Whom?

Both *bonus pater familias* and *pauperrimus* types would prefer democracy to dictatorship. But the first one would like to have a real possibility to decide about public matters, whereas the second would prefer a system in which he could choose who should take care of him. It is difficult to state what kind of constitutional arrangements fit these two basic preferences. Let me just ask two questions. Would the *bonus pater familias* like Swiss style referenda in municipal matters, whereas *pauperrimus* would prefer to vote for a reliable party which takes care of worker’s interests? Would the *bonus pater familias* opt for constitutional division of pow-

ers with a strong judiciary, while pauperrimus would rather have strict majoritarian rule? Would the bonus pater familias trust stable laws more than dynamic adjustment of statutes to the changing needs of people? Would he put law before politics? Would the pauperrimus politicise the law? Would the bonus pater familias protect private law from political interference? Would the bonus pater familias attempt to understand the law and justice whereas the pauperrimus would be happy to trust the politicians? I cannot answer such questions with certainty, but perhaps they are relevant to think about.

And above all – what is the worst case scenario? What happens if ordinary people start believing that justice is nonsense, that politics is a game for the benefit of the players, that freedom is an illusion and that the truth does not exist? What happens if all of us will become like the pauperrimus? People will then lose their trust in the political system. Some will become cynical; others will wait for an autocratic “saviour” – as in South America in the first half of 20th Century. A Caesar will take over – or much worse.

