THE MATERIAL IDEA OF THE LAW-STATE

by

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The idea of the law-state and the future of society. Some crisis-phenomena in modern western states

In this paper I defend the thesis that the legal development of the society of the future — supposing it will be a civilized society — depends on the maintenance and cultivation of the law-state. Western civilization has to a high degree put the idea of the law-state into practice. But there can be no doubt that this idea is now in a crisis. At the end of the second world war one witnessed a restoration of the idea, but since the sixties the political and socio-economic development of the Western states seems to entail serious threats to the idea of the law-state. I am not primarily thinking of the military menace from without, from behind the iron curtain, which is bad enough; I have in mind especially certain factors of disintegration, which undermine our law-states from within.

Let me mention some of these factors: political radicalism and terrorism (think of the Baader-Meinhof group in Western Germany); student revolts (in recent days especially in Italy); corruption among politicians (Watergate, Lockheed-case), explosive increase of criminality, etc. These factors however stand out clearly. There are also factors which operate secretly and hence much more dangerously. In Western countries, among which my home-country, the Netherlands, we are confronted with the simultaneous appearance of an enormous increase of collective expenses, income-levelling and labour costs — unemployment. Economists have pointed out that, given the will to maintain the present rate of collective expenses, income-levelling and full employment, — and in the Dutch political situation these desiderata can hardly be given up — state-coercion becomes virtually inescapable (see Th.A. Stevers, Is the governmental policy endogenous, E.S.B. 1976, p. 1037 ff.). If governmental policy really is ‘endogenous’ we may ask whether this development does not lead ultimately to the decline and ruin of the Western system of free enterprise, a system which traditionally has been the correlative of the Western law-state, just as free education, freedom of association, of religious organization, etc.

Further, mention must be made of the problems attending the increasing extension of the welfare-state. In the social-psychological and political field this produces very disquieting effects, such as exorbitant expectations on the part of the subjects regarding the state and the growth of interest-groups with their group-egotism. (See H. Daudt,
'The political future of the welfare-state', in: Beleid en Maatschappij, 1976, pp. 175 ff., in which he cites the studies of Samuel Brittan and Robert Moss concerning the situation in England). These phenomena together with the demoralizing effect of inflation, imply a serious threat to the law-state and democracy because they undermine the belief in the idea of the law-state itself.

This brings us to the most alarming factor of disintegration in the present crisis of the idea of the law-state. The consensus, essential to a sound development of the state as an integrating, public-legal community, which is founded on fundamental values of law and human freedom, and in which all parts of the population take part as equals and by which the common good of the people must be served — a consensus which is accompanied by a public sense of duty — this consensus evidently is in decay. I only point to the increasing polarization between 'Left' and 'Right' in politics, making political agreement and cooperation finally impossible; to the endeavours to monopolize governmental offices on the part of political parties; to the newly introduced 'right to recall' in the sense of the 'right' of the party-organizations to force members holding an office to give it up in case they deviate from the party-line, etc. Service in a public office is more and more politicized, subjected to the particular party-interests and party-conceptions, and weaned away from the public legal idea of the common interest.

The crisis in political theory

Political developments such as these — and I have pointed to but a few of them — cannot fail to put their stamp on the situation in political theory. In my country several prominent state-conceptions can be characterized as 'state-theory without a state'. Here the influence can be ascertained of modern sociological and politicological theories, in which the concept of the state is deprived of its normative character and the state is reduced to empirical social facts and power-relations. This approach reveals the crisis in the normative sciences ('humanities', 'Geisteswissenschaften'), which under the influence of the historicism of the second part of the previous century and later (Nietzsche, Dilthey, Troeltsch et. al.) have given up their normative foundation in relatively constant, objective norms and values and, in so far as they did not bog down in irrationalism (the different existentialist movements etc.) or nihilism (such as the 'negative dialectics' of the Frankfurters) often have made their choice in favour of the quasi-physical method of 'value-free' sociology and political theory.

The normative concept of the state. The material idea of the law-state

Over against these conceptions I want to plead in favour of a normative theory of the state, not in the sense of a theory which makes the 'value-free' results of the naturalistic sociology and political theory subservient to social and political postulates (the ideal of social emancipation and the like), but in the sense of a doctrine which considers the object of its theory, i.e. the state, according to its inner structure as a normative structural principle. My thesis is that the state according to its normative structure is a law-state. Hereby I understand the state