

Titre annoncé pour Melbourne le 12/03/01

"The limits of the Rule of Law"

The Rechtsstaat and the problem of obedience to the Law

Obedience and obligation in the Rechtsstaat

The problem of obedience may look strange to a legal scholar. Lawyers deal not with obedience but with obligation. The question they ask is not: "*what behavior does effectively take place*" but "*what behavior ought to take place*»? According to leading theories, actual behavior has no effect on the validity of a rule. In other words, a rule is binding or not binding independently of the fact that it is being obeyed (or disobeyed). This is just another way of expressing the difference between *is* and *ought* and the law only deals with what ought to be, not with what actually is or will be. Moreover it is generally agreed that there can be no causal relation between what is and what will be. The fact that something ought to happen does not cause it to happen and the fact that something actually happens has no influence on its being mandatory or forbidden. In other words, the validity of a rule does not depend on its efficacy. Indeed it can be said that the specificity of a rule, as distinguished from a law of nature, lies in its capacity to be violated.

Lawyers and legal scholars therefore leave to sociologists and psychologists the question why men obey the law. True, those who make the rules must have some idea of what makes men obey. If they make and publish those rules, they must assume that knowing the existence of a rule will have some sort of psychological effect on actual behavior and they draft them according to the behavior they expect. Most lawmakers mainly rely on sanctions, in the general sense of both punishment and reward. Yet, whether this is the real reason that explains obedience, is something that lawyers cannot tell. They can tell if, according to the law, this or that behavior ought to take place and what, still according to the law, ought to happen if the prescribed behavior does not actually take place, but he is not concerned by the psychological question why it does or does not take place. Furthermore, for lawyers the question is absolutely irrelevant. If I obey the order from a

State official to pay taxes, I may be doing this for many different reasons, because I think it is a moral duty, because I fear the sanction, because I expect to gain social prestige my letting the public learn about the large amount I pay, or because I had a dream telling me that I will win at the lottery a hundred times the amount of the taxes. From the point of view of a lawyer, all these reasons are irrelevant, the only question being that of the obligation to pay.

Yet, one can find a connection between the question of obedience and the question of obligation within the specific framework of the doctrine of the *Rechtsstaat*. If a citizen asks why he ought to pay taxes, the legal answer is that he has been the subject of a command by a State official, that this officer did not act on his own will and for his own benefit, but that, by issuing the command, he has himself obeyed a statute. The citizen's direct obligation to obey the officer is an indirect obligation to obey the statute. But it depends on the actual obedience by the officer. Actual obedience by State officials is the justification for my obligation to obey them. Similarly the obligation to obey statutes is the fact that lawmakers have actually obeyed the constitution, which prescribes to make rules with certain characters, namely that they be general and that they do not infringe on fundamental rights.

This is the reason why the *Rechtsstaat*¹ is defined a government not of men, but of laws only. There is a double advantage to this situation. First of all, laws are general and stable. If they cannot be changed to suit the whims of those who apply them, I can be said to be free, even if they are severe and unjust, because I am able to predict the consequences of my actions. This is precisely the definition of political liberty given by the philosophers of the Enlightenment¹. On the other hand, if the laws have been made by the citizens themselves, as it is the case in a democracy, these citizens are free in another sense, because they are submitted to their own will. Thus, Rousseau is able to write that when a citizen is in prison, he is just forced to be free.

¹ MONTESQUIEU, De l'Esprit des Lois, Livre XI, chap. III: “ *La liberté politique ne consiste point à faire ce que l'on veut. Dans un Etat, c'est-à-dire dans une société où il y a des lois, la liberté ne peut consister qu'à pouvoir faire ce que l'on doit vouloir et à n'être point contraint de faire ce que l'on ne doit pas vouloir....[c'est] le droit de faire tout ce que les lois permettent*”

In this classic presentation of the legal system, the hierarchy of norms is a justification of the duty to obey. But, this duty does not simply derive from another duty. It derives from the fact that another duty has been effectively obeyed. My duty to obey the tax officer's command derives from the fact that he himself has obeyed the statute. I have an obligation if - and only if - it is a fact that the officer has acted according to the statute. The *Rechtsstaat* is a justification to the extent that it is the exact description at each level of the hierarchy of actual obedience by the individual who enacts a norm to a norm of a higher level. It may be considered a justification not only of legal obligations, but as a moral obligation: if there is a moral obligation to obey just laws and if the lower officer's command has been derived from just laws, I have a moral obligation to obey the officer's command.

It should be stressed that the theory of the *Rechtsstaat* is significantly different from that of the Rule of Law. Let us consider a classical definition of the Rule of Law, such as that given by Finnis². According to Finnis:

“A legal system exemplifies the Rule of Law to the extent...that I rules are prospective not retroactive and II, are not in any way impossible to comply with; that III, its rules are promulgated, IV, clear, and V, coherent one with another; that VI, its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that VII, the making of decrees and orders applicable to limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that VIII, those people who have authority to make, administer, and apply the rules in an official capacity a) are accountable for their compliance with rules applicable to their performance and b) do actually administer the law consistently and in accordance with its tenor.

Thus, the Rule of Law is the description of a situation to be wished for not of the means to reach that situation. There is no guarantee that I, II, III, IV, V, VI, VII will effectively obtain, even if VIII does. The theory of the *Rechtsstaat* therefore appears to be more ambitious since it pretends to be a mean for the establishment of such a situation: all the conditions set forth by the theory of the Rule of Law, that they be prospective, clear, coherent, etc. will obtain if every rule is the exact application of a superior rule, for example

² FINNIS J., *Natural Law and Natural Rights*, Oxford, Clarendon Press, 1980, p. 270

the constitution that prescribes that statutes be prospective, clear, promulgated, coherent, etc.

Why the law is exactly applied seems therefore to be an important question not only from the point of view of sociology or psychology, but also from that of legal theory. If political liberty or the duty to obey the law depends on actual obedience by State officials, it becomes necessary to examine if it is true that obedience to the superior rules by State officials is a guarantee of political liberty, and if it is true that State officials obey the law rather than basing their decisions on their own personal preferences.

The traditional doctrine of the *Rechtsstaat* does not address these issues but merely assumes that the organs of the State actually apply superior rules, thus failing to explain why.

I will first examine the failures of the traditional doctrine of the *Rechtsstaat* and attempt to show that it does not offer the promised guaranties, because strictly speaking there is not even a duty of State authorities to obey superior rules, much less actual obedience. Nevertheless, it does not follow that these authorities exercise their discretion according to their whims. The second part of this paper will deal with constraints, different from obligations, and produced by the legal system.

1 The theory of the *Rechtsstaat*

There is a fundamental ambiguity in the expression *Rechtsstaat*, and the corresponding expressions in continental Europe, that are translations from the German, such as *Etat de droit*, *Stato di diritto*, *Estado de derecho*. They are used in two different ways, sometimes to refer to a State that is submitted to the Law, sometimes to a State whose organs act according to laws made by other organs.

1.1 The *Rechtsstaat* as a State submitted to the Law

The theory that the State can be submitted to the Law presupposes that there is a law that has not been created or posited by the State and it comes in two different versions.

According to the first, this Law is external and superior to the State because it is natural law. Without entering the classic discussion as to whether there is a natural law, it can be stressed, that if citizens obey a State, that is limited by natural law, they cannot be said to be autonomous, because autonomy in this case means the absence of any limitations and

therefore amounts to sovereignty. In Rousseau's words, "*it is the essence of a sovereign power, that it cannot be limited; it can do everything or it is nothing*"³.

The usual objection to the idea that submission of the State to natural law is incompatible with democracy is that the sovereignty of the people is precisely based on natural law. It follows that if the State – or the people – acts in a way contrary to natural law, he cannot be considered the sovereign. The weakness of this objection is that even if there was such a thing as natural law – and the burden of the proof is on those who claim that it exists - and if it was the basis for the sovereignty of the people, this would be only because of rules that are formal and procedural, rules whose function it is to determine the bearer of sovereignty, not because of substantive rules. It would be self-contradictory to point to a sovereign and to assign limits to that sovereign. A sovereign people is one that is only submitted to its own norms and therefore a State submitted to law that it not posited, such as natural law, is one that is not the realization of autonomy, but the contrary of autonomy. Furthermore, in such a system, even if every particular command were a strict deduction from natural laws, it would still not be true that citizens would be subject not of men but of laws only, because natural laws, even for those who view them as existing objectively, have no clear and unambiguous meaning. They must be interpreted and this is a task that can be performed only by men.

According to a second version, sometimes called "positivist", the State is not subordinate to natural law, but to positive law, a law made by men, but prior to its own foundation. The usual example is that of Solon or Lycurgue, laying down rules that will bind future lawmakers, or that of a Bill of Rights.

The most serious difficulty with this theory is that the laws, to which State authorities are submitted, are not at all external to the State. A Bill of Rights is an act of the State. Thus, in such a system the State is really limited only by its own will. Even if one speaks not of the State as a whole, but of State authorities, they are not really submitted to these old laws, for a reason similar to the one mentioned about natural law. Old rules, such as those laid down in a Bill of Rights, are spelled in a language that is necessarily vague. They have to be

³ J.J.

Neumann. Die Herrschaft des Gesetzes, 1980, engl. trans. Political Theory and the Legal System in Modern Society. Leamington Spa, Heidelberg, Dover, 1986.

interpreted and the interpreter, who often is the controlling authority, enjoys enormous discretion, so that the other State authorities are submitted no so much to prior laws, as to the controller.

On the other hand, one could only say that State authorities are submitted to a Bill of Rights if it was impossible for them to change it or allow for exceptions. But even if changes or exceptions to a Bill of Rights are sometimes difficult, they are never impossible in principle and it often happens in European countries that a rule, which one cannot adopt in the form of a statute, because the constitutional court has declared it to be contrary to the constitution or the Bill of Rights, is nevertheless enacted after a constitutional amendment has been passed.

One might object that even if the State as a whole is not submitted to a higher law, each of its organs is necessarily limited, because of the separation of powers that prevents the concentration of all powers in the same hands. Nevertheless such an objection does not take into account the fact that powers are organized in a hierarchy. The legislative power is above the executive and the judiciary and the constituent power above the legislative, so that the organ in charge with the highest power is rightly called sovereign and is not bound by law. This is true of course of the English Parliament, which is not limited by a constitution and a constitutional court, but it is also true where there is a written constitution, because it is always possible to bypass any limitation of the legislative power, by means of a constitutional amendment. Thus, there is still a sovereign, which is the constituent power. Sometimes, the constituent power is divided between several authorities; sometimes the amending procedure makes it difficult to revise the constitution. But this division has no more effect on the principle of sovereignty, i.e. on the absence of any limitation by law than does the physical or psychological weakness of the tyrant in a system that does not claim to be a *Rechtsstaat*.

There is thus an impossibility to think of a State that would really be submitted to a Law that it did not make itself and cannot change. In this sense there is no such thing as a *Rechtsstaat*.

1.2 The *Rechtsstaat* as a State power in the form of law

According to another version of the theory of the *Rechtsstaat*, if the State cannot be limited by a law that it did not make or that it cannot change, liberty will nevertheless be

guaranteed if the organs of the State apply superior norms. Unfortunately, this version actually refers to two very different theories, related to two very different meanings of the expression “application of the law” or two conceptions of the hierarchy between two norms.

First a superior norm can prescribe that an organ of the State behaves in a specific way, for example that it issues a command with a specific content and specific subjects. This is the relation between the penal law and the decision of a criminal court, when that court has no discretion as to the punishment. If the decision of the court is called “decision”, it is an inappropriate name, because it is nothing but the conclusion of a syllogism. This is the reason why Montesquieu writes that the judge is the mouthpiece of the law and that judiciary power is null⁴. In this case, the court’s decision is legally valid, if and only if the deduction from the major premise constituted by the superior norm is logically valid.

But, the relation is more often very different. The superior norm may empower an organ to take a particular decision, without prescribing that this decision be given any particular content. The decision will then be valid, provided that it has been taken by the competent organ, whatever the content. Or the superior norm may specify the content in very general terms, for example by prescribing an aim or an end, leaving to the organ the choice of the means, or by setting limits to the power of the organ. In that case, the organ will enjoy discretion. Its decision cannot be logically deducted from the superior norm. The relationship between the decision and the superior general norm, is not one of conformity, but of mere compatibility.

If all one has in mind, when speaking of the application of the law, is the second type of relation or hierarchy, then a very important consequence follows: one ought to name *Rechtsstaat* not some type of State, the liberal State, but any State with a legal system structured with such a hierarchy⁵.

But this *Rechtsstaat* provides no guarantee either of political liberty, or of democracy, and this is due to several reasons.

⁴ MONTESQUIEU, De l’Esprit des Lois, Livre XI, chap. VI.

⁵ In Kelsen’s view, since Law and the State are two names with the same reference, and since every legal system has the same hierarchical structure, every State is a *Rechtsstaat*.

First, it may be that statutes are made by elected representatives of the people, but rarely by these representatives alone. In most modern States, statutes are subject to judicial review. In order to exercise their control, courts must interpret the constitution, the Bill of Rights and a number of unwritten principles. But legal interpretation, whether an interpretation of statutes, or of the constitution, is not a cognitive but a volitive activity. The courts have a wide discretion to interpret the constitution in one sense or another and to decide that statutes are valid or not valid. In short the courts share with elected representatives of the people the legislative power, which in principle is granted to the latter alone.

Secondly, in the modern State, the executive function implies the power to issue regulations, which, in substance, resemble statutes, because they are very general and may be enacted for policy reasons, so that, although the executive power acts within the limits determined by the lawmaker, it cannot be said to be obeying statutes. One must also stress that the executive power exercises, by various means, an important influence on the legislatures, and thus on the content of statutes.

The second half of the 20th century has seen the development of the so-called executive agencies. These agencies do not obey the head of the executive power and enjoy wide discretion in the application of statutes. In fact, their function often far exceeds mere execution, because many among them are at the same time in charge of designing a policy by drafting general rules, applying them to particular cases, and adjudicating on the violations of their own rules and commands.

Even, the judicial function cannot be viewed as one of application of statutes. Modern statutes do not order courts to take specific decisions, as was the case in the conception of the Enlightenment. Criminal codes give judges a choice of the punishment at least between a maximum and a minimum sentence and civil courts have a very wide discretion in the allocation of damages. More important is the power to interpret both the texts of the applicable statutes and the facts to be adjudicated. The interpreter is able to determine freely the content of the statute that he is supposed to apply. Furthermore he does this retrospectively since, according to the standard fiction, he discovers the meaning that the statute has had from the day of its enactment. As Bishop Hoadley rightly wrote in the 17th century

Whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law-giver to all intent and purposes, and not the person who first wrote or spoke them; *a fortiori*, whoever has an absolute authority not only to interpret the law, but to say what the law is, is truly the law-giver⁶.

One could therefore easily be tempted to conclude that the *Rechtsstaat* is a myth: Neither the State as a whole, nor its organs, can be said to obey rules that they have not made themselves and that they cannot change. Yet, a closer examination shows that State authorities, if they are not bound by rules, are nevertheless constrained in several ways and it remains to be seen if these constraints can produce similar effects and thus be constitutive of a different type of *Rechtsstaat*.

2 Factual constraints in the Rechtsstaat

There are several situations in which State organs are constrained to act in a certain way, without really meeting an obligation or obeying the law. Their behavior is therefore predictable and citizens can obtain at least some of the benefits expected of the *Rechtsstaat*. We can briefly examine some examples of such situations. They result from the existence of constitutive rules, from the organization of mechanical constitutions, and from the necessity for courts to act rationally.

2.1 Constitutive rules

Following a classical theory, we may distinguish two types of legal rules that are followed in very different ways. First a rule such as “driving over 130 km an hour on French motorways is forbidden”. I can chose to obey or not. I know that driving at higher speed, I risk being arrested and punished, but I can still decide to disobey. On the contrary, the rule “land and houses can only be sold by a contract that must be written by a notary and registered by the state” or “marriages must be celebrated by the mayor” cannot be violated. I cannot even think a selling or buying property without going to a notary or have my marriage celebrated by a person other than the mayor. Trying to write a contract to buy property without going to the notary or trying to get married in some way other than having the marriage celebrated at the town hall by a competent officer, is not disobedience and I do not risk punishment. The only consequence is that the sale or the marriage will

⁶ Cited by KELSEN (Hans) (1945, new edit. 1961), *General Theory of Law and State*, New York, NY, Russell & Russell, p. 153).

not be valid. I will have bought nothing or I will not be married. Thus, if I want to get married or buy property, I will say not that I ought, but that I must follow the rule.

This is true of some of the rules regarding State organs, especially but not exclusively, of procedural rules. If the constitution provides that a statute can only be adopted by a simple majority after three readings in Parliament, even if an overwhelming majority of members has voted for it twice, the statute has not been passed.

The type of behavior of someone following these constitutive rules cannot be called obedience, because there is no choice not to obey. Nevertheless, if the whole purpose of the *Rechtsstaat* is to justify the obligation of citizens to obey specific commands of state organs, through the idea that these organs apply superior rules, then this purpose is achieved not only if the application takes place because the organs obey the rules, but also if it takes place because the organs act in a way that they cannot avoid.

2.2 The mechanical conception of the constitution

Some political thinkers of the Enlightenment believed that a constitution well designed could give birth to similar situations. In their view, a constitution was not a norm that could be obeyed or violated, but a mechanism capable of producing some specific effects. A good example of such a mechanism is that of the English constitution, or at least the ideal model drawn from that constitution. In that model, the legislative power belongs to a complex authority, composed of three organs, the House of Commons, the House of Lords, and the King; the executive power belongs to the King. The King thus takes part in the exercise of two powers. All three authorities are completely independent and cannot be punished for the decisions they take. The difficulty comes from the special position of the King. As an executive power, he is under an obligation to apply statutory law, which he contributed to make. If he disobeys and gives orders that are not in conformity with the law, he cannot be punished, because he is independent, but if he remains unpunished, everything happens as if he was the sole legislator. Thus, the distribution of powers is self destructive, because instead of being a part of the legislative power and the sole executive, the King will have both powers in his hands.

The solution is to be found in the institution of ministers, who countersign the acts of the King as an executive, and are held liable for those acts. Because they are liable, they are expected to refuse their signature if an act is against the law. The law therefore will always

be correctly applied. The King will be unable to exercise both powers. On the other hand, the two houses may be tempted to introduce legislation that would infringe on the executive powers, but the King, as part of the legislative power, will protect his power and oppose that legislation. It is assumed therefore that the distribution of powers – and the distribution of powers is nothing else than the constitution – will be automatically preserved. It will be preserved, not because the various authorities will be virtuous and obey, not even because they will be enticed to obey, but because, whatever they do and even if each one of them tries to violate the constitution, they can never succeed. If the mechanism has been well designed, then it is not the case that the constitution ought not to be violated, but simply that it is in effect inviolable.

The end result again is, if the mechanism works as it should, that citizens will obey orders given by the executive, and in doing so indirectly obey higher laws, that are both general and that cannot be changed according to the whims of the law applying organ.

In the minds of its promoters, this piece of constitutional engineering is also supposed to influence some substantial characters of statutes. If the three legislative authorities have conflicting interests, the adoption of new statutes will prove difficult. This is viewed as an advantage, because if there are few laws, there will be little interference in the private sphere and the autonomy of the individual and of the markets will be preserved. On the other hand, the statutes that will be passed, will necessarily be the result of compromises, which means that they will be moderate. Thus, instead of prescribing to lawmakers, for example by means of a Bill of Rights, to issue moderate legislation and to respect the autonomy of individuals, a prescription that may or may not be obeyed, the constitution will achieve this same result through a clever distribution of power.

Of course, such a perfect design can never really be realized, but what is important is the view one could hope to rely on such mechanism and replace a duty of obedience by an impossibility not to comply.

2.3 Constraints in the exercise of discretion

Another type of constraints arises in situations when, from a legal point of view, authorities have complete discretion, for instance in the case of constitutional assemblies, legislatures, administrative bodies or courts when they interpret the law. I will take only two examples of such constraints.

The first is taken from the French national Convention of 1795⁷. This assembly had been elected in 1792 to write a new constitution after the abolition of the monarchy. In June of 1793 a very democratic constitution was actually voted under the influence of Robespierre. It included male universal suffrage. Nevertheless, because of the war that was going on and the revolutionary situation its application was postponed and after the fall of Robespierre, the Convention decided to write a new constitution, which would be much more conservative, but would keep the appearance of democracy. One of the notable features of that new constitution was that men who did not pay taxes because of hardship were excluded from the right to vote. Yet, the Convention did not wish to acknowledge that it had abolished universal suffrage. This situation had a very important consequence: the adoption of two new concepts of citizen.

From the beginning of the Revolution, a citizen was nothing but a member of society. Every person, no matter their sex, age, origin, who was a member of society, was a citizen. This did not mean that they could vote. Obviously, those who were naturally incapable would be excluded from the vote and “naturally incapable” referred to an incapacity considered natural at the time. Thus, infants, idiots and also women were considered naturally incapable of voting. According to the 1793 constitution, they had the rights of citizens, but could not exercise them.

But in 1795, the National Convention could not carry on with this distinction between a right and the exercise of a right, because poverty could hardly be considered a “natural” incapacity. The only way out, if the Convention was to keep the fiction of universal suffrage, a system where all citizens have a right to vote, it had to change the definition of the citizen: a citizen for them is a man over 21, who has been living in the same town for more than a year and pays a minimum amount of tax. These men have at the same time the right and the exercise of the right. All those who meet those conditions are citizens and all citizens may vote. One can say that the new definition of “citizen” is a result of constraints bearing on the constituent power.

But this was not the end of the story, for women, children, idiots and poor men, who had been citizens until then, had lost this quality. If they had ceased to be citizens what were

⁷ The concept of citizenship in the Period of the French Revolution, in. LA TORRE, M. (ed), *European Citizenship: An Institutional Challenge*, The Hague, London, Boston, Kluwer, 1998, pp. 27-50.

they? That was the question asked by Thomas Paine, who had been a member of the Convention from the beginning and close to the more progressive groups of this assembly. Again, the solution to this difficulty was to create a new concept: that of citizen *lato sensu*. In that sense a citizen is any person, whether a citizen in the strict sense or not, living in France and who is not a foreigner. Thus, the Convention writes at the end of the new constitution that foreigners have the right to buy or inherit property in France, “in the same way as French citizens”. These citizens evidently included women and children. The insertion of that special provision was hardly necessary to protect the rights of foreigners. Actually foreigners were not even a legal category. From the beginning of the Revolution, all those who lived in France were citizens and had equal rights and this was still true in 1795. The word “nationality” was not used until the 19th century. But, if the Convention wanted to proclaim once more the principle that all have equal rights, it had to find a new formulation. Equality between all citizens was impossible, because foreigners were not citizens. Thus, it had to be equality between foreigners and all those who have the right to own and inherit property in France. This category exceeds that of citizens strictly speaking, because women and children can of course also own property. One is therefore constrained to create this category and give it a name. For lack of a distinct name, the category is called that of “citizens”. Individuals are citizens, *lato sensu*, are all those who live in France and are not foreigners, i.e. they have French nationality. The new concept therefore means “national”. It is striking that it had been produced originally not from the necessity of distinguishing between French and foreign, but out of the necessity of distinguishing between French and French.

It is easy to see that the Convention had complete discretion to grant the right to vote. There was neither an obligation to restrict it to a fraction of the people over 21, nor to create concepts like that of citizen or national. But once the decision had been taken to refuse the right to vote to those men who did not pay taxes, the necessity to provide a justification led to the creation of the two new concepts.

The second type of situation is that of a Supreme Court, that is a court whose decisions are not controlled by a superior court. If it is agreed that such a court can freely interpret the laws that it is supposed to apply and thus remake them, the question arises of the reasons for the relative stability of its jurisprudence. After all, if it can freely remake the law, why

not remake it according to changing political moods among its members? The classical answer to that question would be: even without sanctions, the court is under an obligation to apply the law. But such an answer would be unsatisfactory for two reasons. First, because we want to know why the court does conform to that obligation. Secondly, because the law that the court ought to apply is not an objective standard, but the meaning of a text, that it has itself interpreted.

Another answer is to be found in the situation of members of the court and of the court as a whole vis-à-vis other institutions. Courts are collegiate bodies and their members tend to disagree on most issues. In the course of their internal discussions, some type of arguments will never be used, not primarily because they are not permissible, but above all because they could never persuade others. It would be impossible for instance to justify one's position by saying that it corresponds to one's personal values. In order to persuade it is necessary to show that the proposed decision is consistent with some ideas that have been previously been agreed upon and thus can be considered "objective". Secondly, even though a court is supreme, it is supreme only within a court system, not in the greater legal system. It follows that its decisions can be overridden by political organs: the decisions of a court of cassation by a legislature, those of a constitutional court by the constituent power. Even without such checks, the court might still be constrained by its own supremacy. Its decisions concern concrete cases and are specific rulings regarding those cases, but they are justified by the statement of general propositions, rules, principles, etc. A supreme court can only influence the lower courts and beyond the courts influence the behavior of individuals if these individuals make decisions, by taking into consideration the consequences of their actions, i.e. if they are able to predict that the courts will react to their actions in a particular way. This will only happen if the jurisprudence of the court is not subject to frequent changes. The court therefore faces the following paradox: its power is greater (in the sense that it exerts a greater influence on actual behaviors) if it is more constrained by past decisions.

These constraints are different from legal obligations and taking them into account is different from obedience. Nevertheless, one could claim that the result is similar to that which is expected of the *Rechtsstaat*: in the *Rechtsstaat*, the duty of citizens to obey is justified by the obedience of political authorities to general rules, because it means that they

themselves will obey indirectly the general rules. But the same benefit can be expected if instead of applying general and superior rules, political and court authorities cannot base their decisions on personal preferences and they are forced to act with regularity. Just like in the *Rechtsstaat* these authorities are limited. True they do not apply superior rules and they are not exactly limited by them, but they are still constrained by their situation in the legal system or by the structure of legal argumentation, so that citizens are politically free, because they can predict the consequences of their actions.

Nevertheless, the theory of legal constraints could not be used as a new version of theory of the *Rechtsstaat* because of several reasons. The first and most important reason is that some decisions can be explained by the existence of legal constraints, but not all decisions. As a matter of fact the majority of decisions can be explained only by the ideology of the law making body, whether a legislature or a supreme court. If a supreme court can make decisions by a 5-4 majority, this shows that the constraints produced nothing but a possibility of choice, but the choice is not the result of a constraint and could actually have been different. Secondly, even when the authorities who make the rules and issue commands are not free to act as they please and are constrained to decide in a certain way, they do not apply higher rules, so that ordinary citizens, when they obey these rules and commands, do not indirectly obey to superior law. Thirdly, the strength of the theory of the *Rechtsstaat* comes from its relation with democratic theory. If the people has made the higher law and if particular commands are derived from that higher law, then one is always indirectly submitted to the presumed will of the people. This does not obtain if the executive and the courts enjoy discretion, because it is to their will that citizens will be submitted to their will. But it does not obtain either if the executive and the courts are constrained because citizens will be submitted neither to the will of the people, nor to superior law, but to the blind necessity created by the system.

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