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What Has Government Done to Law?

Daniel von Wachter
www.von-wachter.de

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As Christians, we must

- Repent of our sins, do no wrong, produce good, expose or rectify evil.
- 'Take no part in the unfruitful works of darkness, but instead **expose** them.' (Eph 5,11)
- Shine as lights, bring fruit, do good works (Eph 2:8, Kol 1:9, Phil 2:15, Mt 13:49 etc.)
- One application: The contemporary understanding of Law (Recht, ius) is diametrically opposed to the correct understanding.
- After presenting understanding that was common in the early middle ages, I shall defend it.

The present understanding of law

- Law is made by the legislative: parliament passes certain ‘laws’.
- Judges solve cases by subsuming them under the ‘laws’.
- Limits to lawmaking are only the ‘Grundrechte’ that are affirmed in the constitution. Property rights are not included. The Bundesverfassungsgericht, which is a state institution, rarely limits the state.

The Medieval, Correct Understanding of the Law

- Law cannot be made.
- No king could claim to make law.
- Eike von Repgow in *Sachsenspiegel*, ca. 1230: 'Gott ist selber Recht, darum ist ihm Recht lieb.' ('God is himself Law, therefore he loves Law.')

The Medieval, Correct Understanding of the Law

- Fritz Kern, 1919, 'Recht und Verfassung im Mittelalter' (in German)
- 'For us law needs only one attribute in order to give it validity; it must [...] be sanctioned by the State. But in the Middle Ages, different attributes altogether were essential; mediaeval law must be 'old' law and must be 'good' law. Mediaeval law could dispense with the sanction of the State, but not with the two qualities of Age and Goodness [...]. If law were not old and good law, it was not law at all, even though it were formally enacted by the State.'

Law is objective

- Law is not made, it something to be discovered.
- Some details depend on tradition. Contracts create legal facts.
- The king is under the Law. If he violates the Law, he loses his legitimacy. Everybody may and should try to restore the law.
- If anything is to be called ‘sovereign’, then it is the Law.

Old?

- Kern should be saying that law is old because it cannot be made.
- The term ‘customary law’ is misleading because law is not created by custom.
- Kern: ‘Age cannot create law, and long-usage does not prove a practice to be rightful. On the contrary, ‘a hundred years of wrong make not one hour of right,’ and Eike of Prepgow in the Sachsenspiegel, for example, emphasized that slavery, which originated in force and unjust power, and was a custom so ancient that ‘it is now held for law,’ **was only an ‘unlawful custom**.’

This is pre-Roman law

- This is before the ‘re-discovery’ of Roman law around 1200, which was enforced by 1495.
- There is no distinction between ‘natural’ law and ‘positive’ law, because all law is natural!

The Law is in God

- Fritz Kern: 'Not the State, but God is the source of all law. Law is a part of the world-order; it is unchangeable. It can be twisted and falsified, but then it restores itself, and at last confounds the evil-doer who meddled with it. If anyone, a member of the folk, or even the highest authority in the State, made a 'law' which conflicted with a good old custom, [...] then the newly-made law was no law, but a wrong; not usus, but abusus. In such a case, it was the duty of every lawful man, of those in authority as well as the common man, to restore the good old law. The common man as well as the constituted authority is under obligation to the law, and required to help restore it. The law being sacred, both ruler and subject, State and citizen, are equally authorized to preserve it.' (150f)

The state cannot change the law

- 'the law is sovereign, not the State, the community, the magistracy, the prince or any other person or body which we should contrast with the law. The State cannot change the law.' (154)

In Defence of the Medieval View

- Legal details depend on tradition, e.g. how land ownership is documented and how coin clippers are to be punished.
- We grasp firmly that we find the right solution to a case by gathering the contingent facts and by thinking.

Lust for power would like to remove the law

- To those who lust for power, the Law is an obstacle.
- They can take your money by force, but they cannot make it to be not your property.
- In a long process rulers tried to make the Law powerless and to make people forget the law. Important years: 1220, 1495, 1803.
- Today, this process has culminated. The state calls its commands 'laws' and recognises no non-made law. The state claims to be the source of law and to have unlimited rights over all and lives. This is the purest form of dicatorship.

What Should We Do?

- Expose the injustice. Do not excuse or participate in it.
- There should be courts that seek the right solution to the cases presented to it and that protect us also against rulers.
- Next step: The state's power to create 'laws' must be limited as far as possible.
- 1 Cor 15:24: Christ will 'deliver the kingdom to God the Father after destroying every rule and every authority and power.'

How the real law was suppressed

- How in Germany the rulers suppressed the real law: 1. The heresy laws by Emperor Friedrich II. 1220. 2. The introduction of the Reichskammergericht 1495, undermining custum law. 3. Reichsdeputationshauptschluß 1803. 4. 1871 legal positivism.