FESTSCHRIFT FOR JULIUS STONE

A Tribute to Julius Stone on his Retirement from the Challis Chair of Jurisprudence and International Law at Sydney University

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THE STATE AS A SECULAR PHENOMENON

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In all his works Julius Stone has always put stress on the importance of historical reflection. Therefore, the author wishes to dedicate to Professor Stone this essay which deals from a Continental point of view with the historical background of one of the most fundamental principles of the modern state. This is the development of the secular character of the state. The essence of this process (which predated the rise of the Continental democracies) is that the state as such is not to be identified with any religious or ideological position, thus guaranteeing the plurality of society.

Since Otto Brunner's notable work *Land und Herrschaft* was published, one has ceased to apply the word "state" to political societies of former historical periods. In other words, we have become aware of the historicity of the phenomenon "state." We get a better understanding of the middle ages when we realize that these political communities were not states. This approach has lain bare the roots of the modern state.

In the times of the vast European migrations, the Church seemed to be the only carrier of culture, civilization and education. Therefore, this period is rightly called the Christian period. Political and religious communities began to form a synthesis. These two types of communities were represented by the renewed empire, and the Roman Pope. In spite of the fact that Charlemagne's empire soon split up, Christendom remained the *principium unitatis*, that is, the only uniting bond of the Occident. The unity of Christendom was felt to be the unity of the Church. In the ninth century Hincmar of Reims wrote that one should not speak about various kingdoms but only about one, which is the Church.[1] This conception of unity is theologically well based: some statements in the epistle to the Ephesians (*e.g.* about one god, one faith and one baptism; about some aspects of the teachings about Christ, mainly the dogma of Christ's *corpus mysticum*) and Augustine's idea about a *Civitas dei* became concepts with an immediate relevance to the political order.[2] This idea arises clearly from a document of the times of Frederick II the Hohenstaufen: *ecclesiam et imperium*

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1. Mock, *Intoleranz und Toleranz der Christianitas*, INTERNATIONALE FESTSCHRIFT FÜR ALFRED VERDROSS 371, 372 n. 6 (1971).

2. *Cf.*, Schmölz, *Societas civilis sive Respublica sive Populus*, 14 OSTERREICHISCHEN ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 29 (1964).

esse unum et idem et mutuis se debere vicissitudinibus adiuvare.[3] The political and the religious community coincided nearly completely. The legal status in one of these communities conditioned the legal status in the other. Excommunication as the Church's legal sanction supported the empirical outlawry, and vice versa.[4]

In early Christendom it was self-evident that all law was founded in God. In many aphorisms and poems God and law are regarded as identical. One has to remember that the *Landrecht* of the *Sachsenspiegel* (1230) starts with the divine installment of the two powers, the Pope and the Emperor. We often find in chronicles the accusation that someone acted "against God and the law."[5] This theonomically founded order was not only "Christian," in the sense that Christendom was regarded as the basis of the political order, but also in the sense that this order was sacred and immediately based on religion. It was regarded as a sacred order which included both spheres, the terrestrial as well as the transcendental, which did not yet differentiate between categories such as "spiritual" and "secular" or "church" and "state."[6] The Christian Roman empire was not immediately based on a imperial Roman tradition, even though it seemed to all appearances derived from it. The empire as *"ecclesia"* was intended to signify the kingdom of God on earth.

This bipolarity of Emperor and Pope in a religious-political order, where the Emperor as well as the Pope was the patron of Christendom and a sacred person, contained the seed of schism. It was the first achievement of the young science of theology to make a distinction between the spiritual and the secular, between *"spiritualia"* and *"temporalid."* This distinction became the main weapon in the so-called investiture-struggle. The representatives of the Church claimed the entire sacred sphere for themselves, as well as their legally constituted *ecclesia*. This latter separated itself, as a sacred-hierarchic institution based on canon law, from the previous all-embracing unity of Christendom. However, the claim for the liberty of the Church (*libertas ecclesiae*), meaning the Church's emanicipation from the secular sphere, meant the arrogation of the world's leadership. The Emperor, as well as the secular political power, was eliminated from the *ecclesia*. The Em-

3. Mock, *supra* note 1, at 372 n.8.
4. 5 P. HINSCHIUS, SYSTEM DES KATHOLISCHEN KIRCHENRECHTS 398 (1893).
5. O. BRUNNER, LAND UND HERRSCHAFT 133 (5th ed. 1965).
6. F. HEER, AUFGANG EUROPAS (1949), and literature there cited.

peror ceased to be a sacred person; he became a layman. As far as his duties as a Christian were concerned, he was under the ecclesiastical jurisdiction. The Church, on the other hand, remained free from any secular responsibilities. This new order was clearly expressed in the so-called *Dictatus Papae* by Gregory VII. This development put an end to the sacral concept of the Emperor. The political order was removed from the realm of the sacred and holy. This was meant as a devaluation by the curial theoreticians, to refute imperial claims in the realm of the *ecclesia*, but in the course of history this conception evolved into the autonomy of the political and secular field. Thus even the scholastic philosophy (as an ecclesiastical movement) gave up the conception that law was primarily based on God. This was done under the influence of the re-discovery of Aristotle's works. Law was now derived from the nature of creation understood as an autonomous order. In Thomas Aquinas's opinion, God acts by means of nature.[7] God is no longer the immediate starting point of law as was taught in bygone times, but rather human nature is. In the same way, the political community is ontologically founded in man's nature, as man is conceived as *animal naturaliter politicum et sociale*, as Aristotle had taught.[8] From this relative autonomy of law, it was only a short way to the theory of Marsilius von Padua, a partisan of the German Emperor. Marsilius theorizes about theology only when he writes to remind theologians that their proper province is the beyond, and *hic et nunc* it is their duty to be good subjects to the Emperor. In his *Defensor Pacis*, he tries to prove that no dispute is necessary between the secular and the spiritual power, if only each respects the competences of the other. However, the church is to exercise its task under the patronage of the political power. Marsilius of Padua conceives, following Aristotle, the political communities (which he calls "*regna*" or "*civitates*") as democracies. It was Marsilius' conviction that an elected Emperor would be the best governor (*genus electum principatus*). In this context it is of great interest that the elected "*princeps*" is bound by statutory law. According to Marsilius, the primary and efficient cause for the law is the people or the totality of citizens or the major part of them chosen by their election or their will (expressed in a general assembly), which under secular punishment orders that something

7. Aquinas, Quaestiones disputatae de potentia Dei III, 7 ad 16.

8. Aquinas, Summa theologica I, II, and 72a.4; Aquinas, De Regimine Principuna II.

has to happen in the realm of human behaviour, or that something is not to happen.[9]

Marsilius von Padua proves the anticipation of democratic and legitimate elements in connection with the secular autonomy of politics to be visionary. Compared with the severity with which the struggle of investiture was fought, the immediate historical and political results were relatively unimportant. The terminological differentiation between "spiritual" and "secular" was blurred by the fact that the new Christendom, now divided into *"temporalia"* and *"spiritualia"* continued the old traditions in the form of the sacral unity of church and state (for instance the act of coronation). In this connection the autonomy of the secular meant only that law and political community ceased to be part of the sacred and holy. They both were deprived of their immediate orientation towards eschatology and the Incarnation but their basic religious significance was preserved. The release of the political community from a religious foundation took place only in consequence of the crisis which began with the Reformation in the fifteenth and sixteenth centuries.

The understanding of religous belief as a quasi-legal relation of loyalty, plus the continued influence of the Christian idea of unity closed the way to toleration in the period of religious struggles. Thus it was unavoidable that the solution of this religious problem became a matter of politics. In the Empire, it was mainly the differences between the Emperor and the estates and, in France, the Huguenot wars which brought about a purely secular community whose legitimation was based on secular principles, *i.e.* the state in the modern meaning of the term. The differentiation between spiritual and secular, which first was made by the Popes (in order to justify the ecclesiastical supremacy) became the claim for the primacy of national politics. No wonder the political power of kings and sovereigns, which did not see itself as secular, took care of spiritual matters, putting these under their custody in order to secure law and order. In times of religious struggles a peaceful order and internal security could only be guaranteed through breaking free from the struggling religious parties. One has to keep in mind this necessity, if he wants to understand the principle *"cuius regio, eius religio"* (in the empire), the territorialism of the protestant ecclesiastical doctrine or as Hobbes's theory of state.[10]

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9. *Alle Zitate und Übersetzungen Nach der Ausgabe von Richard Scholz, Marsilius von Padua, Defensor Pacis* I, 12 § 3 *cited in* 1 E. REIBSTEIN, VOLKSSOUVERÄNITÄT UND FREIHEITSRECHE 34 n.20 (H. von Claudieter Schott ed. 1972).

10. E. BÖCKENFÖRDE, *Die Entstehung des Staates als Vorgang der Säkularisation*, in

It is not necessary here to deal with the details of religious struggles. In this connection it is rather of interest to pay attention to the development of the special political thought which arose from the theories of the so-called *"Politiques,"* (the French jurists) who understood the state as an entity and a concentration of power. In contrast to scholastic jusnaturalism, they based their ideas on a formal concept of peace, a concept which did not derive from the idea of a "life in truth" but from the contrast between peace and civil war. In consequence of the horrors and disasters of these struggles, peace became an obviously justified value. In order to guarantee peace, Bodin claimed the *summa potestas* for the king for the internal sphere of government as well as for the external field. It was again Bodin who posited religious unity as a value of second rank in his "Republic." Bodin said that in case of religious schisms the wisest sovereign should act in the same way as a good pilot who lets himself drift with the stormy sea, because he knows that his resistance would cause a shipwreck.[11] Bodin undertakes to justify his opinion by giving a lot of examples from history. Thus he mentions the Emperor Theodosius I and his relations to the Arianists. He also quotes the Gothic kings Theoderich and Cassiodor and refers to the Orient, where different religions lived together, more or less in peace.

In another work Bodin gives even clearer expression to the trend of the new times. Here I mean his work *Heptaplomeres*, where Bodin describes a discussion of seven wise men on religion. The conclusion of this work is the relative value of every religion, which leads to the relativism of ideas on justice. From then on there were no fixed concepts of justice, but as many ideas of justice as there were religious parties. In view of these difficulties—if not impossibilities—to determine what is just, the positive and written law had to gain in importance. The positive law, being the only guarantee of peace and order in these troubled times, therefore did not appear as unjust, but as inequitable and rigid. In any case it was the minor evil. The growing prestige of positive law, which was thought of primarily as statute law, gave rise to the concept of a mutual relation of protection and obedience (later systematized by Hobbes). The position of statute law moved into the center of constitutional theory. But

SÄKULARISATION UND UTOPIE 83 (1967), dedicated to Ernst Forsthoff on the occasion of his 65th birthday.

11. A. BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE De I, bk. 3, ch. 7; *cf.* 2 J. LECLER, GESCHICHTE DER RELIGIONS-FREIHEIT IM ZEITALTER DER REFORMATION 138 (1965).

while any derivation of law from material norm contained an element of insecurity and was regarded as dangerous and legally irrelevant, positive law gained in value, and a sort of "formalism" began to prevail in legal thought until it reached its climax in Hobbes's *Authoritas non veritas facit legem*.[12] In other words, justness of positive law depended solely on enactment by the competent authority.[13]

In the French Revolution, the type of state which had been envisaged during the religious civil wars was revived for a short time. In the Declaration of Human Rights in 1789, the state was conceived as a *"Corps social."* Its legitimation was neither thought of as deriving from historical tradition nor from a divine precept nor from the service of truth; the only legitimation was to be found with reference to the self-determined individual. Amongst the freedoms for whose preservation and safety the state exists, freedom of belief and religion were included in the French Constitution of 1791. Thus in regard to religion the state appears to be neutral. It freed itself completely from religious authority and moved religion into the sphere of society.

The state's emancipation from religion is, however, to be distinguished from the so-called separation of church and state. In principle there are three ideal forms this separation might take. In the course of the revolutionary developments of the great French Revolution the possibility of a laicism with anti-religious tendencies arose. The two other possibilities are either a moderate system of an established church or an amicable separation of the two spheres. When we regard this separation we are above all faced with the question of the significance of the secularization of the political community. This development is in fact an extended process of emancipation of the secular order from religious authority and connection. With the Declaration of Human Rights this process was completed. There the position of the individual is only determined by himself and his freedom. It becomes obvious that this concept of human rights granted by the state shows aporetic structures; for conscience—originally only valid in the religious sphere—can now be directed against the new state. Thus the modern state is based in the principle of freedom of conscience—a principle which may even act against the state.

12. T. HOBBES, LEVIATHAN, C. XXVI.

13. *Cf.* R. SCHNUR, DIE FRANZÖSISCHEN JURISTEN IM KONFESSIONELLEN BÜRGERKRIEG DES 16. JAHRHUNDERTS 69 (1962).