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Law and The Common Good: Remarks from a Historical Perspective

“In the beginning God created the heavens and the earth” is the first sentence of the Old Testament.¹ Humans are part of this creation. It is of crucial importance for the development of law in Europe. This is not obvious at first glance, especially as we cannot know creation, we can only believe it. From a historical perspective, however, this fact of faith has the greatest impact on the image of humans and thus on the fundamental prerequisite of our legal system, since law is not an end in itself, but the most important form of organization of the human community. What is important for this form is the idea of the meaning and purpose of human existence, in which they find their happiness. If, as was common in the nineteenth century in the wake of scientific discoveries,² people are only seen as a kind of cluster of cells, i.e. materialistically, then there is no room for free will and at best material goals remain. In contrast, the concept of the human developed from the Christian-Jewish heritage in conjunction with Greco-Roman philosophy since antiquity conceives of the human as a being with body and soul, who is a person, has free will and, this is not unimportant, is oriented towards a goal. Whether this goal is described in the philosophical sense of virtue or in the religious sense of holiness is more a question of faith than of knowledge. However, the two do not contradict each other. The answer of faith is not irrational.

The preamble to the Charter of Fundamental Rights of the EU (hereinafter: CFR) clearly refers to this image of humanity when it states: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”³

The preamble refers to a historically evolved “heritage,” which is appropriate because this heritage is the basis of historically evolved law in Europe. The person is

¹ Gen 1:1.

² Cf. A. Wittkau-Horgby, *Materialismus*, Göttingen 1998.

³ Charter of Fundamental Rights of the European Union, proclaimed 7 December 2000, OJ C 364/8, 18.12.2000.

at the "heart." The personhood of human beings gives rise to their special dignity, the inviolability of which Article 1 CFR commands to be respected and protected, as is also the case in modern state constitutions.⁴

If we return to the Book of Genesis, we read that humans were created in the image of God.⁵ Although humans turned away from this image through the fall into sin, it nevertheless remains, theologically speaking, their target image.⁶ The person placed in time is therefore not a completed state, but rather to be understood as a disposition, as a task, as expressed in a well-known passage by Pico della Mirandola in the fifteenth century:

We have given you, Oh Adam; no visage proper to yourself, nor any endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with pre-meditation, select, these same you may have and possess through your own judgment and decision. The nature of all other creatures is defined and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very center of the world, so that from that vantage point you may with greater ease glance round about you on all that the world contains. We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine.⁷

The human being therefore appears unfinished. The task is to form one's personality. Although the Italian humanist emphasizes the freedom of man, he leaves no doubt that there is a goal: "to rise again to the superior orders whose life is divine."⁸

Justice and the law play important roles here. Della Mirandola mentions that other creatures are subject to fixed laws, but that humans must educate themselves. However, this self-education takes place towards an aim. The aim has a normative character. To some extent, it is about becoming a "real" human being, as emphasized by Renaissance humanism. Achieving this goal either happens voluntarily or not at all. In order to achieve the goal, however, Greek-Roman philosophy and the Judeo-Christian tradition teach us that a person's behaviour is not indifferent, but decisive. Philosophically speaking, humans do not develop by themselves, but must develop by themselves through their actions. However, as human beings are not viable on their own, but are existentially dependent on living together with others, as they are a *zôon politikón* (political animal),⁹ this action is subject to rules that we refer to as law. Aristotle already clearly formulates that humans are dependent on law in the

⁴ Example: Article 1 I Basic Law of the Federal Republic of Germany.

⁵ Gen 1:26 f. Similar to Wisdom 2:23.

⁶ Cf. 2 Cor 3:18 and also Thomas Aquinas, *Summa theologiae* I, q. 2, prooem. and III, prol.

⁷ G. Pico della Mirandola, *Oration on the Dignity of Man*, trans. A.R. Caponigri, Chicago 1956, p. 7 s.

⁸ *Ibid.*

⁹ Aristotle, "Politics" [in:] *Aristotle in 23 Volumes*, vol. 21, trans. H. Rackham, Cambridge 1944, 1253a1.

community: "For as man is the best of the animals when perfected, so he is the worst of all when sundered from law and justice."¹⁰

To some extent, law has the task of securing a way for individuals in the community to achieve their personal aims. In his *Nicomachean Ethics*, Aristotle states that the aim of the community is to enable citizens to be virtuous and willing to do what is good.¹¹ The state is therefore "a form of society that helps people to be themselves"¹² through the law. This purpose of the state must be considered when discussing the common good in the concept of law.

In the thirteenth century, Thomas Aquinas, following Isidore of Seville, coined the classic definition of the concept of law¹³:

Et sic (...) potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.¹⁴

And so (...) one can derive the definition of the law, which is nothing other than a regulation of reason for the purpose of the common good promulgated by the one who has the care of the political community.

Two elements are notable here that are missing from the modern, purely formal concept of law: the requirement that the law must (1) be reasonable and (2) serve the common good. Superficially, the purpose of the law is therefore to establish or safeguard the common good. However, this must be supplemented by a further consideration by Thomas, who believed that humans are guided by the law *ad ultimum finem* – towards the ultimate aim.¹⁵ For him, this aim does not consist in the common good, but is (not surprisingly) supernaturally determined. Humans aim towards eternal bliss – *ad finem beatitudinis aeternae*. Philosophically, one would speak of "happiness"; however, the common good and "happiness" are not identical. The orientation of humans towards happiness mentioned at the beginning is connected to the personhood of humans. In modern times, under the influence of voluntarism, the orientation towards the common good has receded from the concept of law in favor of a purely formal definition.¹⁶

¹⁰ *Ibid.*

¹¹ Aristotle, "Nicomachean Ethics" [in:] *Aristotle in 23 Volumes*, vol. 19..., 1099b30.

¹² O. Höffe, "Aristoteles' Politische Anthropologie" [in:] *Aristoteles, Politik*, ed. O. Höffe, Berlin 2011, p. 17.

¹³ S. Schaede, "Gesetz und neues Gesetz bei Thomas von Aquin" [in:] *Gesetz und Gesetzlichkeit in den Wissenschaften*, ed. W. Bock, Darmstadt 2006, pp. 61–86.

¹⁴ Thomas Aquinas, *Summa theologiae* I–II, q. 90, a. 4, in cor. The Glossa ordinaria is more concise: Accursius, *Corpus Iuris Civilis Iustiniani, Primus Digestum Vetus*, vol. I, Lyon 1627, col. 32, gl. lex est: lex est commune praeceptum, id est pro communi utilitate statutum. – The law is a general rule, i.e. established for the common good.

¹⁵ Thomas Aquinas, *Summa theologiae* I–II, q. 91, a. 4, in cor.

¹⁶ W. Krawietz, "Gesetz. I. Im rechtlichen Sinne" [in:] *Historisches Wörterbuch der Philosophie*, vol. 3, ed. J. Ritter, Darmstadt 1974, p. 484.

Jean Bodin defines the law very succinctly as “le commandement du souverain.”¹⁷ And Thomas Hobbes says “The Law is a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth.”¹⁸ In such concepts, the substantive orientation of the law, and thus its purpose, shifts to the level of the purpose of the state itself, but the orientation towards the common good does not simply disappear from the law.

In a final step, the connection between the law and the common good in Francisco Suárez’s (1548–1617) highly regarded treatise on the law conveys an idea of how the dazzling concept of the common good can be filled with content, which is today considered an empty formula.¹⁹ For Suárez, the law serves to promote the righteousness of the subjects as well as the integration of the individual into the community and the creation of peace and justice.²⁰ According to Suárez, the most important effect of the law is to “make the addressees good.”²¹ From here, the common good can be explained as the purpose of the state.²² The common good is achieved when the state enables the conditions for peace and happiness of the addressees of the law.²³ What specifically serves this purpose depends on the respective circumstances,²⁴ but is realized in the abstract when evil is repressed and good is promoted.²⁵ Only if the laws serve the common good in this way does the ruler act legitimately.²⁶ Central to this is the guarantee of peace, which only occurs when justice prevails.²⁷ And it is precisely this idea that corresponds with the overarching purpose of the state, as justice is only achieved where a state of happiness (*beatitudo*) prevails.²⁸

For Suárez, therefore, the common good is by no means an empty formula, but rather a substantive orientation of the law towards the state purpose of peace, which can only be achieved on the basis of a just order. Justice is a state of salvation which, in Suárez’s view, lies in God.²⁹ A law therefore only serves the common good if it ensures the achievement of *beatitudo* for the individual. In this way, the older concept of law reflects the aforementioned creatureliness of man. This, too, is part of Europe’s spiritual heritage, of which the preamble to the Charter of Fundamental Rights speaks. Mere

¹⁷ J. Bodin, *Les six livres de la République*, Geneve 1629, lib. 1, cap. 8, p. 131.

¹⁸ T. Hobbes, *Leviathan. Revised student edition*, ed. R. Tuck, Cambridge 2012, lib. II, chap. 26, no. 8, p. 187.

¹⁹ J. Isensee, *Salus publica – suprema lex? Das Problem des Gemeinwohls in der freiheitlichen Demokratie*, Paderborn 2006, p. 22.

²⁰ F. Suárez, *De legibus ac Deo legislatore. Liber primus: De lege in communi eiusque natura, causis et effectibus*, eds. O. Bach, N. Brieskorn, G. Stiening, Stuttgart-Bad Cannstatt 2019, I 13, 1 and I 3, 19. (All quotations from Suárez in the following according to this edition, cited as “DL”).

²¹ DL I 13, 3: *facere subditos bonos*.

²² DL I 7, 4.

²³ DL I 4, 6.

²⁴ DL I 7, 9.

²⁵ DL I 7, 15.

²⁶ DL I 7, 16.

²⁷ DL I 13, 2.

²⁸ Cf. DL I 9, 10.

²⁹ DL I, proem.

power politics is never suitable for promoting the common good and defeats the purpose of the law. Only the rule of law, one could summarize, corresponds to human nature.

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Summary

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Law and the Common Good: Remarks from a Historical Perspective

The preamble to the CFR establishes a link to Europe's spiritual heritage. This includes the fact that political rule is not an end in itself, but must serve the people. The law is therefore inextricably linked to the common good. The essay sheds light on this connection from a historical perspective. It deals with the purpose of the law as it was already clearly defined in the Middle Ages. Against this background, the concept of the common good does not appear to be an empty formula.

Keywords: Charter of Fundamental Rights, common good, concept of law.

Streszczenie

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Prawo i dobro wspólne – ujęcie z perspektywy historycznej

Preambuła do Karty praw podstawowych Unii Europejskiej nawiązuje do duchowego dziedzictwa Europy, zgodnie z którym władza polityczna nie jest celem samym w sobie, lecz ma służyć ludziom. Prawo nierozdzielnie wiąże się zatem z dobrem wspólnym. W opracowaniu ukazano ten związek z perspektywy historycznej. Omówiono cel prawa, który został jasno zdefiniowany już w średniowieczu. Na tym tle pojęcie dobra wspólnego nie jawi się jako pusta formuła.

Słowa kluczowe: Karta praw podstawowych Unii Europejskiej, dobro wspólne, koncepcja prawa.