

## Abstracts

### The Concept of the Rechtsstaat as a discursive battlefield

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FREDERIK ROSÉN

The German term *Rechtsstaat* [in Danish: Retsstat] has no equivalent in English; the closest may be 'the rule of law'. The liberal or bourgeois concept of the *Rechtsstaat* is based on the idea of a legal enclosure erected to drive out discriminating political subjectivity from the governance of human affairs, so as to secure liberal rights and equality for each and everyone before the law. As such it has become an important and honourable reference for the Danish state: "(...) The Rechtsstaat is »good« and the pre-enlightenment state is »evil«", as the Danish professor in law Vagn Greve expressed it (Greve 2004: 297). This article examines how the politics of law in Denmark on one hand tends to accept a certain degree of legal decisionism *in the name of security*; on the

other hand, efforts are made to maintain the concept of the Rechtsstaat as *the* defining and honourable codification of the relationship between state, law and citizens in Denmark. We are witnessing a slight dislocation or bending of the political concept of the Rechtsstaat that expands its conceptual boundaries so that legally non-conform measures are given a place within the political space of the Rechtsstaat. At the same time, the opposition indignantly claims that this development undermines the Rechtsstaat, and that we have entered a dangerous slide which leads to a kaffkasque or stasi-like state. Thus, the stage for the hegemonic struggle to define the concept of the *Rechtsstaat* is set.

### Separation of powers in the European Union – Which values are really at stake?

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OLA ZETTERQUIST

Separation of powers is a classical constitutional principle that has a history dating

back to antiquity. The principle is however particularly associated with the age of the

enlightenment when it acquired its modern shape. Separation of powers constitutes an essential component of a fundamental political – philosophical theory namely *constitutionalism*. The aim of constitutionalism is to protect the moral rights of individuals and to secure their autonomy by limiting state power. Vertical separation of powers in accordance with the theory of *federalism* is another feature of the basic values of constitutionalism. Constitutionalism and the principle of separation of powers are at odds with the principle of *popular sovereignty*, the aim of which is to secure legal and political unity where the will of the majority acts as a supreme guideline for state power.

The question of separation of powers is well known in the field of (state) constitutional law but has been raised within the context of the exercise of powers by the European Community (EC) and the European Union (EU). Separation of powers within the EC has mainly been concerned with the division of competencies between the Community and the Member States but can, in a wide meaning, be said to comprise the question of how the legal orders affect one another. These issues have been particularly addressed in connection with the adoption of the Treaty Establishing a Constitution for Europe (the Constitutional Treaty). The separation of powers was initially not seen as a major problem since the EC only has those powers that are conferred by the Treaties. The establishment of the European Court of Justice (ECJ) and the European Parliament were originally motivated with the need for a check on the exercise of power in the supranational Commission and for an adequate protection of the rights of individuals in those cases where the Commission

would exercise its authority directly over them. The Treaties thus to a considerable degree built on the idea of a system of checks and balances.

The issues of separation of powers have however gradually become more controversial as the EC has assumed more competencies and as the ECJ has “constitutionalised” the Treaties. The ECJ has in a series of cases interpreted the given competencies in an extensive manner and transformed the relationship between EC-law and Member State law. The Court has motivated several of these judgments by making reference to the need for the effective protection of the rights enjoyed by individuals under EC-law.

On the other hand, mechanisms intended to put a check on further constitutionalisation have been introduced. Such mechanisms are designed to protect the rôle of the Member States as “Lords of the Treaties” and are thus primarily designed to protect the popular sovereignty within the Member State (rather than the protection of rights of individuals).

The Constitutional Treaty contains several new features that are connected to the issues of separation of powers. Among these are the incorporation of the Charter of Fundamental Rights, an expanded formulation of the duty of the EU to respect the national identity of the Member States, the involvement of Member State parliaments in supervising the application of the principle of subsidiarity and a right of unilateral withdrawal from the EU by a Member State. The main impression is that the new features of the Constitutional Treaty emphasize the position of the Member States and that this strengthened position primarily aims at protecting popular sovereignty. On balance, these new features of separation of

powers give the impression that a new pattern of control against increased competencies or further constitutionalisation of the Treaties is emerging. The new pattern emphasizes political mechanisms rather than

judicial review. At the same time a strengthening of the position of the Member States calls into question or even, potentially, undermines the constitutional character of the EU.

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## Untenable functional explanation

LEIF PETTER OLAUSSEN

Functional explanations are very central in Norwegian sociology of law, i.e. Th. Mathiesen's introductory textbook, *Retten i samfunnet*. Building his analysis on R. Merton's distinction between manifest and latent functions, Mathiesen argues that different social arrangements based on positive law are not sustained by their manifest functions, but by their latent ones. However, J. Elster (1977) has shown that latent functions are generally unacceptable as explanations in social sciences unless acceptable causal mechanisms are explicated, and Elster contends that such mechanisms always are hard to find. He shows that Marxian analysis of state power suffers either from lack of mechanisms, or Marxian inspired functional sociologists introduce conspiratorial, powerful (collective) actors as explanatory mechanisms. Although Mathiesen is aware of

Elster's critique he has never paid attention to Elster's arguments. In this article have argued that Elster's objections are highly relevant both for the general theory of functional explanations in Mathiesen's textbook, and for his assertion that the main reasons for the existence of prison punishment in contemporary society are not the punishment's manifest functions (or belief in such functions), but three latent functions: Prison punishment renovates society, diverts people's attention, and make politicians appear as vigorous. I show that the causal mechanisms Mathiesen alludes to, when he tries to substantiate his contention, are not functional but intentional. The intentions alluded to are conspiratorial, and they cannot be refuted empirically. I conclude that this is not acceptable as a valid explanation in social sciences.

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## Replication to Leif Petter Olausen

THOMAS MATHIESEN

In this rejoinder to Leif Petter Olausen's critique of the concept of latent function in Thomas Mathiesen's book *Retten i samfunnet* (17 out of 263 pages), Mathiesen maintains that Olausen's demand for demonstrable mechanisms to explain the feed back circle in latent functions (a criticism originally raised by Jon Elster, 1979) is far too rigid. The result of relying on such a rigid demand would be that a great deal of imaginative and fruitful sociology would disappear, and sociology would become an impoverished discipline. What may be demanded, how-

ever, is that the concepts used in the analysis are *fruitful*, meaning that they open new possibilities, demask what is visible on the surface and enable us to make theoretical and empirical progress. What may also be demanded is that latent functions are made *probable*, meaning that they are argued in a sociologically plausible way.

Olausen argues that lacking demonstrable mechanisms with which to explain the feed back circle in latent functions, Mathiesen resorts a conspirative understanding. Mathiesen dismisses this allegation entirely.

## An analysis of how eksklusive rights to genetic resources can be organized

MORTEN WALLØE TVEDT

The article "An analysis of how exclusive rights to genetic resources can be organized" discusses several approaches to regulate exclusive rights to genetic resources. In particular the article gives some critical perspective to the draft regulation of the topic in Norwegian legislation. The present development in the field of biotechnology has

increased the value of the genes as the building blocks of life. The increased value has triggered difficult issues regarding who has exclusive rights or property rights to the use of genes. The article explores the options for tangible property rights, and assesses types of rights in the perspective of patents to genetic resources.