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RALF DREIER,
Recht - Staat - Vernunft. Studien zur Rechtstheorie 2.
 Suhrkamp, Frankfurt am Main, 1991, 247 pp.

The book *Recht - Staat - Vernunft* brings together nine essays written between 1982 and 1990, and continues the reflections initiated with an earlier volume titled *Recht - Moral - Ideologie* (1981). This second work of Dreier's encompasses a wide range of topics, including essays on the concepts of law and justice, civil disobedience, irrationalism in jurisprudence, property in a legal-philosophical perspective, the 'left / right' schema, and the relation between legal history and legal theory. While none of the essays has as its specific object a clarification of the relation between the concepts of law, state and reason, reconstructing the relations holding between these concepts has the double advantage of supplying an overview of the motifs dominant in Dreier's book and circumventing a merely piecemeal synopsis of its essays. The relations between law and state, state and reason, and reason and law shall be sketched out hereafter.

1. *Law - State*: The relation finds its anchor-point in the transformations occurring in law concomitant to the transformations of the modern *Rechtstaat*. The latter, also qualified as

a 'democratic constitutional state', is characterized by five features: (1) fundamental human and civil rights, (2) division of powers, (3) legality of administration, (4) legal protection by an independent judiciary, and (5) the principles of certainty and foreseeability in the exercise of state power. Whilst originally a product of modern rational law theory, the democratic constitutional state has a 'utopian content' - the free and equal value of all individuals - that transcends its original formulation as a liberal *Rechtstaat*. Although legal positivism was responsible for the formal reduction of the concept of state, the utopian content of modern rational law theory has led to a historically decisive transformation from the liberal to the social *Rechtstaat*. For positive law, this transformation finds its correlate in two phenomena, namely, the shift from formal to material law, and the increased flexibilization of law. As a consequence, a fundamental tension has emerged between the principles of certainty and the foreseeability of law, on the one hand, and the requirements of a material, flexible, law, on the other. This tension is constitutive for the problems encountered in a balanced definition of civil disobedience (see Chpt. 2: 'A right to resistance in the *Rechtsstaat*? Remarks on Civil Disobedience'), sufficiently open to 'channel' resistance aimed at transforming positive law, yet stringent enough to safeguard the principles of foreseeability and certainty. It is likewise constitutive for the structure and problems encountered in applying the formal and general concept of justice 'To each what is his' in the distributive justice holding in the relation between state and citizen (see Chpt. 1: 'Law and Justice').

2. *State - Reason*: The tension present in the relation between state and reason finds its focal point in the tension between the concepts of 'law' and 'right' (see Chpt. 3 'The *Rechtsstaat* in a Relation of Tension Between Law [*Gesetz*] and Right [*Recht*]'). Whereas legal positivism identifies the formula 'Law and Right' as a tautology, modern rational law theories distinguish between positive and natural law, the later understood in terms of its material, i.e. moral, correctness or justice. In Dreier's view, the problem turns on determining whether the concept of right must be interpreted positivistically or whether an ethically modified concept of positive law is possible. Two arguments support the latter alternative. The first suggests that there are norms and normative systems that are unjust in such a high degree that their validity or legal character as such must be denied. The second distinguishes between rules and principles to show that in its very structure positive law is open to ethical considerations. Indeed, whereas legal rules have an 'if-then' structure, principles are rules that set up a purpose or value as obligatory, i.e. possess a teleological structure. Dreier notes that two sorts of tensions ensue for positive law as a result of this distinction, namely, the collision between values or principles, and the collision between principles and rules. A consequence of these tensions is the threat that the division of powers might become overtaxed.

From another perspective, the relation between state and reason finds its political focus point in the viability of the traditional 'left/right' schema, and more precisely, in the question whether right or left wing political preferences allow of rational evaluation (see Chpt. 8 'Remarks on the Left/Right Schema'). Dreier takes up the distinction in the field of argumentation theory to assess the 'right' or 'left wing' function assumed by different argumentative principles. The inertia principle, namely, the principle that whoever wishes

to introduce (social) change bears the burden of argumentation inasmuch as groundless change is unreasonable, can typically be characterized as 'right wing' or conservative. The 'exchange of roles', on the other hand, constitutes a 'left-wing' argumentative principle, inasmuch as it claims that the decision concerning the acceptability, hence potential transformation, of a given norm or institution must be established by taking up the role of all the individuals affected by it, in particular those adversely affected. Three other principles - conceptual clarity, possession of factual information, and the genesis principle - are left / right neutral and can be useful instruments for the rational evaluation of political preferences.

3. *Reason - Law*: While neither it, nor its relation to legal rationality in particular are fully developed, two different aspects of the concept of rationality employed by Dreier are visible throughout the entire set of essays. For the one, the Kantian categorical imperative is the starting point for a concept of a procedural rationality. In particular, the universability principle, presented in the form of a 'role-exchange principle', offers the central criterion for testing the rationality of a given norm. Supplementary criteria (clarity, information, etc.) serve to consolidate the argumentative situation within which universability can be established. In any event, the presence of these conditions in an ideal argumentation is distinguished from their empirical approximation in real argumentative situations. For the other, Dreier introduces a teleological concept of rationality that finds its expression in the 'utopian content' of modern rational law theories.

The procedural and teleological concepts of rationality find their counterparts in Dreier's discussions on the concept of law. Firstly, they lead to rejecting legal positivism (see Chpt. 4. 'The Concept of Law') and the presentation of a concept of law that explicitly connects its validity to rational justification. Secondly, again in discussion with legal positivism, it leads to the outline of a theory of the possibilities and limits of legal rationality (see Chpt. 5. 'Irrationality in Legal Science'). Thirdly, and as a specific instance of the rational justification of legal institutions, Dreier explores whether and in what sense contemporary philosophy might at all retain a competence in relation to the problem of property (see Chpt. 7. 'Property from a Philosophical Perspective'). Fourthly, the teleological concept of rationality is introduced by reference to what Alexy has termed 'Optimization commands' or principles. The final chapter addresses the relation between legal theory and legal history, underlining the actuality of the Kantian interpretation of a historical teleology of progress and its possible application in the field of legal history.

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