

Report on Progress Foundation Colloquium on

Gewaltentrennung: alte und neue Aspekte

in Schwarzenberg (Austria) from Sep. 27 through Sep. 30, 2007

General impression:

Discussions were lively, not only during sessions but beyond. Very positive feedback from some participants. Academic participants had a background in law, sociology and economics. Practitioners were journalists but also an ombudsperson on the state level in Austria.

The Colloquium was divided into six sessions; the reader contained six papers that served as the basis for discussion in the first five sessions.

The first two texts (excerpts from Montesquieu's "De L'Esprit des Lois" and some Federalist-Papers dealing with checks and balances [47-51]) served to lay the basis for all further discussions. It was observed that today, the executive seems to be of overwhelming importance, not only executing laws but also being decisive in preparing them. It was, however, added that it might be useful to separate the executive into a gubernatorial and an administrative function. Different from the view that parliament passes law and that its business is basically over after having passed legislation, it was proposed to think of modern legislators as ex post monitors of how legislation is factually implemented. Additionally, it was criticized that the two basic texts seem to underestimate the potentially crucial role of the courts. The most sweeping hypothesis developed during the discussion that all separations of power that are static and fix seem to be undermined over time. A possible normative conclusion would thus read that the separation of power needs to be dynamic: it should also develop over time to reduce chances to undermine it.

The second session was based on a paper by Bruce Ackerman on "the new separation of powers." Participants were split into those who disliked the paper for a variety of reasons whereas others were inspired into some new thinking. Those who disliked the paper primarily criticized that (1) the author knew where he wanted to end up normatively; he did not hesitate to make the facts fit his normative ideals; (2) the normative benchmarks employed by the author were themselves nowhere justified but simply introduced out of the blue (namely democracy, professionalism and bill of rights).

It was mentioned that it might simply be too easy to attribute the long-standing problems of many Latin American countries to their presidential form of government. Indeed, it was argued that they might not be any better off had they opted in favour of parliamentary systems instead. Inherent are doubts concerning the capacity of institutions to have a substantial influence on the destiny of a country. It was remarked that Ackerman neglects the embeddedness of institutions, but also the path dependency in their development. It was further argued that semi-presidentialism as a cure to the dangers of presidentialism could even be worse than the disease itself. Again, it was criticized that the role of the judiciary remains underestimated: the judiciary would not only be waiting for cases to come in (i.e. not be an agenda-setter) but would actively seek cases in order to steer jurisprudence into its most preferred direction. The proposal to modify constitutions such that citizens can import the politicians they like best was made.

The third session was built around a very short excerpt from Tocqueville's *Democracy in America* that dealt with the role of the public as well as civil society. The text was chosen as a basis for a discussion on the role of the media which is often called "the fourth power". The discussion began with the question whether there was such a thing as "the public" and, more specifically, "public opinion". For economists, this notion seems hard to swallow as they are used to methodological individualism, which implies that outcomes are always the consequence of the behavior of individual actors. Various issues related to the view of the media as the fourth power were discussed: how to explain the apparent homogeneity of views expressed in the media? Is there any way to stop the fast homogenization of views? Any reason to suspect market failure with regard to the provision of media diversity? Sufficient reason to opt in favor of public radio and/or television like in the UK or Germany? How to prevent a cartel between one of the traditional branches and the media?

The reading for the fourth session was a text by Sarah Lister on the legitimacy of NGOs. Over the last couple of years, NGOs have come to play ever more important roles. In international organizations, they often actively participate in hearings and seem to serve the functioning of legitimizing some of the actions of international organizations. But how about their own legitimacy? A multitude of questions were discussed: what is the origin of the term NGO? What is the difference between NGOs on the one hand and firms, business associations etc. on the other? Does a discussion about the legitimacy of NGOs already imply a certain suspiciousness regarding their legitimacy? Legitimacy for what? Is there a need to institutionalize it? Again, it was argued that a static view is dangerous –

and any attempt to institutionalize NGOs would result in less legitimacy. It was hypothesized that the behavior of many states enjoys less legitimacy than that of many NGOs. Some interventions also created a connection between the third and the fourth section. One could, e.g., perceive of NGOs as the fifth power. If it is insufficiently controlled, this could also be due to the bad job of the fourth power.

Section five were based on the reading of two chapters of the new book by Frank Vibert entitled “the Rise of the Unelected”. Vibert had participated in a former Progress Foundation Seminar - and this book was somewhat influenced by those discussions. In the two chapters under review, he deals with the rise of agencies that are often called “non-majoritarian”, i.e. agencies whose representatives are not subject to periodic re-elections. Participants discussed the criteria according to which certain government functions ought to be allocated to such unelected agencies. It was hypothesized that the EU had an interest in such agencies as it would enable it to implement its policies not having to rely on democratically elected bodies in the member states.

In many states, judges are not subject to elections by citizens. There was a discussion on the pros and cons of this institution. A participant in favor of the direct election of judges remarked that one could think of entire lists of judges running together.

The last section for which no reading was assigned was used to discuss a number of open questions, namely (1) how to institutionalize the status of the media into the concept of separation of powers, (2) how to institutionalize NGOs into the concept of separation of powers and (3) how to deal with multi-level-systems – and integrate them into the concept of separation of powers.