

Civil society is created by the principle of the separation of state and society. This principle makes society to a certain extent independent from power and the state, but it is itself dependent on another principle, namely the rule of law. A state that is bound by law is a limited state. It is not necessarily a weak state, which is a reproach often directed at the rule of law in general and democracy in particular. A limited state can be very strong, vigorous and effective within the imposed boundaries of power, even more so than a state that tries to do everything.

When a state is limited in its actions by the law that says what it can and cannot do, a free society independent of power is created. State and society become different spheres and in the latter an independent and free social life can start to blossom, undisturbed by state interference and coercion. It is clear therefore that the rule of law is more than a protection of the individual against the over-powerful state. It transcends the level of the individual because it institutes society.

The state is not allowed to determine all human actions. It can interfere only in a specific number of things, namely those things that are regulated by the law in view of an orderly and effective functioning of social life. The range, the power of penetration and the competence of the state are limited and meet with a society that is to a certain extent impenetrable for the state; "to a certain extent" because not everything is allowed in society, and sometimes the state has to interfere, otherwise it would have no "raison d'être". However, society is more than an object of political interference. It is also a space of freedom, undisturbed by the state and in which there is a plurality of free and autonomous individuals and groups, each with their own identity and rules. These individuals and groups can be mutually incompatible and can clash and contradict each other, as long as the laws, including the laws that regulate these clashes (e.g. human rights) are respected.

The rule of law—the principle that the state can only do what the law allows it to do—is not a sufficient condition for a limited state and a relatively impenetrable civil society. The law can be written in such a vague and general way that the limits on state actions are close to nothing, or laws can allow the state to interfere drastically in the lives of individuals or in the affairs of groups in civil society. That is why there are three other conditions that are necessary in order to have a limited state and a free civil society. Firstly, not everything can be written into a law. If everything could be written into a law, then the rule of law would be a meaningless concept. Even in a democratic rule of law, where the law originates from the will of the people, there are limits on what the law can be. It cannot contradict human rights, because otherwise the range of state actions allowed would be too wide.

Secondly, the law must be stable and predictable in order to avoid that every arbitrary act of state takes on the cloak of the law and thereby seeks the protection of the law. Moreover, only laws that are predictable can be respected. And respect for the law is part of the rule of law.

Thirdly, laws must not be too numerous, otherwise it becomes very difficult to respect the law and without respect for the law, there is no rule of law. A large number of laws is incompatible with one of the goals of the rule of law, namely the creation of a space of freedom. The more laws, the smaller this space of freedom (although one very general and vague law can also reduce this space to nothing).

Only if these four conditions—rule of law, a definition of the law that excludes laws that contradict human rights, and predictable laws that are relatively few in number—are met, can there be a limited state and a relatively free civil society. Human rights create these four conditions. There are certain human rights that specifically protect the rule of law. The third and the fourth condition are implicitly created by the rights which institutes the rule of law (there is no rule of law if it is impossible to respect the laws, and it is impossible to respect the laws if there are too many laws or if laws change too frequently).

But there is a two-way causation. In one direction, human rights create a limited state and a free society, and make it impossible for the state to hold individuals or groups responsible for no matter what action they undertake (some rights directly institutionalize the rule of law and human rights in general are a limitation of the content of laws). Responsibility, conviction, punishment etc. cannot cover everything, only those things translated into stable and predictable laws that conform to human rights. As a result, there exists a relatively large domain outside of the reach of the state and the law, a domain in which individuals and groups can unfold their own autonomous, self-chosen private or public activities and thoughts, free from political leadership, control or interference.

In the opposite direction, there is also a causal link. Human rights institutionalize the rule of law and the separation between state and society, but the opposite is also true. The rule of law and the separation of state and society promote human rights, even though there are states which apply the rule of law and which have a relatively free civil society, but which fail to enforce and respect all or some human rights. A limited state has less opportunity and power to violate human rights than a state that is not limited. The same is true for a state that has to deal with the criticism of a free society. Furthermore, in a free society groups of different kinds can be vehicles for the promotion of certain "new" human rights (the rights of workmen for example).

Human rights institutionalize the rule of law, and the rule of law promotes human rights, but the rule of law can exist without human rights (many things other than human rights can limit government action and can determine laws, for example divine commandments). However, without human rights, we are clearly dealing with another kind of rule of law, a much more dangerous and unstable kind. For example, the content of the laws is then not as clearly circumscribed.

We should avoid turning the rule of law into a dictatorship of the law. The question "what is a good law?" must always remain open. The law, even though it rules, has to be actively criticized, otherwise we get a fetishism of the law, an unconditional surrender to the law, whatever its content and meaning. The necessary permanence of the law—permanence is necessary because of predictability—should not become a dogma either, because in that case the question of the good law will likewise disappear.

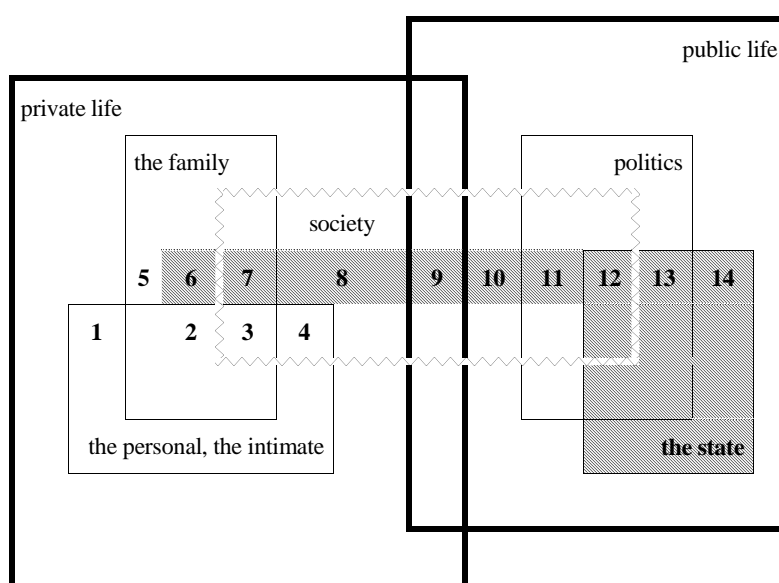
The border between the state and society is not always what it seems or what it is considered to be. The fact that the state is not omnipresent, is no Panopticon, and cannot spread itself uniformly over the whole of society, does not mean that the state stops where society starts. The state can legitimately interfere in society. The border is not an iron curtain. If civil society would be sovereign in its own house, anarchy and lawlessness would be the consequence and there would be

no reason to have a state in the first place. There is interference in society, but in society there is also a space that the law cannot appropriate and in which man is free, on the condition that his free actions do not contradict the law or are not a subject of legitimate legislation (legitimate legislation is legislation which is not contrary to human rights and which springs from the will of the people). Where the law is silent, man can do as he likes.

The border between state and society does not correspond to the border between public and private. Private as well as public things happen in civil society, and political things happen in society. Especially in a democracy do we see that political life takes place in both the state and society. Democracy would be impossible without it and cannot accommodate an equation between society and privacy. It is equally wrong to equate the public sphere with the domain of the law, and the private sphere with the domain of freedom. The private sphere is subject to the rule of law, as much as the public sphere, and the latter is as much a domain of freedom as the former. Freedom and the law are not a straightforward translation of private and public respectively.

Democracy proves that "politics" and "state" are not absolutely the same thing. Without making the difference between these two words it is impossible to hold on to the difference between state and society. Democracy requires the elimination of the difference between rulers and ruled. Democratic politics is everybody's business and takes place, to a large extent, in society. When the citizens and the state desperately try to avoid each other as much as possible—as is implicit in the doctrine of the separation of state and society—then politics becomes a matter only for politicians, and political life becomes something alien, a necessary evil perhaps or a mechanism for coercion instead of a source of values.

For clarity's sake, I have tried to put all these things in a drawing:



Some examples of the meaning of the digits:

- 1: feelings of loneliness
- 2: unspoken marital hate
- 3: certain moral convictions; the reason for the link with society is that these convictions are often influenced by society
- 4: political convictions and certain moral convictions

The common characteristic of points 1 to 4 is that they deal with feelings, thoughts and convictions and are therefore outside of the scope of legislation (the scope of legislation is the gray area).

- 5: the division of labor in the family, adultery, marital fidelity (in some countries, adultery and marital fidelity may still be classified under number 6)
- 6: incest, violence within the family
- 7: raising children in the family (but not the task of educating children in the family, because education is that part of raising children which is a public activity; education is the transmission of public knowledge)
- 8: a sports club
- 9: a school
- 10: a cultural society
- 11: political participation (outside government institutions, for example in a political party), political demonstrations, pressure groups, lobbying (political convictions, mentioned above under number 4, should perhaps be classified under this number, but this would make the drawing unintelligible; in any case, reality is too complicated to be forced into a simple drawing)
- 12: political participation (within government institutions), village meetings, civil disobedience, a court of justice with a jury-system, political parties
- 13: representative politics, parliament, a court of justice without a jury-system, espionage (espionage is obviously not a public activity, but it is nevertheless part of public life because in a democracy, espionage must become public after the fact; it is a secret activity, not because it should never be known to the public, but because it involves acts which require secrecy in order to be successful and effective; however, this requirement loses its force a certain time after the performance of the acts, which is why these secret acts can become public after a while)
- 14: administration, government bureaucracy.

Both the public and the private spaces are at the same time spaces of freedom (in the limited sense of freedom from state interference) and spaces subject to the provisions of the law. The latter are shown as gray areas. As shown above, all state activity is regulated by the law, while the part of the private sphere which corresponds to the purely individual or personal is entirely free from government interference. Needless to say that the drawing depicts an ideal situation.