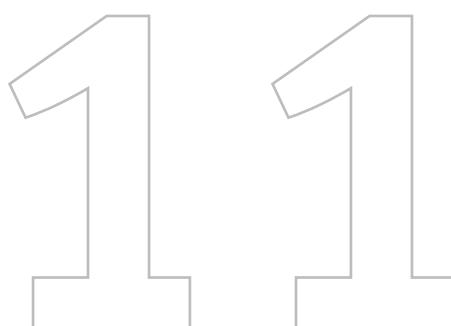


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› Happiness and Law

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The idea that politics might be in a position to make one happy does not readily become obvious to people reading the newspaper or watching the news on TV. Nevertheless, the voices demanding that the subject 'happiness' shall be made into an item on the political agenda have recently been increasing in number. Thus, the British economist Richard Layard demands "[...] a revolution in government. Happiness should become the goal of policy".¹ Other authors may not formulate this in such a forceful manner but also argue for a stronger orientation of politics towards happiness.² As the subtitles of the books mentioned suggest, this demand is made against a background of empirical research on happiness, which has experienced a significant growth internationally in recent years. This field of research examines the happiness and well-being of mankind from various scientific viewpoints, for example, from psychological, sociological and economical as well as from different biological sciences.³ The (alleged) irrelevance of material prosperity for happiness belongs to the results of empirical research on happiness and has caused a great sensation. Let us listen to Layard once again: "In the United States people are no happier, although living standards have more than doubled. There has been no increase in the number of 'very happy' people, nor any substantial fall in those who are 'not very happy'. [...] The story is similar in Britain, where happiness has been static since 1975 and [...] is no higher than in the 1950s. This has happened despite massive increases in real income at every point of income distribution. A similar story holds in Japan."⁴ Hence, the politics of the western world, which rely on economic growth, are said to have failed, and a new policy is said to be needed: to be precise, a policy of happiness.

1 Layard 2005, p. 145.

2 Diener/Lucas/Schimmack/Helliwell 2009; Bok 2010.

3 Cf. Bayertz 2010, overview.

4 Layard 2005, p. 29. In regard to this aspect, it should be noted that the passage quoted gives only a selective account of the actual results. It is a fact that there *are* positive connections between prosperity and happiness. See Easterlin et al. 2010 for a recent overview.

It was almost inevitable that this demand also met with a response in the realm of jurisprudence. In fact, here we also find the analogous idea that law deals, above all, with the promotion of happiness. The factual reason for this is that, in modern societies, governance evolves primarily through law. Therefore, the demand for political promotion of happiness does not only raise questions of political, but also of legal theory.⁵ Some authors have even gone as far as to argue for replacing the central idea of justice, which has been discussed (in vain, as they think) for thousands of years, by the central idea of 'happiness', which can be tested empirically: "Who needs justice if we are all happy?"⁶

I.

These ideas are, of course, not new. In the political theory of antiquity, it was a matter of course that there is no fundamental difference between individual and communal happiness and that it is the prime task of the state to promote happiness.⁷ The continental legal philosophy of the 18th century was also built upon a concept of law based on "happiness".⁸ However, under the central idea that the happiness (*Eudaimonia*) of the subjects was the prime goal of governmental action, the German philosophy of natural law during the Age of Enlightenment, with Christian Wolff and his followers, mutated to become the apotheosis of the paternalistic state. Wolff founded a perfectionist doctrine of state and law⁹, which borrowed Aristotelian motives and was, if nothing else, directed against the liberal doctrines of Anglo-Saxon origin (especially those of Locke). The Wolffian approach stemmed from the fundamental premise that there was a duty in natural law, i.e. a morally *and* legally grounded "duty of man to himself" to attain self-perfection.¹⁰ The resulting behavioural obligations were extensive and related to physical interests as well as to objective moral interests attributed to the individual under the heading "Glückseligkeit"¹¹. Wolff developed the concept of a general legal paternalism aimed at an all-embracing promotion of well-being through the state.¹² The extensive state aim of "happiness" (Glückseligkeit), which enabled the sovereign to have unlimited access to the natural liberty of the subjects, was consolidated in its theory into the ideal type of the patronizing welfare state:

"People who rule behave towards subjects like fathers towards children. [...] Authorities or ruling persons are responsible for taking care of the communal welfare and safety [...], and therefore must consider all means required through which the welfare of the subjects can be promoted most comfortably, also arrange their actions in the way this aim demands. The subjects on the other hand are bound to do or not do what [the governing people] deem best."¹³

Wolff's doctrine, in which there was no room for the notion that individuals are given spaces free from state intervention to act as they see fit, became the dominant idea in the middle of the 18th century in Germany. The eudaimonistic goal of "reasonable" sovereignty and, linked

5 Cf., for instance, contributions in Posner/ Sunstein 2010.

6 Bagaric/McConvill 2005, p. 2.

7 Cf., for instance, Aristotle, *Politics* VII, especially 1325a7-10.

8 Cf. Gutmann 2005 and Klippel 1976, for the following.

9 Cf. Christian Wolff, 1720/21; id. 1754, §§ 103 ff., 133 ff.; id. 1740, § 17.

10 Wolff 1754, § 103, S. 65 with reference to § 43.

11 Wolff 1740, pars VIII, §§ 9, 13; id. 1754, § 118, p. 6.

12 Hellmuth 1985, p. 30. Cf. Sommermann 1997, p. 15 ff.

13 Wolff 1720, II. Theil, chap. 2, § 264, p. 200. (Translation)

to it, a systematic paternalism in the concept of law therefore remained with the authors of the “Prussian natural law”, who followed Wolff and were formed by his ideas.¹⁴ At the same time the concept of happiness of the subjects realized through governmental action, which was developed by Wolff, also became the key concept of the cameralistic doctrine of state and of society.¹⁵ Hence, as far as individual interests concerning the happiness of the subjects were made the aim of the state in the theory of law of the 18th century, the pursuit of these interests should not rest with the individual’s initiative, but rather should primarily be the task of “good policing” (gute Policey).¹⁶ The governmental aim of welfare as such does not seem to be problematic to us, but the presumption connected with it, i.e. that citizens are basically not in a position to realize this through their own efforts.¹⁷

It was not until the last decade of the 18th century that the doctrine of viewing *salus publica* and the happiness of subjects as governmental aims taking precedence and legitimizing interventions more or less without limits was subject to fundamental attack.¹⁸ The direct promotion of the happiness (or even of morality) of the citizens through means of legal coercion was now increasingly dismissed as non-legitimate. For this reason, especially in Kant’s philosophy of law, a concept of law orientated towards freedom separated itself radically from the governmental aim of “happiness”. The Kantian concept of law, according to which “any action is right if it can coexist with everyone’s freedom [*Willkür*] in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with an universal law”¹⁹, demands nothing less than that legitimate positive legal orders establish behavioural norms solely through the principle of the compatibility of individual spheres of freedom of action and thus, from the outset, puts the legislation by the state under the obligation to move away from any eudemonistic well-meaning policy of care.²⁰ Kant’s criticism of eudemonistic paternalism becomes especially clear in his writing “*On the Old Saw: That may be right in theory, but it won’t work in practice*” (*Über den Gemeinspruch*) from 1793, whereby he expresses the “freedom as a human being” (“*Freiheit als Mensch*”) as a fundamental principle a priori in the formula:

„No man can compel me to be happy after his fashion, according to his conception of the wellbeing of someone else. Instead, everybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people’s freedom to pursue similar ends, i.e., on another’s right to do whatever can coexist with every man’s freedom under a possible universal law. If a government were founded on the principle of benevolence toward the people, as a father’s toward his children – in other words, if it were a paternalistic government (*imperium paternale*) with the subjects, as minors, unable to tell what is truly beneficial or detrimental to them, obliged to wait for the head of state to judge what should constitute their happiness [...] – such a government would be the worst conceivable despotism. It would be a constitution that cancels every freedom of the subjects, who retain no rights at all.”²¹

14 Hellmuth 1985, p. 27 ff. (on Nettelbladt 1767, §§ 1237 ff. and Darjes 1762/63).

15 Cf. von Justi 1756, § 7 ff.; id. 1759, § 2, 504 ff.; id. 1760, §§ 1-3; as well as Engelhardt 1981, especially p. 41 ff., 45 f. and 66 ff. and Simon 2004, p. 508 ff.

16 Cf. Klippel 1976, p. 63 f.

17 Preu 1983, p. 198.

18 Klippel 1976, p. 131 ff.; cf. Preu 1983, p. 224 ff.

19 Kant 1797, p. 230 (translation).

20 Kersting 1993, p. 364 f.

21 Kant 1974, p.58 f. (translation by E.B. Ashton).

Kant's approach ratifies the priority of the right before the good, which was also emphasised by Rawls – the conviction that basic individual freedoms impose limits on the collective search for the “right” (and happy) life.²² It therefore remains the archetypal idea of liberal political theory, in which especially paternalistic intervention in the individual's freedom of action in order to achieve his/her alleged happiness is not accepted as a legitimate concern of law.

In the tradition of human rights, which has spelled out the *pursuit of happiness* as an unalienable right since the American Declaration of Independence on 4th July 1776, a theory on the relationship of “happiness” and “law” which can be characterized as liberal and individualistic in a broad sense has gained acceptance. According to this theory, the state should guarantee those individual rights to freedom which enable the individual to pursue his/her self-chosen life plans. The state should try to influence happiness as little as possible – there is neither a right to achievement of happiness nor a duty to achieve it, but there is a right for everyone to pursue happiness in the way he/she considers best.

II.

If we take a look at this liberal theory and practice of law, taking into consideration its justification, two arguments (or rather: two sets of arguments) become prominent. The first of these arguments refers directly to happiness, the second to state and law. In a brief and simplified synopsis, the first argument can be formulated in the following way:

1. Human happiness is radically individual. Whatever makes person x happy, does not necessarily make person y happy.
2. For this reason, only the individual concerned is in a position to know what makes him/her happy.

The political consequence is obvious. It means that governmental promotion of happiness by means of law only leads to the imposition of alien concepts of happiness upon individuals, therefore making them unhappy rather than happy.

This argument is based on a genuinely modern concept of happiness which views happiness as a subjective state in individuals, especially an emotional state. In antiquity, in contrast, a concept of “happiness” as an objective state which is externally identifiable was dominant. One of the questions raised by the programmes of the political-legal promotion of happiness outlined at the beginning is the following: Do the results of recent empirical research on happiness (to which these programmes refer) give cause for revision of the modern concept of happiness?

1. The results of various surveys indicate that individuals definitely refer to different things when using the term “happiness”, but also that the variation occurring is in no way infinite. Regardless of individual variation within different cultures, there are certainly also universal factors of happiness existing between them.²³ To give just one example, personal relationships with other people belong to the transculturally most relevant factors of happiness, although the specific forms of these relationships may differ. This indicates that the “ontological” thesis of the radical individuality of happiness is, if not wrong, then at least in need of correction.

2. The same is true for the epistemic side of the argument. One needs to differentiate between question (a) whether individuals are in a position to recognise correctly if they are happy

22 Cf. Rawls 1988, p. 215.

23 Cf. Diener (summary) 2009, p. 279 ff.

and the question (b) whether they are able to realize correctly what *makes* or *will make* them happy. As amazing as it might seem: There is a great deal of empirical research showing that, with respect to (a), there is indeed room for doubt. This, if nothing else, does relate to the fact that the realization “I am (or was) happy!” consists of two components: an emotionally as well as a cognitively judgemental side. Since the two components do not always accord with each other, the result is frequently a distorted perception, especially when a past feeling is considered. In this way, cultural factors may also have a considerable impact on self-perception.²⁴

There are also numerous findings regarding (b) which run contrary to liberal optimism. Individuals are not well-versed in identifying the factors which really make them happy.²⁵ One of the most frequently recurring mistakes is overestimation of the happiness-promoting effect of single positive incidences, for instance, the victory of a football-team, a holiday or a win in the national lottery. There is also a high rate of false assessment whenever there is a choice to be made whose consequences appear at a later date and whenever there is no opportunity for practice. Precisely this is also true for several of the important decisions to be made in life, such as marriage or the choice of an occupation. This false assessment should not be traced back to the trivial assumption that humans sometimes make mistakes. It is rather concerned with the fact that, firstly, people do sometimes make mistakes in certain matters concerning their own best interests and personal well-being and, secondly, that such mistakes are of a structural nature.

III.

The fact that the individuals are not really very good judges of their own happiness can obviously not lead to the determination that the state and law should take over these tasks. The first objection to this conclusion might lie in the question of how the state should know something which the individuals themselves do not. The solution to this problem given by the authors mentioned at the beginning is already referred to in the subtitles of their texts: The state does indeed not know this of its own accord, but it is in a position to find out if it takes note of the findings of empirical research on happiness and uses these as a basis for its policy. Obviously, the suspicion arises that this answer is based on an inadequate, scientistic understanding of politics which does not do justice to the “fact of reasonable pluralism”²⁶ in regard to questions of happiness and the meaning of life. We are not able to investigate this any further at this point. Let us instead discuss a second objection which, even if the suspicion of Scientism could be refuted, would not be clarified. This objection is of a political nature and can be split up into three areas of reservation:

1. State and law do not exist for the sake of happiness, but rather for other goods (e.g. safety).
The promotion of happiness is not a state or legal task.
2. A state which begins to care for the happiness of its citizens will sooner or later lapse into a paternalistic policy, even a dictatorship of happiness in the end.
3. Policy and law deal with the distribution of goods. These goods might indeed be relevant for happiness, but their distribution cannot occur according to criteria of the maximization of happiness.

24 Cf. Scollon/Diener/Oishi/Biswas-Diener 2009, p. 203 ff.

25 Cf. Hsee/Hastie 2006.

26 Rawls 2001, pp. 32 f..

The first reservation is based on an essentialist conception of state and law. If one considers both as institutions “created” by human beings for human aims, then the task they need to fulfil is dependent upon human beings. Therefore, the task of the promotion of happiness cannot be rejected a priori.

The second reservation is historically well-founded and has to be taken seriously. It underlies the fundamental rejection of a governmental policy of happiness by Kant and Liberalism.²⁷ Nevertheless, one should bear in mind that Kant and the early Liberalism wrote about the authoritarian state of late Absolutism. As a starting point, they therefore took pre-conditions which no longer exist in today’s democratic states. Of course, democratic structures can also lapse into a state paternalism undermining freedom. However, not only a policy of happiness can lead in this direction, but also a policy of internal and external security, for example. At the present time and in the more recent past, individual rights have been limited rather in order to combat crime and terrorism than in the service of the promotion of happiness. In short: The second reservation draws the attention to a *general* tendency which gives a *general* reason for the critical estimation of governmental activities through citizens. It does not become clear that these reservations should be of special importance for the problem concerning happiness or why this should be the case.

Moreover, the development of state and law has, at least partially, already been moving in the direction of the promotion of happiness since the end of the 19th century. This can be seen in the development of the welfare state in various European countries, and indeed even Jefferson’s concept of the pursuit of happiness can also be interpreted as a vision of the collective good of common welfare.²⁸ Therefore, we do not have to deal with the question of “a policy of happiness, yes or no?” nowadays, but rather with the question of “a policy of happiness, how and to what extent?”. In the literature submitted, a number of considerations and suggestions in regard to this can be found, some trivial, some unrealistic, but some also worthy of discussion. More precise examination is not possible at this point. Philosophy, law and the social sciences should not do without such an examination for the precise reason that these considerations and suggestions reached politics via academic spheres long ago. The British government²⁹ commissioned an appropriate expert’s report as early as 2002; the French executive³⁰ did likewise in 2008.

Furthermore, the third reservation draws attention to a real problem. The state needs criteria for the distribution of goods (we use this term in a broad sense which also includes rights, for example,). The suggestion that the maximization of happiness should be the *only* criteria of distribution permitted validity comes up against all the objections which have always countered Utilitarianism. In the theory of law, this debate is argued out between the “Will Theory” and the “Interest Theory” of subjective rights.³¹ Whereas the former, in the tradition of Kant, emphasizes the function of subjective rights to protect the autonomy of its upholder and thus his/her space of options to act freely (which the beneficiary may also use in a way which may prove disadvantageous for his/her well-being and happiness), the latter assumes that subjective

27 Cf. also Geuss 2004, p. 55: “Happiness in [a] positive sense is not a reasonable aim of liberal democracy”.

28 Wills 1978, p. 164 (»When Jefferson spoke of pursuing happiness, he had nothing vague or private in mind. He meant a public happiness which is measurable; which is, indeed, the test and justification of any government»).

29 Prime Minister’s Strategy Unit 2002.

30 Stiglitz/Sen/Fitoussi 2009.

31 Cf. Waldron 1988 and 1993; Gewirth 1992.

rights are designed to serve the objective interests of their upholders. In this consequentialist perspective, the individual's interest in his/her self-determination is only an element of his/her individual well-being, so that the concept of having a subjective right does indeed imply a weighing up of the person's autonomy against other elements of her well-being or happiness. At any rate, the continental European and, above all, the German understanding of subjective rights are greatly influenced by the Will Theory and its notion of a right as a legally respected choice³². Such an understanding guarantees individual realms of freedom, especially in the face of individual and collective maximization of welfare. This is to say that it consciously accepts the fact that legally guaranteed freedom might stand in the way of the maximization of happiness. This also applies if, as in recent American works on the "happiness approach" in legal theory, the latter aim takes the form of a Benthamian principle of happiness empirically re-established with the theoretical instruments of the economic theory of law.³³ In the German legal system, the article on dignity in Article 1, paragraph 1 of the German Basic Law (Grundgesetz) is understood to imply the statement that the individual should not be made an object of his/her own welfare interests.³⁴ Seen from this point of view, the compatibility of law with the aim of the promotion of individual and collective happiness is dependent upon the successful development of a legal policy of happiness which can do without fundamental intervention in the principle of respect for persons, which is guaranteed through individual rights of freedom and, first and foremost, claims that the individual should be in a position to interpret his/her life by him-/herself.³⁵

Even if one is convinced that the promotion of happiness is a legitimate and even a necessary aim of state and law, one is well advised to resist the temptation to make it into an absolute as a sole aim. The insight that society should not orientate itself towards one sole ideal (even if that ideal is the greatest happiness for the greatest number) also belongs to the liberal concepts which one should hold onto and which are constitutive for modern democracy.

"The idea of democracy is the result of the realization that human beings are neither close to the ideal of complete knowledge and unimpeded power of judgment nor are they able to be the ideal society which they dream of. Democracy is the end of the self-delusion of the human being about the feasibility of these ideals. It only assigns the ideal the weak function of regulatory principle in order to avoid terror in the name of the ideal. Democracy is the political form of denial: the sole ideal, the sole method of the justification of knowledge, the sole truth – these should not have a privilege and a right to the octroi."³⁶

IV.

After this brief overview, one can cross off the list the demand for "a political revolution" as solely a programme of a law based on happiness, but without justice. These ideas are only recent versions of Scientism which, at the time being, view the most recent state of research as the key to the salvation of mankind. The opposing conclusion that philosophy, law and the social

32 Hart 1982, p. 189 f.

33 Cf. the articles in Posner/Sunstein 2010.

34 Cf. Rulings of the German Constitutional Court (Entscheidungen des Bundesverfassungsgerichts), volume 52, p. 131 ff. (175 ff.) (1979); Bundesverfassungsgericht (2. Kammer des Ersten Senats), Neue Juristische Wochenschrift 2005, p. 1103 ff.

35 Benn 1988, p. 106 ff.; Dworkin 1977, pp. 272-73; id. 1985, p. 191.

36 Sandkühler 2009, pp. 233 f. (translation).

sciences should go ahead and ignore the results of empirical research on happiness would be just as rash. The fact that this field of research is able to make a contribution to the orientation of politics and law, should, at least, not be ruled out from the outset. Just to give an example, there is strong evidence that the perception of inequality and injustice clearly reduces well-being.³⁷ This is, of course, just one argument amongst others against the demand by Bagaric and McConvill that the discourse on justice should be substituted by the discourse on happiness. Perhaps a special benefit of empirical research is that it gives empirical arguments in defence of overhasty pleas in favour of a policy and law to promote happiness.

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37 Cf. Wilkinson/Pickett 2009, but also Bok 2010, pp. 79-98.

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