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LAW AND POLITICS: CONSTITUTIONAL REFORM

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Law and politics has been an issue for centuries. It was central to the work of the great jurists and political scientists at the time of the emergence of the modern state —Bodin, Althusius, Grotius. Hans Kelsen, among others, insisted upon the profound chasm between law and politics. His theory of pure law seeks to solve the problem of norms by excluding all social reality from consideration. Kelsen is starting from Kant's separation of the "is" and the "ought", but pushing it to a radical extreme. Basically all connection between these two worlds of the "is" and the "ought" is denied. Such a theory of pure law resulted from an effort "to develop a normative theory of normative cognition which would parallel the theories of cognition concerning natural phenomena in Kant". [1]

The radical separation of the "is" and the "ought", of the existential and the normative realm, produces a decidedly formal outlook. Pure law does not wish, so to speak, to soil itself by including the dirty, concrete world of social and political realities. But at the same time, all legal norms are seen as pure facts, a positive reality in itself, completely neutral in respect to all values. Law is seen in its actuality as a body of facts with regard to which jurisprudence develops the concepts derived from the essence of law. According to these concepts the content of law must be arranged and ordered. Thus the doctrine of pure law becomes a structure of potential law, while all actually existing law is accidental (zufaellig). Pure law is, according to one of its exponents, "only a part of logic".

The point of contact between law and politics is the constitution, and constitutional problems have therefore occupied both purists and political scientists. Significant writings in two fields have necessarily dealt with constitutional law and constitutional theory. The result has been a good deal of confusion and controversy. The effort to exclude politics from law have been as unsuccessful as efforts to exclude legal issues from political science. This issue is further complicated by the fact that legal positions are necessarily normative positions and hence, the endeavor to exclude normative issues

[1] This paper is an elaboration of what is said in C. J. Friedrich, *The Philosophy of Law in Historical Perspective* (1963).

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from political studies is abound to fail. Any statement in politics has normative implications. Representatives of the pure theory of law have insisted that the validity of norms is not to be understood politically but strictly normatively. But if the question of the validity of norms is understood to be a political question there cannot be any pure law. Law is a phenomenon of political and social life and this is the starting point of every attempt to develop a "sociology of law". Max Weber's well known attempt to formulate a sociology of law illustrates this fact as well as do the realists in contemporary American jurisprudence. Carl Llewellyn was well aware of this and so are others of his school. These writings do however underestimate the difficult problems this position raises. Recent American controversies that arose in connection with Watergate and other issues illustrate these difficulties, for it is not always possible to ascertain the actual behavior, and this is particularly true in the field of high politics. One central obstacle is the prevalence of secrecy. "Power hides", I wrote many years ago. And this propensity to secrecy is especially noteworthy where power is exercised as influence. A good deal of influence would in fact disintegrate as soon as secrecy has been eliminated. The legislation, regulating pressure groups by making their operations public, illustrates the point very well. But it is true in other context. [2]

The moral disapprobation of secrecy, notably by Bentham and Kant, has deep roots, notably in the scholastic tradition as shaped by Thomas Aquinus. Publicity is made a characteristic of law. The divine doctor made publicity one of the essential characteristics of his definition of law. And Kant followed in his footsteps by maintaining that the morality of law could be insured by making it public. What must be hidden or secret is by that very fact contrary to law —he thought. Such a position is untenable unless law is seen as strictly normative. For who could question the occurence of secret law?

The basis of this outlook is undoubtedly to be thought in the fact that secret law is difficult to enforce and relatively rare. But it does not mean that it is unimportant. In fact, often the reverse is true. Special complications arise when natural law is taken into account. The philosophers of natural law were often puzzled by the reflection that natural law positions might not be known, undoubtedly knowledgable under certain circumstances. So much natural law is conditioned by the setting to which it applies. This is often not known. To explore the difference between secret and unknown would lead in too far a field. In practical life the distinction is often purely formal. Even the scholastics recognize this particularly patent in an area of constitutional law. President Nixon's fumbling offered a striking illustration. His illusion about reason of state and his conclusions concerning

[2] See my more full discussions of related points in *The Pathology of Politics; violence, betrayal, corruption, secrecy and propaganda* (chapter 11), where it is shown that secrecy is eminently functional in many government operations.

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the President's power resulting from such reasoning state led into a veritable morass of a controversial misunderstanding. The consequences were quite unfortunate because many proceded to deny the validity of reason of state in order to be able to deny the President's claims. This was clearly a case of emptying the baby with the bath, for Nixon's mis-application of reason of state to security questions as he saw them had not such consequences. Of course, reason of state, constitutional reason of state that is, is as important for U.S. politics as reason of state is for all politics. The error lay not in the use of the reason of argument but lay in mistaken analysis of the actual situation; for what he talked about were situations in no sense involving security any more than did the alleged dangers to himself at St. Clemente. This case illustrates well the difficulties involved in the intertiming of facts and norms.

These difficulties are recurrent in the field of constitutional law. The importance of constitutional law is that it provides the link and the bridge between law and politics. The distinction and differentiation of public and private law, so significant for the jurisprudence of Europe, has been called a decisive achievement of modern thought. Derived from the Roman law of imperial times, it dominated the jurisprudence of European absolutism and of its inheritors. It is intimately linked with the growth of the modern state, and hence also with its problems. This distinction is, however, not really part of the American legal system and thought. In Germany the distinction is more tangible; the term "Staatsrecht", which broadly speaking corresponds to constitutional law, makes the contrast more explicit; but in English the term "constitutional law" is expressive of a tendency to move away from absolutism. Generally, constitutionalism is incompatible with any absolutism. In England even this distinction has never been really accepted; no separation of constitutional and other law is admitted. All law is seen as simply one body for the creation of which the popularly elected parliament is responsible. This does, of course, by no means exclude continual reference, especially in political discussions, to "the" constitution. But such references are not distinctly to a separate body of law.

The idea of a law of the state, that is, of a law to which the several branches of the government are subject and which they must obey in the exercise of their "authority", is the bridge between an arbitrary despotic absolutism and a fully developed constitutionalism. In the latter, the "state" in the strict sense disappears. It is dissolved into a multiplicity of authorities united formally by the constitution and in fact by the will of the people as expressed in the programs and activities of the political parties. But in times of emergency the state clearly re-emerges, though in the framework of enabling acts and the like; after the crisis is passed, it disappears again. In light of these facts, which are familiar in the politics of constitutional democracies, the entire law may be seen in terms of a hierarchy of sources of law, the lighest of which is the constitution, while the lowest is the measure taken by the police or

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an emergency authority to deal with a concrete situation. In between, law and ordinance are found. Questions as to the compatibility of a lower with a higher norm are decided by the competent court.

The relative position of a particular norm in the hierarchy of norms in a legal system does not correspond necessarily to the substantive importance of such a norm for the life of the legal community and its members. It may happen that a legal norm in the constitution is relatively unimportant or becomes so in the course of time, while on the other hand an ordinance or measure may be of crucial importance. If this fact is not sufficiently taken into account, serious errors and confusions are the result; they may become to troublesome that they endanger the legal system as a whole. Thus, the so-called security legislation in the United States and elsewhere, and, indeed, often mere police measures adopted for the security of the legal order, may undermine what has properly been termed "constitutional morality" to such an extent that the maintenance of the order itself is endangered.

In the age of rationalism, from Locke to Kant and Hegel, law was generally looked upon as the decisive mode of political action —law, that is, in the sense of the statutory enactment. Such law was understood to be a norm enunciating a general rule, a thought which Rousseau stressed particularly. Norms generally seemed to these times and their representative thinkers to be the more important and valuable, the more general they were. Thus Locke insisted that the right to formulate such general rules must be divided between king and parliament; [3] not to have this decisive power concentrated in the hands of one authority seemed to him the kernel of an effective separation of powers as he saw it. Montesquieu and Kant, as well as other philosophers of monarchical constitutionalism, were inclined to accept this view, though they likewise stressed the separation of the legislative from the executive and the judicial power. [4]

As the idea of government according to law spread in the nineteenth century, there developed the position that all general rules must be put into the form of law, that is, into a statutory enactment. It was also demanded that all ordinances and similar acts of administration concerned with the execution of the law be made only "within the framework of the law", that is to say, be based upon legislative authorization. The strength of this liberal tradition became apparent when totalitarian fascism took over the government and yet retained many of these forms of the government according to law. At the same time, it became apparent that such a legislative basis for administrative acts was not so important as had been asserted by the older theory. For, on the one hand, it became clear that everything depends upon who makes the laws and, on the other, that there must be beyond

[3] See John Locke, *Of Civil Government*, Part II, pars. 132, 134 ff. *Cf.* also his *Essays on the Law of Nature*, ed. W. von Leyden (1954), at the beginning and pp. 108 ff.

[4] *Cf.* for all this my *Constitutional Government and Democracy* (3d. ed. 1950), esp. chaps. XVI-XIX.

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and above the legislative decision another decision of more general significance, namely, the political decision. We speak in all fields of public activity today of *policy* as the crucial core of political and legislative decisions, and if one were to ask any person involved in the political process what he believed the most important part of it, he would undoubtedly answer that it was policy. In some of the more recent constitutions, notably in the Basic Law of the German Federal Republic, we find provisions such as that the chancellor determines the basic lines of policy. Policy is the center of the modern legal systems. The changed situation as far as law is concerned is vividly shown in the fact that everyone wants to participate in policy decisions, whereas the formulations of these decisions and their transformation into statutory enactments everyone is quite prepared to leave to lawyer-technicians. Every lawyer will recognize that this outlook is somewhat superficial because the formulation itself involves policy decisions, frequently of the most crucial sort. Still, there is a shift in general emphasis that is highly significant.

What then is the essence of law, or rather of the constitution? In what sense is it *basic law*, that is, the framework for all policy? The constitution is an attempt to give definite institutional forms to the political will of a people, of the members of a legal community.[5]

This "political will" must be understood as the will to live together in a political community; it corresponds in many ways to what traditional natural law calls the will and the right to selfpreservation, admittedly the first right of nature. It is the right to remain or to become an organized people, a nation, structured in many free associations and groups. This idea or norm is basic. The notion that a people could be willing to sacrifice its own existence as a people to some kind of social, economic, or power-political goal contradicts all the facts we know and must be rejected as erroneous. These "facts" upon which the argument rests are clearly made available by what scientific research in the social sciences and in history has shown. We are no longer obliged to derive these propositions, as did the older natural law theory, from a metaphysically grounded view of human nature. Rather, the findings of history, psychology, sociology, and political science enable us to demonstrate the propositions with a high degree of probability.

Thus, the constitution is to be understood as the process by which political action is limited and at the same time given form.[6] A constitution presumably embodies a system of power relationships which has been effectively institutionalized. A constitution is basically a particular kind of law, and like

[5] *Cf.* my paper "Le problème du pouvoir dans la thèorie constitutionaliste", in *Le Pouvoir: Annales de philosophie politique*, I, Nº 1 (1956).

[6] I have recently restated the basic theory of the constitution in *Limited Government: A Comparison* (1974). There the definition of a constitution in its most general sense is found in the first chapter, page 11.

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all law it consists of enforced rules. It is a living system, dynamic and ever-changing, as was pointed out. Just as in an organic system, in a constitutional system the basic institutional pattern remains even though the component parts may undergo significant alterations. Comparative constitutionalism seeks to determine the theoretical presuppositions and institutional manifestations of constitutional systems.

Contemporary constitutions are still much concerned with making legislation the central task of government. The legislative power is put first. Yet legislation has become in substance quite different. General rules continue to be very important, but besides them technical arrangements have expanded. For example the field of public health, while containing many rules affecting the behavior of doctors, nurses, hospitals and so on, also decides what chemicals may be used and what operations may be performed. Highly controversial fields, such as the law of abortions, are shot through with this contrast and modern constitutions are complicated by this intermingling of rulemaking and measure-taking.[7]

In conclusion, let me emphasize that the citizen becomes a participant in the creation of law by reason of his share, in making and amending the constitution as much as by his electing representatives in the legislature. He maintains the law and he develops it.

Law and politics must be distinguished, but they are never separate and cannot survive without each other.

[7] See the chapters in my *Man and his Government* (1963).

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