LAW AND POLITICS

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Is law a creature of the political order? Does law also structure politics? What are the relations between law and politics? The answers to these questions are more complex than many people have assumed. Indeed, my previous work has generally assumed that law is a creature of politics without an adequate consideration of the possible types of relationships between the two.[1] This brief paper provides a preliminary outline of these possible relationships.

"Politics" can be used to refer to various activities in social organizations in which people strive to increase their power and to promote their interests. We speak of politics in labour unions, academic, and voluntary organizations, as well as in the state. The focus here is upon the politics of the state, especially by representatives in legislatures. Even politics so circumscribed can occur at two levels which it is important to keep distinct. One level is that of the constitution in establishing the fundamental structure of the state. The second level is that of ordinary law and decision making, particulary the making of statutes and regulations and their application to particular cases.

At either level, relationships between law and politics may be of three types and in either of two directions. The relationships can go from politics to law, or from law to politics. They can be empirical (causal), analytic (definitional), or deonic (normative). Major theories of law differ about which of relationship holds and its direction.

Politics and Constitutional Law

In considering relationships between politics and law, it is best to consider separately relations from politics to law and viceversa. In constitution making, politics obviously has a relationship to law, for constitutional conventions and ratifications are part of the political

[1] Michael D. Bayles, *Principles of Legislation* (Detroit: Wayne State University Press, 1978).

process. This relationship is an empirical one; politics in fact creates the constitution. H. L. A. Hart holds that an even more basic empirical relationship exists between politics and the legal order. According to Hart, the key to a legal system is the union of primary and secondary rules. The secondary rules of recognition, change, and adjudication are in effect the constitutional structure of a state. According to Hart, their existence depends on acceptance by officials.[2] Although this acceptance need not be on moral grounds, it is fundamentally a political decision. The existence of a rule of recognition is a matter of fact.[3] Thus, in Hart's view, the existence of a legal system causally depends upon political acceptance of a rule of recognition.

This dependence of law on politics is converted by Hart into an analytic relationship. It is logically inconceivable for a legal system to exist without an ultimate rule of recognition which is defined as one accepted by officials. This analytic dependence on law of politics is found in all theories, such as Kelsen's,[4] which maintain effectiveness is a necessary condition for law. Effectiveness depends on a political order, which implies political agreement on the structure of the order. Of course, such a political order need not be thought best or even good by a majority of the populace, yet the power positions must be controlled by persons who largely agree about the constitutional structure of power.

The third possible relationship of politics to law is deontic or normative. For such a relationship to hold, politics must provide normative force to law. Some consent theories imply such a relationship. If one holds that a just political order rests upon the consent of a majority of the people, then a just political order confers normative force to the constitution. Some versions of natural law theory also imply a deontic relationship between politics and law. If political principles are part of natural law, then they confer legitimacy upon the legal system. This deontic relationship will also be an analytic one, if one holds that rules made by an illegitimate political order are not valid law. Professor Lon Fuller came close to holding such a view. The Nazi political system, he thought, so violated the internal morality of law that it failed to constitute a legal system.[5]

To summarize, at a constitutional level law may be thought to

2 H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 113.

3 *Ibid.*, p. 107.

4 Hans Kelsen, *The Pure Theory of Law*, tr. Max Knight (Berkely and Los Angeles: University of California Press, 1967), pp. 208-11.

5 "Positivism and Fidelity to Law —A Reply to Professor Hart", *Harvard Law Review* 71 (1958): 660.

depend on politics in any of three ways. (1) A legal order can be empirically dependent upon a political order, a view held by all people who believe effectiveness is a necessary condition for the existence of a legal system. (2) A legal order can be normatively dependent upon a political order, or a political order that meets certain moral conditions such as consent or an internal morality. (3) Either an empirical or normative relationship can be the basis for an analytic relationship, so that the concept of a legal system logically depends on an effective or moral political order. All theorists appear to agree that a political order is a necessary condition for law in at least one of these three ways.

One may also ask, although few have done so, whether there are relationships from constitutional law to politics. Once a constitution exists, as a matter of contingent fact, constitutional law can fundamentally restrict politics. The primary relationship of this sort consists of constitutional requirements for amendments. A constitutional amending provision regulates the forms of political activity. Thus, in the United States, the requirement for ratification of amendments by three-fourth of the states has significantly shaped political activity for an equal rights amendment. Moreover, it is practically impossible to change the structure of representation in the United States Senate, for no state can be deprived of its two elected senators without its consent.

A very complicated example of the relationship of constitutional law to politics has arisen in Canada. The Canadian constitution is the British North America Act passed last century by the British parliament. The Trudeau federal government has been unable or unwilling toreach agreement with a majority of the provinces on a request for patriation of the constitution with an amending formula.

As of this writing, the dispute has been submitted to the Supreme Court of Canada. The federal government contends the issue is basically a narrowly legal one —whether the federal parliament can pass a resolution requesting partriation of the constitution. It contends that Parliament has the power to pass any regulation it wishes, including a request for patriation of the constitution. The majority dissenting provinces argue that the question is a broader political one involving the nature of federal-provincial relations which cannot be unilaterally altered by one party. The federal government has agreed to abide by the Court's decision, which suggests that politics depends on law. However, the agreement to delay final parliamentary action pending, and to abide by the Court's decision was the result of a political compromise among the three federal political parties. In this situation,

politics and constitutional law evidently affect one another. The effect of the Court's legal decisions upon politics upon a prior political decision to give the Court authority to determine the constitutional question of patriation procedure. Whatever the Court's decision, it will fundamentally structure Canadian federal-provincial politics for years to come.

Hans Kelsen held that law stands in a type of deontic or normative relation to the constitution. The Basic Norm provides the normative force to the political creation of the constitution.[6] While the political order must be effective for the legal order to exist, it is the Basic Norm which provides a normative character to the political system. Without presupposing a Basic Norm, the constitutional order is simply an effective coercive system. Many other theorists hold that the rule of law is a necessary deontic condition of a justifiable political order; it is moral basis for a political system.

For Kelsen, the Basic Norm also stands in an analytic relationship to a legitimate, but not necessarily morally justified, political and legal order. However, a Basic Norm is not logically necessary for the existence of a political order, only for those to which some form of legitimacy is to be ascribed. Thus, at the constitutional level, all theorists agree that a political order is necessary for law, but law is not logically necessary for a political order.

In sum, at the constitutional level, politics ground law, either empirically or normatively. These relationships support an analytical dependence of law on politics. While law does limit and regulate the politics of constitutional amendments and change and the rule of law is widely thought to be a necessary condition for a justifiable political order, nevertheless, these empirical and normative relationships of law to politics do not support politics being analytically dependent on law.

Politics and Ordinary Law

At the level of ordinary law, constitutional law has significant relationships to politics. First, the constitutionally mandated law-making procedures must be followed. Here constitutional law sets normative conditions for politics. Yet, actual compliance with the constitutional procedures constitutes the empirical effectiveness of a constitution or political order. Such effectiveness is an empirical and analytic condition for the existence of a legal system. Second, if a

6 Kelsen, *op. cit.* pp. 198-99.

constitution contains a bill of rights or other substantive restrictions upon law making, the constitutional law stands in a further normative relationship to politics. Interestingly, these constitutional restrictions need not be followed to establish the effectiveness of a political order; they are not analytically necessary for a legal system as a set of effective procedures is.

Ordinary law is obviously the causal outcome of legislative politics. The balance of political forces in the legislature shapes legislation. As an empirical matter, political considerations also influence judicial decisions. Courts often look to legislative considerations interpreting statutory material. Courts are also relucant to make or overturn decisions when they believe the matters should be or have been considered by the legislature.

Ronald Dworkin goes further than this contingent empirical relationship between politics and law. He contends that in reaching decisions in hard cases judges should look to the best political theory consistent with the bulk of precedents.[7] On his view, politics, or the normatively best politics, has a significant deontic role in judicial reasoning. Dworkin not only holds that judicial decisions in hard cases ought to be shaped by the best political theory, but that the law is the logical result of applying the best political theory, whatever the judges may decide, for they can be mistaken. Thus, the deontic relationship becomes an analytic one for determining the law in hard cases.

Dworkin's analytic claim goes too far. It implies that a poor decision of a court of final appeal is not even law, not simply contentions or bad law. He implicitly converts good law into correct law. The opposite of good law is bad law, which is still law. However, the opposite of correct law is incorrect law, which is not law at all. Thus, if court decisions are not the logical results of applying the best political theory, the decisions fail to constitute law. One should keep the deontic relationship of political principles to good law distinct from an analytic relationship for the very existence of law.

Ordinary law can also affect politics. The existence of a law can have a significant causal effect on political considerations. Many laws which confer benefits upon people create vested interests. The politics of repealing such laws is quite different from that of their creation. If a law establishes an administrative agency, then attempts to repeal the law and abolish the agency, considerable opposition win come from agency employees, even if the agency has not been effective in

7 Ronald Dworkin, "Seven Critics", *Georgia Law Review* 11 (1977): 1952; see also Lawrence A. Alexander and Michael D. Bayles, "Hercules or Proteus? The Many Theses of Ronald Dworkin", *Social Theory and Practice* 5 (1980): 276-78.

achieving its purposes. This empirical process accounts for part of the expansion of governments in all countries throughout this century. Moreover, consistency among laws often constrains political activity. New programs may affect many previously existing laws, so the political activity in making new statutory or common law often becomes quite complex.

Can there be an analytic relationship between ordinary law and politics? Kelsen held that anything which a legislature passed in accordance with constitutionally mandated procedures could be law.[8] That is, he held that no analytic relationship exists between ordinary law and politics. Of course, a constitution could have substantive restrictions upon the content of law, but it need not. To the contrary, Lon Fuller held that the very process of making law, as opposed to arbitrary fiat, places some restraints upon what can be law.[9] Perhaps the best claim is that a self-contradictory rule cannot be law. One could argue that even self-contradictory statutes are law, only they cannot be applied. However, the effect is the same, for no such statute can be an effective guide for human conduct. However, statutes can be passed which contradict others. A recent study of the various Ontario statutes concerning confidentiality of medical records found several such contradictions. So if law limits politics at this level, it is primarily empirical and not analytic.

Finally, ordinary law can stand in a deontic relationship to politics. If political activity results in, or is even aimed at, legal change, this often confers a normative status to the activity. Political movements sometimes become legitimated in the public eye if they have some legal goal or success. Under the United States' constitution, such political activity has a protected status.

In sum, constitutional law sets the procedural framework for political activity directed at making ordinary law. It is a normative order for politics which must be satisfied if one is to make law at all. Politics has many obvious empirical or causal effects on law. Extant law can also significantly influence the nature of political activity, either by creating vested interests or by requiring more complex laws than would otherwise be the case. Politics or the best political theory does not stand in an analytic relationship to ordinary law. However, the best political theory does help determine good law, and law can confer a legitimacy upon political activity.

[8] Kelsen, *op. cit.*, p. 198.

[9] Lon L. Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969), ch. p. 2.

The possible relationships between law and politics are many. One must distinguish relationships at a constitutional level from those concerned with ordinary law. At each level, one must also distinguish empirical, analytic, and normative relationships. There may also be connections between the levels, as when constitutional law governs political activity aimed at creating ordinary law. This brief paper has not attempted to provide definitive answers as to which relationships exist, but simply to provide a framework for further consideration.

SUMMARY

This paper gives a preliminary outline of the relationships which may exist between law and politics. One must distinguish relationships at the constitutional level from those at the level of ordinary law. At each level, the relationships can be empirical (causal), analytic (definitional), or deontic (normative). They may be either of two directions —from politics to law, or from law to politics.

At the constitutional level, empirical or deontic dependence of law on politics is often thought to ground an analytic dependence of law on politics. Politics can also depend upon law, as when constitutional provisions limit political changes. Law can also provide normative force to a political order.

At the level of ordinary law, law is causally dependent on politics, and good law is normatively dependent upon political theory, but at this level these relationships do not ground an analytic one. Nonconstitutional law can also causally affect politics, but it has only limited deontic or analytic relationships to politics.