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THE RELATIONSHIP BETWEEN LAW AND POLITICS

DR. MIRO CERAR*

ABSTRACT: This article examines some basic characteristics of the relationship between national and international law and politics. The law functions in relation to politics in three basic aspects, namely as *a goal*, a *means*, or an *obstacle*. First, politics can define certain predominantly legal values or institutions as its *goal*. In this case the *political understanding* of these values or institutions becomes *almost identical to an authentic legal understanding* of the same values or institutions. Second, politics can comprehend the law merely as *a means* for the fulfillment of certain political interests. In this case politics is neutral in its attitude toward the law. Finally, politics can interpret law as *an obstacle* on the way toward the realization of certain political goals. In this situation either politics prevails over law, or vice versa. In the first case politics effectuates its solutions at the expense of the rule of law, while in the second case the autonomy of law is preserved through the decisions of the highest courts or by other actions taken by lawyers, intellectuals, associations, organizations, and the public in order to stop illicit acts of political actors. Law and politics create their own particular pictures of reality. Sometimes those pictures overlap, sometimes they differ. Yet, there is something that the law should never include in its sphere; namely, the differentiation of adversaries according to a purely political criterion. This leads to a strict separation between "ours" and "yours", or, in its most radical expression, to a strict separation between friend and enemy. When the latter occurs, politics inevitably prevails over the law, and reduces or damages the autonomy of the rule of law.

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I. INTRODUCTION

This article examines some basic characteristics of the relationship between national and international law[1] and politics. The subject is obviously much too complex to be dealt with in all possible aspects here; however, some fundamental issues of theoretical and practical, importance are presented with special emphasis. For example, there is an argument to be made that certain checks and balances between law and politics are critical for the relatively peaceful and value-positive (constructive) development of mankind and democratically organized societies. The relatively high level of the autonomy of modern law[2] is one of the most significant factors that define the limits of politics and thus contributes to the constructive development of different societies.

II. STARTING POINT PERSPECTIVES ON THE RELATIONSHIP BETWEEN POLITICS AND LAW

Law and politics as social phenomena are two emanations of the same entity (*a monistic ontological conception*), regarding which their separate existence is only a consequence of a human dualistic or pluralistic perception of the world (*a dualistic ontological conception*). Furthermore, the difference between law and politics is, from a deeper ontological perspective, in fact only illusory, for reason of which also in the fields of legal and political theory and philosophy there are conclusions regarding the partial or complete overlapping of law and politics, sometimes even the equating of the two that raises a crucial question of how both notions are defined. Regardless of such findings, the distinction (i.e. consciously persisting in a distinction) between law and politics at the current level of human development is necessary and indispensable.

With politics, it is necessary to distinguish three fundamental dimensions: the *institutional dimension*, the *normative dimension*, and the *process-related dimension.* The institutional dimension is expressed by the term *polity* and entails the operation of various regulated state and non-state institutions like political parties, social movements, public

1. In this article, by the term *international law* I refer exclusively to *public international law.*

2. A legal system must have a relative degree of autonomy. It cannot be but 'power politics' nor can it be only a specialized language to describe behavior. It lacks the character of law if it is not in some degree 'binding', that is, it must be a means of independent control that affectively limits the acts of the entities subject to it. To that degree, law must be independent of politics. Nor is it law if decisions are wholly arbitrary or capricious. But acknowledging the necessity of that degree of autonomy still allows us to recognize that non-legal factors partly determine or influence the creation, application and modification of the norms and procedures that constitute the legal system (Schachter, 1986, p.747).

media, the legislature, and the government. The *normative dimension* is expressed by the term *policy* and entails the creation of normative ideas or ideals that define basic societal values and objectives geared towards a practical realization of such. Lastly, the *process-related dimension* is expressed by the term *politics*, which is expressed in the formation of the political will through the implementation of the social power and authority and built up through conflict and consensus.[3]

If we attempt to concisely analyze the law through the above mentioned three dimensions, we can see that from an *institutional perspective*, the law is expressed primarily through two factors: the establishment of specific state bodies legitimized by means of their specific professional legal structure and functioning (e.g., the courts and the state prosecutor's office), and non-state institutions where the attorneyship belongs. From the *normative perspective*, the law is the creation of general and individual legal norms. From the process-related perspective, the law appears by means of various procedures like the legislative or criminal procedures where legal solutions are formed through the functioning of state bodies and individuals.

In this text, I will discuss *politics* in its broadest meaning, primarily encompassing the process-related sense, which also includes various policies and polities. I will define *law* as the binding value-normative system established and carried out by, the state in national law and carried out by international organizations and institutions in international law, which are intended for the establishment and maintenance of a balance between justice and order and solving and preventing pressing societal and international conflicts.

The relation between politics and law has both a progressive function and a safeguarding function. Law and politics, separately or together, both encourage and suppress the development of societal relations, while they both also function to bring about justice and order. The essence of their "separate and connected" but not integral existence is to help set each other's borders. These borders prevent excessive one-sidedness in politics or the law, similar to a "checks and balances" mechanism. In actuality, all legal institutes are a partial reflection of individual or collective political decisions at a certain time and in a certain environment, which have assumed a legal form and nature. This is true in systems where the main rule-framer is an extremely politically legitimized body (e.g. the parliament as legislature) and also in systems

3. Drechsler, Hiligen, Neumann, 1995, p. 632.

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where judicial-precedent law has a strong influence because even the most autonomous judiciary is always determined by some sort of political influence.[4] Legal institutes, however, have a reverse influence on politics in that they limit and direct politics as part of a wider legal awareness, or specific legal ideology.

In a mutual relationship, politics and law do not have constantly determined roles, since in different periods they can be, either in agreement or in opposition, socially progressive or conservative, or even reactionary. But, it must be stressed that for law an especially emphasized *conservative function*[5] is characteristic and important, despite the fact that it can sometimes function in a developmentally progressive or creative manner. This doesn't suggest that law cannot be successful in promoting new societal relations but it does suggest that *only* from the aspect of legal policy, this should not be exaggerated. Most often, but not always, it is better to encourage those mechanisms through which the legal order reacts quickly and effectively to the emerging social circumstances and prevents the possibility of one-sidedness or exaggerated aspirations of politics.

It is an immanent characteristic of every law that it is also the means of certain politics.[6] However, law is never a pure form through which political content would be realized, since it is in the very *nature of law* to be *relatively autonomous or independent*.[7] Politics cannot exist without

4. Compare, for example, Dworkin, 1985, pp. 10-11.

5. Since every legal act brings about a certain *change* in the existing (legal) system and therefore always has, in this respect, a dynamic, "developmental" (ideologically progressive or regressive) nature, I would like to explain that by the *conservative function* of law I mean above all the fact that ideas about the new legal order of various societal fields are primarily an expression of a changed political, moral, religious, economic, etc., thinking, and only to a smaller degree also of autonomous legal thinking. The law primarily "conserves" such novelties in its specific (e.g. legislative or judicial precedent) form, and it often also limits them according to the possibilities which are allowed by the existing (constitutional) legal system. Naturally, it is also possible to agree with the standpoints that the law is never only a reflection of the life in society, but it always significantly co-creates and changes the current of societal events (see, e.g. Bugarič 2000, p. 34). However, with regard to this, one must bear in mind that "political policies" are, at least to the degree to which we accept the relative autonomy of politics and law, much more "creative" than is true for "legal policies". Especially in the modern age, politics have assumed, in most cases, the form of general legal acts (e.g. statutes and regulations), which is why e.g. laws that implement various essential societal novelties or reforms, are, in terms of their content, generally still above all an expression of a (new) politics and political ideology, and only to a lesser degree an expression of autonomous legal policies and ideology – certainly, however, such examples very vividly point to the indeterminate nature of the border between law and politics.

6. From the point of view of political thinking the legal system can be viewed as part of the political system, which means that the legislatures and courts are *political* institutions, the rule of law is a *political* ideal, and adjudication and legal reasoning are practices and techniques which are part of the *political* culture of the society in which they flourish (see Waldron (2004), pp. 352 ff.)

7. Compare Maihofer 1969, pp. 1-18, who has defined the role of law in relation to (political) ideology in the light of two opposing fundamental functions. On one hand, he defines law as an

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the law, since the law forms it and keeps it within certain limits that are dictated above all by the ideas of justice and social order. But, law could not exist without politics, since politics gives law its driving force and its "rough content" or substance, which law then adapts to its autonomous framework and develops its final form, expressing it in a specific normative manner. Thus, one of the most demanding tasks of every society is to continuously attempt to establish and maintain an appropriate balance between politics and law. This relationship is completely different in an authoritarian or totalitarian state as compared to a democratic state based on the rule of law. This is because in an authoritarian or totalitarian state, the "*legal policy*" is a subordinate to the "*political policy*." This is in contrast to a democratic state where there is a dynamic, *partner-competitor* relationship between the two policies where sometimes politics prevails and other times the law prevails.

In democratic orders, modern law and politics, as a general rule, intensively confront one another in legislative and other parliamentary procedures. This is where the influence of politics on law is the strongest. Nevertheless, modern law maintains a great amount of autonomy. This autonomy is achieved through: the fact that interest groups never fully determine the decisions of a pluralistic legislative body or could direct such body exclusively according to political preferences; substantive and procedural legal rules, which to a large degree determine the limiting framework where the legislature operates and creates certain parliamentary practice (routine), which it is difficult to depart from (the predominance of legal formalism); and the independent judiciary that limits excessive political aspirations and places them within the legal limits of functioning.[8] What is especially important today in many countries is the role of constitutional courts. These courts, as a general rule, routinely interfere with the politically conditioned and interwoven activities of the legislative and executive branches of power, and therefore their decisions are naturally more or less politically colored. Finally, a certain level of legal awareness can be added to all this. Legal awareness always develops in political actors and directs them as an internal commitment to observing fundamental legal values and the existing law.

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ideological factor ("ideologisches Faktum"), and on the other as a critical factor in opposition to ideology ("ideologiekritische Instanz").

8. Lempert, Sanders 1990, pp. 429-430.

III. FACTORS OF THE RELATIVE AUTONOMY OF (MODERN) LAW

The factors that ensure the relative autonomy of modern law can generally be divided into two groups: the largely formal factors of the autonomy of modern law are its specific formalism, abstract nature, generality, systematicity, specific linguistic expression (legal language), and the professionalization of its agents; in the material (substantive) sense the autonomy of law is ensured primarily by its own historically developed and consolidated values (legal tradition), which are distinguished as a relatively independent whole from the political, moral, customary, religious, and other values.

If we briefly look at generality, abstractness, formalism, and systematicity, we can see that these four largely formal characteristics of modern law indicate a new quality as compared to pre-modern law. *Generality* is a characteristic of the legal norm in that it does not aim at an individually determined person, but rather at a category of people, who are determined only by general characteristics. Generality includes a legal "depersonalization" of the subject, which appears along with the neglect of his individual and societal peculiarities. The main function of generality is to ensure legal equality.

The *abstractness* of legal norms refers to characteristics of norms that through means of symbols and concepts rise above concrete cases and create a model of action, i.e. a pre-formed standard of future relationships and action. The main function of abstractness is to ensure legal predictability and trust in the law. Generality and abstractness help establish typical legal norms. This is especially characteristic of a modern state based on the rule of law that rejects medieval legal particularism, legal inequality, and the arbitrariness of authority.

Formalism is an inevitable consequence of generality and abstractness in law. It is that characteristic of the legal norm that makes it appear to us as a concept separated from concrete content, it establishes clearly formed demands in the process of the formation and use of the law. Legal formalism enables a technical-rational functioning of the state apparatus and other subjects, enabling parties to envisage legal consequences.

Systematicity includes the tendency of the legal system to represent, to the greatest possible degree, a logically coherent, internally balanced, and non-paradoxical system of legal norms. The main characteristics and

functions of the legal system are manifested as ensuring the highest possible level of unity, coherence, and completeness of the law.[9]

None of the four mentioned formal characteristics of modern law is an expression of ideologically neutral methods; instead they all represent an expression of a certain spiritually conditioned societal development. In the narrow sense, these characteristics are primarily an expression of the political demand of the modern society seeking to have such a legal form secured. This corresponds to the values of the modern society and to its accompanying economic and political structure.[10] The formal and material characteristics of modern law are thus mutually dependent; the former cannot be understood without the latter.

An important factor, which in the development of modern society has made a significant contribution to the high degree of autonomy of the law, is the formation of a broad stratum of people engaged professionally in the law and other specific properties of the law (i.e. legal formalism, the "monopolistic" nature of legal language.). An old saying from the time of the reception of Roman law exemplifies the importance of the personal element: "What a lawyer cannot contemplate does not legally exist".[11] This thinking is related to the methodological approach, which seeks a definition of the law merely by focusing on the subject which legal experts are dealing with. But this or any other *closed* definition of the law may lead to it being comprehended in an entirely self-referential manner and hence a *circulus vitiosus*. An example of such comprehension is the *autopoietic* definition (or theory) of law, which defines the law as a self-regulatory system capable of self-generation.[12] This view of the law asserts its independence of religious, economic, and other historical constellations because it acts exclusively in accordance with the rules that it sets itself.[13] The *autopoietic* definition (or theory) of law should have a liberating effect for law, but it is instead a distorted rational comprehension of a certain phenomenon (in this case, the law) in which a high degree of analytical or discriminating capability of rational thought is maintained. But, this paralyzes its irrationally conditioned

9. For more detail on the four basic characteristics of modern law, see Perenič 1981, pp. 29-49; 75-85.

10. *Ibid.*

11. See Weber (note 32), pp. 492, 493.

12. The main characteristics of an *autopoietic* system are: 1. the system produces and reproduces itself in accordance with its own rules, where new elements emerge exclusively through manipulation of the elements within the system itself; 2. the existence and dynamics of the *autopoietic* system are dependent on maintaining its capacity for *autopoiesis*; 3. no external factors can cause a change in this system because all changes to the system are exclusively internal and structurally immanent (for more detail, see, for example, Šumič-Riha, Riha, 1993, pp. 48-57).

13. See Teubner, 1989, p. 36 ff.

developmental (jumping) component, because reason cannot succeed in breaking out of the closed system.

While an *autopoietic* comprehension of the law has a positive function, at least as it highlights the great importance of systemized positive law and as it intensifies the questionable nature of man's objective capacity to appeal to transcendental values and other extra-legal conditions of lawfulness, it merits repeating that the law cannot, by its very nature, be an entirely independent whole. This is because the *mediating role* is one of its basic functions. Grasping the autonomy of the law as a relative and limited category also reflects man's deep awareness of the all-encompassing mutual connectivity of individual phenomena in the world. So the rational remodeling of this deep intuitive awareness, which links the law with extra-legal spheres, much more accurately reflects the authentic nature of the law than does the *autopoietic* or some similar rationalization of the legal phenomenon, such as Kelsen's "pure theory of law."[14]

Returning now to lawyers and other subjects who contribute by their activities to the high level of autonomy of the modern legal system, we can see that these subjects belong to professional groups that establish a high degree of monopoly on the understanding and implementation of law. Lawyers and officials established this monopoly primarily from two perspectives: firstly, through their specific manner of organization and formalized (rigid) rules of operation; secondly, through the formation of a specific language of the law. Naturally, there is an essential difference between lawyers and officials. The position of lawyers and judges is much more independent. Accordingly, they can, to a relatively large degree, co-create the law. Meanwhile, public administration officials are much more hierarchically subordinated in their functioning and can within their competences only minimally co-create the law.

Max Weber was amongst the first to more broadly point out the characteristics and peculiarities of the modern bureaucratic state apparatus.[15] Among these characteristics, there are many that lead to the monopolization of administrative activities by bureaucracy. These characteristics include the realization that administrative-legal regulations are extremely and specifically formalized, which lowers the

14. See Kelsen, 1934.

15. These characteristics are above all strict rationality, formalism, the hierarchical nature and connectedness of functioning, inner discipline, professionalization, the separation of the administrative apparatus from the means of administration, careerism, the business routine – i.e. an impersonal approach to dealing with matters (the operation of *sine ira et studio*), etc. For more detail on this, see Weber, 1956, pp. 125-130; cf. Tadić, 1988, pp. 272-284.

comprehensibility of the law for the layperson. Conversely, the Judiciary and other activities of professional lawyers also establish numerous interpretational and legal sub-systems by their immanent *formalism*. This, to a considerable degree, transforms the fundamental general messages of legal acts into "legal esoterica". It is thus justifiably possible to consider legal or judicial *formalism*, as one of the central constitutive elements of the autonomy of the law.[16]

Within the framework of legal formalism, special importance is placed on legal language. Legal language adds to the high level of autonomy of (modern) law. Naturally, legal language can never be completely autonomous since it is always a sub-system of the general language from which it takes the largest share of its formal and content-related characteristics.[17] However, certain broader layers of the legal language are distinctly legally specific. This means that other language systems aspiring to express themselves through law (e.g. politics, economics, morals) have to significantly adapt to these layers. This is a common practice used by the state or other political authorities whom are aware that a monopoly on the legal language is a powerful means of maintaining a monopoly on power.[18] The difference between various historical ways and the modern way of monopolizing the legal language is that in the past (e.g., in the middle ages) authorities often denied the public nature of the law or they arbitrarily and unpredictably created the law. Conversely, in modern society, the public nature of the law is one of its fundamental principles. But nevertheless, due to its extreme extensiveness and complexity, the law remains to a large degree only in the cognitive reach of legal, administrative, and related occupations.

Alongside all the above-mentioned and largely formal factors of the relative autonomy of modern law, we should at least briefly point out a key substantive, content-related aspect of this autonomy, the value-related tradition of the law itself. The specific tradition of the law is a *condition sine qua non* of the autonomy of the law and its quality in terms of values. Even revolution that forcibly and radically eliminates some political and legal order at the same time always "assumes" some other political and legal history, for example, the bourgeois instead of feudal or the democratic instead of autocratic. Revolutions require the parties to establish a new order, while either following the tradition of

16. See Lempert, Sanders, 1990, pp. 410-419.

17. For more detail, see e.g. Visković, 1989, pp. 25-31.

18. Visković, *ibid.*, p. 125, is even of the opinion that the language of the law is more exclusive and secretive than religious or political languages since it diverges from the general language and general national awareness on a deeper level than the other two.

some other existing order or by following the example of a tradition formed by the fundamental premises of its philosophical-legal and social-theoretical doctrine Clearly, revolution can never be so radical as to momentarily completely break all forms of continuity with the former legal order, practice, and thinking. A part of the "old history" is thus for at least some time still preserved in various legal customs and legal thinking. And as a rule a part of this history is preserved within a renovated institutional order.

Lastly, the key for understanding the relative autonomy of the law is examining the issue of the relationship between law and power/force, since the effectiveness of the law always depends on some kind of normative, cognitive, or other power, and in the final consequence also on physical force (coercion). The principled question that arises first in connection with this is "whether force is merely a *means* of realizing the law," as is usually claimed by traditional legal theory, or is force actually the *content* of law itself? as some important legal theorists think (e.g., Karel Olivecrona, Hans Kelsen, Alf Ross.)[19] It should at this point be briefly emphasized that the power of law is *also* expressed through force, which is immanent in legal norms, but this manifestation of power *just by itself* does not ensure also actually effective force. The law can also be defined as a system of rules about force, but law by itself, without "assistance from outside", cannot fully realize such force. Accordingly, the law needs politics and political power[20] and in a broader sense morals, customs, etc, which are in agreement with the law as a whole. This in turn enables and ensures its effectiveness through its institutions specialized also for the implementation of physical force.

IV. THE STATIC AND DYNAMIC NATURE OF MODERN LAW

Goethe once said "all periods that regress and decay are subjective, while periods of progress have an objective orientation."[21] While it is true that this oscillatory and dualistic perception of the world does generally accompany human development, this or any other bipolarity is, in the holistic sense, merely illusory. In the creation and study of the law, it is always necessary to rise somewhat above the current time and space to see social fluctuations as only a reflection of a general law of relativity which pervades the human world. In this case, it is not a matter of emphasizing the conservative nature of the law mentioned earlier, but

19. For more detail on this, see Bobbio, 1988, pp. 51-61.
20. Habermas, 1997, p. 134, is of the opinion that the law presupposes political power, and that this power is actually constituted in the form of law.
21. From Kaufman, 1994, p. 29.

emphasizing the requirement for the law to have a stabilizing function that does not allow the law to succumb to excessive one-sidedness, for instance, being excessively programmatic. However, this can only be achieved by establishing an appropriate balance between the static and dynamic aspects of the law.

The static aspect of the law is an expression of the illusory idea of an objectively definable legal substance. The dynamic aspect is an expression of an understanding of the socially and otherwise conditioned dynamics of legal development. The illusion of a static aspect is created by the rational form of the legal substance in which, under the influence of irrational factors (such as intuition, emotions, and will), the developmental nature of a rational approach is consciously restricted. Translated, this means that while the mind still recognizes different or opposing possibilities from those laid down in the legal acts, it nevertheless remains "fixed" on the substance contained in the legal acts. At the same time, irrational factors can create within the individual a psychological feeling that this substance forms a homogenous unit, which can only be comprehended in a single correct manner. In this case, the mind is of course actually "fixed" only within the legal sphere, because on extra-legal levels it can oppose the legal substance through various theses, antitheses, etc. On the other hand, we have an idea of the rationally dynamic aspect of the law. This is an irrationally conditioned expression of "liberated reason," which in its discriminating capacity internally divides legal concepts into many different sub-concepts, thereby destroying any possibility of comprehending an individual legal norm or institution as a substantive unity. In this extreme, we are confronted with an infinite dispersion or an infinite pluralism of the legal substance, which upon rational reflection enables unlimited diversity in the empirical social sphere to which the law relates.

At the level of legal discourse, these two aspects represent the difference between the idea of the scientific nature and the contingency nature of the law. These constitute a dualism between the "objective", on the one hand, and the "coincidental," the "optional," the "selective," etc., on the other. Both aspects are one-sided and as such imperfect since they are merely parts of a holistic whole. But because man *cannot think in terms of unities or wholes*, in the law a suitable equilibrium or proportion at least has to be ensured and the degree of complementariness between the static and dynamic aspects of the law and legal acts optimized.[22] It is necessary to rationally maintain the idea of an autonomous and objective

22. Compare Sunstein's findings on the relationship between (constitutional) law and politics (Sunstein, 1994, pp. 126-127.)

law, and, on the other hand, maintain the idea of pluralism in the content of the law, where within the framework of the same legal institute various contents are more or less equal in value. This position constitutes a sort of equilibrium between the idea of the scientific nature of the law, supported mainly by modern formalism and objectivism (conceptualism), and the anti-necessitarian approaches to the law, on the other hand, which are expressed in the idea of contingency.[23] It should be remembered in general that the law is a specific combination of the legal idea and the social/legal practice, which we can never authentically and definitively express in the form of a definition. Kant's proposition that lawyers still seek their own notion of the law remains eternally relevant.

We can summarize all of this in the following manner: to an extent, the selection and definition applied in framing a law has a certain *unchangeable* substance, but to a certain degree this abstract or general substance is *changeable*. In the integral irrational/rational sense, the assertion that part of the law is, at least for a certain period of time, *unchangeable,* is fictitious because a concrete definition of the legal substance even in this regard is always relative or subjective. This fiction is vital for the law as it maintains a certain degree of legal predictability, reliability and trust in legal certainty and prevents excessive legal relativism or skepticism.[24] Although it may seem paradoxical, the fiction of the objectiveness of the law needs to be maintained to a certain measure. This does not mean that in general, we agree with a pragmatic ontology (such as that of Dewey), for on the internal personal level the lawyer, as Radbruch said, "must always be aware of the questionable nature of his profession." Because each era must write its legal science anew,"[25] the fiction of a "correct law" is only temporary in nature. Nevertheless it is vital because without it every decision made in law and also in general would be entirely uncertain and therefore untenable.

If we summarize these findings in the light of determination, interpretation and application of the law, we see that the law is, on one hand, *determined* (*static*), but on the other hand *determinable* (*dynamic*). Between these two legal aspects there must exist a general equilibrium because excessive dominance of the first aspect would mean that the law would be, in the normative sense, completely rigid and socially non-functional, while excessive use of the second aspect would lead to the complete relativization and dissipation of the legal substance and would permit and legitimize legal arbitrariness.

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23. For more detail on this, see, for example, Rorty, 1994; Bugarič, 1996.
24. See, for example, Burton, 1985, p. 188.
25. Radbruch, 1956, p. 222.

V. DIFFERENCES BETWEEN THE LAW AND POLITICS

In general, it can be concluded that law and politics are *similar* in their *general normative orientation towards ordering societal relations.*[26] Within this framework, their search for an *appropriate or just distribution of social statuses and goods* depend on the standpoints of the given ruling elite at the level of political and legal decision making. Law and politics are similar in that both resort to certain ideological definitions of their value-related objectives, which are at the highest abstract level often even identical. Within the framework of democracy, for example, the state based on the rule of law, constitutionality and legality, human rights and justice. However, in the process of concretization they often grow increasingly different. In concrete cases, the law often applies the principle of the state based on the rule of law, the principle of justice, or a certain human right differently than politics. Besides this, there also exist specific political values, which essentially differ from legal values (e.g. the value of affiliation or loyalty to a certain political orientation).

From here onwards, we are already faced with numerous differences between the law and politics, of which only the most fundamental will be concisely treated in the following sections. With regard to this, in perceiving these differences, it is necessary to take into consideration that these are by nature *relative* and based only on the *criterion of predominance.*[27] On the other hand, we must be aware that the law, as well as politics, are each by themselves integral units of all their components. This is why the definitions of individual differences appear from this aspect as only partially reliable or just as illustrative, since the elimination of individual components from their integral units necessarily modifies their characteristics. It must also be taken into consideration that these differences or differentiating criteria can, in different cases, appear unconvincing since in certain situations or in its individual spheres, politics can assume some characteristics of the law, and vice versa.

Politics institutionally comes into existence within the framework of largely political state bodies (e.g. the government and parliament) or within the framework of largely politically oriented and functioning social groups (e.g., political interest groups). The law comes into

26. Widespread consensus exists that law, including courts, and politics are important for three sets of activities that are central to every modern state: policy-making, social control, and regime legitimation (see Jacob, 1996, p. 3).

27. Cf. Novak, 2003, pp. 55-86.

existence on an institutional level within the domain of the above-mentioned political state bodies, and in the domain of the third branch of power, i.e. the judiciary, and in the broader sense in all institutions of the judicial system.

Politics is expressed through political documents and activities (political declarations, party programs, activist field work, etc.), as well as through legal acts (by adopting the constitution, laws, decrees, codes of rules, etc.). The law is most authentically expressed above all in the interpretation and application of legal acts by judicial institutions and through the theoretical ideas and practical activities of lawyers as a special professional class.

In politics *interest* and *power* have a greater role and legitimacy than in law. In law, as a general rule, power is replaced with the concept of jurisdiction, and interest by the concept of legal evaluation, although legal activity at least indirectly reflects certain social/political interests and in its structure it is imbued also with relations of power. Social and political interests are to a large degree implied already in general legal acts, in accordance with which courts, for example, adopt decisions. Through their legal activities, courts can naturally also implement their own interests. In law however, the element of power does not appear as it does in politics, where the question of power is connected with the aspiration for predominance over other political (and partly also non-political) ideologies and subjects. In law power appears for example through the authority of the higher judicial and other legal bodies which by their explanations and decisions *de facto* or *de iure* prevail over the decisions of the lower judicial and other bodies, and above all also through the institutionalized power of the judiciary in comparison with other authorities and subjects.

In their *psychological-political* perception of other subjects, political subjects as a general rule establish extremely polarized relationships, namely in the categories "ours – theirs," or in the sense "whoever is not with us, is against us." In democratic systems, individual political subject, like political parties or their individual members, often hide such an exclusionary perception from the public. In autocratic or totalitarian systems (or in political subjects with totalitarian tendencies) such an attitude or perception of differentness is always expressed publicly (naturally, only by those holding power). In its extreme form, this aspect of political perception is expressed by Schmitt's well-known

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differentiation between friend and enemy.[28] On the other hand, polarizations are also characteristic of typical legal procedures that appear due to the different views and interests of individual parties in legal procedures. However, these polarizations, as a general rule, do not have a "higher" interest or direct ideological background. Moreover, these polarizations, in comparison with political ones, generally do not have the function of fighting for political power.

In its normative structure and actual functioning, politics is more *adaptable* and *flexible* than law. A political decision or political agreement can be, content wise, much more diverse and nuanced than is generally true for decisions or agreements in legal forms (e.g. judgments or contracts). At the same time, politics has a much broader field of functioning at its disposal. In comparison with the law, politics is not confined by the framework of the set legal norms, but can, to a greater degree than law and in a more diverse manner, spread to other value-normative spheres (e.g., the field of religion, morals, the economy, customs, etc.). Accordingly, politics is also more *flexible* in seeking *compromises* between different ideological, interest, or normative premises. The law is also in this respect more rigid and can implement compromise only where the legal system dictates or allows, for example, a "compromise" between aggravating and mitigating circumstances in criminal cases, or a compromise between the principle of legal equality and the social state with regard to their connected explanation and use.

By its nature and practical functioning, politics is considerably less predictable and reliable than law. With a little irony, we can seek and find the confirmation of this in many political promises and predictions. Conversely, legal actions are fairly precisely determined by published legal acts, which can be changed only in accordance with previously envisaged and, as a general rule, public procedures. In contrast, political activity, especially in its part that legitimately extends beyond the sphere of law, is determined more loosely and is not subject to reliable time-based conditions and limitations. Furthermore, the share of political

28. As is well known, Carl Schmitt is of the opinion that the distinction between friend and enemy is, in the last resort, a specific criterion (*differentia specifica*) of the political sphere, as opposed to the dichotomies "good – evil", "beautiful – ugly", "beneficial – harmful", etc., which can be found in morals, aesthetics, and economics. According to this author, the distinction between friend and enemy explains political actions and motives, with regard to which this distinction is sensible only if it refers to an extreme level of intensity of the association or dissociation (see Schmitt, 1994, pp. 84-85). At this point we can mention, for example, that according to Freund *the relation between friend and enemy* is one of the three presuppositions of the *essence of the political.* The other two are the *relationship between command and subordination* and the *relationship between the private and the public* (see Freund, 1997, pp. 100-103).

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guidelines actually determined and political norms are determined by political actors and are not entirely transparently accessible to the public.

Politics and the law differ to a considerable degree regarding sanctions, although they partly also overlap in this field. On one hand, the law itself prescribes certain sanctions for politically unsuccessful actions, like a change of government as a consequence of a constructive vote of no confidence in the government. On the other hand, legal and political incorrectness can be simultaneously penalized in a legal manner, like imprisonment in the event of abusing a position of authority. Naturally, there exist specific political sanctions that the law is not familiar with, for example, spontaneous or organized criticism, the demand for someone's resignation, or not electing someone. Sanctions also exists that cannot be directly connected with political mistakes (e.g., a fine for a traffic violation). In law, it is only possible to pronounce a sanction in accordance with a legal procedure carried out prior to that, while in politics a sanction can also be imposed without such a procedure (e.g. criticism or a boycott).

At this point, the difference between the law and politics stemming from their different *perception* of the relationship between rights and duties must be mentioned. Since both belong to the field of defining rights and duties, law and politics can be similar in this respect. However, the *correlational imperative – attributive* consciousness is primarily the domain of legal thinking and functioning, since only the law very clearly and consistently strives for the establishment of a proportionate correlation between rights and duties. At the starting level of the comparison between law and politics, it can be seen that political actors strive for an unlimited right to implement their own political ideology. The law in a democratic political system determines those limits that a particular political ideology is not allowed to exceed, since by doing such it would excessively or inadmissibly limit the space for the implementation of other admissible political ideologies, or it would inadmissibly interfere with the basic rights of individuals, or impede the fundamental constitutional values of society. On other levels of political functioning, political actors strive in their consciousness and actions for the maximum utilization of functioning space allowed by the legally defined rights and freedoms. In this respect, the law is considerably more balanced since it, correlationally and proportionally places equal weight and importance on rights and duties. In addition the law protects the fundamental human rights of individuals in relation to political authorities.

This presentation certainly does not encompass all possible differences between the law and politics. It is clear that these differences can also be relativized (or absolutized) in many respects. Nevertheless, such a presentation can be beneficial from many aspects because it calls attention to the fact that the law and politics are different due to their different value-related starting points.

VI. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND POLITICS

All of the presented arguments regarding the autonomy of the law, as well as regarding the similarities and differences between the law and politics, which were intended primarily for the sphere of the *national* law and politics, also apply, *mutatis mutandis*, to the sphere of *international* law and politics. Naturally, there are some significant differences between both spheres, but most of these differences are, regarding the issue of the autonomy of international law, only a matter of degree or intensity.

Over the years, international law and its relationship to national laws have been defined in a variety of ways. It is crucial that international law be comprehended as *law*, and is relatively autonomous with regard to national legal orders, and also regarding national and international politics. Of course, there have always been different and opposing theories concerning this issue. There are several arguments for and against the claim that international law is truly law.[29] Here again, we are faced with the issue of ontological monism or dualism. If we are inclined toward monism, we tend to define international and national law as a unity, while a dualistic approach leads us toward the establishment of essential differences between both entities.

Although there have been many thinkers and scholars who have defended either the monistic or dualistic approach,[30] it seems that today the dualistic understanding prevails in theory and practice. International law can be defined as a relatively independent set or system of *legal rules* (legal norms), called and comprehended as *law*, and applies to normatively determined legal subjects, primarily to states and international organizations, but also to other subjects, such as "peoples", and individual human beings.[31] International law significantly differs from national legal systems due to its predominantly horizontal nature,

29. See, for example, Arend, 1996, pp. 292-293.
30. See Andrassy, 1984, pp. 4-6.
31. Cf. Arend 1999, pp. 26-35.

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its embodiment in the system of international relations, the nature of its sources, the nature of its subjects and their treatment within the sphere of international law, the lack of a central ("sovereign") legal authority, the decentralization of legal functions, the characteristics of legal procedures before international tribunals, and, last but not least, the weak and specific nature of international legal obligations and sanctions.[32] Hence, it is useless from a practical point of view to maintain a theoretical approach that denies any essential difference between international and national law.

There are, of course, some common features which can be ascribed to any system of law, such as a set of legal norms (legal principles and rules), the existence of certain legal procedures, and a person or body that creates legal norms and adjudicates accordingly, the existence of relatively effective legal sanctions, etc. Yet, at the very core of its existence the law is a collective psychological phenomenon, which manifests itself in humans' collective imperative-attributive normative comprehensions of the conflicting relationships between different legal subjects.[33] As explained above, every greater digression from this relatively balanced imperative-attributive normative comprehension of social relations means that in our minds we have left the legal dimension and entered some other.[34] Thus, to put it simply, international law exists as a relatively autonomous phenomenon in relation to national law, as well as to international or states' politics, only inasmuch as we comprehend it as *law* and treat it as such at the level of international and other relations.

Almost all factors that establish the relative autonomy of the law apply more or less to the autonomy of international law. These factors are individually and together much weaker than in the case of national law. It is a well-known fact that in international relations politics have a much stronger impact on international law than within individual *democratic* states, where modern law, governed by the rule of law, applies. For this reason it is important that all legal and political actors at the international level strive for more autonomy of international law, especially in relation to politics. As long as checks and balances between international law and politics do not reach a more satisfactory, i.e. equilibrated level, the

32. See, for example, Cassese, 2005, pp. 3-21; Shaw, 2007, pp. 1-13.

33. This kind of psychological view of the law was developed by Leonid Petražicki – see Podgorac, 1981, pp. 64-79.

34. Thus, for example, if we want to extend our rights without limits in order to gain more social power and to realize some particular interests, we are in the dimension of political thinking, while our exclusive focus on our inner duties, guided by our conscience, means that we have entered the dimension of (our) morality.

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demand for greater legal autonomy should remain the leading thought of all international actors.

The same reasons that lead to the recognition of the differences between law and politics at the national level, must also be recognized in the sphere of the comparison between international law and politics of any kind. As already mentioned, these differences, when applied to the field of international relations, appear to be more a matter of degree than content. Thus, the relationship between international law and politics differs from the relationship between *democratic state* law and politics mainly in the following ways: a) in comparison with national law, international law is more intensively mixed with politics in the activities of international lawyers and specialized legal institutions, such as international courts and tribunals; b) international law is more strongly influenced and manipulated by political power and interests; c) it is more subject to political thinking in terms of "ours" and "theirs", or "friends" and "enemies"; d) it is more flexible, and, with some exemptions (such as the practices of international courts) also less predictable than national law; e) it is, as a rule, weaker than national law in the sphere of implementing legal obligations or sanctions; f) the correlational imperative-attributive attitude of its bearers, especially international political and legal actors, is weaker than in national law, because of the stronger impact of politics.

VII. CONCLUSION

From the point of view of the law, it can be concluded that national law, as well international law, function in relation towards politics in three basic aspects, namely, as *a goal*, *means*, or *obstacle*. First, politics (in the meaning of political mind or political actors) can define certain predominantly legal values or institutions (such as, for example, the principle of legal equality, the presumption of innocence, or the right to privacy) as its *goal*. In this case the *political understanding* of these values or institutions becomes *almost identical to an authentic legal understanding* of the same values or institutions (e.g., politics strives for the protection of the principle of legal equality or the right to privacy). Second, politics can comprehend the law merely as *a means* for the fulfillment of certain political interests. In this case politics *is neutral in its attitude toward the law* (e.g. politics defines and realizes its political interests and goals in accordance with the principle of legality and legal equality). Third, politics can understand law as *an obstacle* on the way toward the realization of certain political goals. In this case there are two basic solutions: either politics prevails over the law, or vice versa. In the first case politics effectuates its solutions at the expense of the rule of

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law (for example, the legislature enacts laws which give the executive branch more discretionary powers; or politics leaves the laws unchanged, but it does not act in accordance with them), while in the second case the autonomy of (international) law is preserved by the decisions of the highest (international or national) courts, or by other actions taken by lawyers, intellectuals, different associations, and organizations, and, last but not least, the wider public in order to stop illicit acts of political actors.

The law and politics create their own particular pictures of reality. None of these pictures correspond to reality as such, which is an inseparable unity beyond our human comprehension. However, both particular pictures are of utmost importance for our societal life. Sometimes they overlap, and sometimes they differ, more or less strongly. Yet, there is something that the law, either national or international, should never include in its sphere. Namely, the differentiation of adversaries according to a genuinely political criteria, which leads to a strict separation between "ours" and "yours", or, in its most radical expression, to a strict separation between friend and enemy. The ideal of Justice, often presented in a statue of a woman with blindfolded eyes and scales in her hand, must always remain the fundamental guiding principle of the law, and especially of judges and other lawyers, who must never allow themselves to comprehend the parties in conflict – either individuals, or different legal entities, including states and international organizations – as enemies. When the latter occurs, politics inevitably prevails over the law, and the judge or any other person who thinks and feels in that political-ideological way causes, in proportion to their social rank and power (influence), serious damage to the autonomy of the rule of law. This is, in turn, destructive for the democratic society and international relations and must be as such avoided or appropriately confronted to the highest possible degree.

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