Law and Politics
Mauro Zamboni

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A Dilemma for
Contemporary Legal Theory
Preface

This work started as a preliminary step in a larger project aiming to discuss and build a legal theoretical model to help lawyers better understand the policy aspects of the relations between law and politics. At the very beginning I soon realized how extremely diversified the positions of the legal scholars as to these relations were. This book aims at being nothing more than a descriptive tool for both legal theoreticians and legal scholars in general with which to organize the various contemporary legal theories into different ideal-typical ways in order to portray the relations between law and politics. It absolutely does not pretend to be the final words on this issue; just the opposite, this work simply aims at proposing a descriptive starting point from which to begin to consider and critically evaluate contemporary legal theories and their ideas as to the issue on law and politics.

Before starting, I would like to thank Laura Carlson, Jes Bjarup, Brian Bix, and David Wood for reading the entirety of the manuscript and providing me with invaluable comments along the way. I am also deeply indebted to Bruce Anderson, Reza Banakar, Åke Frändberg, and Kaarlo Tuori for taking their time to read the manuscript and giving me insightful and valued comments. Roger Cotterrell, Fredric Korling, and Jori Munukka also gave me very helpful comments on earlier drafts of this work for which I am very grateful. Last, but not least, to Tiziana and Nicole, for always being there, to whom this book is dedicated.

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The central position politics and the political discourse occupy in the modern legal theoretical discussion has been summarized as that:

“Virtually all of modern jurisprudence rests on a distinction between legal reasoning and politics. Legal analysis and reasoning, on the one end, and political argument or philosophy, on the other, are thought to be recognizably distinct discursive practices.”

However, the absence or presence of any general connection between law and politics and how this has been mirrored in legal theory obviously is not simply a recent phenomenon. Niccolò Machiavelli and Thomas Hobbes stand out clearly for their early lucid and penetrating analyses of the law-politics issues in early modern times. From the very birth of the nation state, and particularly after its transformation into the modern welfare state, attention has been specifically devoted to explaining the interrelationship of the legal and political phenomena. This theoretical interest has its roots in the fact as pointed out by Jürgen Habermas, that the very “complex of law and political power characterizes the transition from societies organized by kinship to those early societies already organized around states.”

Closer to the present, Friedrich Carl von Savigny has a central position in particular among legal scholars attempting to draw a conceptual line between law and politics. According to Savigny, the law elaborated by jurists is indeed formed by two interacting elements: the political element, i.e. the one connecting the law to the feelings of the social community, and the technical element, i.e. the one living its own separate life.

Despite all this attention, the issue of positioning the law with respect to the political realm is far from being settled around generally accepted propositions. Just the opposite is the case, as the distances between opinions as to issues of law and

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2 See, e.g., MACHIAVELLI, THE PRINCE Ch. V, Ch. XII (J. M. Dent and Sons 1908) [reprint 1532]; and HOBSES, LEVIATHAN Ch. XXVI (Penguin Books 1985) [reprint 1660].
4 For Savigny, however, the role played by political actors in the process of creating legal norms is starkly limited, in particular in comparison to the one played by legal scholars. See SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 12-14 (1814).
politics have increased considerably over time, in particular after the birth of welfare state and its dissemination in the Western part of the world.\footnote{See, e.g., Neil Duxbury, \textit{The Theory and History of American Law and Politics}, 13 OXFORD J. LEGAL STUD. 249 (1993): “It seems, during this century, that there has been no question more troubling to American academic lawyers than that of whether or not judges are ever entitled to adjudicate politically.”}

The objective of this work is to reconstruct and to classify, according to ideal-typical models, the different positions taken by the major contemporary legal theories as to whether and how law relates to politics. This reconstruction and classification is done with the purpose of determining whether these major legal theories, though reaching different conclusions, have some common points of departure as to the “law and politics” issue.

After presenting the methodological and terminological apparatus used in this work in Chapter One, the relationship between law and politics as based on this structure will be explored as considered and interpreted by the major contemporary schools or movements of legal theory. The approaches of the different legal theoretical streams are classified according to their responses to the following issues: How these contemporary legal scholars view the law in relation to politics (the static aspect); how the law-making relates to the political order (the dynamic aspect); and the degree of the relation of the legal discipline to the political material (the epistemological aspect).

Three ideal-typical models are proposed based on the answers given to these questions by the legal theories: the autonomous model (Chapter Two), the embedded model (Chapter Three), and the intersecting model (Chapter Four). These provide an ideal-typical classification of the different ways the legal and political phenomena’s relations work for the various contemporary legal theories.

According to the autonomous model, the relations between law and politics are depicted as between two connected but still autonomous phenomena. Legal positivism (as espoused by Hans Kelsen) and Herbert L. A. Hart’s analytical jurisprudence will be ascribed to this ideal-typical model. The “embedded model” is the ideal-type better representing the law-politics relations as portrayed by movements such as Critical Legal Studies (hereinafter “CLS”), Law and Economics, and John Finnis’ natural law theory. These theories are viewed as depicting the law-politics relations as one (law) embedded into the other (politics). In Chapter Four, the American and Scandinavian legal realisms are presented as representatives of a third ideal-typical model, designated as “intersecting,” as law and politics within these theories are two intersecting phenomena. Chapter Five ends with a brief discussion as to how these three models, and the legal theories encompassed therein, share a common ground. Each mirrors the peculiar situation of modern law: law and politics tend to keep the features of being two different phenomena as well as of presenting regions of interaction, although with differences as to extent and intensity.
Chapter 1. A Methodology of Analysis and Certain Key-concepts

As the title indicates, this work is an investigation of the positions as to the relations between law and politics as taken by contemporary legal theories. Before commencing the actual investigation, a clarification of the methodology adopted here for tackling and systematizing the positions of contemporary legal theories on the issue of law and politics relations needs to be provided. This necessity stems in particular from the fact that it is quite alien in legal theory to use, as done in this work, an ideal-type methodology to penetrate the complex reality represented by more than 100 years of legal-theoretical discussions as to the issue of the law and politics.

As with any method employed for categorization, the methodology used in this work also has its limits. These are specifically noted here, in particular those limitations resulting from using ideal-typical models to group apparently very different legal theories. Moreover, the meanings of different key-concepts (e.g. politics, political order) used throughout the work are specified below.

1. A Methodology of Analysis

The law currently is subjected to a system of forces towing it in opposite directions, affecting the very nature of the legal phenomenon. This specific feature of contemporary law is further discussed in Chapter Five, but for the moment, it is sufficient to point out how that one of these forces pulls the law into the hands of politicians (politicization of the law) while the other pulls the law away from the political world instead due to the law becoming more and more complex and specialized (specialization of the law).  

The very fact that these contemporary tensions stretch the law towards and, at the same time, away from politics, affects the work of legal scholars. As pointed

1 As to how these forces concretely operate, for instance, with respect to constitutional law, see Christoph Möllers, The politics of law and the law of politics: two constitutional traditions in Europe, in Developing a Constitution for Europe 129-139 (E. O. Eriksen et al. eds., 2004).

2 See, e.g., Joseph Raz, Disagreement in Politics, 43 Am. J. Juris. 26 (1998); and Kaarlo Tuori, Critical Legal Positivism 283 (2002) and his idea of “dual citizenship of legal science.” See also Habermas, Between Facts and Norms, supra at 388-390.
out by Duxbury, “the political nature of law represents a fundamental – if not the fundamental – problem of modern jurisprudence.”

The focus of this work is the actual investigation and mapping out of the main contemporary legal theories according to the answers they provide as to whether and how legal and political phenomena relate. It is necessary here, however, to examine the methodology used in tackling the difficult and complex issue of how the different contemporary legal theories have positioned themselves in the debate concerning the relations between law and politics.

The perspective investigated in establishing a divisive line among the different theories is internal. “Internal” in this work has a very broad meaning, primarily taking into consideration how legal scholars think (i.e. that which is demonstrated in their theoretical constructions) law is related to politics. Using Hartian terminology freely, one could claim that the criterion here is “the internal perspective” taking into consideration the phenomenon of how legal theories perceive the law-politics relations from the point of view of an internal observer (the legal theories themselves) instead of an external one. This choice in favor of an analysis from an internal perspective, for example, permits the exclusion of a more sociological approach as to considering the ideas or theoretical constructions of legal scholars as products of certain political and social environments. The question of why legal scholars think in terms of law and politics (i.e. the sociological, political or moral background they have) then is not addressed here.

The adoption of an internal perspective however does not imply the exclusion from the analysis of the contemporary legal theories embracing a sociological or quasi-sociological position (i.e. the one of the external observer) as to the relationship between law and politics (e.g. certain representatives of the legal realisms). The sociological contributions such theories give to the debate as to law and politics, i.e. in pointing out the law in terms of human behaviors regulated by legal norms, can be measured as one of the internal point of views legal scholars have of the phenomenon. In other words, this work retains its normative perspective as it investigates quasi-sociological legal theories and the external observer’s perspective of the law from the inside, but without necessarily sharing the perspective as to the law as a sociological phenomenon.

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3 Duxbury, The Theory and History of American Law and Politics, supra at 270.
6 A similar operation, but in the opposite manner, is conducted by Cotterrell. He approaches and exhibits from a sociological perspective not only the quasi-sociological le-
As an almost natural outcome of the use of an internal perspective, the differences among the different theories have been drawn based more on how the schools and legal scholars define their positions on the law-politics issues rather than on how they have been categorized by their critics. This work focuses on whether such theories *explicitly* embrace the idea that law and politics have to be studied as two different phenomena, as two similar phenomena or as two intersecting phenomena.

For example, criticism has been directed at one of the most striking representatives of the model claiming an autonomy of law from politics, Hans Kelsen, for defining the specific field of investigation for the legal disciplines. Kelsen stresses that the legal discipline should be purified from political evaluations and considerations.\(^7\) However, his critics contend that politics, expelled from any investigation of the lower levels of law-making (i.e. in the work of judges and of the legislator) tends to re-enter by the main door, i.e. when it comes to the moment of analyzing the Basic Norm giving validity to the entire legal order.\(^8\) The analysis of Kelsen’s ideas concerning the relations between the legal discipline and politics is here based on that which he states (“legal discipline is not legal politics”) rather than on that as stated by his critics (“Kelsen’s idea of the legal discipline is political”).

Once the perspective from which to investigate the contemporary legal theories has been chosen, the second step is to summarize the major issues taken into consideration in the debate about the relations between law and politics into three aspects: static, dynamic and epistemological.\(^9\)

### 1.1 Law and Politics (Static Aspect)

Only a few exceptions can be found among legal scholars claiming that the *content* of the law is either completely independent from or completely dependent upon politics, particularly after the growth of the nation state and the current globalization occurring in law-making processes. As to this first aspect, the content of legal theories (“Empirical Legal Theory”), but also that which he defines as “Normative Legal Theory.” See Cotterrell, Law’s Community: Legal Theory in Sociological Perspective 24-28 (1997).

\(^7\) See, e.g., Kelsen, Reine Rechtslehre iii (2nd ed., 1960).


\(^9\) Although developing in different directions, this classification starts from the distinction made by Brian Bix, Law as an Autonomous Discipline, in The Oxford Handbook of Legal Studies 975-978 (P. Cane & M. Tushnet eds., 2003). As will become clearer in the following, static and dynamic are used in this work (when nothing to the contrary has been specified) with a meaning quite different from that which is ascribed to them by Kelsen, The Pure Theory of Law 195-198 (1970); Kelsen, General Theory of Norms 112-113 (1991); and Kelsen, ‘Foreword’ to Main Problems in the Theory of Public Law, in Normativity and Norms. Critical Perspectives on Kelsenian Themes 11-12 (S. L. Paulson & B. Litschewski Paulson eds., 1998).
the law cannot be viewed as completely independent from politics because the organizational political form of the nation state is characterized, in part, by the fact that the law (in particular in its statutory forms) is a tool available to Parliaments and Governments (i.e. the most important political actors) in order to effectuate programs within a certain community.\textsuperscript{10}

On the other end, the content of the law does not usually disappear completely into politics. The nation state has brought with it (at least beginning in the second half of 18\textsuperscript{th} century) the principle of the separation of powers. From an institutional point of view, this implies that the actors enacting a statute are not the same as those applying it. Moreover, the increasing specialization and sophistication of legal categories and concepts have made it almost obligatory for politicians and layman to employ persons educated in the specific art of drafting laws.\textsuperscript{11}

As this is the environment in which most contemporary legal scholars live and work, it is then almost natural that the vast majority of scholars claim that the content of the law is separate from or identified with politics only to a certain extent. Luhmann, for example, is one of the strongest paladins of a clear separation between law and politics. He admits, however, that law as a concrete phenomenon is only relatively autonomous from the surrounding environment. In reality, law and politics (rarely) interrelate with each other. It is only when giving a legal sociological account that Luhmann introduces the “systems theory” and the “closedness” of the different subsystems (i.e. legal and political) as investigative fields for legal sociologists.\textsuperscript{12}

In spite of this similarity, it is possible to find a dividing line, in particular among the major schools, based on the issue of whether the political substance or message that the law always carries also affects the structures and forms of the law itself. One example of this boundary can be seen between the legal positivistic vision of law as a more or less neutral machine in the hands of politicians, and the claim of natural law theory that a certain “understanding” between the rulers and the ruled is necessary in order to speak of a legal phenomenon. The famous debate between Lon L. Fuller and Herbert H. Hart is an example of the distances separating these two schools as to the issues of law and politics. They address the question of whether the highly political influence the Nazi regime had on German law affected the very nature of the legal phenomenon so much as to make it something

\textsuperscript{10} See generally Ronald J. Pestritto, Founding the Criminal Law: Punishment and Political Thought in the Origins of America (2000), as an example of the fundamental role played by political factions and their (often short-sighted) political goals in shaping a modern state’s legal system.

\textsuperscript{11} See, e.g., William Robinson, Polishing what others have written: the role of the European Commission’s legal revisers in drafting European Community legislation, 1 LOOPHOLE J.COMMONWEALTH ASS. LEG. COUN. 71-81 (2007).

else (Fuller); or whether it was more a question of reaching different (although morally regrettable) political goals (Hart) with the same legal machinery as used in England.\textsuperscript{13}

The divisive question then becomes whether the law is \textit{flexible} by nature, i.e. whether it tends to adapt its forms and nature according to the political substances it carries; or, alternatively, whether the law is \textit{rigid}, i.e. whether it tends to keep the same forms and mechanisms regardless of the content. The central question is whether the law, as perceived by legal actors, changes its shape and manner of functioning in accordance to the values the political actors aim at implementing in the community.\textsuperscript{14}

\subsection*{1.2 Law-making and Political Order (Dynamic Aspect)}

Moving to the second dynamic aspect of the relationship between law and politics, the legal schools address the functioning of law-making here as an alternative or dependent process with respect to the political order and its processes. This is particularly true with the aim of politics to control the entire life of a community (all social, economic and cultural aspects). This aim is typical of the nation state and taken to its extreme by the welfare state and, although in very different forms, by totalitarian regimes such as the Nazi and the Soviet ones. Law-making in its functioning appears to be more and more an integral part of the political machinery. The process of legal production (either in a legislative, judicial or scholarly form) in the creation of new norms, categories and concepts, is viewed as strongly affected by the political environment.\textsuperscript{15}

On the other hand, there is a tendency towards an increasing specialization of the legal world. This makes it more difficult for the political order to interfere with the work of the courts, lawyers and legal scholars. Moreover, the growing establishment of the rule of law has generally taken away any complete freedom of action from the political sphere, limiting the political influences inside the legal


\textsuperscript{14} See Aulis Aarnio, \textit{Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics} 20-25 (1997). The dichotomy “flexible-rigid” law is used in the present work in a meaning different from the one normally used by legal sociologists. For the latter, flexibility of the law refers to the tendency of present legal phenomenon of retreating from some areas of community life, leaving them to other forms of non-legal regulation. See, e.g., Jean Carbonnier, \textit{Flexible Droit. Pour une sociologie du droit dans sans rigueur} 62-71 (7th ed., 1992).

world and the law-making mechanisms to certain specific areas and through specific modalities of action.16

This dualistic general tendency inside modern relations between the law-making and the political order (i.e. separation and integration) also impacts legal theory. A divisive line can be drawn between the theories according to the solutions presented as to the question of whether law-making, with its own internal logics, works with the political order on a peer-to-peer basis, i.e. the idea of an closed law-making; or whether law-making simply is an operative long hand of the political power, faithfully mirroring the modes of operation and the logics taking place inside the political order, i.e. the idea of a open law-making.17

Naturally, it is difficult to distinguish the static aspect from the dynamic aspect. It is often through the dynamic aspect that one defines the static aspect; for many theories, the law is considered as distinct from politics because it is born through certain processes. Nevertheless, the dynamic aspect concerns the processes and mechanisms of the creation of the law, while the static identifies the complex of norms (i.e. the product of such processes) that are created.

1.3 Legal Discipline and Political Material (Epistemological Aspect)

The assembling of the different contemporary legal theories into an ideal type model relating law and politics has also been done according to the answers given to a third question: To what extent does the legal discipline take into consideration the political material in its work, i.e. the epistemological aspect of the relationship between law and politics.18 This issue is a typical, although not exclusive, province of contemporary legal theories. With the growth of politics as an autonomous object of investigation, a noticeable trend beginning at the end of the nineteenth century with the rise of political science faculties in various Western universities, legal scholars began to focus on whether and to what extent their discipline was influenced by categories and concepts developed in non-legal academic environments, i.e. political science.19

17 See Aarnio, Reason and Authority, supra at 53-54.
18 As to the definition of epistemology as used in this work, it is the branch of philosophy dealing with the questions of how and on which basis the processes of knowledge of a certain phenomenon are developed and validated. See Jaap C. Hage, Formalizing legal coherence, in Proceedings of the 8th International Conference on Artificial Intelligence and Law 22-27 (2001), also pointing out the problems of developing an epistemology of legal discipline due to the particular nature of the legal phenomenon. See also Brian Leiter, Is There An ‘American’ Jurisprudence?, 17 Oxford J. Legal Stud. 370-371 (1997).
19 See, e.g., Edward H. Levi, The Political, The Professional, and The Prudent in Legal Education, 11 J. Legal Educ. 464-466 (1959) as to the debate that took place in some law schools in the USA at the beginning of the Twentieth century.
The environment surrounding universities and research institutions complicates this epistemological question. On one side, there is a socio-political reality always pushing towards the integration of the law into a broader political context and encouraging a more political approach to the study of law, i.e. an approach more oriented towards the goals of the law that are external to the legal system itself (e.g. labor issues). On the other side, there is also the tendency towards and increasing specialization of both the legal profession and the legal conceptual apparatus, a tendency leading to the emergence of disciplines only focusing on purely legal technical matters, addressing only the language of the law and leaving politics to the politicians (e.g. taxation). In other words, there is a tendency towards a Weberian bureaucratization of the profession of legal scholars.

This tension has led to two different approaches toward the issue of the purity of that considered within the legal discipline. The first is the *pure* approach to legal studies, embracing all those theories claiming the possibility and necessity of a legal discipline not contaminated by political categories and concepts (such as “democracy” or “legitimization”). The second is the *mixed* approach to legal studies, maintained by those theories and scholars asserting the necessity of integrating into the legal discipline categories and concepts not specifically belonging to the legal language (mostly produced inside of sociology, psychology, political sciences and economics), relevant in order to fully understand current legal phenomenon.

2. Using an Ideal-typology for Legal Theories

By examining the positions taken by contemporary legal theories with respect to these three aspects, an ideal-typology of three models is presented: an “autonomous model,” an “embedded model” and an “intersecting model.” Similar to the utility of Weber’s ideal-types when applied to the complexity of social reality, these models are intended to be a heuristic device helpful for mapping out the complex world of contemporary legal theories and to reveal certain similar fun-

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22 For a similar use of ideal-types in order to map out different legal theoretical positions as to the issue of law and society, see Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 59-65 (1984).
damental ways of understanding the relation of law and politics, similarities among legal movements otherwise treated as very distinct from each other (e.g. between CLS and Law and Economics). The ideal-types are used as “heuristic magnets” with the capacity of drawing out the iron-cores of each of the contemporary legal theories as to the issues concerning the relation of law and politics. Figuratively, one could say that in this work, the ideal-types play the same role as the cave did in a famous fictitious case by Lon L. Fuller: to point out the fundamental differences between contemporary legal theories in their answers to highly controversial questions (in Fuller’s case, on the issue of the relations between law and morals).

By cross-referencing these two methodologies (aspects of the relation between law and politics and ideal-typical modeling), this work aims at filling in the gray spaces in Table 1 with the features characterizing each model as to its vision of how legal and political phenomenon interact. The investigation will also identify those contemporary legal theories that can be considered representative of each model and, therefore, placed under the autonomous, embedded, or intersecting labels.

In addition to the three models presented in this work, a fourth model can be posited. This model, also of an embedded nature, however in the reverse direction, shows how politics (i.e. both the values to be implemented via the law and the process of selection of those values) is embedded or integrated into the law. This implies that the choices and processes taking place at the political level can only be explained by using the law (flexibility of politics towards law). The political order runs only in accordance (and in a subaltern relationship) with law-making. The political disciplines are then forced to use the categories and concepts as produced inside the legal world in order to investigate that happening inside the political world.

It is very difficult to find adherents to this model among contemporary legal theories and, for this reason, the model of embedding politics into law is not further considered in this work. There are two possible reasons for the lack of attention by contemporary legal theory towards this fourth model in which politics is embedded into law.

First, all Western countries have embraced a democratic form of the state. Consequently, at least theoretically, the legal production ultimately is in the hands of the people through its representatives, i.e. through the political actors. The second reason is typical of the modern state and can be traced back to Machiavelli, the growth and dominance of political reasons and categories over almost all other kinds of discourses.


Table 1. Aspects of the Relations Between Law and Politics in Contemporary Legal Theory

| Relationship of legal discipline to political material (epistemological aspect) | Autonomous model | Embedded model | Intersecting model |
| Relationship between law-making and political order (dynamic aspect) | | | |
| Relationship of law to politics (static aspect) | | | |

2. Using an Ideal-typology for Legal Theories