Law As The Expression Of Politics And The Result Of Its Own Dynamics

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Abstract

Law is the expression of politics. In its multivalent character, law is the result of its own dynamics and the outcome of negotiations mediated by unequal actors in a political scenario of power relations. The impersonality, neutrality and uniformity of the law is only a representation, because the creative process of the law, its dynamics, contains both authoritarian and liberating elements.

The law disguises its internal contradictions and develops a fetishist identity, taking on a life of its own. The negotiations and mediations in the creation of law are not independent from the relationship between the different interests at play in each historical and political context. In law creation the legal system makes the individual both appear and disappear. It appears in the content of the law, but disappears in its formality, when jus becomes lex. Law is both an expression of politics and the result of its own dynamics.

Keywords
Law, political economy, law creation, negotiations, legal system, law dynamics
INTRODUCTION

I will argue that law is the expression of politics. In its multivalent character, law is the result of its own dynamics and the outcome of negotiations mediated by unequal actors in a political scenario of power relations. When the impersonality, neutrality and uniformity of the law is discussed, it is only a representation and an illusion, because at its essence it is the creative process, which is not homogeneous and contains both authoritarian and liberating elements, (Habermas, 1974 in Peters, 1986, in Teubner, 1986: 261) as the very legal system reveals the contradictory nature of social life. (Basso, 1975 in Peters, 1986 in Teubner, 1986: 261).

The law disguises its internal contradictions and develops a dialectical and fetishist identity, taking on a life of its own, independent of how, when and in what context it was created. The negotiations and mediations that influence the creation of law are not independent from the relationship between the different interests at play in each historical and political context. They make the process of law creation possible and/or feasible.

I discuss law as a process. I will argue that law and legality have different dimensions and different moments. Their dimensions of value and their ideological, political and rational dimensions would seem to exclude one another, but they do not. In this process, the individual is present and absent from different moments of the law and the legal system makes the individual both appear and disappear. The individual appears in the content of the law, but disappears in its formality, when *jus* becomes *lex*. That is, the individual is an active part of the creation of the law and is yet passive in the face of legal formality.

From a theoretical perspective, I explore the relation between law and politics, understanding lawmaking as the outcome of processes of struggle that either maintain the social and political order or promote change. Analyzing the dynamics of legal processes is essential for comprehending how the law has been embedded in the political sphere (via conflict and consensus) and in ideological debates. It is in this sense I will claim that law is both an expression of politics and the result of its own dynamics.

The paper is organized in two sections. The first section: Law and its identity, examines the law and the legal system as a “process in motion”, with references to the German, French and Spanish traditions, which have two notions of the law (German: Gesetz and Recht; French: loi and droit; and Spanish: ley and derecho). Recht, droit and derecho refer to a whole body of laws, principles, and institutions in the sense of Roman law (*jus*) and therefore explain the law in its abstract and foundational meaning, which involves the principles that determine positive law, as opposed to statutory or enacted law, or *lex*, when law becomes law. In the second section of this chapter: Law and political dynamics, I undertake a theoretical examination of how the law follows its own dynamics, particularly its own political dynamics. That is, I explore how the law behaves

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1 Refers to actions that take place at the moment they are needed rather than in advance.
according to the articulation of interests between classes, social sectors and pressure groups, in processes that both shape and modify health legislation. I also present the need to analyze the concept of hegemony and its impact on the legal system at the institutional, political and ideological levels.

1. THE LAW AND ITS IDENTITY

“One knows that one does not know why the law functions; but one also knows that one can act precisely because it functions”. (Joerges, 1987 in Teubner, 1993: 7)

A. The law: to be or not to be

All societies have their own mythology and evolve and invent themselves in accord with their own beliefs. In the case of the value and role of the law and why we have laws, Durkheim identified law as a factor of social integration; Weber as a mechanism in the exercise of power; Parsons as a social subsystem and Marx as an element of the superstructure of society. (Varga, 1994: 44-45). Law, with its multifaceted nature, moves from conceptualization to implementation and is validated as a regulatory mechanism. As Jenkins (1980, in Broekman, 1986, in Teubner, 1986: 76-77) writes, “Law is now intervening in areas that it has hitherto steered clear of; it is imposing its opinions and principles upon other social bodies, it is settling questions that were formerly thought of as being political economic, or moral, rather than legal, in nature; and it is issuing detailed directives about the ordering of various aspects of society and social life.”

Zumbansen indicates that the law has several definitions or interpretations. It can be an institutionalized system of rule enforcement, a means of stabilizing expectations, a means of oppression, a hope and also an empty parasite. “Law, legal analysis, legal argumentation altogether constitute society’s self-reflection and as such contribute to the formation of society.” (Zumbansen, 2010: 4). He writes that the first definition (law as an institutionalized system of rule enforcement) is likely to overburden the legitimacy promises of the state, and the second definition (law as a means of stabilizing expectations) runs the risk of everything becoming law. The third and fourth definitions (law as a means of oppression, and law as a means of hope) focus on the anxiety surrounding the “why” of law, its purpose and function. (Zumbansen, 2010: 5). Finally, is fifth definition, the law as an “empty parasite” operates and proliferates, but it does not acquire proper content. It remains open, and this is why it is recognized in a very pluralistic way. “It is through the lens of the fifth definition that the preceding four definitions reveal the deeply political, sociological and cultural dimension of law.” (Zumbansen, 2010: 8). Zumbansen (2010: 9) specifies that, “Law’s extreme functionalization is a necessity and as such is an inevitable by-product of an increasingly differentiated, complex and pluralistic society”. 
Law exists in itself, but it has no value until it is inserted or interpreted in its own history. It is primarily economic factors, along with social factors, that determine (or at least influence) legal strategies and how the law is conceptualized in a given society. It has the ability to be and to exercise a function and a role, but it is not self-sufficient, neither in its genesis nor in its reason to exist. As argued by Csaba Varga, “law is also the imprint of the whole history and culture of the nation. The norms are only signs which by themselves mean nothing: they become alive only in the living practice of society.” (Varga, 1994: 54). “The result of this process is that the concept of law becomes burdened with sociological content (a socialized concept of law) and it is also formulated in rather general terms.” (Broekman, 1986: 77).

Law is thus an element of power, but it is also a formal and rational reality, an expression of will, which in principle represents or purports to represent everyone. Unger indicates that the law imposes a particular and historical form of social order upon human groups and reflects the profound social structure of society. (Unger, 1986 in Burke, 1992: 43). Buchanan (2006: 654) would argue that law creates the society from which it draws its authority, but that society also brings law into reality. This is why law cannot be understood in isolation from other social phenomena and processes, but only through its connections to these phenomena. (Hunt, 1993 in 2007).

According to Unger, (1986) the law continues to be a forum for political and ideological debate. It is therefore important to determine how law, using normative systems, filters social problems and social reality. Commaille, (1994 : 23) specifies this in reference to Jean Carbonnier’s statements when he argues that politics is the direction and law is what allows it to float recognizing the role and the function of ideology. The ideological role of law is, then, to disguise its process of creation.

This is why once the law is made law, once it is resolved; it validates itself, from within. This, as Teubner (1993: 7) says, is consistent in line with the Luhmannian interpretation that there is no law outside the law and, therefore, positive law is a self-produced law. However, Luhmann’s autopoietic law, as a structurational functionalist approach framed in postmodernist currents, has the problem of being a system that is closed “and loosely integrated with the other social institutions.” (Travers, 2010: 51). As his interpretation is self-referential, only the law can change the law. This is both true and false. That is, while it is true in the formal sense, it doesn't fully capture the social embeddeness of law's context. This does not prevent the legal system from reproducing. In other words, the law may seem self-referential and circular, but in its essence it is not. The internal organization of the law may be circular, but it is in a causal relationship with external influences, which are much more complex. In particular the law understood as process and dynamics.

From an approach that looks at law as a process, the neutrality of the law is also fictitious; as the procedure is inseparable from the result, the process of lawmaking necessarily embodies values and incorporates ideas and notions about how power is
distributed and how conflicts are resolved. It is probably correct to say that without circularity, the perspective with which the Rule of law was founded cannot be justified, (Unger, 1976: 180) but laws’ justification and its legitimation are different concepts.

Law’s distinctive feature is its transmutation, which happens only once it has been formalized and not before. This transformation phenomenon of identity that law undergoes is important, because the different “moments” of the law’s own process are contradictory. On one hand, it confers it autonomy and, as discussed above, it makes it seem self-produced, while on the other hand, it denies the dynamics (or it seems to be denying the dynamics) of its own creation. We may ask, then: Can law occupy an autonomous mode, with its own internal structure? Is law eminently political; a primary outcome of disputes for self-interest?

B. Law, legitimation and autonomy

The problem of legitimacy for liberal law is that it is legal rationality and not its specific contents the one that lends the law its legitimacy. From the liberal tradition, legal legitimacy derives from its rationality, its internal logic, more than from its moral or ideological value. Faced with liberal society’s predicament of ensuring the impersonality of power, the Rule of law is based on two assumptions: that the most important powers are concentrated in the government and that power can be constrained by norms, (Unger, 1976: 17) as well as by the role exercised by the state. As Bobbio (1961 in Lenoble & Maesschalck, 2010: 32) points out: “It is true that law…consists of a set of rules of conduct which, whether directly or indirectly, are formulated and validated by the state.” Bobbio opposes a minimal state (liberal) to a maximal state (absolutist), and indicates that democracy is not possible without a legal framework and invalid if it is not accompanied by political pluralism. (Córdoba Gómez, 2008: 19-38). The question of legitimacy becomes crucial, challenging the foundations of liberal legal rationality. Autonomy and the Rule of law are parts of this identity process, as law is politics, or it is a form of politics. For Marxist theory, the law has direct ties to the state, but it displays autonomy with respect to the state and reflects economic relations. It has the potential to be coercive, manifests the interests of the dominant classes both directly and indirectly and legitimates the system in which it is produced and reproduced. The law thus fulfills the role of legitimating the product and the result of its own creation and the values of the hegemonic classes and powers. (Hunt, 1996 in Coleman & Leiter, 2010: 355-361).

Critical structural Marxists (Althusser, 1970 in Althusser & E. Balibar, 1970 in Spitzer, 1983: 107) suggest that the law has its own history (the concept of the “relative autonomy” of the law). The law is understood as independent of the economic system, but dependent in other sense sense. (Althusser, 1970 in Althusser & Balibar, 1970 in Spitzer, 1983: 107). It is precisely this “sense” that has kept alive the debate to ultimately determine its degree of autonomy. Poulantzas, (1973 in Spitzer, 1983: 108) for example,
arguing with Althusser, proposes that the law is not necessarily the “state’s ideological apparatus”, but rather organizes and sanctions the real rights of the dominated classes, despite the fact that these rights are invested in the dominant ideology and that these rights therefore are or can be illusory.

In relation to legitimation and according to Unger (1986 in Burke, 1992: 32) modern liberal law has three essential properties: 1) Rule of law 2) legal justice and 3) formalist adjudication. In addition, law at the legislative and judicial level must profess the properties of generality, uniformity and impersonality. The law is legitimated in its standardization and is applied to all, independently of their class condition or power. This allows the law to validate itself without privileging one interest over another and consolidates or ensures the functioning of the Rule of law in the modern liberal state. (Unger, 1986 in Burke, 1992: 31,32 & 164). This is why the Rule of law has also been described as an “accepted measure ... of governmental legitimacy” (Tamanaha, 2004: 3 in Al Attar, 2012: 205) and an essential pillar upon which any high-quality democracy must rest. (O’Donnell: 32 in Al Attar, 2012: 205).

The law thus develops its relative autonomy, upheld by the legal system, which is to say, by its formality. In other words, the Rule of law and the legal system both bring the law to life and make it autonomous. The law is formalized and made “objective”, and the Rule of law guarantees the neutrality of the state with respect to its citizens. In this sense, the law is politics in its historical liberal form, (Unger, 1986 in Burke, 1992: 43) despite its contradictory principles (content and form) that also reflect the inconsistencies characteristic of liberal society. (Unger, 1975). This is why it is not the autonomy of the law “per se” or its capacity to reproduce itself that is important, as Luhmann (1986 in Teubner, 1986: 25) suggests with his legal thesis. (Febrajo, 1986 in Teubner, 1986: 131). That the law can be autopoietic, that it can reproduce itself, is not ultimately decisive, as the law is both essence and presence.

Tuebner (1993: 42) positions the law in a “hypercycle”, writing that it is “...only when the system has created the necessary conditions for hypercyclical linking by describing and producing its own components that the actual autopoiesis of law can begin.” Cycles link together to form a hypercycle of self-referential systems. (King, 1993: 460) Tuebner refers to legal procedure, the legal act, the positivity of law, the legal norm and legal doctrine as the components of a higher cycle of links that precede the possibility of self-reproduction of the law. Yet it is my view that as the law takes on a life of its own in the formal sense, it does not cease to be a reflection of society. As indicated by Zumbansen (2008: 39): “Law is part of [society], everywhere exposed to and in communication with it.” For Teubner, autonomy and autopoiosis are best understood as a matter of degree, by examining the extent to which that system manages to 'constitute its own components- action, norm, process, identity - into self-referential cycles'. When these cycles link together to form a hypercycle of self-referential systems, the legal system can be said to be totally closed or autopoietic. (King,1993: 459-460 and Teubner,
C. Law and its dual identity: status quo and change

Hobbesian rationale understands law to be at the centre of the relationship between humans confronted by conflicts of interest. However, is law by its nature conservative or progressive? Are there structural social changes that can “determine” legal change? (Teubner, 1986: 5). Can the Rule of law be multifaceted; that is, can it fulfill different roles as a function of the different historical moments of law and legality? Can the law’s autonomy and the Rule of law maintain the social and political order at certain historical moments and protect citizens from arbitrariness or even be instrumental in promoting social change at other moments? According to Spitzer, “Law is thus always structure and praxis,” but he asks, “How we do decide whether that practice is expressive, repressive or both?” “How can law both support and inhibit the transformation of (class) societies?” (Spitzer, 1983: 109).

From an orthodox Marxist perspective, the structuralist theses were criticized for the relative autonomy they attributed to the legal, political and ideological superstructure, considered to be a form of sociological pluralism that blocked an understanding of power relations. (Fine & Picciotto, 1992 in Grigg-Spall & Paddy, 1992: 16-22). However, the law has a large degree of indeterminacy, in addition to its dual role, being able to be both an agent of the status quo and an instrument for change. In asking about the indeterminacy of law in its process and dynamism, there is certainly a factor of uncertainty tied to the very dynamics of historical and political contexts and the relationship of the actors defending their interests, negotiating, maintaining conflicts and generating consensus.

Habermas (1986 in Teubner, 1986: 208) indicates that development toward a social and democratic constitutional state can be understood as a form of constitutionalizing relations of power. Changes in social legislation linked to working hours, union organization, wage improvements, layoff protection, social security and other benefits are instances of the juridification of the balance of power within legal action. The distinctive characteristic of a legal system is not the confirmation of the status quo, but rather the recognition that things can change. In fact, legal theorists have called attention to the relationship between law and social change, (Kostiner, 2003: 2) questioning such matters as the role of law as a stimulant for progressive social change and the methodology of legal tactics used by social movements in promoting social justice. Some authors argue that legal tactics are futile for bringing about social change. (Rosenberg, 1991 in Kostiner, 2003: 324). Others point out that legal tactics can empower social movements, offering them a venue for greater mobilization capacity. (Mc

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2 See also Lance Hamilton Selva, “Toward a Critical Legal Theory: Development of an oppositional legal discourse under late capitalism”, (Dissertation, Ph.D. School of Criminology, Florida State University, April, 1985) p. 49.
Cann, 1994; Silverstein, 1996, in Kostiner, 2003: 324). Those that identify with the *Critical Legal Studies* \(^3\) movement adopt a rather pessimistic stance, arguing that legal doctrines partially support the status quo. (Kairys, 1982; Kelman, 1987 in Kostiner, 2003: 326). In this sense, I believe liberal legalism embodies the belief that social reality is defective, but that it may be reformed. (Peters, 1986 in Teubner, 1986 : 250). As is argued by Thomson, (1992 in Thomson, in Grigg-Spall & Paddy, 1992: 3.) “critical legal theorists assert that law is far from obvious primarily because its relation to power is not obvious.”

The law can be used as an element of change, as a possibility for gradual reform, to the extent that it can be understood as a dynamic process for extending or modifying rights and not only as a self-referential mechanism with which it reproduces itself. Social changes imply cultural changes (outlooks, perspectives, attitudes) that entail new demands and their corresponding legal transformations. (Febrajo, 1986 in Teubner, 1986: 17).

That the law can be an agent of change does not deny or refute that ultimately, it is embedded in the economic and political structure of society and reflects economic relations, particularly class interests, and is ideologically transformed to appear neutral. As indicated by Zumbansen: (2010: 6) “Law has and obviously does in many cases serve as a weapon of hope and emancipation – but also the opposite is possible and frequently the case: with reference to existing laws, great deeds of injustice are committed, a tight grip of oppression over society maintained and law deprived of all its sense of political inconclusiveness, openness and critique.”

“For the legal system in particular the notion of self-reproduction seems difficult to reconcile with the fact that law is determined to a considerable extent by political influences, economic structures, and social factors.” (Teubner, 1993: 21). The legal order thus reflects the social order, a product of social and class conflicts. In any case, Zumbansen, (2008: 18) citing Wechsler (1959 in (Zumbansen, 2008: 6) and Lobel, (2007: 942-948 in Zumbansen, 2008: 6) indicates that the disenchantment with the extension of “rights” to address issues related to social injustice and the neutrality of legal processes are also reasons for dissatisfaction with the law as an instrument for social change. As a product of human activity, the law reflects the uncertainties of social existence (Spitzer, 1983: 117-118) and is therefore contradictory and can be an agent of

change and of oppression. Yet particularly with respect to health care, it is interesting to note that the law invites us to discuss how to reconcile interests, how to correct injustices, but it does not invite us to question basic principles of transforming health into a right, like the right to property or to freedom of expression. Constitutional and universal access to health care services is not enshrined as a right, but private property and market economy appears to be. (Thomson, 1992 in Thomson, in Grigg-Spall & Paddy, 1992: 19).

Perhaps, “like religion in previous historical periods, the law becomes an object of belief which shapes popular consciousness toward a passive acquiescence or obedience to the status quo.” (Gabel & Harris, 1982-1983: 374).

The law does not only play a role as itself and as an institutional relation with respect to the state. The law is also embedded in the social and articulates the interests of political dynamics. As mentioned above, it can be used by powerful interests to preserve inequalities and status quo, and it can be used by less powerful groups as a mechanism for avoiding manipulation by private or government power. (Unger,1976 in Hamilton,1985: 39-40). That is, “by juxtaposing ‘arbitrary power’ and the ‘Rule of law’ it may be argued that law can operate against the state as well as in its service.” (Thomson, 1975 in Spitzer, 1983: 112). It is the historical contexts and political dynamics that articulate the conflicts and consensus that also forge the identity of the law.

2. THE LAW AND POLITICAL DYNAMICS

A. The political nature of the legal process and the law as praxis.

As we have already mentioned it every society creates its own legal system and legal rationality, and it becomes difficult to disassociate law from the culture from which it emerges specifically. Law as a product of negotiation processes between several stakeholders defending their interests is embedded in the social fabric and the political and economic structures of society. It is the expression of how society organizes itself and articulates and represents different interests and worldviews in a given historical context.

Law and the state, from the Hobbesian philosophy of the social contract to the present, are connected – directly or indirectly, only formally or overtly – to a discourse of power. (Broekman 1986 in Teubner, 1986: 105). Using a reflexive interpretation that sees a role for the law in the resolution of conflicts in certain contexts and that makes the law receptive to a range of rationalities, one can study the law as it is materialized at different points in time as a dynamic ongoing process. The legal system interacts in a large public arena in which, as part of different contending interests, intervenes and is reflected and the social order is legitimized: “…the law is never monolithic (....) Its function differs, depending on the relative strength of the social forces which struggle around and within it, and on the balance between these forces. The law is not a thing but a relation. Its formal rules can be given a different social and economic content in different historical

Althusser, (1971 in Spitzer,1983: 108) in his structural Marxist paradigm, proposed law as a part of the ideological apparatus of the dominant classes, but Poulantzas, much closer to Gramsci, saw the law in broader and more dynamic terms, in that it also organizes and sanctions certain real rights of the dominated classes even though of course, these rights are invested in the dominant ideology and are far from corresponding in practice to their juridical form.” (Poulantzas, 1982 in Beirne and Quinney, 1982 in Spitzer, 1983: 108). While neither Gramsci nor Althusser focused their studies on the law, they did not minimize its role. They understood it as a cultural institution that exercised strength and power through the police and the courts. This means that discovering the hidden meaning of legal texts could also be understood as a form of political struggle against the established order, in this case the capitalist order. (Travers, 2010: 72). Poulantzas broadened the debate to a more active notion of the law. A more dynamic law, in movement, less one-dimensional, like the structuralists proposed. Law could be understood not only as a receptacle of values and priorities determined outside of society, but also as part of a complex social whole that society constitutes and where it is constituted, (Kairys, 1982; Thomson, 1992 in Grigg-Spall & Paddy, 1992: 14) as the law is essence and appearance, content and formality. Though for Poulantzas, the law obscures the real differences behind a facade of formalism, (Hamilton, 1985: 51) classes and social groups have many different determinations, which consequently require a negotiation of interests. Poulantzas (1973: 188) sees these interests manifested as a block that “constitutes a contradictory unity of politically dominant classes and fractions, under the protection of the hegemonic fraction.” Referring to Althusser, Sumner, (1979 in Tomasic, 1985: 13) a legal sociologist, suggests that, “Legal enactments must be seen as reflections of contemporary culture and as reflections of political manoeuvre as well as reflections of economic structure.”. It is interesting to note that these structuralist interpretations (Poulantzas, Althusser) are criticized from both the orthodox Marxist perspective and post-modernism. In the debate between structuralism and contemporary post-modernist interpretations, structuralism contributes to explaining and understanding the power relations behind the law, while post-modernism warns us about the deterministic risks of trying to explain everything through the lens of economic and political structures. (Thomson, 1992 in Thomson, in Grigg-Spall & Paddy, 1992: 9-10)

In the 1980s, other theorists indebted to cultural Marxism, such as the Frankfurt School or the critical legal studies movement, also sought to reveal the deep linkages between legal texts and political contexts. Following Gramsci, the critical legal scholars suggest that the law cannot be understood by means of its own self-referential introspection, but rather through its political relations in order to identify the law’s interpenetration with other social processes. (Hunt, 1993 in Al Attar, 2012: 102-103. E.P.
Thomson (1975 in Spitzer, 1983: 109) most profoundly explores this thesis, suggesting that the law is both inside and outside, with both visible and invisible legal structures. Though Merritt (1980 in Spitzer, 1983: 109) suggests that this thesis could be seen as “cultural reductionism”, Thomson proposes that the distinction between the superstructure and the infrastructure levels out, as the law not only influences the basis of society, but also becomes a part of it (Spitzer, 1983: 109).

B. Conflict, consensus and hegemony

It is not law that defines power or guarantees the autonomy of legal institutions, but rather it is the political process that ultimately determines the legislative process (laws) and its legitimization. The rule exists because it is accepted as a matter of convention, and convention is based on consensus (as opposed to disagreement). Therefore, it could be argued that part of social cohesion is also the result of a respect for the legitimacy that law confers. I do not wish to understate the importance of the fact that legal rationality has a meta rationale that is the result of its own process of legitimization, reinforced by the ideological discourses and by the institutions that promote and support it. This could probably be termed “hegemonic consensus”. This condition is the product of the equation between the social and/or political forces that compete to defend their interests and, at the same time, influence the processes of law creation. There is a circular argument at play: legal rationality is dependent upon the power structure in which legality is embedded, and, simultaneously, this legal rationality legitimizes the character and environment of power relations.

Unger (1996: 53) indicates, “interest-group pluralism, as we may call it, represents law as the product of bargaining among organized interest groups. In a democracy the primary but far from the sole locus of this lawmaking activity is legislation, with its background in electoral party politics.” Unger (1996: 53-54) further argues that, “Interest-group pluralism…is not a sociology of lawmaking, but rationalizing legal analysis itself, a prescriptive discourse, providing an account of how law becomes legitimate and how it should be represented.” For functional pluralist traditions as well as for Marxist perspectives, power is dispersed in society in individuals, classes or organizations. However Pluralists, unlike Marxist traditions, deny that a particular group could dominate another, pointing out that everyone has some power and that nobody can have too much. There are pressure groups and interest groups that compete with each other, without any of them having control of the state. In other words, power is disperse. For some, the state is neutral with respect to the resolution of conflicts, and for others it certainly is not. (Hamilton, 1985: 37-41). The differences with respect to the role of the law are not insignificant, as for some it is an articulator for conflict resolution and for

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4 The military Coup of 1973 and the restructuring of the State, which passed to play a subsidiary role, altered one of the keys to Chilean social history, characterized by negotiated legislation.
others a mechanism of domination for the interests of the dominant classes, in which the essence of the law hides the real differences with the facade of universal formalism. (Hamilton, 1985: 51).

Within the conceptual and theoretical framework of the law, when we refer to the debate between conflicts or contradictions of interest and consensus and models of legitimation, we can distinguish between conformist models and critical models. Peters (1986 in Teubner, 1986: 270) indicates that the critical model has both a static operating mechanism, that is, “formal compliance with established law or accepted principles” and a dynamic operating mechanism, which is “justification through rational arguments in critical discussion.” It is true that in cultures where harmony is highly valued and consensus is encouraged for resolving conflicts, these encounters may be rejected. (Peters, 1986 in Teubner, 1986: 270). However, the pursuit “of consensus” does not have to respond only to the functionalist tradition, in which “law answers to requirements, customs and necessities emerging from social practice or crystallizing out of public deliberations.” (Zumbansen, 2008:14). The law is not only an instrument for achieving a social, political or economic objective, but also the result of the action and the concrete dynamics and outcome of a cyclical process with its own political dynamics. It is not, as Nonet and Selznick (1978 in Zumbansen, 2008: 19.) suggest within the notion of “responsive law”, that citizens must appropriate the law in order to arrive at a consensus around the direction of society. This formalist consensus, as Zumbansen (2008: 20-21) explains, idealizes the forces of cohesion in a society that is profoundly complex and fragmented. “Therein lies, to be sure, the great danger for law, for political, in particular democratic theory and for grand-scale social theory.”

Though the liberal state was founded, as Unger (1976: 75) points out, upon compromise. Compromise has crucial implications for the law consensus on a law is only a conjunctural compromise, produced in a given place and time but for an undetermined period, whose limits and timing will be those defined by political dynamics. Even Luhmann (1981 in Christodoulidis, 1998: 130), as a systemic functionalist, explores the complex interdependence between conflict and the law, concluding that a theory of law is related to a theory of conflict. Conflict is productive for law, as it gives the legal system the opportunity to open itself up to the environment, and it is with respect to conflict that the law makes expectations widespread, evolves as a system, fulfills its role in society and attains unity and identity. Conflict and consensus are not necessarily diametrically opposed or extremes of a process. Both are contradictory, both are dialectic, both are circumstantial and both are inevitable. One does not exist without the other, and they are not fixed in time. Neither is more conservative or liberal than the other. Christodoulides (1998: 130) illustrates this very well when he indicates that, “Conflict theory and consensus theory are too often seen as seeking their departure from, gaining leverage from, and positing some kind of teleology to, mutually exclusive alternatives. This in turn has occasionally led to simplistic equations of consensus to social structure and conflict.
to social dynamics…. Conflict is as much inimical to social structures as it is intrinsic to them. Co-operation contains conflict as it does consensus.” (Christodoulidis, 1998: 102).

As discussed above, the process of law creation is an expression of the articulation and negotiation of interests in a given social context, producing the dynamics of struggles for hegemony and power. Law, as the result of a process of conflict, is, as Szabo (1973: 334) puts it, “a condensed or concentrated” product of social relations.

Therefore, law is hardly ever, except during revolutions that generate ruptures or dictatorships, imposed without some form of negotiation. It is even possible that organized and critical players, as a result of their ability to induce legal change without altering the existing order, may defend the status quo in order to adopt standards that will achieve change in their respective social contexts. It is in this sense that not only are the dynamics of law determined by endogenous and exogenous factors, but the law itself can be understood as an agent in such processes, hiding the conflicts of interest generated in its own creation. Hence, law is a synthesis of both the dynamics that create it and the results.

This debate about the political dynamics at play between conflicts of interest and consensus seems to be in opposition with the concept of hegemony. I say that it seems to be, as they are not contradictions per se. As Litowitz (2000: 515) indicates, “the concept of hegemony deserves broader consideration from the legal academy because it is a critical tool that generates profound insights about law’s ability to induce submission to a dominant worldview.” This does not mean that submission to a dominant worldview is necessarily imposed. Political dynamics, like all movements are cyclical and indeterminate, in action, and with results that are temporary and can even be contradictory. As these are not neutral but rather the result of political dynamics themselves, the concept of hegemony is crucial for identifying the mechanisms of power and the role of ideologies in shaping the law, as a product of consensus. Law is legitimated in its formality and accepted and validated as a temporary product of the result of consensus, even when we know that this is devoid of content, contradictions or hegemony.

All legal systems evolve as political practice in the exercise of power and the construction of hegemonies. They depend upon or change in accordance with the social and historical conditions associated with a society. “If we theorize the notion of change in relation to the evolution of power relations, and the concept of hegemony about constructing alliances, integrating rather than simply dominating to win consent,” (Fairclough, 1992: 92) we realize that law is achieved through the dynamic and mutable processes of the construction of hegemony. Therefore, the notion of “alliance” is important if we want to “associate” social sectors with a specific worldview, in this case the hegemonic worldview. The concept of hegemony thus becomes critically essential, since it fundamentally expresses a form of domination, originating in lawful practices, exercised in diverse ways and invariably linked to relations of influence and the power
structure in a given society. While social organizations induce and influence social and human activity, hegemony is concerned with the reproduction of social structure, and more importantly, with the need to secure conditions for this reproduction. Law has the ability to be and to exercise a function and a role in this process, but it is not self-sufficient, neither in its genesis nor in its reason to exist.

Gramsci (1971: 336 & 337) when placing the concept of domination outside the state apparatus and the economic sphere, conceptualized that the superstructure may be autonomous with respect to the structure, and introduced the concept of hegemony as organized consensus. Social groups can be subordinated to others, but the basis of hegemony is always acceptance of the relation (Showstack Sasson, 2001: 11 in Al Attar, 2012:46).

This organized consensus promotes a dominant worldview that is ultimately supported by the majority of the social classes, with the law contributing to the development of the mechanism for securing hegemony under the aegis of the dominant class. (Cutler, 2005: 536 in Al Attar, 2012: 141).

When the legitimacy of the legal system is in crisis, new political economic variables are introduced and new forms of political negotiation are developed that minimize the universal nature of formal legality and open up new opportunities and dimensions that require the legal and political spheres to be reconciled in order to preserve hegemony. (Wolfe, 1977 and Habermas, 1974 in Hamilton, 1985: 273). Furthermore, as the principal characteristic of the law is its formal legitimacy, this legitimacy also bears normative strength, but since the content of law changes, it can also be manipulated to reflect specific interests. It is in this process that structural biases are normalized. (Al Attar, 2012: 104)

**Conclusion**

Law is the expression of politics, in both its creation and its representation, is simultaneously situated in different times and spaces, with a plurality of identities and different roles.

Law undergoes contradictions between its essence and its appearance; that is, between how it is created and how it is presented. This is where the conflict-consensus duality is made manifest, which then becomes formalized and makes the law appear to have its own identity, and even autonomy. Consensus on a law is only a transitional compromise, produced in a given space and time and an undetermined period, whose limits are defined by the political dynamics.

Consensus is the pursuit of consent and by no means expresses unanimity, nor a majority agreement, but rather an agreed upon way to seek agreement. In other words, we do not need to agree on a decision, we only agree on the fact that we have to reach a solution: we agree to not disagree.
It is necessary not only to uncover how this conflict-consensus dialectic develops, but also to clearly differentiate between statutory or enacted law (lex) and the principles of law (jus). This is where the concept of hegemony is fundamental, where law can both maintain and reproduce the relations of power and create or facilitate social change, which reflects that Law as the expression of politics and the result of its own dynamics.

Bibliography


