

CARL J. FRIEDRICH (Harvard)

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LAW AND POLITICS:  
CONSTITUTIONAL REFORM AND TREATY CHANGE

Law and politics, a subject that must be close to any student of international law, has been an issue for centuries. It was central to the work of the great jurists and political scientists at the time of the emergence of the modern state -Bodin, Althusius, Grotius. It has remained so, and was a basic concern of Josef Kunz's great teacher and master, Hans Kelsen, to whom his *Changing Law of Nations* (1968) is dedicated. In a number of well known works<sup>1</sup> Kelsen insisted upon the profound chasm between law and politics. His pure theory of law, or more correctly translated: his doctrine of pure law, seeks to solve the problem of norms by excluding all social reality from consideration. Kelsen starts from Kant's separation of the "is" and the "ought", but he pushes it to a radical extreme so that basically all connection between these two worlds of the is and the ought are denied. Such a theory of pure law resulted from an effort "to develop a normative theory of normative cognition which would parallel the theories of cognition concerning natural phenomena in Kant"<sup>2</sup>.

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- 1 HANS KELSEN, *Der juristische und soziologische Staatsbegriff*, 1928; *General Theory of Law and the State*, 1945, 1961; *Theorie du Droit International Public*, 1953 (Hors Commerce); *Vom Wesen und Wert der Demokratie*, 1929.
  - 2 CARL J. FRIEDRICH, *The Philosophy of Law in Historical Perspective* 1958, 1963, pp. 170 ff., this critique of Kelsen is developed within the broad philosophical context, ch. XVIII, ch. XIV. The quoted statement is from WILLIAM EBENSTEIN's able review, *Die rechtsphilosophische Schule der reinen Rechtslehre*, 1938, p. 24.

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

This sounds like a kind of natural law, but pure law is seen as being in sharp contrast with all natural law. Natural law to Kelsen is an ideological façade, either for an existing legal order or for its criticism. Kelsen and his school cannot admit the challenge of natural law to make any sense, because natural law contradicts the unity of legal science<sup>3</sup>. One might ask whether natural law may not be absorbed into this unity. What prevents one from treating the norms which it contains together with the norms of the positive legal order? We do not bet an answer to this question: it is simply asserted that particular given positive law is *the* law which it is the task of science to understand; and furthermore, it is asserted that positive law consists of coercive norms which are imposed by the "state". Thus a something which appears to be a political reality appears at the center. (I leave aside until later the complicated questions such a statement raises for international law which have perplexed the pure law jurists from Kelsen to the present day).

So obvious a logical objection cannot be intended by the "purists". To cope with it, the state itself is transformed into

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3 Cf. *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays by Hans Kelsen*, 1957, pp. 137 ff. and 174 ff. The volume, unfortunately, does not contain Professor Kelsen's very valuable contribution "Justice et Droit Naturel" in *Annales de Philosophie Politique*, vol. 3 (ed. Raymond Polin), *Le Droit Naturel*, 1959, pp. 1 ff.

a strictly legal concept. How can this be done? By the notion of a basic norm or *Grundnorm*<sup>4</sup>. This basic norm is a norm which states that one should obey a parliament, a monarch, but why this should be so remains an open question. The fact that this crucial question remains unanswered has the consequence that the "state" or the makers of the *Grundnorm* become an axiomatic absolute. To the open question, Kelsen simply replies that one must "content oneself". What this means, evidently, is that the *Grundnorm* is a purely hypothetical assumption which, when the question is pursued beyond such self-contentment, opens up the entire field of politics and its theory of political obligation. The importance of the basic norm is decisive because by it and through it the unity of the legal system is maintained. For the basic norm is "that norm the validity of which cannot be derived from a higher one". And here is the key to the systemic unity: "All norms whose validity may be traced back to one and the same basic norm, form a system of norms, or of order"<sup>5</sup>. The purists insist that the question of the validity of norms is not to be understood politically, but strictly normatively. It seems to me that thus the problem of validity is not solved but made into a tautology. Such an intellectual dead-end alley is the result of making absolute and ontological the logical distinction between is and ought, between fact and norm or value. The basic is actually presupposed to be valid. Or to put it another way, the basic norm is simply the assertion of validity.

The consequences for constitutional law are very odd. We hear that "if we ask why the constitution is valid, perhaps we come upon an older constitution". Finally, we reach by such a reductionist process some constitution that is historically the first; it may have been established by an "individual usurper", and even the will of such an usurper provides a valid ground for a basic norm which simply says: "Thou shalt obey". Thus Kelsen concludes that "the validity of this first constitution in the last presupposition, the final postulate upon which the validity of all the norms of our legal order depends". It is there-

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4 Cf. the works cited above, fn. 1; see also for a terse summary the essay "Why Should the Law Be Obeyed?" *op. cit.* in fn. 3 above.

5 KELSEN, *General Theory*, *op. cit.*, p. 111.

fore "postulated that one ought to behave as the individual or the individuals who laid down the first constitution have ordained" <sup>6</sup>. The absurdity of the claim results from the attempt to be at the same time a radical positivist and a radical normativist. The refusal to consider historical, sociological and political givens when the validity of norms is being considered is thus the *reductio ad absurdum* of the absolute separation of fact and value, of non-legal experience and law. I am tempted to call it the doctrine of the immaculate conception of the law. The desire of the jurist to understand the meaning of legal obligation is not satisfied by such a doctrine. The common man's question: Why should I obey? is left unanswered, except in terms of the arbitrary fiat of some nebulous past. Such bland recognition of bare power and the application of force leads to a highly questionable definition of the state as a legal concept. "The state", we hear, "as a juristic person is a personification of the national community or the national legal order constituting this community". Thus between state and law there is no discernible difference: "The community", we are told, "consists in nothing but the normative order regulating the mutual behavior of the individuals" <sup>7</sup>. Not how the individuals actually behave but how they ought to behave constitutes the actual community. Apart from the tautologies implied in such statements, the legal and juristic consequences of such a position are very serious. A designation of every power to command as an "order of norms" (*Sollensordnung*) seems highly doubtful in communities rent by disagreement over values and hence particularly concerned over the problem of political (and legal) obligation.

Kelsen himself referred all such problems to sociology (Why sociology? They are political and philosophical rather than sociological problems.) and propounded himself a vigorous defense of liberal democracy by reference to a "sociological concept of the state". Its ardor does not compensate for its juristic inadequacy. The truth of the matter is that facts and values are closely related, what men value is a reflection of what they experience as being actual, that is to say the world in which they

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6 KELSEN, *General Theory*, *op. cit.*, p. 115.

7 KELSEN, *General Theory*, *op. cit.*, p. 183.

live,<sup>8</sup> and hence they either obey or protest the law which confronts them. Men do question the justice of law; they do not, as Hobbes tried to argue, base their notions of what is just upon what they find as law, except in societies in which there is a widespread consensus on what is right, a general agreement on values—not very likely in democratic (open) societies. The discontents in America today or at any previous time in the Republic's long history are not apt to accept William the Conqueror's or Alfred the Great's will as a convincing basis of law and order, not even that of the remarkable men who sat at Philadelphia nearly two hundred years ago. They may not accept any ground as valid, but like most revolutionaries they are inclined to argue that only laws made by those who agree with them on basic values are valid and oblige them to obey. This may be a foolish view—as I am inclined to think—but it surely is a widespread one, and not one that is going to be dealt with effectively by the tautological vicious circles of the pure law theory. For if the community we call "state" is its legal order, how can it at the same time be the community created by this national legal order? How can it in addition be a personification of this community? Aned of the national legal order besides? The keen and critical analysis of various theories of the state which the purists like to engage in, while good in itself, cannot serve as proof or evidence for statements that so clearly violate established logical principles. Obviously, if the "state" personifies the community, the community must be something separate from the state to be so personified. Again, if the state personifies the legal order, the legal order must be there to be personified, and cannot be identical with the entity which personifies it. By the same token, if the state is its legal order, it cannot be identical with the community which is being created by the legal order. It would seem that the concept of the "state" is really entirely superfluous, need never have been introduced into the discussion at all, and has in fact been evaporated into thin air—mere wind<sup>9</sup>.

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8 For this view, see my *Man and His Government*, 1963, chs. I and II.

9 FRIEDRICH, *Man and His Government*, *op. cit.*, chs. VIII and XXX.

At this point it should be clear why this criticism of the Pure Law Theory has been engaged in: it was to make crystal clear at the outset that in sharpest contrast to that theory it is our premise that law is closely linked to politics, and that any theory of law, whether pure or not, should correspondingly be related to a political theory. Such a political theory to be useful in this connection must not be value free, but value-oriented and indeed even value-preoccupied<sup>10</sup>. Law to such a political theory appears as the institutional expression of a political community's values and beliefs, more especially its notions of justice. For it is apparent that the law, or rather legal rules, ought to be just but often is not. Law is thus related to justice (or the notion about justice prevalent in a given community) without necessarily actualizing it fully or unequivocally. It is not possible to deny the characteristic of law to that law which is incompatible with prevailing notions of justice in a given community, leaving aside the ancient question of whether that is truly law which contravenes the natural law (which Cicero and Augustus, for example, had denied)<sup>11</sup>. But it is equally inadmissible to identify law with justice as Hobbes and the positivists have done. Rather, justice has to be seen and understood as something toward which the law is oriented and which the law seeks to realize. Such approximate realization is a dynamic process, it takes time. It is dominated by forces struggling within the political community. It is a never-ending process, because as the law comes closer in its approximation, the notions of justice have been changing. When in relatively stable periods the approximation may come close, in turbulent times it does not. Anomie, described as a state of general disorientation over values and consequently notions of justice, cannot really be contrasted with a state of general prevalence of the *nomos*; it is a problem of more or less<sup>12</sup>. Jurisprudence has usually acknowledged that the problem of law enforcement always exists, and the difference is one of degree. If values are generally dis-

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10 FRIEDRICH, *loc. cit.*, note 8 above.

11 For this see *op. cit.* in note 2 above, chs. IV and V.

12 SEBASTIAN DE GRAZIA, *The Political Community-A Study of Anomie*, 1948, highlights this problem, see especially chs. III, IV, VI, and VII.

puted and in doubt, law enforcement becomes increasingly difficult. The question of the relation of law and justice thus raises all the issues that a conflict of ideologies presents, and law appears inseparable from such ideological conflict. Pure law is no law at all, but a Utopian *fata morgana*. All the interesting problems of law are problems of impurity. It is the same with pure politics; all the pressing problems of politics are problems of impurity.<sup>13</sup>

What renders an act just in such political perspective? What is, in short, justice? It is one of the perennial question of political and legal philosophy, and the bridge between law and politics. Because without justice, law cannot be evaluated<sup>14</sup>. And justice is the core of conflict in politics. There have been many answers to the query: what is justice? Which Arnold Brecht has listed in his *Political Theory*, before concluding: "...invariant postulates of justice can be set down... The following five, it seems, can be regarded as universal and invariant postulates of justice... First *truth*... Second, *generality*... Third, *treating as equal what is equal under the accepted system*... Fourth, *no restriction of freedom beyond the requirements of the accepted system*... Fifth, *respect for the necessities of nature in the strictest sense*... The second, third, and fourth can be traced to a more general postulate, which excludes arbitrary laws, actions, and judgments..."<sup>15</sup>. Thus we have three such postulates, three propositions that are taken for granted and as axiomatic: that the grounds upon which a judgment concerning justice is based are, or seem to those making it, true; that such a judgment is not arbitrary or wanton; and finally that a judgment does not demand something impossible to perform (*ultra posse nemo obligatur*). In more limited political perspective, the question of justice may be reformulated to ask: What aspect of political situations do men usually refer to when they say that the acts involved in it are just?<sup>16</sup>. And the answer, it seems

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13 BERTRAND DE JOUVENEL, *The Pure Theory of Politics*, 1963, rightly lets the theory be pure while the politics remains dirty.

14 See my *op. cit.* in note 2 above, pp. 191 ff.

15 ARNOLD BRECHT, *Political Theory, The Foundations of Twentieth Century Political Thought*, 1959, p. 396.

16 Cf. my *op. cit.* in note 8 above, ch. 14.

to me, when the empirically known behavior of men is considered, should be: An action may be said to be just, and hence likewise a rule, a judgment or a decision, when it is based upon a comparative evaluation of the persons affected by the action, and when that comparison accords with the values and beliefs of the political community to which the actor belongs<sup>17</sup>. This formulation is more precise and therefore perhaps more correct than Aristotle's proposition that equals should be treated equally which is equivocal, because of the equivocation involved in equality and mocked by Orwell. The avoidance of the arbitrary is implied here, and so is avoidance of the impossible, but what is not implied is value relativism. For it is the essence of politics, in a way, to argue about justice, that is to say argue about may be compared with whom for what treatment. Justice is not static, but highly dynamic. It seeks to relate the evolving values of the community to what is done, whether in rule-making, dispute-settling, or any other activity. Justice is never given; it is always a task to be achieved, something to be realized. Rosenstock-Huessy expressed this rather poetically when he wrote: "Not the thoughts of the clever and wise, but the talk of the people create the law... Thus a genuine, necessary right will be called for and implored (*beschworen*) until it becomes law". Perfect justice could be achieved only in the completely stable community. This is the dead-end of Plato's philosophizing about justice.

For many centuries, political thinkers and jurists remained committed to Plato's preoccupation with stability. Hence their thought on constitutions is quite different from modern constitutionalism in its preoccupation with making the just norms unalterable, inviolable, permanent<sup>18</sup>. Not so the makers of the American constitution. They sought to formulate what seemed to them just rules, to be sure, but they also provided for their change or amendment, and within a few years, the first ten amendments were added, containing the fundamental beliefs of

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17 *Ibid.*, p. 251. Cf. also, *Nomos*, Vol. VI entitled *Justice* (eds. FRIEDRICH and CHAPMAN), 1963.

18 Cf. my *Transcendent Justice-The Religious Dimension of Constitutionalism*, 1964, esp. ch. I.

Americans at the time. But how profoundly have these been changed, not only by formal amendment, but through interpretation and custom! Constitutional reform has remained a perennial subject of argument and discussion in the modern world, and more especially in America, on the state as well as the federal level<sup>19</sup>. It is paradoxical that the deep veneration Americans exhibit toward their constitution, which has often been commented upon by foreigners<sup>20</sup>, has never kept them from considering possible desirable alterations; thousands of amendments have been proposed in the course of years<sup>21</sup>. All these many proposals, and more particularly the successful ones, demonstrate the close link between law and politics. During the last U.S. presidential election, the constellation caused by the candidacy of Wallace produced such concern over the results of an election thrown into the Congress that proposals for the abolition of the electoral college received widespread support and led to a legislative initiative. In the discussions over this particular amendment, which was to substitute a direct election of the president by popular majority for the old system, the primary consideration was to make the election more "democratic" in the sense of expressing the majority preference<sup>22</sup>. What was largely forgotten, both in Congress and in the public discussion was that such an alteration would profoundly affect

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19 ARTHUR E. SUTHERLAND, *Constitutionalism in America*, 1965.

20 DE TOCQUEVILLE, *Democracy in America*, ch. XV; De Tocqueville underestimated the persistent strength of the constitution and at one point he went so far as to write: "...I shall refuse to believe in the duration of a government which is called upon to hold together forth different nations covering an area half of that of Europe". He thought that the continual shift of forces created its "greatest rish", found in the fine new edition by J. P. MAYER and MAX LERNER (New York: Harper & Row, 1966) on p. 437.

21 Overall revisions have also been put forward: for example, WILLIAM Y. ELLIOTT, *The Need for Constitutional Reform*, 1935, See also KARL LOEWENSTEIN, *Erscheinungsformen der Verfassunsänderung*, 1931, for the eimar Republic.

22 U. S. Congress House, *A Joint Resolution Proposing an Amendment to the Constitution of the U. S. Relating to the Election of the President and Vice President*, H. J. Res. 681, 91st Congress, 1st ses., 1969, pp. H. 8104-H 8144. (*Congressional Record*. Vol. 115, No. 150).

American federalism. It has often been stressed in studies of the American party system that the vitality of the two parties was stimulated by the fact that every four years they had a vital role to play in the selection and eventual election of the president. Thus the presidential election was brought home to the people in a way which would be very difficult to maintain under the new arrangements. (This is incidentally the reason why the proposal probably would not secure the necessary support in the several states.) Both nominations and elections would be handled by some sort of national organization, and thus become subject to the kind of manipulation which such large organizations are inherently exposed to. These are guesses based on what we know about politics. They are here mentioned as an illustration of how legal processes are wrapped up in politics, and more particularly the processes of constitutional law. All this is very familiar, but does not seem to suffice in causing doubts about the notions on law which are prevalent in the land and among its lawyers and jurists.

The tendency to see law as separate and apart from politics is epitomized in the celebrated claim which adorns the constitution of Massachusetts that "this shall be a government of law and not of men". There never was and never will be such a thing. It is an utterly false dichotomy. The true choice is between a government subject to some law and one not so subject and therefore arbitrary. But even a government subject to some law is forever seeking to escape these restrictions and limitations. This is particularly true in the field of international law and the power rivalry behind it. Here the hoary doctrine of reason of state rears its Gorgon head tested in the principle of *pacta sunt servanda* and of *rebus sic stantibus*. If pacts were not to be observed there could not be any international law; if the things under which they were concluded were never to change, we would have that complete stability which the Platonic constitution was based on, and where there as never any change in what constituted a just political act. Unfortunately, things always do change, they never remain static, and one might well ask: If pacts are obligatory only as long as conditions remain

unchanged, what is the sense of concluding them? It is precisely their change which makes it important to have a pact or contract. In a very real sense, here is the core of international law. Josef Kunz has rightly insisted that there is an underestimation of international law, as there is an underestimation of constitutional law in my view. International law is a factor in international relations, as constitutional law is a factor in political relations. Law is not, as Lenin claimed, simply politics; but the two are dialectically juxtaposed. Kunz is right in citing Brierly for the view that international law is "neither a panacea nor a myth."<sup>24</sup> Like the constitution, it is law to which the rulers are subject. The government is subject to this law on what ground? Josef Kunz has spoken of "constitutional rules" of international law, following Verdross who wrote of the "constitution" of the community of international law<sup>25</sup>. *Pacta sunt servanda* is one of these rules, and "the binding force of international treaties... has its reason of validity not, as the dominant doctrine teaches, in the 'coinciding will of the parties', here the states, but in an objective norm of general international law which prescribes that this coinciding will of the parties shall have this legally binding effect."<sup>26</sup> Leaving the problems of customary law aside, this "answer" is not an answer to the question, because the ground of the subjection remains obscure. The same must be said of the traditional references to the general principles recognized by civilized nations, because the value references here implied are dubious to say the least, and in fact are involved in the power struggle between the states, that is to say in international politics. Leading Soviet writers on international law, such as G. I. Tunkin, have, in keeping with Marxist views on the class character of all law, rejected the ancient formula (referred to a number of times by Kunz) that *ubi societas, ibi jus*; it is said to be *unhaltbar*. And in specifically commenting on Kelsen and Kunz, Tunkin rejects the notion that the development of international law is parallel to

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24 KUNZ, *ibid.*, and J. L. BRIERLY *The Outlook for International Law*, 1947.

25 A. VERDROSS, *Die Verfassung der Völkerrechtsgemeinschaft*, 1926.

26 KUNZ, *op. cit.* in note 23 above, p. 102.

that of domestic law, and instead asserts that "international law is *sui generis*"<sup>27</sup>. Tunkin, after criticizing the Stalinist (as stated by Vyzinsky) view which "overestimates the role of coercion in the enforcement of law", proclaims peaceful coexistence as the "specific form of the class struggle between socialism and capitalism on an international plane"<sup>28</sup>. Is this a general principle recognized by civilized nations? These Soviet theorists quite consistently also reject any idea of an effective international order, which they dub o "world state". But the question remains: what is the ground for the subjection of the government of the U.S. and the U.R.S.S. to the rules of international law? Which in turn goes back to the question about the just political act, because such subjection is political in the most specific and intense sense of the term. It is, it seems to me, a matter of reason of state (as is indeed the binding force of treaties and customs).

It is at this point relevant to make reference to the Charter of the United Nations. To the world order enthusiasts, this Charter often appears in the perspective of a world constitution. Kunz has rightly pointed out that "the law of the United Nations has to be carefully distinguished from general international law". And he added: "The latter continues to exist independently of the Charter. The rule of general international law, *pacta sunt servanda*, is the basis of validity of the Charter". Therefore the Charter does not provide, as some might think, an answer to our question. Since the Charter presupposes the

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27 *Modernes Völkerrecht, Form oder Mittel der Aussenpolitik* (ed. W. WENGLER) Berlin, 1965. "Theoretische Fragen des Völkerrechts", pp. 211-373. See also the critical review by EDWARD McWHINNEY, "Soviet and Western International Law..." in the *Canadian Yearbook of International Law*, 1963, pp. 40 ff., and "Changing International Law Method and Objectives..." in *The American Journal of International Law*, vol. 59, 1965, pp. 1 ff.

28 See my "The Failure of the United Nations", in *Comprendre*, vol. 31/32, 1968, pp. 11 ff. For a more optimistic view cf. LELAND GOODRICH and ANNE P. CIMONS, *The United Nations and the Maintenance of International Peace and Security*, 1955, perhaps justified at that early date; cf. also JULIUS STONE, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, 1958.

29 TUNKIN, *loc. cit.* in note 27 above, pp. 237 ff.

principles (including constitutional rules) of general international law, the problem of the subjection of the governments of the U.S. and the U.S.S.R. to the Charter leads to the question of their subjection to these principles and rules. At the end of his interesting paper on *pacta sunt servanda*, Kunz states that "*pacta sunt servanda*, contrary to the opinion of many writers, admits of no exceptions. "The revision of treaties... presupposes necessarily valid treaties and brings up the political problem of a change or termination of valid treaty norms, recognized as valid in positive law by the conflicting parties, for *metajuridical* reasons... *Pacta sunt servanda* means the inviolability, not the unchangeability, of treaties"<sup>30</sup> (italics mine). I italicized "purely political" and "metajuridical" (including, of course, the political) because these words show that Kunz agrees with me that law is rooted in and proceeds from politics; it is a product of the political process. More particularly are treaties and constitutions political law, that is to say they are inconceivable without the contest of power which shapes the political process.

It is from this viewpoint that the binding force of such constitutional rules of general international law becomes understandable as the consequence of reason of state, as is the binding force of a constitution, in subjecting power wielders (rulers and officials) to their rules and norms. For this process is an ongoing affair which imposes its "laws" upon those participating in it. Reason of state, to use once more the traditional term, embodies political rationality; it contains, in other words, those propositions which a rational participant in politics must follow, if he wishes to survive. The old theorists assumed that what was necessary for the security of the state was something not only knowable, but known. In their doctrine of the *arcana imperii*, the secrets of rule, they recognized that this knowledge was difficult and beyond the grasp of the uninitiated. Thus there were kings and councillors, who did know these secrets, and who could therefore be expected to act rationally in terms of these secrets. It was a rationality of expediency or of prudence. (We have had, in the controversy over Vietnam, the spectacle

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30 KUNZ, *op. cit.* in note 23 above, pp. 247 ff.

31 See my *Constitutional Reason of State*, 1957, ch. I.

of what happens when the uninitiated claim to moralize in this sphere). That is to say, it was and is a rationality which may disregard the rules of the prevailing ethic. Very special problems arise here for the constitutionalist who is committed to certain basic moral positions<sup>31</sup>. But the only moral obligation which can be acknowledged by him who has the care of a state is the security of that state and its survival, that is to say, the survival of the people placed in his trust<sup>32</sup>.

At this point, the fact needs to be considered that the great political theorists who have expounded "reason of state" from Machiavelli, through Spinoza and Hobbes, to Hegel, have all be inclined to question the doctrine of *pacta sunt servanda*. It was a manistay of natural law reasoning which they rejected or transformed. Hobbes, whose highly questionable absolutist views are intransigently positivist when he insists that the sovereign is the source of all justice because justice can only be stipulated in relation to positive law, would still insist that a power wielder would be we advised to act in accordance with the rule. For although "words alone if they be of a time to come and contain a bare promise, are an insufficient sing..." And again, "if a covenant be made... wherein neither of the parties perform presently, but trust one another; in the condition of mere Nature (which is a condition of Warre of every man against every man), upon any reasonable suspicion, it is Voyd... The matter ob subject of a Covenant, is always something that falleth under consideration". And from all this he concludes that "there are in man's nature, but two imaginable helps to strengthen a covenant"; for the force of words is too weak to make men perform. In Hobbes' view these two ways are "either a fear of the consequence of breaking their word; or a glory or pride in appearing not to need to break it"<sup>33</sup>. These then would be typically reasons derived from political rationality.

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32 FRIEDRICH MEINECKE, *Die Idee der Staatsräson in der Neueren Geschichte*, 1924, English edition entitled *Machiavellism-The Doctrine of Raison d'Etat and Its Place in Modern History* (Tr. Douglas Scott), 1957, esp. the Introduction. The Introduction by the editor, W. STARK, is also valuable; cf. the Appendix to my *Constitutional Reason of State*.

33 HOBBS, *Leviathan*, 1651, ch. XIV.

Spinoza's argumentation is similar. He too holds that any compact is valid only within the limits of its utility to him who makes it. Everyone has a right by nature to act deceitfully; and no one is bound to observe a contract except by the hope of a greater good, or the fear of a greater evil, than would result from the breaking of the contract. Reason of state is whatever the rulers deem necessary for security and survival. Agreements must be observed because the failure to observe them would result in such distrust of the state as to hurt them more than the provisions of any treaty<sup>34</sup>. Is this, then, an adequate answer to our query concerning the subjection of a government to the basic rules of international law?

It is an argument that has had considerable appeal to thinkers who were generally concerned with the problems of political and legal obligation but rejected natural law, such as Hume. It is a utilitarian argument which maintains that law, and more especially constitutional and international law, is operationally valid because obedience is of greater utility than disobedience. In these fields of public law the query of Glaucon addressed to Socrates<sup>35</sup>, whether it then was not merely a question of seeming to be just, loses its challenge because treaty breach and constitutional violation cannot be kept secret. How valid is the argument, then, where the power is asymmetrical? What is the practical difference between a great power forcing a small power to renegotiate a treaty, the terms of which have become obnoxious to the great power, and the great power violating the treaty provisions (Kunz's above mentioned distinction between changing and violating a treaty)? A treaty or a constitution (a bargain between power groups in the view of some) may be amended or reformed when the balance of power has changed. Here we have the situation which gives rise to the *rebus sic stantibus* clause in its baldest form<sup>36</sup>. Is a shift in power covered by it really? It would seem to be in the case of a modern constitution, for it can be amended, when enough

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34 FRIEDRICH, *op. cit.* in note 31 above, pp. 40 ff. and references.

35 PLATO, *The Republic*, Bk. II.

36 E. KAUFMAN, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus*, 1911, speaks for a very broad interpretation; he later changed his position.

of a new majority emerges to put the amending clauses to work. In a country like Britain where a bare parliamentary majority is able to change the constitution, revolutionary changes may be effected rather readily, as happened in the days of the Reform Act of the 1830's, and with the House of Lords in 1911. It may be much more difficult, as it in the United States, where qualified majorities not only in the Congress but also in the states must combine to make formal changes, although here both Congress and the Judiciary have accomplished far-reaching reforms by "interpretation" in response to changed circumstances. One only has to think of the commerce clause or certain provisions in the Bill of Rights<sup>37</sup>. Here too the compact seems to be subject to a tacit *rebus sic stantibus* clause. But such interpretation is ineffective in matters involving explicit institutional arrangements, such as the federal structure. Here only formal amendment will do it, and some basic provisions, such as the equal representation of the states in the Senate, could only be altered by a two-step procedure in which first the prohibition would have to be eliminated. Incidentally it may be noted that the politically important assertion of the "one man, one vote" principle is completely at variance with the "one state, two senators" provision of the Constitution<sup>38</sup>.

In both constitutional and international law the question remains of which are the *res*, the things which must remain stable in order to maintain the compact intact. There has always been much disagreement among international lawyers about this matter, the strict interpreters seeking to limit these things, while those who wished to argue for the greatest flexibility and latitude in treaty interpretation sought to extend the category of things that must remain unaltered for the treaty to remain intact. Let us start by quoting Kunz when he emphasizes that

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37 GOTTFRIED DIETZE has recently shown the profound transformation in the constitutional protection of the right of private property. See his *In Defense of Property*, 1963, esp. chs. III and IV. On Congressional "interpretation" in general see DONALD G. MORGAN, *Congress and the Constitution*, 1966, esp. chs. 11 and 17.

38 On the dubious aspects of the "one man, one vote" principle, see ALFRED DE GRAZIA, *Apportionment and Representative Government*, 1962.

“the problem of the *clausula rebus sic stantibus* is equally a problem of positive law (as is the cancellation of a treaty, for example) and therefore, entirely different in nature from the purely political problem of revision of treaties”<sup>39</sup>. Kunz further insists that “the *clausula*, in so far as it is positive law, is by no means an exception to the norm *pacta sunt servanda*”<sup>40</sup>. In these statements, the problem of law and politics raises again its ugly head. Can the two realms be considered so sharply separate as the former statement implies? The revision of treaties is presumably not “purely political” and the *clausula* is, even in law, some kind of exception to the norm *pacta sunt servanda*. It all turns upon what are the *res* that must remain *stantes*; what are the circumstances which could nullify a treaty and therefore make it no longer protected by the principle of *pacta sunt servanda*? The bare power theorists from Machiavelli to Hitler and Stalin would include a change in power, and more particularly military strength. But it seems justified to argue *e contrario* that if all changes in the balance of power constitute a relevant circumstance, the reason for concluding treaties disappears. This has fairly generally been recognized in international law in connection with peace treaties, usually based upon the defeat of one party which is *under these circumstances* being obligated to accept certain settlements, such as territorial boundary changes, reparations and occupations which such a defeated power may well seek to change when its power has been restored or at least improved. Having a treaty is intended to protect, up to a point, the victor under international law against such revisions<sup>41</sup>. We shall not explore further the difficult question as to what other circumstances might be excluded from these relevant to the operation of the *clausula*; suffice it to recognize

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39 KUNZ, *op. cit.* in note 23 above, p. 357.

40 *Ibid.*

41 This is, incidentally, a good reason for the Federal Republic of Germany not to be interested in concluding a peace treaty at this late date, and it is paradoxical that its foreign policy makers should be emphasizing its lack. Peace does in fact exist, and it does in law as well, and any treaty could only confirm what has politically come to be the reality of relations between the Federal Republic and other nations.

that those circumstances which are explicitly mentioned in a treaty would be *included*<sup>42</sup>. The fact that the *clausula* also is important in private law, from which it was derived in the days of Grotius,<sup>43</sup> and has occasionally been the basis of argument in constitutional law (for example, Calhoun) is interesting in the context of our argument. For considering constitutional as well as contract law we may say that here also a shift in the balance of power, especially in federal systems, cannot be admitted as by itself nullifying the law and thus in itself justifying a reinterpretation. It may, however, produce a revolution, that is to say a breakdown of the constitutional system, if appropriate adjustments are not made in time. By analogy, in the relations between nations a failure to respond to a shift in the balance of power by suitable treaty revisions may lead to war<sup>44</sup> —in short, in both cases the failure of the law to respond to political realities produces violence and the breakdown of law. The *clausula rebus sic stantibus* by removing from such contests of power a certain number of relevant circumstances has, therefore, a genuine function in maintaining law. It is an escape clause. It has been rightly asserted that “to block revision is to invite nullification, above all in the case of peace treaties, on the basis of the reality, not the plea, of one fundamentally changed circumstance, namely a change in the power relationship of ex-conqueror and ex-vanquished”<sup>45</sup>. But the stress must be on “revision”. To let such alterations be unilaterally allowed on the basis of the *clausula rebus sic stantibus* makes hash of law in the rela-

42 WESLEY L. GOULD, *An Introduction to International Law*, 1957, p. 340; his is altogether a very sensible and politically alert discussion of the *Clausula rebus sic stantibus*.

43 A. NUSSBAUM, *A Concise History of the Law of Nations*, rev. ed. 1954. Whether it was Gentili or Grotius who first suggested the transfer of this clause from the private law of contract to the international law of treaties seems to me “an argument over the emperor’s beard” as the saying goes; for it is also found in their Spanish predecessors, notably Vitoria.

44 JOHN FOSTER DULLES, *War, Peace, and Change*, 1939, was a main advocate of the need for developing machinery to effectuate “peaceful change”. Such machinery as now exists under the Charter of the U. N. is quite ineffectual. Cf. also J. L. BRIERLY, *The Outlook for International Law*, 1944.

45 GOULD, *op. cit.* in note 42, p. 343.

tions between nations, and is an invitation to the use of force. The recent case of the occupation of Czechoslovakia is a painful reminder of the potential consequences of too broad an interpretation. But too narrow an interpretation, such as persuaded the U. S. to fulfill her agreement to accept the Elbe-Thuringia boundary as the line of division of Western and Soviet occupation when it could have pleaded changed circumstances with good conscience, may also have had results in the long-run. A similar argument applies to the U. S. involvement in Korea and Vietnam.

In summary, then, it might be said that a radical separation of law and politics is not only untenable but injurious to the law. Law is the prime political act, and if it is good politics, it achieves, the justice toward which it is oriented. Any constitutional reform or treaty revision has to be argued politically and has to be achieved politically. In constitutional states, politics has to be conducted within the framework of the legal order so that the interaction becomes mutual. A disregard by those in charge of the law of the behavior of political man and its observable regularities does not serve the purity of the law, but condemns the law to sterility (as does too much purity in other fields of human life). Even so perplexing a rule as *pacta sunt servanda*, qualified by *rebus sic stantibus*, confirms these conclusions. It is the purpose of the law, or so it seems, to protect the *statu quo* of the past while providing procedure for changing it into the *statu quo* of the future. It can do so when it expresses the political forces that are at work in a given legal and political community. The rule of *pacta sunt servanda*, as a constitutional rule of general international law and as qualified by *rebus sic stantibus*, assists this inchoate body of law, as does the amending provision of a modern constitution, in fulfilling this purpose of the law. Law and politics are thus mutually interdependent; and their scientific study ought to be equally so.

46 PAYSON S. HILD, *Sanctions and Treaty Enforcement*, 1934, pp. 14-15, has rightly stressed that both the sanctity of treaties and the need to revise them spring from and are therefore intended to serve the needs of the community. The way to accomplish this, we might add, is to make good politics. Cf. also JOSEF KUNZ, "Sanctions in International Law" in *op. cit.* in note 23 above, pp. 621 ff. (reprinted from *American Journal of International Law*).