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# Turning the Law into Laws for Political Analysis

Gary Wickham

## Introduction

**T**wo concepts have been (and continue to be) extremely influential in the political analysis of legal relations - the concept of power and the concept of the law (in the singular). Consider the following brief excerpts from the writings of Marx and Engels (collected in Campbell and Wiles, 1979):

In all states other than democratic ones the **state, the law**, the constitution is what rules, without really ruling ... (Marx, from "Contribution to the Critique of Hegel's Philosophy of Law", 1843, as quoted: 33, emphasis in original)

If power is taken as the basis of right, as Hobbes, etc., do, then right, law, etc. are merely the symptom, the expression of **other** relations upon which State power rests. (Marx and Engels, from **The German Ideology**, 1846, as quoted: 37, emphasis in original)

In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an **internally coherent** expression ... (Engels, from a letter to C Schmidt, 1890, as quoted: 39, emphasis in original)

While it would be absurd to suggest that these passages are the basis of the type of political analysis of law referred to above, it is quite reasonable to see them as representative of a certain way of constructing and understanding the politics of laws: grand concepts - **power and the law** - for a grand project - understanding and perhaps even changing **society and/or the state**.

This essay will make no comment on the appropriateness of these

two concepts and this project for the places in which Marx and Engels worked or for the times in which they worked. Rather, the essay will address the contemporary relevance of these concepts, particularly within the confines of Australian political analysis. I will argue that they are not immediately appropriate and that they can and should be overhauled.

The main focus of the essay will be the concept of **the law**. Consideration will be given to the concept of power only to the extent necessary to support the arguments about **the law**. This limited consideration of power will be carried out in the first section. The second section will contain the main arguments about **the law**, while the third and final section will be an example of a political analysis which uses the concept which will emerge from the overhaul of **the law** undertaken in the second section.

### Scrapping the Concept of Power

**I**n the case of the concept of power, I don't think the word "overhaul" which I used above is strong enough. Elsewhere (Wickham, 1987) I have gone so far as to argue that there is a need to abandon the concept, at least for the time being. I will present a summary of my arguments and briefly develop them in this section.

The basis of my arguments against power is a sympathetic critique of some of Foucault's pieces on power. (Wickham, 1983) This critique reached the conclusion that while Foucault's work on power successfully combats essentialist tendencies in much power analysis - tendencies to read particular objects of analysis in terms of an essence, like class, the state or the individual - it suffers from its own form of essentialism. In other words, Foucault combats the tendency to read power in terms of certain essences, but does not completely combat the tendency to aggregate unnecessarily which is at the heart of essentialism. Long-standing essences are scrutinized and, in the main, rejected. But Foucault's analysis still involves unnecessarily aggregating various parts - for example, operation of power in prisons, operation of power in hospitals, operation of power in mental institutions, etc - into a unified whole. This unnecessary aggregation tendency leads to a new essence.

It happens like this: the specific foci of Foucault's particular, limited, controlled (necessary) aggregations (the operation of power in prisons, etc), take on a combined life beyond these particular ag-

gregations and function for other of his analyses as a universal, eternal entity (an uncontrolled, limitless, unnecessary aggregation), as what I call an essence. This new essence is called discipline, or disciplinary power, or simply power (the temptation to spell these terms with a capital D and a capital P is great).

On the basis of this critique of Foucault I have identified two closely related problems which justify the abandonment of the concept of power. The first problem is the ontological status which the concept of power has assumed in much analysis. Power has become its own reality. To illustrate this point I will turn to an essay often used in Australia to introduce students to some of the complexities of the concept of power - Bob Connell's and Terry Irving's, "Yes, Virginia, There is a Ruling Class". (1976)

For Connell and Irving - and it must be remembered that their essay is a fairly typical example, part of a long tradition (spanning both Marxism and liberalism) of understanding power; I am illustrating here rather than criticizing - power is a real entity in its own right. It is manifested in a "system" or a "structure".

... if we are seeking to define the State, it is in part the system of power that structures the whole society ... (1976: 82)

... the class rules jointly by preserving the power structure ... (1976: 83, emphasis deleted)

Power may be examined in smaller units - for instance, economic power, political power and cultural power - (1976: 83) but it still functions as an entity with its own existence or operation.

The result of this situation is that those carrying out analyses spend a lot of their time trying to know power itself. They wield their tools of analysis - be they surveys, theoretical arguments or archive examinations - with this goal. The objects of analysis which have been unnecessarily aggregated into power - the arrangements and outcomes of contests over different objectives in particular places, like government departments, schools, hospitals, prisons, etc - are ignored or marginalized. Analysts might more productively, in terms of understanding and/or contributing to any one of the different contests referred to above, employ their time addressing these

objects of analysis in their own right, using controlled techniques of aggregation where necessary (ie only where the aggregated unit has clear, specific conditions of operations).

The second problem of our two related problems involves the singular status of power. Power is examined not only as a real entity, but as the one and only entity worth examining. All objects of analysis - all arrangements and outcomes of contests over different objectives - become power. Any number of objects of analysis become the one object: power. Consider, as a very brief illustration, the ready way in which Connell and Irving use the singular form for power and related concepts in the previously quoted passages.

The question will now be asked, if we abandon the concept of power, what tools are available for us to investigate the arrangements and outcomes of contests over different objectives in particular places involving particular forces? The most obvious answer is that we have no general, all-purpose tools and that this is a good thing. Analyses must concentrate on whichever one or grouping of these contests is the object of investigation without reference to general concepts; their tools cannot be specified in advance. They will be whatever tools that are useful at the time. The criteria by which their usefulness will be judged, like the tools themselves, will be shifting criteria with limited temporal and spatial currency<sup>1</sup> - limited to what we might call particular communities of analysis (a point which owes as much to Kuhn [1962] and Feyerabend [1978] as it does to Foucault).

To supplement this obvious answer I would like to advocate a wide role for one particular concept - the concept of politics. This can be done without making this concept into a direct substitute for power, saddled with the same problems of ontological and singular status discussed above. It can be done because I am not suggesting that politics perform the same unifying function that power performs and I am not seeking to grant politics a role beyond the temporal and spatial limits referred to above. Politics can be useful for the time being (it may well eventually take on the ontological and singular status that dogs power; if and when it does it too should be abandoned) and it can be useful for certain tasks within certain communities of analysis, like analyzing contests over certain laws in Australia.

The concept of politics can be used to analyse the arrangements

and outcomes of contests over different objectives in particular places involving particular forces (a formulation which I will replace from now on by the term "sites of politics") without unnecessary aggregation. There will not be a single, grand site of Politics or even an hierarchy of sites of politics. We can have the politics of a particular law in its own right, the politics of the Accord in its own right, the politics of a school in its own right, etc.

Power analysis then, should not be seen as a single enterprise. We are better off to use a term like "analyses of the politics of ...", signalling that analyses of sites of politics are temporally and spatially specific activities with specific objects. It also signals an important point not raised so far: the term "**politics**" should not be used on its own. If it is always used in conjunction with a particular site-as-object, ie the politics of a particular site, there is far less chance of it becoming infected with the joint problems of an ontological and a singular status.

### From the Law to Laws

**I**n this section I want to problematize the concept of the law (in the singular) in a way very similar to that in which I problematized the concept of power in the previous section. The need to undertake the problematization of the law is suggested partly by the points presented in the Introduction and partly (more importantly) by the current operation of some critical jurisprudence arguments in Australia. (see especially Duncanson, 1986) In other words this section is offered by way of support for these critical arguments in confronting "two traditions [which] have functioned in the Anglo-American world to constitute *law* as a discrete unity" for "the last two centuries": one, "associated with Blackstone, whose unifying concept was reason"; the other, "much more familiar in Australia and the United Kingdom, is the one associated with John Austin, which confers unity by reference to political authority". (Duncanson, 1986: 9) So, more accurately, this section is offered by way of support for critical arguments mentioned above in confronting the second of these two traditions.

In this section I will suggest a less drastic reformulation of the concept of the law than that suggested for power in the previous section. I will argue that the law should be replaced by the concept of discrete laws (the definite article disappears). My argumentative plan of attack will be similar to that adopted in the previous section inas-

much as I will be arguing against a general theoretical concept which is often given its own ontological and singular status in much political analysis, in favour of a specific concept informed by tactical considerations.

Such tactical considerations necessitate an eclectic approach to theoretical sources. Theoretical writings should be scrutinized for their tactical usefulness. Rigid commitments to particular theorists should be avoided. The work of any theorist should be used selectively. For example, Foucault's work is ambivalent when it comes to a role for the concept of the law. Sometimes Foucault encourages the abandonment of any unified concept of the law - as when he tells us that the law is not a "mask for power", that power cannot be interpreted in terms of the law, that the law is "neither the truth of power nor its alibi". (1980b: 140-1) But at other times he contradicts this by giving a unified concept of the law pride of place - as when he tells us that disciplinary power uses the law to give it an appearance of legitimacy, to "disguise" its "effective exercise".<sup>2</sup> (1980a: 105-6)

In seeking to turn away from consideration of the law towards consideration of different laws, we might begin by thinking of different laws in the same way we think of different procedural techniques, like techniques for filing documents in an office. These procedural techniques can be formalized and written down (as particular laws are), can be policed (as particular laws are), perhaps by an office manager, and a breach of the techniques by any one of those subject to them can be punished (as is the case with breaches of particular laws), perhaps by dismissal. Just as we are likely, within the current spatial and temporal limits referred to in the previous section, to consider the specific effects of these particular procedural techniques only in terms of their specific operations in specific places at specific times, without reference to a general theory of the procedure, so we might begin to consider the specific effects of particular laws only in terms of their specific operations in specific places at particular times, without reference to a general theory of the law. It is only when we allow different laws to become the law that we run into the sort of essentialist problems of analysis I have been discussing.

It should be noted that I am not suggesting that a general theory of procedural techniques is impossible. A general theory of procedural techniques is just as possible as a general theory of the law. Indeed,

one or more such theories may be forming, or may have already formed, in certain institutions where techniques of administration are currently being unified into a science of administration. I am only suggesting that my analogy is effective when we compare **the law** and procedural techniques **within the current spatial and temporal limits of political analysis**. The concern of this paper, it must be remembered, is political analysis.

It should also be noted that within the institutions of political analysis my arguments against the general concept of **the law** are not only posed against ingrained uses of this concept. Certainly such ingrained uses - the singular and ontologically certain uses of the concept of **the law** which seem such an easy and ready part of analysts' tools - are the main target of my criticisms. But the arguments also have validity against the more conscious, rhetorical uses of this concept. It seems to me that such uses, whether they are by forces trying to achieve what are often called "left political objectives" in order to, for example, unify disparate groups for tactical purposes, or by forces trying to achieve what are often called "reactionary political objectives" in order to, for example, enforce the rule of law for the benefit of the people (I'm thinking here of the current Queensland government's anti-union campaign), are as flawed as ingrained uses. Indeed, these rhetorical uses serve to deflect attention from the problems of the ingrained uses and may even serve, in doing so, to cement the ingrained uses of **the law** more firmly in place.

Shifting the forces of analyses of the politics of legal sites away from **the law** and towards specific laws involves, at a fairly simple but nonetheless important level, a rejection of the obviousness of laws. Phillipps quotes Brecht to emphasize this point: "before familiarity can turn into awareness the familiar must be stripped of its inconspicuousness, we must give up assuming that the object in question needs no explanation". (as quoted in Phillipps, 1982: 55) We have to examine the specific effects of particular laws in particular sites and we cannot assume that what we analyze in one case at a certain time will be the same in another case or in the same case at another time.

Shifting the focus of analysis also involves a rejection of any concrete ontological status for laws (very similar to the rejection of an ontological status for power in the previous section). Laws should not be seen as real entities with eternal meanings built into their realness. Rather, they should be seen as conditions, among other



conditions, of the operation of sites of the politics of laws (especially courtrooms, sites of policing, sites of counselling, etc). Laws are conditions which have effects on the operation of these sites via their own operation, not simply by their real existence. That is, laws only have effects inasmuch as they are used, either directly or indirectly.

Laws of property for example, have no concrete effects in themselves. They have effects only in their different operations in different sites, ie in their different uses. Police use them, we might say read them, in a certain way in a certain situation (and use them differently in different situations). Judges and lawyers use them in a certain way in a certain situation (and use them differently in different situations). Property developers, local government officials, politicians, etc also use them in certain ways in certain situations (and use them differently in different situations).

Laws then, are effectively different laws in different situations, there is nothing unifying them into entities with universal and eternal meanings and effects. To say this is not to doubt that some usages of laws can be quite widespread. The possibility of their wide usage is given by the operations of certain mechanisms (the effects of which cannot themselves be guaranteed of course) which ostensibly have a currency in a wide range of legal sites. Examples of such mechanisms include formal legal and para-legal training in certain procedures, certain legal texts and other publications and, more informally, certain extra-procedural codes, like loyalty. However, no matter how widespread certain usages of particular laws become, we should not mistake such widespread usages for means of unification of laws to the point where universal and eternal meanings and effects can be attributed to them.

The operation of different laws in different sites involves different actors or subjects. Before we discuss actors in legal sites I will summarize some arguments posed elsewhere (Wickham, 1987: 150-2) about actors in other sites of politics. Actors should be thought of, following Althusser, as always-already operating in particular sites of politics, rather than as being produced or constituted in these sites, or in some grand arena like Power or the Class Struggle. The notion of the production or constitution of actors should be avoided as it leads to analysts trying to know actors by attempting direct knowledge of their originating moment. Analysis of actors within sites should concentrate only on their (always-already) operation. In this way, emphasis will be put on the different ways in which dif-

ferent forms of actor are operating in different sites. No attempt will be made to unify actors into one form, whether it be human individual or social class.

It will be noticed that I am using the term "actor" whereas I promoted the use of the term "subject-form" in the paper from which the above points are summarized. I am doing so mainly because the term "subject-form" might prove confusing in the context of discussing legal sites. The term "legal subject" has a technical legal meaning in many legal sites, as a bearer of certain rights. In choosing "actor" I am following Barry Hindess (1986) and the contribution by Graeme Lowe to this volume.

In line with the arguments summarized above, we should reject any general category of legal actors - such as a ruling class which controls laws, or individuals who are protected and/or coerced by laws - in favour of considerations of the specific form(s) and operation(s) of actors in those sites of politics where a law (or laws) are operating. So, for example, instead of seeing Australian employees as individuals (with common psychological and biological characteristics), we have to consider employees as a specific form of actors. Moreover we have to consider the way different types of employee operate as different forms of actor, with different statuses and capacities, in different sites in Australia where different laws (laws governing the public service, laws governing the building industry, laws governing workers' compensation, etc) are operating. Instead of analyzing the operation of employees in terms of their repression as individuals, or as a class, by a ruling class which uses laws as instruments, or in terms of their struggle against this repression, we have to consider the specific political effects of the operations of specific forms of employee in terms of specific objectives in particular sites. At a certain time we might, for instance, have to decide whether the operation of the form of actor "Australian public servant" serves to promote secrecy and lack of accountability in Australian government or whether it serves to protect necessary administrative jobs. Of course our answer might be both or either and our answer will be different depending on when it is given and what site is involved - whether it is an official inquiry into the operation of government or a hearing before the Arbitration Commission, to name just two possibilities.

I argued earlier that some usages of laws are fairly widespread, though never universal or eternal, because of the operation of certain

mechanisms like formal legal training. I now want to argue that some forms of legal actor also have a wide currency, a currency in a range of sites where laws are operating. Examples of widely operating forms of legal actor include judges, courts, lawyers, counsellors, police and criminals. Of course we should never allow these often-repeated forms to become essences (as meta-actors or meta-subjects, like the individual), to treat them as if they necessarily occur and operate in the same way wherever laws are operating. But we can and should consider the ways in which the wide repetition of these specialist forms can have wide effects in terms of certain specific objectives. For example, Phillipps considers the repetition of the specialist legal form of actor "delinquent" - a type of the specific form "criminal" - in a range of sites where certain criminal laws operate, particularly courtrooms. He argues that this wide repetition has a major bearing on the continuance of certain medical, psychiatric and criminological practices to treat the "delinquent" which in turn furthers the objective of incarceration as a means of punishment/rehabilitation. (1982: 60-1)

Once the basic unit of political analysis of sites where laws operate is shifted from the law to specific laws, it might be suggested that a further shift is required to take into account the way specific laws work in different sites. In the example to be offered in the following section I will briefly discuss the internal regulations of a particular organization. Elsewhere I have argued that the concept of specific laws should be supplemented by the concept of specific regulations. (Wickham, 1985) I no longer think this necessary. Within institutions of political analysis a move from the law to laws seems to me now to be all that is required to break the essentialist grip of the concept of the law. This tactical judgement suggests that to go beyond this to a further breakdown into the concept of regulations, as a base unit of analysis, would be to underestimate the potential of the concept of specific laws (I'm now sure analysts specializing in legal fields have known of this potential for a long time; they would see my erstwhile underestimation, quite correctly, as ignorance of the complexity of legal fields). It would also be to risk confusion by using a concept -regulations- which already plays a variety of roles in legal literature. Regulations should be examined where they are operating, but they need not be formulated into a special supplementary concept to help the concept of laws overcome the problems associated with the law. Of course, as I noted before in the case of politics vis a vis power, there is no guarantee that the concept of laws will not eventually serve the same essentialist func

tion I am attributing to the law. My judgement about laws as adequate for present purposes is made within the temporal and spatial limits of contemporary Australian political analysis.

### Using the Concept of Laws in Political Analysis: An Example

Australia's broadcasting laws govern broadcasting practices across the country. These laws operate, they only have effects, in different instances. The operations of these laws involve a range of specific actors - viewer, listener, licensee, community, Australian Broadcasting Tribunal, etc. On the question of broadcasting "blasphemous, indecent or obscene matter", the Australian Broadcasting Tribunal **Manual** (1984) cites the Broadcasting and Television Act 1942 (as amended) as follows: "There is absolutely no ban on the transmission of particular language". It goes on to outline the factors that are "likely to be relevant in a consideration of whether language would substantially offend contemporary community standards of decency". These factors include: "The nature of the transmission as a whole. Was the use of the language in context? Was it gratuitous? Was it deliberate? What was the overall purpose of the transmission? Did it involve a serious matter or artistic or literary merit? Did it involve a serious discussion of some moral or social issue?" (47-8)

It is not my intention here to discuss all the effects of the various usages of this part of this particular law; these various usages, especially those by the Australian Broadcasting Tribunal, have had a large range of specific effects, particularly for public radio stations - including the temporary suspension of 4ZZZ, the tightening up of control of programming at 3RRR and, conversely, the freeing up of control of programming at 3CR. (Interviews with Reece Lamshed, station manager 3RRR, and Geoff Swanton, station manager 3CR, 1 July 1985) What I want to do here is highlight the way the internal regulations of one particular public radio station (not one of those mentioned above) worked to produce a very harsh usage of this part of this law in one particular case.

The particular case involved a series of programmes on the politics of rock music - "The Politics of Rock and Roll" - made for 6UVS in Perth. The programmes, not surprisingly, discussed the advent and role of punk rock and featured several examples of punk rock. In one programme several such examples contained the word *fuck*. When this programme went to air, the manager of 6UVS, via an intermediary, immediately stopped it and banned the remainder of

the programmes in the series. The manager used station regulations to justify this action. He read these regulations to include the following points about the relevant part of the relevant law: that “the word *fuck* [is] one of two words that are all but impossible to justify under any circumstances”; that the use of any such word must be limited (“3 times in less than 30 minutes is excessive by anyone’s standards!”) that the playing of pieces of music does not by itself constitute “a serious matter of artistic or literary merit” or “a serious discussion of some moral or social issue” (“virtually nothing in the commentary added to or supported the artistic elevation of the music tracks beyond the level of basic existence”; “There was no depth to the discussion at all”); that the word “fuck” should not be broadcast to “those below school age and unemployed youth”. (Correspondence between Bill McGinness, station manager 6UVS, and the producers of “The Politics of Rock and Roll”, 18 June 1985 and 24 June 1985)

In this case the use of the concept of specific laws greatly benefits a political analysis of censorship on Perth radio. Certainly an analysis would have been possible using the concept of **the** law, but it would have stalled at a very grand level. Using the concept of laws in the way I have here, based on the arguments contained in the previous two sections, means analysis can be undertaken of the way broadcasting laws operate in many specific sites, not just obvious sites like the Australian Broadcasting Tribunal. In this way, I have examined a usage of Australian Broadcasting laws, involving the operation of the specific form of actor “responsible station manager”, that has served to promote the specific political objective of censoring the content of the radio airwaves in Perth.

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## NOTES

<sup>1</sup>I owe an acknowledgement to the cultural theorist Stephen Greenblatt here. He writes:

In order to achieve the negotiation, artists need to create a currency that is valid for a meaningful, mutually profitable exchange ... I should add that the society's dominant currencies, money and prestige, are invariably involved, but I am here using the term *currency* metaphorically to designate the systematic adjustments, symbolisations and lines of credit necessary to enable an exchange to take place. (1987: 13)

<sup>2</sup>Colin Gordon (1977) goes into more detail about Foucault's treatment of law, especially criminal law.