Review of Policy of Law: A Legal Theoretical Framework

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The Policy of Law: A Legal Theoretical Framework

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Mauro Zamboni, Stockholm University, Department of Law, 2004, 313 pages.

How do law and politics interact and what is the nature of this interaction? How are the values generated within the political arena transformed into legal values, norms, concepts and principles? How can we define the transformational moment when »the policy of law« is shaped normatively? These are some of the questions which lie at the heart of Mauro Zamboni's doctoral thesis.

This study aims to construct »a field in which to locate one of the means of allowing politics to become law« (p. 8). While interrogating the relationship between law and politics, it attempts to throw light on the formation of what Zamboni calls »legal disciplines«. To achieve this, Zamboni adopts an interdisciplinary approach which cuts across the boundaries of law, philosophy, politics and sociology. I have, therefore, read this work from the standpoint of socio-legal research, which encompasses political science, but also legal sociology and legal anthropology. I should, however, add that the aim of this review is not to place Zamboni's central thesis under the microscope. After presenting his thesis, I shall briefly touch on a discrepancy which exists between the research question and the methodology Zamboni adopts in his study. The remaining part of this review will be devoted to drawing attention to the complexity of interdisciplinary research and the conceptual obstacles which hamper cross-disciplinary exchanges between legal theory and sociology of law.

Disposition

This study is divided into two separate but inter-related parts. Part One explores how major schools of jurisprudence describe and theorise the relationship between law and politics. To facilitate this, Zamboni categorises them using three ideal typical models: the *autonomous*, the *embedded* and the *intersection* model. The autonomous model is

represented by versions of legal positivism and analytical jurisprudence, as developed by, for example, Hans Kelsen and H. L. A. Hart, which regard law and politics as two connected but still autonomous entities. Zamboni argues that both Kelsen and Hart sharply distinguish between, and have a »rigid« understanding of, the relationship between law and politics. This means that these scholars, or theoretical traditions, tend to consider the law as having the capacity to retain its internal normative and operational integrity in the face of political interventions which introduce new (political) values into the sphere of law. They also tend to regard law-making as an activity which is, although linked to the legal sphere, nonetheless, closed to politics. Once political values are imported into the sphere of law, they are moulded and reshaped by the internal logic and conceptual apparatus of law.

The embedded model captures the approaches of Critical Legal Studies (CLS), law and economics and natural law theories of such scholars as John Finnis. These theories argue that politics can, and actually, does enter and influence the process of law-making both at the stage of legislation and, also later, at the stage of interpretation and enforcement. Politics influences law not only by introducing new values which are politically tuned, but also at a discursive level influencing how legal decisions are justified.

Finally, the intersection model represents the approaches of American and Scandinavian legal realists to law and politics. Although the American and Scandinavian realist movements differ in many respects, they nonetheless regard law and politics as two intersecting spheres. Law is partially closed (Zamboni uses the term »partially rigid«) to political influence (which also means that it must be partially open (the term »rigid« does not convey the openness of the systems in quite the same way). In this way, the realist traditions try to preserve the specific legal properties of the law, while safeguarding its autonomy in respect to politics (p. 116).

All these theories regard law as being distinct from, but in interaction with, politics. Although they assess the extent and quality of this interaction in different ways, they nonetheless agree on the importance of what Zamboni calls »the transformational moment«. This term refers to the moment when law and politics meet and, through the law-making process, transform values generated within the political sphere into legal categories and concepts (p. 139). Zamboni emphasises that although contemporary theories recognise this transformative stage as central to our understanding of law, they nonetheless fail to subject it to a thorough examination. The reason for this neglect is that they ultimately regard the stage when political values and interests are transformed into legal norms and concepts as extra-legal and, hence, outside the scope of legal inquiry.

Part Two of this study is devoted to the analyses of this »transformational moment«. Political values can enter the legal domain as »valid law« or »binding rules of law«, by going through what Zamboni calls, the »transformational box« which transforms political values into legal categories and concepts. Zamboni writes that this transformational box »can be positio-

ned at a higher level of the legal system, such as the Kelsenian Basic Norm or in the Hartian Rule of Recognition« (p. 142) or at a lower level »such as in the judicial decisional process« (p. 143).

A discrepancy

In Part Two of the study, Zamboni aims to interrogate the »transformational moment« from »the standpoint of legal actors« (p. 266), i.e. in reference to what I would call *the sphere of social action*. This emphasis on the importance of »actors« leads us to expect an empirically (I am using the term »empirical« in the broadest sense of the term) informed treatment of this problem. However, reading through the pages of this book, the reader soon discovers that Zamboni has other things in mind than producing empirically valid arguments.

By re-constructing a number of traditional theories of law, he tries to construct a disciplinary field for »the analysis of the politics of law«. This field of study aims »at enlightening the grey box represented by the transformational processes and its results *with the keys of jurisprudence*« (p. 265) [my emphasise]. The »keys of jurisprudence« are, from what I can gather, the normative analysis of legal philosophy which function as the »philosopher's stone« in Zamboni's scheme of things. In addition, instead of using empirical evidence to explain how the »grey box« functions, Zamboni uses a normative constructs to develop the constitutive elements of his proposed theoretical model.

This creates a discrepancy between the study's research questions, which were formulated in reference to the empirical world (such as the standpoint of legal actors) and its methodology, which attempts to achieve this aim by focusing on normative discourses of legal theory. The policy of law (i.e. Zamboni's *normative* theoretical construct) uses legal theory (also consisting of essentially *normative* statements) to examine the transformation of values (i.e. an *empirical event* of normative significance) from the standpoint of legal actors (again a *factual/empirical* entity or unit of analysis).

Is Zamboni implying that the perspective of legal actors is the same as, or represented by legal theory? Or is he implying that legal actors act in accordance with what their favourite school of jurisprudence tells them to do?

Distinguishing between theory and practice

In the remaining pages, I shall attempt to reflect on some of the issues raised in this study in order to see what socio-legal research can learn from them. I shall do this by distinguishing between *what is of the law* and *what is about the law*. The former has an »independent« factual/empirical property of its own, which is reflected in how ordinary men and women use the law to organise their daily lives and how various legal institutions and legal authorities operate. How political values are transformed into legal norms and principles belong to this sphere, which is why I regard this process as an »empirical event«. In contrast, the

latter, that which is *about* the law, does not necessarily emerge out of law's practices, operations or processes, and can be a product of other discourses (like those of philosophy, legal studies, politics, mass media or popular culture). In short, theories of law, whether jurisprudential or social scientific, are not necessarily *of* the law in the strict sense of being part of, or emerging out of, legal processes, but *about* the law and, in their most reliable form, based on observations of law's processes. The fact that these two are inter-related, interact with each other and feed back into each other is another matter which I have addressed elsewhere and does not immediately concern us here.[1]

Expressed differently, an examination of legal theoretical schools would, at best, reveal *how legal theory normatively constructs the relationship between law and politics*. The study of what Stanley Fish called »theory-talk«, which is concerned with how the state of things *should* be, does not *necessarily* allow us to draw conclusions about how the states of things *are*. Social actors (including legal actors) act in accordance with their beliefs and in response to the actions of other actors and the specific social context they find themselves in, and not in accordance with any social or legal theory. As any practicing lawyer would point out, the practice of law consists of a diverse set of skills, many of which have little, if anything at all, to do with legal theory. Hence, my amazement at the implication of Zamboni's thesis that we could understand and analyse the reality of law and the nature of legal practice, by deconstructing what philosophers of law such as Kelsen or Finnis have said about it.

In this connection I should also emphasis the need to understand academic theorising as a form of discourse (produced by what Stanley Fish described as an »interpretive community«) with its own rational and objectives. Legal theories can be regarded as »interpretive constructs«.[2] Any attempt to dislocate these theories from their academic cultural environment which varies from country to country, and from their temporal and historical contexts, would provide a simplistic picture of the intentions of those who reproduce such discourses.

Has sociology of law neglected Zamboni's »grey box«?

Zamboni suggests that sociology of law has little to contribute to the understanding of his »grey box«. According to him, legal sociologists study judges and lawyers as *social* actors and have nothing to say about their *legal* functions (p. 246). Much of sociology of law, admittedly, focuses on behavioural factors »external« to legal processes, but contrary to what Zamboni believes

1. Reza Banakar, *Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research*. Galda and Wilch Publishing: Berlin/Wisconsin, 2004.

2. Stanley Fish, *Doing Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford Clarendon Press, 1989) at ix.

socio-legal scholars have much to say about legal norms, the legal functions of legal actors and the internal mechanisms of the law.[3]

Zamboni explains that the process of transformation of political values into legal concepts is usually carried through by legal actors who are specialised in such transformation (p. 217). The Swedish research on the impact of law and legal regulation has, in fact, addressed this value formation and transformation in some detail. Some Swedish researchers have focused on the emergence of, and the relationship between, legal and extra-legal norms,[4] while others have examined how the values and objectives of policymakers are realised through legal regulation.[5] In that sense, Zamboni's concern has been a general topic of research within sociology of law for decades. So why has Zamboni missed this body of research? One explanation might be that the various schools of research which constitute sociology of law and traditional schools of jurisprudence use slightly different concepts and notions of law. Let me demonstrate this conceptual problem by reference to a study which was first published more than three decades ago.

In a study of how the Swedish government intervened during a period between 1930s to 1950s to regulate the excessive exploitation of private forests, Per Stjernquist describes how the forestry authorities interpreted and enforced the political and economic values expressed by the legislature. Stjernquist highlights how these values were implemented, or to use Zamboni's terminology transformed into legal norms and concepts, by bringing into focus the interaction between »legal actors«, i.e. the forestry field-personnel, on the one hand, and the forest owners, on the other.[6] The question is whether Zamboni would recognise the forestry authorities as a »specialised legal actor« and its actions as legally transformative of political values. For Zamboni the term »legal actor« probably refers to judges and other lawyers and the process of transformation is some legal analytical processes which take place within a magical »grey box«. The content of this »grey box« is, now to interpret him somewhat freely, the guarded secret of the high priests of the law. That is why only the »philosopher's stone« of jurisprudence, rather than the mundane empirical methods of social sciences, can for Zamboni unlock the secrets of the »grey box«.

For Stjernquist, who served as a judge in the Court of Appeal for many years, »legal actor« means all those authorities, from judges and practicing lawyers to police, local government administrators and social

3. For a discussion on »the content of law analysis« see R. Banakar 2004, and R. Banakar and M. Travers, »Law, Sociology and Method« in Theory and Method in Socio-Legal Research (Oxford, Hart, 2005).
4. Håkan Hydén, Normvetenskap (Lund, Lund Studies in Sociology of Law, 2002).
5. Bo Carlsson, Social Steerage and Communicative Action: Essays in Sociology of Law (Lund, Lund Studies in Sociology of Law, 1998) and Reza Banakar, The Doorkeepers of the Law (Ashgate, Aldershot, 1998).
6. Per Stjenquist, *Laws in the Forest* (Lund, CWK Gleerup, 1973).

workers, who interpret and apply the law. For socio-legal scholars, the transformation of extra-legal values into legal rules or principles is not limited to the articulation of political values into a legal language. From a socio-legal perspective, such articulation amounts to little more than producing what Roscoe Pound termed »law in the books«, which reveals little of importance when considered in isolation from the institutional processes of »law in action«. Thus, a sociologist of law sees the transformation of politics into law as a complex of *institutional processes* which stretch over all the stages and juridical spaces from the pre-legislative negotiations between various interest groups to the implementation, interpretation and enforcement of the law.

As I explained at the outset, the aim of this review is not to dismiss Zamboni's central thesis. Dismissing this work simply because it has misrepresented socio-legal research on the relationship between law and politics, would amount to throwing out the baby with the bath water. Also, for lack of space, I have been unable to address many other issues of importance. Zamboni has not only ignored the importance of feminist jurisprudence and theories such as autopoiesis, which specifically address the relationship between law and politics, but has also neglected to discuss how legal norms and doctrines are also transformed into political values, or how law and politics interact differently in different jurisdictions and within different juridical spaces. Instead, my aim has been to point out some of the conceptual obstacles which continue to hamper interdisciplinary exchanges between legal theory and legal sociology. Despite Zamboni's positive view of sociology of law, we still find him misinterpreting and overlooking what socio-legal research has to offer legal theory. In addition, such studies remind us that we still have a long way to go before achieving a reasonable degree of genuine cross-disciplinary communication.

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