Can Sociology and Jurisprudence Learn from Each Other?: A Reply to Mauro Zamboni

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How Can Sociology and Jurisprudence Learn from Each Other?: A Reply to Mauro Zamboni

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Lack of space does not allow me to engage with all the issues raised in Mauro Zamboni's reply to my review of his *Politics of Law*. We must, therefore, allow ourselves to agree to disagree on certain »minor« points. For example, we can disagree on whether Herbert Hart was an »amateur« sociologist or not. Similarly, we can disagree on whether there are interdisciplinary claims in Zamboni's research question and general approach or not. In addition, I shall not comment on certain issues. Among these are Zamboni's ambition to create a new field of research single-handedly, his so-called »baby of socio-legal studies«, and his assertion that I entertain a naïve conception of normativity. Instead of focusing on side-issues such as these, I shall try to search for, and discuss, the theoretical roots of our disagreements.

In the first part of this reply, I suggest that our disagreements are in parts epistemological and are caused by different conceptions of how legal research aimed at constructing general theories should proceed. I shall do that not by subjecting Zamboni's »grey box« to sociological analysis, but by looking at how, for example, Herbert Hart constructed his concept of law. In the second part, I briefly explain my critique of dichotomies which pervade both legal theory and socio-legal research, and which was misrepresented in Zamboni's reply. Then, in the third part, I reflect on the relationship between socio-legal studies, doctrinal studies and jurisprudence asking how socio-legal research and jurisprudence can learn from each other.

1. Roots of the Disagreement

Zamboni wishes to conduct his analysis at the level of general theory and independently of the mundane realities of legal practice. Hence, his »grey box« that uses

the »philosopher's stone« to transform values emanating from the political system into legal concepts, and which exists independently of the practices of the functionaries of law or socio-cultural characteristics of specific jurisdictions or juridical spaces. Even after recognising that Zamboni might be seeking general views about the nature of law, a quest which requires transcending the specificity of legal practices, I still find certain aspects of his theorising problematic. I argue that a general theory of law needs 1) to engage with law's factual (i.e. institutional and historical) manifestations, at the same time as it addresses law's deontological dimensions and 2) to ensure that it stands in a *dialectical* relationship with those aspects of the law which it wishes to describe, understand or explain. As I shall demonstrate below, it is the absence of such dialectical relationship which casts doubt on Zamboni's theorising.

Contrary to Zamboni's (mis)reading of my review, my intention was not to suggest that »facts« cannot, or should not, be normatively investigated, but to ask a much simpler question. I was wondering why Zamboni did not study what he set out to study. Why is he focusing on the discourses of legal theory, if his intention is to examine the »standpoint of legal actors« and legal processes through which political values are transformed into legal concepts? Legal theories can, arguably, assist Zamboni in illuminating and analysing the actors' standpoints, but they do not replace his need of *first-order research*.[1] Hart's concept of law was, for example, constructed by reference to the attitude of law's participants. It does not, however, necessarily mean that Zamboni can use Hart's theoretical work (or other similar theoretical constructs) to deduce a concrete understanding of the participants' standpoints in relation to his specific research problem. I suggest that we look at, and learn from, the way Hart devised his theory. Hart constructed his general theory of law not through conceptualism and not solely through a systematic critique of other legal theories, such as that of Austin's, but by seeking »to find its concepts in the actual linguistic practices of lawyers, judges and citizens«.[2] Hart does not conjure up his general theory out of other theories, but conducts his own first-order research using linguistic empiricism, which ensures a dialectical relationship between his theoretical work and his object of study.

This also implies that *pure* theoretical analysis is justified only when dealing with meta-theoretical problems. Zamboni's research question does not address meta-theoretical issues which would require or justify an analysis based on juxtaposing various theoretical debates and premises. Instead, it is concerned with a specific operation of the law in relation to the political system, i.e. it is concerned with a legal event, and as such it requires not only theo-

1 Let me give a concrete example. In the section on the sociology of law, Zamboni does not explore the insights of socio-legal research into the interaction between law and politics and instead focuses on the internal debates of socio-legal studies.

2 Roger Cotterrell, »The Politics of Jurisprudence: A Critical Introduction to Legal Theory«, 2nd edition, London: Butterworth, 2003, p. 87.

retical analysis but also first-order inquiry into the nature of its subject matter.

If I were to suggest an alternative model to Zamboni's grey box, a model which ensures a dialectical interaction with those aspects of the law which are implicated in the transformations of values into legal concepts, I would propose a framework which places the role of the »interpretive community of law« at the heart of my thesis. Then, I would develop this framework by analytically and/or empirically by examining (i.e. by carrying out my own first-order research) the practices and processes through which the functionaries of law interpreted, implemented and enforced political values, objectives and policies in the name of law.

2. Dichotomies

I did, admittedly, use a dichotomy to distinguish between *what is of the law* and *what is about the law*, but I also hastened to add that these two manifestations of the law were necessarily »inter-related« and did »feed back into each other«.[3] In *Merging Law and Sociology* I have recognised that these dichotomies are not simple intellectual ideas or theories, but socio-historical constructs.[4] In addition, I have argued that the application of some dichotomies could under certain conditions, and when used correctly, bring clarity to concepts and ideas.

Contrary to what Zamboni suggests in his reply, I have criticised dichotomies which are used within legal theory and the sociology of law, for two reasons: 1) because some of these dichotomies, such as the distinction between formal and informal law, are in essence false distinctions[5] and 2) other dichotomies –such as the distinction between internal and external legal cultures or »the law in the books« and »the law in action«– draw the attention of our analysis away from the significance of the dialectical relationship between the legal system's internal operations (law as an autonomous system of rules, decisions and practices) and the external factors which constitute the law's societal environment (societal forces and extra-legal institutional practices). In this respect, I have emphasised the importance of considering the *interaction* between the internal and external factors which constitute the inside and outside realities and operational conditions of law.

My discussion of dichotomies sits uncomfortably with Herbert Hart's and other rule-based general theories which ignore, or fail to pay sufficient attention to, the dialectical relationship between law as a body of rules and law as a complex of institutional practices. My approach aims to transcend the dichotomy of *theory* and *praxis* through a critique of legal positivism

3 See my review of Mauro Zamboni's »The Policy of Law« in »Retfærd«, 2005/4, pp. 84-5.

4 Reza Banakar, »Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research«, Berlin: Galda + Wilch, 2003.

5 See Alan Norrie, »Law and the Beautiful Soul«, London: GlassHouse Press, 2005. Norrie develops this point by pointing out that this distinction implies that there is such a thing as »formless law«.

which is not motivated by natural law assumptions, but by social scientific insight into the institutional make-up of law. The source of this critique can be traced back to the works of scholars such as Petrazycki, Ehrlich, Pound and Gurvitch, who turned to social sciences in search of an alternative approach to the formal conceptual analysis which dominated the legal studies of their time.

3. Sociology and Jurisprudence

The other foundational issue raised by Zamboni's reply concerns the relationship between socio-legal studies or the sociology of law (I shall use these interchangeably) and jurisprudence. As I have argued elsewhere, the interdisciplinary character of socio-legal studies enables it to highlight aspects of law, legal institutions and legal practice which neither law nor sociology can articulate by itself. In that sense the socio-legal approach can potentially offer a form of knowledge revealing the institutional dimensions of the law, which is not provided by legal studies. To highlight this we need to start by juxtaposing the sociology of law and the doctrinal studies of the law. I suggest that black letter analysis provides a one-dimensional view of the law in so far as it neglects the socio-historical and institutional contexts out of which legal practices and decisions emerge. Instead, it tries to promote an understanding of »the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstractions connected by support relations«.[6] The normative project of constructing a coherent system of rules, neither reflects the reality of law, which consists of a fragmented body of practices, nor emphasises that law also needs to be coherent also in its interaction with its social environment if it is to be an effective instrument of regulation.

Doctrinal studies of law are normatively closed and *inward* looking activities. Their normative closeness is not, as in autopietic social systems, a condition for, but at the expense of, their *cognitive* openness, i.e. their closeness is at the expense of recognising the interaction between law and its social environment. I argue, therefore, that legal scholars can break new grounds once they turn *outwards*, for only if they step outside law, they can view their undertaking in different, and perhaps new, lights. As pointed out by Paul W. Kahn, when »studying law [in the manner of traditional legal studies], we become a part of it« and in many ways incapable of reflexively examining those aspects of law which coincide with our deepest commitments to law.[7] In order to avoid the restrictions intrinsic to traditional legal scholarship one should not approach the law from any standpoint which endows it with authority, validity and legitimacy (and traditional jurisprudence has in parts become a part of this legitimation process), but from such points of view which question the meaning law

6 Aleksander Peczenik, »A Theory of Legal Doctrine« in »Ratio Juris«, 2001, pp.75-105.

7 Paul W. Kahn, »The Cultural Study of Law: Reconstructing Legal Scholarship«, Chicago: The University of Chicago Press, 1999, p. 2.

has for the individual actors belonging to the law's community of belief.

Social sciences offer a vantage point outside of law from which legal theory can view and reconsider law's »empire« and »community«. Legal philosophy was, arguably, meant to provide law and legal studies with a similar external vantage point. However, mesmerised by the authority of law, instead of encouraging legal theorists to step *out* of law to view their undertaking reflexively, (legal) philosophy stepped *into* law to embrace its internally produced values and perceptions. Although a part of (legal) philosophy remains committed to evaluating law from a moral standpoint (which might necessitate exposing law to extra-legal values and standards), much of it has subsequently become a tool for justifying the underlying assumptions of legal theory or bringing conceptual clarity to legal reasoning. Legal philosophy's decision to go native might have to do with the fact that most legal philosophers are socialised in law and have weak ties with philosophy as a discipline. In fact, some legal philosophers have received no systematic training in philosophy and have, subsequently, never seen the law from the other side of the fence. As a result, they tend to take the objectives of the legal profession, the concerns and standards of legal studies and the values of law for granted. It is, admittedly, not only legal philosophers who find law's authority irresistible. Social scientists too are enticed into embracing and reproducing law's values and authority. Identifying themselves with law's self-image and values helps them to secure research funding and gain academic prestige. Also, a section of socio-legal researchers are trained lawyers who view social sciences as an auxiliary to law and a tool for collecting empirical legal data.

To sum up, I suggest here that social scientific methodologies, being empirically and reflexively tuned, lend themselves easily to the examination of the *institutional practices* which constitute law and legal behaviour. But I also add that making use of sociology and philosophy in the same piece of legal research does not necessarily cause epistemological inconsistencies. Much of sociology is, after all, but an application of philosophical reflections. In this sense, those branches of sociology and philosophy, which understand their task in respect to law reflexively and wish to be intellectually independent of traditional legal studies, find themselves in the same intellectual and academic boat.

There are also important differences between various sociological perspectives and schools of jurisprudence. These differences are not in the first place about whether we should pursue an empirical or analytical approach, but about whether or not the State is in actual fact the primary source of law. Some sociological approaches, for example, see the norms of social organisation as the primary source of law. Other perspectives adopt the ideology of legal positivism, but still differ in some respects from traditional legal theories in that they emphasise the *social* nature of governmental control, i.e. they focus on law enforcement rather than on legal rules, decisions or doctrine. As a result, lawyers and sociologists can view law's identity and internal operations in different lights. While some lawyers take law's own self-descriptions for granted, most sociologists

treat law's claims to autonomy, universality and objectivity as *the* object of their study. Non-traditional schools, such as the CLS and feminist jurisprudence, have shown how legal theory can borrow and gain from sociological ideas. They also remind sociology of the wealth of knowledge which is available within law and legal theory and how sociologists can make use of such knowledge. The most important form of knowledge that legal theory offers sociology is related to the »softer« interpretive expressions of law, which are found in legal doctrine and legal reasoning.

This is hardly the end of this debate for we are still to ask the most important of all questions: if my arguments about the relationship between sociology and philosophy are correct, why is it then that socio-legal studies and legal philosophy have not embraced each other and have not together established *the* science of law? The answer to this question must be sought, in parts, in the relationship between the sociology, law and jurisprudence. We need to ask how sociology and jurisprudence can inspire and enrich each other. But we also need to ask other types of questions, questions which are not about the theoretical scope or potential of various schools of thought, but about the politics of academia. For example, why could Herbert Hart not admit that he had read *Max Weber on Law in Economy and Society* and was indebted to Weber for his internal account of legal rules?[8] Also, why do some prominent philosophers of law, such as Dworkin, regard sociological and historical studies of law which view the law from without as »perverse«, while failing to recognise that the internal studies of the law which ignore questions about the social properties of the law and the external manifestations of the law are also »impoverished and defective«?[9]

8 See Nicola Lacey, »A Life of H.L.A. Hart: The Nightmare and the Noble Dream«, Oxford: University Press, 2004.

9 Ronald Dworkin, »Law's Empire«, London: Fontana, 1986, p. 14.