

A Reply to Prof. Banakar's Review of "The Policy of Law: A Legal Theoretical Framework"

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It is always a pleasure to be the recipient when a well-established, stimulating, and profound scholar such as Professor Reza Banakar takes the time not only to go through a doctoral dissertation but also to comment on it. I attempt in this reply to respond to certain of Professor Banakar's criticisms as to my dissertation, though, I suspect, it will be more like a light-weight novice coming up against a heavy-weight champion of contemporary international legal scholarship.

I begin with Banakar's concluding statement that "such studies remind us that we still have a long way to go before achieving a reasonable degree of genuine cross-disciplinary communication." I certainly agree that cross disciplinary communication, and in this specific case, communication between traditional legal theories and socio-legal approaches, is still difficult and often a source of problems. However, it is at least my impression that Banakar's review unintentionally contributes to a further separation of these two types of approaches. His analysis confirms that the

problems are on both sides on the channel, not only on the legal theoretical side.

First, Banakar states that "Zamboni adopts an interdisciplinary approach which cuts across the boundaries of law, philosophy, politics and sociology." Although this a generous description of my efforts, I already with the title and in the very first two chapters directly point out that I do not have such ambitions. Just the opposite is true. The specific and limited theoretical program I use in investigating the transformational moment can be easily classified within the category of analytical jurisprudence. Following the path charted by H. L. A. Hart, the main purpose of the dissertation is to frame "*from a normative perspective*, a field in which to locate" the policy of law.¹ The fact that, in this framing, I then "borrow" a conceptual division between politics and policy made inside political sciences, as well as utilize some of the lite-

1 See Mauro Zamboni, *The Policy of Law: A Legal Theoretical Framework 1* (Stockholm University, Stockholm, 2004).

ature produced inside the sociology of law, is not sufficient in my opinion to define my approach as cross-disciplinary. A cross-disciplinary perspective is much more than simply using materials from other disciplines, otherwise it could be argued that even Hans Kelsen is a proponent of a cross-disciplinary perspective.² As I see it, cross-disciplinary approaches also embrace different perspectives and methodologies of approach as to the same phenomenon, an embracing which does not belong to the program of my book. I briefly speak of sociology of law and political approaches to some segments of the law-making process in Chapter Nine, but this does not justify a claim that I have a cross-disciplinary approach. I simply very generally and briefly point out the objects and perspectives of these disciplines in order to show how a third and different (namely internal or normative) perspective is necessary in order to fully understand why and how politics is transformed into law. It is true that I state in several passages that a policy of law analysis has some areas that overlap with the political and sociological investigations of the law-making process, but this overlapping does not falsify the fact that in their inner hard-cores, these three disciplines have and are three different ways to look at the creation of law.³

I detect in Banakar's criticisms the impression that, in contrast to that which is the objective of a cross-disciplinary pro-

gram, connecting several disciplines in an attempt to better illuminate a certain phenomenon (e.g. law from a sociological, political or normative perspective), Banakar aims at substituting several possible approaches to one unique, dominating and in the end monopolizing perspective, the socio-legal one.

Moreover, Banakar has repeatedly rejected the Hartian possibility of a separation between an internal perception and an external perception of the legal phenomenon.⁴ However, the positive reception that this "dichotomy," as Banakar terms it, has received both among practitioners and in the legal scholarship, should ring a bell for a legal sociologist as Banakar. If he is claiming that this dichotomy is (more or less) wrong, he dismisses as wrong not only a theoretical claim but also how a large sector of the legal world perceives its position in relation to other sub-systems of society. In other words, he dismisses as "wrong" that which actually is an existing social cultural reality, at least for some segments of the legal world, i.e. at least inside the law faculties where future lawyers and judges are educated and trained.

This rejection of the dichotomy by Banakar becomes even stranger when taken in light of the fact that he is one of the first to stress a clear and sharp dichotomy between a normative type of analysis and empirical facts. Implicitly following in Kelsen's steps, he claims that no normative investigation is possible of empirical questions. When he

2 See, e.g., Hans Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode* 52-55 (Scientia Verlag, Aalen, 1970).

3 See Mauro Zamboni, *The Policy of Law*, *supra* at 249-251.

4 See, e.g., Reza Banakar, *Merging Law and Sociology. Beyond the Dichotomies in Socio-Legal Research* Ch. Two (Galda + Wich Verlag, 2003).

states that it is not possible to pose an empirical research question and then answer it with a normative reasoning or discourse, he claims that normative analysis should then only deal with normative research questions. In this way, if one is consequent, then ~~the entirety of Hare's enterprise as developed in *The Concept of Law*, i.e. trying to describe what the law is from a normative perspective, is tainted by this original sin.~~ The problem here, I suspect, is that Banakar means normative in a very traditional, almost old-fashioned manner of Weberian origin. For him, as far as I understand from his critiques, normative consists of constructing a logical system of "ought-statements" as to certain legal issues.⁵

In contrast, one of the original contributions by Hart consists exactly of the possibility of having a normative description of empirical phenomena represented by the law. In the work at issue here, as I clearly point out in Chapter One, normative is intended in this Hartian meaning of description.⁶ This work then attempts to produce "is-statements" about the legal world (and its relations with the surrounding sub-systems) from the perspective of the legal actors, i.e. from the perspective of the actors whose primary perception of the legal system is that of a binding complex of rules.⁷ How this binding complex of rules (and processes creating such rules) is then

seen by these very actors as relating to the social dimension and the political dimension of the law, is the "empirical" question I have tried to answer.

It is true, as pointed out by Banakar, that the "empirical evidence" does not play a central role in the book. However, the objective of this dissertation was not to empirically investigate the social or political factors and/or mechanisms behind the complexity represented by the relationships between law and politics. The aim was simply to offer based on qualitative empirical evidence of a tension between law and politics, a possible middle-range theoretical matrix from which to start a normative investigation of the moment where politics becomes law.⁸

The phenomenon here under investigation (the problems raised by law in its relations to politics) certainly has an empirical ground, but this does not mean that it cannot be investigated by alternative points of observation, sociological, politological, normative, philosophical, or ethical. Within this possibility of having several and different useful points of observation, exists part of the cross-disciplinarity so strongly sponsored by Banakar. Instead it appears, at least if I understand it correctly, that Banakar claims that the empirical disciplines (e.g. sociology of law and socio-legal studies) have the only "correct" perspective for penetrating the issue of how law and politics relate, as only the empirical disciplines ~~"share" the same nature of their object of investigation.~~ In this way, however, Bana-

5 See Weber, *Economy and Society. An Outline of Interpretative Sociology* 311 (University of California Press, Berkeley, 1978).

6 See Mauro Zamboni, *The Policy of Law*, *supra* at 8-9.

7 See Hart, *The Concept of Law* 55-57 (Clarendon Press, Oxford, 1961).

8 See Mauro Zamboni, *The Policy of Law*, *supra* at 1-4, 280-283.

kar implicitly rejects the possibility of useful contributions coming from investigations of the legal discourse “from within,” unless they are investigations of a sociological, socio-linguistic, or psychological character.⁹

In the end, the impression that can be drawn from Banakar’s criticism is that it attempts to hide, under the eye-catching and beautifully coloured carpet of socio-legal and cross-disciplinary approaches, what in reality is a darker and stronger tendency inside the history of epistemology: the desire to exclude other disciplines from investigating, from a different angle and with a different language, the “baby” of socio-legal studies, namely the relations between law and the surrounding environments. This is done mainly by claiming that the “other” approaches have never truly recognized this baby. Unfortunately,

this is not just a baby of socio-legal studies, this baby existed long before they did and, surprisingly enough, traditional legal jurisprudence has contributed to the birth and the growth of the law even in its contextualised form. The baby can then be fully examined from both a sociological and a more traditional legal perspective, such as jurisprudence. Jurisprudence, by expressing (or at least by claiming to represent) the point of view of legal actors, can be “right” or “wrong” in its depiction of the relation between law and society. However, it is certainly a point of view that has to be taken in serious consideration by the other disciplines dealing with the law as jurisprudence and legal thinking shapes, via the education of generations of judges, lawyers and law-makers, the very law.

9 For a similar critique of Hart for being an amateur “sociologist” with, more or less, the same arguments used by Banakar in his review, see Roger Cotterrell, *The Politics Of Jurisprudence. A Critical Introduction to Legal Philosophy* 94-96 (Butterworths, London, 1989).