# Law and Politics in Contemporary Legal Theory

*Mauro Zamboni*

This article aims at mapping out the positions as to the relations between law and politics issue as taken by contemporary legal theories. The approaches of the different legal theoretical streams are classified in accordance to their responses to the following issues: how these contemporary legal scholars view the law in relation to politics (the static aspect), how the law-making relates to the political order (the dynamic aspect) and the degree of relation of legal discipline to the political material (the epistemological aspect).

Three ideal-typical models are proposed according to the answers given to these questions. According to the "autonomous model" (legal positivism and analytical jurisprudence), the relations between law and politics are depicted as between two connected but still autonomous phenomena. The "embedded model" (Critical Legal Studies, Law and Economics, and John Finnis' natural law theory) depicts instead the law-politics relations as one (law) embedded into the other (politics). Finally, the American and Scandinavian legal realisms are presented as representatives of a third ideal-typical model, designated as "intersecting," as within these theories law and politics are two intersecting phenomena.

The article ends with a brief discussion as to how all three models, and the legal theories encompassed therein, share a common mark. Each mirrors the peculiar situation of modern law: law and politics tend to keep the features of being two different phenomena as well as of presenting regions of interaction, although with differences as to extent and intensity.

## 1. A Background

From the very birth of the nation state, and particularly after its transformation into the modern welfare state, attention has specifically been devoted to explaining the interrelationship of legal and political phenomena.[1]

Despite so much attention, this issue of positioning the law with respect to the political realm is far from being settled around generally accepted propositions. Just the opposite is the case, as the distances between opinions as to issues of law and politics have increased considerably with time, in particular after the birth of welfare state and its dissemination in the Western part of the world. This disagreement as to the relation of law and politics has increased in part because the welfare state form of political organization requires as one of its fundamental features the very use of the law as an instrument of social engineering. This feature, in its turn,

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[1] *See*, *e.g.*, Thomas Hobbes, Leviathan Ch. XXVI (C. B. Macpherson ed., Penguin Books 1985) (1651). *See also* Jürgen Habermas, Between Facts And Norms. Contributions to a Discourse Theory of Law and Democracy 137 (1998).

has given birth to the phenomenon of a "systems conflict," an aspect of the more general "dilemmas of law in the Welfare State."[2]

This phenomenon arises due to the co-existence in the contemporary age of two systemic forces towing the law in opposite directions, affecting the very nature of the legal phenomenon. One force already present in the formation of the nation state, pulls in the direction of concentrating the law into the hands of politicians, therefore requiring a law more obedient in nature to reasons of politics than, for example, to those of a systematic legal development. The content of the law hence cannot be viewed as completely independent from politics as the contemporary state is characterized by the very fact that the law is a tool available to Parliaments or Governments in order to realize programs

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[2] Gunther Teubner, *The Transformation of Law in the Welfare State*, *in* Dilemmas of Law in the Welfare State 6-7 (G. Teubner ed., 1986). *See also* Lawrence M. Friedman, *Legal Culture and the Welfare State*, *in* Dilemmas of Law in the Welfare State, *supra* at 13-27.

within a certain community. In other words, law becomes structurally more flexible to the reasons of politics.

The increasing complexity and number of areas the political world recognizes as *its* domain and therefore regulates by law in their turn cause another force pulling the law in the opposite direction. This increasing politicization of the community life produces a force towing the legal phenomenon in the direction of a more specialized and therefore autonomous law with respect to politics. This further encourages a development of the idea of law as autonomous from the outside reality, with its own rules as monopolized by a group of professionals. As a result, the distances between the legal phenomenon and the political world tend to become increasingly greater.

These tendencies, by which the law is politicized or framed in spaces of autonomy, certainly are not typical only of our time. The simultaneous and increasing intensity of the forces pulling law towards and away from politics, almost equal in strength, consequently creating a tension within the legal phenomenon, however are elements, which characterize today's systems

conflict. The recent shifting of many Western countries to a more deregulated or weaker version of the welfare state does not appear to affect the strength of those two pulling and divergent systemic forces. On the contrary, the importance and use of the law as a tool in the hands of politicians has increased.

Political authorities usually promote and implement deregulations of the welfare state through the law. Almost paradoxically, new and often extremely detailed legal measures are now required from the state for regulating the services freed from the state monopoly and now offered by the private sector. The complex and highly technical nature of the deregulating legal measures relegates a leading role then to such legal actors as legal consultants or administrative judges and, more importantly, to their methods of reasoning.[3]

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[3] *See*, *e.g.*, Robert W. Gordon, *A New Role For Lawyers? The Corporate Counselor after Enron*, 35 Conn. L. Rev. 1211 (2003). *See also* Michael D. A. Freeman, Lloyd's Introduction to Jurisprudence 1047 (7th ed., 2001); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100

## 2. Law, Politics and Legal Theory: A Way to Tackle the Questions

The law presently is subject to a system of forces towing it in opposite directions, affecting the very nature of the legal phenomenon. The very fact that these contemporary tensions stretch the law towards and, at the same time, away from politics, cannot leave the work of legal scholars unaffected. As pointed out by Neil Duxbury, "the political nature of law represents a fundamental – if not the fundamental – problem of modern jurisprudence."[4]

It is necessary here to examine then the methodology used in tackling the difficult and complex issue of how the different contemporary legal theories have positioned themselves in the debate concerning the

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Harv. L. Rev. 766-767, 773-774 (1987); and Max Weber, Economy and Society 775-776, 789-792, 856 (1978).

[4] Duxbury, *The Theory and History of American Law and Politics*, 13 Oxford J. Legal Stud. 270 (1993). *See also* Habermas, Between Facts and Norms, *supra* at 388-390; and Joseph Raz, *Disagreement in Politics*, 43 Am. J. Juris. 26 (1998).

relations between law and politics. The main step is to summarize the major issues taken into consideration in the debate about the relations between law and politics into three aspects: static, dynamic and epistemological.

### *2.1 The Static Aspect: What Distinguishes Law from Politics?*

Only a few exceptions can be found among legal scholars claiming that the *content* of the law is either completely independent from or completely dependent upon politics, particularly after the growth of the nation state and the current globalization occurring in law-making processes. The content of the law cannot be viewed as completely independent from politics because the organizational political form of the nation state is characterized, in part, by the fact that the law (in particular in its statutory forms) is a tool available to political actors in order to effectuate programs within a certain community.

On the other end, the content of the law does not usually disappear completely into politics. The modern nation state has brought with it the principle of the separation of powers. From an institutional point of view,

this implies that the actors enacting a statute are not the same as those applying it. Moreover, the increasing specialization and sophistication of legal categories and concepts have made it almost obligatory for politicians and layman to employ persons educated in the specific art of drafting laws.

The divisive question then becomes whether the law is *flexible* by nature, i.e. whether it tends to adapt its forms and nature according to the political substances it carries; or, alternatively, whether the law is *rigid*, i.e. whether it tends to keep the same forms and mechanisms regardless of the content. The central question is whether the law, as perceived by the legal actors, changes its shape and manner of functioning in accordance to the values the political actors aim at implementing in the community.[5]

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[5] *See* Aulis Aarnio, Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics 20-25 (1997).

### *2.2 The Dynamic Aspect: How does Law-making Interrelate with the Political Order?*

Moving to the second dynamic aspect of the relationship between law and politics, the legal schools address the functioning of law-making here as an alternative or dependent process with respect to the political order and its processes. This is particularly true with the aim of politics to control the entire life of a community (all social, economic, and cultural aspects). In the nation state and even more in the welfare state, law-making in its functioning appears to be more and more an integral part of the political machinery. The process of legal production (either in a legislative, judicial or scholarly form) is viewed as strongly affected by the political environment.

On the other hand, there is a tendency towards an increasing specialization of and inside the legal world. This makes it more difficult for the political order to interfere with the work of the courts, lawyers, and legal scholars. Moreover, the growing establishment of the rule of law has generally taken away any complete freedom of action from the political sphere, limiting the political influences inside the legal world and the law-

making mechanisms to certain specific areas and through specific modalities of action.[6]

This dualistic general tendency inside modern relations between the law-making and the political order (i.e. separation and integration) also impacts legal theory. A divisive line can be drawn between the theories according to the solutions presented as to the question of whether law-making works with the political order on a peer-to-peer basis, i.e. the idea of a *closed* law-making, or whether it simply is an operative long hand of the political power, legislating and implementing at the normative level that which is decided inside the political order, i.e. the idea of an *open* law-making.

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[6] *See* Harold J. Berman, Law and Revolution. The Formation of the Western Legal Tradition 9-10 (1983). *See also* Peter Stein & John Shand, Legal Values in Western Society 32-34 (1974).

### *2.3 The Epistemological Aspect: To What Degree does the Legal Discipline Take into Consideration the Political Material?*

The assembling of the different contemporary legal theories into an ideal type model relating law and politics has also been done according to the answers given to a third question: To what extent does the legal discipline take into consideration the political material in its work, i.e. the epistemological aspect of the relationship between law and politics. This issue is typical, although not the exclusive province of contemporary legal theories. With the growth of politics as an autonomous object of investigation, *e.g.* with the rise of political science faculties, legal scholars began to focus on whether and to what extent their discipline was influenced by categories and concepts developed in non-legal academic environments, i.e. political science.

The environment surrounding universities and research institutions complicates this epistemological question. On one side, there is a socio-political reality always pushing towards the integration of the law into a broader political context and encouraging a more political approach to the study of law (*e.g.* labor issues). On

the other side, there also is the tendency towards and increasing specialization of both legal profession and legal conceptual apparatus, a tendency urging the constitution of disciplines focusing only on purely legal technical matters and leaving politics to the politicians (*e.g.* taxation).

This tension has led to two different approaches toward the issue of the purity of that which is considered within the legal discipline. The first is the *pure* approach to legal studies, embracing all those theories claiming the necessity of a legal discipline not contaminated by political categories and concepts (such as "democracy" or "legitimization"). The second is the *mixed* approach to legal studies, maintained by those theories and scholars asserting the necessity of integrating into the legal discipline categories and concepts produced inside sociology, political sciences and economics and

relevant in order to fully understand current legal phenomenon.[7]

### *2.4 Ideal-type as a Heuristic Device*

By examining the positions taken by contemporary legal theories with respect to these three aspects, an ideal-typology of three models is presented: an "autonomous model," an "embedded model" and an "intersecting model." These models are intended to be a heuristic device helpful for mapping out the complex world of contemporary legal theories and to reveal certain similar fundamental ways of understanding the relation of law and politics, similarities among legal movements otherwise treated as very distinct from each other (*e.g.* between CLS and Law and Economics).

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[7] *See* John O'Neill, *The Disciplinary Society: From Weber to Foucault*, 37 Brit. J. Soc. 57 (1986); and Posner, *Legal Scholarship Today*, 115 Harv. L. Rev. 1319 (2002).

### *2.5 Politics, Political Order and Political Material*

The commonly accepted meaning of *politics* as perceived by the legal world is that it is a complex of values (of an economic, social or moral nature), as well as the processes through which such values are then chosen to be implemented by the public authoritative apparatus into the community using the law-making. *Political order* is the complex of actors, both in their institutionalized forms and in the looser form of interest groups, and their relationships interrelating in the production of politics, i.e. of values then to be implemented into the community using the law-making. *Political material* is both the conceptual and ideological data shaped by the political actors (*e.g.* in political party programs) but also those created and used by scholars in order to understand, explain and criticize the values chosen and the processes that have led to their selection (*e.g.* political scientists, moral philosophers' writings, studies in economic policy).[8]

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[8] *See* David Kairys, *Introduction*, *in* The Politics of Law. A Progressive Critique 5, 14-15 (D. Kairys ed., 3rd ed., 1998); Alf

The analysis of the different contemporary legal theories and their positions as to the relation between the legal and the political phenomenon can now begin, as supported by this methodology and conceptual apparatus.

### 3. *Either* Law *or* Politics: The Autonomous Model

One of the tasks most often pursued by legal scholars from the second half of nineteenth century and throughout the entire twentieth century has been that of trying to categorize the legal phenomenon as a specific phenomenon. In this pursuit, many scholars have embraced that which can be depicted as an autonomous model when viewing the relationship between law and politics. The relationship is one between two autonomous phenomena, processes of creation and exploratory disciplines. Autonomy in this context does not mean

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Ross, On Law and Justice 334-339 (1958); Hans Kelsen, Allgemeine Staatslehre 28 (1925); and Raz, *Rights and Individual Well-Being*, *in* J. Raz, Ethics in the Public Domain. Essays in the Morality of Law and Politics 37-40 (1994).

that these legal theories claim a lack of any contact between the two different orders. These theories do not deny the presence of a space where legal and political phenomena meet. Neither Kelsen nor Hart deny the fact that law, in particular in the contemporary age, is mostly produced by political actors.

On the contrary, the presence of such a space is the main reason behind the choice of labeling as autonomous and not "independent" the model covering legal positivism and analytical jurisprudence. That which is typical of legal positivism and analytical jurisprudence is not that they deny such spaces of contacts between law and politics, but the fact that they reduce their extension and frequency as much as possible (*e.g.* limiting them into the Basic Norm).[9]

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[9] *See*, *e.g.*, Neil MacCormick, Legal Reasoning and Legal Theory 236-238 (1997) or Raz, *On the Autonomy of Legal Reasoning*, *in* J. Raz, Ethics in The Public Domain, *supra* at 314-315.

### *3.1 The Rigidity of Law from Politics*

A common point of departure for each of these schools and scholars is the fact that the law is considered, more or less, as a surgical tool, stable and precise, while politics is seen, at least from a normative point of view, as an unclear and unstable complex of conflicting ideologies, values and processes competing with each other outside the legal world for the control and establishment of the goals the legal tools are to pursue.

That which characterizes legal positivism and the analytical legal philosophy is that they see the law as structurally *rigid* against politics. The rigidity of the law entails that the law is based, in its definition, on forms and structures that tend to remain constant regardless of the political content given to them or the political environment in which they operate. The law does not lose its nature only because it is filled with inhuman content, the orders of a dictator instead of rational decisions taken by a democratically elected parliament. The law is the law for the very reason that its most characteristic feature, its normativity (i.e. its form being an authoritative form) can be properly derived only from an internal, legal perspective.

Naturally, this does not imply that according to these theories, the law cannot be seen from a political or sociological perspective. In contrast to the interdisciplinary approach as espoused by the legal scholars included within the embedded model, the autonomous model's theories stress the fact that non-legal perspectives (as psychology or sociology) are unable to assist the legal discipline in its journey of discovering the hard-core of legal phenomena, i.e. its "Ought" dimension as autonomous from the value-world.

For both Kelsen and Hart, the law certainly is open to receiving contributions to its content from the surrounding political world in terms of values; the structures of the law however still tend to be rigid, i.e. to remain the same no matter which values come in.[10]

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[10] *See* Kelsen, *Science and Politics*, *in* H. Kelsen, What is Justice? Justice, Law and Politics in the Mirror of Science 372 (1957). *See also* Raz, *The Identity of Legal Systems*, 59 Cal. L. Rev. 814-815 (1971); Herbert L. A. Hart, The Concept of Law 86-88, 181-182 (1961). Concerning the connection between the rise of legal positivism and the nation state, *see* Wolfgang

### *3.2 Closing the Law-Making to the Political Order*

This rigidity of the law, as intended by the theories within the autonomous model, tends to be translated into a *closedness* of law-making towards other orders in general and the political order in particular. The closedness of law-making in the autonomous model results from the view by legal positivists and analytical legal philosophers that law-making receives inputs from the political order (*e.g.* in form of legislative propositions) but once these inputs arrive into the law-making, their treatment is purely according to the rationality and parameters offered by the legal order itself.

Law-making is perceived as a politically neutral machine. A politically neutral machine in that the law-making tends to be detached in its way of functioning, producing and creatively applying the law, from the various subjective contents for which it is the expression, i.e. the value-contents the different political actors wish

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Friedmann, Legal Theory 256 (5th ed., 1967) and Weber, Economy and Society, *supra* at 874-875.

to give to their use of the legal machinery. Moreover, the mechanisms and procedures of law-making in general are perceived as disconnected from the political processes through which such subjective value-contents have been selected.

The autonomous model states that the legal system is influenced in its operational aspects only by an extremely limited (and mostly at the highest constitutional level) number of inputs coming from the political discourse, i.e. the discourse about the type and manner by which values have to be implemented into a community through law. Law-making tends to work in its own autonomous manner with its own rules, regardless of the factual circumstances that the political order uses it to fulfill, value *f* or *e*. That which is important is the fact that the legal machinery tends to run in the same manner, regardless of whether driver *A* drives to *f* or *B* drives to *e*.[11]

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[11] *See* Waldron, *Legislation, Authority, and Voting*, 84 Geo. L. J. 2189 (1996); and Roger Cotterrell, The Politics of Jurisprudence. A Critical Introduction To Legal Philosophy 151 (1989).

Legal positivism and analytical jurisprudence both try to save the closedness of law-making and legal application mechanisms by referring to a highest binding *legal norm* (most of the time implicit in a national legal system) establishing the fundamental normative criteria to use in order to separate that which belongs to the legal system (the valid law) from that which belongs to the political system (a political statement).

### *3.3 A Legal Discipline Purified of Political Material*

Moving to the issue of how the legal discipline should relate itself and its investigations in general to politics and political material, the theories within the autonomous model usually deny any need for the presence of political elements within the legal analysis. The legal discipline, as with natural or social sciences, is defined as an autonomous branch of knowledge precisely due to its autonomous working space, the law. As the law, as already seen above, is described in a rigid terminology, i.e. making use only of strictly legal terms and qualities, it seems almost natural for the theories falling within the autonomous model to promote a “pure” idea of the legal discipline. The legal phenomenon is to be purified

of any political dust, or in other words, of the categories and concepts typical for other scientific branches, such as political science or sociology.

In order to discover the basic structures of the law, legal scientists have to pass through the empirical dust surrounding the legal phenomenon, i.e. through the different subjective meanings attached to the law (as in Kelsen) or the political usage of the legal language (as in Hart). They have to go deep into the core of the law and fulfill the primary goal of the legal discipline: to identify and investigate the objective meaning of the law, the true normative meaning of legal language and, from that perspective, to look (with a normative lens) at the functioning of the entire legal system.

The legal discipline then should exclusively deal with the positive law as it objectively is expressed in legal norms, norms that, according to the legal system, have the peculiar feature of having an objective meaning (or, as in Hart, the quality of being produced according to the Rule of Recognition), independent from the one attached to it either by the creator of such norms, by the agent who has to apply them or by the scholar that is to investigate them. The study of the law is to

avoid the misleading terminology used in other sciences (with categories such as "democracy" or "justice") and instead focus exclusively on the analysis of the internal characteristics of the law and of the law-making (with categories such as "validity" and "jurisdiction").[12]

## 4. "It's all politics": The Embedded Model

The slogan "it's all politics" summarizes, although in a quite rudimentary manner, the central perspective adopted by the theories and scholars ascribed as the embedded model with respect to the relationship between law and politics. To state that the law is embedded within politics, according to this model, means that the legal phenomenon is nested within the political phenomenon.

This embedded relationship between law and politics is viewed as a two-system relation in which the

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[12] *See*, *e.g.*, Hart, *Definition and Theory in Jurisprudence*, *in* H. L. A. Hart, Essays in Jurisprudence and Philosophy 47 (1983); and Kelsen, The Pure Theory of Law, *supra* at 70. *See also* Wilfrid J. Waluchow, Inclusive Legal Positivism 15-30 (1994).

legal system is embedded within the wider context of the political order. In this model, the interrelationships and exchanges between the two phenomena are frequent, for example, from the drafting of statutes to the legal reasoning of judges, as well as disseminated within all the levels, from the structures and nature of the law to the manner in which the legal discipline is portrayed. This frequency of exchange renders it often very difficult to identify distinctive features within the legal phenomenon.

As the theories within this model posit that "*law* is *politics*," they still find a degree of autonomy in the law that allows for a discussion of the legal phenomenon, however strongly politicized, as distinct from the political one. The embedded model unites under its flag several, and as to certain aspects, quite contrasting legal theories: contemporary natural law theories, CLS and the School of Law and Economics.[13]

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[13] *See* Alan Hunt, *The Politics of Law and the Law of Politics*, *in* Law and Power. Critical and Socio-Legal Essays 51-53 (K. Tuori et. al. eds., 1997).

### *4.1 The Flexibility of the Law Towards Politics*

For this heterogeneous group of theories, the law becomes an integral part of a wider context, the political and moral environment in which statutes, judgments, and other legal production take place. A certain norm or category becomes fully legal, i.e. truly binding for the community only if it fulfils certain requirements determined by this external environment. These can be requirements such as "goodness" or "justice," and also those of "efficiency" or "fidelity."

The theories covered by the embedded model then can be generally characterized from those of the autonomous model for considering as a constitutive part of the law the economic, moral or *stricto sensu* political ends for whose implementation in the community the legal phenomenon is used.[14] In other words, law is considered by natural law theory, CLS and Law and Econom-

[14] *See*, *e.g.*, Fuller, *Human Purpose and Natural Law*, 3 Nat. L. F. 73-74 (1958) and Fuller, *A Rejoinder to Professor Nagel*, 3 Nat. L. F. 95-99 (1958).

ics certainly as an authoritative tool in the hands of the political actors, but whose qualification as "law" is assigned on the base of which moral, political, or economic value the tool is going to promote into the community.

Naturally, this does not mean that the uniqueness of the legal phenomenon according to the embedded model disappears. The law, in the fulfillment of non-legal values, plays a central role (*e.g.* allowing the State to promote economic growth) due to its very authoritative and obligatory nature (*e.g.* legal sanctions against money laundering).

However, characteristic for the theories placed within this embedded model is the definition of the nature and structures of law as *flexible*. In contrast with the autonomous model, these theories claim that some of the fundamental features constitutive of the legal phenomenon have to be found outside the legal world, therefore rendering the internal structures of the law themselves necessarily flexible to the changes occurring at the political and moral levels. Consequently, the answer to the question of what the law is necessarily has to pass by and pay tribute to the political/moral envi-

ronment, for example in terms of statements such as "*just* and *therefore valid* law."

### *4.2 Making Law or Making Politics?*

When it comes to the moment of analysis of the relationship between legal and political orders, the theorists falling within the embedded model adopt a clear position of an *openness* of the law-making towards the political order. Similarly to the theories falling within the autonomous model, those within the embedded model maintain that the political inputs coming from the political system have to be transformed into a final legal product by a specific group of persons, working according to specific criteria, using specific categories and concepts.

Within the embedded model, however, the law-making is open to the political order in the sense that there is not a clear distinction between the formation and the process of selection of certain values inside the political order and the formation and selection of certain corresponding legal categories inside the law-making procedures. In contrast to the closure of the law-making as within the autonomous model, the law-making here is

*open* to the political order in the sense that the rationality and the parameters supervising the working of a legal system tend to be directly imported by the political order.

The working of the law-making and its results (*e.g.* in form of statutes or judicial decisions) are continuously influenced by the confrontations occurring at the political level. The influence of the political order as to the working of the law-making occurs before, during, and after the transformation of certain politics values into legal categories. The embracers of the embedded model then consider the law-making as a mechanism whose manner of working and results are predominately determined by the battles taking place within the political arena.[15] Therefore, the factual circumstance that politics uses the legal order to fulfill value *f* (*e.g.* Christian values) instead of value *e* (*e.g.* Nazi values) does matter for

[15] *See*, *e.g.*, Posner, The Problems of Jurisprudence, *supra* at 442: "Law and economics and critical legal studies resemble each other… in looking outside law for its springs and lifeblood."

the determination of whether it is true (and therefore binding) law or, for example, simply "unjust" (non-binding) statements.

### *4.3 A Mixed Legal Discipline for a Mixed Law*

The issue as to how the legal discipline should handle materials of political origin is, for the theories falling within the embedded model, heavily affected by their ideas of the law and law-making. As the nature of the law and the functioning of the law-making are strongly interconnected with politics and the political order, it is consequential for these theories to stress and promote the use by the legal discipline of both the materials and the methodologies developed in the various branch of knowledge dealing with the political world. As seen above, the theories subsumed within the embedded model neither solely nor primarily refer to the queen of the sciences investigating the political world, i.e. political science. They take other branches of human knowledge also into consideration, those which, albeit perhaps not primarily, have a specific perspective and approach to politics, such as economics, sociology and moral philosophy.

This, of course, does not result in the disappearance of the legal discipline as an autonomous branch of investigation. This is because the legal phenomenon, although with a radically reduced autonomous space, still keeps a (low) degree of distinction from the surrounding political world.[16] However, since the legal phenomenon is embedded within the political environment and is malleable to the political order, the legal discipline does not refrain from looking around in order to obtain from the same environment better tools and methods for understanding and teaching the law. The result is that the legal discipline is configured as *mixed*, composed both of normative components (such as the use of the doctrinal concepts of competence and jurisdiction) and more political categories (such us the possibility of declaring a law invalid as it is "undemocratic").

## 5. Law *and* Politics: The Intersecting Model

A path alternative to those followed by the embedded and autonomous model theories is the one followed by

[16] *See* Fuller, The Morality of Law, *supra* at 202-204.

the legal theories encompassed by the intersecting model for explaining the relationships between law and politics, namely legal realisms. This model is based on the fundamental idea of law as a *partially distinct* phenomenon from the political one. In the intersecting model, in contrast to the embedded one, the law only partially collides with politics and is not totally embedded into the political mass; the law does keep a certain degree of separation. Law is *distinct* from politics because the law has a true normative core, an area which can be defined, can work and which can be investigated using only a specific theoretical apparatus produced by and inside the legal world. This core consists of viewing the law as a mechanism of coercion that, regardless of its value-content, tends to be passed from one generation to the next.[17]

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[17] *See*, *e.g.*, Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 Colum. L. Rev. 586-589 (1940); and Ross, Towards a Realistic Jurisprudence. A Criticism of Dualism in Law 72 (1946). *Compare* Hart's criticism in The Concept of Law, *supra* at 133-134.

However, the intersecting model differs from the autonomous model to the extent that this separation of law from politics is only *partial*. The law, in order to be fully seen in all its constitutive parts, has to be placed in a position that somewhat coincides with the area occupied by politics. The legal phenomenon in the intersecting model is also considered a political product, exploited for political purposes by actors belonging to the political arena. This instrumental nature of the law in its relations to politics is particularly evident in the modern nation state, where the law has become one of the tools politicians more widely use in order to implement their values into a community.

### *5.1 Law and Politics in the Legal Realisms*

When it comes to law and its relations to politics, the legal theories within the intersecting model favor a *partial rigidity* of the legal concepts and categories. They see the law as a phenomenon whose essence eventually consists of being a specific normative phenomenon, i.e. in terms stressing the separation and rigidity of the legal structure towards the political world. In the intersecting model, law is seen as instrumental to politics, but is still

considered a neutral tool that can be used in order to implement radically different values into society. As in the autonomous model, law is then conceived as a technology, with its own space and its own rules, a main reason why legal realisms are sometimes treated as a particular version or as spin-off of legal positivism.[18]

However, in contrast to legal positivism and analytical jurisprudence, the intersecting model's theories also constantly stress the fact that the law is more than a logical and closed system of rules written on paper, more than the *law-in-books*. The legal realists start their construction from the assessment that the law is an empirical phenomenon, constituted by a combination of human behaviors and prevalent ideas among human beings as to what constitutes the law. The law is primarily the *law-in-action*.

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[18] *See* Summers, Instrumentalism and American Legal Theory 20, 176-190 (1982); and Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 Ethics 300-301 (2001). *But see* Anthony Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2094 (1995).

The intersecting model's theories then open the door to the empirical aspects of the legal phenomenon as constitutive elements of the very nature of law, an opening both to the concrete behaviors of human beings and to their socio-psychological underpinnings. As a consequence, the idea of what the law is ends up including a normative hard-core but also elements of a non-normative nature, in particular of sociological and political origins. For this very reason, the theories covered by the intersecting model can generally be seen as having the idea of a *partial* rigidity of the law in relation to politics.[19]

### *5.2 The Legal Realists open the Law-Making*

Moving to the relationships between the processes of production of new legal categories and concepts and the political order, the theories covered by the intersecting

[19] *See* Llewellyn, *Some Realism about Realism*, 44 Harv. L. Rev. 1237 points 5 and 6 (1931); and Ross, Towards a Realistic Jurisprudence, *supra* at 49. *See also* Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 35-36 (1910).

model design the law-making as *open* to political processes. In particular, the law-making process is structurally open to choices made in the political arena, of values to be implemented into a community through the law.

As in the embedded model, both American and Scandinavian legal realists claim that the procedures and directions taken in the political order directly influence the workings of the law-making processes. Legal actors are human beings, educated by and operating inside a larger community and a larger system of production and selection of values. The latter, defined previously as the political order, influences legal actors when they operate within the law. If the focus is on the law-in-action or on the law as fact, then the environment in which the actions or the facts take place becomes of primary importance for the creation of those very actions and facts.[20] For example, the appointment

[20] "[T]he Realist hero is the social engineer who masterfully wields law as an instrument of policy." Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 67 (1984).

of a judge with a certain conservative background and legal education will probably push the legal order, in a particular case, to promote certain legal constructions instead of others.

This openness of the law-making processes and procedures is also created by the fact that, according to both the American and Scandinavian legal realists, legal concepts and categories are generally expressed in a quite vague and, more or less, open-ended language. The legal actors deal primarily with molding the legal language and reasoning in favor of one legal construction over another. In doing so, they take direct inspiration from the political order, i.e. from the system of values in which they live and towards whose implementation their decisions (in form of legislation or judicial decisions) are directed.

The innovative contribution of the openness proposed by the theories covered by the intersecting model (and also by the embedded model), is that the political stimuli and processes of production of those stimuli have to be treated as an integral part of the law-making procedures. The legal realists' idea of law-making procedures also includes those processes, which, although

belonging to the political world, have a direct impact on the production of legal rules or judicial decisions.

### *5.3 The Realists' Legal Discipline and the Political Material*

The considerations of the nature and the role played by the legal discipline occupy a crucial position in the theories covered by the intersecting model. Though they base their analysis on those two apparently repelling poles (rigid law *vs*. open law-making), the theories covered by the intersecting model try to find a point of convergence in the construction of a new typology of legal discipline. On one side, they claim that the legal discipline, in order to receive the label of a "scientific" discipline, has to stress the specific nature of its object of investigation, the law. The latter, although intersecting with other phenomena (and in particular with the political one), cannot be fully assimilated with them. The legal discipline, in order to be viewed as a scientific form of knowledge, therefore has to reflect the (partial) autonomy of its object of investigation.

On the other side, the theories covered by the intersecting model do open the law-making of the legal

system to the influences of the processes occurring in the political world. A scientific investigation of legal phenomenon is an investigation aiming at finding out what the law *really* is. Law is one of the most powerful tools in the hand of the political establishment used to get their goals implemented into the society. Legal scholars therefore have to take into consideration that which happens in the political world as relevant for that which happens in the legal world during the creation of new laws. Legal discipline needs to focus on those parts or elements of a legal phenomenon that are politically charged in order to discover and bring into the light of day what political is still in the reality of law.

The intersecting model's theories then unlock the doors of the legal discipline to categories such as "welfare" or "policy," categories produced by disciplines typical of the political arena such as political science or political philosophy. The legal discipline is then *mixed* in character.[21]

[21] Ross, On Law and Justice, *supra* at 48-49.

This mixed nature of the legal discipline, however, is of a *partial* character. It has to always be kept in mind that the political material tends to flow freely between different value options but when it is introduced into the legal discipline, it is sometimes subjected to legal limitations and constraints. These limitations and constraints are caused, as seen above, by the partial autonomy of the law, by the principles and doctrines governing both the legal process and the legal production.

## 6. Common Points of the three Models

Combining the conclusions drawn in Chapters Three and Four with the intersecting model presented in the previous chapter, it is possible to expand the table representing the models relating the law to politics (*see* Table 1). It can be clearly seen from Table One that the results for each model are unique, each having its own particular way of viewing how and to what extent the legal phenomenon relates to the political one. The theories covered by the autonomous model tend to see the law and its system of production as relatively closed to that which happens in the political world. In contrast, the scholars both of the embedded model and of the inter-

secting model tend to open the legal phenomenon to the political reality, i.e. to the world in which the values to be implemented in a community via law, are produced and selected.

However, the legal movements covered by the intersecting model distinguish themselves from the positions taken, for example, by CLS scholars and natural law scholars. It is true that legal realists consider lawmaking as open to the influences coming from the political world and that this openness is reflected in a mixed nature of legal discipline, i.e. in its being open to the use of material produced in the political arena. Nevertheless, this opening of the legal discipline is only partial since the theories covered by the intersecting model still retain a certain degree of autonomy with respect to the legal concepts and categories as towards the conceptual political apparatus.

Despite these distinctions, it is still possible to find at least two common points of discussion among the different models, even if their answers differ. First, each of the theories covered by the three models begins its analysis from the fact that law and politics relate to each other. That which actually characterizes their approach-

es, and distinguishes the models, is the degree of intensity in the interrelationship between law and politics, not the dilemma of its presence or absence.

| | **Relationship of law to politics (*static aspect*)** | **Relationship between law-making and political order (*dynamic aspect*)** | **Relationship of legal discipline to political material (*epistemological aspect*)** |
|---|---|---|---|
| ***Autonomous model*** (Legal Positivism, Analytical Jurisprudence) | *Rigidity* of law | *Closed* law-making | *Pure* legal discipline |
| ***Embedded model*** (Natural Law Theory, CLS, Law and Economics) | *Flexibility* of law | *Open* law-making | *Mixed* legal discipline |
| ***Intersecting model*** (American and Scandinavian Legal Realisms) | *Partial rigidity* of law | *Open* law-making | *Partially mixed* legal discipline |

*Table 1. Politics and Law in the Autonomous, Embedded, and Intersecting Models.*

The intensity of this relationship varies according to the models encompassed by the theories. The degree of intensity is extreme in the embedded model. Here the norms are considered law only when they adapt themselves to certain values produced inside the political arena; the law-making is widely open to that which is happening inside the political world and the legal discipline is actually of a mixed nature, largely making use of material and categories produced inside the political arena (*e.g.* economic efficiency or moral sociability). It is a model in which one phenomenon (law) is surrounded entirely by the other (politics).

The relationship between law and politics can also be less obvious, as in the intersecting model. The legal realist theories covered by this model posit the openness of both the processes leading to the creation of the law and (to some degree) the legal discipline towards the political phenomenon. However, they still try to keep the law as a partially rigid concept, for whose nature only a limited amount of political concepts and categories is required as constitutive elements (*e.g.* the law refers to the behavior of specific actors, the judges, identified by the law itself). In this model, the two phe-

nomena of law and politics overlap, while keeping a certain degree of an autonomous hard core, whose nature can be fully explained making a limited use of the other's categories and concepts. As seen above, the hard core of the legal phenomenon towards politics is due to the fact that the law has a (partial) rigid conceptual structure towards that which is inside politics. This rigidity renders the legal discipline of an only *partially* mixed character, i.e. they can make use of political material only to a certain extent.

In the third model, law and politics are considered as two autonomous phenomena. Both the nature of the law and law-making processes of the legal order do not directly require any reference to the political world; moreover, the legal discipline avoids any contact with the political material and conceptual apparatus. Although this model stresses the central and monopolizing role played by the legal world in deciding how and when the values are transferred into the legal world, the autonomous model also still recognizes that there actually is a transfer of values from one world (politics) to the other (law), i.e. that there is a point of contact where

the law does touch politics (either at judicial level, as for Hart, or at the higher Kelsen's Basic Norm's level).

The second common point of discussion among the different models is the consideration that law and politics, regardless of the intensity of their relations (highest in the embedded model, lowest in the autonomous one), actually identify two phenomena that cannot be fully assimilated within each other. This separation between law and politics is transparent for the theories within the autonomous and intersecting models (in particular because of their idea of a hard core of the law with a normative nature).

This division becomes *prima facie* opaque when speaking of the embedded model. This model, indeed, is characterized by the law being implanted inside the political phenomenon, and for its existence and procreation being dependent upon that which happens inside the political world. Nevertheless, embeddedness does not mean the dissolution of law into politics. First, all the theories covered by the embedded model still speak of two different phenomena, one called law, the other, politics. Stressing the dependency of the first to the second does not imply that they are simply two words iden-

tifying one phenomenon. It is true, in particular within CLS, that "law is politics," but this statement simply points to the fact that the law tends to become incorporated into the political world and its conflicts. Still, the law is not assimilated into politics and there is always a difference in nature between the two phenomena.

Second, each of the theories covered by the embedded model are designed with the very purpose of arousing lawyers and judges. Law and Economics followers, natural law scholars, and CLS want to create a consciousness of their central positions in the wider political environment and the possibility of operating as legal actors and influencing both what happens inside their legal world but also what happens outside in the surrounding political world.[22]

This influencing of the surrounding world of course can take various directions, according to the values or politics whose protection or implementation the different theories tend to prioritize. For example, Law

[22] *See*, *e.g.*, David Lyons, *Justification and Judicial Responsibility*, 72 Cal. L. Rev. 188 (1984).

and Economics privileges the influence (although in a *laissez-faire* direction) of the political world as to economic questions. In contrast, natural law theories tend to be more concerned with using lawyers and judges in order to mark the extreme borders (*e.g.* with category such as "wrongful" law) the political power can never transgress (*e.g.* as the Nazis did) if it still wants to make use of the tool of coercion called law.

Even if "law is politics," with the right type of legal education and training, legal actors can still play a part in the political world, a role not as politicians but as politically-oriented judges or lawyers. The fact that the vast majority of representatives of the theories covered by the embedded model (with the exception of some of the "self-destructive" members of CLS movement) have produced a large bulk of legal writings stressing the need to reform the law, not abolish it, is then not a coincidence. This is a clear indication of the fact that for those within the embedded model, the law is also a vital component of the political phenomenon, that cannot be

substituted by other types of coercive procedures or mechanisms.[23]

In summary, most of the contemporary legal theories, regardless of the model in which they fall, tend to reflect the historical situation in which they operate. As seen in the introductory chapter, the theories concern a situation in which the law becomes more and more a specific technique, with its own rules and languages; but also more and more invoked by the political world. As a result, in current legal theories, law and politics, two (more or less) different phenomena remain, and these two phenomena still communicate and transmit with each other.

[23] See Gordon, Critical Legal Histories, supra at 101. See also Gordon, 'Of Law and the River,' and of Nihilism and Academic Freedom, 35 J. Legal Educ. 14 (1985).