

– TANULMÁNYOK –

THE FRAMEWORKS OF AN AUTONOMOUS LEGAL POLICY

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Law and policy as two distinct notions, interconnected even if “belonging to two different worlds”, the first one relatively autonomous and the second one emerging as “a sub-product of the political system”,¹ are termed and applied since the late nineteenth century in the English language civilisation,² albeit the centre of their interconnected cultivation has ever been Germany, with an interest particularly arisen since the Second World War.³

The pursuit of them named as legal policy and the need to lay its scientific foundations are generated both by political maturity and society’s respect for what is

¹ MAURO ZAMBONI: *Law and Policy*. In <<http://ssrn.com/abstract=929253>>. 5. As he will then define their relationship, “Policies are [...] generally perceived as paths of a political nature because they are produced outside the legal world, and through which, political evaluations and decisions are inserted (to a greater or lesser extent) into the legal system.” *Ibid.* 11.

² For their interconnected recent and ample treatment, see Mauro Zamboni: *The Policy of Law. A Legal Theoretical Framework*. Oxford: Hart Publishing, 2007. 222. and MAURO ZAMBONI: *Law and Politics. A Dilemma for Contemporary Legal Theory*. Berlin – Heidelberg: Springer-Verlag, 2008. 166.

³ For their theoretical approach in monographies, see RUDOLF WASSERMANN: *Vorsorge für Gerechtigkeit: Rechtspolitik in Theorie und Praxis*. Bonn: Verlag Neue Gesellschaft, 1985. 344., RÜDIGER VOIGT: *Recht als Instrument der Politik*. Opladen: Westdeutscher Verlag, 1986. 303. and EIKE VON HIPPEL: *Rechtspolitik: Ziele, Akteure, Schwerpunkte*. Berlin: Duncker & Humblot, 1992. 427.; as well as DIETER GRIMM – WERNER MAIHOFFER (eds.): *Gesetzgebungstheorie und Rechtspolitik*. Opladen: Westdeutscher Verlag, 1988. 423., *Rechtspolitologie und Rechtspolitik*. Pfaffenweiler: Centaurus, 1989. 255., MICHAEL HOLOUBEK & GEORG LIENBACHER (eds.): *Rechtspolitik der Zukunft – Zukunft der Rechtspolitik*. Wien: Springer, 1999. 428. and MANFRED REHBINDER – MARTIN USTERI (eds.): *Glück als Ziel der Rechtspolitik*. Bern: Stämpfli, 2001. 248. for collective coverage; and RÜDIGER VOIGT: *Recht und Politik. Beiträge zur Rechtspolitologie*. Siegen: Siegen University Press, 1985. 25., NORBERT RÖTTGEN: Herausforderungen der Rechtspolitik heute. *Zeitschrift für Rechtspolitik*, (36) 2003/1. 20–22. and CHRISTOPH ENGEL: Rationale Rechtspolitik und ihre Grenzen. *Juristenzeitung*, (60) 2005/12. 581–590. for individual papers.

distinctive in law.⁴ Numerous programmes—official and unofficial (initiated mostly in scholarly circles) alike—were also launched in Hungary to draw the outlines of legal policy and set its requirements.⁵ Nevertheless, there are basic notions that such programmes frequently and recurrently regard as initially given, thereby leaving some essential relations unclear. The present paper attempts to clarify the interrelations of some of such notions.

I. Relationship between Politics and Law

Both politics and law are situated within the social totality, hence they mutually refer to and precondition one another. However, their roles played in social existence are of different weight. *Politics*, on the one hand, is a complex that reconciles the fundamental interests of society, transforming them into dominant interests and, thereby, contributing to the integration of society. *Law*, on the other, is a kind of complex that, by and large, mediates between other complexes of society. For this reason, law is dependent on—in its relationships to—other fundamental complexes: its value lies in mediation, that is, in the mediated complexes outside its own sphere (thus, primarily, in the transformation and shaping of politics, economy, culture, and so on, through its own medium). This means that politics usually outweighs law in social processes (as we may perceive the economic sphere to outweigh the political one—in the long run and in a historical perspective). This, however, by no means alters the fact of their mutual dependence (naturally, from the point forward at which social classes, divided into antagonistic oppositions, and their integration by means of the state, etc., are born).

Within this relationship, the connections between politics and law can be either direct or indirect. The way in which connections evolve is largely a function of *socialisation*. By socialisation, we mean the advancing process of breaking with natural existence, with social relations becoming increasingly complex, and the

⁴ Cf., e.g., from various cultures, PREBEN STUER LAURIDSEN: *Studier i retspolitisk argumentation*. København: Jurisforbundet, 1974. 668., HIRAI YOSHIO: [A Theory of Legal Policy Making, in Japanese]. Tokyo: Dai 2-han, 1995. 197. and PEEP PRUKS: On Formation of Policy Analysis and Legal Policy in Estonia. *Rechtstheorie*, (31) 2000/3–4. 337–347.

⁵ For the late period of Communism in Hungary, see MIHÁLY SAMU (ed.): *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik / Pravogo-teoreticheskie problemy naušnogo obosnovaniya pravovoy politiki*. Budapest: Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály, 1986. 322. and PETER KOLLER – OTA WEINBERGER – CSABA VARGA (eds.): *Theoretische Grundlagen der Rechtspolitik*. (Ungarisch–österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990.) Stuttgart: Franz Steiner Verlag Wiesbaden, 1992. 185.; for MIHÁLY SAMU's ever progressing monographising, his: *Jogpolitika – jogelmélet* [Legal policy, legal theory]. Budapest: Közgazdasági és Jogi Könyvkiadó, 1989. 273., *Általános jogpolitika: A jog depolitizálása* [General legal policy: the depolitisation of law]. Budapest: Akadémiai Kiadó, 2003. 296. and *Jogpolitika: A jog humanizálása* [Legal policy, a means for humanising law]. Budapest: Akadémiai Kiadó. 2008. 335.; and for a deeply analytical approach, MÁTYÁS BÓDIG: A jog és a jogpolitika közötti fogalmi kapcsolat: egy tisztázási kísérlet [The notional connection between law and legal policy: an attempt at clarification]. *Állam- és Jogtudomány*, 2004/1–2. 51–86.

purely social functions of mediation and the state of everything being increasingly mediated coming to prominence and then to full perfection. Such processes can take place either on an *ontogenetic* or on a *phylogenetic* plane. The overall development of humanity from primitive ages to developed civilisations makes up the ontogenetic plane, whereas the development of a society organised into a state from its anarchistic or revolutionary origins up to its consolidation represents the phylogenetic one.

Between politics and law, *direct connections* were characteristic of early, primitive forms. These could already be observed in archaic times, that is, beginning with the ancient forms of development—especially in autocratic societies relying on despotism or unconditional absolutism. They can be noticed also in anarchistic or revolutionary processes of transformation, as well as in areas of political destabilisation resulting in anarchy or revolution. The examples range from original state-organisations (e.g., the North-American strong-arm law), via periods of revolutionary transition (e.g., what Lenin consciously undertook after the October Revolution⁶), to destabilising intervals of political struggle (e.g., the events that took place under the banner of “cultural revolution” in China⁷). The common feature of these states is that the political power at any given time, on the one hand, shapes the law directly, whilst the law, on the other, is not in a position to shape or organise the power: the latter can provide additional forms to the conditions of the former, for instance, at most through its legitimisation. In such instances, the law can directly take over the functions of the power (thereby becoming degraded or instrumentalised into a mere glamour, rite or propaganda in the hands of the power), while, in its turn, the power can directly fulfil roles specific to the law (most often in the form of a lawless jurisdiction, be it based on brute force, “revolutionary consciousness”, or on the leader Mao’s citation).

Indirect connections presume formation of distinctive traits and acquisition of relative independence on the part of both politics and law. In such a phase, politics is filtered through law, being “tamed” by the law—organised and mediated by it in relevant aspects. At the same time, politics can influence law only through the law’s own medium; thus, it can prevail only as filtered through the particularities of law. Since socialisation and the acts of mediation approach a state of increasingly pure social indirectness, the relationship of politics and law becomes complex in that not only moral and religious, but also political and party norms contribute to a balance in which the political influence exerted on the evolution and assertion of law will stay within certain limits without transcending them. Both law and politics more and more require such a complexity as backed by their own departmental interests—that is, in order to grow in their respective legitimacies and also in their effectiveness in socio-political organisation.

⁶ Cf., e.g., CSABA VARGA: Lenin and Revolutionary Law-making. *International Review of Contemporary Law* [Brussels], 1982/1. 47–59. reprinted in CSABA VARGA (ed.): *Comparative Legal Cultures*. Aldershot, etc.: Dartmouth – New York: The New York University Press, 1992. 515–527.

⁷ Cf., e.g., CSABA VARGA: *Codification as a Socio-historical Phenomenon*. Budapest: Akadémiai Kiadó, 1991. and <<http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>>. 240–242.

II. Legal Policy as a Mediator

In the increasingly socialising practice of regularly guaranteed mutual influence, an intermediate area is becoming formed, which can be gradually distinguished from both sides as it eventually gains relative independence in that the specifically political can impact upon that which is to be channelled by exerting influence on the specifically legal. This is the field of *legal policy*.

From the point of view of its purport, means and mechanism of functioning, legal policy is *politics* insofar as it is aimed at political pressure through recourse to non-formal(ised) means. At the same time, it is law from the point of view of the targeted medium of exerting an influence, taken as a provoking and stimulating filter, which lets through (by selecting) given kinds of influence, with its particular structure transforming the exertion of influence. For it is nothing but the legal that is directly targeted, by preserving its optimum legal quality, when the non-legal is re-formulated in law by homogenising it according to and within the legal medium. Therefore, legal policy affords a specific intermediary in the transition of politics to law and vice versa, concomitantly bearing the distinctive features of both.

Accordingly, legal policy is (1) a medium of *influence* by politics on law. However, it is not a medium of (2) any kind of influence whatsoever, but only of those made *conscious* in their abstract generality and formulated, objectified, recorded and processed as such. For this reason,

- characteristic manifestations of legal policy are those in which political and legal demands are condensed into an abstract generality;
- this generality provides a filtering role that enables politics to exert an influence on law with the effect of becoming radiated within the law; while
- regardless of this, the effect of the concrete on the concrete (of the particular on the particular) may still be created directly—or significantly more directly than otherwise.

III. Legal Scholarship, Legal Policy, and the Law on Law

From what we have said above we can derive the fact that, in the final account, legal policy is a kind of politics broken down as applied to a particular terrain, sector or profession. At the same time, it is not a simple passive filter but the reformulation of *general policy in terms and under the conditions of specific particularities*. Accordingly, through its specific filter it can lead to either

- letting political effects through, or
- blocking political effects, or
- creating something new in its homogeneous instrumental medium that did not and could not have been born directly and spontaneously from within the uninstrumentalised heterogeneous social reality.

From this it also follows that legal policy is *practical* a category with the ultimate criterion of *effectiveness*. In consequence, the effects of such theoretical qualities as a selection based upon true cognition and proper evaluation can only surface in the long run within the framework of and as subordinated to effectiveness.

Within such a view, legal scholarship, legal policy and the law on law can be clearly separated conceptually from one another.

The task of *scholarship* is to disclose through analysis the developmental regularities and correlations between the relevant phenomena as components of reality. Instead of performing evaluation *per se*, it presents feasible historical alternatives with all of their consequences. It does not process values and evaluations, goals and goal-settings, forms of consciousness and ideologies in terms of their own evaluation, goal-setting and/or ideology but as historically objectively emerging components of social existence.

Legal policy performs its own evaluation, goal-setting and/or ideologisation as a result of scholarly analysis but within the sphere of politics. Its fundamental task is to help achieve the practical realisation of what is feasible and available in principle, or at least to transform the idea of realisation into a task now seen as practical.

The *law on law* reformulates, according to the formalities of positive law and reinforced by its compulsory force, that which legal policy has formulated, which is generally regulated by normative means, and thus withstands specific regulation on the level of the particular for one or another reason.

In the field of *law-making*, this triple task is designated by the science of law-making [*Gesetzgebungslehre*] as an area of jurisprudence dedicated to clarification of the philosophical, theoretical and sociological foundations of legislation and its correlations; to law-making policy as a field of legal policy concerned with the selection of values that are considered desirable *hic et nunc* as drawn from the results of *Gesetzgebungslehre*; and, finally, to the statute on law-making as an area of positive enactment of what, through which procedures and ways and with what formal requirements, is to be regulated. In principle, in the field of *law-application* we can similarly distinguish the science of law-application, law-applying policy and the statute on law-application.

At the same time, it certainly marks the pathology of social development and the destruction of the law's own distinctiveness with its eventual annihilation if the law is not held sufficient in, by and of itself; therefore, it is construed that something of a "legal policy" is also required to marshal the law towards social goals, to supplement the law by surpassing or even denying it in practical effects. (The example of Hungary after World War II can be recalled when, as part of the struggle for power, the Administrative Court was banned by the Communists because it insisted on strictly relying upon the law and considerations drawn from the law. To balance this, a separate "legal policy supervision" was instituted in practice both structurally and ideologically, so that after 1949 the daily tactics of politics could also prevail in law and force everything particularly legal into the background.) It also proves an unhealthy course of development if legal policy considerations are granted a role as a general subsidiary within the sources of the law to fill gaps. Finally, it is obviously a sign of social disorder if legal policy is taken as a completed regulation with the effect that actual regulations are no longer enforced.

IV. Demand for an Autonomous Legal Policy

Socio-ontological considerations already suggest that socialisation not only means that social structures become more complex and their functioning presumes a more

complex mediation, but also that it is a process in which both the particularity of the components, active in its functioning, and the relative autonomy of such particularities in the mechanism of mediation are allowed to evolve and gain ground, increasingly influencing the entire social motion. In as much as this holds true, our conclusion is almost self-evident: the given stage of socialisation presumes a given degree of political autonomy, and this autonomy presumes the formation and separation of legal policy as a mediator between politics and law.

Thus, it is an indispensable precondition to the healthy functioning of both politics and law that a specific medium—*legal policy*—be inserted into the overall socio-political process as a selective and formative filter of political influence exerted upon law and vice versa. However, once this is established, everything we have said in relation to mediators as a requirement and consequence of socialisation will be true for mediators between mediators as well. That is, legal policy can carry out its role adequately only by bringing its particularities to perfection, and acquiring a relative independence and autonomy from both politics and law.