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Raimo Siltala

Law, Truth, and Reason

A Treatise on Legal Argumentation

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LAW, TRUTH, AND REASON

A Treatise on Legal Argumentation

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Springer

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Chapter 1
Introduction

1.1 The Three Ideologies of Judicial Decision-Making by Jerzy Wróblewski

In his treatise *The Judicial Application of Law*, the Polish legal philosopher Jerzy Wróblewski (1926–1990) made the distinction between the three ideologies of *bound*, *legal and rational*, and *free* judicial decision-making.[1]

In Wróblewski's classification, the ideology of *bound* judicial decision-making refers to a strictly systemic, formal conception of law as a closed system of enactments issued by the Parliament and the legal rules entailed in them. With reference to the totality of such rules, the judge is able to determine the outcome for an individual case by adhering to the rules of purely formal, logico-deductive reasoning. The legal rule extracted from an item of legislation will then function as the major premise in a deductive inference, while the fact-constellation of the particular case at hand will provide the minor premise for it. The only legitimate source of law under such an austere conception of law is the sum total of the formally valid enactments issued by the Parliament. As Wróblewski put it[2]:

> The ideology of bound judicial decision-making has a very simple doctrine of the "sources" of law and it can be summarised briefly: the unique primary source of law is a statute in the formal sense of the term; decisions have to be based on statutory rules.

The ideology of bound judicial decision-making effectively reiterates the ideal of a purely mechanistic judge-automaton, stripped off of any powers of genuine legal interpretation, as suggested by Baron de Montesquieu. According to him, a judge cannot legitimately claim to be more than "a mouthpiece that reads the letter of the

[1] Wróblewski, *The Judicial Application of Law*, pp. 265–314.

[2] Wróblewski, *The Judicial Application of Law*, pp. 265–314; cf. Siltala, *A Theory of Precedent*, pp. 3–6. – Cf. Wróblewski, *Contemporary Models of the Legal Sciences*, p. 88 et seq., where the author introduces the distinction between the *traditional positivist*, the *modern positivist*, the *modern antipositivist*, and the *complex "integrative"* conceptions of legal science.

R. Siltala, *Law, Truth, and Reason*, Law and Philosophy Library 97,
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law", i.e. a passive organ of law-application that cannot have access to such legal discretion as is entailed in legal interpretation.[3]

Ideologically, the ideology of bound legal decision-making fosters the two ideals of *political liberalism* that aims at safeguarding the inalienable rights of the individual against any intrusions by the state or other citizens, on the one hand, and *legal positivism*, on the other, with emphasis on the formal values of legal predictability and certainty at the cost of any content-based criteria of law. Thereby, the role of arbitrariness and personal whim on part of the judge is allegedly prevented. In the continental systems of law, the ideology of bound judicial decision-making is closely connected to the birth of national codifications of law.[4] Still, any at least temporarily locked up criterion may function as the required reference for bound legal discretion.

Georg Friedrich Puchta's master idea of a highly *constructivist* legal science (*Begriffsjurisprudenz*) that focused on an allegedly closed, gapless, and internally consistent system of legal concepts and their mutual relations as its subject matter would quite effortlessly satisfy Wróblewski's criteria for the ideology of bound judicial decision-making. Puchta's highbrow legal constructivism had a profound impact on the German legal doctrine at the late nineteenth century and the beginning of the twentieth century. Similarly, the case method introduced by Christopher Columbus Langdell and his like-minded followers, like James Barr Ames and Joseph Beale, could be classified under Wróblewski's ideology of bound legal decision-making. According to Langdell's methodological agenda, the American case law was to be collected under a few general principles, as duly identified by Langdell and his school of law.[5]

Neither Hans Kelsen's *Reine Rechtslehre*, where the systemic structure of the law is defined by reference to the transcendental-logical basic norm (*Grundnorm*), nor H. L. A. Hart's analytical jurisprudence, where the boundaries of the legal system vis-à-vis the norms of political morality, religion, etiquette, or any other social phenomena are drawn with the *Queen rule* of law-identification,[6] would qualify as an

[3] "Mais, si les tribunaux ne doivent pas être fixes, les jugements doivent lẽtre à une telle point, quiỉs ne soient jamais quún texte précis de la loi. (. . .) Mais les juges de la nation ne sont, comme nous avont dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur." Montesquieu, *L'esprit des lois*, pp. 399, 404. – In the critical texts by American legal realists, the notion of a judge who is stripped from all law-creating power was soon coined a *slot-machine judge*.

[4] "The ideology of bound judicial decision-making presupposes some features of the law, viz. the positivistic conception of the codified law in statutory legal systems. The law is seen as a system which is consistent and complete, a set of rules according to which one can decide any legal case without going outside the system. For the law-applying organ the system is closed and can be changed only by the law-maker. The concept of codification is extrapolated on to all of law. The completeness of legal system, often attacked by the adversaries of positivism, is linked with liberty, legal certainty and legal security." Wróblewski, *The Judicial Application of Law*, p. 278.

[5] Duxbury, *Patterns of American Jurisprudence*, pp. 14–25.

[6] I.e.: "what the Queen in Parliament enacts is law in England". Hart, *The Concept of Law* (1961), e.g. pp. 99, 104, 108, 113, 117, 142, 145.

instance of Wróblewski's ideology of bound judicial decision-making. The reason thereto has to do with the inevitable margin of free discretion reserved for the judge in the both. Though Kelsen underscored the fact that there can be no other source for the law except for the law itself,[7] he nonetheless acknowledged the idea that legal rules do leave some margin of free discretion to the judge or other law-applying official.[8] Hart, on the other hand, pointed out how legal rules, like linguistic concepts, entail a core of settled meaning, on the one hand, and a penumbra of doubt, on the other, where several interpretations of the rule are possible.[9] As a consequence, Kelsen's and Hart's analytical jurisprudence is in need of a theory of legal interpretation that neither of them provided for.

The ideology of *free* judicial decision-making in Jerzy Wróblewski's catalogue refers to a loose-edged collection of movements or schools of legal thought that share (no more than) a critical stance vis-à-vis the legal formalism of the bound ideology of legal decision-making. Unlike the bound ideology that adheres to the ideal of the *Rechtsstaat*, strictly defined, the ideology of free judicial decision-making does not entail or even imply any coherent political or legal background ideology that would be shared by all of its proponents. Rather, there is a wide range of possible social and legal prerequisites involved. What holds the various manifestations of the ideology of free judicial decision-making together is a shared critical stance towards legal formalism. In consequence, the doctrine of the sources of law is extended to cover a wide range of other kind of legal source material in addition to legislation and its internal systematics that were the only sources acknowledged by Wróblewski's ideology of bound judicial decision-making. In addition, the models of legal reasoning to be adopted include more variation than merely deductive reasoning and logico-deductive inference recognized by the ideology of bound judicial decision-making.

According to François Gény, the judge ought to have recourse to free scientific research on the law and society (*libre recherche scientifique*), and then make the legal decision accordingly.[10] Similarly, the German Free Law Movement (*Freirechtslehre*; *Freirechtsbewegung*) underscored the role of legal intuition and the sense of justice (*Rechtsgefühl*) or the sense of values (*Wertfühlen*) prevalent in the community, rejecting any striving for such a formal, systemic idea of law that had prevailed in Germany at the late nineteenth and early twentieth century. Wróblewski even classifies the quasi-legal *Führerstaat* ideology of the National Socialist Germany of the 1930s under the ideology of free judicial decision-making.[11]

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[7] "Denn es ist eine höchts bedeutsame Eigentümlichkeit des Rechts, daß es seine eigene Erzeugung und Anwendung regelt." Kelsen, *Reine Rechtslehre* (1960), p. 73; Cf. Kelsen, *Reine Rechtslehre* (1960), p. 239: "In einem positivrechtlichen Sinn kann Quelle des Rechts nur Recht sein."

[8] Kelsen, *Reine Rechtslehre* (1960), p. 250.

[9] Hart, *The Concept of Law* (1961), pp. 124–128.

[10] On François Gény as a legal thinker, cf. Bouckaert, "Gény, François (1861–1959)"; Bergel, *Méthodologie juridique*, pp. 249–253.

[11] Wróblewski, *The Judicial Application of Law*, pp. 285, 298.

In the United States, sociological jurisprudence at the end of the nineteenth and the beginning of the twentieth century,[12] and the American realist movement since the 1920s both laid heavy emphasis on the creative role of the judge in legal adjudication. Holmes even defined the concept of law with the legal expectations of the "bad man", i.e. a potential law-breaker who is only interested in foreseeing the legal consequences of his law-defiant action by the courts of justice or other officials.[13] John Chipman Gray, in turn, pointed out that formally valid legislation is no more than a source of law, i.e. raw material that the judge may draw upon when making a legal decision. It is only the final judicial verdict that counts as the law proper for Gray[14]:

> And this is the reason why legislative acts, statutes, are to be dealt with as sources of Law, and not as part of the Law itself, why they are to be coördinated with the other sources which I have mentioned. It has been sometimes said that the Law is composed of two parts, – legislative law and judge-made law, but, in truth, all the Law is judge-made law.

The ideology of free judicial decision-making downgrades the significance of formally valid legislation and, instead, defines the law as the "law in action", i.e. the totality of decisions given by the courts of justice and other law-applying officials, social norms of various kinds, and the set of social values in the legal community.[15] Rather than the formal values of legal security and the predictability of a legal decision, as were emphasized by the ideology of bound judicial decision-making, Wróblewski's ideology of free judicial decision-making underscores the importance of case-bound reasonableness, equity, and justice on an individual basis.

The third model in Wróblewski's catalogue of judicial ideologies, the ideology of *legal and rational* judicial decision-making, is said to refer to a compromise between the bound and free ideologies of judicial decision-making. It avoids the *ultra-rationalistic* fallacy of the bound alternative, to the effect that the decision to be made by the judge is not wholly determined beforehand, and it also avoids the *irrationalistic* fallacy committed by the free alternative, to the effect that the judge's decision is not entirely unbound and free-floating, either.[16] The judge's decision is less constrained by the legal sources than under the formally bound ideology of law-application, since there now is room for the use of judicial evaluations as "a necessary element of judicial heuresis and justification".[17] But, in contrast to the ideology of free judicial decision-making, the ideology of legal and rational judicial decision-making does not approve of judge-made law, i.e. the creation of general,

[12] Several justices approved the ideology of sociological jurisprudence, such as Louis Brandeis, Harlan Fiske Stone, Benjamin N. Cardozo, and Felix Frankfurter, besides Oliver Wendell Holmes.

[13] Holmes, "The Path of the Law", pp. 460–461.

[14] Gray, *The Nature and Sources of the Law*, p. 125.

[15] Wróblewski, *The Judicial Application of Law*, pp. 292–293.

[16] Wróblewski, *The Judicial Application of Law*, p. 306: "Legality is ultimately treated as a formal legality which accepts the consistency of the decision with the law in force. Rationality is defined as a proper justification of decisions with good reasons."

[17] Wróblewski, *The Judicial Application of Law*, p. 310.

abstract legal rules by the courts of justice, as detached from the will-formation of the parliamentary legislator.

The ideology of legal and rational judicial decision-making is intertwined with the two seminal principles of modern Western law, i.e. *ratio* and *auctoritas*, or the *formal legality* and *rational justifiability* of a legal decision.[18] They are like the two sides of the coin, the one presupposing the existence of the other.

The *legality* of judicial decision-making refers to the idea that the judge is bound by the rule of law, having to adhere to the set of arguments derived from the mandatory sources of law in his legal decision-making. The concept of formal legality may be taken as referring to the *institutional* sources of law, such as legislation, the *travaux préparatoires*, and precedents, along with the totality of rules and principles of law that can be derived from them. Wróblewski, for one, opted for an even stricter notion of law, since he excluded precedents and other judge-made law from the concept of the legal system.[19] In the wide sense, the requirement of legality may be taken to comprise all the *institutional* and *non-institutional*, i.e. societal, sources of law acknowledged in a legal system. Such a wider notion of legality will find a better accord with the concept of law that has been defended – on separate terms – by Alf Ross and Ronald Dworkin. If the concept of law is outlined so as to entail value-laden legal principles, as well, the criterion of formal legality must be defined accordingly.

The *rationality* of judicial decision-making, in turn, is equal to the requirement that legal decisions ought to be justified with a set of *epistemic* and *axiological* reasons.[20] Though Wróblewski does not present any particular legal source doctrine in the context of his three ideologies of judicial decision-making, the requirement of the judge's recourse to such epistemic and axiological reasons may be reformulated in terms of the institutional and non-institutional sources of law and the arguments drawn from them. Instead of the axiological and epistemic reasons, one could speak of the *norm premise* and the *fact premise* of a legal decision, respectively. The legality of a judicial decision is manifested by means of the rationality conditions of judicial decision-making.

Moreover, Wróblewski introduces the distinction between internal and external justification of a legal decision. *Internal* justification refers to the relation that prevails between the outcome of a case and the normative and factual premises presented in its support, to the effect that the outcome can be derived from the combination of the said norm premise and fact premise. The norm premise is derived

[18] Wróblewski, *The Judicial Application of Law*, pp. 307–311. On the two requirements of *ratio* and *auctoritas* in modern law, Bergholtz, *Ratio et auctoritas. Ett komparativrättsligt bidrag till frågan om domsmotiveringens betydelse främst i tvistemål*; Aarnio, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics*; Siltala, *A Theory of Precedent*, pp. 179–196.

[19] "The legal system is constituted by sufficiently general and abstract rules, but does not include individual law applying decisions and inter alia judicial decisions." Wróblewski, *The Judicial Application of Law*, p. 296.

[20] Cf.: "Rationality is defined as a proper justification of decisions with good reasons. This is contrasted with the non-rational decision which is badly justified and the irrational decision which gives no reasons at all." Wróblewski, *The Judicial Application of Law*, p. 306.

from the sources of law, while the fact premise signifies the legally material facts of the case. *External* justification, in turn, refers to the justification of the epistemic and axiological premises themselves with some criteria external to the decision made.

Wróblewski explores legal reasoning with the five *levels of justification* involved. The *internal* justification of a decision, as outlined in terms of a set of epistemic and axiological reasons given for the legal outcome reached, comprises the first level of justification. The *external* justification for the said epistemic and axiological premises of the first level of justification constitutes the second level of legal justification. The third level is equal to the *logic of justification* by means of which the adequacy and appositeness of the first two levels of justification can be appraised. The fourth level of justification consists of the identification of the *presuppositions* necessary for any justification of the first three levels. The fifth, final level of justification consists of the *ultimate premises* that justify or explain the justification attained on the four preceding levels.[21] Still, the exact character of those "ultimate" premises of legal justification is left unspecified by the eminent Polish legal philosopher.[22]

Wróblewski's three categories of judicial decision-making provide a solid ground for the further analysis of legal argumentation, but as such the classification is too crude and leaves too many issues unattended. What do the criteria of *legality* and *rationality* of a judicial decision signify, to be more precise? What is it that binds the judge's legal discretion, if his discretion is constrained by factors laid down by the ideology of bound judicial decision-making? How free is the judge in his discretion, if the ideology of free judicial decision-making is preferred? Though legally unbound, is the judge still constrained by some other, non-legal factors? Wróblewski's mid-range ideology of legal and rational decision-making would seem to be the most promising for analysis, but how can the semantic values of an assertion on the construction and interpretation of law be specified, in terms of its truth-value and a specific meaning-content? The advice of just following a "legal and rational" procedure does not lead us very far here, if the underlying premises of legality and rationality are not spoken out.

1.2 The Three Situations of Legal Decision-Making by Kaarle Makkonen

In his treatise *Zur Problematik der juridischen Entscheidung. Eine strukturanalytische Studie*, Kaarle Makkonen (1923–2000) analysed the legal discretion of the judge or any other law-applying official in a manner that is highly reminiscent of Jerzy

[21] Wróblewski, *The Judicial Application of Law*, pp. 210–211. Cf. Siltala, *A Theory of Precedent*, pp. 215–216.

[22] I tackled the issue of the ultimate premises of law under Hans Kelsen's, H. L. A. Hart's, and Jerzy Wróblewski's analytical legal positivism by introducing the notion of the *infrastructures* of law in Siltala, *A Theory of Precedent*, pp. 34–39, 229–231, 255–260, 264–267.

Wróblewski's classification above.[23] Makkonen made the distinction between three different legal decision-making situations[24]:

(a) An *isomorphic* situation, where no act of legal interpretation in the proper sense of the term is required from the judge, due to the "clear and self-evident" character of the norm to be applied to the facts of the case.
(b) A *semantically vague* situation, where recourse to the semantics and methodology of legal interpretation is required from the judge due to the semantically open-ended, ambiguous character of the norm to be applied to the case at hand.
(c) A legally *unregulated* situation, where there is no legal norm available in the legal system that would have some normative bearing on the case at hand.

For the first, in an *isomorphic* situation, there is a *picture relation* between the two types of facts involved, i.e. the ones existing in the world and the ones depicted in the fact-description of some legal norm. As Makkonen put it[25]:

> For the first, we may be dealing with such a clear and patently obvious case that the applicable legal norm is immediately evident to the decision-making authority. The relation that prevails between the given facts and the facts in a legal norm is like the one between a picture and the object depicted. Of such a case, I will use the term an *isomorphic situation*.

In the case of the isomorphic situation of legal decision-making, Makkonen still introduces the classification on whether the legal norm allows only one legal consequence or whether there are several legal consequences available among which the judge may then select one. If there is only one conceivable legal consequence permitted by the norm, we are confronted with a simple case of isomorphism. Legal reasoning then follows the *syllogistic* model of logical deduction, where the enforcement of the legal consequence(s) is brought into effect by force of the existence of an isomorphic relation between the two fact-descriptions concerned and the valid rules of inference of deductive reasoning.[26]

Though legal isomorphism requires that the legal norm be entirely unequivocal and unambiguous as to its semantic meaning-content, it may still leave open a choice

[23] Makkonen's *Zur Problematik der juridischen Entscheidung* was published in 1965, Wróblewski's *The Judicial Application of Law* in 1992, so Makkonen was ahead of Wróblewski in time. In English the title of Makkonen's book would be: *On the Problematics of a Legal Decision-Making. A Study in Structural Analytics.*

[24] Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 78 et seq. In the German original the situations of legal decision-making are as follows: *Isomorphiesituation*, *Auslegungssituation*, *ungeregelte Situation*.

[25] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 78–79: ". . . kann es sich um einen so klaren und allseitig deutlich gestalteten Fall handeln, dass die anzuwendende Rechtsnorm der entscheidenden Instanz ohne weiteres sofort bekannt ist. Zwischen den gegebenen Tatsachen und den im Rechtsnormsatz dargestellten Tatsachen herrscht dann das Verhältnis des Abzubildenden zum Bilde. Wir gebrauchen für eine derartige Lage die Benennung *Isomorphiesituation*." (Italics by Makkonen; translation by the present author.)

[26] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 79, 84–97.

within a range of feasible legal consequences for the judge. Makkonen illustrates the issue with the norms of criminal law that may leave open the choice between, say, a fine or imprisonment, and also the exact quantity of punishment to be inflicted upon the offender within the type of punishment chosen. As the court of justice needs to make a value-laden choice as to the exact legal consequences to be inflicted upon the offender from among the range of alternative legal sanctions, the model of deductive reasoning will not suffice here.

In addition, the judge may be confronted with a situation of norm conflict of two or more legal norms, both or all of which cannot be satisfied at the same time, while each norm equally stands in an isomorphic relation with respect to the facts existing in the world. That, too, is an instance of isomorphism, despite the dilemma of having to make a choice between the two or more legal norms available. The settled rules for solving a norm conflict will then be applied, such as *lex superior derogat legi inferiori*, i.e. a hierarchically superior legal norm supersedes a hierarchically lower norm,[27] *lex posterior derogat legi priori*, i.e. a subsequent legal norm supersedes a prior norm, or *lex specialis derogat legi generali*, i.e. a more specific legal norm supersedes a more general norm.[28] If the norm collision cannot be resolved by means of such formal collision norms, the judge then needs to make a value-laden choice among the two (or more) norms available.[29]

For the second, in a *semantically uncertain* or *unclear* situation of legal decision-making, recourse to the methods and canons of legal interpretation is required from the judge, since there is no isomorphic relation that could be affirmed for the case under investigation. Any would-be isomorphic relation between the two fact-constellations has become too "thin" so as to count as no more than an approximate relation of partial affinity between the two fact-situations, due to the linguistic vagueness of the norm or the lack of a corresponding state of affairs in the world. In such a case, though the judge is able to identify the norm that most likely applies to the fact-situation at hand, the application of the norm to the facts yet necessitates a semantic analysis and elucidation of the linguistic expressions entailed in the norm.[30] An act of legal interpretation is, in other words, required.

Makkonen makes a division into two different cases of where, firstly, there is only one legal norm to be applied to the facts of the case, and secondly, where the judge has to make a choice between two or more legal norms that equally apply to the facts at hand. In both situations, the judge's decision requires an act of legal interpretation in the sense of *giving*, or *ascribing*, a specific meaning-content to the particular linguistic expressions entailed in the norm formulation, instead of merely

[27] The meta-level conflict resolution norm *lex superior derogat legi inferiori* presupposes a settled norm hierarchy within the legal systems, as suggested by e.g. Adolf Julius Merkl and Hans Kelsen.

[28] Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 95.

[29] Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 95: "In der Praxis besteht also die Tätigkeit dessen, der die Entscheidung zu treffen hat, in der Widerspruchssituation hauptsächlich darin, dass er aufgrund von Gründen, die von ihm erwogen werden, die eine der beiden widersprüchlichen Bestimmungen zur Grundlage seiner Entscheidung wählt." (Italics in original.)

[30] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 79, 97–122.

discovering the "true" meaning of the legal norm somewhere "out there" in the pre-ordered domain of legal semantics.[31] The interpretation of law, in other words, necessitates an active *act of will* on part of the institutional decision-maker entrusted with that task, exceeding the limits of a mere passive (re)cognition of the contents of the law.

As grounds for legal construction and interpretation, Makkonen refers to the well-settled arguments as commonly adopted in the legal community, such as the original intentions of the legislator and the social conditions prevalent at the time of issuing the item of legislation, with reference to the traces of *occasio legis* and *ratio legis* found in the official *travaux préparatoires* and the like documents. Makkonen also refers to the social, economic, cultural, technological, and political factors that exerted influence on the individual item of legislation concerned, reminiscent of the extra-legal considerations that had previously been recommended for the normative gap situations by Otto Brusiin in the Finnish literature on jurisprudence.[32] When the legal norm to be applied entails value-laden concepts, the choice among the alternatives is in the last resort dependent on the social preferences of the judge concerned.[33] It would seem that Makkonen does not quite exhaust the array of *institutional* and *societal* sources of law before turning to the personal preferences of the judge concerned.

For the third, in an *unregulated* situation of legal decision-making, there is no legal norm available in the legal system that could be applied to the case, and no such norm can be found even after the kind of legal construction work that is required from the judge in a semantically vague situation of legal decision-making.[34] We are thus confronted with a legal gap situation. The emergence of a normative gap in the legal system may have been induced by some unexpected breakthrough in the technological or scientific evolution or by some unforeseen change in the social settings of law, resulting in a situation where legislation (and jurisdiction) decisively lag behind the state of affairs in society. In some cases, the existence of a legally unregulated situation may be due to a deliberate legislative policy by the Parliament, with the intention of leaving some branch of social life to be covered by the settled conventional usages and practices among the professionals of the field concerned.[35]

According to the established doctrine, there is a legal gap in a legal system if some actual or merely hypothetical fact-situation is not covered by any of legal norms of the legal system concerned, with reference to the totality of norms that can be derived from the commonly acknowledged sources of law by means of

[31] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 118, 131.

[32] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 103–104.

[33] Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 105.

[34] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 79, 122–140. – Cf. Brusiin, *Tuomarin harkinta normin puuttuessa*, pp. 204–229, where Brusiin stresses the role of social scientific knowledge, if there is no legal norm that would guide the legal discretion of the judge. In English Brusiin's thesis would be: *The Discretion of the Judge in the Absence of a Legal Norm* (1938).

[35] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 126–127.

legal reasoning. The definition of the legal system and the definition of a normative gap situation are therefore mutually interlocked. If the concept of a legal system is defined with sole reference to e.g. the institutional sources of law, the notion of a legal gap is defined accordingly. Under the notion of *law as integrity* as envisioned by Ronald Dworkin, where the totality of the legal rules and principles in a legal system constitute "a seamless web of reasons" for the judge's legal decision-making,[36] there would be no conceptual room left for normative gaps, since the normative space is in its entirety occupied by those legal principles, each with a situationist normative impact of its own.

Makkonen points out that the borderline between a semantically ambiguous situation and an unregulated situation of legal decision-making is soft-edged and open to a diversity of different interpretations.[37] In a legally unregulated situation, the judge will need to have recourse to legal *analogy* whereby the field of application of some legal norm is analogically extended so as to cover the novel case at hand as well, or, if there is no ground for such legal analogy, to the technique of *e contrario* reasoning whereby the normative impact of some would-be pertinent legal norm is rejected for the case at hand.[38] In his treatise *Tuomarin harkinta normin puuttuessa*, Otto Brusiin had effectively argued that in a situation of normative gap the judge ought to have wide recourse to the results obtained by the (other) social sciences, such as the economics, political science, and sociology, in considering the consequences of legal interpretation in society.[39] Unlike Brusiin, Makkonen does not address the social consequences of law in a normative gap situation. It seems that Makkonen follows the methodological precepts of analytical jurisprudence here, while Brusiin was more receptive to the ideas of legal phenomenology and sociological jurisprudence.

Wróblewski's and Makkonen's analysis of legal argumentation is intertwined with the issues of linguistics and semantics, as is commonplace with the texts of analytical jurisprudence. In fact, they would both seem to follow the common division of linguistic studies into the three parts of the *syntax*, *semantics*, and *pragmatics* of language. Wróblewski's ideology of *bound* judicial decision-making and Makkonen's *isomorphic* situation of legal decision-making both deal with the *syntax* of legal language. Wróblewski's ideology of *legal and rational*

[36] "The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were. (. . .) [Judge Hercules] must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well." Dworkin, *Taking Rights Seriously*, pp. 116–117.

[37] "It is as hard to say of the spectrum where the area of the blue ends and that of the violet begins, as it is to say of the "spectrum" of legal decision-making where the realm of legal construction ends and that of legal analogy begins." Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 135. (Translation by the present author.)

[38] Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 131–132.

[39] Brusiin, *Tuomarin harkinta normin puuttuessa*, pp. 204–229, and esp. pp. 220–225 (on sociology), pp. 225–226 (on political science), and pp. 226–227 (on economics).

judicial decision-making and Makkonen's *semantically ambiguous* situation of legal decision-making are both mostly associated with issues that deal with the *semantics* of legal language. Finally, Wróblewski's *ideology of free judicial* decision-making and Makkonen's *unregulated* situation of legal decision-making are both aligned with the *pragmatics* of legal language, transcendenting the limits of linguistic analysis for social value considerations. Besides Makkonen's and Wróblewski's jurisprudence, modern semantics by Frege and Carnap constitutes the theoretical basis of the present treatise.

1.3 The Subject Matter of the Treatise: Legal Argumentation, or How to Construct and Read the Law in a Reasoned Manner

Jerzy Wróblewski's bound, legal and rational, and free ideologies of judicial decision-making and Kaarle Makkonen's isomorphic, semantically ambiguous, and unregulated situations of legal decision-making provide a solid ground for the analysis of the judge's legal discretion. Still, Wróblewski's and Makkonen's insights need to be further elaborated so as to gain a more detailed picture of the issue.

In Makkonen's theory of law, an isomorphic situation between the two fact-constellations, the one as specified in a legal rule and the other as prevalent or at least possible in the world, is given logico-conceptual priority vis-à-vis the two other situations of legal decision-making discerned, since the semantically ambiguous and the unregulated situation of judicial decision-making are defined by the *absence* of an isomorphic relation between the fact-constellations. But, to be more precise, what does it mean to say that there exists an *isomorphic* relation between the two fact-constellations? What is the relation of Wróblewski's three ideologies of judicial decision-making and Makkonen's three legal decision-making situations to the *institutional* and non-institutional, i.e. *societal*, sources of law and the social values entailed in them? As I see it, Wróblewski's and Makkonen's seminal ideas need to be read in the context of the *legal source doctrine* and the canons of *legal methodology* acknowledged in the legal community so as to gain a sharper picture of the constraints placed upon the judge's legal discretion.

In the present treatise, Wróblewski's and Makkonen's initial frame of legal analysis will be elaborated with the ten *frames of legal analysis* discerned, each with a distinct criterion, or a set of mutually converging criteria, for judging the methods and outcome of legal argumentation. In this, the philosophical *theories of truth*, like the correspondence theory, the coherence theory, and the array of pragmatist theories of truth, will provide for the initial reference for analysis, to be complemented by a set of other approaches with possibly a better grasp of the institutional characteristics of law.

After giving a general outline of the premises of legal argumentation, the scope of analysis will be tackled with the tools provided by modern semantics, i.e. Gottlob Frege's distinction of the *reference* and *sense* of a linguistic sign or expression and Rudolf Carnap's parallel method of *extension* and *intension*. The two semantic properties of a linguistic sentence are accordingly defined as the *truth-value*

(reference/Frege; extension/Carnap) and specific *meaning-content* (sense/Frege; intension/Carnap) of the sentence. In the context of law we are dealing with the semantic properties of an assertion on how to construct and read the law vis-à-vis some specific fact-constellation.

At the end of the treatise, a systematic account will be given of some of the major philosophical issues of legal argumentation theory, viz. the truth-value of a legal assertion as conditional upon, and determined by, the particular frame of analysis adopted; the metaphysical "nuts and bolts" in the legal universe, as analysed under the three categories of the logical constitution, normative ontology, and structural axiology of law; and a systemic "order of things" in a set of legal rules and legal principles, as first judged in light of Carlos Alchourrón's and Eugenio Bulygin's conception of (the outcome of) legal systematics and (the process of) legal systematization and as then extended to comprise the subject matter in more general terms as a complex priority order for the rule/rule, principle/principle, and rule/principle combinations in a legal system.

The present treatise seeks to give a concise outline of the seminal issues of *how to construct and read the law* under the ten frames of legal analysis discerned, from legal isomorphism to radical decisionism in legal decision-making. The first objective of how to *construct* the law refers to the act of *identifying* the law and legal phenomena from among the phenomena in society, and *determining* their mutual relations in a complex *priority order* for the rule/rule, principle/principle, and rule/principle combinations that may emerge in a legal system. The second objective of how to *read* the law refers to the act of *ascribing* a specific meaning-content to the legal rules and legal principles so constructed vis-à-vis a specific fact-constellation, as either actually prevalent in the world or as produced by the imagination of a legal scholar. The present treatise is a contribution to the *legal argumentation theory*, approaching the issue from the point of view of *analytical jurisprudence* and drawing its major inspiration from Jerzy Wróblewski's and Kaarle Makkonen's main works. The other methodological path followed is modern semantics, as outlined by Gottlob Frege and Rudolf Carnap.

1.4 The Concept of a Frame of Legal Analysis

A frame of legal analysis is a *scheme of interpretation* that makes it possible to *identify* and *discern* the legal phenomena from among the other phenomena in society, no matter whether they are deemed to belong to the domain of political morality, economics, religion, societal etiquette, arts and crafts, sports and play, or some other field of life. A frame of legal analysis is equal in function to Hans Kelsen's and Alf Ross' seminal idea of the *scheme of interpretation* adopted for the identification and interpretation of law.[40] In specific, the frame of legal analysis

[40] In German: *Deutungschema*; in Danish: *tydningsskema*. Kelsen, *Reine Rechtslehre* (1960), s. 3 et seq.; Ross, *Om ret og retfærdighed*, pp. 56–57; Ross, *On Law and Justice*, p. 43.

as here intended provides a reference for judging the *semantic qualities* of a legal sentence or assertion, defined as its *truth-value* (reference/Frege; extension/Carnap) and specific *meaning-content* (sense/Frege; intension/Carnap). A *legal sentence* is a syntactically correctly formulated assertion on how to construct and read the law vis-à-vis some given fact-constellation x as prevalent or at least possible in the world.

Truth is a *semantic* quality, defined as a relation of correspondence, or mutual match, between a linguistic assertion and a state of affairs in the world, according to the *correspondence* theory of truth; or a quality that is applied to the mutually converging relations in a set of linguistic expressions, according to the *coherence* theory of truth; or a quality that has to do with warranted assertability, empirical testability, or expediency of an idea or conception in explaining and predicting the phenomena in the world, according to the *pragmatic* theory of truth. If the notion of truth as defined in the philosophical literature is deemed too demanding for the analysis of legal argumentation, some softened-down version of it might by adopted instead, such as the *rightness*, *adequacy*, *acceptability*, *correctness*, *appositeness*, or *warranted assertability* of the proposition in question. Without having access to *some* such frame of legal analysis and the criteria for judging the semantic qualities of the legal sentence concerned, no consistent account of legal argumentation could be given, either.

A frame of legal analysis determines a criterion, or a set of converging criteria, for judging the method and outcome of legal argumentation, as conducted by the judge or a legal scholar. There are at least ten frames of legal analysis that a theory of legal argumentation ought to account for:

(1) *Isomorphic Theory of Law*: an isomorphic, picture relation of structural similarity prevails between the two states of affairs compared, the one as given in the fact-constellation of a legal rule and the other as prevalent in the world.
(2) *Coherence Theory of Law*: mutual congruence and reciprocal support among the arguments drawn from the institutional and societal sources of law, like the notion of *legal integrity* in Ronald Dworkin's theory of law.
(3) *Societal Approval/The New Rhetoric*: approval or disapproval of the methods and outcome of legal argumentation in the intended *universal audience*, as outlined by Aristotle and Chaïm Perelman.
(4) *Philosophical Pragmatism* (*sensu stricto*)*/Social Consequentialism*: external consequences of law in society, as judged in light of the (other) human or social sciences, such as economic analysis of law.
(5) *Subjective Interpretation/Legal Exegesis*: retracing the *original intentions* of the legislator or a court of justice, as reconstructed from the law text and the *travaux préparatoires* at the back of it or the justificatory reasons given in support of a precedent.
(6) *Objective Interpretation/Analytical Legal Realism*: law as the (in past) effected and the (in future) enforceable judicial decisions, with reference to the totality of legal rights and duties that enjoy effective legal protection by courts and other legal officials.

(7) *Philosophical Conventionalism*: common *acceptance* or *recognition* of certain well-settled practices and usages in the community as having legal significance, or a set of *mutual expectations* and *cooperative dispositions* to the said effect in the community.
(8) *Legal Formalism*: the law as defined by certain logico-conceptual and systemic criteria of law, as defined by Georg Friedrich Puchta's legal constructivism in Germany and Christopher Columbus Langdell's case method in the United States.
(9) *Natural Law Philosophy*: law as a part of (absolute) social justice, as defined by the norms of religious, social, or political morality.
(10) *Radical Decisionism*: social justice on a strictly contextual, *ad hoc* basis, in denial of any meta-theory, meta-narrative, or meta-context of the law and society.

Each frame of analysis is like a lens through which the law and its key semantic qualities can be observed and critically evaluated. Without first presuming the presence of the constitutive criteria of *some* such frame of analysis, the legal phenomena could not be outlined in the first place. Each frame of analysis depicts the law in a different light, highlighting the role of some qualities and downplaying the role of others. Moreover, it is only in light of some such frame of analysis that the semantic qualities of a legal assertion, i.e. its *truth-value* and *meaning-content*, can be determined.

1.5 The Theories of Truth and Legal Analysis

In her treatise *Law without Truth*, the Italian scholar Anna Pintore puts forth the argument to the effect that the notion of truth cannot be extended to the law.[41] In that she is of course right, since her claim, so it seems, concerns the *ontology* of law, and not the *semantics* of linguistic assertions on how to construct and read the law.

The two categories of the *metaphysical* or *ontological* domain of legal norms, objects, "things", or entities, on the one hand, and the *linguistic* or *semantic* domain of assertions on how to construct and read the law, on the other, need to be distinguished from each other. The realm of law as a collection of legal rules and legal principles, and the institutional and non-institutional sources of law from which they are extracted, cannot carry the quality of being true or being false, since truth is a *semantic* quality that can only be applied to linguistic propositions or assertions, not to legal norms or other ontological entities as such. Here, the relation between law and truth is taken in the semantic sense, and not in the "metaphysical" or ontological sense adopted by Pintore. Therefore, it seems her critique will not affect my account of the semantics of legal argumentation.

[41] Pintore, *Law Without Truth*, esp. pp. 237–24.

In traditional philosophical analysis, there are three theories that predominate the truth-theoretical discourse: the *correspondence* theory, the *coherence* theory, and the *pragmatic* theories of truth.[42] In the context of law and legal analysis, the notion of *truth* may yet have to be slightly modified so as to gain a better grasp of the *institutional* character of the phenomena under consideration. That, however, will not affect my basic argument to the effect that a legal assertion on how to construct and read the law does obtain the quality of "true" or "untrue" by force of the semantic preconditions laid down by the frame of analysis adopted.

The *correspondence theory of truth* defines truth as an isomorphic relation of structural similarity between a certain linguistic expression and the corresponding phenomena or states of affairs in the world. The most noteworthy examples of such a truth-theoretical notion are Ludwig Wittgenstein's picture theory of language, as entailed in his *Tractatus Logico-Philosophicus*, and Alfred Tarski's semantic theory of truth. Wittgenstein defined the truth as a *picture relation* between language and the world. Below, I will argue that Wittgenstein's idea such a picture relation between language and the world can be applied in the legal context, as well, to the effect of shedding some bright light on the notion of an *isomorphic* relation entailed in Kaarle Makkonen's *Zur Problematik der juridischen Entscheidung*.

The *coherence theory of truth* rejects the idea of truth as an isomorphic, picture-like relation between a linguistic expression and a state of affairs in the world.[43] The reason is simple and rather easy to accept: we have no *epistemic shortcut* or a somehow privileged access to the phenomena "out there" without first having resort to the epistemic and logico-conceptual edifice that constitutes the prevalent world-view or "order of things" in the world (*épistémè*). Nor can there be any reliable knowledge of the relation that prevails between language and the world. All knowledge we may have of the phenomena in the world is conveyed to us through the conceptual categories of language. There is no escape from the prison house of language,[44] no matter how hard the advocates of the correspondence theory of truth wished for one.

To affirm the presence or absence of an isomorphic relation between a linguistic expression and the corresponding state of affairs in the world would necessitate having to step outside the domain of meaningful linguistic usage and to say what is unsayable, according to the unyielding methodological *credo* of Wittgenstein's *Tractatus Logico-Philosophicus*. Such metaphysical assertions could not satisfy the master criterion of sustaining a picture-like relation vis-à-vis some state of affairs in the world, as Wittgenstein and the logical positivists were soon to realize.

Even if the *definition* of truth were outlined by the correspondence theory, the *criteria* of truth may need to be adjusted to the requirements justified by the coherence theory. The coherence theory of truth and knowledge underscores the

[42] On Pintore's account of the said theories, plus the common distinction between the definition (or meaning) and the criteria of truth, Pintore, *Law without Truth*, p. 21 et seq.

[43] On the coherence theory of truth as seen from a philosophical point of view, cf. Walker, *The Coherence Theory of Truth. Realism, Anti-Realism, Idealism.*

[44] Cf. Pears, *The False Prison. A Study of the Development of Wittgenstein's Philosophy*, *Vols I–II*.

mutual relations of support that linguistic assertions have vis-à-vis one another. As Otto Neurath put it[45]:

> *Assertions are to be compared with assertions*, not with "experiences" or with a world, or with anything else. All of these senseless *duplications* belong in a more or less refined metaphysics and are therefore unacceptable. Each new assertion will be contrasted with the totality of those available assertions that have already been brought into harmony with each other. *An assertion is called "correct" when it can be incorporated* into this totality.

Perfectly coherent fairy-tales and other fiction tales, like the twisted reality in *Alice's Adventures in Wonderland* and *Through the Looking-Glass* or the fantasy world in J. K. Rowling's books on Harry Potter, might well satisfy even the strictest criteria of internal textual coherence, if the impact of any incoherence-inducing assertions, such as the ones produced by the natural sciences, are ruled out of consideration. The intended context of the assertions whose truth-value is to be evaluated has a crucial impact on the judgment of truth or falsity of any assertions: are we dealing with the game of *quidditch* and other oddities that twist the laws of the physics, as might take place within the stone walls of the *Hogwarts School of Witchcraft and Wizardry* in Rowling's world of imagination, or are we dealing with the more common everyday world of ours where the laws of gravity and causation have a more even grip on the phenomena?

A *pragmatic* approach to the truth covers a host of philosophical positions that all share a critique of the traditional theories of truth and knowledge. Rejecting both the correspondence theory and coherence theory of truth, the pragmatists attach the criteria of true knowledge in the approval or disapproval of any would-be true beliefs, conceptions, or assertions by the scientific or other pertinent community, on the other hand, and in the external, verifiable effects of such beliefs, on the other. Philosophical pragmatism has been a source of inspiration for a down-to-earth *consequentialist* conception of law that gives priority to the economic and other consequences of law in society. Moreover, the notion of human knowledge and argumentation based on the Aristotelian idea of *rhetoric* (and *topic*) has close affinity to the ideas of pragmatism so defined. The same goes for legal or social *conventionalism* with its emphasis on the acceptance or recognition of some societal practices and usages by the ones concerned.

Under philosophical pragmatism, the *consensus theory of truth* places the emphasis on the relation that an assertion has to a wider set of beliefs that are commonly acknowledged as true, or rather *warranted*, at the community. Thus, *warranted assertability* or similar criteria now replace the ones adopted by the correspondence or coherence theory of truth. Since it is always the scientific or other community that has the final say on the claimed truth or falsity of a belief, conception, or

[45] Neurath, "Soziologie im Physikalismus", p. 403 (italics by Neurath), cited in Coffa, *The Semantic Tradition from Kant to Carnap*, p. 365. Cf. Neurath, "Protocol Sentences", p. 201: "*There is no way of taking conclusively established pure protocol sentences as the starting point of the sciences*. No *tabula rasa* exists." (Italics in original.)

assertion, the correspondence and the coherence theory go equally astray in not paying attention to the community-aligned tenets inherent of all human knowledge.

Still, the scientific community as the collective subject of human knowledge may be totally mistaken as to some item of knowledge, as the transition from the earth-centred, religious world-view to the sun-centred planetary system at the beginning of the seventeenth century bears witness of. According to Galileo Galilei, the earth revolves around the sun and not the other way round, to the effect of removing earth from the centre of the universe. As is well known, the Church as assisted by the Italian and Spanish Inquisition tried hard to prevent the inevitable switch from the deeply religious mediaeval world-view to the secular, scientific conception of the world on the verge of the modern era, ultimately losing the battle over the criteria of scientific knowledge.[46]

The *new rhetoric*, based on Aristotle's philosophy of rhetorical reasoning as re-discovered in the late 1950s by Chaïm Perelman,[47] brought the notion of the *audience* of legal, moral, or political argumentation back to the focus of interest in philosophy and jurisprudence. Perelman's and thereby Aristotle's ideas of rhetoric were widely adopted in legal argumentation theory since the late-1970s by Neil MacCormick, Robert Alexy, Aleksander Peczenik, Aulis Aarnio, Jerzy Wróblewski, and by the research group *Bielefelder Kreis*.[48] The approval or disapproval of the methodology and the outcomes of legal reasoning at the universal audience has a seminal role in any rhetorical enterprise in law and legal analysis, bearing witness of the impact of philosophical pragmatism in it.

Knowledge of the world under philosophical pragmatism is defined as the *warranted assertability* of a belief or assertion. Pragmatism takes the collected *empirically observable consequences* of a scientific idea or conception as decisive vis-à-vis its truth-value. As William James insightfully put it[49]:

> Pragmatism, on the other hand, asks its usual question. "Grant an idea or belief to be true," it says, "what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash value in experiential terms?" – The moment pragmatism asks this question, it sees the answer: *True ideas are those that we can validate, corroborate and verify. False ideas are those that we can not.* That is the practical difference it makes to us to have true ideas; that, therefore, is the meaning of truth, for it is all that truth is known as.

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[46] Giordano Bruno was burnt as a heretic on the Campo dei Fieri in Rome in 1600. Galileo Galilei (1564–1642), threatened by the Inquisition, was forced to deny his claim to the effect that the earth revolves round its axis and circles round the sun, and not the other way round as the Church had it.

[47] Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation. La nouvelle Rhétorique*, passim.

[48] The international research group *Bielefelder Kreis* was active in the 1980s and 1990. It produced two reference works in the field of comparative legal argumentation theory: *Interpretation Statutes. A Comparative Study* (1991) and *Interpretation Precedents. A Comparative Study* (1997). In fact, Neil MacCormick, Robert Alexy, Aleksander Peczenik, Aulis Aarnio, and Jerzy Wróblewski all belonged to it, along with other high-ranking scholars associated with the analytical and rhetorical approach to the law and legal argumentation theory.

[49] James, "Pragmatism's Conception of Truth", p. 142. (Italics in original.)

The idea of *truth as verifiability*, as collected empirical evidence that can be presented in support of a scientific assertion, defines the core of philosophical pragmatism, strictly defined. The issue can also be phrased in terms of the observable consequences that are realized if the contested assertion turns out to be true. In the legal context, the gist of pragmatic philosophy has given birth to a *consequentialist* doctrine where the external effects of law in society are given prime importance. The *economic* effects of law in society have thereby gained weight. Still, the pragmatist notion of truth as warranted assertability and empirical verifiability under James' request of "what concrete difference will its being true make in any one's actual life" cannot claim title over the entire area covered by the natural sciences, as Moore and Wittgenstein have pointed out with reference to the ultimate grounds of knowledge. Besides, assertions in the field of the human and social sciences induce difficulties of their own kind in this regard, due to the inherently constructive and contested character of many of the key concepts entailed, such as democracy, the rule of law, state sovereignty, due diligence, fair trial, and equity.

Empirical observation sentences are of the type: "(I know that) the cat is on the mat", "It is snowing in the Alps now", or "The rain in Spain stays mainly in the plain". Whether they are true or not can be empirically tested, corroborated, verified, or falsified by empirical observations, i.e. the collected sense data available to us. Yet, how could we test the following propositions that patently assert something of the world, yet fail to yield to the test of such empirical observations: "I *know* that the earth existed long before my birth",[50] "I *know* that my body has never disappeared and reappeared again after an interval",[51] and "I *know* that I have never been on the moon"?[52]

According to Moore and Wittgenstein alike, such "quasi-empirical" propositions fall outside the domain of empirically testable knowledge, of reasonable doubt, and propositional truth-value, because they are – phrasing the issue in different terms – the fixed ground of the prevailing form of life, a system of pre-propositional "knowledge" (in a weak sense of the term) that is silently presupposed in all empirical propositions concerning the world, or the end points of a line of philosophical argumentation.[53] The epistemic and semantic quality of truth or untruth cannot be extended to the very grounding prerequisites of human knowledge, as Georg Henrik von Wright has pointed out.[54] They are aligned with the postulated *certainty* of the form of life, and with not any empirically falsifiable data or knowledge of the world, according to Wittgenstein.[55]

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[50] Wittgenstein, *Űber Gewissheit – On Certainty*, § 84 et seq. (p. 12/12e et seq.).

[51] Wittgenstein, *Űber Gewissheit – On Certainty*, § 101 (p. 15/15e).

[52] Wittgenstein, *Űber Gewissheit – On Certainty*, § 111 (p. 17/17e).

[53] Cf. Wittgenstein, *Philosophical Investigations – Philosophische Untersuchungen*, § 217 (p. 85/85e): "If I have exhausted the justifications I have reached the bedrock, and my spade in turned. Then I am inclined to say: 'This is simply what I do.' "

[54] von Wright, "Wittgenstein varmuudesta", p. 19.

[55] Wittgenstein, *Űber Gewissheit – On Certainty*, passim.

The ultimate premises of legal validity and legal rationality, as manifested in Gunnar Berholtz' and Aulis Aarnio's notion of *reason* and *authority* in the Western legal thinking and in Jerzy Wróblewski's ideology of legal and rational judicial decision-making,[56] may be called (part of) the *infrastructures* of law and legal knowledge under such premises. They follow a similarly unyielding "non-epistemic" logic of judgment as illustrated by Moore's and Wittgenstein's examples above. Thus, the transcendental-logical *Grundnorm* in Kelsen's pure theory of law and the ultimate *rule of recognition* in Hart's *The Concept of Law* resist the act of being classified into one or the other of the two conceptual categories available, i.e. law/fact or legal validity/social effectiveness, under the premises of analytical jurisprudence. As a consequence, the ultimate premises of legal knowledge under the Western form of life cannot themselves be situated under the very same norm/fact dichotomy that is in the first place established by reference to the presumed existence of such "ultimate" criteria, without falling victim to either vicious *logical circularity* or a *never-ending regress* to ever higher premises of reasoning.[57]

Finally, the collection of philosophical theories of truth incorporates the *redundancy theory of truth*.[58] From a truth-theoretical point of view, the attribute "is true" is allegedly redundant, with no traceable effect on the truth-value of the assertion with the same propositional content. As a consequence, there is no difference in the semantic extension of the two assertions "p" and "it is true that p", or in the semantic extension of the two assertions "Venus is the morning star" and "It is true that Venus is the morning star". Both assertions express the proposition "that p" in the first example and the attribute of "the morning star" in the second example. Still, the redundancy thesis cannot plausibly be extended to sentences like: "What I am now about to tell you is true", "The first sentence on this page is true", or "I hereby swear to tell the truth, the whole truth, and nothing but the truth", without running into a grave philosophical predicament. The same goes for the redundancy theory of truth and the *Liar Paradox*. A Cretan says: "all Cretans are liars". Is the assertion true or false? Is the speaker telling the truth or is he lying? If he is telling the truth, he is lying; and if he is lying, he is telling the truth. Thus, the assertion is true, if it is false; and it is false, if it is true. In such cases, the attribute "is true" patently is not redundant or devoid of semantic content, which is contrary to the redundancy argument.

The traditional theories of truth based on the notions of the presence of correspondence, coherence, or warranted assertability in the subject matter of study all seek to provide a philosophically sound criterion, or a set of converging criteria, for judging the semantic values of a linguistic sentence, assertion, or proposition. Such theories may naturally be extended to the domain of law and legal analysis, resulting

[56] Bergholtz, *Ratio et auctoritas. Ett komparativrättsligt bidrag till frågan om domsmotiveringens betydelse främst i tvistemål*; Aarnio, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics*.

[57] On the notion of the infrastructures of law, cf. Siltala, *A Theory of Precedent*, pp. 197–248, 264–267.

[58] Walker, "Theories of Truth", pp. 322–325.

in different stances on how to judge the extension and intension of an assertion on how to construct and read the law. Moreover, there are other approaches to the issue that may be less philosophically rigorous but that may still reach the *institutional* premises of law. Retracing, as authentically as possible, the original historical motives of the parliamentary legislator or a court of justice vis-à-vis some item of legislation or an individual precedent, is an instance of an institutional "regime of truth" that will find a good match with a legal point of view. – Before entering the frames of legal analysis, the semantics of law needs to be briefly accounted for.

1.6 The Semantics of Law: Rudolf Carnap's Method of Extension and Intension

From the analytical point of view, linguistic analysis comprises three fields of investigation, focused on the *syntax*, *semantics*, and *pragmatics* of a linguistic expression.

The *syntax*, or syntactic dimension, of language consists of the rules that make up the either logical or descriptive *grammar* of language, with reference to the signs (the alphabet or other elementary constituents) and linguistic expressions (words or sentences) that are employed in a language. The *logical* (or formal, ideal, pure) syntax of language refers to the grammatical rules of language as seen from a logical point of view, while the descriptive syntax of language refers to the rules of grammar that are actually in use in some linguistic community.[59] Thereby, the issues dealt with by the descriptive syntax of language come rather close to linguistic pragmatism.

Semantics deals with the *reference* and *sense* a linguistic sign or expression, having to do with the convoluted relation that ties together the "words" (*les mots*), or linguistic expressions, of language and the "things" (*les choses*), or entities or phenomena or the like, in the world. The connection between the words and things is set by the prevalent order of things, or *épistémè*, as insightfully analysed by Michel Foucault in his outline of an *archaeology of knowledge* for the human sciences.[60] Finally, linguistic *pragmatics* focuses on the various uses of language in different social settings and speech act situations, along with the speaker-related or addressee-related facets of language. Such a pragmatic approach to language is illustrated by e.g. the Oxford school of linguistic philosophy. In legal argumentation on how to construct and read the law all the three facets of language gain significance but the semantic issues would seem to be the most important.

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[59] "By the *logical syntax* of a language, we mean the formal theory of the linguistic forms of that language – the systematic statement of the formal rules which govern it together with the development of the consequences which follow from these rules." Carnap, *The Logical Syntax of Language*, p. 1. Cf. Carnap, *The Logical Syntax of Language*, pp. 1–4, 6–7.

[60] Foucault, *Les mots et les choses. Une archéologie des sciences humaines*. – The English edition of the work is titled, *The Order of Things. An Archaeology of the Human Sciences*.

The exact meaning of the two terms *syntax* and *semantics* was not entirely settled in 1934, when Rudolf Carnap published his major work *Logische Syntax der Sprache*.[61] In it, Carnap points out the affinities in linguistic usage with Hilbert who had analysed the syntax of mathematics under the term *metamathematics*, and the Polish logicians, like Jan Łukasiewicz (1878–1956), who had made use of the term *metalogic* with a similar syntactic designation. Moreover, "semantics" was used by Chwistek to denote the same object as "syntax" in Carnap's linguistic usage. Karl Bühler and his followers had used the term *sematology* for the empirical or psychological study of meanings, which in turn should be distinguished from *semasiology*, or the general study of meanings in natural languages.[62] In *Logische Syntax der Sprache*, Carnap to a great extent anticipated Alfred Tarski's later distinction between the *object language* and the *metalanguage*. For the dichotomy, Carnap uses the terms *object language* and *syntax language*.[63]

According to Carnap's demanding thesis in *The Logical Syntax of Language*[64]:

> The aim of logical syntax is to provide a system of concepts, a language, by the help of which the results of logical analysis will be easily formulable. *Philosophy is to be replaced by the logic of science* – that is to say, by the logical analysis of the concepts and sentences of the sciences, for *the logic of science is nothing other than the logical syntax of the language of science*.

Carnap's philosophical *credo* can be read as the methodological agenda for the *Wiener Kreis*, or *Logical Positivism*, that flourished in Wien from 1925 to 1935. Here, I prefer to follow the model of philosophical analysis that Carnap introduced in his later work in the 1950s, i.e. *Meaning and Necessity. A Study in Semantics and Modal Logic*. I do not undersign the young Carnap's stern methodological request that the only legitimate object of philosophical study is the logical syntax of language. In the science of law there are other scientific and philosophical commitments entailed, in addition to those comprised by the logical and linguistic elements entailed by the logical syntax of language.[65]

Ludwig Wittgenstein's philosophy was the source of inspiration for two different schools of philosophy in the twentieth century. Wittgenstein's masterwork *Tractatus*

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[61] Carnap's *Logische Syntax der Sprache* was translated into English as *The Logical Syntax of Language* in 1937.

[62] Carnap, *The Logical Syntax of Language*, p. 9.

[63] Carnap, *The Logical Syntax of Language*, p. 4; cf. Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 300–305. – Later on, even Carnap adopted the Tarskian terms of *object language* and *metalanguage*. Carnap, *Meaning and Necessity*, pp. 4–5. On how close Carnap's philosophical concerns came to those held by Alfred Tarski, cf. Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 300–301, 304–305.

[64] Carnap, *The Logical Syntax of Language*, p. XIII. (Italics in original.) – Cf.: "By the *logical syntax* of a language, we mean the formal theory of the linguistic forms of that language – the systematic statement of the formal rules which govern it together with the development of the consequences which follow from these rules." Carnap, *The Logical Syntax of Language*, p. 1. (Bold in original replaced by italics here.)

[65] Siltala, *Oikeustieteen tieteenteoria*, pp. 387–460.

Logico-Philosophicus was a key source of inspiration for the *Wiener Kreis* and its austere views on science, language, and metaphysics. Wittgenstein was quick to distance his own views from any (mis)readings of his philosophical ideas by the *Wiener Kreis*. As Wittgenstein saw it, "[*Tractatus Logico-Philosophicus*] consists of two parts: the one presented here plus all that I have *not* written. And it is precisely this second part that is the important one".[66] In Wittgenstein's opinion, the adherents of the *Wiener Kreis* were completely misguided in their agenda for a scientific world-view, if it were based on Wittgenstein's *Tractatus Logico-Philosophicus*.

According to the picture theory of language, no issues of philosophical logic, metaphysics, ontology, or ethics could be meaningfully depicted by the conceptual categories of language, since they do not establish an *isomorphic* relation vis-à-vis the corresponding state of affairs in the world. The requirement of isomorphism in the language – world relation had the effect of ousting even Wittgenstein's *Tractatus* from the realm of meaningful linguistic usage, as the Austrian philosopher pointed out at the very end of the book.[67] Wittgenstein's *Tractatus Logico-Philosophicus*, like any treatise in philosophical semantics and ontology, consists of a set of linguistic assertions that cannot have a truth-value under the premises of the picture theory of language, being either *senseless* (*sinnlos*), if they are part of philosophical logic that can only be shown, not said; or downright *non-sensical* (*unsinnig*), if they are part of a philosophical metaphysics that, according to Wittgenstein, cannot even be shown. As J. Alberto Coffa has pointed out, good philosophy still ought to make the (self-defeating) effort of saying what can only be shown, i.e. the *Sinnlos*, while evading utterly nonsensical topics that cannot even be shown, i.e. the *Unsinnig*.[68]

As a contribution to linguistic philosophy, Wittgenstein's *Tractatus* deals with the logical *syntax* and *semantics* of language, leaving the issues of linguistic pragmatics out of its concern. Therefore, it cannot provide a philosophical ground of judgment for legal analysis either, except as either affirming or denying the existence of an isomorphic relation of structural similarity between the two fact-constellations, as analysed under the *isomorphic* situation of legal decision-making by Kaarle Makkonen and the *isomorphic* theory of legal argumentation based on such premises. In Wittgenstein's posthumously published works, such as *Philosophical Investigations* and *The Blue and Brown Books*, the focus of analysis was switched from the syntax and semantics of language to linguistic *pragmatics*, where the subject matter has to do with the *speaker* and *addressee*, and the particular *situation* of a linguistic expression.

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[66] Wittgenstein in *Prototractatus*, p. 15, as cited in Coffa, *The Semantic Tradition from Kant to Carnap*, p. 142.

[67] "6.54. My propositions are elucidatory in this way: he who understand me finally recognizes them as senseless (*unsinnig*), when he has climbed out of through them, on them, over them. (He must so to speak throw away the ladder, after he has climbed up on it.) – He must surmount these propositions; then he sees the world rightly. – 7. Whereof one cannot speak, thereof one must be silent." Wittgenstein, *Tractatus Logico-Philosophicus*, p. 189.

[68] Coffa, *The Semantic Tradition from Kant to Carnap*, p. 156 (*in fine*).

The semantic constitution of a linguistic sign or expression consists of two different elements: its *reference* (Frege) or *extension* (Carnap) and *sense* (Frege) or *intension* (Carnap).[69] The *reference* of a linguistic sign or expression is equal to its coverage, or field of application, of facts, states of affairs, "things", or other entities that may dwell in the world. The *sense* of a linguistic sign or expression is equal to its specific meaning-content, as produced e.g. in contrast to the totality of all other linguistic signs or expressions in the same system of signs. On the level of linguistic sentences, the semantic categories of reference/extension and sense/intension determine the *truth-value* and specific *meaning-content* of the sentence.

The two semantic qualities of a linguistic sign or expression, *reference* and *sense* (à la Frege) or *extension* and *intension* (à la Carnap), can best be illustrated with an example provided by Frege (1848–1925). The two predicates "a morning star" and "an evening star" both have the same reference, i.e. the planet Venus, but the sense of the two attributes is very different: the predicate "a morning star" refers to a heavenly body with the inherent property of "is seen at dawn", while the predicate "an evening star" refers to a heavenly body that has the property "is seen at dusk". Yet, we are all the time speaking of one and the same object, planet Venus.[70] Similarly, the two mathematical expressions, "2 + 1" and "$\sqrt{}$9", both have the same reference/extension, but the sense/intension of the two expressions is different from the other.[71] Rudolf Carnap (1891–1970), another key figure in the development of formal semantics, named his system of semantics the *method of extension and intension*.[72]

At the time when Wittgenstein was writing the *Tractatus Logico-Philosophicus*, the terminology in semantics was not entirely settled, and Wittgenstein defines the sense/reference dichotomy in a manner that deviates from the conceptual usage adopted earlier by Frege (and Bertrand Russell).[73] In the present treatise, I will rather follow the linguistic usage adopted in Carnap's *method of extension and intension*, as elaborated in his mature work from the 1950s, *Meaning and Necessity. A Study in Semantics and Modal Logic.*

A linguistic expression can be a term or a sentence.[74] *Terms* may further be divided into predicates and individual terms. A *predicate* designates some quality that is attached to an entity, like "the morning star" and "the evening star" as two different attributes of the planet Venus, or "a rational being" as a definitional feature of all human kind. An *individual term* designates some individual being or

[69] Carnap, *Meaning and Necessity*, pp. 16–32.

[70] Frege, "On Sense and Reference", pp. 9–12. – On the relation between Frege's *nominatum/sense* dichotomy to Carnap's corresponding *extension/intension* dichotomy, Carnap, "On Sense and Reference", pp. 124–129.

[71] Miettinen, *Logiikka*, p. 172.

[72] Carnap, *Meaning and Necessity*, pp. 1–68.

[73] Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 142–143.

[74] Niiniluoto, *Johdatus tieteenfilosofiaan*, p. 119.

subject, such as Socrates, the Greek philosopher, or James Joyce, the Irish author, as singled out by the use of the individual term. *Sentences* or *propositions* are linguistic expressions that are formulated syntactically in a correct manner and that, moreover, put forward an assertion that is either true or untrue, such as "Socrates was a talented Greek philosopher", "James Joyce is the author of *Ulysses* and *Finnegans Wake*", or "The moon is made of *Wensleydale* cheese" (according to Nick Park's great wax animation movie, *Wallace and Gromit: A Grand Day Out*), and so on.

Predicates can be divided into *one-place* predicates and *many-place* predicates. The properties of "having a red hair" or "having a high IQ" are instances of one-place predicates, and so are the two predicates of the planet Venus mentioned, i.e. "being a morning star" and "being an evening star". The relational properties of "being the child of", "being the mother of", "being taller than", and "being different from" are many-place predicates. The extension of a one-place predicate is a *class of objects*, and its intension is a certain *property*. The extension of a many-place predicate is a *relation*, and its intension is a *relational concept*.[75] According to common understanding in the literature on semantics since Frege, the extension of a sentence is equal to its *truth-value*. The intension of a sentence or proposition is equal to its (propositional) *meaning-content*.

For Carnap, the extension of a *predicate* designates a class of individuals, and the intension of a predicate designates a certain property that is attached to that class.[76] These correspond to Frege's two concepts of the reference (*Bedeutung*; *nominatum*) and sense (*Sinn*) of a linguistic expression. The extension of an *individual expression* designates a certain individual, and the intension of an individual expression is the corresponding individual concept. In Frege's systematics of semantics, there is no place for such an entity, though.[77] The extension of a *sentence* is for Frege and Carnap alike its truth-value, and the intension of a sentence is the proposition, or the "thought-content", it entails. In all, Frege's and Carnap's two systems of semantics match fairly well with each other, except for the case of individual linguistic expressions. Also, in the case of an oblique *nominatum* and oblique sense the two systems do diverge from each other, since the equations "reference equals extension" and "sense equals intension" are valid for the ordinary *nominatum* and ordinary sense only.[78] Carnap justifies his option by pointing out that, unlike Frege's model based

[75] Niiniluoto, *Johdatus tieteenfilosofiaan*, p. 120.

[76] Carnap, *Meaning and Necessity*, p. 19. – The term (general) *concept* could also be used.

[77] On the history of modern semantics and its relation to the research program of the Wiener Kreis, cf. Coffa, *The Semantic Tradition from Kant to Carnap*, where Coffa provides an excellent account of the issue.

[78] Carnap, *Meaning and Necessity*, pp. 124–129. – As examples of ordinary and oblique manner of speech one might have the sentences: "The earth revolves round the sun." (= ordinary reference and sense) and "Copernicus claimed that the earth revolves round the sun." (= oblique reference and sense). Carnap, *Meaning and Necessity*, pp. 123–124.

on the *Bedeutung* and *Sinn* of a linguistic expression, his conception of semantics is not dependent on the particular context of an expression.[79]

Summarizingly, the extension and intension of a one-place predicate, many-place predicate, an individual term, and a sentence (proposition) can be presented as follows[80]:

Table 1.1 Types of linguistic expression, and the extension and intension of each

Type of linguistic expression	Extension	Intension
One-place predicate	Class of individuals	Property, concept
Many-place predicate	Relation	Relational concept
Individual expression	Individual	Individual concept
Sentence	Truth-value	Proposition, thought-content

Frege supported his influential argument to the effect that the semantic reference of a sentence is equal to its *truth-value* by pointing out that besides the thought of a sentence we tend to attach importance to the truth or falsity of the sentence.[81] He also refers to Leibniz' interrogative argument: "what else but the truth value could be found, that belongs quite generally to every sentence if the reference of its components is relevant, and remains unchanged by substitutions of the kind in question [i.e. when a part of the sentence is replaced by an expression having the same reference]?"[82] As an unintuitive consequence thereof, all true sentences, on the one hand, and all false sentences, on the other, have the same reference, i.e. the truth or the falseness of the sentence concerned.

Carnap points out that it has become customary to use the term "extensional" for such truth-functional connections where the truth-value of the whole sentence is determined as a function of the truth-values of its components. According to him, there is a strong analogy between the truth-value of a sentence and a *predicator*, i.e. a predicative expression: it is characteristic of an *n*-degree predicator that *n* argument expressions need to be added to it in order to form a sentence. In consequence, a sentence may be taken as a predicative expression (i.e. a predicator) of zero degree,

[79] Carnap, *Meaning and Necessity*, p. 125.

[80] Carnap, *Meaning and Necessity*, pp. 1, 23–42; Niiniluoto, *Johdatus tieteenfilosofiaan*, p. 120.

[81] "The fact that we concern ourselves at all about the reference of a part of the sentence indicates that we generally recognize and expect a reference for the sentence itself. The thought loses value for us as soon as we recognize that the reference of one of its parts is missing. We are therefore justified in not being satisfied with the sense of a sentence, and in inquiring also as to its reference. But why do we want every proper name to have not only a sense, but also a reference? Why is the thought not enough for us? Because, and to the extent that, we are concerned with its truth value. (. . .) We are therefore driven into accepting the *truth value* of a sentence as its reference. By the truth value of a sentence I understand the circumstance that it is true or false. There are no further truth values." Frege, "On Sense and Reference", p. 10. (Italics in original.)

[82] "*Eadem sunt, quae sibi mutuo substitui possunt, salva veritate*." Cited in: Frege, "On Sense and Reference", p. 11.

and two sentences S_1 and S_2 have the same extension, if and only if "$S_1 \equiv S_2$" is true, i.e. if and only if S_1 and S_2 are equivalent. Thus, it seems natural to define the truth-value of a sentence as its extension.[83]

Carnap's method of extension and intension is of course applicable to the semantic analysis of any linguistic expression, inclusive of legal sentences with the effect of how to construct and read the law. What is more, it may be applied to the analysis of *conventional*, i.e. institutional or societal, facts in general, once they are given a linguistic formulation. Thus, Dick W. P. Ruiter has analysed the ontological and conceptual commitments of a legal *institution* by means of the following seven categories[84]:

a) *Legal Persons*: a valid legal régime with the form of an entity that is qualified to act legally, such as the European Union.
b) *Legal Objects*: a valid legal régime with the form of an entity that can serve as the object of legal (trans)actions, such as a conveyable right of ownership.
c) *Legal Qualities*: a valid legal régime with the form of a property of a subject, such as the required majority of a legal person like a corporation.
d) *Legal Status*: a valid legal régime with the form of a property of an object, such as a listed historical monument.
e) *Personal Legal Connections*: a valid legal régime with the form of a connection between subjects, such as a personal right.
f) *Legal Configurations*: a valid legal régime with the form of a connection between objects, such as an easement (or a connection between a servient tenement and a dominant tenement).
g) *Objective Legal Connections*: a valid legal régime with the form of a connection between a subject and an object, such as the (right of) ownership of property.

When read in light of Carnap's method of extension and intension (which Ruiter does not do, since his research interest lies elsewhere), Ruiter's categories (a) and (b) designate the *extension* of a predicate, i.e. its field of application as either the subjects, or bearers, of a legal right (= point a) or as objects of a legal right (= point b), on the condition they are acknowledged in the legal system concerned. Ruiter's categories (c) and (d) designate the *intension* of such predicates, i.e. the particular properties or qualities attached to a legal subject (= point c) or an object of a legal right (= point d), as acknowledged in a legal system. The last three categories follow the logic of Carnap's method of extension and intension, too, having to do with a *two-place predicate relation* between legal subjects (= point e), between objects of legal rights (= point f), or between the combination of legal subjects and objects of legal rights (= point g).

The key question of legal analysis and legal argumentation remains unanswered, though. What is the *truth-value* of a legal sentence, i.e. a syntactically correctly

[83] Carnap, *Meaning and Necessity*, p. 26.

[84] Ruiter, *Legal Institutions*, pp. 96–115, and pp. 98–99 in specific.

formed assertion on *how to construct and read the law*, as judged in light of the arguments drawn from institutional and non-institutional sources of law? The answer is conditional on the *frame of legal analysis* adopted. There are nine plus one frames of legal analysis to be considered.[85]

[85] Nine plus one, and not ten, because radical, ad hoc based decisionism denies the impact of any *legally* qualified criteria in the construction and interpretation of law.