Law and Philosophy Library 97

Raimo Siltala

Law, Truth, and Reason

A Treatise on Legal Argumentation

Springer

Chapter 7
Legal Realism: The Law in Action, Not the Law in Books, As the Subject Matter of Legal Analysis

7.1 Philosophical Realism Defined

Philosophical or scientific *realism* is a plural notion, i.e. a *cluster concept* with a multitude of references (extensions) and senses (intensions). According to Ilkka Niiniluoto and Sami Pihlström, it may refer to at least the following seven types of phenomena[1]:

1) *ontological* realism: there exist mind-independent reality, i.e. reality is (at least for the most part) independent of the human mind,
2) *semantic* realism: truth is a semantic relation between language and reality, as depicted in, for instance, Alfred Tarski's correspondence theory of truth,
3) *epistemological* realism: reliable knowledge of the world can be attained,
4) realism in *scientific theory construction* and *concept formation*: properties of truth and falsity are applicable to the outcomes reached by scientific research language, such as descriptions, laws, and scientific theories,
5) *methodological* realism: there exist the best methods for pursuing knowledge,
6) *axiological* realism: truth is one of the aims of philosophical or scientific enquiry, and
7) *ethical* realism: moral values exist in reality.

The varieties of scientific realism would seem to some extent overlap with each other. Yet, all types of scientific realism presume a common, shared commitment to the grounding premises of *ontological* realism: without the presumed existence of a mind-independent reality there could not be realism of a semantic, epistemological, scientific, methodological, axiological, or ethical kind, either.

A) *Ontological realism* defines reality – at least for the most part – as independent from the contents of any individual human mind. The existence of the phenomena in the world is not contingent on whether they are the subject matter of

[1]On the varieties of philosophical realism, Niiniluoto, *Critical Scientific Realism*, pp. 2–13. Cf. Pihlström, *Tutkiiko tiede todellisuutta?*, pp. 30–66, 72–73.

R. Siltala, *Law, Truth, and Reason*, Law and Philosophy Library 97,
DOI 10.1007/978-94-007-1872-2_7, © Springer Science+Business Media B.V. 2011

the human consciousness, i.e. the sense data, recollections, or some other mental states of mind of someone, at a given moment of time. Tables and chairs, forks and knives, rocks and stones are trivial examples of the common, domestic entities acknowledged by a realistic ontology. Similarly, the planets, stars, galaxies, pulsars, white dwarfs, black holes, magnetic fields, radioactive radiation, and the like phenomena make up the "furniture of the world" in the field of macro-scale astronomy and physics. *Institutional* facts are far more enigmatic in this regard, since their existence depends on the presence of certain conventions in the community, defined as the shared expectations (Lewis), "we-intentionality" in the sense of collective acceptance or recognition of certain phenomena (Searle), mutual expectations (Lagerspetz), or the combination of mutual expectations and cooperative dispositions (den Hartogh) among the members of the community vis-à-vis certain phenomena.

Similarly, the idea of there being commonly shared things, entities, or artefacts that have been initiated by an individual human mind but have subsequently been "objectified" in the sense of having gained independence from the contents of any human mind belong to the realm of conventional facts. They dwell in what the Austrian philosopher Karl Popper (1902–1994) called the *Third World* as part of his three-partite ontological scheme. According to Popper, the *Third World* of objectified ideas and cultural artefacts is to be distinguished both from the *First World* of physical objects or physical states and from the *Second World* of mental states or states of individual human consciousness.[2] The entities of the *Third World* entail, for instance, mathematical figures, scientific theories and symbols (Newton's theory of gravity, Einstein's general theory of relativity, Heisenberg's indeterminacy principle, the formula $E = mc^2$), works of art (Leonardo da Vinci's *Mona Lisa*, Michelangelo's *David*, Arvo Pärt's *Tabula Rasa*), monetary currencies, and legal institutions (marriages; contracts; valid wills; mortgages; the national constitution; the original Rome Treaty, as later modified by the Maastricht, Amsterdam, Nice, and Lisbon Treaties). The entities that dwell in Popper's *Third World* need not be ruled out of the domain of a realist ontology, though. Ilkka Niiniluoto, for one, has endorsed the existence of institutional, convention-bound facts as part of his realist conception of ontology.

B) *Semantic realism* defines the truth of a linguistic sentence or proposition as a relation of *correspondence* between the proposition and a phenomenon or state of affairs in the world external to language. Under the Tarskian premises, the sentence or proposition S_X, to the effect that "it is raining", is true if and only if it is raining. Similarly, the sentence or proposition S_Y, to the effect that "legal norm *n* is valid in the legal community LC", is true if and only if legal norm *n* is valid in the legal community LC. Under the Tarskian premises, the truth-value of a sentence or proposition is determined by comparing its propositional content to the corresponding state of affairs that either prevails or not in the reality,

[2] Popper, *Objective Knowledge*, p. 106 et seq.

i.e. whether it is raining and whether legal norm *n* is valid in the legal community LC in the two examples above.[3] Tarski's semantic realism of course rules out the alternatives to the correspondence theory of truth, such as the coherence theory and the pragmatist theories of truth.

C) *Epistemological realism* signifies the idea that reliable knowledge can be attained of reality by scientific means. A *critical* epistemological realist can be distinguished from a *naïve* one, in that the first, but not the second, acknowledges the fact that all human knowledge is conditional on the conceptual frame adopted and, as a consequence, can never be absolutely true or absolutely false but only true or false under the premises defined by the said frame.[4] In the context of law, the frame of analysis defines the logico-conceptual and epistemic preconditions of legal analysis. The criteria that define epistemological realism match well with those of ontological realism, realism in scientific theory construction and concept formation, and semantic realism as endorsed by the Tarskian correspondence theory of truth. As a consequence, epistemological realism ought to be kept apart from epistemological idealism, phenomenology, philosophical scepticism, and philosophical pragmatism, all of which deny the possibility of obtaining reliable knowledge of an objective, subject-independent reality.[5] Epistemological realism is compatible with scientific *fallibilism*, or the inherent self-corrective capacity of science.[6]

D) Realism in *scientific theory construction* and *concept formation* extends the quality of being true or false into scientific theories and the concepts entailed. As a consequence, theoretical concepts, such as positrons, quarks, and the spin-value of elementary particles in quantum physics, refer to actually existing "things", entities, or phenomena in reality, and so do their inherent properties and mutual relations that prevail among them. Scientific laws and generalizations, like Isaac Newton's classic theory of gravity and Albert Einstein's theory of relativity, are accordingly either true or false. Equally, realism in scientific theory construction renounces all *instrumentalist* criteria for the evaluation of truth in a scientific theory, to the effect that that the utility, success, or approval of a conception by the scientific community might serve as the criterion of its truth or validity. Also, it rejects scientific *descriptivism* to the effect that theoretical terms in science could be returned to or translated into terms of an empirical observation language. Under a realist notion of scientific theory construction and concept formation, a scientific theory is true, if and only if the laws and concepts it entails refer to the phenomena that actually exist in the reality; not if the theory is claimed to be efficient, economical, functional, or successful in

---

[3] On Tarski's theory of truth, Tarski, "The Concept of Truth in Formalized Languages"; Niiniluoto, *Critical Scientific Realism*, pp. 55–64; Pihlström, *Tutkiiko tiede todellisuutta?*, pp. 45–52.

[4] Pihlström, *Tutkiiko tiede todellisuutta?*, pp. 34–35.

[5] Pihlström, *Tutkiiko tiede todellisuutta?*, p. 35.

[6] According to Charles S. Peirce, the scientific method entails an element of *public justifiability* and *self-correctiveness*. Niiniluoto, *Johdatus tieteenfilosofiaan*, pp. 81–85; Peirce, *Johdatus tieteen logiikkaan ja muita kirjoituksia*, pp. 137–150; Siltala, *Oikeustieteen tieteenteoria*, pp. 469–471.

instrumentalist sense, nor if the theoretical terms it contains could be turned into empirical observation terms.

E) *Methodological realism* validates the best methods for attaining true insights of reality, in line with the grounding premises of ontological and epistemological realism, and realism in scientific theory construction and concept formation. The variations of methodological anti-realism, on the other hand, share a denial of such truth-aligned qualities of scientific theories, opting for other criteria for the evaluation of a scientific theory or methodology, such as the empirical adequacy of a theory by van Fraassen; the common acceptance of a scientific theory in the scientific community by Thomas S. Kuhn; or the pragmatic usefulness and effectiveness of a theory in the service of practical life by William James.[7]

F) *Axiological realism* in science puts forth the thesis that the pursuit of truth, or some notion analogical to truth, is the ultimate goal of all scientific research, at the cost of various kinds of instrumentalist or pragmatist goals.

G) Finally, *ethical realism* is committed to the idea that values have objective existence in reality, and not only as the contents of the human consciousness. Its inherent links to the theory of science are thinner than those of methodological or axiological realism.

7.2 Legal Realism, American and Scandinavian

Scientific realism can be defined by means of an overlapping set of criteria that define the qualities of an ontological, epistemological, semantic, methodological, axiological, and ethical realism, plus realism in scientific theory construction and concept formation. *Legal* realism, in turn, refers to a variety of approaches to the law that share certain "realistic" qualities, such as the *sociological school of law* in Europe and *sociological jurisprudence* in the United States, *American legal realism*, and *Scandinavian legal realism*. The various realist approaches to law share two tenets only: a *critique of legal formalism* and the idea of *law as a social fact*, and not a social or moral ideal.

Sociological jurisprudence, as advocated by Oliver Wendell Holmes, Jr. (1841–1935), Roscoe Pound (1870–1964), and John Chipman Gray (1839–1915) at the turn of the 20th century, to a great extent paved the way for the American realist movement. The methodological *credo* of the sociological movement boiled down to Pound's demand of replacing the barren *law in the books* of the traditional legal doctrine and the "Landellian orthodoxy" by the *law in action*, as found in the decisions given by the courts and other officials. *American legal realism* had its heyday in the mid-1920s to mid-1930s, with Jerome Frank (1889–1957), Karl N. Llewellyn (1893–1962), Walter Wheeler Cook (1873–1943), and Felix S. Cohen (1907–1953) as its key proponents. In the Nordic countries, *Scandinavian*

[7] Pihlström, *Tutkiiko tiede todellisuutta?*, pp. 57–58; Niiniluoto, *Critical Scientific Realism*, p. 160 et seq.

> *legal realism* was a parallel realist and sociological phenomenon, as represented by Karl Olivecrona (1897–1980), Vilhelm Lundstedt (1882–1955), Per Olof Ekelöf (1906–1990), Torstein Eckhoff (1916–1993), and Alf Ross (1899–1979).[8]

Robert S. Summers has suggested the concise term *pragmatic instrumentalism* for the three intellectual movements of philosophical pragmatism, sociological jurisprudence, and legal realism in America,[9] but the term has not rooted in literature on jurisprudence.

As with the mutual relation of scientific positivism and legal positivism, the various facets of *legal realism* need not be committed to the basic tenets of fully-fledged *scientific realism*. What the diverse branches of legal realism have in common is a critical, detached stance as to all the schools and approaches to law with a non-realistic bent, viz. legal idealism as proffered by the natural law philosophy; analytical legal positivism with its emphasis on the historical will of the sovereign and the original intentions of the legislator under legal exegesis; and the excesses of legal formalism under the German or American constructivism.

The American schools of sociological jurisprudence and legal realism were heavily influenced by philosophical pragmatism, as embodied in the writings by Charles S. Peirce, William James, and John Dewey.[10] Scandinavian legal realism had a very different taste for philosophy, placing its focus on the theory of legal science, and not philosophical pragmatism. One of the key ideas cherished the Scandinavian realists was the effort of "saving" the legal science from the fierce attacks made by the famous Swedish philosopher Axel Hägerström (1868–1939). Idealistic metaphysics in all its manifestations, with the legal doctrine included, had been the main target of Hägerström's relentless, nihilistic critique directed at the philosophy of science. To Hägerström's mind, lawyers' belief in the existence of legal rights and duties was childish, or a sign of immaturity, since such assertions lacked semantic reference outside the wild imagination of the legal profession. According to Hägerström, assertions on, say, the legal right of ownership were to be rejected as instances of a totally senseless metaphysics.[11]

---

[8] A kind of legal realist program was pursued by the German Free Law movement, too, as represented by Oscar Bülow, Eugen Ehrlich, Hermann Kantorowicz, and Hermann Isay. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 59–62; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 579–581.

[9] Summers, *Instrumentalism and American Legal Theory*, pp. 19–26 (and pp. 22–23 in specific); Horwitz, *The Transformation of American Law 1870–1960*, p. 169 et seq.; Summers, ed., *American Legal Theory*; Golding, "Jurisprudence and Legal Philosophy in the Twentieth-Century America – Major Themes and Developments". Cf. also Tamanaha, *Beyond the Formalist–Realist Divide*, in which the ingenuity of the realist movement is strongly undermined.

[10] Summers, *Instrumentalism and American Legal Theory*; cf. Summers, ed., *American Legal Theory*; de Been, *Legal Realism Regained*, p. 177 et seq.

[11] On Scandinavian legal realism, Helin, *Lainoppi ja metafysiikka*, pp. 11–260. – *Praeterea censeo metaphysicam esse delendam* (i.e. "Besides, I think that metaphysics ought to be deleted"), as Hägerström's own nihilistic slogan sounded. Helin, *Lainoppi ja metafysiikka*, p. 32.

Analytical legal realism, as manifested by Alf Ross, looks upon the law and legal phenomena as a collection of social facts, and not social ideals. The *normative ideology* collectively and more-or-less uniformly internalized by the judges holds a key position in Ross' theory of law: it is by means of such knowledge that the constitutive premises of the judges' future legal decisions can – "with reasonable accuracy", as Ross put it – be predicted by the legal science.[12] The truth-value of any legal predictions is *approximate* and *probable* in kind only, and never absolutely certain, categorically true, or even in principle verifiable. If the judicial ideology goes through a change in content, all predictions made of the future course of adjudication need to be altered accordingly, but the judges seldom give any pre-warning of such intentions as they might have.

Ross' notion of the constitutive premises of legal science, when viewed in light of the *ontological*, *epistemological*, *semantic*, *methodological*, and *axiological* commitments of such research, plus the ones that define the elements of *scientific theory construction* and *concept formation*, would seem to seamlessly match with the philosophical commitments endorsed by scientific realism. The effected law in action at the courts and other legal officials provides legal science with a fixed reference against which its legal assertions can be evaluated. The idea of law as a social fact, and not a social ideal, corresponds to the ontic commitments of a realist philosophy of science, if institutional facts, too, are acknowledged in it.

Methodologically, legal realism has often entailed an empiricist or sociological approach to the law, where priority is given to the effected court practice, rather than any intentions originally held the legislator or the outcomes of legal analysis as produced by legal science.[13] The law in action is allowed to displace any law in the books,[14] whether conceived as ideal law, perfectly just law, formally valid law, or the law that was historically intended by the legislator but that may still lack any means of effective enforcement at the courts and other officials.

The qualities that constitute a realistic stance in *scientific theory construction* and *concept formation* are more difficult to classify vis-à-vis scientific realism *vs.* instrumentalism in Ross' theory, since the theoretical concepts involved, like the normative ideology collectively internalized by the judges, may be taken to refer to the phenomena that exist "out there", in line with scientific and philosophical *realism*, or as useful instruments of scientific (re)presentation and prediction only, in line with scientific and philosophical *instrumentalism*. In the former case, scientific concepts do obtain a specific truth-value according to the criteria laid down by

---

[12] In Danish: *den normative ideologi der besjæler dommeren*. Ross, *Om ret og retfærdighed*, p. 56. The term "judges" comprises all kinds of law-applying officials in Ross' theory of law.

[13] Ross refers to the idea of an empiricist approach in the preface to the English edition of *Om ret og retfærdighed*. Such an empiricist approach is not equal to scientific realism, though. Ross, *On Law and Justice*, p. IX. – Of the representatives of Scandinavian legal realism, Theodor Geiger had the strongest inclination towards a fully-fledged sociological approach to the law. Geiger, *Vorstudien zu einer Soziologie des Rechts*.

[14] The terms *law in the books* and *law in action* were coined by Roscoe Pound. Cf. Pound, "Law in Books and Law in Action", pp. 12–36.

the correspondence theory of truth. In the latter case, it is the utility and success of such theoretical concepts in the service of, say, predicting the future outcomes of legal adjudication that determine their worth in the science of law. The analytical and realist tradition in practical legal analysis in the Nordic countries greatly underscored the *functional* role of scientific concepts, inclining the analysis towards the instrumentalist tradition.

Ethical realism may perhaps be bypassed in the present context, except as having reference to such values in society that are able to draw institutional support in the court decisions and decisions given by other officials. In such a case we are dealing with the kinds of social values that have gained adequate ground in the institutional premises of law.

7.3 The Legacy of American Legal Realism

The most uncompromising of the American realists, Jerome Frank (1889–1957) was acquainted with, and inspired by, the use of psychology and psychoanalysis in explaining the legal discretion of the judge. He was a rule-sceptic, denying the existence of legal rules in advance of an individual judicial decision. The only thing that a legal scholar could have access to in predicting the outcome of any future judicial decisions was a set of prior judicial decisions in which the judges had reacted, in a certain manner, to the facts presented to them, along with the individual motives, ideological preferences and aversions, and psychological denials in the mind of the judge concerned. According to Frank's psychological and psychoanalytical insight, the lawyers' quest for absolute legal certainty and belief in the judge's infallibility inevitably bore witness of intellectual immaturity and a child-like yearning for fatherly authority.[15]

Yet, far more common among the realists than Frank's openly avowed rule-scepticism and even nihilism as to the existence of legal rules prior to a judicial decision was the tendency to highlight the inherently vague and underdetermined character of the law. The vehement critique by the realists against "mechanistic jurisprudence" was directed against Christopher Columbus Langdell's (1826–1906) and Joseph Beale's (1861–1943) highly formalist case method that had gained predominance in legal science and education during the latter part of the nineteenth century, carrying its impact over to the twentieth century.

The intellectual legacy of the sociological jurisprudence and the legal realist movement has left an imprint on at least the following tenets in subsequent jurisprudence.

For the first, Holmes' oracle-like prophecy of the future of legal science, to the effect that the future of legal analysis was reserved for "the man of statistics and the

[15]Frank, *Law and the Modern Mind*, pp. 259–269. – For a good account of the legal realists and their agenda, cf. Tamanaha, *Law as a Means to an End*, pp. 60–76. Cf. also Summers, *Instrumentalism and American Legal Theory*; Summers, ed., *American Legal Theory*.

master of economics",[16] would seem to have become true in the breakthrough of an *economic analysis of law* and similar strands of empirical legal research that leans methodologically on the social sciences in the twentieth century.[17] Novel fields of socio-legal enquiry have emerged, like the sociology of law, economic analysis of law, legal anthropology, legal statistics and the mathematics of social risk analysis. Such fields of socio-legal analysis bypass the research interest of technical legal analysis in the sense of *legal doctrine* (*Rechtsdogmatik*). Instead, they focus on the external effects and consequences of law in society (= legal sociology); economic efficiency and wealth maximization attained by legal regulation and effectiveness of the resulting recourse allocation in society (= economic analysis of law); or the analysis of law, social risks, and other legal phenomena by means of statistical and mathematical analysis (= legal statistics and social risk analysis).

The ever-persistent rumours concerning the death of traditional legal doctrine would seem to be premature, however, since there is, and will continue to be, a constant demand for the kind of knowledge in society that traditional legal doctrine is able to provide in terms of technical legal construction and analysis. No sociological or economic analysis of law will be able to answer the question of how to construct and read the law, even though the results obtained in sociological and economic analysis may well be utilized in legal doctrinal analysis.

For the second, Myres S. McDougal's (1906–1998) and Harold D. Lasswell's (1902–1979) idea of policy-oriented *configurative jurisprudence* would seem to bear the imprint of the realist tradition in legal analysis.[18] What is characteristic of McDougal's and Lasswell's model of legal research is the adoption of a *phase analysis* of the legal decision-making situation and its social context, representing the situation on a level of abstraction that best matches it and the social values and goals entailed.[19] Like the legal realists, McDougal and Lasswell sought for an alternative to legal formalism, bending the analysis towards philosophical pragmatism and instrumentalism. Also, the emphasis placed on law as a viable instrument of *social engineering* and the *de lege ferenda* reflections in the legal doctrine are in line with the realists' stance towards the law and society.

[16]Holmes, "The Path of the Law", p. 469. – According to Golding, the famous opening line in Holmes' *The Common Law*, to the effect that "The life of the law has not been logic; it has been experience." was openly targeted at Langdell. Golding, "Jurisprudence and Legal Philosophy in the Twentieth-Century America – Major Themes and Developments", p. 442; Holmes even coined Langdell "the greatest living legal theologian" of the time. Tamanaha, *Law as a Means to an End*, p. 64, note 24, citing Holmes' Book Review of the Second Edition of Langdell's Casebook, in 14 *American Law Review* (1880).

[17]Schlegel, *American Legal Realism and Empirical Social Science*.

[18]The terms *jurisprudence of the policy sciences*, *policy-oriented jurisprudence*, *contemporary legal realism* and *the New Haven school* or *approach* have also been used of the said intellectual movement. Cf. Nagan and Willard, "Lasswell/McDougal Collaboration: Configurative Philosophy of Law", p. 481. The basic text of *configurative jurisprudence* is Lasswell and McDougal, *Jurisprudence for a Free Society. Studies in Law, Science and Policy*.

[19]Nagan and Willard, "Lasswell/McDougal Collaboration: Configurative Philosophy of Law", p. 482.

For the third, though the issue is far from uncontested, the *Critical Legal Studies* movement with its emphasis on the social and political commitments of the law, legal science, and legal education has carried on the agenda of the realists. In the 1970s and 1980s, the *Crits* launched a fierce critique of the traditional conception of the law. The *Crits* sought to bring law back its true political premises, stripping the law bare from any false validity ground outside the realm of the political. They greatly underscored the inherently vague character of all law, denying in open terms the Dworkinian or other pretensions of having access to a one right answer to a legal dispute. In their crusade against legal formalism, the *Crits* would seem to have taken up the torch lit up by the most cynical of the realists, Jerome Frank, the famous rule-sceptic, and the young Karl Llewellyn, for whom legal rules were nothing more than pretty playthings for those childish enough. Denying the political character of the law was the gravest of the many errors committed by traditional legal science. Roberto Mangabeira Unger's *False Necessity* is a good example of the CLS endeavours in which the law is seen as part of politics pure and simple[20]:

> *False Necessity* (. . .) carries to extremes the thesis that everything in society is politics, mere politics, and then draws out of this seemingly negativistic and paradoxical idea a detailed understanding of social life.

In all this, the *Crits* no doubt provide a "nightmarish" account of law for the standards legal positivists, such as H. L. A. Hart.[21] From a methodological point of view, the CLS approach is (or perhaps: was) characterized by its all-embracing syncretism, internal fragmentation into ever-smaller pockets as preferred approaches to the law, and the opting for sheer methodological anarchism and eclecticism in legal analysis. Duncan Kennedy's methodological reflection in his *A Critique of Adjudication* is a good example thereof[22]:

> This book is methodologically eclectic. It uses concepts, techniques, and models of performance drawn from technical legal analysis, jurisprudence, neo-Marxism, Weberian sociology, semiotics and structuralism, psychoanalysis, historicist narration, Lewinian field theory, phenomenology, modernist fiction, and deconstruction.

---

[20]Unger, *False Necessity*, p. 1. – Cf. Thomas Morawetz' use of Duncan Kennedy's happy phrase, to the effect that the law is steeped with *politics all the way down*. Morawetz, "Law as Experience: The Internal Aspect of Law", p. 218. Cf. also Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", passim. Kennedy makes use of the acronymic expression HIWTCO, or "how-I-want-to-come-out", with reference to the essentially idiosyncratic, non-legal motives and strategies guiding the judge's or other legal official's legal decision-making. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", p. 548 et seq. Cf. Kennedy, *A Critique of Adjudication*, passim; Kairys, ed., *The Politics of Law. A Progressive Critique*, passim. – Martti Koskenniemi's fine book, *From Apology to Utopia. The Structure of International Legal Argument*, applies a thoroughly CLS-spirited methodological (but not necessarily very Derridean) conception of deconstruction to the structures of argumentation in international law.

[21]Cf. Hart, *Essays in Jurisprudence and Philosophy*, pp. 123–144 ("American Jurisprudence through English Eyes: The Nightmare and the Noble Dream"). Hart, however, did not deal with the nihilistic agenda of the *Crits* in his essay. For Hart, the nightmare vision of law was represented by the American legal realists who yet were more moderate than the *Crits* in their critique of law.

[22]Kennedy, *A Critique of Adjudication*, p. 15.

Kennedy's methodological stance leads to obstinate philosophical dilemmas so soon as the theoretical consequences of the divergent and at least partly conflicting philosophical premises are fully unfolded. Moreover, despite any incantations to the contrary effect by the realists or the *Crits*, traditional legal analysis and doctrine is still "alive and kicking", as the (other) human and social sciences have not been able to oust it from the realm of scientific enquiry.

The like-minded, mutually converging nature of the two intellectual movements, the realists and the *Crits*, is far from non-contested, though. Wouter de Been has forcefully and, as far I can see, quire convincingly argued against the common conception that the overly nihilistic agenda of the *Crits* could be seen as a follow-up of the realists' sceptical stance towards the law and legal science.[23] To put it concisely: the realists put their faith in pragmatic instrumentalism and social engineering through the law; whereas the *Crits* believed in (almost) nothing and looked upon the law as part of the problem and not as a solution to the pertinent social issues. The legal realists endorsed a realist ontology, manifesting a rather commonsensical view of the law and society; while the *Crits* were committed to a free-wheeling constructivist option as to the issues of social ontology in line with the Marxists, the structuralists, or some other European school of philosophy as to the issues of social ontology. Finally, the basically optimistic, functionalist stance of the realists as to the attainment of social progress and the New Deal through the law has had to recede in the writings by the *Crits*, giving room for a pessimistic, defeatist conception of law as a radically autonomous, self-determined phenomenon that follows a logic of its own under the Marxist, the structuralist, the feminist, or other constitutive premises freely and eclectically borrowed from the Continental philosophical tradition.[24]

7.4 The Concept of A Judicial Ideology by Alf Ross, and the Rule of Recognition by H. L. A. Hart

Though H. L. A. Hart is commonly known as a key representative of analytical legal positivism in the footsteps of Hans Kelsen, Hart's definition of the rule of recognition as a collective, more or less uniformly shared commitment among the judges and other officials to a similar set of institutional and non-institutional legal sources draws his theory of law rather close to Alf Ross' analytical legal realism.[25] Concerning the rule of recognition in a modern legal system Hart writes as follows[26]:

---

[23] de Been, *Legal Realism Regained*.

[24] A good comparison of the legal realists and the *Crits* is found in de Been, *Legal Realism Regained*, p. 177.

[25] There is, however, the much criticized and, so it seems, mostly unwarranted reference to the methodology of descriptive sociology in the Preface to Hart's book. Hart, *The Concept of Law* (1961), p. V.

[26] Hart, *The Concept of Law* (1961), p. 98.

> In a modern legal system where there are a variety of "sources" of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy.

In a legal system the boundaries of which are drawn by reference to the rule of recognition, the judges and private citizens alike are able to identify the valid rules of law and draw them apart from all that is not law. According to the legal realists, a legal order may comprise various kinds of legal norms, such as legal rules and legal principles, on the condition that they are entailed in the *normative ideology collectively internalized by the judiciary* (Ross)[27] or are identified by the *rule of recognition* collectively adopted by the judges and other law-applying officials (Hart).[28]

Ross' judicial ideology entails the institutional and societal sources of law, along with the criteria of legal decision-making that may be inferred from them through legal argumentation.[29] According to Ross, the range of legal source material available to the judge varies from fully complete, "hard-and-fast" legal rules that can be applied to a case in a straightforward manner to the various kinds of incomplete, "yet-to-be-formed" legal arguments that only provide some general guidelines for the judge's legal discretion, so that the judge will then need to formulate an exact rule of law for the case at hand by drawing on such less-than-complete material.[30]

In Ronald Dworkin's later terminology one could speak of legal *rules*, identified by their formal source of origin in legislation or jurisdiction, on the one hand, and legal *principles*, policies and other sorts of standards that enjoy possibly only oblique but still legally adequate institutional support and sense of approval in the legal community, on the other.[31] What they have in common is the normative pressure they exert upon the judge's or other official's legal discretion. Unlike Dworkin's coherence-seeking conception of law under the law in integrity, neither Ross nor Hart make any claims as to seeking to enforce a highly coherent legal narrative in the course of the judge's legal decision-making.[32] Rather, case-to-case bound reasoning will do, if it stays in line with the prevalent judicial ideology or rule of

[27] Ross, *Om ret og retfærdighed*, p. 56: "Retsvidenskaben beskæftiger sig med den normative ideologi der besjæler dommeren."

[28] On H. L. A. Hart's legal philosophy, Hart, *The Concept of Law* (1961); Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream*.

[29] "... at man ved retskilderne forstår indbegrebet af de faktorer der øver indflydelse på dommerens formulering af den regel hvorpå han baserar sin afgørelse", Ross, *Om ret og retfærdighed*, p. 56.

[30] "... fra sådanne tilfælde, i hvilke kilden præsterer dommeren en fuldt færdig retsregel der blot overtages af dommeren til sådanne tilfælde, i hvilke kilden ikke byder dommeren andet og mere ond visse inspirerende ideer ud fra hvilke han selv formulerer den regel han har brug for." Ross, *Om ret og retfærdighed*, p. 56.

[31] "... in those hard cases ... [lawyers] make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards." Dworkin, *Taking Rights Seriously*, p. 22.

[32] "Law as integrity ask judges to assume, so far as this is possible, that the law is structured by a *coherent set of principles* about justice and fairness and procedural due process, and it asks them

recognition adopted by the judiciary. If the prevalent judicial ideology (à la Ross) or the rule of recognition (à la Hart) is taken to entail such systemic elements, as well, the situation is of course different.

In light of Robert S. Summers' conception of legal formality, we may speak of the different levels of legal *formality* that is manifested by legal rules and legal principles, respectively. Legal rules are inherently *formal* legal arguments, detached and at least nominally cut off from the social values they were deemed to exemplify and promote in society at the time when they were enacted by the legislator or enforced by a court or other official. Legal principles, in turn, are no more than *weakly formal* legal arguments that, by force of their definition, have retained their intertwinement with the particular values they exemplify and seek to promote in society.[33]

According to Ross, any legal assertions on how to construct and read the law are *predictions* of future court decisions, based on the legal source material available for the legal scholar. As such, legal predictions can never be absolutely certain or absolutely true but more or less probable only as to their epistemic status.[34] The common judicial ideology among the judges provides a reference with which such legal predictions can first of all be made and then be critically evaluated. If the constitutive premises of the prevalent judicial ideology are not altered in an unexpected manner, a legal scholar may produce legal sentences that, according to Ross, are "with considerable certainty" true[35]:

---

to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards." Dworkin, *Law's Empire*, p. 243. (Italics added).

[33]Despite the differences in terminology, i.e. legal rules and principles in Dworkin and the different levels of legal formality in Summers, the subject matter is more or less the same in the both, even though Dworkin and Summers do not have any cross-references to the other scholar's theory of law. A parallel reading of Dworkin and Summers can be found in Siltala, *A Theory of Precedent*, pp. 49–54.

[34]"Når den retsvidenskabelige påstand om, at en vis regel er gældende dansk ret, som påvist efter sit realindhold er en forudsigelse om reglens anveldelse i fremtidige retsafgørelser, følger heraf, at sådanne påstande aldrig kan gøre krav på absolut sikkerhed, men kun kan hævdes med *større eller mindre sandsynlighed*, alt efter styrken af de holdepunkter, fremtidskalkulationerne hviler på. Sandsyndlighedsværdien kan variere over hele feltet lige fra praktisk vished og ned til værdier omkring 0,5. Der kommer herved en relativitet ind i retsvidenskabelige sætninger, som det er vigtigt at have for øje, men som altfor ofte overses. (. . .) I virkeligheden er påstanden om, at en regel er gældende ret, noget højst relativt. Om man vil, kan man også sige, at en *regel kan være gældende ret i højere eller mindre grad varierende med den grad af sandsynlighed, hvormed det kan forudsiges, at den vil finde anvendelse*." Ross, *Om ret og retfærdighed*, s. 58. (Italics in original.)

[35]"Retsvidenskaben beskæftiger sig med *den normative ideologi der besjæler dommeren*. Kendskab til denne ideologi (og dens tolkning) sætter os derfor i stand til *med betydelig sikkerhed* at forudberegne det retsgrundlag, hvorpå visse fremtidige afgørelser vil blive truffet, og som altså vill figurere i domspræmisserne." Ross, *Om ret og retfærdighed*, pp. 56–57. (Italics added; translation by the present author.) – On the inherently collective character of the judges' normative ideology, cf.: "Det er i det foregående talt snart om "dommeren", snart om "domstolene". Forudsætningen for, at man kan operere med begrebet "dansk ret" som et for det hele retssamfund fælles, identisk system er, at de individuelt forskellige dommere besjæles af en fælles,

> Legal science deals with the *normative ideology internalized by the judge*. Knowledge of that ideology (and its interpretation) places us in a position to predict, *with considerable certainty*, the legal grounds upon which certain future [court] decisions will be based, and which will be part of the normative premises of those decisions.

Ross' notion of the *normative ideology internalized by the judge* may comprise both legal rules and legal principles, on the condition that they are part of the normative ideology adopted by the judges and other officials. As such, the concept of a judicial ideology is entirely neutral as to the content it may have in a legal system.

H. L. A. Hart, in turn, defines the concept of law with reference to the ultimate *rule of recognition* in the legal system, in the sense of a set of institutional and non-institutional, or societal, sources of law generally acknowledged by the judges and other officials in their task of identifying the valid legal rules. In Hart's *The Concept of Law*, legal principles are at least *prima facie* excluded from the domain of law, since they cannot be identified by reference to their formal source of origin only, as is required in Hart's jurisprudence.[36]

The question whether the norms of *legal methodology*, i.e. the meta-level rules and principles of legal argumentation that guide the judge's and legal scholar's process of legal construction and interpretation, is part of Ross' judicial ideology and Hart's rule of recognition, cannot be answered by a simple yes or no. It seems that Ross' idea of the prevalent judicial ideology could be read so as to comprise the meta-level norms of legal reasoning, too. According to Ross, it is the task given to the legal science to predict the course of future court decisions "with considerable accuracy", as he put it, by having recourse to the judicial ideology among the judges and other legal officials. Without such knowledge, the success of legal predictions would be very low, which would seem to strike the balance in favour of a more permissive reading of Ross' theory, even though Ross did not address the issue directly.

In comparison, Hart's rule of recognition is more closely tied up with the issues of an institutional epistemology of law, as distinguished from the issues of legal

---

overindividuel ideologi, og at det derfor kommer ud på et, om man refererer til "dommeren" eller til "domstolene". Retten er et socialt, d.v.s. overindividuelt fænomen. I det omfang, den enkelte dommer motiveres af særegen ideosynkrasi, henregnes denne ikke til "dansk ret" – selv om den naturligvis ligefuldt er en faktor der må tages i betragtning af den der er interesseret i at forudkalkulere en konkret retsafgørelse." Ross, *Om ret og retfærdighed*, pp. 48–49.

[36]Nonetheless, Hart does make a reference to the case where the rule of recognition may indeed include content-bound elements, in addition to purely formal criteria, related to the source of origin of a legal source or argument. The possibility of such content-bound elements has the effect of turning his theory of law into one of *inclusive*, or *soft*, legal positivism. "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality." Hart, *The Concept of Law* (1961), p. 199. If such is the case, there is no obstacle – at least "in principle" – of taking legal principles in Hart's rule of recognition as well. Cf. Hart, *The Concept of Law* (1994), p. 250, where Hart's reply to Dworkin's criticism of his rule-bound theory is posthumously presented.

methodology, since the rule of recognition would not seem to have any significant impact on the methods to be adopted in legal reasoning. In general, issues of legal interpretation are touched upon only in the passing in Hart's *The Concept of Law*[37]; whereas Ross devotes far more concern to the topics of methodology under the prediction theory of law. Still, even Hart's theory of law presupposes the presence of relative uniformity of the court praxis vis-à-vis the commonly acknowledged sources of law in the legal community, brought into effect by the judges' shared commitment to a similar rule of recognition. If there were not a relatively common conception of the models of legal reasoning among the judges, there could be no uniformity in legal praxis, either. As a consequence, it seems that Hart's rule of recognition, too, has to comprise some elements of legal reasoning, even if Hart did not directly address the issue himself.

Thus, it seems that Ross' notion of judicial ideology and Hart's master rule of recognition can both be read so as to comprise the norms of judicial *methodology*, too, in addition to the legal source material that constitutes the institutional *epistemology* of law. In Ross' theory, those methodological elements would entail both legal rules and legal principles, though Ross in 1953, when the first edition of *Om ret og retfærdighed* came out, of course could not make use of Dworkin's much later terminology of the "principles, policies and other sorts of standards"[38] that have a normative impact on the judge's legal decision-making. In Hart's theory, the few allusions made to the methodology of legal argumentation encompass legal rules only, since value-laden principles and standards of law do not satisfy the formal criteria laid down by the rule of recognition.

Issues concerning (the outcome of) legal systematics and (the process of) legal systematization are left quite untouched both by Ross' normative ideology of the judges and Hart's master rule of recognition, which is yet quite understandable. Rarely, if ever, do the judges aim at producing a specific outcome in terms of pure legal systematics, as detached from the issues of legal interpretation. The issues of legal systematics and legal systematization rather belong to the domain of legal science and legal analysis, and not that of judicial decision-making, even though legal interpretation entails an at least tacit conception of legal systematics in the sense of a complex priority order among the *rule/rule*, *principle/principle*, and *rule/principle* combinations in a legal system.

Alf Ross and H. L. A. Hart both make the assumption of an essentially *collective* and, at the same time, more or less *uniform* character of the master criterion used for the identification of law. By means of the judges' normative ideology (Ross) or the rule of recognition (Hart), the valid norms of a legal system can be identified and distinguished from all that is not law, such as the norms of social or political

[37]Cf. Hart, *The Concept of Law* (1961), pp. 120–132. There, Hart outlines the semantics of legal interpretation with reference to the *core of settled meanings*, on the one hand, where the meaning-content of law is unambiguous, and the *core of penumbra*, on the other, where several interpretation outcomes are equally possible. Cf. Hart, *The Concept of Law* (1961), pp. 200–201, where Hart briefly touches upon the issues of legal interpretation.

[38]Dworkin, *Taking Rights Seriously*, p. 22.

morality, societal etiquette, sports and play, arts and crafts, and religion.[39] Such a presupposition is not entirely unproblematic, but on a general level is seems to hold true: judges very rarely dispute as to whether an individual item of legislation or a precedent really counts as valid law. Thus, the criteria adopted for rule-identification would seem to a great extent converge among the judiciary. Hart points out that the question of whether some legal rule is valid law in the legal community is very rarely posited in express terms by the judges. According to Hart, that incontestable fact lends support to the stance that the rule of recognition actually fulfils its prime function as an operative criterion in unifying the methods of legal adjudication.[40] Like Ross, also Hart refers to the logico-conceptual truism that speaking of a legal system presupposes the essentially collective character of the criteria of recognition involved, since otherwise there could be no legal system in the first place.[41]

Alf Ross' idea that it is the task for legal science to produce legal predictions of future court decisions on the basis of the *normative ideology* internalized by the judges deviates from the more straightforwardly *behaviouristic* prediction theory that was advocated by the proponents of American legal realism and sociological jurisprudence. Thus, Oliver Wendell Holmes and the young Karl Llewellyn saw the issue in terms of "what the courts will do in fact", when faced with a certain kind of fact-situation. In Holmes-inspired American jurisprudence, the "black-letter" analysis of law was to recede, giving room for a variety of the novel human and social sciences of law. For Ross, it is not only the legal response of the judges to certain kind of behaviour or the psychological, statistical, or sociological laws investigated by the social sciences that shed light on the legal phenomena. Rather, it is a compound of the judges' *behaviour* in the context of the prior cases or precedents, to be studied by empirical means as provided by the social sciences, on the one hand,

[39]"... the rule of recognition exists only as *a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria*. Its existence is a matter of fact." Hart, *The Concept of Law* (1961), p. 107. (Italics added.) – Cf. Hart, *The Concept of Law* (1961), p. 111 (italics added): "Here what is crucial is that there should be a *unified or shared official acceptance* of the rule of recognition containing the system's criteria of validity." – On Alf Ross' reflection on the collective nature of law and judicial ideology: "Det er i det foregående talt snart om "dommeren", snart om "domstolene". Forudsætningen for, at man kan operere med begrebet "dansk ret" som et for det hele retssamfund fælles, identisk system er, at de individuelt forskellige dommere besjæles af en fælles, *overindividuel ideologi*, og at det derfor kommer ud på et, om man refererer til "dommeren" eller til "domstolene". Retten er et *socialt*, d.v.s. *overindividuelt fænomen*. I det omfang, den enkelte dommer motiveres af særegen ideosynkrasi, henregnes denne ikke til "dansk ret" – selv om den naturligvis ligefuldt er en faktor der må tages i betragtning af den der er interesseret i at forudkalkulere en konkret retsafgørelse." Ross, *Om ret og retfærdighed*, pp. 48–49. (Italics added.)

[40]The question whether the judge's normative ideology or the rule of recognition, which draws the borderline between the law and the not-law, is itself *inside* or *outside* of the law cannot be answered by a straightforward yes or no. I have reflected on the ontological status of Kelsen's basic norm and Hart's rule of recognition in Siltala, *A Theory of Precedent*, pp. 221–229; Siltala, *Oikeustieteen tieteenteoria*, pp. 711–730. The argument of course applies *mutatis mutandis* to Ross' idea of the ultimate premises of the judicial ideology.

[41]Hart, *The Concept of Law* (1961), pp. 112–113.

and the judicial *ideology* that consists of more traditional legal material such as the sources of law, on the other, that are the essentials for Ross' theory of law.[42]

7.5 The Formal Validity and Efficient Enforcement of Law

Legal realism entails a realist epistemology of law, seeing the law and legal phenomena as empirically observable social facts, and not as a social or moral ideal. What is perhaps slightly disturbing is that legal realism is based on theoretical premises that cannot be justified with philosophical criteria provided by philosophical realism itself. When trying to answer the question of what will count as a legally qualified legislator, a court of justice, or other institutional authority endowed with the power to create, modify, enforce, or derogate the rules of law will necessitate having recourse to a set of valid rules in the field of constitutional law and the law of court organization and judicial procedure. They, in other words, cannot be identified by mere reference to Justice Holmes' dictum of "what the courts will do in fact". Rather, the Parliament, a court of justice, or a legal official is an *institutional fact*, the existence of which by necessity requires the formal validity – and not merely realism-aligned effectiveness – of a set of legal norms that define the legal constitution of the institution in question and the procedure to be followed in the parliament's act of law-making or, respectively, a set of legal norms that define the court structure and judicial procedure to be followed in the enforcement of law in courts.

Without first assuming the existence of such a normative frame of analysis, no judgment could be made concerning the validity of an item of legislation, a judicial precedent, or an administrative decision given by an administrative body in the legal system concerned.[43] Therefore, a realistic definition of law needs to be modified in a manner that entails a set of normative, constitutive qualities of law, as well:

> The law is the sum total of arguments, or reasons for judgment, that exert normative impact on the legal discretion of a judge or other official, as derived from the institutional and non-institutional, or societal, sources of law that can be identified with reference to the judicial ideology collectively and more or less uniformly internalized by the judiciary (Ross) or the rule of recognition commonly adopted by the judges and other legal officials (Hart). In addition, the concept of a legal system necessitates the validity of the rules of constitutional law and the law of court organization and judicial procedure, as defined by legal positivism (Kelsen) and not by analytical legal realism.

As a consequence, there are two kinds of constitutive elements, intertwined with each other even in the realism-aligned concept of law now under consideration, viz. the constitutive premises of *legal realism* that define the effected "law in action"

---

[42] Ross, *Om ret og retfærdighed*, pp. 41–66.

[43] Ross, *Towards a Realistic Jurisprudence*, pp. 61–62. Cf. Helin, *Lainoppi ja metafysiikka*, p. 143: "Like the concepts of a 'state', '[legally] competent organ', and 'sovereign', similarly a 'court of justice' and 'judge' are legally qualified concepts. (. . .) The law cannot be defined in an exhaustive manner by reference to the judge's behavior, since we already need to know something of the legal order so as to find out who is a judge." (Translation by the present author.)

of court decisions, as suggested by Alf Ross and H. L. A. Hart, and the constitutive premises of *legal positivism* that lay down the criteria for the validity of the norms of constitutional law and the law of court organization and court procedure, among others, as suggested by Hans Kelsen. A mere reference to the law in action of the effected court practice will leave the *legally qualified* status of the parliament, courts of justice and other law-applying officials unexplained. Taken individually, neither of the two is able to provide a satisfactory definition of law.

Without the effectiveness of the “law in action” at the courts of justice and other officials, as provided for by analytical legal realism, legal positivism would fall victim to the critique of upholding the validity of mere “paper rules” which, though valid in the formal sense, might lack the quality of being effectively enforced by the courts and other authorities. Even Kelsen with his urge toward methodological purity in legal science ultimately had to make such a concession, by making room for the overall effectiveness of the legal system (*im grossen und ganzen wirksam).*[44] But neither can analytical legal realism alone provide for an overarching definition of law, without at the same time presupposing the formal validity of constitutional law and that of the court organization and judicial procedure.

Summarizing, the interlocking character of law under the twin premises of (analytical) legal positivism and (analytical) legal realism can be presented as follows:

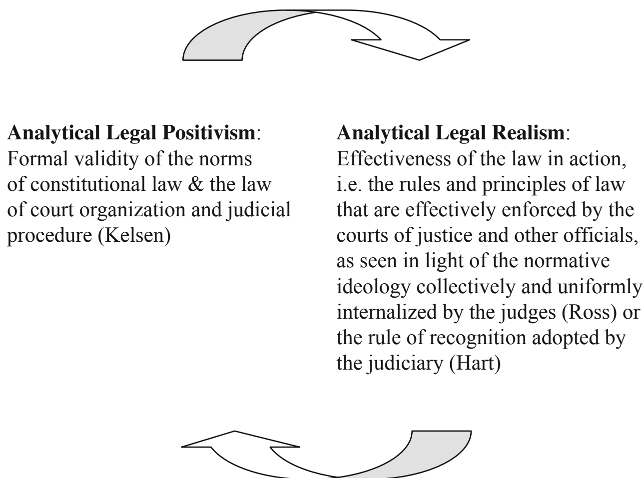

Diagram 7.1 Mutually interlocking relation of the formal validity of law under legal positivism and the effectiveness of the law in action under legal realism

[44] Kelsen, *Reine Rechtslehre* (1960), p. 219: “Eine Rechtsordnung wird als gültig angesehen, wenn ihre Normen *im grossen und ganzen* wirksam sind, das heiβt tatsächligt befolgt und angewendet werden. Und auch eine einzelne Rechtsnorm verliert ihrte Geltung nicht, wenn sie nur in einzelnen Fällen nicht wirksam ist, das heiβt nicht befolgt oder angewendet wird, obgleich sie befolgt und angewendet werden soll.” Kelsen, *Reine Rechtslehre* (1960), p. 219. (Italics in original.) – Kelsen thereby rules out of consideration such individual *desuetude* cases in which a formally valid legal norm is not, for some reason or another, applied in the court practice.

In fact, Kelsen's legal normativism and Ross' analytical legal realism would each seek to provide an answer to a different kind of scientific enquiry. Kelsen's pure theory of law defines the constitutive criteria of what will count as law, and the line of reasoning is backward-looking and historical, in line the constitutive premises of law: how can the normative character or binding nature of the law be justified? The answer is anchored in the historically first constitution of a legal system with an unbroken tradition of legal constitutions, as supported by the transcendental-logical presupposition of the *Grundnorm*. Ross, on the other hand, delineates the issues of legal validity and legal interpretation with reference to the normative ideology internalized by the judges, and the line of reasoning is *forward-looking*, future-oriented, in line with the prediction theory of law: how can the semantic meaning-content of legal rules and other standards of law be determined for the cases to come?

Both scholars define the criteria of legal validity and the identification of the valid norms of a legal system, Kelsen with the transcendental-logical *Grundnorm* and Ross with the judicial ideology collectively adopted by the judiciary and other legal officials. Still, the question of legal interpretation is never properly tackled by Kelsen, who was happy to devote just a few pages to the issue, as a kind of *post scriptum*, at the very end of the second, 1960 edition of the *Reine Rechtslehre*. For Ross, on the other hand, the issues of how to construct and read the law are expressly tackled by means of the judge's normative ideology.

7.6 A Critical Evaluation of Analytical Legal Realism

Analytical legal realism defines law as the sum total of the rules and principles of law, along with the corresponding legal rights and duties allocated to individual legal subjects, that are *effectively enforced* by the courts of justice and other legal officials and that, because of the normative ideology collectively internalized by the judges (à la Ross) or the rule of recognition collectively adopted by the judiciary (à la Hart), will most probably continue to be so enforced in the near future, as well. The *law in action* as enforced by the courts of justice and other officials (à la Pound) now has priority over the law in the books, i.e. the law as originally intended by the legislator or subsequently "glossed" by the legal science.

Since individual court decisions are the fixed reference on how to construct and read the law under the Rossian premises, no *internal* critique of law is possible, except by having recourse to the claimed inherent integrity, well-settled nature, or presumed continuity of the court practice, when judged in light of the legal source doctrine and the models of legal construction and interpretation as commonly adopted by the courts and other officials. An *external* critique of law, on the other hand, is of course possible by reference to the criteria presented by the political morality in society or the natural law philosophy in general. One advantage of both analytical legal realism (à la Ross) and analytical legal positivism (à la Kelsen), when combined in the manner suggested above, is the achievement of conceptual clarity of the concept of law vis-à-vis anything that is not law, such as

norms of political morality, religion, or societal etiquette. Another advantage of analytical legal positivism and analytical legal realism alike, when compared to social pragmatism or natural law philosophy, is that the *institutional* dimension of law is now duly taken into account.

Analytical legal realism is committed to a *realistic* ontology and epistemology. As a consequence, the law is defined as the totality of phenomena that dwell in the *world of facts* (*Sein*), i.e. individual legal decisions issued by the courts and other law-applying officials, rather than the totality of phenomena that inhabit the *world of ought* (*Sollen*), such as norms. Under such premises, the metaphysical "furniture of the world" is outlined so as to match with an empiricist frame of analysis. Here, the interlocking premises of analytical legal realism, on the one hand, and analytical legal positivism, on the other hand, vis-à-vis the definition of law ought to be kept in mind, though.

Under analytical legal realism, judicial decision-making power is vested at the courts of justice and other law-applying authorities. The courts of justice are no more than the "tip of the iceberg" in the field of jurisdiction, in the sense that they are not the only authorities that have power to shape the course and content of the law. In specific, there is a variety of *ombudsmen*, *arbitration boards*, and other authorities involved, such as (in Finland) the Parliamentary Ombudsman, the Chancellor of Justice, the Ombudsman of Minority Rights Protection, the Gender Equality Ombudsman, the Ombudsman of the Bankruptcy Issues, and the Data Protection Ombudsman, plus a host of official and semi-official arbitration boards and the like. All those officials are involved in the administration of justice, though each with a different legal or quasi-legal agenda. The normative impact of such decisions and resolutions to a great extent varies, too, ranging from mere recommendations to binding precepts of law. Moreover, their temporal directionality may vary, in the sense of whether they are taken as an evaluation of the past decisions only or as normative guidance for the future conduct of officials, too.[45]

[45] In Finland, Jaakko Jonkka, currently the Chancellor of Justice, has stressed that the decisions given by Chancellor of Justice, even if given as a response to a complaint made by an individual whose legal rights allegedly have been violated by some state official, are frequently "forward-looking" in character as well, endowed with the intention of guiding the future conduct of officials. Jonkka, "A Model for the Weighing and Balancing of Interest in the Prosecutor's Legal Discretion".