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Raimo Siltala

Law, Truth, and Reason

A Treatise on Legal Argumentation

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Chapter 13
Law and Metaphysics

13.1 The Truth of a Legal Sentence As Determined by the Frame of Analysis Adopted

As mentioned in the Introduction above, the truth of a linguistic proposition or sentence is commonly defined with reference to one of the following three alternatives in the traditional philosophical literature:

(a) the *correspondence* theory of truth: there is an *isomorphic*, picture relation between a linguistic assertion and the corresponding fact or state of affairs in the world;
(b) the *coherence* theory of truth: there is a mutual match and reciprocal congruence among a set of linguistic propositions or arguments under;
(c) the *pragmatic* theory of truth: *warranted assertability* can be applied to certain beliefs or conceptions, defined in terms of the empirically observable consequences of a belief, its approval or disapproval at the intended audience of argumentation, or its being commonly accepted or recognized as having certain kind of qualities in the community.

In the legal context, the required link to a philosophically sound and solid theory of truth may need to be softened and weakened a bit, so as to make room for the *institutional* characteristics of law.

Though neither of the two founders of modern semantics, Gottlob Frege and Rudolf Carnap, focused on the semantics of law in specific, Frege's idea of the *reference* (*Bedeutung*, *nominatum*) and *sense* (*Sinn*) of a linguistic sign or expression may well be extended to the domain of law. Naturally, the same goes for Carnap's method of *extension* and *intension*. Since the semantic reference (Frege) or extension (Carnap) of an assertion is equal to its *truth-value*, such a conception of language by necessity entails a commitment to *some* internally consistent conception of truth.

Modern law is a *constructive*, inherently interpretation-bound phenomenon (Ronald Dworkin); an *essentially contested concept* that is open to a host of divergent readings and interpretations (W. B. Gallie); or a *deliberative practice* (Thomas

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Morawetz) whose identity is always open to be challenged and possibly redefined by those engaged in the legal discourse. Therefore, there is no one right definition of the concept of law, nor of the constitutive criteria that determine the semantic qualities of a legal assertion on how to construct and read the law.[1] In other words, there is no absolute, a priori, or self-justified point of view to the law that could oust other alternatives out from legal deliberation and legal discretion. But nor can there be a totally non-committed, self-sustaining *view from nowhere* to the law that would be free from all the philosophical and ideological premises that define the very subject matter and methodology of legal analysis. The analysis of law will need to incorporate some stance on "what there is" in the sphere of law, in the sense of the constitutive elements of a legal ontology; the inclusion and exclusion of different kind of legal source material and types of argument under legal epistemology; the commonly approved models of legal reasoning under legal methodology; the logico-linguistic commitments of the law; axiological premises concerning the relation of the law to social values and ideologies; and so on.

Without an express or tacit entailment of such philosophical prerequisites in legal analysis, the notion of law could not be configured in the first place, or at least not in a fairly consistent manner. In the domain of law and legal analysis, the epistemic and semantic concepts of *truth* and *knowledge* can only give effect to *qualified*, *conditional*, or *provisional* knowledge that is by necessity relative to, and determined by, a set of theory-laden premises that define the constitution of law with reference to the *ontological*, *epistemological*, *methodological*, *logico-conceptual*, *axiological*, and possibly other commitments involved.

The frame of legal analysis adopted determines the semantic qualities of a legal assertion on how to construct and read the law in terms of the *reference/extension* and *sense/intension*, or the *truth-value* and *meaning-content*, of the said assertion. The truth of a legal assertion to the effect that "the content of law vis-à-vis fact-constellation F_N is x" is conditional on a set of *truth-constituting* premises, defined by the ideologies of *bound*, *legal and rational*, and *free* judicial decision-making by Jerzy Wróblewski and the frames of legal analysis discerned under them. Due to the essentially contested character of law, none of the frames of analysis discerned may claim absolute authority or priority position vis-à-vis the other alternatives, even if the frames of analysis situated under the legal and rational ideology do gain more weight than the bound and free alternatives in the modern law.

To put it concisely, the semantic qualities of an assertion on how to construct and read the law can be depicted as follows[2]:

The *reference* (Frege) or *extension* (Carnap) of a legal assertion is equal to one of the following alternatives:

[1] The same goes for any feasible definition of post-modern law with at least as good a reason, no matter what specific reading is attached to the fuzzy, problematic attribute *post-modern*.

[2] In the text, the sub-index "L" refers to the *legal* elements in the sense of the institutional (and partly societal) tenets, the sub-index "F" to the *formal* elements, and the sub-index "S" to the *substantive* or axiological-teleological elements involved.

(a) The *institutional* truth-value "true$_L$" or "false$_L$", if the constitutive premises of the ideology of *legal and rational* judicial decision-making have been adopted, specified as:

(a/1) a relation of mutual match, reciprocal support, common alignment, absence of dissonance, and/or shared congruence vis-à-vis one another of arguments drawn from the institutional and non-institutional sources of law, according to the *coherence theory of law*;
(a/2) approval or disapproval of the methods and outcome of legal argumentation at the intended universal audience, defined as a subjective thought construct of the speaker, according to the Perelmanian *new rhetoric*;
(a/3) retracing, as authentically as is possible, the original intentions of the legislator or court of justice, as reconstructed in light of the official *travaux préparatoires* at the back of an item of legislation or the express reasons given in support of a precedent, according to *legal exegesis*;
(a/4) the evolvement of such legal rights and duties that enjoy effective protection at the courts of justice and other officials, as judged in light of the normative ideology collectively internalized by the judiciary *sensu largo*, according to *analytical legal realism*;
(a/5) the acceptance or recognition of certain social phenomena as having legal significance or the prevalence of mutual expectations and cooperative dispositions to the said effect in the legal community, according to *legal conventionalism*.

(b) The *formal* truth-value "true$_F$" or "false$_F$", if the constitutive premises of the ideology of *bound* judicial decision-making have been adopted, specified as:

(b/1) 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 existing in the world, according to the *isomorphic theory of law*;
(b/2) the logico-conceptual and systemic criteria of law, according to *legal formalism*.

(c) The *substantive* truth-value "true$_S$" or "false$_S$", if the constitutive premises of the ideology of *free* judicial decision-making have been adopted, specified as:

(c/1) the external consequences of law in society, as judged in light of the (other) human or social sciences, according to *social consequentialism*;
(c/2) absolute social or religious justice or political morality under which all legislation and judicial decisions must yield, according to *natural law philosophy*;
(c/3) social justice taken on a strictly ad hoc basis, in denial of any meta-level theory, or meta-narrative, of law and society, according to *radical decisionism*.

The *sense* (Frege) or *intension* (Carnap) of a legal sentence, in turn, is equal to the specific *meaning-content* of law, as determined by the bound (formal), legal and rational (institutional), or free (substantive) frame of legal analysis.

13.2 The Logico-Conceptual Constitution, Normative Ontology, and Structural Axiology of Law

Legal rules and principles regulate society, or "something" in society, but what is it that the law seeks to regulate? What is the *ontological constitution* of law or the "things", objects, entities, or artefacts that form the "furniture of the world" within the realm of law? The law entails a set of commitments that constitute the alleged *reality structure* of law with reference to "on what there is" in the law. The metaphysical commitments of law may comprise three types of elements: the *logico-linguistic constitution*, *normative ontology*, and *structural axiology* of law. Taken together, they provide the "nuts and bolts" of the legal universe, i.e. the ontological edifice of the law and legal phenomena as conceived by the "order of things" in the legal community.

For the first, the *logico-conceptual constitution* of law comprises the various ways of conceptualizing legal phenomena with the conceptual categories and legal doctrinal constructions based on such linguistic devices. For instance, the conceptual domain of the law can be defined with a set of mutually correlative legal rights and duties, as notably outlined by Wesley Newcomb Hohfeld for the concept of legal ownership. The legal doctrine of ownership and the legal position of the owner of certain object of property can be defined with the four *right-concepts* (right, privilege, power, and immunity) and the correlative *duty-concepts* (duty, "no-right", liability, and disability). Hohfeld's conceptual scheme can be presented in the form of the set of legal correlatives and legal opposites.[3] The legal position of A, the owner of property item *x*, has no semantic reference except for the system of rights and duties as laid down by the law so that the right-positions occupied by A are matched with a corresponding duty-positions occupied by another person B, as defined by the valid legal rules of the legal system concerned.

Alternatively, Georg Friedrich Puchta's idea of the genealogy, or pyramid, of legal concepts (*Genealogie der Begriffe*, *Begriffspyramide*) might be adopted to the effect of establishing a highly systemic conception of the mutual relations of law, logic, and language. Finally, as a third example of how to outline the logico-conceptual edifice of law is Thomas Wilhelmsson's idea of switching over to *concrete*, *person-related*, and *situational* concepts in the legal doctrine, such as the concept of a debtor who has been affected by some grave, unexpected economic misfortune, like serious illness or unemployment, which outcome is not due to his own fault. Wilhelmsson downgrades the role of traditional abstract and relational

[3]Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, p. 35 et seq., and summarizingly p. 36.

role concepts (à la Hohfeld and Puchta) in legal analysis, in the image of the debtor/creditor or employer/employee cut off from the economic or other non-legal circumstances that might affect the social position of the legal subject concerned.[4]

There is no one right way of conceptualizing the legal phenomena, even if Hohfeld's model of mutually interlocking, relational concepts would seem to be predominant at present.

The ontological commitments of law and legal analysis comprise two categories, the one aligned with legal *norms* or the like entities under the *normative ontology* of law, and the other aligned with the inherent *value* element in law under the *structural axiology* of law. The issues of normative ontology and structural axiology of law are intertwined in the domain of law.

For the second, the *normative ontology* of law comprises the ontological commitments of law, with reference to the "things", phenomena, states of affairs, or entities that dwell in the domain of law. The normative ontology of law may be defined e.g. with the following entities, if the Hohfeldian approach, as modified by legal principles, is acknowledged:

(a) a system of correlative *legal rights* and *legal duties* as allocated to individual legal subjects, as envisioned by W. N. Hohfeld;
(b) a set of *legal rules*, as laid down by the law-making and law-applying authorities, and *legal principles*, as endowed with possibly no more than oblique but still legally adequate institutional support and a sense of approval in the community;
(c) subsequently retraceable individual decisions made by the law-making and law-applying authorities and well-settled societal practices and usages in the legal community, as manifested in the institutional and non-institutional, i.e. societal, *sources of law*;
(d) *social values & collective goals* at the back of legal rules and legal principles, as acknowledged in the institutional and non-institutional sources of law.

Legal rules are formally valid arguments for legal decision-making that are primarily based on individual, subsequently retraceable decisions made by the law-making and law-applying authorities, i.e. the parliamentary legislator, the courts of justice, and other officials. *Legal principles*, in turn, are valid arguments for legal decision-making that are primarily based on the well-settled practices and usages of customary law in the community, such as decisions given by various kinds of private or semi-official arbitration boards or the code of professional ethics and well-esteemed legal standards adopted by the legal profession or some fraction of it.

An argument is *valid* in the present sense of the term, if it can be derived from, and traced back to, the institutional or non-institutional sources of law and if it is given some legal value in the community. Different frames of analysis on how to construct and read the law give different weights to different combinations of legal

[4] Wilhelmsson, *Social civilrätt*.

rules and legal principles, and to the various institutional and societal premises, plus the social values and collective goals, at the back of such rules and principles.

Finally, the *structural axiology* of law looks upon the law from the point of view of the *social values* and *goals* entailed in the sources of law. It also comprises the inherent potential of such values and goals of being transformed into value-laden legal principles, if they come to satisfy the twin criterion of enjoying institutional support and a sense of approval in the community, or possibly further into legal rules, if they become incorporated in, and acknowledged by, individual decisions given by the institutional law-making or law-applying authorities in the legal community.

Of the various facets of law and metaphysics, the *logico-conceptual constitution* of law looks upon the issue from the point of view of logic and linguistics. The *normative ontology* of law is aligned with on what there is in the realm of law, i.e. the "nuts and bolts" of the legal universe. Finally, the *structural axiology* of law places the focus on the inherently value-laden characteristics of the law. To put it concisely, the bound, legal and rational, and free ideologies of judicial decision-making, as outlined by Jerzy Wróblewski, along with the elements of the logico-linguistic constitution, normative ontology, and structural axiology of law can be presented with Diagram 13.1.

The diagram above depicts the *bound*, *legal and rational*, and *free* ideologies of judicial decision-making by Jerzy Wróblewski, with approximate match with the isomorphic, semantically ambiguous, and totally unregulated legal decision-making situations by Kaarle Makkonen. Each of the three ideologies of judicial decision-making entails several sub-categories that, due to lack of space, are not depicted here. Thus, the ideology of legal and rational judicial decision-making would comprise the coherence theory of law, the new rhetoric, analytical legal positivism and legal exegesis with either legislative or judicial bent, analytical legal realism, and philosophical conventionalism in the field of law. The ideology of bound judicial decision-making would comprise an isomorphic theory of law and legal formalism. The ideology of free judicial decision-making would entail social consequentialism, natural law philosophy, and radical ad hoc based decisionism.

The ideology of *bound* judicial decision-making occupies the upper left-hand side corner of the diagram, with reference to the logico-formal and systemic criteria of how to construct and read the law. The ideology of *free* judicial decision-making occupies the lower right-hand side corner of the diagram, with reference to the openly axiological and teleological criteria in the construction and interpretation of the law. Finally, the mid-area in-between the bound (formal) and the free (substantive) alternatives is occupied by the ideology of *legal and rational* judicial decision-making, with reference to the (predominantly) institutional and (supplementarily) societal criteria of legal argumentation.

The formal tenets of law predominate at the left-hand side of the diagram, and their impact is intensified towards the left-hand side upper corner of the diagram. The substantive characteristics of law predominate at the right-hand side of the diagram, and their impact is intensified towards the right lower corner of the diagram. The legal and rational ideology of law, in turn, is a combination

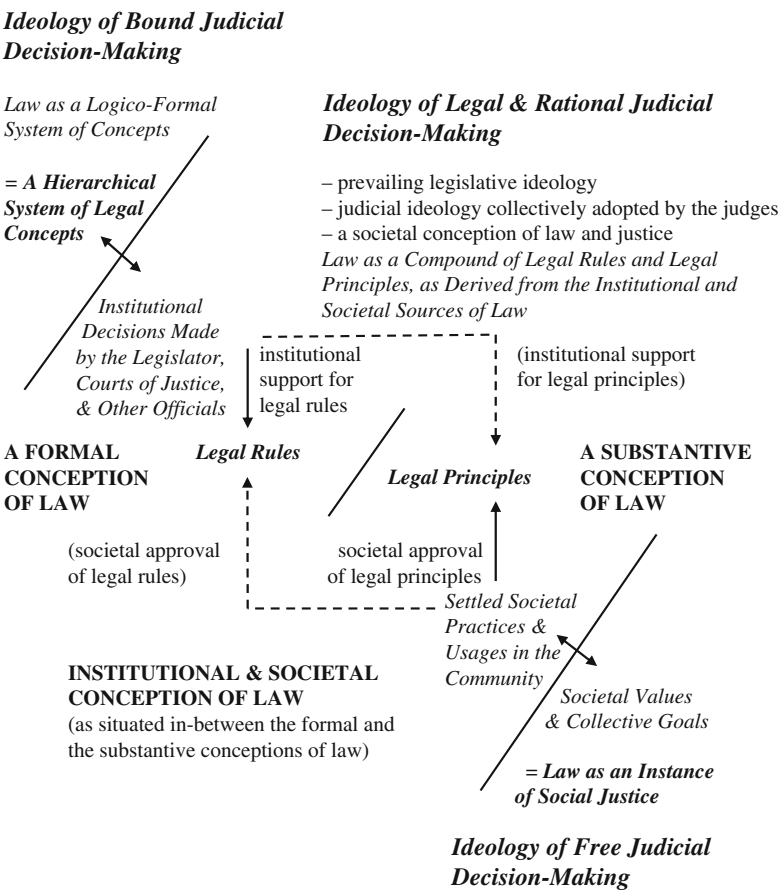

Diagram 13.1 The ideologies of bound, legal and rational, and free judicial decision-making, along with the logico-linguistic constitution, normative ontology, and structural axiology of law, and with coverage of the legal concepts, legal rules and legal principles, and societal values and collective goals entailed

of moderately formal and moderately substantive tenets of law. The institutional sources of law and rule-bound arguments drawn from them are the more formal, or source-oriented, constitutive elements of law; whereas the non-institutional sources of law and principle-aligned arguments drawn from them are the more substantive, or content-oriented, constitutive elements of the law.

Legal *rules* are formally valid arguments in legal decision-making, primarily based on decisions made by the law-making and law-applying authorities. According to H. L. A. Hart, they can be identified by their formal source of origin, as captured in the rule of recognition of the legal system concerned. Nevertheless, even legal rules need to enjoy some degree of content-based approval in the legal community, since a rule that is deemed grossly unjust would fall into disuse by the officials

and citizens alike, despite having perfectly formal validity ground in legislation or judicial decision-making. In such a case, we are dealing with an instance of a *desuetudo*.

Legal *principles* are value-laden, context-sensitive arguments in legal decision-making that are primarily based on the well-settled societal practices and usages that are commonly approved in the legal community of legal professionals, some other professional group, or the legal community at large. As pointed out by Ronald Dworkin, legal principles need to enjoy a sense of content-based approval in the legal community. Since they are inherently intertwined with value-laden criteria, legal principles cannot be identified by their formal source of origin only. What is more, they must enjoy some kind of institutional support so as to qualify as properly *legal* principles and not principles of, say, morality or religion.

The distinctive manner of "being-in-the-world" of the legal phenomena may be collected under the three headings of the logico-conceptual constitution, normative ontology, and structural axiology of law. Taken together, they account for the distinctive metaphysics of law under the *épistémè*, or *order of things*, in Michel Foucault's sense of the term.[5]

The *logical constitution* or, in wider terms, the *logico-conceptual constitution* of law naturally comprises the logical and linguistic commitments of law and legal analysis, with reference to the *logical syntax* of a legal language, as suggested by Rudolf Carnap for the language in general.[6] The *normative ontology* of law entails the "nuts and bolts" or elementary "building blocks" of the law, such as legal rights and duties; legal rules and principles; institutional and societal sources of law; or social values and collective goals entailed in the former. Finally, the *structural axiology* of law comprises the axiological commitments of law in the form of social values and collective goals acknowledged in law.

Different characteristics of legal metaphysics gain weight under the different ideologies or situations of judicial decision-making.

The logical syntax of law is aligned with the *formal* tenets of law, as manifested in Wróblewski's *bound* judicial ideology and Makkonen's *isomorphic* situation of legal decision-making. The normative ontology of law underscores the *institutional* tenets of law, as manifested in Wróblewski's *legal and rational* judicial ideology and Makkonen's *semantically ambiguous* situation of legal decision-making. Finally, the structural axiology of law is aligned with the *substantive* tenets of law, as manifested in Wróblewski's *free* judicial ideology and Makkonen's *unregulated* situation of legal decision-making.

Still, also the logico-linguistic tenets and the axiological premises of law require some ontological frame to pin down the legal concepts and social values of law into "something" in the reality. Similarly, the axiological value commitments and the institutional prerequisites of law require some logico-linguistic formulation to be taken into account in the legal analysis. Finally, the conceptual frame and the

[5] Foucault, *Les mots et les choses.*

[6] Carnap, *The Logical Syntax of Language*.

ontological entities of law need to sustain some kind of relation to the value premises at the back of the law so as to reach the axiological element inherent in law.

13.3 A Systemic Order of Things Among the Rules and Principles of Law

As Oliver Wendell Holmes once sardonically noted, the traditional idea of the American common law is "a chaos with a full index".[7] If, however, the legal system is deemed to be something else than a mere chaotic heap of haphazard, overlapping, and zigzagging legal rules, principles, standards, precepts, or whatever "things" are thought to inhabit the legal universe, we need to somehow account for the phenomenon of *legal systematics* as a systemic "order of things" among such rules, principles, and standards of law. In fact, to successfully carry out the task of legal interpretation requires first having *some* working conception of legal systematics.

It is a task for *theoretical* legal doctrine to analyse the systemic order of things among the rules and principles of law, while it is a task for *practical* legal doctrine to provide arguments for the interpretation of law vis-à-vis particular fact-constellations of either actual or merely hypothetical kind.[8] Taken together, the theoretical and practical aspects of the legal doctrine account for the task of how to construct and read the law vis-à-vis various feasible fact-constellations, as either come into existence in the world or as merely configured in the legal imagination of a legal scholar. Yet, a judge or other official engaged in the application of law rarely, if ever, seeks to enforce some specific notion of legal systematics as a goal to be attained as such. His passion for legal knowledge is far more concrete, having to do with the facts of the case at hand and the legal consequences to be attached to them by force of law.

According to the two Argentinian scholars, Carlos Alchourrón (1931–1996) and Eugenio Bulygin, legal systematization can be defined as the *reformulation* of the original normative system, or the "basis", that was initially laid down by the legislator[9]:

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[7] The phrase is commonly attributed to Thomas Erskine Holland. Cf. Holland, *Essays on the Form of the Law* (London, 1870), as cited in Reimann, "Holmes's *Common Law* and German Legal Science", p. 114.

[8] On the two notions of theoretical and practical legal doctrine (or legal dogmatics), cf. Aarnio, *The Rational as Reasonable*, pp. 14–15, and the reference entailed.

[9] Alchourrón and Bulygin, *Normative Systems*, p. 79. (Italics added.) – Cf.: "*Reformulation of the system*: consisting in the substitution for the original basis of another one. This usually occurs when the number of sentences in the basis is very large. The replacement of a very extensive basis by another that is more restricted but deontically equivalent is considered by jurists to be an advantage, since applying the system thereby becomes simpler. On the other hand, this operation does not modify the system itself but only its representation. Frequently when jurists speak about the systematization of the law, they mean precisely what we call reformulation of the basis." Alchourrón and Bulygin, *Normative Systems*, p. 71 (italics in the original). – Cf.: "We have characterized a legal system as a normative system whose basis is composed of legal sentences. The fact that jurists reformulate the basis of a system, substituting some sentences for others, does not

> Generally speaking, the reformulation of a system consists in the replacement of the basis by a new one, that is *less extensive*, *more general* and *normatively equivalent*.

Alchourrón and Bulygin define legal systematization with the requirement of *normative equivalence* of the two normative systems, the "basis", or the basic, *original* system, as initially produced by the legislator, and the novel, *reformulated* system, as subsequently (re)produced by the legal science.[10] The novel, reformulated system is deemed to be *normatively equivalent* to the basic, original system, in the sense that the normative consequences entailed in it are equivalent to those entailed in the basic system, while the concepts utilized in the reformulated system are *less extensive* and *more general* than the ones utilized in the basic, original system. The requirement of *normative equivalence* of the two normative systems thus boils down to the requirement that the same normative consequences be attached to the same fact-constellations, or states of affairs, under the both.

As I see it, (the process of) legal systematization and (the outcome of) legal systematics can be defined in two distinct ways, the one *formal* and the other *substantive* in kind.

A *formal* notion of the process of legal systematization and the outcome of legal systematics legal systematics and systematization can be outlined in terms of Carnap's *method of extension and intension*, as now applied to Alchourrón's and Bulygin's requirement of the relation of *normative equivalence* between the two normative systems concerned. The extension of a sentence denotes its *truth-value*, and the intension of a sentence is equal to its specific *meaning-content*. A legal system S_n that consists of a set of legal rules and (possibly) legal principles can be depicted by a set of legal sentences to the said effect. As a consequence, the notion of *equivalence* of two normative systems, the basic, original system (S_{orig}) and the reformulated system (S_{refor}) can be defined as follows:

> The two normative systems (S_{orig}) and (S_{refor}) are *equivalent*, if and only if they are equivalent in extension and equivalent in intension. They are *equivalent in extension*, if and only if they obtain the same truth-value on the same values of variables; and they are *equivalent in intension*, if and only if they produce the same set of meaning-contents on the same values of variables.[11]

The requirement of such normative equivalence, though valid from the point of view of logic, will not exhaust the epistemic needs and expectations of the legal

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affect the identity of the system, provided that the new basis is *normatively equivalent* to the original. There is no change in that system, in the sense that its normative consequences remain the same." (Italics added.) – A solid account of Alchourrón's and Bulygin's conception of a normative system is in Aarnio, *Reason and Authority*, pp. 237–240.

[10] Alchourrón and Bulygin, *Normative Systems*, p. 80: "The requirement of *normative equivalence* is most important: only if the new basis has the same normative consequences as the original can we regard the result as the same system reformulated. If the new basis lacks some of the normative consequences of the original, or has new consequences, we are confronted not by the same system, but by a different one." (Italics in original.)

[11] The terms S_{orig} and S_{refor} of course refer to the *original* and the *reformulated* normative system, respectively.

profession, however. As a consequence, a *substantive* notion of (the process of) legal systematization and (the outcome of) legal systematics is needed, as well. It deals with the formation and internal structure of the legal doctrine, defined in terms of the *systemic weights* that are attached to the various legal rules and legal principles in a legal system. Enforcing a systemic *order of things* within a set of rules and principles signifies the act of determining the relative weight of each vis-à-vis all the other rules or principles that belong to the same normative system or some branch or sub-class of it.

Legal systematics in the substantive sense concerns the decision which legal rule (or rules) is given the status of the *predominant*, *leading*, or *main* rule (or rules) in some branch of law, to be applied frequently and in the vast majority of cases; and, conversely, which (other) rules are deemed as *exceptions* to the main rule, i.e. *supplementary* rules that are to be interpreted more strictly and applied in some less frequent or exceptional cases. Moreover, if defined in a wide sense of the term, legal systematics comprises even the decision which legal principle (or principles) is given the status of the *leading*, *major*, or *predominant* principle (or principles) in some branch of law and, respectively, which (other) principles are taken as no more than *receding*, *weak*, or *supplementary* principles of law, endowed with less argumentative force, an inclination to yield when contested by some predominant principle, and applied in a more constrained manner than the leading principle.

The term *systemic intensity* may be adopted to describe the inherent propensity of legal norms to satisfy such systemic qualities. In a set of legal principles, the level of systemic intensity is significantly lower than in a set of legal rules, due to the inherently less formal qualities of principles. Because of the weaker systemic intensity that may be attained in a set of legal principles, the very notion of a *legal system* would need to be weakened so as to cover legal principles, too. If so (re)defined, the concept of a legal system will be very different from the one adopted above by Alchourrón and Bulygin. At the same time, it would have better coverage vis-à-vis the contents of a legal system taken as a compound of both legal rules, valid due to their formal source of origin, and legal principles, endowed with legal weight because of the institutional support and sense of approval they enjoy in the community.

A legal system signifies the act of locking up a complex *priority order* for the *rule/rule*, *principle/principle*, and *rule/principle* combinations that may emerge within it, as captured in the *main rule/exceptions to the main rule* and the *leading principle/supplementary principles of law* categorizations in the legal system as a whole or in some specific branch of it.

Legal doctrine need not, and most often does not, aim at only satisfying the idea of legal systematization as a *reformulation* of the basic legislative system in another system that is "less extensive, more general and normatively equivalent" vis-à-vis the basic system, as argued above by Carlos Alchourrón and Eugenio Bulygin.[12] If

[12] Alchourrón and Bulygin, *Normative Systems*, p. 79. Cf. Aarnio, *Reason and Authority*, pp. 243–244.

that were the case, no novel normative results could ever be achieved through legal systematization, as the requirement of normative equivalence of the two normative systems, defined as the *equality in extension* and *equality in intension*, would effectively block any progress or alteration in legal analysis. Still, far more often lawyers aim at some *alteration*, *modification*, *refinement*, or *adaptation* of the basic system, so as to bring about some novel normative outcomes so as to have a better match with the changes in society. Such an act of systematization signifies a *redefinition* or *modification* of the basic system, and the novel normative system that is thereby brought into effect may be called a *redefined*, *revised*, or *modified* system, instead of the *reformulated* system à la Alchourón and Bulygin.

13.4 Textual Coherence, Institutional Authorities, and the Legal Community

In his essay "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", H. L. A. Hart situated American legal philosophy in the late 1970s between the two extremes of a *nightmare* vision of law, as represented by the legal realists, and the *noble dream*, as represented by Ronald Dworkin's idea of the law as a "seamless web of reasons", or a coherent collection of value-laden rules and principles of law.[13] Adopting one or the other of the extreme options for legal studies will have the effect of eradicating traditional legal doctrine and analytical jurisprudence from among the legal and social sciences, reducing it to an instance of politics (à la realists) or morality (à la Dworkin). Hart's own idea of the place for jurisprudence was safely in the middle, avoiding both the bleak cynicism of the realists and – in Hart's opinion – the unfounded idealism manifested by Dworkin.

Despite the claimed weaknesses of Hart's own methodological stance,[14] his impact on subsequent jurisprudence has been nothing short of tremendous.[15] Reminiscent of Hart's analysis, Brian Z. Tamanaha has looked upon the law in light of *legal formalism* and *social consequentialism* or a *non-instrumentalist* and

[13]Hart's poetic depiction of Dworkin as the "noblest dreamer" of them all, i.e. the prime idealist among the legal philosophers, is of course an allusion to Shakespeare's play *Julius Caesar*. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", p. 137. Hart refers to the sarcastic speech given by Marc Anthony, a friend of Caesar's, after Caesar's cruel murder by the conspirators, with Brutus among them: "This was the noblest Roman of them all:/All the conspirators, save only he,/Did that they did in envy of great Caesar;/He, only in a general honest thought/And common good to all, made one of them." (William Shakespeare: *Julius Caesar*, Act 5, scene 5, 68–72.)

[14]Hart own depiction of his methodology as *descriptive sociology* in the preface of *The Concept of Law* in specific has invited criticism from the scholars acquainted with the social sciences and the sociological approach to law in general. Hart, *The Concept of Law* (1961), p. V.

[15]For instance, a recent anthology on the methodology of legal theory focuses solely on Hart's influence on jurisprudence and the responses to it by other scholars. Cf. Giudice, Waluchow, and Del Mar, *The Methodology of Legal Theory, Vol. 1*.

an *instrumentalist* conception of law.[16] Other authors, too, have voiced similar thoughts. Indeed, it seems that the fate of the modern or postmodern law is to be trapped in-between the two alternatives of bleak *cynicism* and naïve *idealism* (Hart), or text-oriented legal *formalism* and socially oriented legal *realism* (Tamanaha), or all-inclusive *apology* and unfounded *utopia* in argumentation in the field of international law (Koskenniemi).[17] Above, a similar sounding dichotomy was given in terms of the *bound* and the *free* ideologies of judicial decision-making (Wróblewski) and the *isomorphic* and the *unregulated* situations of legal discretion (Makkonen).

Rejecting the two extremes of barren formalism and excessive social realism in neglect of the institutional tenets of law, I prefer to configure the prerequisites of modern law, legal analysis, and legal argumentation in terms of Wróblewski's ideology of legal and rational judicial decision-making and the three constitutive elements involved: (a) the *institutional authorities* engaged in the task of legislation and legal adjudication, i.e. the parliamentary legislator, courts of justice, and other legal officials; (b) the set of institutional and non-institutional *sources of law*, as produced by the official state authorities vis-à-vis the institutional sources and by the legal professionals and legal community at large vis-à-vis the societal sources; and finally (c) the *legal community* that has the last word on the merits and shortcomings of any proposed method and outcomes of legal argumentation. Different combinations of the five frames of legal analysis discerned yield different outcomes as to how to construct and read the law, but the aimed satisfaction of the twin requirement of *legality* and *rationality* in legal discretion guarantees that the impact of at least some of such tenets be acknowledged.

As was argued above, the *coherence theory of law* is focused on the mutually converging relations that are thought to prevail among the institutional and non-institutional, or societal, sources of law, placing the emphasis on the textual and coherence-enhancing tenets of law in legal reasoning. Institutional authorities and the legal source material produced by them gain the most significance under such premises of legal reasoning. *Legal exegesis*, in association with *analytical legal positivism*, and *analytical legal realism* both underscore the role of institutional authorities in shaping the law, with reference to the role of the parliamentary legislator in legal exegesis and the courts of justice and other legal officials in analytical legal realism. In the *new rhetoric* and *legal conventionalism*, the role of the legal community is given prime importance.

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[16] On the two notions of legal formalism and social consequentialism, Tamanaha, *Beyond the Formalist-Realist Debate: The Role of Politics in Judging*; on instrumentalist and non-instrumentalist conceptions of law, Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*. – Interestingly, Brian Z. Tamanaha seeks to combine traditional analytical legal positivism (à la Hart) with the social and realistic tenets of modern law under "a socio-legal positivist approach to the law" or "realistic socio-legal theory". Tamanaha, *A General Jurisprudence of Law and Society*, p. 133 et seq; Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, p. 129 et seq.

[17] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument.*

In all, legal argumentation is a form of *deliberative practice* that takes place under three different types of constraints:

(a) the *textual* constraints provided by the text-based sources of law and the canons of methodology applied to them;
(b) the *institutional* constraints provided by the institutional authorities, such as the legislator and the courts of justice, involved in the task of creating, altering, and derogating the legal norms in force;
(c) the *community-aligned* constraints provided by the legal community on the legitimacy of the outcome of legal construction and interpretation.

The issues of textual coherence, the decision-making power of the institutional authorities, and the role accorded to the legal community each have a (shifting) position under Jerzy Wróblewski's ideology of legal and rational judicial decision-making. The weight given to each element depends on the particular frame of legal analysis adopted.

13.5 (Is There) A Future for Analytical Jurisprudence?

Several profound changes have taken place in the conception of modern law and society, when viewed on a global scale, affecting the mode of legal analysis.

For the first, the role of various kinds of legal instruments with only loose connection to the will of the parliamentary legislator have to a great extent been enhanced in society. The role of *judge-made*, *precedent-based* law has increased and the role of traditional legislation has slightly declined even in the Continental and Nordic legal systems that have traditionally been based on the primacy of parliamentary legislation. That development is mostly due to the impact of *multinational* and *transnational* law that is manifested in the precedents given by the two European courts, viz. the Court of the European Union and the European Court of Human Rights.

The effected change in the relative weight given to national legislation and to multinational precedents with cross-border legal effects has induced a similar change in the concept of law as well. The effected law in action at the courts, as proffered by *legal realism*, has gained more weight, while the positivist notion of law has been in parallel decline, no matter whether the law has been defined as sanction-based orders as issued by the sovereign ruler (Austin); a hierarchical system of norms whose legal validity is based on the transcendental-logical *Grundnorm* (Kelsen); or a set of rules that can be identified with the rule of recognition for the legislative norms, being of the type "what the Queen in Parliament enacts is (valid) law in England" (Hart).

For the second, the role of the *non-institutional*, i.e. societal or community-based law has been strengthened by the recent technological changes. The breakthrough of novel digital communication technology, data copying and transfer with no

loss of data in the process, global network systems like the Internet and the platforms of social media incorporated in it, and the administration of global net site domain addresses and protocols have more with the non-institutional than the institutional law to do. As a consequence, legal *conventionalism* that is based on common acceptance or recognition of certain social phenomena as having legal significance has gained ground at the cost of the institutional facets of law that the positivist and the realist approaches underscore. There are other tenets, too, that lay the emphasis on the societal, community-aligned, and non-institutional tenets in law at the cost of the state-bound, institutional law with either legislative or judicial bent.

In business law transactions, recourse to litigation in ordinary courts is frequently ruled out by arbitration clauses to the said effect. Such manifestations of a discretionary, *negotiable* law clearly belong to the sphere of community-aligned, societal law even though the very possibility of dispositive law is based on the express or tacit will of the legislator. In a similar manner, semi-autonomous *self-regulation* by some profession in society, like the attorneys-at-law, bookkeepers, or auditors, gives effect to a societal, community-based notion of law. *Soft law*, in turn, refers to the recommendations, guidelines, and qualification standards that are issued by the officials or professionals of a certain field. Soft law standards may still have a great de facto bearing on the issues covered by them, despite the fact that they do not have formal mandatory force or authorized standing.

The attainment of all-inclusive *cohesion* or *coherence* in a collection of norms derived from the fields of transnational or multinational law, judge-made law, negotiable law, legal self-regulation, and soft law is harder than in the officially promulgated, institutional law, due to the weaker systemic characteristics of the former category of legal norms, or "proto-norms" if taken as raw material for the legal norms proper. Constructing the subject-related intended *universal* audience vis-à-vis such norms is not easy either, if the thought construct of a universal audience is defined with the shared form of life and the possibility of reasoned value-consensus or, at the least, reasoned majority stance on values among those concerned, as Aulis Aarnio's theory of legal argumentation would require.[18] In all, the future of modern law would seem to have more to do with a fragmented dissensus than an overarching consensus as to the basic values and other facets of the common form of life.

For the third, the highly unexpected rise of *religion* and religious values in the world is bound to induce some thorny issues for the future law. Religion may or may not be anchored in the premises of traditional natural law philosophy, depending on what kind of religious values and convictions we are dealing with. Islamic values will not match well with classic natural law philosophy by Thomas Aquinas or the more modern one proffered by John Finnis. The impact of religion will seek to provide religious answers to social issues, no matter whether we are dealing with the freedom of speech and press, the neutrality or commitment of public education vis-à-vis the religious and other convictions, or the regulation of public space in society in general.

[18] Aarnio, *The Rational as Reasonable*, p. 221 et seq.

Fourthly, the impact of both backward-looking textual formalism and future-oriented social consequentialism can be felt within modern law, putting pressure upon the judges on how to construct and read the law from the point of view of textual authenticity and the rule of law ideology, on the one hand, and sensitivity to the entirely novel issues that may quite unexpectedly surface in society, on the other.[19] Here, the *instrumentalist* tenets of law seem to be gaining ground at the cost of the inherent logic of the law, as manifested in the variety of legal formalism and also in the Marxist conception of law and society.[20]

The modern law is certainly not in the midst of "withering away" by force of the irrevocable progress of class-consciousness and the dismantling of the forces of economic production in society, as the Marxists would have it. Quite on the contrary, the place of law in the Western world is stronger and safer than ever, due to the multi-faceted process of European legal integration, the effected state treaties on the protection of the human rights and the procedures for their enforcement in national courts and the European Court of Human Rights in specific, provisions to a similar effect incorporated in the national constitutions, and the enhanced progression of globalization where the need for legal rules and principles is badly felt. Though to a great extent economic in its hue, the current situation with the law in society will not easily yield to the categories and models of a Marxist analysis. Rather, an openly Marxist approach has been bracketed with the fall of the leftist option in politics in all the Western societies and to a great extent in the former Eastern Europe, as well. The winner of this round is not to be found among the ideological heirs of Karl Marx and Georg Lukács, but among "the men of statistics and the masters of economics", as Oliver Wendell Holmes put it at the end of the nineteenth century.

Finally, to judge the value of some fresh approach, methodology, or stance in law and legal analysis one will need to have recourse to a non-biased, ideologically neutral platform for the judgment. It is still one of the strengths of *analytical jurisprudence* that it can easily incorporate a great variety of different models, approaches, or ideologies of law for an impartial judgment. What Kelsen so confidently wrote of the essentially value-free, ideologically open character of the pure theory of law, turning the critique it had received from various directions into its profit, is a valid methodological *credo* for legal analysis, today and in future.[21] Though analytical jurisprudence has been declared dead and buried for long by some of its most passionate critics, its future looks safe enough as long as the need survives in society to find a reasoned answer to the core issue of the legal doctrine: *from the point of view of the law, how is the state of affairs* x *to be judged?*

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[19] On the notion of rational acceptability in legal argumentation, Aarnio, *The Rational as Reasonable*, passim; on the unpredictable element in the EU law, Wilhelmsson, "Jack-in-the-Box Theory of European Community Law".

[20] The Marxist ideology of law and society was not considered above, except briefly in Section 5.4. "'Why Efficiency?' – A Critical Evaluation of the Economic Analysis of Law, with Brief Comments on the Marxist Theory of Law", since the Marxist approach does not entail a consistent theory of legal argumentation.

[21] Kelsen, *Reine Rechtslehre* (1960), p. V; Kelsen, *Reine Rechtslehre* (1934), pp. XII–XIII.

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Name Index

Subject Index

Note: The letter 'n' following the locators refer to notes cited in the text.