NORWEGIAN LEGAL REALISM SINCE 1945

BY

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Norwegian legal realism may be viewed as part of Scandinavian legal realism. It gathers within it themes taken partly from what is called the "Uppsala School" (Axel Hägerström, Ingemar Hedenius, Vilhelm Lundstedt, Karl Olivecrona in Sweden, Alf Ross in Denmark), partly from American legal realism from Oliver Wendell Holmes to Roscoe Pound, and partly from the Norwegian realistic tradition which originates with Anton Martin Schweigaard and is carried further by among others Fredrik Stang jr, G. Astrup Hoel and Ragnar Knoph.

This presentation of post-war realism in Norwegian jurisprudence will be limited to three legal theorists: Torstein Eckhoff, Vilhelm Aubert and Carsten Smith. In this way an attempt will be made to shed light on legal realism in its different versions: as philosophy of law, as sociology of law and as legal doctrine.

PHILOSOPHICAL LEGAL REALISM

As a philosophical position legal realism was elaborated in line with the fundamental philosophical view in Scandinavian realism, namely the Vienna Circle's doctrine of logical empiricism and thus the belief in the unity of science. From this viewpoint all science is either analysis of a logico-mathematical kind (the internal consistency of concepts) or knowledge based on empirical facts. The perspective of logical empiricism was the defeat of metaphysics. Thus, it rejected not only theology and large parts of traditional philosophy but also significant parts of the traditional sciences concerning man and society.

Alf Ross understood legal science in conformity with the logical empiricist concept of "the nature, task and method of science".[1] Since from a scientific point of view there is only one world and one form of knowledge—the world of the senses and knowledge through the senses—normative statements of the type "Thou shalt not kill" or "This system is just", which do not refer to any body of empirical fact, must be rejected as being scientifically meaningless utterances. For Ross, legal science is

[1] A. Ross, *Om ret og retfærdighed* (On Law and Justice), Copenhagen 1953, p. 82.

in the final instance "a branch of knowledge concerning social phenomena", and the task of the philosophy of law is "to assess the validity of law as social efficiency". The question of the normative validity of positive law is a "metaphysical construction" and thus uninteresting to legal science. On the same grounds Ross rejects the two major branches of the normative theory—natural law and utilitarianism. Ross exposes natural law as nothing but a"a dogmatic and pathetic expression for the given conception of morals and justice at any time".[2] It is true that utilitarianism with its requirement that an action should be judged on the basis of its consequences implies a "step towards a realistic theory of lasting value",[3] but at the end of the day utilitarianism is also rejected as being a form of "crypto-natural law".[4] Both natural law and "crypto-natural law" must in the end be given a psychological interpretation as "a manifestation of the need of the conscience for an absolute principle of action which can relieve man of the agony of decision."[5]

Ross was thus very radical in his antinormativism. Ross' Norwegian disciples followed their master in the rejection of natural law but interestingly enough not of utilitarianism. In a debate on legal philosophy concerning "realism" and "idealism" with Frede Castberg in the early fifties, Torstein Eckhoff gave a summary of his defence in principle of realism. According to Eckhoff a central tenet in legal realism is "that law forms a part of the reality we perceive with our senses". Law consists, says Eckhoff, of "words and actions, feeling and thoughts which may be investigated and described in the same way as other psychological and sociological facts".[6] People's notions that something is right or wrong, just or unjust, forbidden or permitted to have meaning in a scientific context only if they are considered as notions that may be explained on the basis of "the world which we perceive with our senses". Like moral norms, the normative statements of law are postulates in the sense that they cannot be justified rationally beyond reference to "current law", i.e. that an administrative decision is "valid", or that a judgement is in conformity with existing law and legal practice. The validity of legal norms can be set up as a postulate—beyond that it is a purely sociological question: whether or not the legal norms are in fact generally

[2] *Ibid.*, p. 375.
[3] *Ibid.*, p. 378.
[4] A. Ross, "Nogle træk af naturrettens historie" (Some aspects of the history of natural law), *TfR* 1953, pp. 31f.
[5] *Om ret og retfærdighed*, p. 382.
[6] T. Eckhoff, "'Realisme' og 'idealisme' i rettsvitenskapen" ("Realism" and "idealism" in the science of law), *Jussens Venner*, 1954, p. 37.

respected in a particular society, whether it is in fact the case that there is a relatively high degree of agreement among jurists that a particular set of norms shall be used as a basis in a society, etc.

However, even at this early stage Eckhoff's anti-metaphysical legal realism has a more pragmatic touch than Ross' militant struggle against intellectual "infantilism".[7] The difference between realism and idealism, says Eckhoff, may rest upon differences in *the use of language*: "The fact that for my part I prefer the realistic rather than the idealistic is because I can more easily understand it, and because it is better suited to discussing such questions as I find interesting. The realistic use of language also has the advantage that it more effectively than the idealistic keeps religious and magical notions at a distance."[8]

Throughout all his writings on legal philosophy Eckhoff has maintained the realistic rejection of the question of validity as being something which could be made the object of rational knowledge. In his article "Ross om rettskilder og rett" (Ross on the sources of law and law), Eckhoff refers to Ross' distinction between *experiences* of validity and the *normative* notion of validity. The experiences of validity belong in the real world—even if they might be notions *about* something unreal or imagined to be real; the notion of the "supra-sensory" obligation of law, however, does not. "I remain like Ross", Eckhoff writes, "very sceptical of the notions of such a 'validity'."[9]

As a philosophical standpoint the attack from Norwegian legal realism was directed at natural law, with Frede Castberg as a relatively lone wolf in natural law during this period.[10] In his various contributions over the years Eckhoff is basically negative in principle to the argumentation of natural law. In particular, the tendency of natural law to objectify moral judgements is rejected. Thus, it is not from a positivist point of view that Eckhoff criticises natural law; his point is not at all to refute the subjective element in legal practice. Eckhoff's theory is based on a positivist theory of knowledge, but his legal realism is not legal positivist. Indeed, it is more the opposite, since he has emphasized that subjective evaluation necessarily follows law at its different stages, from legislation,

[7] "Nogle træk af naturrettens historie", p. 8.

[8] Eckhoff, *op.cit.* p. 41.

[9] T. Eckhoff, "Ross om rettskilder og rett" (Ross on sources of law and law), *TfR*, 1987, p. 205.

[10] See for example Frede Castberg, *Forelesninger i rettsfilosofi* (Lectures in the philosophy), Oslo, 1965. Castberg was not entirely alone—in this respect see C.J. Arnholm, "Naturrecht, Widerstandsrecht und Widerstandspflicht" in *Legal Essays*, Festschrift for Frede Castberg, Oslo, 1963, p. 23f.

through legal doctrines to the application of law. Eckhoff's line of thinking is that through the creation of awareness of the place of subjective evaluation in the system, these evaluations can be brought to light and in this way made the object of open debate. Thus, in this sense Eckhoff recognises the question of the validity of positive law as central, though inaccessible to rational scientific analysis.

This normative question becomes acute when one is confronted with positive law, statutes or decisions, in conflict with one's own deepest convictions. There are, says Eckhoff, "certain limits to how far obedience to the law should extend", but the determination of such limits has the character of nothing but "a personal declaration of faith" that there are certain values that one rates more highly than obedience to the law.[11] Such an attitude in the form of civil disobedience, for instance, cannot be based on a "*knowledge* that there are legal norms which have another basis than positive law".[12] It is wholly and solely a question of subjective decision. Seen in this light Eckhoff represents a form of normative *decisionism*.

Yet it turns out that Eckhoff nevertheless does not maintain this subjective, decisionist point of view consistently in his analyses. In a discussion of the film about the judgments given at Nuremberg he concludes:

> "It appears to me that we do what is most right by accepting *certain absolute barriers* to our freedom of action. There ought to be *certain limits* to what we can permit ourselves to subject other people to—even if we reckon it to be fairly certain that in the long run this will have enormous consequences."[13]

However, a concept such as "absolute barriers" has no meaning if the absolute can be made relative to subjective evaluation—it presupposes that in one sense or another it is meaningful to speak of an objective norm. One finds another example of lack of consistency in his analysis of human rights. Many natural law norms, writes Eckhoff, have in the course of time been incorporated in positive law so that they have gradually acquired a purely positive law character. "But this has not been the way things have gone in the case of human rights," he points out. "In spite of the fact that they are incorporated in many positive law systems, the natural law tradition from which they originated has lived

[11] T. Eckhoff, *Rettferdighet og rettssikkerhet* (Justice and the rule of law), Oslo, 1966, p. 154f.

[12] T. Eckhoff, "Naturretten og dens historie" (Natural law and its history) in *Politiske idéer* (Political ideas), Department of the History of Ideas, University of Oslo, 1984, p. 5.

[13] *Rettferdighet og rettssikkerhet*, p. 157, italics added.

on—so that many of them can be said to have a double, *natural law and positive law*, basis."[14]

Eckhoff mentions in one connection that "For those who do *not* feel themselves unconditionally bound by positive law but regard it as a set of norms which must sometimes give way to other norms and values to which one attaches weight, there is less need to have any natural law as a counterbalance."[15] But surely this formulation reveals the limitation of legal realism's somewhat psychologising view of the significance of natural law? For does not Eckhoff show through his analysis of human rights that it is precisely the intersubjective binding to human rights as a supra-positive norm that in certain situations limits the bonds of positive law? Indeed, what else is the notion of the supra-positive validity of human rights but a notion of "supra-sensory obligation", which legal realism purported to have exposed as a "metaphysical construction"?

SOCIOLOGICAL LEGAL REALISM

The primary aim of sociological legal realism was the integration of legal studies and modern social science. The programme was formulated by Fredrik Stang jr in his final lecture in 1932: "If there are to be developments in the science of law, it must feel its connection with the other cultural sciences and let itself be fertilised by them. The connection with sociology is of course given ... But with the other cultural sciences as well, connections must be opened, or the connection there is must be extended. The period of a hundred years' isolation must be over ... Just think of the significance it would have if the psychological concepts we work with were corrected on the basis of modern realistic notions. Imagine a system of criminal law based on realistic psychology of the individual. And imagine a system of constitutional law confronted with the observations of modern mass psychology!"[16]

It is Stang's programme Vilhelm Aubert follows up in two important articles "Noen problemområder i rettssosiologien"[17] (Some problem areas in the sociology of law) and "Logisk analyse og sosiologi i rettsvitenskapen"[18] (Logical analysis and sociology in legal science). In these

[14] "Naturretten og dens historie", p. 17, italics added.

[15] T. Eckhoff, *Retten og samfunnet* (Law and society), Oslo, 1976, p. 165 (originally published in *Jussens Venner*, 1967).

[16] F. Stang, "Om rettsvidenskap" (On legal science), *TfR*, 1933, p. 131.

[17] V. Aubert, "Noen problemområder i rettssosiologien", *TfR*, 1948, p. 432ff.

[18] V. Aubert, "Logisk analyse og sosiologi i rettsvitenskapen" in *Skrifter tillägnade Vilhelm Lundstedt* (Writings dedicated to Vilhelm Lundstedt), *SvJT*, 1952, p. 524ff.

articles Aubert seeks to unite the Uppsala School's logical analysis of the concepts of law with the demand of American realism for empirical-sociological investigation of the function of law. The Uppsala School's "analytical clearing-up operation" concerning "the logical and terminological deficiencies of legal science" has provided "greater clarity and a more secure basis for legal methodology", Aubert maintains.[19] But in Aubert's estimation the Uppsala School placed too one-sided an emphasis on the logical analysis of legal language and thus it "overestimated the significance of terminological reforms alone".[20] In his opinion it is "even more important" to focus attention on the possibility of *new empirical material* for legal studies. Aubert's contention is that logically untenable or meaningless views can have a basis in reality of which account must be taken—not least if one has a politically radical aim in legal theory.

The philosophical horizon for Aubert is the same as for the Uppsala School, that is to say logical empiricism and its programme for the defeat of metaphysics. But the Uppsala School and Aubert each follow their own direction within the logical empiricist school. The Uppsala School transfers to legal science Rudolf Carnap's programme for the defeat of metaphysics by logical analysis of language; Aubert's sociology of law is on the other hand more in line with Arne Næss' programme for the defeat of metaphysics by empirical investigations of language usage. Broadly speaking, Næss' empiricism rested upon two elements: first an empirical philosophy of language which aimed at answering traditional metaphysical questions such as "truth" through observation on non-philosophers' use of the concept,[21] secondly the elaboration of a methodology for empirical investigation of language usage.[22] Harald Ofstad's first writings on the concept of "legal rule" are a direct application of Næss' programme,[23] yet it was Vilhelm Aubert who set up the more programmatic aim of analysing legal science on the basis of the new legal empiricism.

There are particularly three fields of research Aubert points out in his

[19] "Noen problemområder i rettssosiologien", p. 432.

[20] *Ibid.*, p. 434.

[21] A. Næss, *Truth as conceived by those who are not Professional Philosophers*, Oslo, 1938.

[22] A. Næss, *Interpretation and Preciseness*, Oslo 1953; in a popular edition: *En del elementær logiske emner* (Some elementary topics in logic), Oslo, 1960. In connection with the interpretation of Næss' empiricism see also my thesis *Positivisme og vitenskapsteori* (Positivism and the philosophy of science), Oslo, 1980, p. 16ff.

[23] See *inter alia* H. Ofstad, *Alf Ross' begrepsbestemmelse av begrepet 'Rettsregel'* (Alf Ross' conceptual determination of the concept of 'legal rule'), Oslo, 1946.

sociological legal programme article from 1948. The first is the *sociological origin of legal rules*. Important to the study of the causal background of law, says Aubert, is the "coordination of statistics and theory". Aubert places particular faith in the modern sociological attitude and opinion pools. They will be able "to open up new perspectives in the study of the social function of law. In particular they will be able to clarify the concept of 'sense of justice.'"[24] The supposition was that references e.g. in judgments to people's "sense of justice" could well be camouflage for the jurists' own attitudes to law. The first—albeit very modest—breaking of the ground along this empirical road had incidentally already been done by Johs. Andenæs in his doctoral thesis *Straffbar unnlatelse* (Criminal neglect): "In order on certain points to test the language usage and sense of justice of the man in the street, I conducted some experiments with questionnaires which I got a number of persons ... to answer."[25] Today it is probably true to say that the hope of being able to identify the concept of sense of justice empirically has faded away. However, the sociology of law has managed to shed new light on the sociological causal relations of legal rules, especially with respect to questions of legislative policy.

The second field of research Aubert mentions is *sociological causes of conflicts with relevance to law*, which points the way towards several investigations from the early fifties and onwards, with the establishment of the Department of Criminology and Criminal Law at the University of Oslo as a significant institutional event. Here of course belongs Aubert's own doctoral thesis *Om straffens sosiale funksjon* (On the social function of punishment) (1954), with its discussion of the theory of the general deterrent effect of punishment. Yet the central figure in this field was not Vilhelm Aubert but Johs. Andenæs. In his inaugural lecture in 1946 on "Straffens formål" (The purpose of punishment) in which Andenæs *inter alia* discussed the theory of general deterrence, the conclusion was precisely the need for empirical knowledge of the causes of crime and of the effects of punishment on criminal and public.[26] Furthermore in his 1949 lecture on "Almenprevensjon—illusjon eller realitet?" (General deterrence—illusion or reality?) Andenæs concludes by pointing out the need for an empirical study of the psychology and sociology of *obedience to the law*.[27]

[24] V. Aubert, *op.cit.*, p. 441.

[25] J. Andenæs, *Straffbar unnlatelse*, Oslo, 1942, p. VI.

[26] J. Andenæs, *Avhandlinger og foredrag* (Theses and lectures), Oslo, 1962, p. 83 (originally published in *TfR*, 1946).

[27] *Ibid.*, pp. 141 f. (Originally published in *Nordisk Tidsskrift for Kriminalvidenskab* 1950).

The third field of research Aubert puts forward is the *sociological effect of law*, including the actual effect of legislation. The examination of the Norwegian Domestic Help Act (hushjelploven) in *En lov i sokelyset* (An Act under scrutiny) (1952) was the first Norwegian investigation of its kind, and it was subsequently followed by others. However, as Aubert somewhat resignedly points out in his conclusion to *Rettens sosiale funksjon* (The social function of law) (1976), it is highly uncertain how much empirical investigations can tell us—they must be considered "more as illustrations of problems that are posed than as answers to the general question of whether and under what conditions laws are respected and work according to their purpose".[28]

The legal realist programme with which Aubert started off was composed of different themes, between which there was at times mutual tension. One theme lay in the legacy from logical empiricism: a revolutionising transformation of the conceptual apparatus of law. This theme swiftly faded since Aubert's and the interests of the sociologists of law did not move in a theoretical, let alone a doctrinal legal direction. Another theme was that of establishing the sociology of law as a kind of corrective assistant discipline to law. For a time, perhaps, that is the way things appeared to be going; the Department of the Sociology of Law was established in the Faculty of Law, but Aubert himself, who came from law, left the sociology of law and went over to sociology. With his main work *Rettens sosiale funksjon* the sociology of law has been definitively established as a hyphenated discipline *within sociology*.

A third theme was the integration of law and social research. This has not taken place in the way dreamt of by those who were most eager. On the other hand jurisprudential sociological realism has been significant in promoting the dissemination of a consistent manner of thinking in law inspired by the social sciences as a result of the desire to investigate the social consequences of legislation and judicial decisions.

A fourth theme had to do with legal policy: in the sociology of law Aubert saw "an instrument of reform which can have great power".[29] Since the 1960s, points of view coming from the sociology of law have gained ground in public debate, in particular with respect to criminal matters and questions of social policy, and they have manifested themselves in an opposition movement. The movement gradually grew around the perspective of *critical law*. Nils Kristian Sundby gave this a theoretical form in his doctoral lecture in 1974 on "Critical law: what is

[28] V. Aubert, *Rettens sosiale funksjon*, Oslo, 1976, p. 164.
[29] Aubert, "Noen problemområder i rettssosiologien", *TfR*, 1948.

that?". Sundby explicitly anchors critical law in the legal realist tradition. For example, when it comes to criticism of the legal method of argumentation, Sundby refers to Hägerström, Ross and American realism as forerunners: "We 'neo-critics' object however that this new methodological insight has partly remained hanging at the abstract level: legal science has not in any way realised the full consequences of the fact that the method has been seen through."[30] Whether Sundby's critical law of 1974 was so much more radical than Aubert's sociology of law of 1948 is probably a matter of debate—the theme is at any rate the same: exposing the law through the confrontation of the ideals of the law with the empirical realities. It is probably at this level of legal politics that the sociology of law has had greatest effect. But radical legal politics has only to a slight extent been an internal criticism of established law—rather it has been the use of existing law in a radical social commitment for underprivileged groups.[31]

Eckhoff's and Aubert's legal realism faded out in the 1960s. Aubert gave up his radical legal realist standpoint of the 1940s and 50s. With Eckhoff, legal realism was no doubt a more lasting standpoint, but his enthusiasm also cooled; instead came a kind of general legal pragmatism. There are two reasons in particular for the fact that the legal empiricism of realism no longer exercises the same attraction. In the first place there is growing doubt about what law stands to gain at all from empirical social research. Many of the social causal relationships that law is interested in are, writes Eckhoff in the 1970s, "so complex that there is at present little that can be said with certainty about them from social science quarters. The special investigations that are carried out to chart facts which have juridical relevance also have limited significance. They may lead to a better foundation for some of the hypotheses on which we base our assessments and possibly to changes in some standpoints. *But this will not make the juridical arguments particularly different from what they are today*".[32] Secondly both Eckhoff and Aubert became more aware of the limitation of the theory of social utility which provided a kind of moral philosophical basis for legal empiricism. In 1971 Eckhoff published his great analysis of *Rettferdighet* (Justice) as the normative concept competing with social utility, and in *Likhet og rett* (Equality and law) Aubert attacks the prevailing "tendency to attempt to

[30] N. Kr. Sundby, "Critical law: what is that?", *Jussens Venner*, 1975, p. 121.
[31] See e.g. S. Eskeland, *Fangerett* (Prison Law), Oslo, 1989.
[32] Eckhoff, *Retten og samfunnet* (Law and society), p. 321, (italics added).

rationalise all measures in terms of utility".[33] A major theme in *Likhet og rett* is precisely the conflict between utility and justice.

LEGAL DOCTRINAL REALISM

Aubert's, and in particular Eckhoff's, legal realism had public law as its main arena. In this respect it differs from the immediately preceding legal realist generation: from Fredrik Stang's *Indledning till formueretten* (Introduction to the law of property) (1911) to Ragnar Knoph's *Utviklingslinjer i moderne formuerett* (Development trends in the modern law of property) (1934), property law was a major filed. The central field which lies between the private law area of property law and the public law area of public administrative law—in other words the core area of regulation in the social-democratic mixed economy—has only to a modest extent aroused the interest of jurists. Here on the other hand economists have been able to develop their ideas relatively freely—and from a legal point of view the result is what one might expect, as Carsten Smith remarks.[34]

An important part of Carsten Smith's research touches on the central field of the mixed economy, monetary and credit theory, through studies partly concerned with the public law regulation of monetary and credit policy and partly with the private law regulation of monetary and credit contracts. The law Carsten Smith advocates is "realistic and social-science-oriented law".[35] It is a law that like Schweigaard's realism has arisen in the confrontation with economics and not with philosophy—nor with sociology, as in the case of Eckhoff's and Aubert's. Furthermore, like Schweigaard, Carsten Smith recommends the *inductive* method. But while Schweigaard used inductive procedure in his comprehensive work on legislative policy to create new law altogether, Smith applies the inductive method for a doctrinal legal purpose, namely in the legal analysis of normative material which actually exists but has not gained normative status as a source of law. While the sociology of law seeks to widen the field for legal primary material in an empirical-sociological sense, Smith's aim is to widen the *normative primary material*. While legal philosophical realism has natural law as its main opponent,

[33] V. Aubert, *Likhet og rett*, Oslo, 1964, p. 8. In *In Search of Law*, Oxford, 1983, even Aubert concludes with natural law viewpoints (p. 152ff). See otherwise Aubert's posthumous *magnum opus* Continuity and Development. I*n Law and Society*, Oslo, 1989.

[34] C. Smith, *Bankrett og statsstyre*, (Bank law and state government), Oslo, 1980, p. 566.

[35] *Ibid.*, p. 597f.

one can say that sociological legal realism and legal realism have their front against "concept jurisprudence".

The first step in inductive procedure is to collect, as meticulously as possible, data about what legal rules are in fact applied and apply within a given area of law, including norms which are in fact respected even if they do not find expression in statutes or judgements. Smith carries out his realist programme for the first time in his doctoral thesis on *Garantirett* (guarantee law) (1963). The most important normative material in his research is the decisions of the inferior courts, "inferior court precedent", as it is called, and the use in fact of guarantee agreements (forms for contracts and other such documents). The conclusions about legal doctrine and principles are then drawn on the basis of the investigation of the use in fact of the different guarantee agreements.[36]

A key element in Carsten Smith's investigation of guarantee law is the upgrading of *inferior court decisions as a factor in the sources of law*. This kind of upgrading wins support in several theses later in the 1960s. Three comprehensive studies may be mentioned which all came in 1966; In *Entreprenörrisikoen* (The building contractor's risk) Tore Sandvik advocates the realist source of law view that the source of law is what in fact is respected in the building trade. "Significant sources of law" are the standard contracts used in the trade and decisions made by the court of court of arbitration created by the trade.[37] In *Luftfart og ansvar* (Aviation and responsibility) Peter Lödrup maintains that "Less normative effect than theory cannot at any rate be ascribed to an inferior court judgement; this fact in itself makes the judgement 'worthy of citation'".[38] Corresponding support for the norm-forming significance of inferior court precedent is provided by Arvid Frihagen in *Villfarelse og ugyldighet i forvaltningsretten* (Ignorance and invalidity in administrative law).[39] In her thesis *Foreldremyndighet og barnerett* (Custody and the law relating to children) (1980) Lucy Smith thus takes this extension of the normative primary material practically for granted: "It is first and foremost in the inferior courts that legal disputes about the custody of children are decided in our society," writes Lucy Smith, and she adds: "Legal science which is to be of practical utility just therefore conduct a dialogue with these courts."[40]

[36] C. Smith, *Garantirett*, III, Oslo, 1981, p. 45.
[37] T. Sandvik, *Entreprennörrisikoen*, Oslo, 1966, p. 68,76.
[38] P. Lödrup, *Luftfart og ansvar*, Oslo, 1966, p. 71.
[39] A. Frihagen, *Villfarelse og ugyldighet i forvaltningsretten*, Oslo, 1966, pp. 190ff.
[40] L. Smith, *Foreldremyndighet og barnerett*, Oslo, 1980, p. 125f.

The present author should like to suggest the following thesis for possible further investigation in terms of legal history: the upgrading of the normative status of contract precedent and inferior court decisions in the course of the 1960s is an expression of realism's *doctrinal legal breakthrough*. Interestingly enough this happens at the same time as legal empiricism fades out.

In his article "Domstolene og rettsutviklingen" (The courts and the development of law) Carsten Smith argued in principle for the courts', and not least the inferior courts' law-creating role. While legal literature has traditionally stressed the difference between legislating and pronouncing judgement, Smith emphasises the similarity:

> "Just as the Storting (Norwegian national assembly) through its legislation works out compromises between rival social interests, judges undertake a corresponding form of harmonisation on a smaller scale through their court-created rules. Any collegiate court is in this way a kind of legislative assembly in miniature—whether the court likes it or not and whether it recognises it or not."[41]

Carsten Smith's emphasis of the courts' law-creating significance is on the whole in line with American legal realism and its notion of "judicial legislation". There are two arguments in particular Carsten Smith advances to defend his point of view. The first is that legal science should to a far greater extent than previously concern itself with case law both from the high courts and from the district and city courts, because "this precedent forms an important piece of Norwegian reality and a particularly significant part of Norwegian legal life." "If one is to form a realistic opinion of what is living law in our country, 'law in action', one cannot," says Smith, "ignore the majority of the decisions that are made by Norwegian courts."[42] Smith's second argument is that "there is a *presumption* that the solution ... used in a judgement is a good and practically usable solution which there is reason to hold on to once it has been chosen."[43] While sociological legal realism studies the *de facto* force of the normative, according to these two arguments doctrinal legal realism is based on a presupposition of the normative force of the *de facto*.

Carsten Smith wishes in general to give the courts a clearer—and more clearly recognised—*political function*. In his article "Høyesterett—et politisk organ?" (The Supreme Court—a political body?) Smith con-

[41] C. Smith, *Statsliv og rettsteori* (The state and the theory of law), Oslo, 1978, p. 334.
[42] *Ibid.*, p. 348.
[43] *Ibid.*, p. 349, italics added.

cludes as follows: "One should in my view *to a greater degree* than is usual in Norwegian legal literature recognise the fact that the Supreme Court *has* a political function, and one should *to a greater degree* than is usual in Norwegian legal life recognise the fact that the Supreme Court *must have* a political function."[44] Smith's argumentation includes at any rate an erasing of the sharp dividing line between law and politics, between judicial and political decisions—and thus a rejection of the depoliticised conception of Justitia as a blindfolded judge. Away with gowns in court, says Carsten Smith. The problem of the legitimacy of the court thus presents itself as particularly urgent for this kind of realist law. For the judicial decision as for the political decision, consideration of the judges' or decision-makers' *representativity* becomes significant. If the judges' general view of society is not only *in fact* to play a part in judicial deliberations but also *ought* to do so, the idea immediately comes to mind that the courts must be given a more socially representative composition through an increase in the number of non-jurists, to secure both additional specific expertise and a broader democratic selection.

The argument for the courts' increased political function is accompanied in the case of Carsten Smith by a strong emphasis on *real considerations* ("reelle hensyn") as a factor in the sources of law. For the realist-minded jurist, consideration for the consequences of a decision, e.g. of an economic kind, is of considerable importance in the final deliberation: "A statute may of course be interpreted narrowly and a precedent may be deviated from when the pressure from the real economic arguments becomes sufficiently strong. How far one may go in the direction of deviating from these historically given starting points, can hardly be stated exactly. Some jurists are more daring and keen on responsibility—and thus more legally liberal—than others. These are therefore more inclined to give economic considerations the status of important factors in decisions."[45]

The increased emphasis on "real considerations" as a factor in the sources of law is in itself a sign of the influence of legal realism in legal thinking. In Torstein Eckhoff's *Rettskildelære* (Theory of the sources of law) (1971) "real considerations" have become authorised as a factor in the sources of law in a textbook context. Gudmund Sandvik says that in his *Rettskildelære* Eckhoff took "a theoretically important step when he

[44] C. Smith, "Høyesterett—et politisk organ?", Department of Private Law, University of Oslo, stencilled series No. 85, 1982, p. 14f.

[45] *Bankrett og statsstyre*, p. 599f.

openly acknowledged that what are called real considerations are a factor in the sources of law."[46] It is true that this formulation can easily be misunderstood, for what Eckhoff did was to give an overall presentation in the light of the realist argumentation for real considerations as a factor in the sources of law which had already been put forward *inter alia* in the doctrinal legal literature referred to above.

It would incidentally be an interesting exercise in legal history to follow the growth of today's concept of "real considerations". In this way one could throw light on utilitarianism's ousting of natural law in Norwegian legal theory from the point of view of history of concepts. The first rudiments of today's concept of "real considerations" are perhaps to be found in the later Chief Justice of the Supreme Court Herman Scheel's trial lecture in 1892 "Om Rettens Grund som Udgangspunkt for Læren om Retskilderne" (On the ground of law as a starting point for the theory of the sources of law) in which he presents the following conclusion: "If it is so, that the grounds of law and therefore equally its touchstone are *the good of society*, it therefore becomes necessary under any circumstances to submit the theory of the sources of law to a revision on this basis. And I believe that such a revision will lead to recognition also of other factors than custom and legislation as determining what shall be deemed existing law."[47] Scheel hesitated for 15 years before having his lecture published. This was not, we know, Schweigaard's period in Norwegian legal science.

REHABILITATION OF NORMATIVE LEGAL THEORY

Legal realism was launched as a strongly anti-normative theory. According to Alf Ross, all normative statements had to be considered "exactly in the same way as a scream or a hurrah; none of them designates any existing object, but they can all be understood as spontaneous expressions of a contemporaneous subjective experience, a certain range of feelings or impulses."[48] Now, as we know, both Aubert and Eckhoff

[46] G. Sandvik, "Fire liner i yngre norsk rettshistorie" (Four lines in modern Norwegian legal history), in K. Bloch *et al.*, *Utvalde emne fra norsk rettshistorie* (Selected topics from Norwegian legal history), Oslo, 1981, p. 190.

[47] H. Scheel, "Om Rettens Grund som Udgangspunkt for Læren om Retskilderne", *TfR*, 1907, p. 261, italics added.

[48] A. Ross, "Vinding Kruses bidrag til rettskildelæren (Vilding Kruse's contribution to the theory of the sources of law), quoted from F. Castberg, "Fra naturrett til 'kritisk jus'" (From natural law to "critical law"), *Jussens Venner*, 1975, p. 320.

moved away from this kind of anti-normative realism. The theoretical break came with Nils Kristian Sundby's thesis *Om normer* (On norms) (1974). Now Sundby's contribution to legal thinking was highly incomplete because of his premature death; in his writings he left several, at times contradictory, points of view. In the first place there is the connection with legal realism in the legal political argumentation for critical law. Secondly, there is the linguistic-analytical speech-act philosophy which dominates in his great study *Om normer*. Through speech-act theory Sundby seeks to give rational meaning to the law's traditional concepts of norms, obligation, etc., which legal realism had discarded as outdated metaphysics. Thirdly, in his second doctoral lecture Sundby gives his support to natural law: "Natural law stands in undeserved disrepute in many of today's leading scientific milieux, especially in legal circles. Here in the Nordic countries this is due to Axel Hägerström's and the Uppsala School's anti-metaphysical criticism plus the whole positivist way of thinking and the relativist theory of values of the time."[49]

Subsequently Torkel Opsahl among others has given his support to natural law viewpoints. Originally Opsahl was strongly influenced by Ross, especially by his writings on constitutional law, and his thesis on *Delegasjon av Stortingets myndighet* (Delegation of the authority of the Storting) (1965) follows in Ross' footsteps. In recent years however he has been a central figure in the Norwegian Human Rights Project, which—if anything ever was—must be said to be founded on natural law. In a criticism of the present author's contributions on the liberal constitutional state Opsahl thus launched the concept of the "human-rights state".[50]

Tove Stang Dahl's argumentation for women's law as a new discipline within legal science is interesting in this connection.[51] In one respect she continues the tradition from sociological legal realism so that *via* criminology it is carried on in women's law topics. Yet on the other hand Tove Stang Dahl gives a markedly normative justification for the new women's law in contradiction to both philosophical and doctrinal legal realism. She unites in her argumentation themes from both natural law

[49] N. Kr. Sundby, "Naturrettslig legitimasjon for normativ kompetanse" (Natural law legitimacy for normative competence), *TfR*, 1975, p. 343.

[50] Cf. A. Eide, H. Eriksen, J. Helgesen, T. Opsahl, "Rettsstaten og menneskerettsstaten" (The constitutional state and the human-rights state), *Nordisk Administrativt Tidsskrift*, 1985, p. 32ff. For my point of view, see my thesis *Rett og politikk—et liberalt tema med variasjoner* (Law and politics—a liberal theme with variations) 1987).

[51] Cf. T. Stang Dahl, *Kvinnerett* I (Women's law I), Oslo, 1985, p. 81ff.

and Hagerup's "concept jurisprudence", and points the way towards a more general rehabilitation of the normative-theoretical types of problem *within* law.

Legal realism aimed at the integration of law and recent research in the social sciences such as economics, sociology and psychology. There is something about the aim itself that invites scepticism. In conclusion the present author's views on this point will be more sharply defined.

With Eckhoff's *Rettskildelære* the traditional system of sources of law was in reality exploded. In place of the two traditional sources of law—legislation and custom—Eckhoff sets seven "source-of-law factors", with "real considerations" as the seventh and final factor. But as Eckhoff remarks, he cannot "guarantee that the list is exhaustive."[52] In Eckhoff's reasoning there thus lies an acceptance of the relativisation of the source-of-law factors in a two-fold sense: in the first place with respect to the number of source-of-law factors and secondly concerning their mutual hierarchy.[53] The decisive relativisation mechanism is the "real considerations" factor.

As a concept "real considerations" is a hybrid. It allows room for evaluations of what is just and reasonable—in other words *ideal* considerations; for evaluations based on "the good of society"—in other words *utility* considerations; and for suppositions about conditions in society and social consequences—in other words *empirical* considerations. "Real considerations" as the driving factor in the sources of law may open the way for lack of clarity in legal argumentation, with the consequences this may have for exercising law. Take for instance empirical considerations: these are based on a presupposition that one can predict with a considerably high degree of probability what effects the exercise of law will haver in fact. If in the first place such prediction were possible, it would perhaps be reasonable for jurists to give up their palaces to other social scientists with greater competence in consequential analysis.[54] But secondly social scientists today have become considerably more skeptical about the possibility of planned steering of social development in every detail, as economists for many years had assumed. Jon Elster, one of those who for a number of years promoted the hegemony of economists in social science, sums up his view today in the following way: we know

[52] T. Eckhoff, *Rettskildelære*, 3rd edition, Oslo, 1980, p. 21.

[53] Cf. K. Andenæs, "Relativseringstendensene i den juridiske metodelære" (Relativisation tendencies in legal theory of method), unpublished ms. 1983.

[54] A corresponding point is formulated by Francis Sejersted in *Demokrati og rettsstat* (Democracy and the constitutional state), Oslo, 1984, p. 156f.

so little about social causal relations that "if one considers planned change as a process in which one looks for the best means of realising a given aim, it is most probably that one will fail."[55]

In his argumentation for the significance of inferior court precedent, Carsten Smith emphasises as essential "that there is a presumption that the solution that has been used in a judgement is a good and usable solution." But such a presumption is difficult to maintain if the judgement in its premises has placed decisive weight on "real considerations" which rest upon dubious scientific presuppositions about social causal relations.

Realist law has tended to look to other social sciences as being more advanced—first psychology and sociology, and later economics. But jurists are not empiricists or statisticians—they are *normicists*.[56] Law ought to withdraw to its proper field: the norm-regulated society. Sundby's study *Om normer* was in terms of the philosophy of law a step in that direction. Thus there might be greater reason for other social sciences—not least sociology—to look to law, in as much as it clarified also for sociologists what ought to have been their proper topic, namely social norms and their institution.

[55] J. Elster, "Skeptiske tanker om samfunnsplanlegging" (Skeptical thoughts about social planning), *Forskning og Framtid* 1/1984 p. 27.

[56] The present author has borrowed the term "normikere" (normicists) from Gudmund Hernes who on one occasion demanded that sociologists must to a greater extent become "normicists" ("Sosiologien, makten og staten" (Sociology, power and the state), *Tidsskrift for samfunnsforskning*, 1977, p. 19).