Theory Choice in Jurisprudence

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1   Kinds of Legal Theory

Research in law is mostly oriented towards practical problems, rather particular then general. However, there is also a persisting trend to do more general research. In different times and places, it appears under different names, such as Legal Encyclopaedia, General Study of Law, Jurisprudence and Legal Theory. Legal Philosophy and Legal Sociology are also established disciplines. Sometimes, one meets combinations like General Theory of State and Law, General Theory of Law and Morals and so on. Finally, there are numerous "Law and" subjects, such as Law and Economics, Law and Society, Law and Literature etc.

Representatives of all these disciplines belong to various more or less overlapping informal networks, quote each other, meet at common conferences and in many other ways appear as a kind of community of scholars. However, this community is in a state of chaos, creating more problems than solutions and more misunderstandings than problems. There is a plethora of conflicting definitions and characterizations of law. One might think that the controversy is about different descriptions of the law as a social phenomenon, or about different descriptions of the essence, nature, or concept of law. I agree with the following estimation:

> [W]hat is the status of the claims made within theories of law? Are these claims of sociology, anthropology or psychology, discussing how people naturally or inevitably act in large groups? Are they metaphysical claims, about the "essence" or "nature" of Law? Or are they (merely) claims about the way we use language (for example, the way we use the terms "law" or "legal")?
> The short answer to the above is that different theories seem to be responding to different types of inquiries and are making different kinds of claims. […] [I]t is common and perhaps inevitable that conceptual theories, of which most general theories of law are examples, will "talk past one another". (Bix 1999, 12)

In general, law theorists say many things, but it is not always clear what they talk about, and even less clear why.

Let me give some examples. With a couple of exceptions, I am restricting myself to my Polish and Scandinavian teachers and colleagues. Some fifty years ago, most of them belonged to the so-called Legal Realism. Later on, this school of research disintegrated, leaving the epigones in the state of despair.

2   Anti-metaphysical Legal "Realism"

From the beginning of the 20th century, Legal Realism presented itself in many countries, not the least in the United States and Scandinavia. In addition to it, an important version of a psychological Legal Realism exerted a great influence upon Polish legal theory. Leon Petrażycki (for the references, see Peczenik 1975) created an original theoretical system covering moral and legal philosophy, theory of science, psychology and sociology. Petrażycki's theory rested on basic assumptions concerning ontology, semantics and theory construction. His ontology was materialist in a broad sense; for him, values did

not exist. His basic semantic assumption was Humean, that value- and norm-statements ("practical statements") are logically distinct from descriptive statements. His theory of science stated that scientific theories are adequate, that is, neither too broad nor too narrow. A too broad ("jumping") theory would be like "all soldiers are courageous", whereas the truth is that only some are. A too narrow ("lame") theory would state something like "all Swedes are mortal", whereas the truth is that all humans (and indeed all living organisms) are. A descriptive, materialist and, at the same time, adequate theory of law must be psychological. The law is the same as legal impulsions ("emotions"). Legal rules are mere "impulsive phantasms"; projections of shared legal impulsions. Legal research in ordinary sense (legal dogmatic), dealing with legal rules, not with the impulsions - makes the law more uniform and better adapted to its social function to create peace. It uses analogy, induction, conceptual analysis and deduction in an as precise way as possible. But it is not an adequate scientific theory.

Petrażycki was able to explain in psychological terms nearly all facts about the evolution of law since the Roman times. Yet, he usually faced the objection that legal institutions cannot be fully described in an individually psychological manner. Neither was he able to answer all objections directed against the idea of adequate theory. For a couple of generations, his theory dominated Polish legal theorising. Later on, it lost the dominant position.

Another chapter of the "Realist story" is the Scandinavian one (see Bjarup 1978 and Bjarup 1982). The founder of the so-called Uppsala School, Axel Hägerström, built up his theory around the following theses concerning reality. All knowledge concerns something real. Only one reality exists and it includes objects located in time and space. A human being is thus real, since she exists during a certain time, and always occupies some position in space. Mental processes exist because they are indirectly related to time and space: people experience them as existing in time and space. Time and space are objective. What cannot be placed in time and space does not exist. According to Hägerström, value concepts like "good", "beautiful" etc. are self-contradictory. They apparently tell something about the objects (e.g., "this picture is beautiful") but in fact they do not do it at all, and merely express feelings (such as one's admiration of the picture"). Moreover, value statements lack truth-values, since they "describe" something outside of time and space. The value "existing" in an object, e.g., goodness "existing" in it, does not exist in any definite sense at all. Consequently, rights, duties, valid law etc. are mere products of imagination which in fact do not exist. Theories of rights, duties and objective values are "metaphysical" and metaphysics should be destroyed. Thus, one can discuss "about morality", that is, describe mental states and actions of people who believe in moral values, but one cannot meaningfully discuss "in morality", that is give reasons for the conclusion that something is good or bad.

Hägerström's ideas gained influence among the lawyers due to their reception by outstanding legal scholars, such as Karl Olivecrona and Alf Ross. In Olivecrona's opinion, legal rules are no imperatives in the literal sense, yet they are independent imperatives, i.e. they are regarded by the addressees as if they were imperatives. Beliefs in valid law do not refer to any fact. Yet, they have social functions. They direct human conduct, facilitate concise writing of

statutes and even convey a vague information, e.g., that the "owner" of an estate in the usual course of things has a kind control over it. Alf Ross, too, accepted Hägerström's philosophy. Yet, he proposed a new definition of valid law. According to Ross, the scientific assertion that a certain rule is valid is, according to its real content, a prediction that the rule will form an integral part of justification of future legal decisions. The philosophical background of this theory consists in the conviction that scientific propositions must have verifiable consequences concerning physical conduct and mental experiences of the persons who monopolize the use of physical force in the society.

Petrażycki's and Hägerström's theories resemble each other in ontology and semantics. Both thinkers were value-nihilists. Their theories differ in style and scope, but they do not contradict each other. Neither do they contradict the basic theses of American Legal Realism. Differences in details may be disregarded in the present article.

Legal Realism is quite convincing in its "no-nonsense" style. However, it left some unsolved problems. Firstly, its ontological foundations are controversial – not all philosophers are materialists. Hägerström wanted to destroy all metaphysics but, in fact, he preached a materialistic branch of metaphysics. Second, practical consequences of Legal Realism are fatal. Any philosophical theory that regards valid law as a product of fantasy creates an unbridgeable gap between ordinary beliefs and legal philosophy. A lawyer has to use such concepts as "valid law" and "rights". A legal philosopher, meanwhile, tells him that their use is objectionable. This gap may easily cause professional frustration, leading to a retardation of legal dogmatic. A great American Legal Realist thus concluded with resignation: "A right man cannot be a man and feel himself a trickster or a charlatan" (Llewellyn 1960, 4).

Nowadays, legal scholars in Scandinavia use very often Hägerström-inspired language and share his anti-metaphysical metaphysics. However, they do it tacitly, without discussing ontological problems. Moreover, they are often inspired by the postulate of a value-free science. For example, Åke Frändberg (2000, 654 ff) advocates a value-free, scientific legal theory. Only a minority believes in rational discussion "in morality". I am proud to belong to this minority. Jes Bjarup is another person who belongs to it. According to Bjarup, the discussion of values is not a discussion about mental states of persons who believe in values, but it rather is a cognitive discussion of values themselves. It is cognitive because one gives reasons for values-statements and these reasons can be valid.[1]

On the other hand, value-nihilists who want to say something interesting about law and morality have a choice between the following strategies:

1   Move to meta-level,

2   Move to descriptions without ontology,

3   Move to construction of logical models,

4   Questioning relevance of value nihilism for legal discussions

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[1]   This has always been Jes Bjarup's position. The clearest exposition is in Bjarup 2004.

2.1   Wróblewski - Metatheoretical Relativism

One way out of the "post-realist" predicament of legal theory is relativism. Tacitly, it is embraced by many scholars, especially those doing comparative law and international private law. There is also a general theory of "poly-centricity" of the law (Henrik Zahle 1995 etc. and Håkan Gustafsson 2002), rather sympathetic towards relativist epistemology. Advocates of various critical theories are also relativists. A good Swedish example is feminist theory developed by Eva Maria Svensson (1997). Within the discipline called Legal Theory, one of the greatest relativists was, Jerzy Wróblewski (*Cf.*, e.g., 1992). His method was a rationalistic and relativistic meta-theory. He thus formulated theories about the ideologies of statutory interpretation. He also created a classification of various actually existing and logically possible methods of statutory interpretation and indicated their functions. The methods were reworked in the most rational manner. The main analytical tool consisted in a distinction between two kinds interpretative directives. Each method of statutory interpretation was thus characterised as a list of first-order directives, for interpretation of statutes, completed with a list of second-order directives, for a choice between competing first-order ones. The author himself did not endorse any of the methods, but he understood the point of all of them. Relativism and intellectual liberalism of this kind were important characteristics of Wróblewski's all works. He was able to find a rational core of any legal theory, however strange it might appear to others.

   In brief, Wróblewski developed a meta-theory, useful to classify and compare various theories of law and various theories of legal argumentation, both descriptive and normative. But he does not explicitly formulate his own theory of law, nor a theory of legal reasoning, neither descriptive (delivering new knowledge of facts or concepts), nor normative. No doubt, Wróblewski's meta-theory of law was founded on profound philosophy, most probably linked to both Petrażycki and Viennese positivism. But he published no confession of this kind.

2.2   Strömberg – from "Realism" to "Description" of Rules

Tore Strömberg has elaborated a theory of law, based on Olivecrona's ideas but also including some original points. Strömberg has pointed out that the concept of Swedish legal order, valid Swedish law, is conventional. If one tries to verify, e.g., the proposition that the Real Property Act of 1970 is a valid Swedish statute, one finds ultimately no ground for this proposition but the common belief that so is the case. Strömberg has called this belief a social convention (*Cf.* Strömberg 1981, 39 ff.). The content of legal rules according to Strömberg partly corresponds to the facts, that is, human actions and situations, partly does not. The non-real part of this content consists of imaginary legal qualities and competences together with the idea of legal validity (*Cf.* Strömberg 1981, 63 ff.).

   Yet, Strömberg devoted most of his theoretical writing to describing legal rules, as if these had existed. He presented the whole legal order as a system of three kinds rules, i.e., rules of conduct, qualification and competence. The legal

order includes also individual counterparts of the rules, determined in time and space, that is, individual imperatives of conduct (e.g. an order to pay), qualification acts (e.g. an appointment of a guardian) and competence acts (e.g. drawing an authorisation). A legal duty, quality or competence can be created only by a person who in his turn has a competence to do it. All legal competence is thus ultimately based on the assumed validity of the constitution. In this connection, Strömberg has accepted Alf Ross's idea, inspired by Kelsen, that the meaning of all rules of a national legal order constitutes a totality of interrelated parts. This totality rests ultimately on a social convention.

This is a significant change of emphasis. Whereas the older "legal realists" believed that valid law, rights etc. are fictions, Strömberg took this criticism for granted and produced a detailed description of these fictions. No doubt, he merely wanted to describe the lawyers' erroneous beliefs. Yet, the vocabulary of his books collides with his philosophy. Interpreted literally, his descriptions often refer to legal rules, not to beliefs in legal rules. Thus, interpreted literally, Strömberg's theory is inconsistent, describing non-entities.

2.3   *Positivist "Descriptions" of the Law*

There is only one step from Strömberg's position to Oxford-style legal positivism.

According to Bentham and Austin, the law consists of declaratives of volition or commands of the habitually obeyed sovereign, ensured by the threat of punishment. However, one cannot define precisely "volition" of such an abstract entity as the sovereign, who all the time wants all the law of a state to be applied (*Cf.* Olivecrona 1971, 71 ff. and 73 ff.). Consequently, Herbert Hart refined the theory, avoiding the problem of fictitious sovereign, and referring to legal rules and to officials instead.

> On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. (Hart 1961, 113)

Hart's theory is much discussed. Without commenting the vast literature on the subjects, I would like to make two comments.

1. Strömberg would say that only beliefs in rules exist, not rules themselves. Hart adopts the internal point of view of a lawyer and writes about rules, not about beliefs in rules. But one may wonder in what manner those rules exist. Hart did not solve ontological problems discussed by Hägerström and his followers. Rather, he devised a strategy for avoiding the problems.

2. Is not customary law – historically anchored in the community – genuine law, even before the officials discover it as a standard for their behaviour? Is everything the officials accept as such a standard the law? What about extremely

unjust "laws" enacted by a brutal dictator? What about corrupt officials, tolerated by the dictator? Obviously, Hart's theory emphasizes some data and ignores or at least plays down other data. For what purpose?

Joseph Raz who developed Hart's theory in an even more sophisticated manner stated the following.

> In the most general terms the positivist social thesis is that what is law and what is not is a matter of social fact. (Raz 1979, 37)

In a meta-language:

> A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument. (ibid. 39)

Why so? Because the function of the law is to give us

> publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard. (ibid. 52)

In other words, the theory choice behind legal positivism of such scholars as Hart and Raz is an insight, concerning the function of law. Notoriously, Raz also speaks about the "nature" of law. It is, however, not entirely clear in what manner this insight can be justified. Can one give it a deep justification without entering an evaluative debate about what kind of society is desirable?

In general, legal positivists advocate separation of law and morals, but this separation is only contextual, not ultimate. For practical reasons, it is fine to separate law from morality in some contexts but not in other contexts. What looks like a description or conceptual analysis is a model, serving a practical purpose. Such a model has links to reality, but it is not an objective description. An even more general reflection is that some philosophers of law present various different and competing theories claiming to describe the law but a closer view reveals that differences rather depend on different purposes, sometimes spelled out clearly, more often hidden. Theories are not descriptions of empirically "given" facts, but rather models, idealised descriptions of aspects of reality, including only data which fit chosen view points and interests (*Cf.* Andreasson 2004).

Positivist theories of law often claim to be analytical. In other words, they claim to describe some concepts, such as the concept of law. However, describing concepts is a rather risky activity. A Platonist – and, indeed, even Hägerström (see Bjarup 2000) believes that concepts are "given". Most present-day philosophers are, however, nominalists, and regard concepts as constructs. Thinkers like Hart and Raz appear to describe such constructs. Their theories would be easier to understand if they stated honestly that they are constructing

concepts, not describing them. Then, the question would occur, What is the purpose of the construction?

2.4   Logical Analysis

Logical analysis is a more straight-forward and more secure way to build models. Let me give one example.

Many legal concepts are intermediate concepts, linking as set of conditions with a set of consequences.[2] Alf Ross used the following picture:

> Each Fi expresses a possible legal ground for x's being the owner of y. Each Cj expresses one of the consequences of x's being the owner of y. "O" (ownership) merely stands for the systematic connection that F1 as well as F2, F3 ... Fp entail the totality of legal consequences C1, C2, C3 ... Cn. As a technique of presentation this is expressed by stating in one series of rules the facts that create ownership and in another series the legal consequences that ownership entails (Ross 1956–57, 820; English translation of Ross 1951).

The theory of intermediate concepts is an important and useful analytical tool. Moreover, Lars Lindahl and Jan Odelstad (2000) have presented a further analysis of intermediate concepts, using an algebraic framework. They pointed out that, in many cases, the imperceptible shift between the descriptive and the normative speech

> observed by Hume might result from the use of intermediate terms. For example, it might plausibly be held that "to be in the public interest" is an intermediate term within ethics, in a way analogous to the way in which "owner" is an intermediate term in the law. It is not clear that the sentence "the action *A* is in the public interest" is wholly descriptive neither that it is wholly normative. Rather "to be in the public interest" seems to be descriptive in part and normative in part. (Lindahl and Odelstad 2000, 273)

A strong point of this analysis is its high level of preciseness. On the other hand, it leaves out ontology of law and epistemology of legal knowledge. This fact may be contrasted with Ross' position. For Ross, there was no such entity as "ownership". There was only a term "ownership", a useful tool without semantic reference. Ross used the tool but felt committed to make ontological disclaimers about non-existence of such entities as ownership. Lindahl and Odelstad do not need such disclaimers. They do not describe the law as fact. They make a model which may be useful for such a description, and it may also be useful for other things. They do not do empirical science but rather mathematics. For obvious reasons, I cannot discuss here whether mathematics describes concepts or constructs them.

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2   *Cf.* Ekelöf 1945 and Ross 1951. Wedberg 1951, 246, refers to a lecture called "On the fundamental notions of jurisprudence," given by himself in the Law Club of Uppsala, 1944. It is an interesting research topic to relate such propositions to fused propositions in Svein Eng's sense.

2.5   *Questioning Relevance of Value Nihilism for Legal Discussions*

Svein Eng has put forward a general theory on the descriptive and the normative element in legal language and argumentation (Eng 2003, 312 ff). According to Eng, statements *de lege lata* have a fused descriptive and normative modality. They are neither purely descriptive nor purely normative. If a discrepancy emerges between one lawyer's statement de *lege lata* and the opinion of other lawyers in that same regard, the lawyer who made the statement may either align it with the other lawyers' opinion or uphold the statement despite the other lawyers differing opinion. In the first case, statements *de lege lata* appear to be descriptive; in the second, normative. But there are no rules at the level of legal language or of legal methodology that may help us determine usual kinds of *de lege lata* statements by lawyers as either descriptive or normative. In other words, the level of subjective meaning presents us with a fusion of the descriptive and the normative. The general descriptive component in lawyers' statements *de lege lata* is always considered relevant to ask and to take into account what opinion other lawyers will probably hold. It corresponds with what Eng terms the perspective of the generalized lawyer. The concrete context of the general descriptive component and its corresponding perspective of consciousness is the legal-institutional context consisting, on the one hand, of bodies competent to make final and binding decisions as to how to interpret and subsume cases under legal norms and, on the other, of the lawyers corresponding interest in what these bodies will conclude. The general descriptive component, its perspective of corresponding consciousness, and their concrete context distinguish law from language in general, and from morals, and explain why we do not find fusion in these last domains (Eng 2003, 347 ff).

In other words, Eng argues that the distinction between normative and descriptive statements is not relevant in the "perspective of the generalized lawyer". Let me add that, in this perspective, the Legal Realist objections against normative statements and normative concepts are no longer dangerous for the study of law. Statements *de lege lata* can be subject to rational constraints and scientific re-working in legal research due to their descriptive side.

Another example of questioning relevance of value nihilism for legal discussions can be found in Christian Dahlman's book (2002). Dahlman argues that it does not matter for practical discussions in law or for practical discussions in morality whether values are objective or not. In other words, normative moral and legal theory is possible without ontology of values.

2.6   *Discovering "Pre-existing" Principles*

Theorists like Wróblewski, Strömberg, Hart, Raz, Lindahl, Eng and Dahlman thus found ways to circumvent Hägerström's ontological criticism of legal thinking. Their respective research can be valid and important independently of ontological quarrels. For some other scholars, the strategy of circumventing was too little. Rather, they bluntly assumed that Hägerström and other "Legal Realists" were wrong. Thus, Nils Jareborg wrote an important book on evaluations (1975), clearly distancing himself from value nihilism. Later on, he

became the most important figure of Scandinavian criminal law research. One might guess that his success in criminal law would be smaller, if he had been a faithful disciple of Hägerström. It would have been painful to accompany all evaluations a criminal lawyer must make with disclaimers that would satisfy value nihilists.

Leaving for a while the Scandinavian environment, let me add that Ronald Dworkin's writings are another example of research which was possible due to refutation of value nihilism. Let us read some fragments of Dworkin's writings:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author - the community personified - expressing a coherent conception of justice and fairness. […] According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice. (Dworkin 1986, 225)

Moreover:

> Law as integrity […] holds that people have as legal rights whatever rights are sponsored by the *principles* that provide the best justification of legal practice as a whole. (ibid. 152)

Such a theory, appealing as it is, is not beyond doubt. As an example, one can quote the following leaflet:

> This is an examination of Ronald Dworkin's claim that the true theory of legal practice is the theory that puts legal practice in its 'best light'. By 'best light' Dworkin means a measure of desirability or goodness: the true theory of legal practice, says Dworkin, portrays the practice at its most desirable. Now why would that be the case? What's between the desirability of a theory and its truth? (Raban 2003, 243)

It is not my intention to be entrapped in an analytic or pseudo-analytic dispute with Dworkin's theory. Let me merely state the following.

- Dworkin rejects value nihilism.

- Dworkin's theory includes notoriously contestable statements about categorical priority of principles over policies, about equality as the sovereign value, about pre-existing rights, about the only right answer to all hard legal questions and so on.

- Dworkin refuses to discuss metatheoretical questions (*Cf.* Dworkin 1986, 78ff. and 266ff.).

One may suspect that Dworkin does not describe the law as it is; perhaps he merely presents a model, useful in political debate (*Cf.* Andreasson 2004). Moreover, the theory is difficult to assess, because its basis is concealed in a

conceptual fog. It is a theory without ontology and perhaps even without epistemology.

2.7   *Return to Natural Law*

Dworkin's influence in Scandinavia is limited. But there are some signs of revival of Natural Law. Zetterquist (2002, 208-9) elaborates The European Citizen model to justify legitimacy of European Union Law.

> The European Citizen model is … based on a more fundamental politico-philosophical theory. It can be called the individual-based theory and it is ultimately derived from Locke's political philosophy, according to which it is individuals, and not states, that are the primary political subjects. Government results solely from the fact that individuals have delegated certain of their political rights to public organs, but it remains open to them to retract the act of delegation. The key words in this theory are therefore consent, trust and the protection of rights. Means of coercion are necessary but do not play the dominant role that they do in the state-based theory. Without the categorical coupling with the means of coercion neither is there any requirement that the legal system must be an indivisible unit, and it is entirely possible to have several parallel legal systems.
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> In Lockean theory human beings have moral rights and obligations towards one another, independently of the state. Political power therefore derives not from the state but directly from individuals. The starting point for this theory is thus radically individualist. All individuals have a fundamental right to autonomy or self-government, that is to say the right to run their own lives themselves. This right is not among those that are entrusted to the political society. What is delegated to government is the right to execute the Law of Nature in regard to individuals who do not respect that law. The power that is delegated to government is thus the right oneself to do what is necessary to ensure the preservation of mankind in accordance with the Law of Nature and to punish those who break it. It is this power that constitutes the legitimate domain of government.

One may wonder whether Zetterquist derives normative consequences from Locke's theory of Natural Law. For example, the statement: "neither is there any requirement that the legal system must be an indivisible unit, and it is entirely possible to have several parallel legal systems" can be interpreted as descriptive, that is, describing normative consequences of Locke's theory. But it can also be interpreted as an expression of Zetterquist's own normative position, justifiable by his endorsing of Locke's theory. Regardless the interpretation, it is quite obvious that Zetterquist's theory would appeal to persons who have certain normative convictions, for example moderate Euro-sceptics, who are afraid of uncontrolled growth of a European Leviathan unchecked by firmly established individual rights.

2.8   Aarnio's Argumentation Theory

Aulis Aarnio has devoted many writings to legal doctrine (legal dogmatic); *Cf.*, e.g., Aarnio 1997. The tasks of legal dogmatic are interpretation and systematization of legal norms. This task is normative, in contrast to the explanatory task of sociology. Two basic demands of legal interpretation are rationality and acceptability. Systematization aims at reformulation of legal norms in an abstract manner, in relation to certain basic concepts. Systematization is a bearer of legal tradition. According to Aarnio, legal interpretation is a hermeneutic activity justifiable in relation to an audience. Legal audience is characterized as essentially "relativistic", in the sense of admitting the possibility of disagreement about evaluations. Aarnio contrasts this relativism with Ronald Dworkin's theory of only right answer to all legal questions. Whereas Dworkin is bound to commit himself to value-objectivism, Aarnio's own position is relativist, but this relativity is also relative, namely relative to the audience. Aarnio's theory of audience is one of his original contributions to legal theory. He has all his scholarly life aimed at understanding legal reasoning in the context of society. He sees legal interpretation, legal institutions and human actions, as parts of overarching totality. In brief, Aarnio has developed a meta-theory making sense of legal argumentation. The meta-theory has been inspired by Ludwig Wittgenstein. Aarnio has summarised it, as follows (1997, 123-125):

> At least the following ideas seem to be interwoven in the Wittgensteinian way of thinking.
>
> (1) Practical legal discourse (praxis), in this very connection, the interpretation of legal texts, is "on the whole" hermeneutic by nature. It has to do with a textual and contextual matter in which both the object and the output are linguistic. In this regard, the practical lawyer as well as legal dogmatician are prisoners of language.
> (2) This means that also a great deal of legal dogmatics, is based on a hermeneutic approach. […]
> (3) Legal dogmatical interpretation is an activity. […] Meaning is not concealed in language and to be picked out from there. It is constructed, although not freely constructed, in the creative process of the interpreter.
> […]
> (5) […] Reasoning in legal dogmatics is participating in a language-game. This participation uses hermeneutical tool and, as such, it also can try to improve the language. A legal *philosopher*, in his or her turn, is not to try and set norms as to how lawyers or scholars (the participants of the interpretative games) should act. The practical life cannot be dictated from the chamber of a philosopher. Certainly also a legal philosopher can himself *participate* in everyday language-games and try, by playing them, to influence their character, on the quiet, in the same way as any participant in language can change the games. But the change is not based on the philosopher's role as a philosopher but that of a practical agent.
>   Yet, the task of a legal philosopher is a *reconstructivist* one. He tries to recover the implicit features of our language and behaviour making them explicit, i.e. "visible" so that the language-games become understandable. […]

(6) […]   Lawyers try to clarify the content of the ideal normative world. Yet, legal thinking in this respect is *horizontal,* to use the expression of Hintikka […]. This leads us to a problem that has been extensively considered in the legal theory of the recent years, the concept of *coherence*.

2.9   *Anchoring Legal Reasoning in a Cluster of Philosophies*

Some years later, another Finnish scholar, Kaarlo Tuori (2002), attempted a synthesis of similar insights with some well-known philosophical works. The publisher presents Tuori's work, as follows.

> This profound and scholarly treatise develops a critical version of legal positivism as the basis for modern legal scholarship. Departing from the formalism of Hart and Kelsen and blending the European tradition of Weber, Habermas and Foucault with the Anglo-American contributions of Dworkin and MacCormick, Tuori presents the normative and practical faces of law as a multilayered phenomenon within which there is an important role for critical legal dogmatics in furthering law's self-understanding and coherence. Its themes also resonate with importance for the development of the European legal system.

Tuori main point is that the basis of internal legal criticism of legislation and practice resides in the deep structure of the law, not in morality. Tuori (2002, 147) distinguishes three layers of the law:

> 'Mature' modern law does not consist merely of regulations that can be read in the book of statutes or court decisions to be found in published collections. It also includes deeper layers, which both create preconditions for and impose limitations on the material at the surface level. I call these sub-surface levels the legal culture and the deep structure of the law.

An interesting aspect of Tuori's theory is its ontological turn. The profound answers to methodological and epistemological problems of legal doctrine are ontological, given in terms of what the law is. Thus, the law is complex, it consists not only the surface structure but also of legal culture and deep structure. Tuori does not endorse Hägerström's anti-metaphysical and minimalist ontology. He stipulates ontology of complex entities, such as the multilayered law.

   Moreover, Tuori's theory appears to be eclectic. Can one really integrate heterogeneous philosophies developed by Weber, Habermas, Foucault, François Ewald, Dworkin and MacCormick into one coherent theory? Can one integrate them with reflections based on Savigny, Puchta, Laband, Hart, Kelsen and other great jurists who inspired Tuori, as well? Can one integrate all this with obvious influence of Scandinavian thinkers, for example Aulis Aarnio's, who also left traces on Tuori's work? As a legal scholar, Tuori is not satisfied by any single philosophical theory. To approximate legal thinking, he needs a cluster of philosophical theories.

2.10 Self-reflection

My own theory has been influenced by Jerzy Wróblewski, Aulis Aarnio, Robert Alexy (*Cf.*, e.g., Aarnio, Alexy and Peczenik 1981), and later by Jaap Hage (Hage 1997 and Hage-Peczenik 2000 and 2001). I have always focused on coherent reconstruction of legal reasoning, using more profound philosophy only as a tool that helps understand how the lawyers think. Among writings delivering such philosophical tools, let me mention Berlin 1998 on value pluralism; Copp 1995 on socially centred morality; Haack 2003 on foundherentism in epistemology; Lehrer 1997 on coherentism in epistemology; Smith 1994 on platitudes in moral theory; and Swanton 1992 on wide reflective equilibrium. Recently, I have also been deeply impressed by the following words:

> The conscientious philosopher has no alternative but to proceed systematically. […] The fully adequate development of any philosophical position has to take into view the holistic issue of how its own deliberations fit into the larger scheme of things. (Rescher 2001, 43)
>
> The better (the more smoothly and coherently) an interpretation fits a text into its wider context, the better it is as an interpretation. (ibid., 69)
>
> Recourse to the idea of best systematization offers a distinctly more promising alternative to that of best explanation […] For systematization requires both coherence and a maximum of achievable comprehensiveness. (ibid. 138, 139)

The reconstruction of legal reasoning includes meta-theoretical observations and philosophical reflections. The central point is that almost all legal thinking is defeasible, outweighable and justifiable by recourse to coherence.

Jurists deal with legal rules, and they aim not only at solving cases but also at systematizing and ameliorating the rules. They sometimes develop theories (doctrines) at a high level of generality and aim at coherence of both the law and its moral surrounding. Thus, legal reasoning results in elaboration of legal doctrines at various levels of generality, same dealing with fragments of the law, others with the whole legal order. The latter constitute general legal doctrine. General legal doctrine describes and systematizes legal sources and legal arguments. It is a cluster of theories that differ by their age, geography, and generality. Some are traditionally juristic; others are more abstract and philosophically oriented. Some have attained greater sophistication in the common-law environment; others are more sophisticated in continental law. Some have developed relatively uniformly across different parts of the law and across various legal systems; others are rather local and fragmentary. My latest book (Peczenik 2004) deals extensively with legal doctrine.

Though jurists developing legal doctrine aim at generality, whatever they say is open to counterexamples which originate from weighing of moral considerations. When stating that it is the case, my theory is descriptive, not normative. But it is also normatively recommended by the author as legally correct. In other words, my theory not only describes legal doctrine but, being partly descriptive, partly normative, itself belongs to general legal doctrine. Due to its normative component, my attitude towards theorising in law resembles Jes

Bjarup's. However, while Bjarup bases his reflections on political and moral philosophy, and derives normative consequences applicable to legal reasoning, I use a reverse strategy: In my opinion, normativity is always social, in part inherent in the law and legal practice. Behind this society-centred theory of normativity, there is a sceptical meta-theory. Being a sceptic, I doubt any metaphysics, any moral theory, any epistemology, and I also doubt any anti-metaphysical theory, any moral nihilism and anti-foundationalist deconstruction of knowledge. But even a sceptic must live, and this implies believing in some things, though defeasibly. Nothing is certain, but inner normativity of the law appears to me as less uncertain than normativity grounded on moral theories which quarrel with each other.

2.11 The Search for Global Coherence in Legal Theory

One wonders whether not all theories of law are biased and fragmentary. A law theorist who closes his eyes to external reflections in a broader context, and stays within firmly delimited discipline called Jurisprudence, General Theory of Law etc., is like a driver in a fog. He sees a part of the road and only can guess what is before him. If he switches a stronger light, the fog apparently becomes even denser. But there is a road ahead though he cannot see it clearly. He must try to stay on it or crash.

   Wróblewski developed no theory of law or legal argumentation, only a meta-theory. Strömberg's theory, interpreted literally, is inconsistent, describing non-entities. Hart's, Raz's and Dworkin's theories are not descriptions of empirically "given" facts, but rather models including only data which fit chosen view points and interests. Logical analysts do not describe "given" facts about the law, but rather construct concepts. Aarnio, Tuori and Peczenik, each at his own way, present meta-theories of legal argumentation. However, the emphasis of these theories is different than in Wróblewski's theory. Wróblewski's goal was to classify and compare various theories of legal argumentation. Aarnio, Tuori and Peczenik wish rather to understand and justify the practice of legal argumentation. To do so, they pick up different philosophies; let it be Wittgenstein's, Habermas's and Foucault's or Lehrer's and Haack's. Since the concept of justification is normative, none of these authors can restrict the theorising to description and analysis. Each of these theories contains normative recommendations, as well. By involving justificatory problems, meta-theorists are thus forced to be involved in normative debate at the theoretical (not only meta-theoretical) level.

   Thus, discussing meta-theoretical questions is an important way to anchor locally coherent theories in the global system of acceptances/ preferences, aiming at global coherence. Legal theory as an academic subject can be understood as practice aiming at this linkage of local and global coherence. In the search for global coherence starting from legal doctrine, the jurists face philosophical problems. This encounter poses problems; both for jurists and for philosophers (*Cf.* Peczenik 2004a, 106 ff.). Yet, the linkage can be achieved in at least the following manner:

- One can continue Wróblewski's project, that is, to classify and compare legal theories, and also to list links of juristic method to controversial philosophical assumptions and philosophical controversies.

- One can also attempt to make interconnections between different problems more accessible than they are now. This can be done by discussing hidden assumptions and interests behind various legal theories. Mutual communication and chances for consensus, and even chances for truth, will increase if one understands not only the content but also the practical underpinning of the theories.

- Finally, one can search for platitudes behind conflicting theoretical models. Such platitudes will often be practical, expressing intuitions about what society is desirable etc.

One way or another, the plethora of legal theories is now ripe for systematizing.[3]

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[3] Nicholas Rescher's (2001) general theory of philosophical reasoning leads to a similar conclusion. His estimate of modern philosophy is the following. Nineteenth-century philosophizing consisted in the articulation of ambitious systems (Rescher 2001, 257). Many philosophers of the post-WWI era maintained that philosophical systematization of the traditional kind must be abandoned (ibid. 259). After World War II, there was a revival of philosophy, but a rather particularist one, without great systems (ibid. 261ff.). Today, philosophers are again producing complex systems, even if they do so multilaterally and collectively, proceeding by disaggregated and unplanned collaboration (ibid. 268). In other words, philosophy has once again taken an interest in global reason. At the same time, all philosophical theories are deeply problematic (*Cf*., e.g., ibid. 212, 243 etc.). In other words, one can compare a philosopher to Sisyphus (Peczenik 1999, 209).

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