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A Treatise on Legal Argumentation

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Chapter 6
Analytical Legal Positivism: Retracing the Original Intentions of the Legislator Under Legal Exegesis

6.1 Scientific Positivism Defined

Legal exegesis is based on a *positivist* conception of law. The term "positivism" is yet ambiguous, since it may denote at least two different things: *scientific positivism*, based on a positivist conception of science, and *legal positivism*, based on a voluntarist conception of law.

Scientific positivism, or positivism in the context of *philosophy of science*, refers to the philosophical stance to the effect that scientific knowledge can only be based on empirical observations, as then shaped into the form of causal laws, explanations, and predictions in the natural sciences. No traits of metaphysical speculation; nor intuitive, self-evidently valid or a priori assertions outside the safe realm of empirical observations and experiential knowledge; nor any personal values or subjective ideological preferences of a scientist may have legitimate footing in science, so conceived.

The term "positivism" was originally introduced in the 1830s by Auguste Comte (1798–1857) as part of his methodological agenda for a mature science, free from all religious or metaphysical predisposition, bias, and prejudice that had plagued Western science in the past. In the full-grown, positivist phase of human knowledge, *empirical* science based on scientific observations and experiments would displace any misguided references to the allegedly self-evident principles of man and the world as provided by theology and philosophical metaphysics. Similarly, John Stuart Mill (1806–1873) underscored the role of empirical observations as the true source of all scientific knowledge.

In the 1920s and 1930s, the *Vienna Circle* (*Wiener Kreis*) pushed the positivist *credo* of science to the utmost limits. The specific stance in the philosophy of science, as propounded by the *Wiener Kreis*, was to be known as *logical positivism* [1] To be more precise, the two intellectual movements of *logical positivism* and *logical*

[1] Niiniluoto and Koskinen, eds., *Wienin piiri*; esp. Manninen, "Uuden filosofisen liikkeen ja sen manifesti synty", pp. 27–128.

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empiricism need to be distinguished from each other, even though they are often mistakenly identified with each other.[2]

Logical positivism, as represented by Rudolf Carnap, Friedrich Waismann, Otto Neurath, Kurt Gödel, and Moritz Schlick, among others, counts as an influential stance vis-à-vis the philosophy of science in the 1920s. A major philosophical argument put forth by the logical positivists was to the effect of reducing the realm of meaningful linguistic propositions (in the terminology suggested by Rudolf Carnap and Otto Neurath) into *protocol sentences*, or sentences that are empirically verifiable, ruthlessly expelling from the domain of science all metaphysical speculation and the meaningless, nonsensical expressions that did not satisfy the criterion of empirical verifiability. Wittgenstein's *Tractatus* served as the source of inspiration for the logical positivist, even though in a manner that Wittgenstein himself did not fully endorse. Still, *Tractatus* was now read as a methodological program for a positivist science, based on empirical observation sentences and the logic of truth conditions applied to them. The name *Wiener Kreis*, or the *Vienna Circle*, refers to the logical positivists.

Logical empiricism, on the other hand, as represented by e.g. Hans Reichenbach and Carl Hempel, is a later intellectual movement the influence of which on science and the philosophy of science continued to prevail even at the second half of the twentieth century. Instead of Vienna, Austria, its geographic centre was Berlin, Germany. Carnap, Feigl, and Hempel first started as logical positivists but later switched over to logical empiricism.[3]

There are several common features in the two intellectual movements, though, which may explain the common confusion of them into single school of thought in the philosophy of science. Logical positivism and logical empiricism were both initiated as a reaction to the post-Kantian, idealistic philosophy of science at the end of the nineteenth century. They both underscored the significance of empirical knowledge and modern logic in the service of science. Equally, they both looked upon the methodology of the natural sciences as the model and reference for all scientific research. Both emphatically rejected idealistic, speculative metaphysics of all kind. Logical empiricists took a partly critical stance as to the philosophical commitments and ideas related to the theory of science that had been upheld by their predecessors, the logical positivists. The philosophical impact of logical positivism had come to an end before the 1950s, whereas the influence of logical empiricism continued until the latter half of the twentieth century. Of the philosophers who started as adherents of logical positivism, Rudolf Carnap, Herbert Feigl, and Carl Hempel changed over to contribute to logical empiricism.[4]

Georg Henrik von Wright (1916–2003) defined scientific positivism with the following three tenets in his *Explanation and Understanding*[5]:

[2] Salmon, "Logical Empiricism", p. 233.

[3] Ray, "Logical Positivism", pp. 243–251; Salmon, "Logical Empiricism", pp. 233–242.

[4] Salmon, "Logical Empiricism", p. 234.

[5] von Wright, *Explanation and Understanding*, p. 4.

(a) *methodological monism*, or the idea that there can be only one valid scientific method;
(b) the idea that exact natural sciences, and *mathematical physics* in specific, set a methodological ideal or standard for all the other kinds of science, with the humanities included, and
(c) the idea of adopting *causal explanation* in science instead of teleological or intentional explanations.

Kyösti Raunio, a Finnish social scientist, has concisely defined the positivist conception of science for the human and social sciences by means of the following five rules[6]:

(a) the rule of *phenomenalism*, to the effect that only immediate sense experience can offer a reliable ground for scientifically grounded knowledge of reality;
(b) the rule of *nominalism*, to the effect that abstract scientific concepts are to be derived from sense experience and, in turn, theoretical terms ought to be translatable to the language of empirical observations;
(c) a *non-cognitivist stance towards values and norms*, to the effect of separating the facts that make up the "world of *Is*" (*Sein*) from the values and norms that make up the "world of *Ought*" (*Sollen*), while denying the status of scientific knowledge from any value statements and normative assertions, since they amount to no more than mere expressions of emotion or the will of the speaker concerned;
(d) the rule of *methodological naturalism* or *methodological naturalist monism*, to the effect that the methodology of the natural sciences is to be applied in the field of the human and social sciences, as well; and
(e) the *nomothetic* rule, to the effect that the goal for science is to state general laws, or statements that consist of general law-like assertions, of reality.

Frequently the term *positivism* is however adopted in a more loose-edged manner even in the philosophy of science, with reference to any research that only deals with facts that can be observed by reference to some objective criteria, without making any commitment to some value-laden considerations as to the nature of reality. A "cheerful positivist", as Michel Foucault (1926–1984) described his agenda of an archaeology of knowledge for the human sciences,[7] is fully satisfied with just describing, as objectively as possible, the subject matter of research, refraining from all normative, critical evaluations of his own. Such a scientific methodology

[6] Raunio, *Positivismi ja ihmistiede*, pp. 112–115.

[7] "Analyser une formation discursive, c'est donc traiter un ensemble de performance verbales, au niveau des énoncés et de la forme de positivité qui les caractérise; ou plus brièvement, c'est définir le type de positivité d'un discours. Si, en substituant l'analyse de la rareté à la recherche des totalités, la description des rapports d'extériorité au thème du fondement transcendantal, l'analyse des cumuls à la quête de l'origine, on est un positiviste, eh bien *je suis un positiviste heureux*, j'en tombe facilement d'accord." Foucault, *L'Archéologie du savoir*, pp. 164–165. (Italics added.)

resembles the one suggested by Leopold von Ranke (1795–1886), whose idea of legitimate historical research was confined to finding out "what in fact had taken place" (*wie es eigentlich gewesen*) in some historical occasion.[8]

What often goes unnoticed by the positivists themselves is that even a positivist stance in science entails a set of value commitments built in the methodology adopted: the philosophical stance of excluding any value considerations from the domain of science is itself a value-laden position. Under Michel Foucault's or Leopond von Ranke's expressly positivist premises of doing research, one need not adhere to the austere methodological theses of the logical positivists or the logical empiricists, but a less strictly defined stance vis-à-vis the subject matter and methodology of science will do, especially in the context of the humanities or the social sciences.

6.2 What Is Analytical Philosophy?

Analytical philosophy is not a uniform "school, doctrine, or body of accepted propositions" of philosophy, as the standard definition in a standard dictionary of philosophy has it.[9] It is not an intellectual movement that would be drawn together by some shared collection of philosophical theses or other fixed foundation, even if the privileged status given to Ludwig Wittgenstein's *Tractatus Logico-Philosophicus* in the analytical circles of the *Wiener Kreis* comes close to having such a standing. Rather, the analytical movement in philosophy refers to a certain kind of approach, style, or mentality of "doing philosophy" that is most often associated with the works of Gottlob Frege (1848–1925), Bertrand Russell (1872–1970), G. E. Moore (1873–1958) and, in specific, Ludwig Wittgenstein (1889–1951). The four philosophers and their intellectual followers make up the four cornerstones of the analytical and linguistic movement in philosophy.

Wittgenstein's *Tractatus* provided the main source of inspiration for the adherents of *logical positivism*, such as Moritz Schlick (1882–1936), Otto Neurath (1882–1945) and Rudolf Carnap (1891–1970). Wittgenstein's later, posthumous works, such as *Philosophical Investigations*, *The Blue and Brown Books*, and *On Certainty*, provided a very different insight into the relation of language and the world, manifested in the *Oxford school of linguistic philosophy*, as exemplified by the works of Elizabeth Anscombe (1919–2001), John L. Austin (1911–1960), Gilbert Ryle (1900–1976), and H. L. A. Hart (1907–1992).[10] According to the

[8] "Man hat der Historie das Amt, die Vergangenheit zu richten, die Mitwelt zum Nutzen zu künftiger Jahre zu belehren, beigemessen; so hoher Ämter unterwindet sich gegenwärtiger Versuch nicht: er will bloss zeigen, *wie es eigentlich gewesen*." Cited in: Kalela, *Historiantutkimus ja historia*, p. 50. (Italics added.)

[9] Heil, "Analytic Philosophy", p. 22.

[10] A good introduction to the thematics of analytical philosophy is provided in the two books edited by A.P. Martinich and Ernest Sosa, *A Companion to Analytic Philosophy* and *Analytic Philosophy. An Anthology*. Similarly, the essay collection, *The Linguistic Turn. Essays in Philosophical*

methodological *credo* of analytical philosophy, the only legitimate task for philosophy is *linguistic analysis*, i.e. the logical syntax of language, as in Wittgenstein's *Tractatus Logico-Philosophicus* and Carnap's *Logische Syntax der Sprache*, or, alternatively, an analysis of the common linguistic practices and usages in the community, as in John L. Austin's *How To Do Things with Words*, Gilbert Ryle's *The Concept of Mind*, and H. L. A. Hart's *The Concept of Law*.[11]

Analytical philosophy rejects all notoriously metaphysical, idealistic, or speculative ways of "doing philosophy", as endorsed by the Marxist and the Heideggerian approaches to philosophy in specific. According to the unyielding methodological *credo* of analytical philosophy, logico-conceptual precision is to be pursued in science, and all deceptive references to metaphysical idealism, philosophical introspection, self-evidently valid or a priori truths, or other philosophical speculation that cannot produce scientific, empirically verifiable propositions concerning the facts of the world are to be avoided.[12] The existential claims of Martin Heidegger's (1889–1976) fundamental ontology provided an easy target for the vehement critique of the *Wiener Kreis*. As Heidegger himself wrote[13]:

> What is to be investigated is being only and – *nothing* else; being alone and further – *nothing*; solely being, and beyond being – *nothing*. *What about this Nothing? . . . Does the Nothing exist only because the Not, i.e. the Negation, exists?* Or is it the other way around? *Does Negation and the Not exist only because the Nothing exists? . . .* We assert: *The Nothing is prior to the Not and the Negation. . . .* Where do we seek the Nothing? How do we find the Nothing?. . . We know the Nothing. . . *Anxiety reveals the Nothing. . . .* That for which and because of which we were anxious, was "really" – nothing. Indeed: the Nothing itself – as such – was present. . . . *What about this Nothing? – The Nothing itself nothings.*

Such metaphysical and, according to the logical positivists, utterly senseless, meaningless assertions were to be sternly rejected from the field of sober philosophy and science, to the effect of rephrasing the Heideggerian question in terms of a meta-level linguistic analysis as follows: "What is it that you mean, to be more precise, when you say that 'The nothing nothings itself'?" Rejecting the lure of any futile metaphysics, analytical and linguistic philosophy focuses on the semantic *truth-conditions* of a linguistic assertion: how can we possibly know whether Heidegger's key claim of the essence of "Being-in-the-World" as care, concern,

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Method, gives a balanced account of the endeavours of the linguistic movement in philosophy. Cf. Soames, *Philosophical Analysis in the Twentieth Century, Vols. 1–2*.

[11] The title of Ryle's *The Concept of Mind* served as a model for Hart's *The Concept of Law*.

[12] The fate of e.g. psychoanalysis was similar, since its assertions of the unconsciousness could be neither verified nor falsified.

[13] Heidegger in his "Was ist Metaphysik?", as cited in Carnap, "The Elimination of Metaphysics Through Logical Analysis of Language", p. 69. (Italics in original.) – On the key phrase "Das Nichts nichtet", cf. also Waismann, *The Principles of Linguistic Philosophy*, p. 334. – The German verb "vernichten" from which Heidegger's "nichten" is derived signifies the (act of) obliterating, annihilating, or destroying (something). There is no similar connotation entailed in the English expression adopted in the translation, viz. "nothing" used as a verb. A more accurate translation of Heidegger's metaphysics might be: "nothingness annihilates (itself)".

or anxiety (*Dasein als Sorge*), or of the annihilating character of *nothing* is true, or – which amounts to the same question – how could we possibly *corroborate* any such assertions? The answer provided by analytical philosophy was firmly in the negative: metaphysical assertions are *senseless*, devoid of any reference outside of language and, therefore, without truth-value or sensible meaning. Besides Heideggerian metaphysics, analytical and linguistic philosophy focused its most severe critique on the Marxist philosophy or any other fields of human enquiry, like psychoanalysis and theology, in which the assertions could neither be verified nor falsified with reference to certain empirical observations in the world.

Even though it rejected the pursuit of a scientific world-view, the Oxford school of ordinary language is built on the premises initially laid down by Ludwig Wittgenstein's *Tractatus Logico-Philosophicus* and the logical positivists. A.M. Quinton gives a concise summary of the relation between the methodology adopted by the Oxford school of linguistic philosophy, on the one hand, and the one adopted by Wittgenstein and the logical positivists, on the other[14]:

> In general terms, then, the method of the Oxford philosophers lay somewhere in between the professed method of Wittgenstein and the methods of the logical positivists of the 1930s. With the positivists and against Wittgenstein they believed that the job of philosophy was to set out the logical properties and relations of the various forms of discourse in a systematic way. But with Wittgenstein and against the positivists they rejected the ideal of linguistic perfection suggested by formal logic, concerning themselves with the description of language as it actually is rather than with the extrication of some ideal essence from it or with the proposal of a logically superior conceptual system as an alternative to it.

The Oxford school of linguistic philosophy thus carried on the Wittgensteinian agenda of defining the relation between language and the world.

6.3 Legal Positivism Defined

Legal positivism is to be distinguished from logical positivism. According to the Italian legal philosopher Norberto Bobbio (1909–2004), *legal positivism* can be defined existing in the world the following seven characteristics[15]:

(1) Concerning the *subject matter of enquiry*: law is to be taken as a social fact and not as a value, to the effect that legal phenomena, since they are analogical to the phenomena studied by the natural sciences, can be studied by a similar method as adopted in the natural sciences. A legal scholar is required to refrain from taking any evaluative stance on the moral qualities or the goodness or evilness of the law. Finally, a theory of legal validity can be derived from the above in line with legal formalism.

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[14] Quinton, "Contemporary British Philosophy", p. 546 – in O'Connor, D.J., ed. *A Critical History of Western Philosophy*. Hampshire & London: MacMillan Publishing, 1964, pp. 530–555.

[15] Bobbio, *Il Positivismo Giuridico*, pp. 151–154 (*I punti fondamentali della dottrina giuspositivistica*).

(2) Concerning the *definition of law*: the concept of law is defined as its coerciveness in a society, in line with the notion of law as a social fact.
(3) Concerning the *sources of law*: legislation is regarded as the primary source of law, and a complex theory is then developed as to its relation to the other sources of law, such as customary law and judicial decisions.
(4) Concerning the *theory of a legal norm*: a legal norm is defined as a command or an imperative [issued by the sovereign];[16] and, as a consequence, permissive norms and the addressee of such legal commands may induce theoretical difficulties to legal positivism.
(5) Concerning the *theory of a legal order*: the legal order is defined as internally coherent and complete, to the effect that:
    (a) the co-existence of antinomical, i.e. contradictory or mutually contrary norms is ruled out by the presumed *coherence* of the legal order, and
    (b) the existence of normative gaps is ruled out by the presumed *completeness* of the legal order.
(6) Concerning the *method of legal science*: legal interpretation is defined in terms of purely formal, mechanistic jurisprudence, to the effect of denying any genuinely norm-creating discretion of the judge.
(7) Concerning the *theory of absolute obedience to the law*: the law ought to be obeyed because it is valid law, irrespective of its substantive content (*ein Gesetz is ein Gesetz*).

Bobbio's points (1)–(4) are essentially in match with the common idea of legal positivism today, even if he gives more weight to the sanction-based tenets of law than e.g. H. L. A. Hart. However, Bobbio's extremely formalistic idea of a legal system (= Bobbio's point 5) and of legal interpretation (= Bobbio's point 6), and the idea of absolute obedience to the law, irrespective of its content (= Bobbio's point 7), is too constricted to comprise the complexity of modern law. Therefore, I will use John Austin's, Hans Kelsen's, H. L. A. Hart's, and Jerzy Wróblewski's conceptions of law as the primary source of inspiration here.

In line with Bobbio's definition above, legal positivism refers to a *voluntarist* stance to the effect that the law in force is defined as a compound of the acts of volition and individual, subsequently retraceable decisions issued by the sovereign ruler, as John Austin (1790–1859) thought in the 1820s. The "sovereign" may refer to the various *institutional* decision-making organs of a legal order, endowed with either *legislative* or *judicial* powers,[17] if a wider and more modern notion of law

[16] I.e. commands, issued by the sovereign ruler, as in John Austin's theory of law, or some other state institution, like the Parliament. Bobbio, however, leaves the definition of a sovereign untouched.

[17] The *legislator* is in fact a plural noun, since it may refer to a host of institutionally qualified law-giving authorities, such as the Parliament, the President of the Republic at the State Council, the Ministries, and other administrative bodies that are endowed with the power to issue legal norms. In addition, the legislative organs of the European Union need to be added thereto, i.e. the European

and sovereignty is opted for. The use of the attribute "valid" in the legal context is restricted to legal enactments, precedents, and other court decisions that can (only) be initially created, subsequently altered, legally enforced, and ultimately annulled by an act of will by the legislator, a court of justice or other legal official. Modern law is *positive law* (*ius positivum*), and not something that dwells in the divine order of things or something that can be discovered by the faculties of the human reason.

Modern *analytical* legal positivism is based on the idea of drawing a sharp distinction between the formal validity of law and its moral merit or dismerit. An evil law is still valid law, if it has been correctly enacted. As John Austin admirably put it[18]:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the from the text, by which we regulate our approbation and disapprobation.

Austin focused his critique on Sir William Blackstone's conception of law where the two issues were irredeemably intertwined, as they are in all theories of law based on natural law philosophy.[19] The subject matter of legal research for a legal positivist consists of the valid rules of some legal order only, i.e. the sum total of norms laid down by the sovereign ruler. Any judgments concerning the actual contents of law falls outside of the legitimate sphere of study for the legal positivist.

Legal positivism has an uneasy relation to the norms of *customary law*, since the binding character of customary law cannot be traced back to an express act of will by the sovereign ruler, i.e. the Parliament or other ultimate lawgiver. If the law is defined as the outcome of will-formation of a sovereign ruler, customary law falls outside the concept of law, strictly defined. Similarly, legal positivism commonly ignores the impact on the judge's discretion of value-laden principles of law and other legal standards that cannot be identified by sole reference to their source of origin, as captured by the notion of the *rule of recognition* by H. L. A. Hart.[20] The binding force of legal principles is instead based on (possibly oblique but still legally adequate) *institutional support* and content-based *sense of approval* that they draw from the various institutional and non-institutional sources of law in society.[21] Under a positivist notion of law, individual legal subjects are even able, when acting in line with the power-inducing legal norms, to alter their legal relations vis-à-vis other legal subjects by making a valid contract, a will, or some other private law instrument.

Parliament, Council, and Commission. – Similarly, the term "court" should be use with coverage of other officials endowed with law-applying powers, as well.

[18] Austin, *The Province of Jurisprudence Determined*, pp. 157–159. – For a critique of Ronald Dworkin for not observing the said distinction and returning to a "pre-Benthamite" conception of law, cf. Neil MacCormick's sharp essay "Dworkin as Pre-Benthamite".

[19] Austin, *The Province of Jurisprudence Determined*, pp. 157–159.

[20] Hart, *The Concept of Law* (1961), pp. 97–107.

[21] Dworkin, *Taking Rights Seriously*.

Like Austin, the Austrian legal philosopher Hans Kelsen (1881–1973) defined the legitimate sphere of legal analysis by reference to what the law in a given society *is*, not what it *ought to be* when judged from the point of view of natural law philosophy or critical political morality in general.[22] The price for such austere methodological purity was paid in the restrictions placed on legal science: a legal scholar was not allowed to present any priority order among the semantically possible outcomes for the case in hand, being under obligation to refrain from taking any evaluative or preferential stance on the issue at hand.[23]

The traditional idea of the legal doctrine or legal dogmatics (*Rechtsdogmatik*) as an enquiry into the *systematization* and *interpretation* of the legal norms of some legal order vis-à-vis a variety of fact-constellations was excluded from legitimate research, since it failed in Kelsen's test of scientificity. The methodology to be adopted in legal science was restricted to what Kelsen called *eine wertfreie Beschreibung ihres Gegenstandes*,[24] i.e. a value-free description of its subject matter, the valid norms of a legal order. Questions concerning the content of law could not be reached by a scientifically valid methodology, except in the trivial sense of presenting a set of technical meta-level collision norms, such as *lex superior derogat (legi) inferiori* and *lex specialis derogat (legi) generali* for a legal system.

Intellectual confusion has been induced by the fact that the *subject matter* of a legal positivist research may have been defined more or less in line with the descriptive and empiricist criteria of scientific positivism, focusing on the social facts only and leaving the personal values and ideological preferences of the scholar out of the scope of study; while the *methodology* of such research may have fallen short of the prerequisites of a positivist approach of science as defined by the *Wiener Kreis*. Alf Ross, for one, was perhaps all too quick to place an equation mark between the two categories of legal positivism and scientific positivism[25]:

> Considering how the term "positivism" is used in general philosophy, it seems to me reasonable to take the term "legal positivism" in a broad sense to mean an attitude or approach to the problems of legal philosophy and jurisprudence, an approach *based on the principles of an empiricist, antimetaphysical philosophy*.

Natural law philosophy, as a major alternative and logical counterpart to Ross's account of legal positivism, is characterized with reference to ". . . the belief that the law cannot be exhaustively described or understood in terms of empiricist principles, but requires metaphysical interpretation, that is, interpretation in light of the rational

[22] "Sie [die reine Rechtslehre] versucht, die Frage zu beantworten, was und wie das Recht ist, nicht aber die Frage, wie es sein oder gemacht werden soll. Sie ist Rechtswissenschaft, nicht aber Rechtspolitik." Kelsen, *Reine Rechtslehre* (1960), p. 1.

[23] "Rechtswissenschaftliche Interpretation kann nichts anderes als die möglichen Bedeutungen einer Rechtsnorm herausstellen.", Kelsen, *Reine Rechtslehre* (1960), p. 353.

[24] Kelsen, *Reine Rechtslehre* (1960), p. 84.

[25] Ross, "Validity and the Conflict between Positivism and Natural Law", p. 148. (Italics added.)

or divine nature of man, a priori principles and ideas transcending the world of the senses."[26]

Ross, moreover, defines the "kernel" of an empiricist approach to the law by means of the two theses.[27] Firstly – though Ross would seem to be moving in a logical circle here, begging the question – the belief in the existence of natural law is erroneous, since all law is, by definition, positive law. That, however, is a mere stipulation, not a philosophical argument.

Secondly, the existence of positive law can be established in purely factual, empirical terms, "based on the observation and interpretation of social facts (human behaviour and attitudes)".[28] Ross' very terminology, i.e. observation *and interpretation* of social facts, yet reveals that no straightforwardly empiricist approach alone, detached from the methodological elements of constructive interpretation, can cover the subject matter of legal science, even though in the preface to the English edition of his *Om ret og retfærdighed* Ross boldly claims "to carry, in the field of law, the empirical principles to their ultimate conclusions".[29] In Ross' jurisprudence, the *normative ideology internalized by the judges*,[30] when employed as a scheme of interpretation in qualifying certain social facts as legal phenomena,[31] signifies the intrusion of an inherently constructive, interpretation-laden element into the field of analysis reserved for purely empiricist observation by Ross.

What is common to all the variants of legal positivism and legal realism alike is the idea that law is a *social fact*, and not some social ideal irredeemably beyond the reach of human endeavours. The key difference between legal positivism, on the one hand, and legal realism and sociological jurisprudence, on the other, is that the former defines the law with reference to the general, abstract rules issued by the legislator, while the latter opt for the individual judicial decisions as laid down by the courts of justice and other legal officials. In the latter, the empiricist "law in action" will take over from the more idealist "law in the books".

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[26] Ross, "Validity and the Conflict between Positivism and Natural Law", p. 148.

[27] Ross, "Validity and the Conflict between Positivism and Natural Law", pp. 148–149.

[28] Ross, "Validity and the Conflict between Positivism and Natural Law", p. 149.

[29] Ross, *On Law and Justice*, p. IX: "The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this idea springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the analytical demand that the fundamental legal notions must be interpreted as conceptions of social reality, the behaviour of man in society, and as nothing else.'" – As the Finnish scholar Markku Helin has convincingly argued, there is a *hermeneutical* element entailed in Ross' *Om ret og retfærdighed*, though Ross would not seem to have been entirely conscious of its impact. Helin, *Lainoppi ja metafysiikka*, pp. 159–169.

[30] In Danish.: *den normative ideologi der besjæler dommeren*. Ross, *Om ret og retfærdighed*, p. 56. Cf. Ross, *On Law and Justice*, p. 43.

[31] In German: *Deutungschema*; in Danish: *tydningsskema*. Cf. Ross, *Om ret og retfærdighed*, p. 41; Kelsen, *Reine Rechtslehre* (1960), p. 3 et seq. – Ross' early work *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des Positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* was deeply influenced by Kelsen's *Reine Rechtslehre*. It may be that the similarity in thought vis-à-vis the scheme of interpretation dates from that period in Ross' legal thinking.

Thomas Morawetz made the following acute observation as to choice of subject matter of legal positivism and its alternatives in the field of jurisprudence[32]:

> Accordingly, positivists distinguish sharply between analytical legal theory and normative legal doctrine. The first involves the analysis of the nature of legal rules, legal validity, institutional structure, and so on, but not normative questions such as what rights should be part of the system and how those rights are to be understood. Critical theorists, like positivists, characteristically distinguish between questions about the nature of law (e.g. as legitimating ideology) and the particular merits, demerits, and uses of normative responses to legal issues. On the other hand, natural law theorists often address these issues in ways that bridge analytical and normative questions.

What the legal positivists share with the scientific positivists is a denial of mixing facts with values in scientific enquiry.

As a consequence, the concept of law under legal positivism may be defined so that the law is based on an *act of will* of the (sovereign) legislator or some other institutional lawgiver, and it is – at least *prima facie* – arbitrary in content, or free from any content-bound criteria derived from religion or political morality. Thus, Neil MacCormick defined legal positivism with the following two criteria[33]:

(i) The existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems,
(ii) The existence of laws depends upon their being established through decisions of human beings in society.

There is a variety of intellectual currents under the heading "legal positivism", though. *Analytical legal positivism* stresses the volition-based character of law, having reference to the will-formation of the legislator, while *institutional legal positivism* underscores the linguistic and institutional elements involved in the creation, enforcement, alteration, and derogation of law. Common to them both is the emphasis laid on the *acts of will* of a legally competent decision-making body, such as the legislator or a court of justice. Below, I will consider analytical and institutional legal positivism, before entering the (historically older) semantic realm of *legal exegesis* under the French and Belgian *exegetical school of law* (*École de l'Exégèse*) in the nineteenth century.[34] Moreover, in the recent jurisprudential writings on legal positivism the distinction between *exclusive legal positivism* and *inclusive legal positivism* has been made. The division between the two is based on whether the distinct social values that are entailed in the rule of recognition of a given legal order are part of valid law or not.

Below, I will tackle *analytical* and *institutional* legal positivism, along with the *exclusive* and *inclusive* subcategories of the former. Kaarlo Tuori's *critical* legal

[32] Morawetz, "Law as Experience: The Internal Aspect of Law", p. 215, note 74.

[33] MacCormick and Weinberger, *An Institutional Theory of Law*, pp. 128–129.

[34] On analytical legal positivism, Siltala, *A Theory of Precedent*, pp. 17–21; Siltala, *Oikeustieteen tieteenteoria*, pp. 32–40, 876–877; on institutional legal positivism, Siltala, *Oikeustieteen tieteenteoria*, pp. 43–45.

positivism will be considered, as well, though it seems to miss some of the very definitional qualities of legal positivism, strictly defined. – The saga of modern legal positivism begins with H. L. A. Hart's *The Concept of Law*.

6.4 The Saga of Modern Legal Positivism

6.4.1 Analytical Legal Positivism

Analytical legal positivism has drawn inspiration from analytical and linguistic philosophy. As an intellectual "school" of legal thought it is yet older than its counterpart in general philosophy or the philosophy of science. Both intellectual movements share a whole-hearted striving for conceptual precision and a similar aversion toward any sky-soaring, "puffy" metaphysics that cannot withstand the test of empirical corroboration and validation. In jurisprudence the impact of the analytical and linguistic approach can be seen in H. L. A. Hart's writings since the 1950s and 1960s.

> The roots of an analytical approach to law and language can be traced back to the writings by William of Ockham (1285–1347), a Fransiscan friar and a nominalist philosopher in the Middle Ages. In the heated theological (and philosophical) debate with the Pope John XXII on the nature of the property rights of donations received by the Franciscan order, William of Ockham wrote the thesis *Opus nonaginta dierum*, defending a highly sophisticated conception of legal ownership that predates the one that was put forth by analytical jurisprudence several centuries later. *Ockham's razor*, i.e. the law of parsimony in philosophical explanation, is commonly attributed to William of Ockham.[35] As a consequence, any postulated entities in a philosophical ontology or the grounds of philosophical explanation are not to be multiplied beyond what is absolutely necessary. According to Ockham, *less is more* in ontology and philosophical explanation.

According to analytical legal positivism, the concept of law can be defined by the following four criteria.

Firstly, modern law is by definition *positive* law (*ius positivum*), based on an *act of will* of the sovereign legislator in Austin's theory of law or some other decision-making body with an institutionally acknowledged standing, such as the Parliament, the Council of State, or a court of justice, in Kelsen's and Hart's jurisprudence. The law-making power of the legislator is at least in principle unconstrained by any moral, content-bound criteria that could logically and conceptually precede an act of will by the legislator, and the same goes for the courts' judicial discretion. Being itself the outcome of such institutional decision-making, the law of a state or some international community, like the European Union, cannot be subject to some

[35] There is no one authoritative formulation of Ockham's razor. It has been given a host of different formulations, such as: *entia non sunt multiplicanda praeter necessitatem* or *entia non sunt multiplicanda sine necessitate* or *frustra fit per plura quod potest fieri per pauciora* or *pluralitas non est ponenda sine necessitate*.

standards of an eternal, immutable, and supra-positive natural law, the positivists claim.

Secondly, and closely related to the previous tenet, valid rules of law are to be identified by their formal *source of origin* in legislation or judicial decisions. With reference to such a *test of pedigree*, as Dworkin a bit sardonically put it, legal rules are distinguished from the norms of political morality, religion, sports and play, and societal etiquette in all of which the substantive content of a norm has more bearing than its formal source of origin. Legal enactments and administrative regulations, on the other hand, are binding because of their source of origin, not because of their substantive content. Yet, even Hart ultimately had to alleviate that methodological and epistemic demand with the *minimum content of natural law* in *The Concept of Law*.[36]

Thirdly, the validity or normatively binding character of law is ultimately based on *coercion*, since the threat of *official sanction* in the case of non-compliance with some valid legal rule is one of the definitional characteristics of legal positivism.[37] In Kelsen's *Reine Rechtslehre*, the mandatory character of a legal rule is ultimately based on the threat of a legal sanction that will be inflicted upon a disobedient judge who refuses to apply a valid legal norm.[38] The secondary rules of change and adjudication in Hart's *The Concept of Law* and, from the ontological point of view, the rather problematic rule of recognition as part of it, are a notable exception to the inherently sanction-based notion of law in Hart's version of legal positivism.

Fourthly and finally, analytical legal positivism is committed to a *rule-based* conception of law, ruling out from the sphere of law the impact of value-laden principles and standards of law with adequate institutional support and societal approval.

Still, analytical legal positivism notably fails to provide a satisfactory account of the judge's act of legal interpretation. In the writings by the major figures of the movement, i.e. John Austin, Hans Kelsen, H. L. A. Hart, and Jerzy Wróblewski, the issues of legal interpretation and legal argumentation are treated in the passing only, and the focus of analysis is placed on other topics, such as the definitional characteristics of positive law as a command by the sovereign ruler, backed by the threat of force in the form of a sanction and distinguished from the precepts of natural law or social morals (Austin), the internal structure of law along with the methodological purity of the science of law (Kelsen), or the rule-aligned concept

[36] Hart, *The Concept of Law* (1961), pp. 189–195.

[37] In a similar manner Max Weber, one of the founders of modern sociology of law, defined the law by means of the state's monopoly as to the use of coercion in Weber, *Wirtschaft und Gesellschaft*, pp. 29–30, 821–824. – Cf. also Ross, *Om ret og retfærdighed*, pp. 41–47 (Chapter 7: "'Dansk ret' er regler om monopoliseret udøvelse af fysisk tvang ved offentlig myndighed").

[38] Kelsen, *Reine Rechtslehre* (1960), pp. 51–55. – The idea of law being based on sanctions is repeated in Aulis Aarnio's and Aleksander Peczenik's theory of legal sources where the binding force of legislation (and customary law) is justified by reference to the possible infliction of a sanction upon a disobedient judge.

of law and its relation to morality (Hart).[39] In Neil MacCormick's institutional theory of law, the issues of legal interpretation are dealt with more erudition, but he would seem to belong to the later *institutional* variant of legal positivism, and not the more "orthodox" analytical trend by Austin, Kelsen, and Hart. Moreover, there are elements drawn from the new rhetoric or even non-analytical theory of law in Neil MacCormick jurisprudence, so it is not an instance of positivism, pure and simple.[40]

The founder of analytical legal positivism, John Austin, distinguished general *laws or rules* from *occasional or particular commands*.[41] As an example of the latter, i.e. occasional or particular commands, Austin referred to individual judicial decisions.[42] Hart renamed Austin's sanction-based notion of law as the *gunman situation writ large*, since the bank-robber, like the legislator in Austin's theory of law, uses the threat of force to have his will complied with. To Hart's mind, Austin's idea of positive law was in essence a set of *orders backed by threats*, as issued by the lawgiver.[43] Hart, however, failed to take notice of the fact that for Austin the law consists of general rules as issued by the sovereign legislator, and occasional or particular commands were explicitly ruled out of the realm of law. Yet, since Austin's focus of interest is on the definition of the concept of law and its autonomy vis-à-vis social morality, he does not properly address issues of legal interpretation in the book.

Hans Kelsen's *Reine Rechtslehre* is a highly ambitious theory of the *science of law*, carefully "purified" from all non-legal elements no matter whether they deal with the impact of, say, religion, politics, moral philosophy, sociology, economics, or societal etiquette vis-à-vis the law. Yet, even Kelsen mostly bypasses the question of legal interpretation. In the first edition of *Reine Rechtslehre*, the question of interpretation is totally ignored. It is only at the end of the second edition of *Reine Rechtslehre*, written almost as a kind of postscript to the book, Kelsen introduces the distinction between the *authentic* and *inauthentic* acts of interpretation. Authentic interpretation refers to the *norm-creating* act by a judge or other legal authority whereby a legal norm is created. Inauthentic interpretation, in turn, refers

[39] Summarizingly (and critically) on the idea of legal interpretation in analytical legal positivism, see Fuller, *The Morality of Law*, pp. 224–227.

[40] Neil MacCormick's institutional theory of legal interpretation will be considered at more depth in Section 12.3.1. "Neil MacCormick's Theory of the Three C's in Legal Reasoning: from Consistency and Coherence to the Consequences of Law" below.

[41] "Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of '*occasional* or *particular* commands'." Austin, *The Province of Jurisprudence Determined*, p. 25.

[42] Austin, *The Province of Jurisprudence Determined*, p. 27: "To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules."

[43] Hart, *The Concept of Law* (1961), pp. 18–25.

to the act of interpretation by a legal scholar or ordinary citizen, devoid of any such law-creating power.[44]

The outcome of an *authentic* act of legal interpretation is a valid legal norm, either a *general* norm issued by the legislator or an *individual* norm tailored for the case at hand by a court of justice or other legal official.[45] An act of interpretation by the parliament has to do with the semantics of the constitution; while an act of interpretation by a judge or other official deals with the semantics of (mostly) legislative enactments and administrative regulations of various kind. According to Kelsen, the difference between general norms, as created by the legislator, and individual norms, as laid down by the courts of justice or other law-applying officials, is one of degree only, and not a qualitative one. The general norms issued in legislation are step-by-step specified and concretized in the course of legal adjudication through the individual acts of interpretation by judges and other legal authorities.

The outcomes of legal science only count as instances of inauthentic legal interpretation, since such an act of interpretation is devoid of any norm-creating, norm-altering, norm-enforcing, or norm-derogating force. In terms of John L. Austin's and John Searle's later speech act theory, one might say that an act of interpretation by a legal scholar by definition lacks the kind of *perlocutionary* force that the act of interpretation by the legislator, a court of justice, or legal authority is endowed with.

According to Kelsen, the legitimate task of legal science, if it wishes retain its status as science and not be reduced to mere politics, can only be *eine wertfreie Beschreibung ihres Gegenstandes*,[46] in the sense of a value-free *description* of the valid legal norms of a legal order and of the hierarchical, pyramid-like totality they constitute. A legal scholar is not allowed to present a preference order of any kind among the semantically possible readings of the valid legal norms. If the content of the law is semantically ambiguous, lending support to more than just one interpretation, as is the case if we are not dealing with an *isomorphic* situation of legal decision-making (à la Makkonen), then all a legal scholar may legitimately do is to present the semantically possible alternatives of interpretation while refraining from giving any kind of preference order of them.

From the judge's *committed* point of view as well as from a legal scholar's more *detached* point of view to the law, the intellectual cost of Kelsen's purification of legal science from all value-laden, interpretation-aligned elements is all too high: the most pertinent issues tackled by traditional legal analysis and legal doctrine – i.e. what is the content of law vis-à-vis some state of affairs *x* in light of the institutional and non-institutional sources of law and the canons of legal methodology

[44] On conflict-resolution norms, Kelsen, *Reine Rechtslehre* (1960) pp. 210–212, 275; on authentic and inauthentic interpretation, Kelsen, *Reine Rechtslehre* (1960) pp. 346–354 and especially pp. 351–352. Cf. Alf Ross' notions of legal science and legal politics, Ross, *Om ret og retfærdighed*, p. 385 et seq.

[45] "Die Interpretation durch das rechtsanwendende Organ ist stets authentisch. Sie schafft Recht (. . .) authentisch, daß heiβt rechtsschaffend", Kelsen, *Reine Rechtslehre* (1960), p. 351, 352.

[46] Kelsen, *Reine Rechtslehre* (1960), p. 84.

adopted – are ruled out of consideration as inherently unscientific. The issue of legal interpretation has proven to be the *Achilleus' heel* of legal positivism in general.

Hart's notion of law entails a well-known theory of legal semantics based on the insights of Ludwig Wittgenstein's later philosophy and the Oxford school of ordinary language philosophy. According to Hart, linguistic concepts, and legal rules that incorporate such concepts, have a *core of certainty*, where the semantic meaning content is clear and unambiguous, and a *penumbra of doubt*, where several readings of the concept or rule are equally possible.[47] Following Thomas Morawetz' terminology, we might say that the notion of law as a *deliberative practice* that is always open to novel reinterpretations is entirely located in the penumbral area of Hart's two-fold semantics.[48] Yet, even Hart mostly ignores the thorny issues of legal interpretation, as he sees them as (no more than) part of a wider semantic theory of the core and the penumbra, as now applied to a legal context. When dealing with the interpretation-bound semantic realm of the penumbra of rules, the judge's legal discretion is compared to the discretion enjoyed by the legislator, only restrained by the valid constitution and, though Hart did not foresee the issue, the rules, principles, and standards of law that can be derived from the duly ratified international conventions, such as the European Convention of Human Rights.[49]

The absence of a credible theory of legal interpretation and the lack of societal elements in Hart's concept of law has not gone unnoticed by the less benign commentators and critics of his legal thinking. True, Hart's essentially semantic notion of law and legal interpretation would seem to ignore the legal community at which the outcome of interpretation is yet directed, as pointed out by Chaïm Perelman and the school of new rhetoric since the late 1950s. Similarly, Lon L. Fuller, the prominent American natural law philosopher, held Hart's notion of law as seriously inadequate, since it fails to give effect to the inherently goal-oriented, purpose-directed, and community-aligned nature of law.[50]

The most influential of Hart's many critics is no doubt Ronald Dworkin who has relentlessly blamed Hart for not taking the inherently *constructive* tenets of law duly

[47] Hart, *The Concept of Law* (1961), pp. 123–124.

[48] Morawetz, "Epistemology of Judging. Wittgenstein and Deliberative Practices". Cf. Siltala, *Oikeustieteen tieteenteoria*, pp. 25–32, 895.

[49] Hart, *The Concept of Law* (1961), pp. 121–132, 200–201. – Hart makes remarkably little use of any supranational human rights instruments in his argumentation on legal interpretation, though Britain of course is one of the founding members of the European Convention of Human Rights in 1950 and one of the first states to ratify it.

[50] Fuller, *The Morality of Law*, pp. 224–227 et seq., where Fuller criticizes the notion of legal interpretation upheld by H. L. A. Hart, Hans Kelsen, John Austin and John Chipman Gray: "These diverse ways of confronting a shared predicament suggest that there is something fundamentally wrong with the premises that serve to define the problem. I suggest that the difficulty arises because all of the writers whose views have just been summarized [i.e. Hart, Austin, Kelsen, Gray] start with the assumption that law must be regarded as *one-way projection of authority*, instead of being conceived as a *collaborative enterprise*. Fuller, *The Morality of Law*, p. 227. (Italics added.)

into account.[51] Contrary to what the Hart and other advocates of analytical jurisprudence would have us believe, judges are not allowed to have resort to freewheeling discretion of a "small-scale legislator" in the *hard cases* of legal adjudication in which there are no legal rules that would apply to the facts of the case or, alternatively, the rules that are available for the judge contradict each other. Hence they cannot provide a satisfactory answer to the legal issue at hand. According to Dworkin, in such cases the judges make frequent use of "principles, policies, and other sorts of standards" of law.[52]

And to Dworkin's mind, that's how things ought to be as well: the *rights* of an individual or group of individuals, based on such legal principles or standards with institutional support and societal approval, should be the ultimate ground of legal argumentation. Though Hart did not respond to Dworkin's critique in his lifetime, there are some scattered notes on the issue in the postscript to the second edition of Hart's *The Concept of Law*, as posthumously published in 1994.[53] I will consider those arguments in the section on inclusive legal positivism below.

Of the key representatives of analytical legal positivism in the twentieth century, there is still one figure that should be mentioned, viz. the Polish legal philosopher Jerzy Wróblewski (1926–1990). Like Austin before him, Wróblewski ruled individual judicial decisions outside of the concept of a legal system in his major treatise *The Judicial Application of Law*[54]:

> The legal system is constituted by sufficiently general and abstract rules, but does not include individual law applying decisions and inter alia judicial decisions.

As individual court rulings were left out of Wróblewski's notion of a legal system, it is no wonder that he did not present a theory of legal interpretation. Rather, he chose to deal with the more general issue of the different judicial ideologies, distinguishing the three categories of *bound*, *free*, and *legal and rational* judicial ideology.[55] The same goes for Kaarle Makkonen, the Finnish legal philosopher, who introduced a similar list of the judge's decision-making situations of an isomorphic, semantically ambiguous, or entirely unregulated kind.[56]

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[51] Dworkin succeeded Hart in the Oxford chair of jurisprudence in 1968, very much to Hart's own approval.

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

[53] Hart, *The Concept of Law* (1994), pp. 238–276 and 244–268.

[54] Wróblewski, *The Judicial Application of Law*, p. 296.

[55] Wróblewski, *The Judicial Application of Law*, pp. 265–314; cf. Siltala, *A Theory of Precedent*, pp. 3–6.

[56] Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 78 et seq.

6.4.2 Institutional Legal Positivism

Institutional legal positivism, as elaborated by Neil MacCormick (1941–2009) and Ota Weinberger (1919–2009), has further modified Austin's, Kelsen's, and Hart's analytical legal positivism. An institutional approach to the law sees the law and legal phenomena as *institutional facts* that can (only) be initially created, subsequently altered in content, legally enforced, and ultimately derogated by *speech acts*, as successfully performed by the legislator, a court of justice, or other official.[57] The theory entails a specific conception of language, the world, and the relation between the two, as defined in the form of *speech acts* and *institutional facts*. An institutional theory of law is based on the linguistic philosophy of Elizabeth Anscombe, John L. Austin, and John Searle.[58]

According to the institutional theory of language and the world, reality consists of two kinds of facts, viz. *brute facts* and *institutional facts*. Brute facts are "raw", empirically observable phenomena the existence of which is not conditional on the prevailing linguistic, societal, or cultural conventions upheld by the members of the community concerned.[59] Institutional facts, on the other hand, rely on a set of societal, linguistic, or cultural conventions for their very existence, in the sense of some "brute" facts read in the light of specific rules of either legal or social kind. In institutional facts, empirical facts and normative rules of legal or social kind are thus inextricably intertwined with each other.[60] MacCormick's and Weinberger's institutional legal positivism is committed to a *realistic* ontology, and it acknowledges the existence of conventional, rule-bound facts, in addition to raw facts.

Legal phenomena, such as the national constitution, various kinds of private law contracts and agreements, wills, property rights, legislative acts passed by the Parliament, and a request for a preliminary ruling made to the Court of the European Union, are examples of rule-bound, institutional facts whose existence is conditional on a set of legal rules and principles. Such an idea of there being a conceptual link between some phenomena in society and a set of legal rules or principles is not a total novelty, however. In fact, Hans Kelsen pointed out in the 1920s that the semantic reference of the concept of a *state* is co-existent with a set of formally valid legal

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[57] MacCormick and Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, passim; Weinberger, *Law, Institution and Legal Politics*, esp. pp. 3–29, 148–185.

[58] Anscombe, "On Brute Facts"; Anscombe, *Intention*; Austin, *How to Do Things with Words*; Searle, *Speech Acts. An Essay in the Philosophy of Language*.

[59] Tables and chairs, waterfalls and mountains, black holes (i.e. collapsed stars), galaxies, and dark matter are all brute facts that will continue to exist irrespective of human beliefs and conventions. On raw facts and institutional facts, cf. Anscombe, "On Brute Facts", passim.

[60] Institutional ontology is usually stated in terms of facts (or prevailing states of affairs), rather than individual objects, entities, or "things". That may be related to the issue that institutional facts are *per definitionem* intertwined with societal rules and thus come, so to say, already equipped with certain properties. The Wittgensteinian ontology sketched above in the context of the correspondence theory and the related idea of isomorphism is therefore suited to institutional facts, as well, if the other preconditions of isomorphism are duly satisfied.

rules. In other words, a state is a shorthand description for the totality of legal norms in the field of e.g. constitutional law, administrative law, financial law, criminal law, procedural law, and international law of some legal order. Contrary to what some legal philosophers had claimed prior to Kelsen, a state does not have any "organic" or sociological mode of existence outside of the normative realm defined by such legal norms.[61]

According to MacCormick and Weinberger, a *legal institution* consists of three kinds of rules: (a) *institutive* rules that define the conditions for the coming into existence of an institution, (b) *consequentialist* rules that define the legal consequences brought into effect by a legal institution, and (c) *terminative* rules that define the terms of derogation of a legal institution.[62]

Issues of legal interpretation have not been at the focus of interest by institutional legal positivism, either. Instead, the research efforts of the "institutionalists" have been on the *ontological* project of the preconditions for the initial *creation*, subsequent *modification* in content, due *enforcement* at the courts of justice and other officials, and ultimately *derogation* of legal norms through the institutional speech acts by the legislator, courts of justice, or other legal authorities. Neil MacCormick, for sure, introduced a challenging theory of how to construct and read the law in his breakthrough work *Legal Reasoning and Legal Theory*. That fine item of legal scholarship, however, would still seem to rely on the constitutive premises of the new rhetoric and analytical argumentation theory, and not those of an institutional theory of law. In fact, MacCormick's linguistic turn to the institutional theory took place in *An Institutional Theory of Law. New Approaches to Legal Positivism*, coauthored with Ota Weinberger and published in 1986.

Under legal positivism, widely defined, the thorny issues of legal interpretation have been tackled mainly by the French and Belgian *exegetical school of law* (*École de l'Exégèse*) in the nineteenth century. Before turning into questions of legal exegesis, I will consider the most recent variants of analytical legal positivism, viz. *exclusive* and *inclusive* legal positivism, and the highly challenging notion of collective *intentionality*. The reader should note that the chronological order is not preserved here, since exclusive and inclusive legal positivism is a phenomenon of the late twentieth and the twenty-first century, while the exegetical school of law had its heyday at the nineteenth century.

[61] Kelsen, *Der Soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, passim, where Kelsen argues *contra* e.g. Jellinek's notion of a state.

[62] MacCormick and Weinberger, *An Institutional Theory of Law*, pp. 52–53; MacCormick, *Institutions of Law*, pp. 49–50.

6.4.3 Exclusive and Inclusive Legal Positivism

In recent literature on jurisprudence and legal philosophy, the relation of legal positivism to natural law philosophy has been analysed with the two concepts of *exclusive*, or *strong*, legal positivism and *inclusive*, or *soft* or *incorporatist*, legal positivism. The key issue is how the concept of law is defined vis-à-vis the norms of prevalent social or political morality.[63]

Exclusive legal positivism defines the notion of legal validity with reference to purely conventional criteria, i.e. the formal *source of origin* of a legal norm. Hans Kelsen's pure theory of law seeks to provide a theory of legal science the subject matter of which is defined in strictly legal terms, as carefully "purified" from all non-legal elements, no matter whether they of social, political, economic, moral, or religious kind. As a consequence, the norms that make up the prevalent or critical political morality in society could not have any bearing on the systemic validity of an individual legal norm. Under such premises, the law is defined by reference to the will of the sovereign legislator or a legally competent court of justice, and no external or moral criteria can be imposed upon the law.[64] Thus, Kelsen's theory of law fulfils the criteria of exclusive legal positivism with flying colours.

Exclusive legal positivism seeks to satisfy John Austin's methodological request of enforcing a clear-cut division between the validity of law and its substantive, content-bound qualities.[65] John Chipman Gray, an early American legal realist who to a certain extent followed Austin's ideas, reached a similar conclusion in his *The Nature and Sources of the Law*[66]:

> The great gain in its fundamental conceptions which Jurisprudence made during the last century [i.e. 19th century] was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is.

Ronald Dworkin has adopted the (perhaps slightly ironic) term *test of pedigree*[67] for such a formal, source-oriented criterion by means of which valid rules are to

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[63] Summarizingly, Marmor, "Exclusive Legal Positivism"; Himma, "Inclusive Legal Positivism". – As representatives of exclusive legal positivism, Himma counts Joseph Raz, Scott Shapiro and Andrei Marmor; and as representatives of inclusive legal positivism, H. L. A. Hart, Jules Coleman, W.J. Waluchow and Matthew Kramer. Hans Kelsen with his pure theory of law would qualify as a key figure in the school of exclusive legal positivism as well. Himma, "Inclusive Legal Positivism", p. 125.

[64] Kelsen, *General Theory of Law and State*, p. 113; Kelsen, *Reine Rechtslehre* (1960), p. 201.

[65] Austin, *The Province of Jurisprudence Determined*, p. 157. Cf. Hart, "Positivism and the Separation of Law from Morals"; Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart".

[66] Gray, *The Nature and Sources of the Law*, p. 94. – Cf. Hart, *The Concept of Law* (1961), p. 203 (i.e. "the great battle-cries of legal positivism"). Hart's page reference to Gray's *The Nature and Sources of the Law* is would seem to be erroneous, however.

[67] Dworkin, *Taking Rights Seriously*, p. 40.

be identified and distinguished from the norms of political morality under Hart's analytical legal positivism. The impact of legal principles and other value-laden legal standards is thereby rejected, as Dworkin has pointed out.

Inclusive legal positivism, on the other hand, is committed to the idea that the rule of recognition that is commonly acknowledged in a legal system may well entail a reference to some inherently content-oriented criteria, but such a reference is not a necessary but merely contingent facet of the law. To the extent that the rule of recognition does in fact entail some moral criteria, the judge may, or perhaps is even obliged, to have recourse to such moral criteria in the identification of valid law. In the standard commentary work, Kenneth Einar Himma uses Hart's *The Concept of Law* as a prime example of inclusive legal positivism.[68]

Contrary to what Ronald Dworkin has argued, the ultimate rule of recognition in Hart's theory of law may entail a reference to some content-bound criteria, which clearly matches with the core ideas of inclusive legal positivism. In the chapter titled "Law and Morals" in *The Concept of Law*, Hart addresses the issue in quite open terms[69]:

> In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality.

Moreover, Hart comments on the relation of legal positivism vis-à-vis natural law theory were essentially in line with inclusive legal positivism[70]:

> Here we shall take Legal Positivism to mean the simple contention that it is in no sense a *necessary* truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.

And in the posthumous postscript to the second edition of *The Concept of Law* Hart replies to Ronald Dworkin:

> This [Dworkin's criticism] is doubly mistaken. First, it ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called "soft positivism" and not as in Dworkin's version of it "plain-fact positivism". Secondly, there is nothing in my book [*The Concept of Law*] to suggest that the plain-fact criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendment to the United States Constitution respecting the establishment of religion or abridgements of the right to vote.

Though Hart's ideas of law in *The Concept of Law* clearly contribute to the tradition of inclusive legal positivism, the contingent but nonetheless prevalent relation between the law and morality that is acknowledged in, e.g., the constitution of the United States is not duly acknowledged in the original, 1961 edition of Hart's *The*

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[68] Himma, "Inclusive Legal Positivism", pp. 125, 139, 141–143.

[69] Hart, *The Concept of Law* (1961), p. 199.

[70] Hart, *The Concept of Law* (1961), pp. 180–181. (Italics added.)

Concept of Law. Notwithstanding the brief reflections on the issue in Chapter on "Law and Morals", the rule of recognition is treated as a source-oriented criterion only in the said book. Indeed, Hart's own prime example of the ultimate rule of recognition for the English legal system is given in the *Queen rule*, i.e. what the Queen in Parliament enacts is (valid) law in England.[71] Hart fails to deepen his analysis in this respect so as to comprise the morals-impregnated clauses of the American constitution, though he does touch upon the issue in the passing. Since Hart's self-pronounced goal in *The Concept of Law* was to provide a *general* theory of law, one might have expected him to give a more thorough analysis of the relation that may prevail between the three key elements of his legal theory, viz. law, morality, and the rule of recognition that provides for the transition from the world of facts to the world of norms.

Nor in his other writings on jurisprudence did Hart devote much attention to the said commitments to an inclusive, or "soft", legal positivism, and to what might follow thereof as to the concept of law and the idea of legal interpretation. In the heated debate with the American natural law philosopher Lon L. Fuller (1902–1978), Hart was quick to point out that although there was no *logical* obstacle for the rule of recognition to entail even some principles of morality and justice, the disregard of which would lead to the invalidity of a legal norm, constitutions do not generally "invite trouble" by taking that kind of form.[72]

In discussing the shape of the rule of recognition in the modern Western legal systems, Hart refers to the written constitution, "ordinary" legislation, and precedents.[73] Fully unfolded, the rule of recognition would of course comprise a reference to all the *institutional* and *societal* sources of law whose normative impact on the judge's legal discretion is acknowledged in the legal system concerned.

As concerns legal interpretation, *exclusive* legal positivism will not bring about much of a change to what was mentioned above in the context of Austin's and Kelsen's theories of law. Kelsen put forth the argument that the act of legal interpretation by a judge's is *authentic* in character, since it creates a binding legal norm for the case at hand; while legal interpretation by a legal scholar is no more than *inauthentic* in character, since it lacks any legally enforceable effects.[74] Knowledge of the authenticity of a judge's or other legal official's act of legal interpretation cannot provide much guidance for the judge on *how* he should construct and read legal rules, any more than a corresponding knowledge of the inauthenticity of the act of interpretation by a legal scholar can provide such guidance for the latter. Moreover, Kelsen's austere conception of the legitimate task for legal science will not admit of

[71] Hart, *The Concept of Law* (1961), e.g. on pp. 99, 104, 108, 113, 117, 142, 145.

[72] Hart, "Lon L. Fuller: *The Morality of Law*", p. 361.

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

[74] Kelsen, *Reine Rechtslehre* (1960), pp. 350–354. – "Die Interpretation durch das rechtsanwendende Organ ist stets authentisch. Sie schafft Recht. (. . .) Von der Interpretation durch ein rechtsanwendendes Organ unterscheidet sich jede andere Interpretation dadurch, daβ sie nicht authentisch ist, das heiβt: daß sie kein Recht schafft." Kelsen, *Reine Rechtslehre* (1960), p. 351, 352.

any recommendations as to the mutual preference order of the semantically possible outcomes of interpretation.[75]

The same scarcity as to the criteria of legal interpretation would seem to hold true even for Hart's theory of law. According to Hart, the act of interpretation by a judge or a scholar is defined by the two-geared semantics of the *core of settled meaning* and the *penumbra of doubt* that determines the elucidation of any legal rule that entails linguistic concepts.[76] In a *hard case* of legal decision-making, the legal discretion enjoyed by the judge is then compared to that of a "small-scale legislator", only constrained by the valid constitution and, in light of the subsequent legal development, by the international treaties and conventions that have an effect on domestic law, such as the Treaty of the European Union or the European Convention on Human Rights.

As a consequence, the soft, incorporated, or inclusive character of Hart's legal positivism, as acknowledged by Hart himself in the postscript to *The Concept of Law*, would not seem to have left any significant imprint on his notion of legal interpretation in the said book or in Hart's other key contributions to analytical jurisprudence. If consistently applied, inclusive legal positivism would seem – at least to some extent – to open legal discretion to ideas entailed in the political or social morality, as underscored by Ronald Dworkin vis-à-vis legal principles.

What is common to the various strands of legal positivism is the *voluntarist* idea to the effect that the boundaries of law can be determined by reference to the will-formation of the (sovereign) legislator, courts of justice and other legal officials. The theoretical foundations of such will-formation were drawn "in the thin air" by the key representatives of analytical legal positivism. There is yet one tenet of legal positivism in the wide sense of the term that has devoted major attention to the issue of legal interpretation, viz. the *Exegetical School of Law* in France and Belgium in the nineteenth century. As the school of legal exegesis predates most of the writings that were classified as analytical legal positivism above, it cannot be classified as an instance of modern legal positivism *sensu stricto*. Still, it shares with it the key element of seeing the law as the product of intentional will-formation by the lawgiver, which entitles the use of the term "positivism" here. In addition, the notion of *collective intentionality*, as ascribed to the parliamentary legislator or a court of justice with several members, needs to be elucidated. First, however, one would-be variant of modern legal positivism still needs to be considered.

[75] "Rechtswissenschaftliche Interpretation kann nichts anderes als die möglichen Bedeutungen einer Rechtsnorm herausstellen." Kelsen, *Reine Rechtslehre* (1960), p. 353.

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

6.5 The Unresolvable Dilemma of Kaarlo Tuori's Critical Legal Positivism

Despite the author's several express allusions to Hans Kelsen's and H. L. A. Hart's analytical legal positivism as the theory reference of his conception of law,[77] Kaarlo Tuori's *critical legal positivism* fails to qualify as an instance of legal positivism, strictly defined. In his major treatise *Critical Legal Positivism*, Tuori criticizes Kelsen's and Hart's "traditional", i.e. analytical, legal positivism for failing to attain the two main objectives of modern jurisprudence: to define the *boundaries* of law in a clear-cut manner vis-à-vis the other phenomena in society, such as the norms of religion or political morality, and to provide for a content-based critique of law so as to judge the *legitimacy* of law.[78] Tuori's own *critical* variant of positivism allegedly succeeds better in those two tasks. In it, Tuori combines an extensive array of theory-laden fragments into a complex synthesis of law, drawn from Sakari Hänninen's novel reading of Georg Lukács' Marxist theory of law and society, representing the oldest theoretical layer in Tuori's conception of law,[79] and from the writings by Max Weber, Jürgen Habermas, Michel Foucault, François Ewald, Fernand Braudel, Pierre Bourdieu, Ronald Dworkin, John L. Austin, and John R. Searle.[80]

According to Tuori, modern law is a historically evolving entity that consists of three different layers or sediments: the *deep-structure* level, the level of the *legal culture*, and the *surface-structure* level of law.[81] The phenomena that dwell at the *deep-structure level* of law, such as the basic concepts of law and the most grounding principles of law, are the least malleable and the most resistant to the efforts of legal change by the legislator and the courts of justice. The phenomena at the *level of legal culture*, such as the general principles and general doctrines of law, are relatively more malleable while showing resistance to the efforts of legal change by the parliamentary legislator and the courts of justice. It is only the phenomena that dwell on the "stormy" or "turbulent" *surface-structure level* of law, such as individual legal enactments and individual judicial decisions, that are entirely malleable at will by the legislator and the courts of justice, showing no resistance to efforts of legal change.

By embedding the quasi-autonomous phenomena at the deep-structure level of law and the level of legal culture in the allegedly positivist frame of analysis Tuori

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[77] Tuori, *Critical Legal Positivism*. p. 8.

[78] Tuori, *Critical Legal Positivism*. p. 8: "Traditional legal positivism is not able to answer certain fundamental questions about the law which gain importance under the conditions of modern law, culture and society. These are the questions of the *limits* and the *criteria of the legitimacy* of the law." (Italics in original.) – Tuori speaks of the limits of the law. I use the term boundaries in the same sense here.

[79] Cf. Hänninen, *Aika, paikka, politiikka. Marxilaisen valtioteorian konstituutiosta ja metodista.*

[80] Tuori, *Critical Legal Positivism*, p. 121 et seq.

[81] On the three levels of law in Tuori's conception of law, cf. Tuori, *Critical Legal Positivism*, p. 147 et seq.

strikes a patent discord with the constitutive premises of Kelsen's and Hart's analytical jurisprudence, since Kelsen and Hart were both committed to a consistently *voluntarist* conception of law, with no "levels" or sediments of law that would be out of reach of the will of the sovereign legislator, the courts, or other officials.[82] In this, Tuori's conception of law has far more affinity with a *phenomenological* and, indeed, a *Marxist* account of the law and society, to the effect that the *economic* deep-structure level phenomena of society determine the manifestations of the phenomena at the *ideological* surface-structure level of society under the Marxist premises. There is more from Karl Marx and Georg Lukács, than from Hans Kelsen and H. L. A. Hart, in Tuori's multi-layered conception of law.

Tuori confidently puts forth the claim of simultaneously attaining the two divergent goals set for a *positivist* and for a *critical* theory of law, respectively, as even reflected in the title of his treatise, *Critical Legal Positivism*. Thus, he seeks to defend a *voluntarist* conception of law in line with Kelsen's and Hart's analytical legal positivism; while at the same time making room for a content-based *critique* of law in line with Dworkin's seminal idea of value-laden legal principles. As I see it, Tuori's effort of combining the two mutually contradictory elements is bound to fail, for logico-conceptual reasons. A genuinely voluntarist conception of law with sharply drawn boundaries (à la Kelsen and Hart), which at the same time would make room for content-based critique of law (à la Dworkin), is a *chimaera*, or something that for logico-conceptual reasons cannot exist.

A positivist, *voluntarist* conception of law draws the boundaries of law vis-à-vis political morality, religion, or any other normative phenomena in society in a clear-cut manner, as illustrated by Kelsen's transcendental-logical *Grundnorm* and Hart's ultimate rule of recognition as the criteria of legal validity in a legal system. The impact of value-laden principles and standards of law is, however, excluded from the domain of law by Kelsen and (probably) by Hart,[83] since they do not satisfy the master criterion of having a formal source of origin, or "pedigree" as Dworkin put it, in some individual decision issued by the sovereign legislator or given by a court of justice. If, on the other hand, the legal system is defined so as to make room for the value-laden principles and standards of law in Dworkin's sense of the term, the boundaries of the law become blurred vis-à-vis the political morality in society. *Porous legality*, or legality punctured by the impact of the openly value-laden principles and standards of law, will then occupy the place of Kelsen's methodological purity and Hart's judge-oriented rule of recognition.

[82] Even Hart's notion of the minimum concept of natural law fully accords with a voluntarist notion of law, as we are dealing with certain contingent, and not necessary or a priori, constraints on the legislator's discretion.

[83] Hart's philosophical position is slightly ambivalent here, since in the posthumously published *Postscript* to *The Concept of Law* (1994) he made some concessions to the stance known as inclusive legal positivism in this respect, to the effect of allowing a larger role for legal principles than the adherents of exclusive legal positivism, like Kelsen.

The two goals Tuori set for himself, i.e. a *voluntarist*, positivist conception of law (à la Kelsen and Hart) that would also make room for a content-based critique of law, as derived from the *political morality* in the community (à la Dworkin), cannot both be attained at the same time, but the one or the other has to yield so as to make room for the other. The end result is a zero-sum game between those two ingredients of modern jurisprudence, necessitating a choice between Kelsen's and Hart's formal, *rule*-based conception of law and Dworkin's openly value-laden, *principle*-oriented conception of law.

6.6 One Step (or Two) Back in History: The Exegetical School of Law (*École de l'Exégèse*) in France and Belgium in the Nineteenth Century

The *Exegetical School of Law*, i.e. *École de l'Exégèse*, was dominant in France and Belgium in the nineteenth century.[84] It sought to severely restrict the legal source material available for the judge in his legal decision-making. According to the exegetical notion of law, legislation is the primary, if not the only, source of law that the judge may legitimately have resort to in his legal discretion.[85] The law was defined as equal to the will of the sovereign legislator, as found in legislation and the *travaux préparatoires*.

The heyday of the exegetical school was in 1830–1880. The years from 1804 to 1830 were the years of its formation, and the years from 1880 to 1900 were the years of its disintegration.[86]

Though the representatives of the exegetical school approved the key ideas of a non-positive natural law, such ideas were regarded as too vague to guide the legal discretion of the judge. Rather, it was assumed that the fundamental principles of natural law had now been given an indisputable expression in the form of written law. Enacted law was once again seen as *ratio scripta*, i.e. "reason expressed in a written form", as the master collection of Roman law texts, *Corpus Iuris Civilis*, had been for the mediaeval lawyers.[87] As Boudwijn Bouckaert has convincingly

[84] The most comprehensive account of the exegetical school of law is Bouckaert, *De exegetische school. Een kritische studie van de rechtsbronnen- en interpretatieleer bij de 19de eeuwse commentatoren van de Code Civil*. – Cf. also Halpérin, "Exégèse (École)", passim.

[85] Bouckaert, "Exegetical School", pp. 276–278. – "The theory of legal sources of the exegetical school was dominated by the conviction that the written law was by far the most important source of the law. (. . .) The written law was also regarded as the nearly exclusive source of the law." Bouckaert, "Exegetical School", p. 277.

[86] Bouckaert, "Exegetical School", p. 277.

[87] "All authors of the exegetical school expressed their faith in a suprapositive natural law, to which the legislator owed full respect. The philosophical origin of their natural law views varied greatly: some were of a Christian thomistic inspiration, others were lockean, still others were hegelian. Their allegiance to natural law, however, did not alter their unconditional recognition of the written law as the decisive source of positive law. The natural law was considered to be too vague to serve

argued, the exegetical school provided the link between rationalistic natural law thinking dating from the time of the French revolution and the school of modern legal positivism in the twentieth century.

The school of *analytical jurisprudence* in England, outlined by John Austin in the 1830s, and the extremely formal, conceptualist, and constructive notion of law under the German school of *Begriffsjurisprudenz* are parallel phenomena to the French and Belgian exegetical school of law. The German *Begriffsjurisprudenz* gradually evolved from the historicist, "organic" notion of law that had been suggested by Friedrich Carl von Savigny earlier in the nineteenth century.

The emergence of the would-be all-inclusive national law codifications at the turn of the eighteenth and nineteenth century is a key precondition for the emergence and breakthrough of the exegetical school of law. Of the law codifications, the French civil code (*Code civil*) in 1804 is deservedly the best known. The codification movement had its swansong in the completion of the highly influential German civil law book (*Bürgerliches Gesetzbuch*) that came into force in 1900. Since the early nineteenth century von Savigny and the other adherents of the historical school had strongly underscored the role of the "organic", free-evolving societal customs in a legal community as the primary source of law. In a more sophisticated legal system, like the one in the Germany of the nineteenth century, the legal profession was thought to occupy a privileged position as the most authentic interpreter of the *Volksgeist*, or the "spirit of the nation", that according to von Savigny defined the very essence of the law.

The fierce intellectual debate between the historicist approach, as defended by von Savigny, and the uprising positivist approach, as represented by Thibaut and the codification movement, ended at the turn of the nineteenth and twentieth century in an almost total defeat of the historicists and almost as complete a victory of the codification ideology of the legal positivists.[88] Ever since, the role of customary law has been in steady decline in the Western world. As the legislation-oriented model of law, proliferated by Thibaut and the codification movement, ultimately won the upper hand, a major demand was created for the kind of methodology on how to construct and read legislative enactments, which the exegetical school of law could provide.

The call of the French and Belgian exegetical school was for *authenticity* in legal interpretation in retracing – as authentically as possible – the original intentions and motives behind an act of legislation. The authoritative text of an enactment and the

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as a criterion for the practical decision of the judge. Natural law principles needed to be specified by the positive legislation. As most authors of the school thought that most natural law principles were elaborated in the civil code, positive law was nearly completely identified with natural law." Bouckaert, "Exegetical School", p. 277.

[88]Friedrich Carl von Savigny's "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" and Anton Friedrich Justus Thibaut's "Über die Nothwendigkeit eines allgemeinen Bürgerlichen Rechts für Deutschland" were the battle-cries of the two intellectual movements. Both texts are included in Hans Hattenhauer's compilation of essays, *Thibaut und Savigny. Ihre Programmatische Schriften*.

travaux préparatoires at the back of it were the primary, if not the only, legitimate source in retracing the legislator's original intentions. Logical and linguistic methods of interpretation were utilized, as well, such as inferences of the *e contrario* and *a fortiori* kind, plus analogical reasoning the importance of which increased towards the end of the nineteenth century.[89]

At the end of the nineteenth and the beginning of the twentieth century, the exegetical school with its constrained legal source doctrine had to recede even in the French-speaking countries, at least partly due to the impact of various kinds of *empirical*, *sociological*, and *realist* approaches to law. In France, the polymorphic and eclectic approach to law by François Gény, with its emphasis upon the "scientific" and historic character of legal analysis, took the lead for a moment. The gist of Gény's ingenious methodological program was grasped by the loose catch-phrase *libre recherche scientifique*, or the pursuit of free scientific research in law, with recourse to a variety of (mostly) empirical and historical tools in legal analysis.[90] Another approach that attacked the idealistic and formalist premises of the exegetical school was the *Free Law Movement* (*Freirechtslehre*; *Freirechtsbewegung*), by Eugen Ehrlich among others.[91] The school of *Interessenjurisprudence*, as envisioned by Rudolf von Jhering, underscored the goal-oriented, interest-laden tenets of law at the end of the nineteenth century, even though the outcomes of such purposeful orientation in law were to a great extent modified by the social and political compromises that are frequently reached during the legislative process.[92]

In line with von Jhering's methodological *credo*, and in fact partly due to the original inspiration drawn from it, *sociological jurisprudence* in the United States looked upon the law as a case of social engineering, i.e. as an effective tool for the attainment of certain social goals.[93] In the French legal culture, the dominant traits of legal formalism, such as the predominant recourse to highly legalistic reasons and the essentially terse, magisterial style of judicial decisions bear witness to the impact of the exegetical school even today.[94]

Contrary to the thesis of the exegetical school, parliamentary legislation is not the only legitimate source of law in any Western legal system anymore. Rather, an array of institutional and societal sources, both of national and transnational kind, now provide for the criteria of legal discretion. The idea of giving impact to the will-formation of the parliamentary legislator is yet a major institutional premise in all Western societies, as given effect in the constitution, legislative enactments

[89] Bouckaert, "Exegetical School", pp. 277–278.

[90] On Gény's "libre recherche scientifique", cf. Bergel, *Méthodologie juridique*, pp. 249–253.

[91] Ehrlich, "Frei Rechtsfindung und freie Rechtswissenschaft", passim.

[92] von Jhering, *Der Zweck im Recht*, p. I: "Der Zweck ist der Schöpfer des ganzen Rechts", i.e. [social] purpose is the creator of all law, as von Jhering claimed in the motto of the book.

[93] Pound, *Social Control through Law*; Pound, "Law in Books and Law in Action".

[94] MacCormick and Summers, eds., *Interpreting Statutes*, pp. 171–212, 500–508 (and p. 502 in specific); MacCormick and Summers, eds., *Interpreting Precedents*, pp. 103–140. Cf. de Lasser, *Judicial Deliberations*, pp. 27–61, 166–202.

and the *travaux préparatoires*, if any. Such an ideology is expressive of the Western *rule of law* ideology in which the will of the legislator looms large.[95] Recently, Pekka Hallberg has presented an analysis of the notion of a rule of law ideology by means of the following four elements: (a) legality in social decision-making, (b) proper balance among the stately powers, (c) respect for the constitutional rights and human rights of individuals, and (d) the functioning of the legal and social system in general.

Today, the impact of the French and Belgian exegetical school in law can be seen in at least three different phenomena. Firstly, the French legal culture has retained many formalistic tenets initially advocated by the exegetical school. Since the French Cour de Cassation served as the model for the European Court of Justice (now: Court of the European Union), the style of reasoning of the latter court, too, bears the impact of high legal formality. That can be seen in, for instance, the fact that the Justices of European Court are not allowed to write a dissenting opinion to its rulings.

Secondly, the *travaux préparatoires* are acknowledged as an important source of law in most Western legal systems, as they provide authorized information of the original legislative intentions and motives of the legislator. In Sweden and Finland, legislative drafting material such as committee reports, memoranda, bills, and the like documents are often quite profound, highly professional, and detailed,[96] even though the enormous volume of the current national and EU-based legislation has, perhaps rather understandably, lowered the standard of meticulousness. And thirdly, the idea of retracing the original intentions of the prior court still looms large in the system of precedents in the United Kingdom.[97]

6.7 A Critical Evaluation of Legal Exegesis

Legal interpretation is the Achilleus' heel of legal positivism. All the variations of legal positivism discerned, i.e. *analytical*, *institutional*, *exclusive*, and *inclusive* legal positivism, equally fail to present a philosophically satisfactory account of the "nuts and bolts" of how to construct and read the law in the substantive, content-oriented sense of term, and not in the sense of merely presenting some structural

[95] Hallberg, *The Rule of Law*, pp. 70–91; Hallberg, *Prospects of the Rule of Law*, p. 146. – On the rule of law ideology in general and in legal comparative perspective, cf. Costa and Zolo, eds., *The Rule of Law. History, Theory and Criticism*.

[96] On the *travaux préparatoires* and the historical will of the legislator, Peczenik, *Vad är rätt?* pp. 241–259. – According to Article 64 of the Internal Rules of Procedure of the Finnish Parliament (1999/40), the line of reasoning presented in support of some legislative bill in the respective Parliamentary Committee Report are held to have been authoritatively accepted, unless the Parliament expressly decides otherwise. Thereby, significant authority is conferred on such reasons.

[97] MacCormick and Summers, eds., *Interpreting Precedents*, pp. 315–354; Siltala, *A Theory of Precedent*, pp. 84–90.

typology or classification of the different legal decision-making situations.[98] In John Austin's, Hans Kelsen's, H. L. A. Hart's, and Jerzy Wróblewski's analytical writings on jurisprudence, the focus of interest has been elsewhere, viz. on the concept and internal structure of law, and the separation of law from morality. As to the operative criteria of legal construction and interpretation, analytical and institutional legal positivism leaves the judge rather empty-handed.

The closest *methodological* parallel to legal exegesis can be found in traditional theological studies where the will of the Almighty God has been retraced or reconstructed, as authentically as possible, in the corpus of holy writings. In the context of law, more secular institutional authorities, like the Parliament and courts of justice, now occupy the privileged position in how to construct and read the law. Within the jurisprudential tradition, the *exegetical school of law* (*École de l'Exégèse*) made the most significant contributions to the construction and interpretation of law. It anchored such criteria to the will of the legislator, giving effect to the law text and the official *travaux préparatoires* at the back of an item of legislation. Respect for the institutional will-formation of the Parliament has been an integral part of the modern *rule of law* ideology. There are other elements entailed in it, as well, like an effective protection of the human and constitutional rights of an individual.

The claimed authenticity of legal interpretation is yet difficult to judge. How can the legal community be convinced that the outcome of legal (re)construction truly matches with the original intentions of the parliamentary legislator or the court of justice that issued a particular precedent? The situation is like the one facing the judge or a legal scholar under Ronald Dworkin's idea legal integrity as "the best constructive interpretation of past political decisions in the legal community".[99] For the hard cases of legal adjudication where the original intentions of the legislator are often hard to find, recourse to the *hypothetical will* of the legislator has been suggested as a way out of the dilemma. As a consequence, the judge or legal scholar ought to reason how the legislator would have reacted to the facts of the current case, had it made such a judgment. Yet, retracing the hypothetical will of the legislator is no more than a wild guess of something that cannot be ascertained.

It is one of the strengths of the positivist and exegetical approach that it gives full credit to the *institutional* premises of law. Its inherent weaknesses have to do with the historical, backward-looking orientation of legal analysis under legal exegesis, which to a great extent diminishes its utility as a tool of legal analysis in times

[98] Nor does Kaarlo Tuori's *critical legal positivism* address the substantive issues of legal interpretation and argumentation. The focus in Tuori's theory of law is on the issues of legal *ontology*, seeking to find an answer to the question of "what is law". Tuori answers to that question by means of the three levels (i.e. surface level, level of legal culture, and deep-structure level of law) and the two dimensions of law (i.e. legal norms and legal practices). Tuori, *Critical Legal Positivism*, pp. 121–216.

[99] Dworkin, *Law's Empire*, p. 262. – Cf. "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, *Law's Empire*, p. 255.

of social change or upheaval. If the institutional and societal values at the back of legislation are in a state of being transformed, there is perhaps not much sense in seeking to enforce the historical will of the legislator or some outdated values acknowledged in the historical archives of precedent-based law.