

# Legal Realisms and the Dilemma of the Relationship of Contemporary Law and Politics

Mauro Zamboni\*

<b>1 Introduction</b> .....	584
<b>2 Some Preliminary Clarifications of Key-terms</b> .....	585
<b>3 The Dilemma of Law and Legal Theories in This Contemporary Age</b> .....	586
<b>4 Politics, Law and American Legal Realism</b> .....	589
<b>5 Scandinavian Legal Realism and the Partial Rigidity of Law</b> .....	595
<b>6 The Intersecting Depiction: “Law And Politics”</b> .....	599
<b>7 Conclusion</b> .....	603

---

\* I would like to thank Brian Bix, Roger Cotterrell, Laura Carlson and Jori Munukka for their many helpful comments on earlier drafts of this article. Any errors remaining are my own.

Jes Bjarup has devoted much of his professional life to two passions: legal philosophy and politics. While the first has been pursued mostly in the written form, mainly revolving around the legal realisms, his interest in politics has been mostly pursued by active participation in Danish politics, both at the local and more national level. This tribute to Bjarup attempts to combine these two aspects of his professional life, trying to create a model for explaining the legal realists' depictions of the relationship between law and politics.

## 1 Introduction

The focus of this work is on how the issue, whether and to what extent the nature of the law is affected by politics, has been taken up in the American and Scandinavian legal realisms. These legal philosophical movements, despite their several and fundamental differences, have a similar general depiction, or model, of how the law relates to politics; a depiction that is an alternative to the accepted views as embraced by traditional legal positivism and natural law theory.

American and Scandinavian legal realists, because of their very act of pushing forward a new way of perceiving legal phenomenon, mirror the complexity the relation between law and politics presents in this contemporary age better than the well-established theories of natural law and legal positivism. The latter two originated in a time in which political forms of organization in the community were other than the contemporary welfare state. The legal realisms, by the very fact of their being products of the socio-political conditions of this century, have been the movements that have more explicitly and systematically brought to the surface in their legal-philosophical proposals one particular characteristic phenomenon of contemporary Western legal systems: the existence of two basic forces, one attractive and the other repulsive, affecting the law in its relations with the political world.

After briefly sketching aspects of the terminology used in this article in Part II, Part III addresses the complexity of present contemporary factual backgrounds characterizing the relationship of law and politics. Attention is focused in particular on the dualistic system of forces typical of the welfare state, forces pulling the law towards and pushing it away from its political dimension. The effects such underpinnings have on traditional legal theories are also outlined, as well as their ideas of whether the inner-core of the legal phenomenon is affected by the political values carried and the political functions performed. Parts IV and V examine the stances taken as to the same issue by the American and Scandinavian legal realisms. In contrast with natural law theory, both the Americans and Scandinavians opt for a general idea of the rigidity of the law towards politics. In contrast to traditional legal positivism, the legal realists consider however this "rigid" nature of the law as only partial in nature. As a consequence, a model defined as "intersecting" is presented in Part VI as epitomizing the legal realists' basic ideas of how the legal phenomenon interact with the political one.

## 2 Some Preliminary Clarifications of Key-terms

This discussion requires two preliminary clarifications. The first is the meaning of *politics* as used in this work. *Politics* identifies the *complex of values* (of an economic, social or moral nature), as well as the *processes* (and the actors participating in them, e.g. group interests) *through which such values are then chosen* to be implemented by the public authoritative apparatus into the community using law-making.<sup>1</sup>

The second clarification has to do with the difficulty in general when speaking of *a* movement or *a* stream of legal thinking. In the case of the legal realists, it is even more difficult because of their tendency, in particular in the United States, to encompass a wide range of legal-theoretical positions (from the moderate position of Llewellyn to the radicalism of Jerome Frank).<sup>2</sup> Moreover, it is often difficult to find common elements between the American and the Scandinavian legal realisms. They differ both in their theoretical premises (pragmatism in United States, the moral philosophy of the Swedish Axel Hägerström in Scandinavia) and in the focus of their investigations (the work of the courts in America, the statutory texts in Scandinavia).<sup>3</sup> These differences have led some authors to even state that the only thing these two movements have in common is the labeling “legal realism.”<sup>4</sup> This negative perspective

---

<sup>1</sup> See Van Hoecke, Mark, *Law as Communication*, Hart Publishing, Oxford 2002, p. 64; Kairys, David, *Introduction*, in Kairys, D. (ed.), *The Politics of Law. A Progressive Critique*, 3<sup>rd</sup> ed., Basic Books, New York 1998, p. 5, 14-15; Ross, Alf, *On Law and Justice*, Stevens & Sons, London 1958, p. 334-339; Kelsen, Hans, *Allgemeine Staatslehre*, Julius Springer, Berlin 1925, p. 28; and Raz, Joseph, *Rights and Individual Well-Being*, in Raz, J. (ed.), *Ethics in the Public Domain*, Clarendon Press, Oxford 1994, p. 37-40. *But see* Unger, Roberto Mangabeira, *The Critical Legal Studies Movement*, Harvard Law Review 1982, vol. 96, p. 568. *Cf.* MacCormick, Neil D., *Institutional Normative Order: A Conception of Law*, Cornell Law Review 1997, vol. 82, p. 1062-1064 (as to a possible distinction between political values and moral values). *Compare, e.g.*, the classic definitions for political sciences in Easton, David, *A Systems Analysis of Political Life*, The University of Chicago Press, Chicago 1979, p. 21-33; Dahl, Robert A., *Modern Political Analysis*, 5<sup>th</sup> ed., Prentice Hall, Englewood Cliffs 1984, p. 9-10; and generally Lasswell, Harold D., *Politics: Who Gets What, When, How*, Meridian Books, New York 1958. *See also* MacCormick, Neil D., *H.L.A. Hart*, Stanford University Press, Stanford 1981, p. 48 (as to the meaning of the term value) and Cotterrell, Roger, *Law's Community. Legal Theory in Sociological Perspective*, London, Butterworths, p. 13 (for a similar definition but under the label of “ideology”).

<sup>2</sup> See Llewellyn, Karl N., *Some Realism about Realism*, Harvard Law Review 1931, vol. 44, p. 1233-1234. *See also* Duxbury, Neil, *Patterns of American Jurisprudence*, Clarendon Press, Oxford 1995, p. 68-71 and Christie, George C. and Martin, Patrick H., *Jurisprudence. Text and Readings on the Philosophy of Law*, 2<sup>nd</sup> ed., West Publishing Company, St. Paul (Minn.) 1995, p. 725, 735.

<sup>3</sup> As to the philosophical roots of the American and Scandinavian legal realisms, *see* Holmes, Oliver W. Jr., *The Path Of The Law*, Harvard Law Review 1897, vol. 10(8), p. 461, 465-467; Frank, Jerome N., *Law and the Modern Mind*, Stevens and Sons, London 1949, p. 253; Bjarup, Jes, *Skandinavischer Realismus: Hägerström –Lundstedt –Olivecrona –Ross*, Karl Albert Freiburg, Munich 1978, p. 23-38; and Ross, *On Law and Justice*, *supra* p. x.

<sup>4</sup> *See* Friedmann, Wolfgang, *Legal Theory*, 5<sup>th</sup> ed., Columbia University Press, New York 1967, p. 304-305; McCoubrey, Hilaire and White, Nigel D., *Textbook on Jurisprudence*, 3<sup>rd</sup> ed., Blackstone Press, London 1999, p. 178; Kelly, John Maurice, *A Short History of Western Legal Theory*, Oxford University Press, Oxford 1992, p. 369; Twining, William, *Talk about*

however seems to amplify certain national legal peculiarities of the two legal streams too much while underestimating their central common points.<sup>5</sup> For example, this perspective of purely a nominal coincidence between the Americans and the Scandinavians underestimates the common point that both American and Scandinavian realists, in the end, consider the law as a socio-psychological phenomenon.<sup>6</sup>

Despite the position one may take with respect to these problems, an indirect goal of this article is to demonstrate, at least in the discussion as to politics, that American and Scandinavian legal realists are on the same track: The perception of the law as neither totally outside of nor completely embedded into the political mass, but as intersecting the political world.

### 3 The Dilemma of Law and Legal Theories in This Contemporary Age

From the very birth of the nation state, attention has specifically been devoted to explaining the interrelationship of legal and political phenomena.<sup>7</sup> This theoretical interest has its roots in the fact that, as pointed out by Jürgen Habermas, the very “complex of law and political power characterizes the transition from societies organized by kinship to those early societies already organized around states.”<sup>8</sup>

Despite so much attention, this issue of positioning the law with respect to the political realm is far from being settled around generally accepted propositions. Just the opposite is the case, as the distances between opinions as to issues of law and politics have increased considerably with time, in particular after the birth of welfare state and its dissemination in the Western world. This disagreement as to the relation of law and politics has increased in part because the welfare state form of political organization requires as one of its fundamental

---

*Realism*, New York University Law Review 1985, vol. 60, p. 361. See also Freeman, Michael D. A., *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed., Sweet & Maxwell, London 2001, p. 872 and Alexander, Gregory S., *Comparing the Two Legal Realisms – American and Scandinavian*, American Journal of Comparative Law 2002, vol. 50, p. 132.

<sup>5</sup> See, e.g., Hart, Herbert L. A., *Scandinavian Realism*, Cambridge Law Journal 1959, vol. 1959, p. 237 (supporting the idea of Ross as “an American realist in Scandinavia”).

<sup>6</sup> As to the issue of legal realism and law as a socio-psychological phenomenon, see, e.g., Olivecrona, Karl H., *Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, New York University Law Review 1951, vol. 26, p. 124. See also Funk, David A., *Juridical Science Paradigms as Newer Rhetorics in 21<sup>st</sup> Century Jurisprudence*, Northern Kentucky Law Review 1985, vol. 12, p. 455. But see LoPucki, Lynn M., *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, Northwestern University Law Review 1996, vol. 90(4), p. 1500 n.10, 1542 n.210.

<sup>7</sup> See, e.g., Machiavelli, Niccolò, *Il Principe*, Einaudi, Turin 1972 (1532), Ch. V, Ch. XII and Hobbes, Thomas, *Leviathan*, Penguin Books, Harmondsworth 1985 (1651), Ch. XXVI. Closer to the present, see Savigny, Friedrich Carl (von), *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Mohr und Zimmer, Heidelberg 1814, p. 12.

<sup>8</sup> Habermas, Jürgen, *Between Facts And Norms. Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge (Mass.) 1998, p. 137.

features the very use of the law as an instrument of social engineering.<sup>9</sup> This feature, in its turn, has given birth to the phenomenon of a “systems conflict,” an aspect of the more general “dilemmas of law in the Welfare State.”<sup>10</sup>

This phenomenon arises due to the co-existence in the contemporary age of two systemic forces towing the law in opposite directions, affecting the very nature of the legal phenomenon. One force already present in the formation of the nation state pulls in the direction of concentrating the law into the hands of politicians, therefore requiring a law more obedient in nature to reasons of politics than, for example, to those of a systematic legal development. In other words, law becomes structurally more flexible to the reasons of politics.<sup>11</sup>

The increasing complexity and number of areas the political world recognizes as *its* domain and therefore regulates by law in their turn cause another force pulling the law in the opposite direction. This increasing politicization of the community life produces a force towing the legal phenomenon in the direction of a more specialized and therefore autonomous law with respect to politics. This further encourages a development of the idea of law as autonomous from the outside reality, with its own rules as monopolized by a group of professionals. As a result, the distances between the legal phenomenon and the political world tend to become increasingly greater.<sup>12</sup>

These tendencies, by which the law is politicized or framed in spaces of autonomy, certainly are not typical only of our time.<sup>13</sup> The simultaneous and increasing intensity of the forces pulling law towards and away from politics, almost equal in strength, consequently creating a tension within the legal phenomenon, however are elements characterizing today’s systems conflict.<sup>14</sup>

<sup>9</sup> See, e.g., Friedman, Lawrence M., *Introduction*, *Theoretical Inquiries in Law* 2003, vol. 4, p. 446. For a theoretical debate on this tendency of the increasing “juridification” of the community’s life under the Welfare state, see also Habermas, Jürgen, *Law as Medium and Law as Institution*, in Teubner, G. (ed.), *Dilemmas of Law in the Welfare State*, Walter de Gruyter, Berlin 1986, p. 203-220; Teubner, Gunther, *Juridification -Concepts, Aspects, Limits, Solutions*, in Teubner, G. (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-Trust and Social Welfare*, Walter de Gruyter, Berlin 1987, p. 3-4. For the more practical impacts of juridification on different areas of law, see, e.g., Orts, Eric W., *Reflexive Environmental Law*, *Northwestern University Law Review* 1995, vol. 98, p. 1227-1320 and Römken, Renée, *Law as Trojan Horse: Unintended Consequences of Right-Bases Interventions to Support Battered Women*, *Yale Journal of Law and Feminism* 2001, vol. 13, p. 265-291.

<sup>10</sup> Teubner, Gunther, *The Transformation of Law in the Welfare State*, in Teubner, G. (ed.), *Dilemmas of Law in the Welfare State*, Walter de Gruyter, Berlin 1986, p. 6-7. See also Friedman, Lawrence M., *Legal Culture and the Welfare State*, in Teubner, G. (ed.), *Dilemmas of Law in the Welfare State*, Walter de Gruyter, Berlin 1986, p. 13-27 and Teubner, Gunther, *Law as an Autopoietic System*, Blackwell, Oxford 1993, p. 65.

<sup>11</sup> See Posner, Richard A., *The Decline of Law as an Autonomous Discipline: 1962-1987*, *Harvard Law Review* 1987, vol. 100, p. 766-767, 773-774 and, as an actual example of such flexibility, Glicksman, Robert and Schroeder, Christopher H., *EPA and the Courts: Twenty Years of Law and Politics*, *Law and Contemporary Problems* 1991, vol. 54, p. 250.

<sup>12</sup> See Watson, Alan, *Roman Law & Comparative Law*, The University of Georgia Press, London 1991, p. 104.

<sup>13</sup> See Weber, Max, *Economy and Society*, University of California Press, Berkeley (Cal.) 1978, p. 775-776, 789-792, 856.

<sup>14</sup> See Bourdieu, Pierre, *The Force of Law: Toward a Sociology of the Juridical Field*, Hastings

The recent shifting of many Western countries to a more deregulated or weaker version of the welfare state does not appear to affect the strength of those two pulling and divergent systemic forces. On the contrary, the importance and use of the law as a tool in the hands of politicians has increased.<sup>15</sup>

The very fact that these contemporary tensions stretch the law towards and, at the same time, away from politics, cannot leave the work of legal scholars unaffected.<sup>16</sup> As pointed out by Duxbury, “the political nature of law represents a fundamental – if not the fundamental – problem of modern jurisprudence.”<sup>17</sup> The traces of these forces as operating on the modern Western legal systems can then be detected in the positions taken by contemporary legal theories as to the issue of law and politics. As pointed out by Roger Cotterrell, contemporary legal scholars are inclined to be attracted into a dyadic way of solving the law and politics dilemma. Contemporary legal theories tend to choose to depict the legal phenomenon either as being essentially *voluntas regis* (i.e. law shaped by political powers) or as dominated by its own *ratio* (i.e. law as shaped by its internal rationality).<sup>18</sup> In other words, the two concomitant and divergent forces presently shaping the modern law/politics relations, also affect contemporary legal theories. The latter tend to shift between two extremes or, as one can call them, two ideal-typical ways of depicting the law/politics relations: “law is politics” and “either law or politics.”<sup>19</sup>

---

Law Journal 1987, vol. 38, p. 835-836; Hunt, Alan, *The Politics of Law and the Law of Politics*, in Tuori, K., Bankowski, Z. and Uusitali, J. (eds.), *Law and Power. Critical and Socio-Legal Essays*, Deborah Charles Publications, Liverpool 1997, p. 82-83; Luhmann, Niklas, *Closure and Openness: On Reality in the World of Law*, in Teubner, G. (ed.), *Autopoietic Law: A New Approach to Law and Society*, Walter de Gruyter, Berlin 1988, p. 346; and Cotterrell, *Law's Community*, *supra* p. 299. See also Summers, Robert S., *Law as a Type of “Machine” Technology*, in Summers, R. S., *Essays in Legal Theory*, Kluwer Academic Publishers, Dordrecht 2000, p. 52.

<sup>15</sup> See, e.g., Freeman, *Lloyd's Introduction to Jurisprudence*, *supra* p. 1047; Ruggie, Mary, *The Paradox of Liberal Intervention: Health Policy and the American Welfare State*, *American Journal of Sociology* 1992, vol. 97, p. 927-940; and Gordon, Robert W., *A New Role For Lawyers? The Corporate Counselor after Enron*, *Connecticut Law Review* 2003, vol. 35, p. 1211. But see Raz, Joseph, *Government by Consent*, in Raz, J. (ed.), *Ethics in the Public Domain*, Clarendon Press, Oxford 1994, p. 339-340.

<sup>16</sup> See Raz, Joseph, *Disagreement in Politics*, *American Journal of Jurisprudence* 1998, vol. 43, p. 26. See also Habermas, *Between Facts and Norms*, *supra* p. 388-390.

<sup>17</sup> Duxbury, Neil, *The Theory and History of American Law and Politics*, *Oxford Journal of Legal Studies* 1993, vol. 13, p. 270.

<sup>18</sup> See Cotterrell, *Law's Community*, *supra* p. 165-166, 317-320. This dyadic way of solving the law and politics dilemma can also be seen from a different perspective: by looking to whether the legal theories focus more on the normative functions or on the social functions of law. See also Raz, Joseph, *On The Functions of Law*, in Simpson, A. W. B. (ed.), *Oxford Essays in Jurisprudence (Second Series)*, Clarendon Press, Oxford 1973, p. 280-288. It is worth mentioning that, because of the equal strength of the forces pulling the law towards and away from politics, this dichotomy (law as politics vs. law or politics) remains a tendency. See Cotterrell, Roger, *Why Must Legal Ideas Be Interpreted Sociologically?* *Journal of Law and Society* 1998, vol. 25, p. 181. Contemporary legal theories end up being stretched on a quantitatively and qualitatively broad spectrum of intermediary positions, where law is depicted as a mixture of *ratio* and *voluntas*. See Cotterrell, *Law's Community*, *supra* p. 277-278, 319. See, e.g., Habermas, *Between Facts and Norms*, *supra* p. 152.

<sup>19</sup> It is true that the typology of natural law theory (law is politics) vs. classical legal positivism

The divisive question is whether the law is *flexible*, i.e. whether it tends to adapt its forms and its nature according to the political substances it carries (law *is* politics). This feature of the law is pointed out in particular by natural law theory, e.g. John Finnis' theory.<sup>20</sup> The other ideal-type solution is to consider the law as tending towards *rigidity*, i.e. as tending to keep the same forms and mechanisms regardless of the content (law *vs.* politics). This feature is stressed in particular by Kelsen and his idea of law and politics as two autonomous phenomena.<sup>21</sup> The dyadic typology of depicting the relations between law and politics in term of "law is politics" (Finnis) *vs.* "either law or politics" (Kelsen) is however incomplete, as it leave outside a third way of looking at the issue, namely the one advocated by the American and Scandinavian legal realisms.<sup>22</sup>

#### 4 Politics, Law and American Legal Realism

The complex and, to some extent, contradictory relation of contemporary law towards politics is mirrored in the American legal realism's depiction of their relations in which there is a normative core but certain parts of the law's nature

---

(either law or politics) condenses that which in reality is a more complex phenomenon: the universe of differing answers given by contemporary legal theories as to the central question of how the law relates to politics. Even within the work of the same individual legal scholar, it can be difficult to trace any unconditional embracing of one model over another. *See, e.g.,* Finnis, John, *Natural Law and Natural Rights*, Clarendon Press, Oxford 1980, p. 148-149 and Cotterrell, Roger, *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy*, Butterworths, London 1989, p. 148. Despite this limitation typical of every generalization, it can be maintained that this typology covers the vast majority of contemporary legal theories.

<sup>20</sup> *See, e.g.,* Finnis, John, *The Authority of Law in the Predicament of Contemporary Social Theory*, Notre Dame Journal of Law, Ethics and Public Policy 1984, vol. 1, p. 133; Finnis, *Natural Law and Natural Rights*, *supra* p. 147-150, 154-197. *See also* Balbus, Isaac D., *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, Law and Society Review 1977, vol. 11, p. 585 (as to the similar position on the issues reached by the Marxist legal theory). *Compare* Varga, Csaba, *Law As A Social Issue*, in Varga, C., *Law and Philosophy. Selected Papers in Legal Theory*, Faculty of Law of Lóránd Eötvös University, Budapest 1994, p. 462.

<sup>21</sup> *See* Kelsen, Hans, *The Pure Theory of Law*, University of California Press, Berkeley (Cal.) 1970, p. 89-91; Honoré, Tony, *The Basic Norm of a Society*, in Paulson, S. L. and Litschewski Paulson, B. (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Clarendon Press, Oxford 1998, p. 94.

<sup>22</sup> More generally, several of the representatives of the legal realisms view themselves as a third type of legal theory, alternative to the traditional legal thinking, namely legal positivism and natural legal theories. *See, e.g.,* Ross, Alf, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*, Ejnar Munksgaard, Copenhagen 1946, p. 11-13; Olivecrona, Karl H., *Law as Fact*, 2<sup>nd</sup> ed., Stevens and Sons, London 1971, p. 77 [hereinafter Olivecrona, *Law as Fact* (1971)]; and, in a more indirect form, Llewellyn, Karl N., *On Reading and Using the Newer Jurisprudence*, Columbia Law Review 1940, vol. 40, p. 586-589. *But see* Summers, Robert S., *On Identifying And Reconstructing A General Legal Theory –Some Thoughts Prompted by Professor Moore's Critique*, Cornell Law Review 1984, vol. 69, p. 1021. *Cf.* Summers, Robert S., *Instrumentalism and American Legal Theory*, Cornell University Press, Ithaca (NY) 1982, p. 21 (where only the American version of legal realism can be considered as an alternative to the traditional legal theories of law).

extend beyond into the political world.<sup>23</sup> For American legal realism, the complexity of the nature of law originates in the very fundamental features of the legal phenomenon, which they understand as a mixed construction of normative elements (decisions of the courts) and socio-psychological elements (judicial behaviors). According to American legal realists, the rigidity of the law towards politics exists in their basic assumption that the law is not simply paper rules. The law also is predominantly the result of the work of the courts and their decisions in concrete cases.<sup>24</sup> This identification of the law with the decisions of the courts leads to the rejection of any ontology as to the legal phenomenon that tries to establish the law's grounds elsewhere, in particular in the value world (as done by natural law scholars). On the path established by Holmes, American realists perceive a border between the legal phenomenon, i.e. the courts decisions, and the values (or politics) this phenomenon is directed to implement in the community.<sup>25</sup> The ought-statements forming the judicial decisions are labeled "legal" regardless of whether they are directed at fulfilling value *f* or the opposite value:

*"Law is law, whether it be good or bad, and only upon the admission of this truism can a meaningful discussion of the goodness and badness of law rest."*<sup>26</sup>

The rigidity of the law as perceived by the American legal realists is also ensured by the fact that legal rules and concepts are the products of the behaviors of *specific* actors (the judges). The actors, in order to be qualified among the "specificity," must then be designated according to other legal rules (e.g. the legal rules as to the election or selection of judges or as to any required legal education or work experience). In this way, the concept of law sort of closes its borders, leaving outside any political and moral evaluations such as those identifying a judge as "reasonable" or "good."<sup>27</sup>

It is important to stress the fact that the battle that American legal realists fought against formalism does not necessarily imply the rejection of the idea of the law as having an autonomous space, i.e. not occupied by politics.<sup>28</sup> To deny the use of a different logic for law and politics does not mean the acceptance that

---

<sup>23</sup> "The difficulty in framing any concept of 'law' is that there are so many things to be included, and the things to be included are so unbelievably different from each other." Llewellyn, Karl N., *A Realistic Jurisprudence – The Next Step*, Columbia Law Review 1930, vol. 30, p. 431.

<sup>24</sup> See *id.* p. 447-448. For this very reason, the American legal realists' theory of law has to be reached passing through their theory of adjudication, i.e. their ideas of the ways the judges decide cases.

<sup>25</sup> See Holmes, *The Path of the Law*, *supra* p. 459-460.

<sup>26</sup> Cohen, Felix S., *The Ethical Basis of Legal Criticism*, Yale Law Journal 1931, vol. 41, p. 204 [*italics added*].

<sup>27</sup> See Murphy, Jeffrie G. and Coleman, Jules L., *The Philosophy of Law. An Introduction to Jurisprudence*, Rowman & Allanheld, Totowa (NJ) 1984, p. 39.

<sup>28</sup> See, e.g., Bix, Brian, *Jurisprudence. Theory and Context*, 3<sup>rd</sup> ed., Sweet and Maxwell, London 2003, p. 179-180 (on formalism as the real target of the American realists' attacks). See also Leiter, Brian, *Is There An "American" Jurisprudence?* Oxford Journal of Legal Studies 1997, vol. 17, p. 374 (as to the meaning of legal formalism).

they are the same phenomena. Several phenomena have the same logic, but are still considered (for several reasons) different and separate; for example, marketing and political propaganda. Though American legal realism aims at expelling formalism from the law, “it maintains the existence of a viable distinction between legal reasoning and political debate.”<sup>29</sup> Legal realists then constantly stress the importance of the investigation of the specific logic of the law, i.e. the conceptual investigations of legal tools such as contracts or liability. Some commentators, *in primis* Leiter, have even labeled American legal realism as a conceptual theory.<sup>30</sup>

This investigation of the specific logic and conceptual apparatus structuring the law has to be done in order to establish (or better yet, confirm) their instrumental nature, i.e. their being concepts and categories in the hands of judges who can use them for the implementation of opposite values into society.<sup>31</sup> The instrumental nature of the legal apparatus leads American legal realists to find that linguistic indeterminacy is one of the fundamental features of the law. This indeterminacy of the legal language has brought some American realists to radical positions. For example, Felix Cohen ends up asking:

“‘Where is a corporation?’ Nobody has ever seen a corporation. What rights have we to believe in corporations if we don’t believe in angels?”<sup>32</sup>

The ambiguity of legal language and legal categories, such as a “corporation,” allows for the possibility that the same category can fulfill different values. One reason for this indeterminate nature of legal language is that the legal concepts and categories used in judicial decisions can find their explanation in a large number of precedents, in the techniques to evaluate such precedents and in established rules.<sup>33</sup> This broad underpinning in the decisions of the courts most of the time is characterized as being linguistically “open,” as being usable in different directions. A classical example of this open language is the nebulous

---

<sup>29</sup> Freeman, *Lloyd’s Introduction to Jurisprudence*, *supra* p. 1041. This distinction is possible because, as pointed out by Leiter, “[f]ormalism is a style of decision-making, not a substantive political program.” Leiter, *Is There An “American” Jurisprudence?*, *supra* p. 374.

<sup>30</sup> See Leiter, Brian, *Legal Realism*, in Patterson, D. (ed.), *A Companion to the Philosophy of Law and Legal Theory*, Blackwell, Oxford 1996, p. 262-263. *But see* Bix, *Jurisprudence*, *supra* p. 185; *cf.* Hart, Herbert L. A., *The Concept of Law*, Clarendon Press, Oxford 1961, p. 132-137.

<sup>31</sup> See Summers, *Instrumentalism and American Legal Theory*, *supra* p. 60-80.

<sup>32</sup> Cohen, Felix S., *Transcendental Nonsense and the Functional Approach*, *Columbia Law Review* 1935, vol. 35, p. 811. Cohen however implicitly withdraws from his nihilist avowal when he further states that what realists want is not to eliminate the concepts from the idea of law, but to redefine “concepts and problems in terms of variable realities.” *Id.* p. 822.

<sup>33</sup> “The best version [of legal realism] suggests that the exact meaning of a proposition of law – the conditions under which lawyers will take the proposition to be true – depends on context.” Dworkin, Ronald M., *Law’s Empire*, Harvard University Press, Cambridge (Mass.) 1997, p. 36. *See also* Rumble, Wilfrid E., *American Legal Realism. Skepticism, Reform, and the Judicial Process*, Cornell University Press, Ithaca (NY) 1968, p. 55-63 and Llewellyn, Karl N., *The Common Law Tradition. Deciding Appeals*, Little, Brown and Co., Boston 1960, p. 189.

prohibition in the Sherman Antitrust Act against “every contract... in restraint of trade or commerce among the several states.”<sup>34</sup> The ambiguity of the statutory provision has produced several diverging interpretations by the very same US Supreme Court (in particular concerning the necessity or not for the contract being “unreasonably” restrictive of trade).<sup>35</sup>

The idea of the indeterminacy of the legal language does not necessarily imply a flexible idea of the law towards politics, i.e. an idea that the determinacy of the legal language has to be found referring to values produced outside the legal world. At the opposite, one of the central themes for all American realists is to improve as much as possible the *predictability* of judicial decisions. This has to be done looking primarily (but not exclusively) into the same legal world’s categories and concepts, into the judicial decisions and their legal language. As stated by Llewellyn,

“whereas the formula ‘[government] of laws and not [of men]’ is inherently false, the formula ‘by the Law’, rightly understood, can, when provided with the right rules, right techniques, and right officers, come close to being accurate.”<sup>36</sup>

Rules, technique and officers are then the constitutive elements of the “real” law and, more importantly, they all belong (at least primarily) to the legal world, not the political one. More clearly, Llewellyn states in another article that one of the main purposes of legal realism is “not the elimination of rules, but the setting of words and paper in perspective.”<sup>37</sup>

Despite the ontological linguistic indeterminacy of the law, American legal realists then consider the law as tending towards a rigid character in its relations with the world of values. This tendency towards rigidity is grounded in the fact that judges choose among different legal constructions, i.e. among different normative categories and not among different values.<sup>38</sup> For example, the US Supreme Court can choose between a statutory prohibition of “unreasonably” restrictive as to trade and a statutory prohibition of “every” contract restraining trade. It does not choose (at least explicitly) between the economic value of

<sup>34</sup> Section 1 in the United States Code (No. 15/1890) [*italics added*]. This example is used by the American realist Frank in his *Law and the Modern Mind*, *supra* p. 22-24.

<sup>35</sup> See the different interpretations given by the US Supreme Court in *Standard Oil v. United States*, 221 U.S. 1, p. 87-89 (1911) (restricting the prohibition to contracts “unreasonably” limiting trade) and in *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. p. 327-328 (1897) (expanding the prohibition to all contracts perceived as limiting commerce). See also Sklar, Martin J., *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890-1914*, New York Law School Law Review 1990, vol. 35, p. 802-811.

<sup>36</sup> Llewellyn, *The Common Law Tradition*, *supra* p. 12 n.1 [*italics in the text*].

<sup>37</sup> Llewellyn, *A Realistic Jurisprudence*, *supra* p. 453.

<sup>38</sup> As stressed by Llewellyn, “the field of free play for Ought in appellate courts is vastly wider than traditional Ought-bound thinking ever has made clear. This, *within* the confines of precedent as we have it, *within* the limits and on the basis of our present [legal] order.” Llewellyn, *Some Realism about Realism*, *supra* p. 1252 [*italics in the text*]. Moreover, for Llewellyn, “[l]egal concepts’ are ‘the categories given us by the legal order as the proper units to have rules of law about’.” Twining, William, *Karl Llewellyn and the Realist Movement*, Weidenfeld & Nicolson, London 1973, p. 490.

allowing certain forms of monopoly and the value of considering competition as the central core of the economic system. Judges, in the end, choose between different legal concepts and rules, not between values (at least not directly). For the realists, “[r]ules of law occupy a central place in the institution of law.”<sup>39</sup>

This choice among different legal categories however is the point at which American legal realists begin to open the structures of law.<sup>40</sup> They make the law more flexible, or better, only *partially rigid* towards the political world.<sup>41</sup> In fact,

“[e]ach precedent considered by a judge and each case studied by a student rests at the center of a vast and empty stadium. The angle and distance from which that case is to be viewed involves the choice of a seat. Which shall be chosen? Neither judge nor student can escape the fact that he can and must choose.”<sup>42</sup>

This very act of choosing a seat, of choosing among the different legal-conceptual structures that are law, is the moment when judges are most heavily influenced by the value environment in which they are educated, live and work. It is this very idea that the law is that which the judges produce, and not that which is in the books, that makes the American realist point out how the social and political environments in which judges operate have to be taken into consideration when dealing with the issue of what the law is.<sup>43</sup> Only after that can one really understand how and why a certain rule, concept or category has been created or chosen in a judicial decision to become law.<sup>44</sup> Using the previous example of the attitudes of the US Supreme Court towards the Sherman Act, Frank states that the shift occurred because “the Court had, by process of death and disease, changed its membership and its mind;” with new judges, new values came into the courtroom and therefore into the law.<sup>45</sup>

The realist idea of law then leaves relevant spaces (although inside a framework of rigidity of the law) to the political conceptual apparatus. The orientation by the judiciary in favor of giving normative status to one concept

---

<sup>39</sup> *Id.* p. 491.

<sup>40</sup> For every legal theory in general, “[t]he theory of [judicial] interpretation is crucial in assessing the degree to which values enter into legal reasoning.” Moore, Michael S., *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism. A Review Essay of ‘Instrumentalism and American Legal Theory’ by Robert S. Summers*, Cornell Law Review 1984, vol. 69, p. 1006.

<sup>41</sup> See, e.g., Llewellyn, Karl N., *On Reading and Using the Newer Jurisprudence*, *supra* p. 593-594 and his idea of the judges as not “free to be *arbitrary*” but nevertheless “free to some real degree to be *just and wise*” [italics in the text].

<sup>42</sup> Oliphant, Herman, *A Return to Stare Decisis*, American Bar Association Journal 1928, vol. XIV, p. 73.

<sup>43</sup> This tendency of the American legal realists of identifying the judges’ law with *the law* in general, originates at the side of Holmes’ *The Path of Law*, in Gray, John Chipman, *The Nature and Sources of Law*, Columbia University Press, New York 1909, p. 125.

<sup>44</sup> “Behind decisions stand judges; judges are men; as men they have human backgrounds.” Llewellyn, *Some Realism about Realism*, *supra* p. 122. See also Llewellyn, *The Common Law Tradition*, *supra* p. 201. See also Llewellyn, *On Reading and Using the Newer Jurisprudence*, *supra* p. 588-589 and Cook, Walter Wheeler, *Facts and Statements of Fact*, University of Chicago Law Review 1937, vol. 4, p. 233.

<sup>45</sup> Frank, *Law and The Modern Mind*, *supra* p. 23.

(e.g. the normative construction of the prohibition of contracts unreasonably restricting trade) instead of the other (e.g. the prohibition of every contract restricting trade) is mostly determined by non-normative elements; *in primis*, the social environment and the political ideology of the judges: “The task of prediction involves, in itself, no judgment of ethical value.... But judicial beliefs about values of life and the ideals of society are *facts*” and, as facts, they can come in into the realist analysis of what law is, i.e. the law made by the judges.<sup>46</sup>

In summary, American realists consider the law as *rigid* towards politics because the law is that which is decided by judges, and judges allow the values of the political world to enter into the law only if the values take the form of the legal concepts and categories as available or newly constructed.<sup>47</sup> American legal realists embrace a vision of rigidity of the law because, as for legal positivists, according to them

“a putative rule qualifies as valid law only if an appropriate court or other body has acted upon it or laid it down as law. The content of a putative precept (including its reasonableness and its moral quality) is largely irrelevant to whether the precept is valid.”<sup>48</sup>

In other words, American legal realists are legal positivists to the extent that “they employ primarily pedigree tests of legal validity.”<sup>49</sup>

However, it is only a *partial* rigidity of the law towards the political world. As legal language is vague and the precedents available endless and often contradictory, judicial decisions are influenced by the values they share (or not share). This influence in particular occurs in the moment of proposing one theoretical construction instead of another, that is in the moment of choosing which concept becomes law and which does not.<sup>50</sup> Moreover, the surrounding value environment must necessarily be taken into consideration because there is a “tendency of the crystallized legal concepts to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition.”<sup>51</sup> Therefore, the law can be fully understood in all its fundamental

---

<sup>46</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* p. 839. See also Leiter, *Legal Realism*, *supra* p. 270 and Holmes, Oliver W. Jr., *The Common Law*, Dover Publications, New York 1991, p. 41.

<sup>47</sup> See Freeman, *Lloyd's Introduction to Jurisprudence*, *supra* p. 1040.

<sup>48</sup> Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* p. 1018. See also Summers, *Instrumentalism and American Legal Theory*, *supra* p. Chapter 4.

<sup>49</sup> Leiter, Brian, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in Coleman, J. L. (ed.), *Hart's Postscript. Essays on the Postscript to the Concept of Law*, Oxford University Press, Oxford 2001, p. 278. See also Llewellyn, *A Realistic Jurisprudence*, *supra* p. 453. But see Bix, Brian, *Law as an Autonomous Discipline*, in Cane, P. and Tushnet, M. (eds.), *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford 2003, p. 979. This “intermediate” position of American legal realism, i.e. of an idea of a partially rigid law, is also supported in Chapter II of Duxbury, *Patterns of American Jurisprudence*, *supra* p. 4, 65-159.

<sup>50</sup> See Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* p. 839.

<sup>51</sup> Llewellyn, *A Realistic Jurisprudence*, *supra* p. 454.

components only if the new value environment is taken into consideration as constitutive of the law itself.<sup>52</sup>

## 5 Scandinavian Legal Realism and the Partial Rigidity of Law

Although coming from a different theoretical background as well as premises, Scandinavian legal realists follow their American colleagues in that the Scandinavians also tend to embrace an idea of a partial rigidity in the law's nature and structure towards politics. In contrast to their colleagues overseas, however, the partial rigidity of law for the Scandinavian legal realist is not derived from the investigation of the central role played by the legal actors (in particular the judges) in the legal phenomenon. Scandinavian legal realists take another road; one could say a more traditional road of conceptual analysis. They commence by directly focusing on the different concepts and categories that constitute the essence of the law: rights, duties, property, damages, etc. This starting point is common to all Scandinavian realists although for different reasons. While for Lundstedt and Olivecrona, it is derived by their following the philosophical path laid by Hägerström, Ross' analysis of the legal concepts finds its roots in his endorsing some of logical positivism's instances.<sup>53</sup> Regardless of these differences, all Scandinavian realists as a result of their investigations draw two concurring ideas of the nature of the law.

First, legal concepts and categories are *per se* detached from any system of moral, religious or political values; the concepts of rights or duties are as attached to moral or political values as much as the expression *tû-tû* can be.<sup>54</sup> The law is a complex of linguistic or symbolic signals enacted with the purpose of provoking a certain behavior (or non-behavior) in the addressees; they are "directives" showing the paths the community or the judges ought to follow.<sup>55</sup> The legal phenomenon is a mechanism constructed by linguistic or symbolic signs. These signs, regardless of the values they bear, always work as stimuli (with words or symbols) in order to gain responses (with behaviors) from the members of the community. Similar to traffic lights or fences, the legal rules are characterized not for the goals-values they are directed to fulfill (*e.g.* lights can be indifferently used to make the traffic slower or faster) but for the function

---

<sup>52</sup> "The realist does not deny the normative character of legal rules. What he says is that these norms do not provide the complete answer to the actual behaviour of courts, legal officials or those engaged in legal transactions." Freeman, *Lloyd's Introduction to Jurisprudence*, *supra* p. 810. See also Leiter, Brian, *Legal Realism and Legal Positivism Reconsidered*, *Ethics* 2001, vol. 111, p. 285.

<sup>53</sup> For an example of the logical positivist aspects in Ross' work, see Ross, *On Law and Justice*, *supra* p. 67. See also Ross, Alf, *Directives and Norms*, Routledge & Kegan Paul, London 1968, p. 15, particularly in connection with Ross, Alf, *Legal Fictions*, in Hughes, G. (ed.), *Law, Reason, and Justice. Essays in Legal Philosophy*, New York University Press, New York 1969, p. 225.

<sup>54</sup> See Ross, Alf, *Tû-tû*, *Harvard Law Review* 1957, vol. 70, p. 818-822.

<sup>55</sup> See Ross, *On Law and Justice*, *supra* p. 8. See also *id.* 32-33; and Lundstedt, Vilhelm A., *Legal Thinking Revised. My Views on Law*, Almqvist & Wiksell, Stockholm 1956, p. 34, 133; Olivecrona, *Law as Fact* (1971), *supra* p. 135.

they play (e.g. lights are directed to influence, in one direction or the other, the drivers' behavior).<sup>56</sup> The very nature of the legal phenomenon is then considered by the Scandinavian legal realists as similar to one of a machine, and the direction the law takes (to value *f* or the opposite value *e*) does not influence its way of working. In either case, it is law being the inner nature of the law considered by the Scandinavians as relatively disconnected from the surrounding value-environment.

In order to support this idea of a relatively neutral (in the sense of value-detached) nature of the law, the Scandinavian realists make great use of legal history.<sup>57</sup> They show, starting from ancient Roman law, how the legal phenomenon has always been a machine that, although passing through different economic, social and political environments (i.e. different value-environments), each time works in the same way. Through history, law tends to keep, more or less, its original nature: to be a complex of rules, both of conduct and of competence, designated to regulate the use of force.<sup>58</sup>

Scandinavian legal realists then consider the law as having a rigid nature in relation to the values expressed in the political arena. A legal phenomenon is always the same: it is a stimuli-response mechanism regardless of whether it is directed at fulfilling the value of protecting individual private property, as in a capitalistic economic system, or the value of substituting it with collective rights, as in a communist system. In both cases, the opposite legal constructions (individual property *vs.* collective property) are considered "real" law and therefore binding in their respective national legal orders. More or less, it is up to the political, economic, and cultural powers to decide which interests or values the law is to implement into the society. The kind of values the legal phenomenon bears, i.e. the directions to which behaviors should be oriented by the law, is not a matter of law but of other fields of human activity (e.g. economics).

The Scandinavian legal realists clearly distance themselves from a vision of a flexible law. They reject the idea that, in order to state the existence of legal concepts, one has to make reference to value-elements either of a moral nature, such as "justice" or "goodness," of a political nature, such as "democracy" or "the will of the Parliament," or of an economic nature, such as "efficiency." The Scandinavian legal realists harshly attack those legal theories that, according to

---

<sup>56</sup> See *id.* p. 128-129.

<sup>57</sup> This manner of proceeding is derived directly from Hägerström and his "disclosure" of modern legal concepts through the investigation of ancient Roman legal categories and concepts. See Hägerström, Axel, *Der römische Obligationsbegriff im Lichte der Allgemeinen römischen Rechtsanschauung*, Almqvist & Wiksell, Uppsala 1941, vol. II, Appendix 5. But see Olivecrona, *Law as Fact* (1971), *supra* p. 110-111 (as to the difficulties of such a task).

<sup>58</sup> See Ross, *On Law and Justice*, *supra* p. 52-58 and Olivecrona, Karl H., *Law as Fact*, 1<sup>st</sup> ed., Ejnar Munksgaard, Copenhagen 1939, p. 134-143 [hereinafter Olivecrona, *Law as Fact* (1939)]. In order to emphasize this detachment from the political, social, and economic categories prevailing p. the time of the creation of a certain legal concept, Olivecrona speaks of legal rules as "independent imperatives." See Olivecrona, *Law as Fact* (1971), *supra* p. 128-134. This depiction of law as formed by "independent imperatives" leads him to a position not so far from Kelsen's theory of legal rules as norms that exist independently from the legislator. Compare Kelsen, *The Pure Theory of Law*, *supra* p. 233-237.

them, introduce as constitutive elements of the legal categories values of a moral or political nature. Lundstedt firmly rejects as “unscientific” most contemporary legal theories (even the legal positivistic ones) because, from his perspective, they ultimately base legal concepts and categories on the “ideology of justice.”<sup>59</sup> Similarly, Olivecrona outlaws several schools for being erroneous in their giving a “voluntaristic” explanation of legal phenomenon, grounding the latter either in the will of a sovereign (as in Austin or Bentham) or of the State (as in Radbruch).<sup>60</sup>

A norm is legal, and therefore binding to the community, even if it is highly unjust or economically inefficient.<sup>61</sup> That which is fundamental when speaking of a legal concept or category is that it *works in reality* as a stimulus to make people follow certain patterns of behaviors. For both American and Scandinavian realists, the general task is to dig through the different ideologies and philosophies that have dusted and covered the legal phenomenon, rendering it almost unrecognizable. At the end of this work, the law will reveal itself as that which it is in reality, a linguistic and socio-psychological tool to influence human behaviors.<sup>62</sup>

The fact, however, that concepts and norms have “to work in reality” to be considered legal, is of fundamental importance in the Scandinavian realists’ vision of how law relates to politics and this introduces the second feature in their depiction of the nature of law. This empirical aspect of the legal realists’ idea of the nature of law indeed renders the legal phenomenon, similarly to American realism, only *partially* rigid towards the political world.

According to the Scandinavian legal realists, the law has the quality to bind a certain community (or certain legal actors, such as judges) to certain patterns of behaviors (regardless of which type of behavior), as long as the law is valid. “Validity,” however, according to the Scandinavian realists, is a quality of the law and of the legal categories that cannot be derived from the same legal system as it is, for example, for Kelsen and his Basic Norm.<sup>63</sup> The source of validity has to be found outside the law, namely within the space-time coordinates of the empirical reality.

A legal norm or concept is considered valid, and therefore transformed by the mere declaration of the intention to binding statements, as soon as it is “in force.” Norms and concepts are legal as soon as the majority of the community of addressees observes them.<sup>64</sup> Moreover, in order to speak of a valid law, it is

---

<sup>59</sup> See Lundstedt, *Legal Thinking Revised*, *supra* Chapter 1.

<sup>60</sup> See Olivecrona, *Law as Fact* (1971), *supra* Chapter 2.

<sup>61</sup> Although for a short period, this separation of values and the law brought Olivecrona to publicly support the full validity of the Nazi regime as a legal order. See generally Olivecrona, Karl H., *England oder Deutschland?* Reichskontor der Nordischen Gesellschaft –W. Limpert Verlagshaus, Lübeck 1941.

<sup>62</sup> As to the similarity of the general projects of American and Scandinavian legal realisms, see Martin, Michael, *Legal Realism: American and Scandinavian*, Peter Lang, Bern 1997, p. 203-204 and Ross, *Towards a Realistic Jurisprudence*, *supra* p. 9.

<sup>63</sup> See Olivecrona, *Law as Fact* (1971), *supra* p. 113-114.

<sup>64</sup> See Ross, *On Law and Justice*, *supra* p. 34-38. Although reaching the same conclusions, Olivecrona states the necessity of dropping the very labeling “validity of the law” in order to avoid falling into the traditional natural law- positive law debates. See Olivecrona, *Law as*

necessary not only that people observe and follow it, but also that the law is felt by this majority as “socially binding.”<sup>65</sup>

Much criticism has been directed at the Scandinavian realists for including in their idea of law the subjective component of the “feeling of being bound.” In particular, it has been pointed out how this subjective component makes it difficult to distinguish between legal concepts and moral concepts, both being grounded in the same feeling.<sup>66</sup> The Scandinavian realists have replied that both law and morals operate in the same way and, to some extent, they help each other in transmitting their patterns of behaviors into a population.<sup>67</sup> Nevertheless, the feelings behind the legal and the moral phenomena differ substantially. While in obeying the law, the addressees say to themselves “I ought to do it” (feeling of objectivity of the duty or, in Ross’ words, formal legal consciousness), when it comes to moral prescriptions, the addressees feel in terms of “I must do it” (feeling of subjectivity of the duty or material legal consciousness).<sup>68</sup>

Although inside a general idea of a rigidity of legal concepts towards the world of values, the Scandinavian legal realists timidly open the door of the law towards concepts and categories of a non-legal nature. Accordingly, although it does not make any sense introducing as constitutive elements of law concepts such as “democratic” or “just,” they still are of fundamental importance for having a binding law, i.e. a “real” law. The legal categories and concepts in general reflect the values spread in a certain community (in Lundstedt) or among certain legal actors (judges in Ross). Only in this way will the law be followed by the majority of people and felt as binding by the community or the legal actors.<sup>69</sup> For example, in producing the legal norms, the lawmaker for Lundstedt should not aim for goals contrary to the aims of the *common sense of justice*: “The law-maker cannot reasonably escape being aware of the fact that the laws are not established for the sake of the law-maker but for the sake of society.”<sup>70</sup> In doing so, the lawmaker should pay attention to what is “the valid law.” According to Lundstedt, this is the law that is observed by the majority of the

---

*Fact* (1971), *supra* p. 112.

<sup>65</sup> See Ross, *On Law and Justice*, *supra* p. 18. According to Ross, the incorporation into the definition of valid law of these two components, its efficacy as being in force and its obligatory force as a social feeling of being bound, resolves one of the classical antinomies of legal philosophy: the fact that law is considered “at the same time something factual in the world of reality [efficacy] and something valid in the world of ideas [obligatory force].” *Id.* p. 38.

<sup>66</sup> See, for criticism of Ross’ idea of validity as in “On Law And Justice,” Hart, *Scandinavian Realism*, *supra* p. 238-240 and Ross’ defense in Ross, Alf, *The Concept of Law*. By H. L. A. Hart, Yale Law Journal 1962, vol. 71, p. 1186-1187.

<sup>67</sup> See, e.g., *id.* p. 1188-1190.

<sup>68</sup> See Ross, *On Law and Justice*, *supra* p. 55 and Olivecrona, *Law as Fact* (1939), *supra* p. 161-168.

<sup>69</sup> Similarly, for American legal realists, “if no true values existed, conventional values are the only values that could be used in adjudication.” Moore, *The Need for a Theory of Legal Theories*, *supra* p. 1008-1009.

<sup>70</sup> Lundstedt, *Legal Thinking Revised*, *supra* p. 150.

population for the very reason that it is not contrary to the common sense of justice.<sup>71</sup>

In the end, the Scandinavian legal realists adopt an interpretation of the law as a complex of norms and categories of a *rigid* nature towards the world of values; norms and categories that are always binding law, no matter the type of ideologies to be implemented in society. The law always works in the same manner; it has a hard core autonomous from politics. However, such rigidity is only *partial*, being softened by the necessity of opening up the law more to the surrounding political and social environments. This is done through focusing on one of the constitutive and specific elements of the legal concepts and categories: their validity. Their validity, in its turn, means that they are “in force,” they are observed and, more important, they are felt as binding by the majority of the population, or by its qualified part (*e.g.* the judges):

“The black figures on paper representing letters remain the same; but the ideas evoked in the minds of readers are conditioned by the vastly different situations at different times.”<sup>72</sup>

In order to remain the valid law or the law in force, it has to then have a content of concepts and categories intersecting the concepts and categories produced in the political world.<sup>73</sup>

## 6 The Intersecting Depiction: “Law And Politics”

The legal realists’ way of depicting the law/politics relations can be considered as an alternative to the traditional dyadic vision of “law is politics” (as in natural law theory) *vs.* “either law or politics” (as in Kelsen’s legal positivism). The legal realists’ depiction can be labeled as “intersecting” since the American and Scandinavian legal realisms adopt a model depicting the law and politics as two intersecting phenomena. The legal realists recognize the existence of a

---

<sup>71</sup> *See id.*. With these statements, despite his intentions, Lundstedt crosses the bridge and joins the idea of natural law scholars of what the law is and how it relates to the value world. Similarly, Olivecrona also embraces certain aspects of the natural law theories by stating: “The system of ‘legal’ rules is not a closed system which can be identified by formal criteria. It is instead an ‘open’ system without fixed boundaries.” Olivecrona, *Law as Fact* (1971), *supra* p. 272. For a similar evolution in one of the most hard-liners among American legal realists, *see* Glennon, Robert J., *The Iconoclast as Reformer: Jerome Frank’s Impact on American Law*, Cornell University Press, Ithaca (NY) 1985, p. 63-64.

<sup>72</sup> Olivecrona, *Law as Fact* (1971), *supra* p. 111.

<sup>73</sup> Actually, one of the recurrent criticisms against Scandinavian legal realists is the very impossibility of combining these two ideas: a specific and autonomous hard-core of the law and, p. the same time, its empirical nature, i.e. its “existing” only when and if other socio-psychological components exist. For example, Bjarup and Jacob Sundberg state that, in the end, Hägerström’s idea of the law is similar to the one proposed by natural law supporters. *See* Bjarup, Jes, *Legal Realism or Kelsen versus Hägerström*, *Rechtstheorie* 1986, vol. 9, p. 247-251 and *generally* Sundberg, Jacob, *Hägerström and Finland’s Struggle for Law*, Rothman, Littleton (Col.) 1983.

normative hard-core in the legal phenomenon, with actors and types of reasoning different and autonomous from the political ones (rigidity of law). Nevertheless, they also admit that these different legal and political worlds actually have boundaries that cross and to some extent overlap with each other (partial rigidity of law).

In contrast to the natural law theories, the law is considered as only partially colliding with politics and as not totally being embedded into the political mass; the law does keep a certain degree of separation. Law is *rigid* towards politics because the law has a true normative core, an area which can be defined, work and be investigated using only a specific theoretical apparatus produced by and inside the legal world. This core consists of viewing the law as a mechanism of coercion that, regardless of its value-content (politics), tends to be passed from one generation to the next. Over time, the law has acquired a certain degree of autonomous legitimacy, i.e. a legitimacy built more on the specific ways a certain rule is enacted and implemented (its normative features) than on its content (its political goals).<sup>74</sup> As for the Kelsenian legal positivism, law is then conceived as a technology, with its own space and its own rules.<sup>75</sup> Legal realists, in considering the law as rigid towards politics, then mirror one of the features of contemporary legal phenomenon. As legal positivism has revealed, a distinction exists between law and politics since, at least in recent centuries, they have diverged as two different ways of “forcing” or convincing people onto paths that they otherwise would not have followed.<sup>76</sup> For example, judges are politically

---

<sup>74</sup> See, e.g., Llewellyn, *On Reading and Using the Newer Jurisprudence*, *supra* p. 589 and Ross, *Towards a Realistic Jurisprudence*, *supra* p. 72. See also MacCormick, Neil D., *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford 1997, p. 188. Compare Hart’s criticism in Hart, *The Concept of Law*, *supra* p. 133-134.

<sup>75</sup> This is one of the main reasons why legal realisms are sometimes treated as a particular version or as spin-off of legal positivism. See Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* p. 1017; Summers, *Instrumentalism and American Legal Theory*, *supra* p. 20, 176-190; and Friedmann, *Legal Theory*, *supra* p. 255 (as to the definition of legal realisms as a type of “pragmatic positivism”). See also Bjarup, Jes, *Law and Legal Knowledge from a Realistic Perspective*, in Atienza, M., Pattaro, E. and Schulte, M. (eds.), *Theorie des Rechts und der Gesellschaft. Festschrift für Werner Krawietz zum 70. Geburtstag*, Duncker & Humblot, Berlin 2003, p. 459-483; Waldron, Jeremy, “*Transcendental Nonsense*” and *System of Law*, *Colorado Law Review* 2000, vol. 100, p. 31; Leiter, *Legal Realism and Legal Positivism Reconsidered*, *supra* p. 300-301 and Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *supra* p. 355-356. But see Bix, *Law as an Autonomous Discipline*, *supra* p. 978-980; Freeman, *Lloyd’s Introduction to Jurisprudence*, *supra* p. 810-811; Sebok, Anthony J., *Misunderstanding Positivism*, *Michigan Law Review* 1995, vol. 93, p. 2094; Hart, *The Concept of Law*, *supra* p. 132-144; Hart, Herbert L. A., *Self-referring Laws*, in Hart, H. L. A., *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, p. 175-178; Lundstedt, *Legal Thinking Revised*, *supra* p. 27; and Olivecrona, *Law as Fact* (1971), *supra* p. 77.

<sup>76</sup> As to the determinant role the legal actors and their reasoning can play in the relationships between law and politics, see Ross, *On Law and Society*, *supra* p. 330-331; Olivecrona, *Law as Fact* (1971), *supra* p. 86-89, 92-93; Llewellyn, Karl N., *The Normative, The Legal, and The Law-Jobs: The Problem of Juristic Method*, *Yale Law Journal* 1940, vol. 49, p. 1395-1397; and Frank, Jerome N., *Courts on Trial. Myth and Reality in American Justice*, Princeton University Press, Princeton (NJ) 1950, p. 239-242. See also Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* p. 1017-1018 and Martin, *Legal Realism*, *supra* p. 168-170. More critical to the concrete implications of such visions

influenced in their decisions but, at the same time, they must rationalize this with their legal education and the limits (or directions) imposed by the existing methods of legal reasoning(s).<sup>77</sup>

Despite this rejection of the view of the law as totally embedded into the political mass, the legal realists differ from the Kelsenian depiction to the extent that this separation of law from politics is only *partial*.<sup>78</sup> The legal realist theories constantly stress the fact that the law is more than a logical and closed system of rules written on paper, more than the *law-in-books*. The legal realists start their construction from the assessment that the law is an empirical phenomenon, constituted by a combination of human behaviors and prevalent ideas among human beings as to what constitutes the law. The law is primarily the *law-in-action*.<sup>79</sup>

According to the legal realists, the law, in order to be fully seen in all its constitutive parts, has to be placed in a position that somewhat coincides with the area occupied by politics. This is because the legal realists perceive the law as written words, that is as the bearers of the values of the writers, the goals they possess when they write or implement them (either in judicial, legislative or doctrinal documents). The fact that all legal realists, although from different perspectives (pragmatic for the American legal realists, analytical for the Scandinavians), pay peculiar attention to the nature and functions played by the legal language is then not a coincidence.

The legal realists open the door to the empirical aspects of the legal phenomenon as constitutive elements of the very nature of law, an opening both to the concrete behaviors of human beings and to their socio-psychological underpinnings. As a consequence, the idea of what the law is ends up including a normative hard-core but also elements of a non-normative nature, in particular of sociological and political origins:

“Our object in determining the concept of law is not to spirit away the normative ideas, but to put a different interpretation on them, reading them for what they are, the expression of certain peculiar psycho-physical experiences, which are a fundamental element in the legal phenomenon.”<sup>80</sup>

---

are Sundberg, Jacob, *Scandinavian Unrealism: Co-report on Scandinavian Legal Philosophy*, *Rechtstheorie* 1986, vol. 9, p. 312 and Duxbury, *Patterns of American Jurisprudence*, *supra* p. 149-155.

<sup>77</sup> See Freeman, *Lloyd's Introduction to Jurisprudence*, *supra* p. 810-811 and MacCormick, *Legal Reasoning and Legal Theory*, *supra* p. 188.

<sup>78</sup> For Kelsen's idea of structural autonomy of law from politics, see, e.g., Kelsen, Hans, *On The Pure Theory Of Law*, *Israel Law Review* 1966, vol. 1(1), p. 5; and Kelsen, Hans, *The Pure Theory of Law and Analytical Jurisprudence*, *Harvard Law Review* 1941, vol. 55, p. 45-48. See also Honoré, *The Basic Norm of a Society*, *supra* p. 94; Freeman, *Lloyd's Introduction to Jurisprudence*, *supra* p. 274; Fuller, Lon L., *The Morality of Law. Revised Edition*, Yale University Press, London 1969, p. 110, 119; and Cotterrell, *The Politics of Jurisprudence*, *supra* p. 112.

<sup>79</sup> See Llewellyn, *Some Realism about Realism*, *supra* p. 1237, points 5 and 6. See also Pound, Roscoe, *Law in Books and Law in Action*, *American Law Review* 1910, vol. 44, p. 35-36.

<sup>80</sup> Ross, *Towards a Realistic Jurisprudence*, *supra* p. 49. This twofold nature of the law as intended by the realists has resulted in Enrico Pattaro speaking of two kinds of legal realisms, a distinction alternative to the traditional one between American and Scandinavian realisms.

The legal categories and concepts directly pay the price for this enlargement of the nature of the law. The legal conceptual apparatus is forced to allow the entrance of categories and concepts of social and political natures.<sup>81</sup>

The main difference between the intersecting and the Kelsenian legal positivism depiction of the relations between law and politics is not the fact that the latter somehow denies the existence of an outside non-legal world; a world which exercises its influence on the structures and on the very nature of law. Kelsen would never support such a position.<sup>82</sup> The distinction between the legal realists and Kelsen lies in the fact that the legal positivist depiction forces the political values to be transformed into legal categories *before* entering into and influencing the legal world. For example, the widespread dissemination of the idea of democracy among judges does not have any impact on their legal resolutions as to disputes, as long as “democracy” is not translated into additional legal concepts, such as the “right to vote” or “non discrimination in wages.” The intersecting depiction embraced by the legal realists, on the other hand, claims that political values sometimes directly enter into the legal world and directly influence and shape the different legal concepts and categories.<sup>83</sup> For example, in studying the judicial creation of the legal category of strict liability, legal scholars have to directly take into consideration as its constitutive part also whether judges have been formed and educated in an environment in which the idea of economic democracy has been disseminated.

In stressing this partiality of the separation between legal and political phenomena, the legal realists then grasp the other feature of contemporary law: its being a tool in the hands of political actors for the implementation of their values, a tool whose structure is flexible to different purposes (values) as used for by these actors.<sup>84</sup> A feature that, as pointed out more recently by legal

---

According to Pattaro, legal realism can be divided into a *normative* legal realism (e.g. with Ross) and a *non-normative* legal realism (e.g. with Lundstedt and, to a certain extent, Frank). See Pattaro, Enrico, *Lineamenti per una teoria del diritto*, CLUEB, Bologna 1990, p. 163-165.

<sup>81</sup> See Friedmann, *Legal Theory*, *supra* p. 296.

<sup>82</sup> See, e.g., Kelsen, *The Pure Theory of Law*, *supra* p. 352. See also generally Kelsen, Hans, *Vom Wesen und Wert der Demokratie*, J. C. B. Mohr, Tübingen 1929; Kelsen, Hans, *General Theory of Law and State*, Harvard University Press, Cambridge (Mass.) 1949, Chapter 4; Kelsen, Hans, *Foundations of Democracy*, Ethics 1955, vol. LXVI, p. 86-94; and Merkl, Adolf, *Hans Kelsen als Verfassungspolitiker*, Juristische Blätter 1931, vol. 60, p. 385-387.

<sup>83</sup> See Leiter, Brian, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, Texas Law Review 1997, vol. 76(2), p. 278. This opening of the law towards politics is also confirmed by the fact that several movements representing the law as embedded in the political world (CLS *in primis*) claim the roots of their “law is politics” motto as in the work of the American legal realists. See Note, ‘Round and ‘Round the Bramble Bush: from Legal Realism to Critical Legal Scholarship, Harvard Law Review 1982, vol. 95, p. 1677. But see Leiter, *Rethinking Legal Realism*, *supra* p. 271-274 (where the theoretical relations between CLS and American legal realism are devaluated).

<sup>84</sup> This structural flexibility of the law towards politics has led Leiter to define the American legal realists’ theory of adjudication as “naturalized jurisprudence,” i.e. as empirical enquiry of what input in the minds of judges causes what output in terms of judicial decisions. See Leiter, *Rethinking Legal Realism*, *supra* p. 311-314.

thinkers ranging from “inclusive” legal positivism to Dworkin, cannot leave the very nature of law unaffected.<sup>85</sup>

One of the fundamental reasons behind the modernity by legal realisms in perceiving the law/politics relations can be traced to the fact that while the natural law and classical legal positivism approaches have been in existence before the formation of the contemporary welfare state system, the legal realisms are of recent formation.<sup>86</sup> The legal realisms first appeared in Western legal culture in the first half of twentieth century. It is then quite natural that these very legal theories, before the others, were most likely to embrace a vision of the relationships between law and politics mirroring the phenomena and the dilemma typical of the law in the contemporary age.<sup>87</sup>

The basic view upon which the entire enterprises of both Scandinavian and American legal realism have been developed is one of considering themselves as a new legal theory for new times; the new alternative to the aged debate between legal positivism and natural law theories. Legal realists strive to be the legal theory for the new political form of organizing the national community: the welfare state. It is not a coincidence that one of the major criticisms against both the Scandinavian and American realisms is that they are the legal theoretical façade of a general social engineering program, the Social democratic values in Scandinavia and Roosevelt’s New Deal in the USA.<sup>88</sup>

## 7 Conclusion

This article began with the consideration that in our contemporary age, in particular in the national communities adopting a welfare state system of socio-political organization, the law is under a system of two opposite pulling forces:

---

<sup>85</sup> See, e.g., Coleman, Jules L., *Second Thoughts and Other First Impressions*, in Bix, B. (ed.), *Analyzing Law. New Essays in Legal Theory*, Clarendon Press, Oxford 1998, p. 257-322; Waluchow, Wilfrid J., *Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism*, *Legal Theory* 2000, vol. 6, p. 76-81; and Dworkin, Ronald M., *A Matter of Principle*, Harvard University Press, Cambridge (Mass.) 1986, p. 15-20. See also Raz, Joseph, *On The Autonomy of Legal Reasoning*, in Raz, J. (ed.), *Ethics in the Public Domain*, Clarendon Press, Oxford 1994, p. 324.

<sup>86</sup> See, e.g., Sophocles, *Antigone*, in Lloyd-Jones, H. (ed.), *Sophocles, Antigone. The Women of Trachis. Philoctetes. Oedipus p. Colonus*, Harvard University Press, Cambridge (Mass.) 1994, p. 45.

<sup>87</sup> See Martin, *Legal Realism*, *supra* p. 2. It is not a coincidence that the other legal movements, distinctively products of the twentieth century, claim their roots either directly in the legal realism (as CLS) or its legal philosophical sources (e.g. Holmes for Law and Economics). See Bix, *Jurisprudence*, *supra* p. 185-186. See also Singer, Joseph, *Legal Realism Now*, *California Law Review* 1988, vol. 76, p. 468. But see Horwitz, Morton J., *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, Oxford University Press, Oxford, 1994, p. 270.

<sup>88</sup> See Bjarup, *Legal Realism or Kelsen versus Hägerström*, *supra* p. 256-257; White, Edward G., *From Sociological Jurisprudence to Realism: Jurisprudence in Social Change in Early Twentieth-Century America*, *Virginia Law Review* 1972, vol. 58, p. 1013-1026; and, much more cautiously, Cotterrell, *The Politics of Jurisprudence*, *supra* p. 203-206. See also Horwitz, *The Transformation of American Law 1870-1960*, *supra* p. 219-220 as well as Alexander, *Comparing the Two Legal Realisms*, *supra* p. 131-133.

towards the political world and, at the same time, away from it by becoming more and more specialized. Based on this, it has been shown how this system of dual forces does not leave the manner by which contemporary legal theories perceive the law unaffected. In particular, the legal realisms, both in America and Scandinavia, have portrayed this dilemma better in their ideas of how the nature of law relates to politics. These two forces pulling contemporary law in opposing directions are the very reasons underpinning the legal realist consideration of law as a partially rigid phenomenon towards the values and processes occurring in the political world. Law is a mechanism directed at affecting the behaviors of the people authoritatively, i.e. in a manner different from political “persuasion” or propaganda. Such a mechanism must however rely, for its full and proper working (e.g. for its being considered as binding by the addressees), on some of the values (and the processes for their production and/or selection) coming from the political world.

In the end, the legal realists have succeeded, at least in their idea of how law and politics relate, in their goal of getting through in contemporary legal theory the reality of law in the welfare state: a reality in which the legal and political phenomena present themselves as two intersecting worlds. The realists have succeeded as, in the end, the perception of law as having a partially rigid structure towards the worlds of values and their formation, has found its space both inside legal positivism and among natural law followers.<sup>89</sup>

This space inside legal positivism in particular can be seen with the recognition by Hart and contemporary legal positivism (both in its inclusive and exclusive form) that legal positivism should be characterized not for claiming the ontological but only the conceptual separation of law from the value-world.<sup>90</sup> Conversely, most natural law scholars recognize that, although the law, in order to be defined as such, has to embrace and fulfill certain goals, law-making at times can take its own specific path, deviating from that of fulfilling the “good of community.”<sup>91</sup>

Regardless of this movement in different directions as to the issue of what the law is, almost all contemporary legal theories have then arrived to the point to share the same starting point as lifted to the surface in the theoretical proposals by the American and Scandinavian legal realists: in the contemporary age, the legal and political phenomena tend to be two different phenomena as well as to

---

<sup>89</sup> See, e.g., Bix, Brian *Natural Law Theory*, in Patterson, D. (ed.), *A Companion to the Philosophy of Law and Legal Theory*, Blackwell, Oxford 1996, p. 223-240 and Soper, Philip E., *Some Natural Confusions About Natural Law*, *Michigan Law Review* 1992, vol. 90, p. 2394-2403. See also Kennedy, Duncan, *Two Globalizations of Law and Legal Thought: 1850-1968*, *Suffolk University Law Review* 2003, vol. 36, p. 678-679.

<sup>90</sup> See Hart, Herbert L. A., *Postscript*, in Hart, H. L. A., *The Concept of Law*, 2<sup>nd</sup> ed., Clarendon Press, Oxford 1994, p. 240, 255. See also Hart, *The Concept of Law*, *supra* p. 55; Spaak, Torben, *Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification*, *Ratio Juris* 2003, vol. 16(4), p. 473; and Coleman, Jules L., *Rules and Social Facts*, *Harvard Journal of Law and Public Policy* 1991, vol. 14, p. 715-717. Compare Schauer, Frederick, *Constitutional Positivism*, *Connecticut Law Review* 1993, vol. 25, p. 800-801.

<sup>91</sup> See Finnis, *Natural Law and Natural Rights*, *supra* p. 148-149. See also Cotterrell, *The Politics of Jurisprudence*, *supra* p. 148.

present (more or less extended and intense) regions of interaction.<sup>92</sup> At least, when it comes to the issue of the relations between law and politics, perhaps it is true that we are now all realists.

---

<sup>92</sup> See Bix, *Law as an Autonomous Discipline*, *supra* p. 975-976, 985-986.